STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. DG 15-121

Northern Utilities, Inc.	)	Brief of Northern Utilities, Inc. on NOV
Request for Hearing	)	Related to New Hampshire Avenue
	)	Regulator Station [1]

As Mr. Meissner explained during Northern's opening statement, this proceeding is about the Company's imperative need for clear and consistent application of the federal gas safety regulations that govern the Company's design, operation and maintenance of its natural gas distribution systems. This proceeding is not about trying to "skirt" the requirements of the federal regulations as Staff suggests. Northern takes great pride in its well-deserved industry recognition as a leader in natural gas pipeline safety and its personnel frequently are featured in national industry conferences on best practices. The Company takes pipeline safety seriously, and imbues a culture that the safety of our customers, employees and the general public is Northern's top priority. Northern appreciates Commissioner Bailey's acknowledgement during the hearing that the Company's personnel "really take the safety aspect of this [proceeding] very seriously." (Tr. D2 at 54:16-19.[2])

The Pipeline and Hazardous Materials Safety Administration ("PHMSA") is the federal agency responsible for promulgating the federal gas safety regulations, codified at 49 C.F.R. Parts 190 – 199 (the "Code"). PHMSA provides guidance material to Northern and other gas system operators for the express purpose of promoting the consistent interpretation and enforcement of the Code. Any gas safety program must start with a firm understanding of the applicable regulations. If the Company cannot clearly understand the Code, it cannot possibly

[1] This Brief references Northern Utilities, Inc. as "Northern" or the "Company." Northern is filing a separate Brief on the issues related to Staff's NOV concerning the New Hampshire Avenue Regulator Station.

[2] This Brief adopts the citing convention of Transcript (Tr.) Day 2 (D2) at page:line.

achieve Code compliance. This is important because the federal gas safety regulations comprehensively regulate nearly every aspect of the Company's gas distribution system, including the design of the system, how it must be operated, and the requirements for its maintenance. Without clear and consistent interpretation of the regulations individually and as a comprehensive whole, it is impossible for the Company to train its personnel on the proper standards and procedures for Code compliance.

With regard to the circumstances related to the New Hampshire Avenue Station NOV, the Code is clear and Northern followed the Code exactly as written. To confirm Northern's interpretation of the Code, the Company requested and received from PHSMA an interpretation letter related to the events at the New Hampshire Avenue Station addressed in the NOV. PHMSA confirmed that the Company's design was sound and that the Company's regulators performed consistent with Code requirements in the event of a failure of the worker regulator.

The Commission's Staff disagrees with PHMSA's interpretation. According to the NOV, the Company's regulator set points are set too high and violate the provisions of the Code related to regulator station design (Section 192.195) and maximum allowable operating pressure ("MAOP"; Section 192.619).

Northern is in an impossible position. It believes it understands the requirements of the Code based on a holistic interpretation of the Code, and the Company's interpretation has been confirmed by PHMSA. Staff, on the other hand, interprets the Code differently than PHSMA, and does not feel obligated to follow PHMSA's interpretation. Although the Company deeply respects the pipeline safety enforcement role played by Commission Staff, the Company cannot achieve Code compliance without consistency in the interpretation of the Code.

As for the merits of the NOV, nearly all of the material facts are included in a Joint

Stipulation. The dispute involves the proper interpretation of the Code. As this Brief demonstrates, the Company's holistic interpretation is consistent with the Code and PHMSA's guidance materials that interpret the Code. The Staff's interpretation, however, fails to give meaning to the entire Code, and would render large segments of the Code meaningless. Staff's interpretation would also require the Company to operate all of its distribution systems at lower pressures, which would significantly reduce the capacity of these systems and result in insufficient gas supply during the upcoming peak winter heating season. Staff has not met its burden of proof, and Northern respectfully requests that the Commission reject the NOV in its entirety.

BACKGROUND

The facts material to Staff's NOV are not in dispute. The Parties filed a Joint Statement of Stipulated Facts with the Commission on August 18, 2015 ("Stip."), which provides as follows:

1. On June 25, 2014, at Staff's request, Northern separately simulated the failure of two worker regulators at the Portsmouth Intermediate Pressure (lP) System (the tests).
2. At the time of the tests, Northern had established the MAOP for the Portsmouth IP System at 56 psig.
3. At the time of the tests, Northern had set one worker regulator at 52 psig, the other worker regulator at 50 psig, and both monitor regulators at 55 psig.
4. At the time of the tests, Northern knew that when a monitor regulator assumes control over the system pressure there is an expected build-up of pressure that temporarily causes pressure to rise above the monitor regulator's set point.
5. As a result of the tests, the system pressure exceeded 56 psig on both occasions, as measured at a gauge located within the regulator station, approximately six feet downstream of the regulators.
6. The first test resulted in a pressure reading of 56.9 psig before that test was stopped.
7. The second test resulted in a pressure reading of 57.2 psig for approximately 1-2 minutes. The monitor regulator then assumed control over pressure and the pressure at the pressure gauge stabilized at the monitor's set point of 55 psig.
8. At the time of each test, the regulators being tested were connected to the downstream system.

Other facts relevant to the Commission's analysis of Staff's NOV are discussed in the body of the Brief.

Legal Standard

A. Standards for Statutory Interpretation.

When construing a statute or regulation, New Hampshire courts initially determine whether the statute is silent or ambiguous on the subject at issue or whether the statute is unambiguous.[3] *E.g., Goudreault v. Kleeman*, 965 A.2d 1040 (N.H. 2009); *Neang Chea Taing v. Napolitano*, 567 F.3d 19 (1st Cir. 2009). If the statute is "plain and unambiguous, the court must apply the statute according to its terms." *Neang Chea Taing*, 567 F.3d at 23 (1st Cir. 2009) (internal quotation marks omitted); *see also Cloutier v. City of Berlin*, 907 A.2d 955, 959 (2006) ("When a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent, and we will not consider what the legislature might have said or add language that the legislature did not see fit to include.").

When determining whether a statute or regulation is ambiguous, the courts look first to the language of the statute or regulation and will ascribe its plain and ordinary meaning. *Soraghan v. Mt. Cranmore Ski Resort, Inc.*, 881 A.2d 693, 695 (N.H. 2005); *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009). It is also well-settled that the courts will not read words or phrases in isolation, but in the context of the entire statute and statutory scheme. *Soraghan*, 881 A.2d at 695 ("Our goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme."); *United States v. Roberson*, 459 F.3d 39, 55 (1st Cir. 2006) (considering the statutory structure and the statute as a whole when interpreting statute at issue) . The courts may consider not only the text, but also the structure of the statute. *See, generally, Roberson; Neang Chea Taing*.

