DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF PIPELINE SAFETY
WASHINGTON, DC 20590

In the Matter of	)	
Belle Fourche Pipeline Company,	)	**CPF No. 5-2007-5002**[1]
Bridger Pipeline Company LLC	)	**CPF No. 5-2007-5003**
Butte Pipeline Company	)	**CPF No. 5-2007-5008**
Respondents	)	

PETITION FOR RECONSIDERATION OF ITEM 11 OF FINAL ORDER ISSUED APRIL 2, 2009

PETITION FOR RECONSIDERATION OF TIME ALLOWED TO COMPLY WITH CERTAIN REQUIREMENTS OF COMPLIANCE ORDER

Respondent Bridger Pipeline Company (Bridger) hereby respectfully requests reconsideration of Item 11 of the Final Order, and the associated requirement 5 of the Compliance Order, issued in CPF No. 5-2007-5003 and further requests a stay of the Compliance Order concerning such matter. Bridger also requests reconsideration of the time allowed to comply with certain Compliance Order requirements (2 and 4), and an extension of time to comply.

Item 11 of the Final Order Should be Reversed

This matter came before the Pipeline and Hazardous Materials Safety Administration, Office of Pipeline Safety (PHMA) for an informal hearing on August 31, 2007, in Denver, Colorado. In the Final Order, PHMSA ruled that Bridger violated 49 C.F.R. §195.428. This regulation requires the operator to, each 15 months (but at least once each calendar year), "inspect and test each pressure limiting device, relief valve, pressure regulator, or other item of pressure control equipment . . . ." Bridger seeks reversal of the determination that Bridger violated 49 C.F.R. §195.428, and revocation of the associated requirement 5 of the Compliance Order. Bridger also seeks a stay of requirement 5 of the Compliance Order pending a ruling on this motion.

[1] Although these three proceedings were heard on a consolidated basis, the Final Order at issue here was issued in CPF No. 5-2007-5003.

Bridger seeks reversal because PHMSA simply did not sustain its burden of proving that the "transmitters" associated with Bridger's SCADA system are "pressure control equipment" within the meaning and intent of the regulation. Instead, PHMSA has improperly recast the Notice of Probable Violation to support its predetermined outcome, has relied on speculative and unsupported new assertions and characterizations that were not presented at the hearing, and has simply dismissed the only reliable evidence that was presented at the hearing.

As an initial matter, the Final Order should be reversed because PHMSA's own allegations as clarified at the hearing supported a finding of non-liability. The Final Order correctly notes that the parties discussed at the hearing the distinction between a "transmitter" and a "transducer." The reason for this discussion, which PHMSA does not disclose in the Final Order, is that the NOPV did not consistently or clearly define or identify the type of equipment that Bridger allegedly failed to test. Because of this confusion caused by PHMSA's pleadings, Bridger presented uncontroverted expert evidence that there is a distinction between a transmitter and transducer, and that it in fact tested transducers on the required basis, in conformance with the regulation.[2] None of this evidence was disputed by PHMSA. To the contrary, PHMSA clarified at the hearing (as noted in Bridger's Post-Hearing Disclosure at page 12) that the intent of the NOPV was to allege that the Respondents had failed to test transducers only.

To avoid the adverse implications of the undisputed evidence that Bridger did in fact test transducers in accordance with the law, PHMSA now seeks to change the rules of the game. PHMSA concludes in the Final Order, for the first time in this proceeding, that the terms "transducer" and "transmitter" can "simply" be collapsed into one term, a "pressure transmitter." There was absolutely no evidence presented by PHMSA at the hearing to support this statement.

Having summarily concluded that a transducer and transmitter are the same thing (a pressure transmitter), without any citation to the record, and in contravention of the only expert testimony presented (by Bridger), the Final Order seals Bridger's fate. The Final Order observes that the regulation applies to "pressure control equipment." It then concludes that the "ordinary meaning of those terms would include devices to control pipeline operating pressures." The Final Order then concludes that every transducer and transmitter (which PHMSA has concluded are the same thing) qualify as "pressure control equipment," even if the transmitter simply sends a signal to a SCADA system. PHMSA then presented various hypothetical factual scenarios that allegedly support its theory. Since Bridger has both transducer and transmitter equipment, it could not escape liability under PHMSA's theory.

The problem is that PHMSA's only support for its theory is the Final Order itself. The PHMSA presented no evidence at the hearing about the regulatory meaning of the term "pressure control equipment" and certainly did not present evidence on its "ordinary meaning." PHMSA presented no expert or other testimony about Bridger's transmitters and its SCADA system in relation to the regulatory meaning of "pressure control equipment." The only evidence on this

[2] As Mr. Stamp testified, Butte and Bridger do test transducers - - *i.e.*, the on-site mechanical devices that sense pressure and are hard-wired to mechanically shut down the system locally and independently of the SCADA system - - on an annual basis. (*See Affidavit of Robert Stamp submitted at Hearing*,. ¶¶ 13-16.)

point was presented by Bridger, both through expert testimony and affidavit, and it directly contradicts the Final Order. Rather than deciding this matter based on the pleadings and the evidence presented at the hearing, PHMSA's Final Order is effectively a "do over" of the pleadings and the hearing, except that Bridger was not allowed to respond or participate.

