U.S. Department
of Transportation

Pipeline and Hazardous Materials
Safety Administration

1200 New Jersey Ave., SE
Washington, DC 20590

JUN 29 2011

Mr. Thomas Stone
Vice President, Chief Operations and Maintenance Officer
Florida Gas Transmission Company, LLC
5444 Westheimer Road
Houston, TX 77056

Re: CPF No. 2-2010-1004

Dear Mr. Stone:

Enclosed please find the Final Order issued in the above-referenced case. It makes findings of violation and assesses a civil penalty of $95,000. The penalty payment terms are set forth in the Final Order. This enforcement action closes automatically upon receipt of payment. Service of the Final Order by certified mail is deemed effective upon the date of mailing, or as otherwise provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

for Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Enclosure

cc: Mr. Alan Mayberry, Deputy Associate Administrator for Field Operations, Pipeline Safety
Mr. Wayne Lemoi, Director, Southern Region, PHMSA
Mr. Louis P. Soldano, Vice President, General Counsel, Florida Gas Transmission Company, LLC

CERTIFIED MAIL - RETURN RECEIPT REQUESTED [7005 1160 0001 0075 9503]

U.S. DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF PIPELINE SAFETY
WASHINGTON, D.C. 20590

In the Matter of	)	
Florida Gas Transmission Company, LLC	)	**CPF No. 2-2010-1004**
Respondent.	)	

FINAL ORDER

Pursuant to 49 U.S.C. § 60117, representatives of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted an investigation of a failure involving a pipeline system operated by Florida Gas Transmission Company, LLC (FGTC or Respondent) in Martin County, Florida. FGTC is the operator of a 5,000-mile natural gas pipeline system that originates in Texas and terminates in South Florida.[1]

The investigation arose out of a May 4, 2009 failure that occurred on FGTC's 18-inch natural gas pipeline at Milepost 810.3 in southeast Florida. Specifically, the pipeline ruptured and the gas ignited ejecting a 113-foot section of pipe from the ground. The failure resulted in serious injuries including the hospitalization of three individuals and the temporary closure of the Florida Turnpike.[2]

As a result of the investigation, the Director, Southern Region, OPS (Director), issued to Respondent, by letter dated February 23, 2010, a Notice of Probable Violation and Proposed Civil Penalty (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that FGTC had committed various violations of 49 C.F.R. Part 192, and proposed assessing a civil penalty of $95,000 for the alleged violations. The Notice also included several warning items pursuant to 49 C.F.R. § 190.205.

FGTC responded to the Notice by letter dated March 26, 2010 (Response). Respondent contested three of the allegations and requested a hearing. An informal hearing was subsequently held on July 15, 2010, in Atlanta, Georgia, with an attorney from the Office of Chief Counsel, PHMSA, presiding. At the hearing, FGTC was represented by counsel and

[1] http://www.panhandleenergy.com/comp_fld.asp.

[2] *See In the Matter of Florida Gas Transmission Company, LLC*, CPF No. 2-2009-1002H (May 7, 2009) (available at www.phmsa.dot.gov).

presented testimony from its Director of Pipelines and a Technical Consultant. After the hearing, Respondent provided a post-hearing statement for the record, by letter dated August 30, 2010 (Closing).[3]

FINDINGS OF VIOLATION

The Notice alleged that Respondent violated 49 C.F.R. Part 192, as follows:

Item 2: The Notice alleged that Respondent violated 49 C.F.R. § 199.105, which states in relevant part:

> **§ 199.105 Drug tests required.**
>
> Each operator shall conduct the following drug tests for the presence of a prohibited drug:
>
> (a) . . . .
>
> (b) *Post-accident testing.* As soon as possible but no later than 32 hours after an accident, an operator shall drug test each employee whose performance either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. An operator may decide not to test under this paragraph but such a decision must be based on the best information available immediately after the accident that the employee's performance could not have contributed to the accident or that, because of the time between that performance and the accident, it is not likely that a drug test would reveal whether the performance was affected by drug use.[4]

The Notice alleged that Respondent violated 49 C.F.R. § 199.105(b) by failing to drug test each employee whose performance either contributed to the May 4, 2009 accident or could not be completely discounted as a contributing factor to the accident. In particular, the Notice stated that FGTC did not drug test two of the four pipeline controllers who were involved in operating the pipeline during the accident.[5]