The courts will harmonize statutory provisions to give effect to the entire statutory

[3] New Hampshire and federal courts observe similar standards for statutory construction, and therefore both standards are supplied.

scheme and avoid absurd results. *Roberson*, 459 F.3d at 55 ("courts must strive to harmonize all the provisions of a statute and to give them all force and effect."); *see also In re Mooney*, 7 A.3d 1145 (N.H. 2010); *Appeal of Town of Brookline*, 91 A.3d 627, 630 (N.H. 2014) ("We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result.").

Finally, and importantly here, New Hampshire courts interpret federal statutes and regulations "in accordance with federal policy and precedent." *Dube v. N.H. Dep't of Health & Human Servs.*, 97 A.3d 241, 247 (N.H. 2014).

Summary of Argument

The fundamental issue in this proceeding is whether an operator violates Sections 192.619 and 192.195 of the Code when: (1) a monitor regulator takes over pressure control from a failed worker regulator; (2) downstream pressure temporarily exceeds MAOP due to the monitor build-up pressure; and (3) the monitor limits the build-up pressure to no greater than the limit allowed by Section 192.201.

There was no violation of either Section 192.619 or Section 192.195. Section 192.619 governs MAOP, and Section192.619's limit on operating pressure applies only during normal operation of the system. It is undisputed that Commission Staff directed the Company to simulate the failure of the worker regulator to assess the operation of the monitor regulator. (Stip., ¶ 1.) The failure of a worker regulator is an emergency condition, not normal operation. During such an emergency condition, Section 192.201(a)(2) supplies the build-up pressure limitation. For a 56 psig system, that limitation is 6 psig over MAOP, or 62 psig. 49 C.F.R. § 192.201(a)(2)(ii). The observed pressure at the Station never exceeded 57.2 psig during Staff's inspection (Stip. ¶¶ 6,7), and therefore there was no violation.

Nor was there any violation of Section 192.195. That provision governs "protection against accidental overpressuring" and expressly requires pressure limiting devices on distribution systems to "meet the requirements of . . . § 192.201." Moreover, the New Hampshire Avenue Station was designed with a worker/monitor configuration, and PHMSA has made clear that such a configuration complies with the requirements of 192.195(b). Finally, the monitor set points were established such that when the monitor regulator took control over system pressure, the downstream pressure stayed below the 62 psig limit established by Section 192.201(a)(2)(ii). The monitor regulators were set at 55 psig, and the pilots were equipped with a two-pound "blue spring" to ensure that the maximum downstream pressure would be 57 psig (plus a fraction of a psig during activation). Therefore, contrary to the NOV, the Station met the design requirements of Section 192.195.

Staff's interpretation of Sections 192.619 and 192.195 completely ignore Section 192.201 and other important provisions of the Code that are rendered meaningless by Staff's interpretation. The Company's interpretation, by contrast, harmonizes the various segments of the Code that address design, operation and maintenance and demonstrates the important role that Section 192.201 plays in Code.

Finally, if the Commission were to adopt Staff's interpretation, the Company would not have sufficient gas to supply customers during peak winter loads. If the Company were required to reduce the operating pressure on its distribution systems, those systems would have less gas capacity to provide service to customers. Although this would affect both the intermediate pressure ("IP") and low pressure ("LP") systems, the Company would likely encounter LP system customers with high-efficiency heating systems who will lose heat during the coldest days of the winter because the system will not be able to supply gas at a sufficient

pressure for the customer's equipment. It would cost millions of dollars to build new pipeline system improvements to bring additional gas capacity to these systems so they could provide reliable gas service during the winter heating season.

For these reasons, as well as others discussed below, Staff cannot meet its burden of proof and the Commission must reject Staff's NOV in its entirety.

DISCUSSION

As configured at the New Hampshire Avenue Regulator Station, the worker regulator provides normal system pressure regulation, and the monitor regulator provides "overpressure protection." In other words, if the worker malfunctions, then the monitor will take over control of the downstream pressure and protect the downstream system from the full pressure of the upstream system. The Code dispute between the Company and Staff is whether the build-up pressure allowance in Section 192.201 applies when a monitor regulator assumes pressure control from a failed worker regulator. Section 192.201 provides, in pertinent part:

> **§192.201 Required capacity of pressure relieving and limiting stations.**
>
> (a) Each pressure relief station or pressure limiting station or group of those stations installed to protect a pipeline must have enough capacity, and must be set to operate, to insure the following: . . .
>
> (2) In pipelines other than a low pressure distribution system: . . .
>
> (ii) If the maximum allowable operating pressure is 12 p.s.i. (83 kPa) gage or more, but less than 60 p.s.i. (414 kPa) gage, the pressure may not exceed the maximum allowable operating pressure plus 6 p.s.i. (41 kPa) gage; . . . .

(Emphasis added.)

The distribution system downstream of the New Hampshire Avenue Station has an established MAOP of 56 psig, and therefore the build-up pressure limit allowed by Section 192.201 is 56 psig plus 6 psig, or 62 psig.

To understand how Section 192.201 applies to Staff's NOV, it is necessary to examine the Code beyond the two sections that the NOV contends were violated by the Company.

A. Northern's Holistic Interpretation is Consistent with the Plain Language of the Code and Does Not Render Provisions of the Code Meaningless.

Part 192 of Title 49 of the Code of Federal Regulations ("Part 192") provides the minimum federal safety standards for the transportation of natural gas by pipeline. Part 192 is broken down into 16 separate subparts that govern every aspect of pipeline safety, including design of the pipeline system[4], its operation[5] and maintenance,[6] and the training programs necessary to ensure that the system is being constructed, operated and maintained by a qualified workforce.[7] Due to the comprehensive nature of the regulatory framework, Part 192 must be interpreted holistically. In other words, the provisions of the Code that govern the design of the system must be read consistently with the provisions that govern how that same system is required to be operated and maintained pursuant to the Code. *In re Mooney*, 7 A.3d at 1148 ("We interpret statutes not in isolation, but in the context of the overall statutory scheme."); *Roberson*, 459 F.3d at 55.

1. Section 192.201 is a Common Element in the Design, Operation and Maintenance of Regulator Stations.

a. Subpart L (Design) Incorporates Section 192.201.

Part 192 requires that pressure regulating stations, such as the New Hampshire Avenue Station, be designed, operated and maintained to the standards of Section 192.201. In terms of design, Section 192.195 provides as follows:

§192.195 Protection against accidental overpressuring.

[4] 49 C.F.R. Part 192, Subpart D (Design of Pipeline Components).
[5] *Id.* Subpart L (Operations).
[6] *Id.* Subpart M (Maintenance).
[7] *Id.* Subpart N (Qualification of Pipeline Personnel).

> (a) General requirements. Except as provided in §192.197,[8] each pipeline that is connected to a gas source so that the maximum allowable operating pressure could be exceeded as the result of pressure control failure or of some other type of failure, must have pressure relieving or pressure limiting devices that meet the requirements of §192.199 and §192.201.
>
> (b) Additional requirements for distribution systems. Each distribution system that is supplied from a source of gas that is at a higher pressure than the maximum allowable operating pressure for the system must
>
> (1) Have pressure regulation devices capable of meeting the pressure, load, and other service conditions that will be experienced in normal operation of the system, and that could be activated in the event of failure of some portion of the system; and
>
> (2) Be designed so as to prevent accidental overpressuring.

