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PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA
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WASHINGTON, D.C. 20005

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DISTRICT OF COLUMBIA
PUBLIC SERVICE COMMISSION

ORDER

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May 8, 2009

VIOLATION 08-2, IN THE MATTER OF THE INVESTIGATION INTO THE NOTICES OF PROBABLE VIOLATIONS 0802, ISSUED TO WASHINGTON GAS LIGHT COMPANY;

VIOLATION 08-3, IN THE MATTER OF THE INVESTIGATION INTO THE NOTICES OF PROBABLE VIOLATIONS 0803, ISSUED TO WASHINGTON GAS LIGHT COMPANY; and

VIOLATION 08-4, IN THE MATTER OF THE INVESTIGATION INTO THE NOTICES OF PROBABLE VIOLATIONS 0804, ISSUED TO WASHINGTON GAS LIGHT COMPANY; Order No. 15260

I. INTRODUCTION

1. By this Order, the Public Service Commission of the District of Columbia ("Commission") grants Washington Gas Light Company's ("WGL" or "Company") petition to review Notice of Probable Violation ("NOPV") 0802 and, *sua sponte*, reviews NOPVs 0803 and 0804. Upon review, the Commission finds that NOPVs 0802 and 0804, and any associated fines, shall be withdrawn. Therefore, WGL's request for hearing regarding NOPV 0804 is denied as moot. NOPV 0803 and associated fines are withdrawn, in part, consistent with this order. To the extent that WGL requests an evidentiary hearing in NOPV 0803, that request is denied, as the Company has not identified any material issue of fact. However, the Commission will accept written argument in support of a compromise on the penalty for the remaining portion of NOPV 0803. Within ten (10) days from the date of this order, WGL shall either submit in writing the basis for its request for compromise of the remaining \$20,000 penalty or, alternatively pay the \$20,000 penalty and this matter shall be closed.

II. BACKGROUND

2. On February 5, 2008 and April 3, 2008, the Commission's Office of the Deputy Executive Director for Regulatory Matters' Office of Engineering ("OE") issued three Notices of Probable Violations; two for mis-markings and one for training and certification violations.¹ WGL asserts that, under the circumstances, the fines are unwarranted.² The Commission agrees with WGL's assertion.

III. DISCUSSION AND DECISION

Proposed Violation 0802

3. NOPV 0802, issued on February 5, 2008, concerned gas pipeline safety inspections conducted by an OE Pipeline Safety Inspector ("PSI") for construction work performed by WGL and its subcontractors on December 21, 2007, and December 27, 2007, at 1327 21st Street, N.W. and 331 K Street, N.E., respectively. The PSI found one mis-marking at each location and determined that the mis-marking was not compliant with the Code of Federal Regulations and WGL's Operations and Maintenance Manual.³ Although neither federal nor Commission regulations include provisions for a "Notice of Investigation" ("NOI")⁴ *per se*, the OE issued a NOI on December 27, 2007, directing WGL to provide a written report within 10 days setting forth all relevant facts regarding the mis-markings so that the OE could determine whether there has been a "probable violation" of the Commission's pipeline safety standards. WGL responded on January 8, 2008, stating that the "locate technician" had not followed WGL's "locate procedures." The company further stated that the technician had been disciplined and retrained.

4. On February 5, 2008, the OE issued NOPV 0802, pursuant to 49 C.F.R. §190.207, for the mis-marking referenced in the NOI. The NOPV contained a "Proposed Compliance Order" section directing WGL to investigate why the mis-marking was inaccurate and to identify the steps WGL intends to take to avoid a reoccurrence, including training, even though WGL had already explained the cause of the problem and the steps it had taken to correct it. The NOPV further proposed a fine of \$20,000 per violation for a total of \$40,000. Although the NOPV states that the OE has considered, among other things, the gravity of the violation, the respondent's history of prior offenses and the good faith shown to achieve compliance, there is no indication of how these

¹ Vio-0802, Notice of Probable Violation ("NOPV 0802"), issued February 5, 2008 (mis-marking); Vio-0803, Notice of Probable Violation ("NOPV 0803"), issued April 3, 2008 (training and certification violations); and Vio-0804, Notice of Probable Violation ("NOPV 0804"), issued April 3, 2008 (mis-marking).