In its Response, at the hearing, and in its Closing, FGTC disputed this allegation. Respondent

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[3] On September 1, 2010, the presiding official informed Respondent that he had not received its post-hearing materials, which were due by August 30, 2010. He ordered counsel to show cause as to why the matter should not be decided in their absence. On September 3, 2010, FGTC responded by stating that those materials had been sent to the presiding official via certified mail on August 30, 2010, and later provided further information which verified their transmission on the date in question. The presiding eventually received Respondent's Closing and confirmed that its receipt had been delayed for several days due to an internal mailing issue. For the reasons, FGTC's Closing is deemed timely filed as of its mailing date for purposes of this proceeding.

[4] In accordance with § 199.3, the term "accident" includes an incident reportable under part 191 involving a gas pipeline facility.

[5] The Notice incorrectly stated that FGTC only had four pipeline controllers on duty on May 4, 2009. The actual number was five.

explained that its pipeline controllers are staffed on 12-hour shifts, and that those shifts are scheduled daily from 5:30 a.m. to 5:30 p.m. (day shift) and 5:30 p.m. to 5:30 a.m. (night shift). FGTC stated that it drug tested the two night-shift pipeline controllers who were on duty at the time of the rupture, but that it did not drug test the three day-shift controllers who reported for duty shortly thereafter. Respondent argued that the best available information at that time of the accident showed that the performance of the day-shift controllers could not have been a contributing factor. Therefore, FGTC concluded that it did not need to drug test those three day shift employees.[6]

At the hearing, the Director maintained that the company did not have sufficient information immediately available after the accident to "completely discount" the performance of the day-shift controllers as a contributing factor. The Director further noted that Respondent had not made or kept any contemporaneous records documenting the basis for its decision not to drug test those three employees.

Section 199.5(b) states that "an operator shall drug test each employee whose performance either contributed to the accident or cannot be completely discounted as a contributing factor to the accident." Like the other requirements in 49 C.F.R. Part 199, § 199.5(b) is designed to "place significant constraints on an operator's discretion in conducting drug testing."[7] Indeed, the text and structure of the regulation creates a strong presumption in favor of post-accident drug testing, i.e., an operator must drug test each employee whose performance either contributed to the accident or *cannot be completely discounted as a contributing factor to the accident.*

In this case, the evidence indicates that FGTC's pipeline ruptured at approximately 5:09 a.m. Eastern Daylight Savings Time (EDT). Two night-shift pipeline controllers were on duty at that time, with three day-shift pipeline controllers reporting for duty during the next 26 minutes, i.e., at 5:10 a.m., 5:34 a.m., and 5:35 a.m., respectively.

The evidence also indicates that FGTC first learned of the failure when it received a telephone call from the Martin County Fire and Rescue Squad at 5:49 a.m., approximately 14 minutes after the last day-shift controller reported for duty and 1 minute before the last night-shift controller left the premises after completing his transition duties. The three day-shift controllers then spent the next several hours assisting FGTC in its efforts to respond to the failure.

Finally, the evidence indicates that at 8:05 a.m. on the morning of the accident Respondent reported to the National Response Center (NRC) that the cause of the failure was "unknown" and that it had "limited information." FGTC still listed the cause of the accident as "unknown" and "under investigation" in the incident report it filed with PHMSA 34 days later, on June 8, 2009.

Based on this evidence, I find that Respondent did not have sufficient information available immediately after the accident to conclude that the performance of the day-shift controllers could

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[6] In fact, FGTC argued that it did not have to drug test any of the pipeline controllers because the information available at the time showed that they could not have caused or contributed to the accident.

[7] *See Control of Drug Use In Natural Gas, Liquefied Natural Gas, and Hazardous Liquid Pipeline Operations*, 53 Fed. Reg. 47084, 47086 (Nov. 21, 1988).

"be completely discounted as a contributing factor to the accident." Accident scenarios play out over a period of time and the actions of employees who came on the scene in the minutes following the initiating event can impact the severity of spills and releases and the effectiveness of response actions. All three of these employees were on duty when FGTC first learned of the failure, and each had an active role in its response to the accident.