(Emphasis added.)

It is important to note that Section 192.195(a) provides the "general requirements" for protection against overpressuring and Section 192.195(b) provides "additional requirements for distribution systems." The New Hampshire Avenue Station is part of a distribution system, so subsections (a) and (b) both apply to that station.[9] Thus, the New Hampshire Avenue Station must be designed to comply with Section 192.201. 49 C.F.R. § 192.195(a).

Staff argues that their NOV is limited to a violation of Section 192.195(b), that Section 192.201 is not referenced in Section 195(b), and therefore Section 192.201 is irrelevant to the NOV. (Tr. D1 at 98:16-19, 146:06-24 (question by Commissioner Bailey).) Staff's argument misses the mark. Section 192.195(b) unambiguously supplies "[a]dditional requirements." Those requirements are clearly intended to be "[a]dditional" to the "[g]eneral requirements" supplied by Section 192.195(a), and Section 195(a) expressly applies Section 192.201. In other words, whenever Section 192.195(b) applies to a regulator station on a distribution system, then

[8] Section 192.197 applies to service regulators that are installed at the customer's premises and is not relevant to this proceeding. (Exh. 1, Sher Test'y, p. 10, n.6.)

[9] There is no dispute that the other conditions of Section 192.195 have been met (i.e., the New Hampshire Avenue Station receives gas from an interstate natural gas transmission pipeline and reduces the pressure of the gas to serve the Portsmouth IP System).

Section 192.195(a) applies also.[10] Thus, Section 192.201 is the design standard that applies to both pipelines and distribution systems under Section 192.195(a).

Finally, as the Company explained in its response to NUNH-Staff-1-10, PHMSA has concluded that an operator meets the requirements of Section 192.195(b) when its design implements and worker/monitor configuration such as that which was used for the New Hampshire Avenue Station. (Ex. 2, Tab 13.)

b. Subpart M (Maintenance) Incorporates Section 192.201.

Just as Section 192.201 provides the design standard for the New Hampshire Avenue Station, it also provides the maintenance standard for the station.[11] Section 192.739 provides as follows:

> **§192.739 Pressure limiting and regulating stations: Inspection and testing.**
> (a) Each pressure limiting station, relief device (except rupture discs), and pressure regulating station and its equipment must be subjected at intervals not exceeding 15 months, but at least once each calendar year, to inspections and tests to determine that it is
>
> (1) In good mechanical condition;
> (2) Adequate from the standpoint of capacity and reliability of operation for the service in which it is employed;
> (3) Except as provided in paragraph (b) of this section,[12] set to control or relieve at the correct pressure consistent with the pressure limits of §192.201(a)
> . . .

(Emphasis added.)

Section 192.739(a)(3) requires Northern to inspect its regulator stations periodically to ensure that regulators are "set to control or relieve at the correct pressure consistent with the

[10] Staff's interpretation of Section 192.195 leads to an absurd result. If Section 192.195(b) were to apply to distribution systems, but Section 192.195(a) did not, then distribution systems would never be required to have "pressure relieving or pressure limiting devices that meet the requirements of §192.199 and §192.201" (as required by Section 192.195(a)). In other words, based on Staff's interpretation, regulator stations on distribution systems would not be required to have overpressure protection. *Appeal of Town of Brookline*, 91 A.3d at 630 (all parts of statute must be construed together to avoid absurd result).

[11] Thus, Staff's position that Section 192.201 is limited to being a "design standard" and not a maintenance or operations standard is contracted by the Code. (Tr. D1 at 93:07-07 (Staff testifying: "We believe that [Section 201] is a design standard, okay, not an operation standard.").

[12] Staff confirmed during the hearing that Section 192.739(b) does not apply to the New Hampshire Avenue Station. (Tr. D1 at 137:10 – 138:12.)

pressure limits of §192.201(a)." At the time of Staff's inspection, Northern's procedure 2-L governed set points for regulators as follows:[13]

> (d) The following pressure limitations apply to pressure limiting devices specified below. [192.201(a)(2)]
>
> (1) Control Regulator: The outlet set pressure shall not exceed the established maximum allowable operating pressure (MAOP).
>
> (2) Monitor Regulator and/or Overpressure Protection Devices: The monitor regulator for the overpressure protection device shall be set to ensure that the outlet of the pressure regulating station does not exceed the allowable buildup pressure limits in Table 2-L-1.

Table 2-L-1 - Allowable Pressure Buildup in Other than Low Pressure Distribution Systems

MAOP	Allowable Buildup
Less than 12 psig	MAOP + 50%
12 psig or greater but less than 60 psig	MAOP + 6 psig
60 psig or greater	MAOP + 10% or 75% of SMYS, whichever is lower

(Exh. 5, emphasis added.)

Northern's procedure 2-L follows Section 192.739(a)(3) by requiring monitor regulator set points to be established pursuant to Section 192.201(a)(2).[14] Northern's procedure complies with 192.619 because it requires worker regulators to be set such that MAOP will not be exceeded, and monitor regulators to be "set to ensure that the outlet of the pressure regulating station does not exceed the allowable buildup pressure limits in [Section 192.201]."

Although the Company's procedure for establishing set points for monitor regulators follows Section 192.739, Commission Staff's module used to evaluate the New Hampshire Avenue Station does not. (Exh. 1, LeBlanc/Pfister Test'y, Att. K.) Staff admitted during cross-examination that its inspection module follows Section 192.739 in all respects except Section

[13] A later version of Northern's procedure 2-L was provided in Exhibit 1, LeBlanc/Pfister Test'y, Att. J. As Mr. LeBlanc testified, the version of the procedure provided in Attachment J was the result of an attempt to satisfy Staff that the Company would not establish set points (not build-up pressures) for worker or monitor regulators above the established MAOP for the system. (Tr. D2 at 75:11 – 76:10.) After the hearing concluded, the Company made further refinements to its procedure 2-L, which were provided to Commission Staff by letter dated September 4, 2015.

[14] Table 2-L-1 adopts the pressure limits of Section 192.201.

192.739(a)(3), the provision that incorporates Section 192.201.[15] The Staff's inspection module mirrors Section 192.739(a)(1), (2) and (4), but as demonstrated in the comparison below, Staff's module omits the reference to Section 192.201 in Section 192.739(a)(3):

Code Section 192.739(a)(3)	"set to control or relieve at the correct pressure consistent with the pressure limits of §192.201(a);"
Staff's Module Section 192.739(a)(3)	"Set to function at the correct pressure."

Thus, although Section 192.739(a)(3) of the Code requires Northern to set its monitor regulators during routine maintenance to comply with the pressure limits of Section 192.201(a), Staff's regulator station inspection module omits the reference to Section 192.201 from Section 192.739(a)(3). Staff's inspection module, which was used to evaluate the performance of the New Hampshire Avenue Station, does not conform to the Code on this critical point.

c. Subpart L (Operations) Incorporates Section 192.201.