² Vio-08-2, 08-3, and 08-4, Washington Gas Light Company's Petition for Commission Review of Notice of Probable Violations 0802, Request for Hearing on NOPVs 0803 and 0804 and Clarification of NOPV Rules, filed May 5, 2008 ("WGL's Petition").

³ Transportation of Natural and Other Gas by Pipeline: Minimum Federal Safety Standards, 49 C.F.R. § 192.13(c) (2006); Washington Gas Light Operation and Maintenance Manual § 4101.

⁴ There is, however, a provision for a "Request for Specific Information" under federal rules. See 49 C.F.R. § 190.203(c).

factors were weighed or meaningfully considered. For instance, the NOPV does not state whether the offenses are serious relative to other types of offenses, whether WGL has a history of prior mis-markings, or whether WGL was credited with acting in good faith and, if so, how that was factored into an assessment of a reasonable penalty.

5. Apart from the defects in the NOPV itself, issuance of the NOPV at this juncture was premature under the Commission's rules. Section 2311 of the Commission's rules supplement federal provisions and state that, prior to issuance of a NOPV, the operator, WGL in this case, may correct the violation at the time of inspection. If onsite corrective action is taken, the OE shall confirm such action by sending a letter to the operator specifying the violation and remedy. If no corrective action is taken, the investigator shall prepare a written report of the probable violation for the OE; and the OE shall file that report with the Commission. None of the procedures under 15 District of Columbia Municipal Regulations ("DCMR") §2311 were followed. Consequently, there is nothing in the record that states whether or not the violation was ever corrected.⁵ In our view, imposing a \$40,000 penalty under these circumstances and in this manner is arbitrary.

Proposed Violation 0804

6. NOPV 0804, issued April 3, 2008, is also a mis-marking violation. The NOI vehicle used in NOPV 0802 was not employed in this instance. According to the NOPV, the gas main and service lines were inaccurately marked for three locations at 17th and Irving Streets, N.E. The NOPV notes that the problem was corrected to allow the work to proceed. As in NOPV 0802, NOPV 0804 contained a "Proposed Compliance Order" section directing WGL to investigate why the marking was inaccurate and identify the steps WGL intends to take to avoid a reoccurrence, including training. The NOPV proposed a fine of \$30,000 per violation for a total of \$90,000. Although the NOPV states that it has considered, among other things, the gravity of the violation; the respondent's history of prior offenses; and the good faith shown to achieve compliance, there is, again, no indication of how these factors were weighed or meaningfully considered. NOPV 0804 is similarly deficient to NOPV 0802, as it does not state whether mis-marking offenses are serious relative to other types of offenses; assert that the mis-marking involved the same WGL employees and/or subcontractors as NOPV 0802, or another similar NOPV; explain why the penalty for mis-marking is now \$30,000 per violation instead of \$20,000 as in NOPV 0802; or indicate whether WGL was credited with acting in good faith by correcting the problem at the time of the inspection.

7. Correcting the problem at the time of the inspection is particularly important because section 2311.2 of the Commission's rules specifically allows the company to take onsite corrective action. If an onsite corrective action is taken, then section 2311.3 requires that the OE confirm the violation and remedy by sending a letter to the company. If no on-site corrective action is taken, then a NOPV is issued pursuant

⁵ We note that in its petition for review, WGL claims that the mis-markings were corrected in the presence of the PSI. WGL's Petition at 2. The Commission makes no finding with respect to WGL's allegations.

to section 2311.4. However, in this case, the provisions of section 2311 were not followed and the OE inexplicably issued a NOPV even though the violation was corrected on site. Imposing a \$90,000 penalty under these circumstances, and outside the regulatory framework, is arbitrary.

Proposed Violation 0803

8. On April 3, 2008, the OE issued NOPV 0803 proposing to fine WGL a total of \$60,000 for three separate violations. The violations regarded WGL's employee training for specialized tasks and the misrepresentation of the date on which the employees were trained. Specifically, the NOPV states that pursuant to what appears to be a verbal "request" by the OE sometime in 2005, WGL submitted an Operator Qualification program for encapsulation procedures, stating that on July 27, 2005, all appropriate employees were trained regarding encapsulation. However, on June 11, 2007, during an inspection of the work at 3219 Quesada Street N.W., the PSI found that WGL had an untrained employee performing an encapsulation task on a leaking fitting of a cast iron main.