Moreover, Respondent had not identified the cause of the failure in the NRC report filed on the morning of the accident, or in the incident report filed with PHMSA some 34 days later. That undermines FGTC's assertion that it had a legitimate basis for concluding that the performance of the day-shift controllers could be completely discounted as a contributing factor, particularly in the immediate aftermath of the failure.[8]

In summary, the day-shift controllers were on duty when events critical to the accident occurred, including the initial reporting and response to the failure, and Respondent lacked a sufficient, contemporaneous basis for concluding that those employees should not be drug tested.

Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 199.105 by failing to drug test each employee whose performance either contributed to the May 4, 2009 accident or could not be completely discounted as a contributing factor to that accident.

Item 3: The Notice alleged that Respondent violated 49 C.F.R. § 199.225, which states in relevant part:

> **§ 199.225 Alcohol tests required.**
>
> Each operator shall conduct the following types of alcohol tests for the presence of alcohol:
>
> (a) *Post-accident.*
>
> (1) As soon as practicable following an accident, each operator shall test each surviving covered employee for alcohol if that employee's performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. The decision not to administer a test under this section shall be based on the operator's determination, using the best available information at the time of the determination, that the covered employee's performance could not have contributed to the accident.[9]

The Notice alleged that Respondent violated 49 C.F.R. § 199.225(a)(1) by failing to test each covered employee for alcohol whose performance of a covered function either contributed to the

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[8] At the hearing and in its Closing, FGTC objected to the Director's references to the absence of any documentation of its decision not to drug test the day-shift controllers, arguing that 49 C.F.R. Part 199 does not require an operator to make or keep such records. I note that the allegation of violation in the Notice is based solely on Respondent's failure to drug test its employees after the accident, rather than any failure on its part to maintain adequate documentation.

[9] As defined in 49 C.F.R. § 199.3, the term "covered employee" includes any person who performs an operations, maintenance, or emergency-response function regulated by 49 C.F.R. Part 192.

May 4, 2009 accident or could not be completely discounted as a contributing factor to that accident. In particular, the Notice stated that FGTC did not test two of the four pipeline controllers who were involved in operating the pipeline during the accident for the presence of alcohol.[10]

In its Response, at the hearing, and in its Closing, FGTC argued that it did not commit the alleged violation for the same reasons discussed in Item 2. The Director relied on his same response in maintaining that a violation occurred.[11]

Neither party has argued that a material difference exists in the construction or application of § 199.105(b) and § 199.225(a)(1), and I find that there is no other basis in the record for doing so in this proceeding. Accordingly, for the reasons discussed in Item 2, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 199.225(a)(1) by failing to test each of the controllers for alcohol whose performance of a covered function could not be completely discounted as a contributing factor to that accident.

Item 4: The Notice alleged that Respondent violated 49 C.F.R. § 192.709, which states in relevant part:

> **§ 192.709 Transmission lines: Record keeping.**
>
> Each operator shall maintain the following records for transmission lines for the periods specified:
>
> (a) The date, location, and description of each repair made to pipe (including pipe-to-pipe connections) must be retained for as long as the pipe remains in service.

The Notice alleged that FGTC had violated 49 C.F.R. § 192.709(a) by failing to retain a record of the date, location, and description of each repair made to the 18-inch pipeline that ruptured on May 4, 2009. In particular, the Notice stated that Respondent had replaced some of the original Polyken-tape-coated pipe with fusion-bond-epoxy-coated pipe after discovering external corrosion during a 2004 inline inspection.

In its Response, at the hearing, and in its Closing, FGTC did not contest this allegation of violation, but noted it had recently taken steps to improve its recordkeeping system. Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 192.709(a) by failing to retain a record of the date, location, and description of each repair made to the 18-inch pipeline that ruptured on May 4, 2009.

These findings of violation will be considered prior offenses in any subsequent enforcement action taken against Respondent.

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[10] As with Item 2, the Notice incorrectly stated that FGTC had four pipeline controllers who were on duty on May 4, 2009. The actual number was five.

[11] Although the Notice stated that Respondent had tested two of the pipeline controllers who were on duty on May 4, 2009, for the presence of alcohol, FGTC acknowledged at the hearing that it had not in fact tested any of those employees.