In summary, PHMSA's liability determination: (1) is premised on an untimely reinterpretation of the pleading that lacks any evidentiary support in the record and is inconsistent with the evidence that was presented; (2) ignores the clarification at the Hearing that PHMSA in fact was focusing on transducers; and (3) relies on the Final Order to support the Final Order. These defects are a basis for reversal

The Final Order also rendered a new interpretation of § 195.428, asserting that the regulation applies even if the transmitter device does not actually regulate pressure. The new interpretation is unsupported by the record and flatly contradicted by PHMSA's own regulations and the evidence.[3] The two paragraphs of the Final Order at page 11 regarding SCADA systems and transmitters in support of this claim are interesting, but they are not evidence because no PHMSA witness testified to these statements at the Hearing. Again, the Final Order is relying on the Final Order, not evidence presented at the hearing. The Final Order is not evidence and even if it was Bridger had no opportunity to cross-examine PHMSA regarding the new factual assertions now being made in the Final Order.[4]

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[3] Nor does the Final Order deal with PHMSA's own interpretation of the regulation that it has released to the regulated community. PHMSA has described the types of "overpressure safety" devices that are covered under §195.428 in a "Fact Sheet" addressing pressure control devices. The "Fact Sheet," available at *http://primis.phmsa.dot.gov/comm/FactSheets/FSPressureControl.htm*, gives examples of devices intended to control overpressure:

What are pressure control and relief devices and why do failures occur?

- Examples of pipeline equipment responsible for pressure control and relief include:
  - Relief valves that open when pressure rises above a set pressure .
  - Pressure sensors that monitor pressure of the liquid or gas in the pipeline.
  - Pressure control devices receive input from pressure sensing devices and regulate pipeline equipment to raise or lower operating pressure.

PHMSA did not include in this interpretation a transmitter that simply sends a signal to a SCADA system, and such a transmitter is wholly unlike the equipment included in the interpretation.

[4] The Final Order cites to three "warning letters" that allegedly support PHMSA's interpretation about the scope of the term pressure control device in § 195.428. However, bare allegations in warning letters are not legally binding precedent. Similarly, the *ExxonMobil* case is not dispositive. There was no "finding" as PHMSA asserts, but instead the discussion of §

PHMSA's rewrite of the Compliance Order to specifically incorporate "SCADA systems" is procedurally defective and simply highlights the improper finding of liability. The Proposed Compliance Order said:

> Test all pressure transducers that are used for operations of the Poplar pipeline including those transducers that are part of the computational pipeline monitoring (CPM) system.
>
> Ensure that all pressure transducers that are used for operations of the Poplar pipeline, including those transducers that are part of the CPM system, are tested and inspected once each calendar year not to exceed 15 months.

PHMSA, in the Final Order, now says that it "likely used the term 'CPM system' [in the proposed compliance order] to cover pressure transmitters that send signals to a SCADA system . . .." There is no evidence that this was the "likely" intent of PHMSA. Nobody testified to this effect at the hearing. This is a highly unusual statement. If it was "likely" that the Proposed Compliance Order meant something other than what it said, then PHMSA should have amended it or at least attempted to explain the difference at the hearing. Neither occurred.

PHMSA engages in this sleight of hand to avoid the consequences of § 195.444, which expressly regulates transducers "that are part of the computational pipeline monitoring (CPM) system." Section 195.444 does not require the testing of a CPM system every 12 months, as does § 195.428. Section 195.444 incorporates API 1130, which has its own testing requirements. PHMSA's position would subject an operator to two different regulations with different, and inconsistent requirements, such as the frequency for testing. Nonetheless, the Final Order holds that Bridger did not present evidence that complying with both sets of regulations would impose inconsistent requirements. As the foregoing conclusively demonstrates, PHMSA is incorrect. Because PHMSA cannot simply re-write compliance orders to avoid their negative impact on liability theories, and in any event because Bridger has demonstrated the inconsistent effect of the regulations, the Final Order should be overturned.

The Proposed Compliance Order Associated with Item 11 Should Be Stayed, Or the Time for Compliance Should be Extended

Bridger contends that PHMSA's confusion in its allegations regarding § 195.428, its failure to present any genuine evidence at the hearing, its near total disregard of the real world expert testimony presented by Bridger, and its attempt to use the Final Order as "evidence"

195.428 arose in the context of a warning letter, and the Final Order merely points out that the parties disagreed as to the interpretation of the regulation. Further, there is no indication whether the "pressure transmitter" in that case was sending a signal to function as overpressure safety protection. As noted above, the undisputed evidence is that Bridger did test its overpressure safety devices. Moreover, contrary to what PHMSA states in the Final Order, the Final Order in *ExxonMobil* is not being "reconsidered," it has been withdrawn and a de novo hearing has been ordered.

betrays extreme regulatory uncertainty regarding the intent and scope § 195.428. This is magnified by a Compliance Order which has evolved not to suit any factual circumstance but instead to conform the case to legal theories. Given this uncertainty, Bridger believes that it has demonstrated a reasonable likelihood that it will prevail on this request for reconsideration, and therefore seeks a stay of Item 11 of the Compliance Order. Further, given PHMA's position that Bridger must comply with both § 195.444 and § 195.428, Bridger would be subject to two different, and in aspects, inconsistent regulatory frameworks. This would inequitable. In the alternative, and for the same reasons, Bridger requests that the period to comply with the Compliance Order should be 180 days from issuance of a modified Compliance Order granting this request for additional time.

