



U.S. Department
of Transportation

**Pipeline and
Hazardous Materials Safety
Administration**

400 Seventh Street, S.W.
Washington, D.C. 20590

OCT 27 2005

Mr. Richard C. Kelly
President
Northern States Power Company
414 Nicollet Mall
Minneapolis, MN 55401-1927

Re: CPF No. 36301

Dear Mr. Kelly:

Enclosed is a decision on the petition for reconsideration filed in the above-referenced case. The Associate Administrator for Pipeline Safety has denied the petition. Accordingly, payment of the \$3,000 civil penalty is due immediately. In addition, please be advised that appropriate corrective action regarding the Warning Item specified in the Final Order must also be taken if such action has not already been completed. Your receipt of this decision constitutes service under 49 C.F.R. § 190.5.

Sincerely,

James Reynolds
Pipeline Compliance Registry
Office of Pipeline Safety

Enclosure

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

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

_____)
In the Matter of)

Northern States Power Company,)

Petitioner)
_____)

CPF No. 36301

DECISION ON PETITION FOR RECONSIDERATION

On September 20, 2004, pursuant to 49 U.S.C.S. § 60112 (2004), the Associate Administrator for Pipeline Safety (“Associate Administrator”) issued a Final Order in this case finding that Petitioner had violated the pipeline safety regulations and assessing a civil penalty in the amount of \$3,000. The Final Order also warned Petitioner to take appropriate corrective action regarding certain inspection and testing requirements.

On October 15, 2004, Petitioner filed a petition for reconsideration of the Final Order. Approximately three months after the filing of this petition, and before the decision on it was issued, Petitioner received a Delinquency Notice regarding the unpaid \$3,000 debt. On February 10, 2005, Petitioner wrote a response letter to the Office of Pipeline Safety (OPS) requesting that the Delinquency Notice and Final Order be vacated.¹

In its petition for reconsideration, Petitioner sought reconsideration of the Final Order on the grounds that the delay between the issuance of the Notice of Probable Violation (NOPV) on January 30, 1996 and the issuance of the Final Order on September 20, 2004 was unreasonable and violated the Administrative Procedure Act (APA) § 6, 5 U.S.C.S. § 555 (1989) and 49 C.F.R. § 190.213(e) (2003). Petitioner contended that the civil penalty assessed for Petitioner’s violation of 49 C.F.R. § 193.2621(a) should therefore be vacated.

The Final Order found Petitioner violated 49 C.F.R. § 193.2621(a) by failing to test its ethylene refrigerant system hoses. Section 193.2621(a) requires that these transfer hoses be tested “once each year but with intervals not exceeding 15 months, to the maximum pump pressure or relief

¹ Please be advised that the Delinquency Notice was sent inadvertently and may be disregarded. Pursuant to 49 C.F.R. § 190.215(d), “[t]he filing of a petition . . . stays the payment of any civil penalty assessed.” Therefore, Petitioner is not responsible for the interest and finance charges of \$77.58 assessed in the Delinquency Notice.

valve setting.” According to the NOPV, Petitioner had “never tested the ethylene refrigerant system hoses.” NOPV at 2. In its petition for reconsideration, Petitioner admitted that “. . . NSP did not contest the NOPV in February 1996 and requested only a reduction in the civil penalty.” Petition at 3. The Final Order did reduce the civil penalty that had been proposed in the NOPV from \$5,000 to \$3,000 based on the information concerning the corrective actions taken by Petitioner it provided in response to the NOPV. Nonetheless, Petitioner now argues that the time which has elapsed between the issuance of the NOPV and the issuance of the Final Order constitutes unreasonable delay and should be grounds for complete rescission of the Final Order and civil penalty.

In its petition, Petitioner advanced two arguments for setting aside the Final Order and civil penalty. First, Petitioner argued that the delay between the issuance of the NOPV and the issuance of the Final Order violated 5 U.S.C. § 555. Petitioner specifically quotes this section of the APA for the proposition that this delay was excessive and unreasonable. Subsection (b) states, in part, that “[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.” Likewise, the applicable provision from subsection (e) reads, “Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with an agency proceeding.” Petitioner also cites two federal cases² in which courts held that delays of five years or more in adjudicating unemployment claims and computing amount of back pay owed to NLRB employees respectively were unreasonable under the APA.