ASSESSMENT OF PENALTY

Under 49 U.S.C. § 60122, Respondent is subject to an administrative civil penalty not to exceed $100,000 per violation for each day of the violation, up to a maximum of $1,000,000 for any related series of violations. In determining the amount of a civil penalty under 49 U.S.C. § 60122 and 49 C.F.R. § 190.225, I must consider the following criteria: the nature, circumstances, and gravity of the violation, including adverse impact on the environment; the degree of Respondent's culpability; the history of Respondent's prior offenses; the Respondent's ability to pay the penalty and any effect that the penalty may have on its ability to continue doing business; and the good faith of Respondent in attempting to comply with the pipeline safety regulations. In addition, I may consider the economic benefit gained from the violation without any reduction because of subsequent damages, and such other matters as justice may require. The Notice proposed a total civil penalty of $95,000 for the violations in Items 2, 3, and 4, cited above.

Item 2: The Notice proposed a civil penalty of $40,000 for Respondent's violation of 49 C.F.R. § 199.105(b), for failing to drug test each employee whose performance either contributed to the May 4, 2009 accident or could not be completely discounted as a contributing factor. FGTC argues generally that the proposed penalty amount is excessive. Respondent further argues that the two night-shift pipeline controllers received drug tests immediately after the accident, and that its determination that the day shift controllers did not contribute to the accident was based on the best information available at the time thereby warranting a reduction in the proposed civil penalty.

With regard to the gravity of this violation, FGTC failed to drug test all of the employees involved in a serious pipeline accident, i.e., one that occurred in a high consequence area and which led to the ejection of a 113-foot section of buried pipe, the hospitalization of three individuals, and the temporary closure of the Florida Turnpike. Moreover, as with all violations of the drug testing requirements, Respondent's inaction also meant that the opportunity to drug test these employees in connection with this accident was forever lost.

Moreover, at the time the Notice was prepared and issued, OPS believed, incorrectly, that FGTC had only failed to drug test two employees. The fact that Respondent actually failed to drug test three employees suggests that the proposed civil penalty is below the amount that should have been assessed for this violation, not that a reduction is warranted.

The Notice also proposed identical civil penalty amounts for Respondent's violation of both the drug and alcohol testing requirements. As these requirements serve the same purpose, and the allegations of violation are based on the same factual premise, i.e., that FGTC had failed to test all covered employees the proposed penalties for both violations are reasonable and consistent.

Finally, Respondent has not presented any persuasive justification for its conduct, or contended that the proposed penalty would have an adverse effect on its ability to continue in business. Accordingly, FGTC's contention that it should receive a reduction in the proposed civil penalty for failing to drug test all covered employees is unpersuasive. Accordingly, having reviewed the record and considered the assessment criteria, I assess FGTC a civil penalty of $40,000 for violation of 49 C.F.R. § 199.105(b).

Item 3: The Notice proposed a civil penalty of $40,000 for Respondent's violation of 49 C.F.R. § 199.225(a)(1), for failing to test each covered employee for alcohol whose performance of a covered function either contributed to the May 4, 2009 accident or could not be completely discounted as a contributing factor to that accident. FGTC argues that the proposed penalty amount is excessive. For the reasons stated in Item 2, I do not find these arguments persuasive.[12] Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of $40,000 for violation of 49 C.F.R. § 199.105(b).

Item 4: The Notice proposed a civil penalty of $15,000 for Respondent's violation of 49 C.F.R. § 192.709(a), for failing to retain a record of the date, location, and description of each repair made to the 18-inch pipeline that ruptured on May 4, 2009. FGTC notes that it has recently taken steps to improve this aspect of its recordkeeping system.

Respondent failed to properly document repairs that it made to a pipeline that later experienced a failure. If readily available, those records could have assisted in determining its potential cause and the likelihood of a similar incident occurring in another location. Respondent has not presented any persuasive justification for its conduct, or argued that the proposed penalty would have an adverse effect on its ability to continue in business. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of $15,000 for violation of 49 C.F.R. § 192.709(a).[13]

Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a total civil penalty of **$95,000**.

Payment of the civil penalty must be made within 20 days of service. Federal regulations (49 C.F.R. § 89.21(b)(3)) require such payment to be made by wire transfer through the Federal Reserve Communications System (Fedwire), to the account of the U.S. Treasury. Detailed instructions are contained in the enclosure. Questions concerning wire transfers should be directed to: Financial Operations Division (AMZ-341), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 269039, Oklahoma City, Oklahoma 73125. The Financial Operations Division telephone number is (405) 954-8893.