Finally, the Code provisions that address system operation also rely on the build-up pressure allowance provided by Section 192.201(a). Section 192.605(a) requires operators to prepare and use a manual of written operation and maintenance procedures. Section 192.605(b) provides, in part:

[15] The pertinent portion of the cross-examination is excerpted below:

Q. Sure. What you and I have done is we've just walked through each of the Code Provisions in 739(a).
A. (Burnell) Right.
Q. And, we walked through (a)(1). And, we confirmed together that 739(a)(1) in the Code ties out to 739(a)(1) in your module, right?
A. (Burnell) Yes.
Q. And, we did the same thing for 739(a)(2). Your module ties out to the Code, right?
A. (Burnell) Uh-huh.
Q. And, 739(a)(4), your module ties out to the Code?
A. (Burnell) Yes.
Q. Where your module doesn't tie out to the Code is in 739(a)(3)?
A. (Burnell) Yes.

(Tr. D2 at 136:19 – 137:09.)

> (b) Maintenance and normal operations. The manual required by paragraph (a) of this section must include procedures for the following, if applicable, to provide safety during maintenance and operations. . . .
>
> > (5) Starting up and shutting down any part of the pipeline in a manner designed to assure operation within the MAOP limits prescribed by this part, plus the build-up allowed for operation of pressure-limiting and control devices.

(Emphasis added).

Section 192.605(b)(5) requires Northern to include in its operations and maintenance procedures a provision that limits regulator build-up pressure during system start-up and shut-down to "the build-up allowed for operation of pressure-limiting and control devices." The provision in the Code that addresses build-up pressure in regulators is Section 192.201. (Tr. D2 at 79:02-15.) Thus, Section 192.201 also plays an important role in the operation of a regulator station.

Based on the foregoing Code analysis, there is no room for doubt that Section 192.201 is a recurring theme in the Code. Section 192.201 provides the standard for regulator set points that is applied during regulator station design (Section 192.195), maintenance (Section 192.739(a)(3)) and operation (Section 192.601(b)(5)). Regardless of which branch of the Code is considered, they all lead to Section 192.201.

2. Unitil's Code Interpretation is Consistent with PHMSA Guidance Materials, Including a PHMSA Interpretation Based on the Actual Facts at Issue in this Proceeding.

PHMSA's public web site provides operators with a variety of Code interpretation resources labeled "Guidance."[16] These resources include PHMSA's Letters of Interpretation and Enforcement Guidances. PHMSA notes that it provides the Enforcement Guidances to

[16] *See* http://phmsa.dot.gov/pipeline/guidance.

ensure that federal regulations are being consistently enforced and to clarify the regulatory obligations imposed by the Code:

> In some selected areas, Enforcement Guidance is available that clarifies PHMSA's enforcement authority by identifying and summarizing precedent, including that from Interpretations, Advisory Bulletins, Final Orders, and Decisions on Petitions for Reconsideration. This guidance facilitates improved enforcement consistency, provides a strong tool for building sound enforcement cases, and is particularly helpful where precedence exists for clarifying performance-based requirements.[17]

(Emphasis added).

The PHMSA Enforcement Guidance for Section 192.619 is particularly helpful in clarifying that Section 192.619's MAOP pressure limitation applies only during "normal" operation of the system, and that Sections 192.201 and 192.739 apply to overpressure requirements. For example, under the heading "Guidance Information" PHMSA states:

> 2. An operator must have some means that will ensure that the MAOP is not exceeded during normal operations…
> 7. Operators may not design or set normal pressure controlling devices such that any part of any pipeline segment exceeds its prescribed MAOP…
> 13. For overpressure requirements, see §192.201 and §192.739.

(Exh. 2, Tab 9, pp. 10, 11 (emphasis added).)

These provisions make clear that Section 192.619 applies to "normal" operations and "normal pressure controlling devices" (i.e., worker regulators). Moreover, Sections 192.201 and 192.739 are to be followed for overpressure requirements.

The Enforcement Guidance also provides the following examples of a probable violation:

> 3. Actual operating pressure exceeded MAOP, without the occurrence of an equipment malfunction or failure.

(*Id.* at p. 11 (emphasis added).)

[17] *Id.*

This provision clarifies that a probable violation occurs when operating pressure exceeds MAOP, "without the occurrence of an equipment malfunction." In other words, if an equipment malfunction occurs, MAOP can be exceeded without violating Section 192.619. And, as demonstrated above, Section 192.201 provides the limits of that MAOP exceedance during such a malfunction.

PHMSA's Enforcement Guidance for Section 192.739 (Maintenance) similarly references Section 192.201 as providing the standard for monitor regulator set points:

> 2. Set pressures for pressure protection/relief devices must be set so as to prevent system pressures from exceeding the pressure limits of either §192.201(a) or §192.739(b), whichever is applicable…
> 15. If a facility has been installed or modified after March 12, 1971, and there is only a single pressure control device, the operator must also be able to show that the failure of that device will not cause the downstream MAOP to be exceeded, otherwise there must be an over-pressure protection device installed that will meet the requirements of §192.199 and §192.201.

(Exh. 2, Tab 10, pp. 5, 6 (emphasis added).)

In addition to these PHMSA Enforcement Guidances, Northern has also cited PHMSA interpretation letters supporting the Company's interpretation that the Code allows MAOP to be exceeded by the pressure limits stated in Section 102.201(a) when there has been an equipment failure, such as the failure of a worker regulator. Those interpretations are discussed in Mr. Sher's testimony. (Exh. 1, Sher Test'y at 17:05 – 20:03.)

3. PHMSA's Code Interpretation Related to Staff's Inspection of the New Hampshire Avenue Station Validates Northern's Interpretation of the Code.

On September 5, 2014, Northern requested an interpretation of the Code with regard to Staff's inspection of the New Hampshire Avenue Station. (Exh. 1, LeBlanc/Pfister Test'y, Att. M.) After providing PHMSA with background on the Station and the observations during Staff's inspection, Northern requested guidance on two questions:

> (1) During normal operation (i.e., no system emergency) of a high pressure distribution system with a properly established MAOP of 56 psig, does the operator violate 49 C. F.R. § 192.621 (a) if the system is operated above 56 psig?
>
> (2) During a system emergency, such as a failed worker regulator, on a high pressure distribution system with a properly established MAOP of 56 psig, does the operator violate 49 C.F.R. § 192.201(a) if the system pressure does not exceed 62 psig?