9. The NOPV states that the encapsulation procedures listed in WGL's Operator's Qualification Test Subtask ("OQTS' -1102")⁶ available at the site only addressed the repair procedures for non-leaking fittings, but the appropriate written procedures for the covered task of leaking fittings was not available at the work site for review by the PSI, as required by law.⁷ This was the first infraction.

10. The NOPV notes that the operator was properly trained and certified to perform encapsulation repairs on non-leaking fittings, but the PSI found the operator in violation of the federal regulations because he was not trained to perform repairs on leaking fittings. This was the second infraction.

11. Upon closer examination of the allegedly untrained WGL employee's qualifications for working on non-leaking fittings, the PSI found that he was not trained to perform such work until January 17, 2006. Even though WGL's employee was not working on a non-leaking fitting at the time of the inspection, the OE essentially found that on July 25, 2005, WGL had inaccurately represented that all appropriate employees had been trained regarding encapsulation. This was the third infraction.

⁶ The OQTS establishes the procedures for performing specific repairs under a covered task.

⁷ 49 C.F.R. § 192.809 states in pertinent part:

(a) Operators must have written qualification programs.... The program must be available for review by the Administrator or by a state agency participating under 49 USC Chapter 601 if the program is under the authority of the state agency.

(b) Operators must complete the qualification of individuals performing covered tasks by October 28, 2002.

12. With regard to the first infraction, although the NOPV states that, among other things, the gravity of the violation, the respondent's history of prior offenses and the good faith shown to achieve compliance have been considered, this NOPV shares the defect of the other two NOPVs in that there is no indication of how these factors were weighed or meaningfully considered. The NOPV does not explain whether failing to have written procedures available at the site is serious compared to other infractions, or state whether the Company has been previously cited for similar violations, nor does it state whether and to what extent any mitigating circumstances were considered. In the absence of some rational application of relevant factors to the circumstances of this violation, a penalty of \$20,000 is arbitrary.

13. The third infraction is similarly flawed. Assuming that WGL's employee was employed in a position in 2005 that required training, the NOPV does not explain whether this type of offense is serious as compared to other infractions; does not state whether there have been previous violations of this sort or whether this is a first offense; nor does it state whether and to what extent any mitigating circumstances were considered. More importantly, there is no indication of why the OE considered a \$20,000 penalty reasonable considering the fact that the problem had been corrected a year and half before the PSI discovered it.

14. We do not see the same defects in the second infraction for NOPV 0803 that the WGL employee worked on a leaking fitting without being properly trained to perform the work. The charge appears straightforward and so does the risk to public safety. In its petition, WGL does not dispute the charge and, therefore, raises no material issue of fact warranting an evidentiary hearing.⁸ However, pursuant to D.C. Code §34-706 (c), we will allow WGL an opportunity to present, in writing, a case for compromise of the penalty. Alternatively, WGL can pay the \$20,000 fine and this matter will be deemed closed.

THEREFORE, IT IS ORDERED THAT:

15. Washington Gas Light Company's ("WGL") Petition for Commission Review of Notice of Probable Violations ("NOPV") 0802 is **GRANTED**;

16. NOPV 0802 and the associated fines are **WITHDRAWN**;

17. Consistent with paragraphs 12, 13, and 14, of this order, NOPV 0803 and the associated fines are **WITHDRAWN** in part;

18. NOPV 0804 and the associated fines are **WITHDRAWN**;

19. WGL's Request for Hearing on NOPV 0804 is **MOOT**;

⁸ *Office of the People's Counsel v. Public Service Comm'n of the District of Columbia*, 797 A.2d 719, 726 n.9 (D.C. 2002), citing *Watergate East, Inc. v. District of Columbia Public Service Comm'n*, 662 A.2d 881 (D.C. 1995) (Formal hearing not necessary when there are no material issues of fact).

20. WGL's Request for Hearing on NOPV 0803 is **DENIED**;

21. WGL shall submit written arguments, if there be any, in support of a compromise in the penalty for the remaining portion of NOPV 0803, or in the alternative, pay the \$20,000 penalty for that portion of the violation which has not been withdrawn; and

22. The written submission for compromise or payment of the penalty shall be made within ten (10) days of the date of this order.

A TRUE COPY:

BY DIRECTION OF THE COMMISSION:

A handwritten signature in black ink, appearing to read "D. Wideman", with a long horizontal flourish extending to the right.

CHIEF CLERK

**DOROTHY WIDEMAN
COMMISSION SECRETARY**