We acknowledge that an extended period of time elapsed between the issuance of the NOPV and the issuance of the Final Order on September 20, 2004. Petitioner, however, failed to explain how the delay could have prejudiced its rights in this proceeding in any way. Petitioner’s response to the NOPV consisted entirely of its letter dated February 29, 1996. Petitioner did not request leave to submit additional materials and did not request a hearing. Therefore, the record used by the Associate Administrator in making the decision reflected in the Final Order was closed as of February 29, 1996, 30 days after the NOPV was issued. Therefore, the delay in issuance of the Final Order, while uncharacteristic, did not prejudice Petitioner’s ability to respond to the NOPV.

We further note that the remedy for a party that claims to have been aggrieved by an administrative delay in violation of the APA is not vacation of the proceeding. Rather, the aggrieved party may request a writ of mandamus to compel the agency to act in compliance with governing statutes or regulations.³ A writ of mandamus is considered an “extraordinary” and

² *Air Line Pilots Ass’n, Int’l v. Civil Aeronautics Bd.*, 750 F.2d 81 (D.C. Cir. 1984); *Silverman v. NLRB*, 543 F.2d 428 (2d Cir. 1975).

³ 28 U.S.C.S. § 1361 (2003).

“drastic” remedy.⁴ In a mandamus action, a court would likely require that Petitioner demonstrate that agency delay was egregious and that it actually prejudiced the Petitioner.⁵ In this case, Petitioner not only never requested a writ of mandamus, it never contacted OPS to express any concern that it would be prejudiced if the Final Order were further delayed.

Moreover, unlike the two cases Petitioner cited to support its argument regarding unreasonable delay under the APA, this proceeding was initiated as a result of noncompliance by Petitioner, for which liability was never contested. In the two cases Petitioner cited in its petition, however, aggrieved parties were objecting to an agency’s inaction regarding monetary *benefits* that they claimed were owed to them respectively. On the contrary, in the present proceeding, Petitioner *owes* money for violating the pipeline safety regulations. Therefore, Petitioner’s reliance on these cases is unfounded.

Petitioner also contended that the delay between the issuance of the NOPV and the issuance of the Final Order in this proceeding without proper notice was inconsistent with the Part 190 adjudication procedures used by OPS. Specifically, Petitioner asserted that this delay violated 49 C.F.R. § 190.213(e), which reflects OPS’ policy to issue Final Orders within 45 days whenever practicable. Again, Petitioner never contested the merits of the investigation or the conclusion of OPS that Petitioner violated the pipeline safety regulations. While this regulation reflects OPS’ own administrative practices, exceeding the period does not operate as a bar to OPS issuing a Final Order in furtherance of its pipeline safety mission.

Relief Denied

I have considered Petitioner’s request for reconsideration. I do not find Petitioner’s arguments warrant withdrawal of the findings of violation or a vacation of the civil penalty assessed in the Final Order. Therefore, all terms of the Final Order remain in effect, including assessment of the civil penalty in the amount of \$3,000.

Payment of the civil penalty must be made within 20 days of service. Federal regulations (49 C.F.R. § 89.21(b)(3)) require this payment be made by wire transfer, through the Federal

⁴ See *Kerr v. United States Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394 (1976); *In re United Mine Workers of American International Union*, 190 F.3d 545 (D.C. Cir. 1999).

⁵ See *Panhandle Co-op. Ass’n, Bridgeport, Neb. v. EPA*, 771 F.2d 1149 (8th Cir. 1985) (refusing to reverse assessment of penalty against petitioner for mislabeling pesticide tank despite a two and one-half years delay between the issuance of the final brief and the issuance of the final order because, among other reasons, petitioner did not demonstrate that it was prejudiced by the delay); see also *Pub. Citizen v. Heckler*, 602 F. Supp. 611 (D. D.C. 1985) (opining that when deciding whether agency action has been delayed unlawfully or unreasonably, courts should consider prejudice, agency justification for delay, and statutory context and scheme). *But see Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30 (D. D.C. 2000) (granting Indian tribe’s request for writ of mandamus to compel Bureau of Indian Affairs to resolve pending petition partly because of the fact that the Indian tribe’s members’ health and welfare was threatened by the delay).

Reserve Communications System (Fedwire), to the account of the U.S. Treasury. Questions concerning wire transfers should be directed to: Financial Operations Division (AMZ-120), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 25082, Oklahoma City, OK 73125; (405) 954-4719.

Failure to pay the 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. Failure to pay the civil penalty may result in referral of the matter to the Attorney General for appropriate action in a United States District Court.

This decision on reconsideration is the final administration action in this proceeding.



for
Stacey Gerard
Associate Administrator
for Pipeline Safety

OCT 27 2005

Date Issued