PHMSA answered the two questions as follows:

> Response 1 - Yes, the operator violates § 192.621(a) if the MAOP is exceeded during normal operating conditions. Under the regulation, operators must use pipeline pressure control equipment sized for pressure control with pressure sensors, actuators and control or relief valves that react in a timely manner and have pressure settings that do not exceed MAOP in accordance with Part 192.
>
> Response 2 - No, the operator does not violate § 192.201(a) as long as the MAOP limits are met during a system emergency and the pipeline meets the Subpart D - Design of Pipeline Components requirements. In this case, the emergency operating limit is 62 psi (56+ 6 psi). Emergency operating overpressure conditions are only allowed for the time required to activate the overpressure protection device and are not meant for long term or frequently occurring normal operating or periodic maintenance conditions and, therefore, require immediate response by the operator either to shut down or reduce the operating pressure to the normal operating conditions.

(Exh. 1, LeBlanc/Pfister Test'y, Tab N, pp. 2-3 (emphasis added).)

In Response 1, PHMSA confirmed that an operator violates Section 192.621(a) if MAOP is exceeded during "normal" operation of the system.[18] Staff confirmed during the hearing that Sections 192.619 and 192.621 are essentially equivalent for the purposes of this proceeding. (Tr. D1 at 142:02-13.) Thus, if an operator allows MAOP to be exceeded while all equipment is performing as designed, then there has been a violation of 192.621 (or 192.619). Northern agrees with this conclusion, and sets its worker and monitor regulators accordingly.[19] (Exh. 1, LeBlanc/Pfister Test'y at 8:11 – 10:08.)

[18] For example, if an operator set its worker regulator at 56.5 psig on distribution system with a 56 psig MAOP and the pressure on the system exceeded 56 psig without any equipment failure, then the operator would be in violation of Section 192.619.

[19] Northern's philosophy is more conservative than other operators, who commonly set worker regulators at MAOP and monitor regulators above MAOP. (Exh. 1, LeBlanc/Pfister Test'y at 9:12-20; *id.* Sher Test'y at 14:04-13; Tr. D2 at 38:08 – 39:05 (question by Commissioner Scott).)

In Response 2, PHMSA confirmed that Section 192.201(a) allows system pressure to exceed MAOP temporarily "for the time required to activate the overpressure protection device" (i.e., monitor regulator) during a system emergency. PHMSA also confirmed that the Section 192.201(a) pressure limit for a system with a 56 psig MAOP is 62 psig. Again, Northern agrees with this interpretation and sets its monitor regulators below MAOP consistent with Section 192.201. (*Id.*)

Rather than find that Sections 192.619 and 192.201 are in "conflict" or that one is more "stringent" than the other,[20] PHMSA properly read them in harmony. *In re Mooney*, 7 A.3d at 1148; *Roberson*, 459 F.3d at 55. PHMSA concluded that Section 192.619 applies the system pressure limit during "normal" operation, while Section 192.201(a) applies the system pressure limit during a system emergency. There is no conflict between the two provisions, and neither provision is more stringent than the other. They simply apply to their own separate set of circumstances (i.e., normal operation versus emergency condition).

It is also noteworthy that Staff had plenty of opportunity to raise any concerns with PHMSA related to the Company's September 5, 2014 interpretation request. There was ample opportunity for Staff to participate in the process:

a. On September 5, 2014, Northern emailed to Staff a copy of the Company's interpretation request. (Exh. 2, Tab 1, p. 1.)
b. On September 5, 2014, Mr. Knepper emailed the Company's interpretation request to Mr. Burnell and asked whether it was accurate; Mr. Burnell responded on September 10, 2014 that it was a "good description of what [he] observed." (*Id.*)
c. On September 5, 2014, Mr. Knepper emailed the Company's interpretation request to Mr. Blanton of PHMSA[21] and asked whether it was accurate; Mr. Blanton responded on September 8, 2014 that the letter "reflects what [he] observed." (Exh. 2, Tab 2, p. 1.)
d. About three months later, on January 9, 2015, Staff emailed Mr. Anderson at PHMSA to assert that "there are many incorrect statements made in this letter" and that "New Hampshire believes this is a 192.195 and 192.619 code violation." (Exh. 2, Tab 3, p. 2.)

[20] Commissioner Scott asked about "conflict" and "stringency" issues during the hearing. (*See* Tr. D1 at 158:09 – 159:24.)

[21] Mr. Blanton accompanied Mr. Burnell during the June 25, 2014 inspection of the New Hampshire Avenue Station.

e. On April 10, 2015, at PHMSA's request, Staff sent to PHMSA copies of the NOPVs and NOVs related to New Hampshire Avenue Station that had been issued by Staff. (Exh. 2, Tab 4, p. 1.)
f. On April 16, 2015, PHMSA emailed to Staff a draft of its responses to Northern's interpretation request and asked Staff to "respond to" the draft. (Exh. 2, Tab 5, p. 1.) Staff responded that same day by email with "no comments." (*Id.*)

Although Staff initially agreed in September of 2014 that the Company's interpretation request letter was accurate (items a, b, and c), it apparently changed its assessment by January 9, 2015 when it told PHMSA that the letter contains "many incorrect statements" (item d). Staff never advised PHMSA what those "many incorrect statements" were. (Tr. D1 at 113:12-20.) Nor did Staff provide any comments to PHMSA, notwithstanding that PHMSA asked Staff for a response to its preliminary conclusions. (Item f.) Staff never requested its own interpretation from PHMSA, even though Staff acknowledged that state regulators are able to make such requests. (Tr. D1 at 116:05-08, 121:24 – 122:04.) Simply put, Staff had plenty of opportunity to "correct" any alleged errors in the Company's request to PHMSA for an interpretation, and it instead chose not to participate in the process.

Staff's decision not to participate in the PHMSA process was unfortunate. PHMSA provides this guidance for the purpose of promoting consistent interpretation and enforcement of the Code so operators can understand how to achieve compliance. (*See, e.g.,* Exh. 1, LeBlanc/Pfister Test'y, Tab N (footer of PHMSA's interpretation letter states: "Interpretations do not create legally-enforceable rights or obligations and are provided to help the public understand how to comply with the regulations.").) Northern is now in the predicament of having designed, operated and maintained its system consistent with PHMSA's interpretation of the Code, and now having to defend its actions in this proceeding because the Staff has a

fundamentally different interpretation from PHMSA's.[22]

B. Staff's Interpretation Disregards that the Code is a Comprehensive and Integrated Regulatory Framework.

Staff has offered an interpretation of the Code that is both contrary to PHMSA's interpretation, and unsupported by the Code as a whole. Staff's NOV focuses solely on Sections 192.619 and 192.195, and ignores the remainder of the Code that provides important context to the interpretation of those provisions. *Roberson*, 459 F.3d at 55 (considering the statutory structure and the statute as a whole when interpreting statute at issue); *Soraghan*, 881 A.2d at 695 (same). Staff's interpretation is also contrary to PHMSA's interpretation of the Code and must be rejected. *See Dube*, 97A.3d at 247 (New Hampshire courts interpret federal statutes and regulations "in accordance with federal policy and precedent").