The Time for Compliance with Requirement 2 of the Compliance Order Should be Extended

There are compelling grounds to reverse the ruling that Bridger violated 49 C.F.R. § 195.230 (Item 4 of the Final Order). For example, PHMSA now agrees that a "pinhole" is not an "unacceptable" defect under Section 9 of API 1104 . PHMSA instead asserts, for the first time, that Bridger's welding inspection contractor determined that the pinhole was "detrimental to the weld." There is absolutely no evidence in the record to support this finding. PHMSA points to no such statement by the welder, no testimony by its own witnesses, and no documentary finding that the "pinhole" was "detrimental to the weld." As the welding inspector stated, far from being "detrimental to the weld," the "pinhole" was a "tiny surface imperfection" that was "ground down and visually inspected." (*See Affidavit of Ryan Dehner submitted at hearing,* ¶ 4.)

Further, PHMSA complains that there was no "definitive statement" that the repair was ever made. This is incorrect. Mr Dehner stated as follows: "[a]ll pinhole imperfections that were identified by me as a result of my radiographic examination were ground down and visually inspected by representatives of Bridger Pipeline." *Id.* It is difficult to imagine a more definitive statement of repair. Another Bridger employee also testified about repair of welds. PHMSA finds it "telling" that the evidence allegedly was not "conclusive." PHMSA is confused about the burden of proof. In an enforcement matter, the burden of proof rests with PHMSA; the defendant need not come forward with "conclusive proof." As the proponent of the underlying NOPV's, the Agency is clearly responsible for coming forward with proof for each element of the allegations contained therein, and also bears the risk of non-persuasion as to each of those elements. PHMSA did not present any evidence, it simply criticized the evidence presented by Bridger.

Despite the failure of PHMSA to sustain the burden of proof, and in the spirit of cooperation, Bridger has elected not to seek reconsideration of the finding of liability. However, Bridger does seek reconsideration of the 60 day period for compliance with requirement 2 of the Compliance Order. The Compliance Order requires that extensive portions surrounding a buried pipeline be excavated and inspected. Spring weather conditions (e.g., wet and muddy ground) will delay commencement of this work. In addition, Bridger needs additional time to locate, hire and mobilize a crew in this remote location. Bridger believes that it can complete the inspection work no later than the fourth quarter of 2009, and therefore requests that the Compliance Order be modified so that the date of compliance with requirement 2 be 180 days from issuance of a modified Compliance Order granting this request for additional time.

The Time for Compliance with Requirement 4 of the Compliance Order Should be Extended

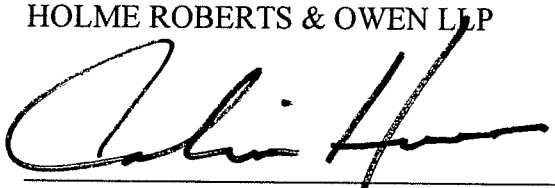
Requirement 4 of the Compliance Order is associated with Item 10 of the Final Order. PHMSA's decision appears to have been based largely on a Post-Hearing Disclosure by Bridger that certain welds had "toe cracks" as determined by voluntary re-excavation activities. The original non-destructive testing contractor found possible "toe cracking" based on magnetic particle testing and visual observation. Bridger subsequently retained a contractor (Coast to Coast NDE Services) to use more sophisticated NDT methodologies and equipment. The results of the more detailed and reliable NDT work has revealed no toe cracking. There have been some issues with coating and location of welds, and those issues have been corrected to insure that the pipeline repairs have been done in a manner that is safe and that will prevent damage to persons and property.

Bridger has completed NDT examination of approximately 60% of the welds that are subject to requirement 4 of the Compliance Order. The remaining work is scheduled to be completed in the fourth quarter of 2009, using Coast to Coast NDE Services. Due to the scope of this project, and scheduling issues for both the contractor and Bridger in relation to other pipeline maintenance projects, Bridger would not be able to complete this work until the fourth quarter 2009. Bridger therefore requests that the Compliance Order be modified so that the date of compliance with requirement 4 is 180 days from issuance of a modified Compliance Order granting this request for additional time.

Dated this 21st day of April, 2009.

Respectfully submitted,

HOLME ROBERTS & OWEN LLP



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of April 2009, a true and correct copy of the foregoing Petition for Reconsideration was served via Federal Express Overnight Delivery as follows:

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