Failure to pay the $95,000 civil penalty will result in accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717, 31 C.F.R. § 901.9 and 49 C.F.R. § 89.23. Pursuant to those same authorities, a late penalty charge of six percent (6%) per annum will be charged if payment is not made within 110 days of service. Furthermore, failure to pay the civil penalty may result in referral of the matter to the Attorney General for appropriate action in a district court of the United States.

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[12] The Notice stated that FGTC had tested two of the pipeline controllers for alcohol, but Respondent admitted at the hearing that it had not tested on any of its five pipeline controllers. As OPS has not asked to issue an amendment based on that admission, the civil penalty is based solely on the allegation made in the Notice, i.e., that FGTC failed to perform the required alcohol test on two employees.

[13] *See In the Matter of Columbia Gas Transmission, LLC*, CPF No. 1-2007-1004, 2009 WL 5538656 (Dec. 17, 2009) (assessing $11,000 civil penalty for violation of recordkeeping requirement in 49 C.F.R. § 192.709).

WARNING ITEMS

With respect to Items 1, 5, and 6, the Notice alleged probable violations of Part 192 and specifically considered these to be warning items. The warnings were for:

> 49 C.F.R. § 192.5(b)(3) (**Item 1**) — Respondent's alleged failure to determine the proper class location unit for the pipeline that ruptured on May 4, 2009. Specifically, the Notice stated that this segment lies within 100 yards of South Fork High School's 4H agriculture facilities, and that those facilities are occupied by 20 or more persons on at least 5 days a week for 10 weeks in any 12-month period and that FGTC should have identified it as being within a Class 3 location;
>
> 49 C.F.R. §§ 192.615(a)(3)(iii) and (a)(6) (**Item 5**) — Respondent's alleged failure to have and follow procedures for prompt and effective response to each type of emergency, including an explosion that occurs near or directly involves a pipeline facility and for initiating an emergency shutdown and pressure reduction in any section of its pipeline system that is necessary to minimize hazards to life or property. In particular, the Notice stated that FGTC's 18-inch natural gas pipeline ruptured at 5:09 a.m. EST on May 4, 2009, but that Respondent did not recognize that event until it received a phone call from the Martin County Fire and Rescue Squad 5:49 a.m. EST. The Notice also stated that a mainline valve downstream from the rupture point failed to automatically close at the time of the accident, and that natural gas from a parallel 30-inch line continued to flow back into and vent out of the 18-inch line until FGTC manually closed that valve two hours later. Finally, the Notice stated that Respondent's emergency response was not prompt, and that its Supervisory Control and Data Acquisition System failed to recognize the rupture at the time of the accident; and
>
> 49 C.F.R. §§ 192.903 and 192.905(b) (**Item 6**) — Respondent's alleged failure to identify South Fork High School's 4-H agricultural facilities as an identified site within the potential impact radius (PIR) of its 18-inch line. In particular, the Notice alleged that South Fork High School students use those facilities five days per week, that they are within the 365-foot PIR for FGTC's 18-inch line, and that Respondent is in the process of designating the affected pipeline segments as a High Consequence Area (HCA).

FGTC presented information in its Response showing that it had taken certain actions to address the cited items. In the event that OPS finds a violation of these provisions in a subsequent inspection, Respondent may be subject to future enforcement action.

Under 49 C.F.R. § 190.215, Respondent has the right to submit a Petition for Reconsideration of this Final Order. The petition must be sent to: Associate Administrator, Office of Pipeline Safety, PHMSA, 1200 New Jersey Avenue, SE, East Building, 2nd Floor, Washington, DC 20590, with a copy sent to the Office of Chief Counsel, PHMSA, at the same address. PHMSA will accept petitions received no later than 20 days after receipt of the Final Order by the Respondent, provided they contain a brief statement of the issue(s) and meet all other

requirements of 49 C.F.R. § 190.215. The filing of a petition automatically stays the payment of any civil penalty assessed. If Respondent submits payment of the civil penalty, the Final Order becomes the final administrative decision and the right to petition for reconsideration is waived.

The terms and conditions of this Final Order are effective upon service in accordance with 49 C.F.R. § 190.5.

for: Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

JUN 29 2011
Date Issued