1. Staff's "Simple" and "Bright Line" Argument Ignores Important and Unmistakable Code Requirements.

Staff's interpretation of the Code is essentially: (1) Section 192.619 does not allow MAOP to ever be exceeded, and when the pressure at the New Hampshire Avenue Station exceeded MOAP by 1.2 psig during Staff's inspection, that was a violation of 192.619; (2) Section 192.195 was violated because the design of the Station allowed MAOP to be exceeded. (Tr. D1 at 42:08 – 43:04.) Staff offers various characterizations of its Code interpretation that include "simple," "clear" and "bright line." (Tr. D1 at 42:08-23, 152:21 – 153:11.)

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[22] In a single question, Commissioner Bailey confirmed that Staff fundamentally disagrees with PHMSA's interpretation of the Code:

> Q. If the same conditions occurred during an emergency, and the gauge happened to be installed where it was, downstream, but not too far downstream of the regulator, and everything operated the way it did, and it went to 57.2, and then the pressure got backed off by the monitor, and it went back down to 55, would there have been a Code violation?
>
> A. (Knepper) Yes. I still think 619(a) applies. The question that was asked was not 619(a), the question that they asked was "does it have the capacity to relieve?" You can have the capacity to relieve, but the Operations section limits you to not exceeding the MAOP.

(Tr. D1 at 145:17 – 146:05.)

As for the "bright line" argument, Staff argues that the problem with exceeding MAOP even by as little as 1.2 psig is "because you would be infringing upon the safety factors built into the Code." (Tr. D1 at 153:21 – 154:04.) To the extent Staff is suggesting that its Code interpretation is "safer" than PHMSA's, it is important to recognize that PHMSA's top priority is public safety. 49 U.S.C. § 108(b) ("Safety as Highest Priority. In carrying out its duties, the Administration shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in pipeline transportation and hazardous materials transportation."). Thus, PHMSA is charged by law with interpreting and enforcing the Code in a way that gives public safety the highest priority.

As Mr. LeBlanc testified during the hearing, moreover, Staff's "bright line" argument is undermined by Staff's own discovery response, Staff 1-28. (Exh. 2, Tab 11.) In Staff 1-28, Staff identified three provisions in the Code where MAOP is allowed to be exceeded:

> Subpart K Uprating (Pressures made in increments to establish a new MAOP);
> Subpart J Pressure Testing (when pressure testing a segment being returned to service); and
> Subpart L Operations (Starting and shutting down of a pipeline).

Staff's "bright line" argument that MAOP can <u>never</u> be exceeded is inconsistent with Staff's recognition that the Code does allow MOAP to be exceeded in these instances. The "bright line" is not as bright as Staff argued during the hearing. Commissioner Bailey put her finger on the issue during her questioning of Staff:

> Q. So, what is 201(a) about emergency --
> A. (Knepper) It's something that, and I don't want to put words in Unitil's mouth, but it's not something that we cited. It is something that Unitil feels is very critical to their understanding of the Code.
> Q. Well, it's part of the Code, right?
> A. (Knepper) Yes.
> Q. So, how does it apply?
> A. (Knepper) I don't see how 201 applies to 619 at all. I don't see that, those words in

there. I would have to see "as referenced in 195", which then brings in 201. If you went to 619(b), PHMSA actually does reference "195". But they don't --

Q. And, 195 references "201"?

A. (Knepper) But 619(a) does not. They specifically did not use that language in 619(a). That's all we're looking at is the language that exists in 619(a). We're not adding words or subtracting words. We're just reading 619(a).

Based on this exchange, Staff's interpretation of Section 192.619(a) is that if Section 619(a) does not reference Section 192.201, then Section 192.201 cannot provide an exception to Section 192.619. That logic, however, is inconsistent with Staff's response to Staff 1-28 (Exh. 2, Tab 11), where Staff admits that Subparts K, J and L each contain exceptions. There is no reference in Section 619(a) to any of those Subparts of the Code, yet Staff acknowledges that they contain exceptions to Section 192.619.

The fundamental flaw in Staff's "simple" interpretation of the Code is that it would render significant portions of the Code meaningless. If MAOP could never be exceeded as Staff contends, then the provisions in Subpart K, Subpart J and Subpart L referenced by Staff in Staff 1-28 would be rendered meaningless. For example, Subpart K provides the means by which a pipeline system can be "uprated" from its current MAOP to a higher MAOP. It is essentially performed through a series of pressure increases above the current MAOP to establish the new, higher, MAOP. If MAOP can never be exceeded as Staff contends, then Subpart K uprates could never be performed.

Staff's acknowledgement in Staff 1-28 that the Code allows MAOP to be exceeded during starting up and shutting down a pipeline (Subpart L) is also important. The provision in Subpart L that addresses starting up and shutting down a pipeline is Section 192.605(b)(5).[23]

[23] Section 192.605(b) provides, in part:

> (b) Maintenance and normal operations. The manual required by paragraph (a) of this section must include procedures for the following, if applicable, to provide safety during maintenance and operations. . . .

As discussed above in Section A.1.c of this Brief, Section 192.605(b)(5) allows build-up pressure to exceed MAOP during system start-up and shut-down, and the amount of allowed build-up pressure is determined by Section 192.201(a)(2).

Finally, Staff's "simple" and "bright line" interpretation defies common sense. As discussed above in Section A.1, the provisions of the Code that govern regulator station design, operation and maintenance all rely on Section 192.201(a)(2). It is implausible that the Code would require regulator stations to be designed, maintained and operated to the build-up pressure standards of Section 192.201(a)(2), but then deem it a violation of the same Code if there is a build-up pressure within the Section 192.201(a)(2) limitation during a system emergency. This is an absurd result that must be avoided when interpreting the Code. *Appeal of Town of Brookline*, 91 A.3d at 630 ("We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result.").

2. Staff's Authorities Cited in Support of its Code Interpretation are Distinguishable.

Northern requested an interpretation from PHMSA related to Staff's inspection of the New Hampshire Avenue Station. That interpretation fully supports Northern's interpretation of the Code. During discovery, Staff was asked in Staff 1-29 to provide all authorities that support their interpretation. Three authorities were provided by Staff in Staff 1-29 (Exh. 2, Tab 6), and each is distinguishable.

First, Staff cites a July 29, 2014 NOPV that Staff issued against Liberty Utilities. (Exh. 2, Tab 7.) That NOPV is Staff's interpretation of the Code, and therefore is no greater authority

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> (5) Starting up and shutting down any part of the pipeline in a manner designed to assure operation within the MAOP limits prescribed by this part, plus the build-up allowed for operation of pressure-limiting and control devices.

(Emphasis added).

than Staff's interpretation contained in the NOV issued in this proceeding. Moreover, based on the NOPV, it appears that when Liberty was performing inspections of its regulator stations, it was failing the worker regulator to assess the operation of monitor regulators just as Staff directed Northern in connection with this NOV. (*Id.* at p. 2.) Finally, Liberty's O&M manual allowed monitor set points to be established above MAOP (*id.* at p. 3), whereas Northern's monitors are set below MAOP, and MAOP might be exceeded only temporarily as a result of build-up pressure before the monitor brings the pressure to its set point below MAOP. For these reasons, the Liberty NOPV cited by Staff does not support their Code interpretation.

Second, Staff relies on a February 13, 1973 PHMSA interpretation to support its argument. That interpretation (Exh. 2, Tab 8) was issued shortly after the Code was adopted in 1970. The interpretation merely concludes that the operational requirements of Subpart L of Part 192 apply to facilities that were designed and constructed prior to the adoption of the Code. The interpretation does not address whether Section 192.201(a)(2) governs the limitation on build-up pressure when a worker regulator fails and the monitor regulator takes over control of system pressure. For these reasons, the 1973 PHMSA interpretation Staff relies upon is inapposite.

Third, in Staff 1-29 Staff cites PHMSA's Enforcement Guidance for Section 192.619. (Exh. 2, Tab 9.) In fact, that Enforcement Guidance supports Northern's Code interpretation. As discussed in Part A.2 above, the Enforcement Guidance makes clear that Section 192.619 applies during "normal operations" and that Section 192.201 applies the pressure limitation standards for overpressure protection.

Staff has only cited three authorities to support its interpretation of the Code, and none of those authorities controls the outcome here.

3. Staff's Interpretation Would Cause Service Disruptions During the Winter Heating Season Due to the Reduced Operating Pressure.

If Staff's "bright line" interpretation were adopted, then Northern would be required to reduce its operating pressures on all of its distribution systems. This is necessary because monitor regulator set points would need to be lowered to avoid build-up pressure from ever exceeding MAOP during a system emergency. The worker regulator set points would also need to be lowered to avoid the monitor and worker regulators "fighting" each other for control over the system pressure. (*See* Exh. 1, LeBlanc/Pfister Test'y at 09:12 – 13:08, 22:12 – 24:19; Tr. D1 at 206:01 – 208:19; Tr. D2 at 39:06 - 41:16 (questions by Commissioner Scott).) In addition, the Company's distribution systems would require millions of dollars in system improvements to increase the gas capacity on the distribution systems so there would be sufficient gas available for customers during the winter peak demand. (*Id.*)

Contrary to Staff's suggestions, there is no simple fix to this capacity deficiency. Staff's argument that the MAOP could be raised for either the New Hampshire Avenue Station or all of the Company's distribution systems is not a viable option. (*See* Tr. D1 at 208:20 – 209:18.) As discussed during the hearing, with regard to the Portsmouth IP system, the 56 psig MAOP is based on the design pressure of the weakest element in the distribution system, and therefore it would be necessary to replace those system components before establishing a new, higher, MAOP. (Tr. D2 at 44:18 – 45:05 (questions of Commissioner Bailey).)

Nor is Staff's hypothetical pilot with a one-pound lock-up a viable solution. (*See* Tr. D2 at 8:19 – 10:11.) Most importantly, Staff never introduced evidence in the record that such a pilot even exists. Therefore, the Commission cannot rely on this as a basis for its decision. Even if such a pilot does exist, however, due to the mechanical nature of these devices no

manufacturer would guarantee that the pilot would lock up at 1.000 psig over the set point under all possible operating conditions. (Tr. D2 at 66:18 – 68:02.) The pilot installed in the New Hampshire Avenue Station on the day of Staff's inspection was a "blue" spring rated to lock up at 2 psig over set point, and the build-up pressure temporarily exceeded its set point by 2.2 psig. (*Id.*) Thus, even if a pilot with a one-pound lock-up does exist (and there is no competent evidence in the record that one does exist), Northern would still need to reduce the set points on all of its monitor and worker regulators to ensure that the build-up pressure would never exceed system MAOP under Staff's interpretation. (*Id.*)

If Staff's interpretation is upheld, Northern will have difficulty maintaining system reliability during the peak winter heating season unless and until system improvements are made to reinforce the Company's distribution systems. Those system improvements will take months to engineer, and are estimated to cost millions of dollars to construct.

4. Staff Directed Northern to Simulate the Failure of the Worker Regulator.

As demonstrated by this Brief, PHMSA concludes that if the New Hampshire Avenue Station had performed in a true system emergency as it did during the Staff-directed simulation of a failed worker regulator, then there would be no Code violation. In its interpretation letter, however, PHMSA made the following additional observation:

> Finally, we would note that based upon your actions described in your letter, there may be some confusion about appropriate testing and maintenance of a pressure limiting or regulator station for buildup and set point. Conducting a simulated test on a pressure limiting or regulator station that is not isolated from the system does not constitute a system emergency. It is a normal operation subject to the limitations described above. The pressure limiting or regulator station should be isolated from the system prior to any testing of buildup and set points.

Northern's September 5, 2014 letter to PHSMA requesting the Code interpretation did not disclose that Commission Staff had directed the Company to perform the simulated failure

of the worker regulator. PHMSA apparently assumed that this test was performed as part of the Company's routine maintenance. Thus, to the extent that PHMSA believed there was "some confusion about appropriate testing" of the regulator station, that was not confusion on the part of Northern. Staff admits that they directed the Company to simulate the failure of the worker regulator. (Stip., ¶ 1 ("On June 25, 2014, at Staff's request, Northern separately simulated the failure of two worker regulators at the Portsmouth Intermediate Pressure (IP) System (the tests)." (emphasis added).)

Mr. Ahlin, who was present during Staff's inspection, testified that he was aware that failing the worker regulator as Staff directed might cause the build-up pressure to exceed MAOP. Mr. Ahlin further testified that he views the Commission Staff's role, as enforcer of the Code, to be equivalent to law enforcement. (Tr. D1 at 173:22 – 175:06.) In Mr. Ahlin's words, "[y]ou obey the officer." (*Id.*) Mr. Ahlin also testified that he assumed Staff would not instruct him to do something that would violate the Code. (Tr. D2 at 71:15-22.) There can be no dispute that Commission Staff is in a position of authority over the Company's personnel, and Mr. Ahlin was only doing what Staff instructed him to do.

Based on questioning during the hearing, it appears that Staff might argue that Northern's personnel should have offered to perform a different procedure than what Staff directed. That argument should be rejected for three reasons. First, it is contrary to the Joint Stipulation. There is no dispute that Staff directed the Company to simulate the failure of the worker regulator. Second, the Company explained that the simulation of a failed worker regulator can only be performed in the way it was performed by the Company during the inspection, without first making significant piping modifications to the station (and those modifications would serve no other useful purpose beyond Staff's inspection). (Tr. D1 at

164:16 – 167:13.) Third, the Company's seven-step procedure for establishing regulator set points is not the equivalent of simulating the failure of the worker regulator. The seven-step procedure discussed in Mr. Ahlin's testimony is designed to establish regulator set points. (Exh. 1, Ahlin Test'y, at 8:04 – 9:04.) That procedure will not provide information on how the monitor will react (in terms of build-up pressure) when it takes over control from the failed worker. (Tr. D2 at 68:03-17.) As discussed above, the maximum build-up pressure for the monitor is determined by the spring installed in the regulator pilot, which in this case was a "blue" two-pound spring. (*See also* Tr. D2 at 63:24 – 66:17 (explaining significance of spring installed in regulator pilot).) Thus, the Company's procedure for establishing set points would not have satisfied Staff's desire to evaluate how the monitor responds when the worker regulator fails.

It is also important to point out that Staff directed the Company to simulate two worker regulator failures during its inspection. First, Staff directed the Company to fail the worker regulator on Run A, and later Staff directed the Company to simulate the failure of the worker on Run B. (Tr. D2 at 100:04 – 103:06.) Thus, by the time the failed simulation was performed on Run B, Staff knew exactly what process the Company's personnel would use to follow Staff's directions. (*Id.*) After seeing the results of the simulated failure on Run A, Staff did not halt the inspection of the Station. Rather, Staff directed the Company to perform the exact same simulated failure of the worker regulator on Run B. (*Id.*) Significantly, the NOV is based on the simulated failure that Staff directed the Company to perform on Run B, after already witnessing the results of the identical simulation performed on Run A. (*Id.*)

Finally, Staff may also dispute whether an emergency[24] condition was simulated when Staff directed Northern to simulate the failure of the worker regulators. Based on questioning by Chairman Honigberg, the Company explained the relationships between normal operation, abnormal operating conditions and emergency conditions in Venn diagram format. (Tr. D2 at 54:24 – 56:15.) As Mr. LeBlanc explained, the Company considers the failure of a worker regulator to be an emergency condition because there is a potential that whatever caused the worker regulator to fail could also cause the monitor regulator to fail. (*Id.* at 56:16 – 57:08.) PHSMA agrees with the Company's assessment. (Exh. 2, LeBlanc/Pfister Test'y, Att. N at pp. 2, 3: "During a system emergency, such as a failed worker regulator;" "In this case, the emergency operating limit [when the worker fails] is 62 psi. . . .") Chairman Honigberg also correctly observed during the hearing that this was considered to be a simulated emergency:

> CHAIRMAN HONIGBERG: Oh. But you understand, Mr. Sheehan, that if you hear the witnesses who testified, both the Staff witnesses and the Company's witnesses, that phrase leaps out from what everyone was talking about. In plain English, they "simulated an emergency". Now, that's not what some of the rules contemplate. It's obviously not what PHMSA thinks is an appropriate thing to do maybe. But, you know, just plain English, laymen, which is what we are in this circumstance, that's what they did. They "simulated an emergency".

(Tr. D2 at 174:08-18.)

There is no dispute that Staff directed the Company to simulate the failure of the worker regulators in Run A and Run B during Staff's inspection. Nor is there any dispute that this was a simulated failure of an emergency condition. To the extent that the act of failing the worker regulator while the regulator station is supplying gas to downstream piping is considered a

[24] Staff may seek to define the term "emergency" based on other Commission regulations such as Puc 802.04 (damage prevention) and Puc1200.10 (utility customer relations). Those rules, however, are neither pertinent to matters involving pipeline safety, nor were they developed with consideration of federal pipeline safety regulations. They were definitions of emergencies that were developed in entirely different contexts and pertain to completely different circumstances.

violation of the Code,[25] Northern should not be subject to any enforcement action. Northern's personnel were following the directives of the Commission Staff, and Staff was in a position of authority over the Company during the inspection. It would be grossly unfair to penalize the Company for following Staff's directives. The Commission should conclude that the Staff is estopped[26] from pursuing the NOV or apply principles of entrapment from the criminal law[27] and reject the NOV to the extent it is based on the Company's compliance with Staff's orders.

[25] There would be no violation of Section 192.195 in any event. The monitor set points were properly established to maintain system pressure within the limits of Section 192.201.

[26] The elements of estoppel are: (1) a representation or concealment of material facts with knowledge of those facts; (2) the party to whom the representation was made must have been ignorant of the truth of the matter; (3) the representation must have been made with the intention of inducing the other party to rely upon it; and (4) the other party must have been induced to rely upon the representation to his or her injury. *City of Concord v. Tompkins*, 471 A.2d 1152, 1154 (N.H. 1984). The party asserting estoppel must demonstrate the reliance was reasonable. *Id.* at 1154; *see also Turco v. Town of Barnstead*, 615 A.2d 1237 (N.H. 1992) (holding that town was estopped from failing to maintain road after granting plaintiffs a building permit to develop land near road; concluding that plaintiff's reliance on Town's issuance of building permit was reasonable). Here, Staff should be estopped from asserting that the Company violated the Code when it was Staff who directed that the worker regulator be failed (not once, but twice). Mr. Ahlin reasonably believed that Staff would not direct the Company to do something that violates the Code, and Mr. Ahlin admits that he is not a "Code person" who is familiar with the details of the Code. (Tr. D2 at 24:11-13). Moreover, Mr. Sher testified that this simulation of the worker regulator is a test that has been standard in the industry for years, and that PHMSA criticized that testing procedure in the Northern interpretation letter. (*Id.* at 152:18 – 153:11.) It would be inequitable to enforce an NOV against Northern under these circumstances.

[27] New Hampshire law adopts a statutory defense of entrapment under R.S.A. § 626:5 (2015), which provides:

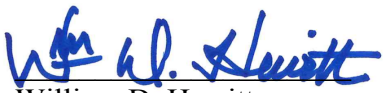
> It is an affirmative defense that the actor committed the offense because he was induced or encouraged to do so by a law enforcement official or by a person in cooperation with a law enforcement official, for the purpose of obtaining evidence against him and when the methods used to obtain such evidence were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it. However, conduct merely affording an opportunity to commit an offense does not constitute entrapment.

"The entrapment defense is designed to prevent persons from being convicted of a crime manufactured by law enforcement officers." *State v. Little*, 535 A.2d 517, 520 (1981) (citing *State v. Bacon*, 319 A.2d 636, 638-39 (N.H. 1974). New Hampshire courts employ both an objective and subjective test to determine whether a defendant was entrapped. That is, the courts will examine both the conduct of law enforcement officials and the defendant's predisposition to commit the crime. Under New Hampshire law, therefore, entrapment consists of two elements: (1) government inducement; and (2) the defendant's lack of predisposition to commit the crime alleged. *State v. Larose*, 944 A.2d 566 (N.H. 2008). Although the defense of entrapment is in the Criminal Code, it is nonetheless instructive here because of the role that Staff plays as the enforcer of the Code. As Mr. Ahlin testified, "[y]ou obey the officer." (Tr. D1 at 175:03-06.)

CONCLUSION

For all of the reasons stated above, Northern respectfully requests that the Commission reject Staff's NOV in all respects.

Dated: September 23, 2015



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