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May 7, 2009

Patricia Van Gerpen
PUC Executive Director
500 E. Capitol
Pierre, SD 57501

VIA E-FILING

Re: RM09-001

Dear Ms. Van Gerpen:

Staff appreciates the time NorthWestern Energy, MidAmerican Energy and Montana-Dakota Utilities took to provide the Commission with comments regarding Pipeline Safety Staff's (Staff) proposed pipeline safety rules. Staff believes the pipeline safety program at the Commission will benefit from structure much like all other Commission departments. Staff appreciates drafting rules from scratch is difficult but argues the proposed rules formalize the current practice and historical practice of the pipeline safety department. Below, I address each issue raised by the commenting operators starting with those common to more than one company.

1) Routine Inspection Comments. The companies request definition regarding when to expect inspections. The rule as proposed by Staff is as follows:

An inspector shall conduct periodic inspections and spot checks of records and property in the possession, custody, or control of the pipeline operator to determine compliance with applicable pipeline safety standards. Inspections may be conducted pursuant to routine scheduling by the inspector, upon a complaint received from a member of the public, upon information obtained from a previous inspection, or when there is cause to believe that a threat to public safety may exist.

It seems the "periodic inspections and spot check" language concerns several commenting companies. Staff draws the Commission's attention first to the later language in the rule. Specifically, "inspections may be conducted pursuant to routine scheduling by the inspector, upon a complaint received from a member of the public, upon information obtained from a previous inspection, or when there is cause to believe

that a threat to public safety may exist.” Staff believes this language eliminates the concern relayed by operators and further specifies when an inspection shall occur. This proposed rule was written consistent with SDCL 49-34B-7. The sited statute requires inspections be done at a “reasonable time and in a reasonable manner.” The rule along with the statute should eliminate operator concern.

2) Operator/Inspector meeting: Several operators requested a rule change to add a procedural step and formalize a meeting with Operators and the Inspector at various times throughout the process. Staff does not object to a meeting with the operator. Clearly, the better staff and the operator understand each other’s concerns the better and more accurate the final report. With that being said, Staff does not believe the rules need to specifically require this sort of meeting. Currently, as written, nothing prevents a meeting from taking place. Further, Staff believes Commission discovery along with the rules of civil procedure facilitates an understanding of party positions. Again, Staff does not oppose communication, just does not understand why a formalization of a discussion process is necessary for pipeline safety when it has not been seen as a necessity in any other Commission process.

MidAmerican specifically requests this meeting take place both after an inspection and after an incident. To provide the Commission with context it is useful to understand the communication that currently takes place in the course of a routine inspection. Step one involves scheduling the inspection. Along with a joint scheduling the inspector provides the operator with a checklist of the items he or she will discuss and look for at the inspection. After the inspection the inspector walks through the checklist to share his or her concerns before leaving the facility. The operator knows, upon the completion of the inspection what to expect in the written report. As the inspector prepares the report, he or she may call the operator with questions. Finally, the report is prepared. The report and all corresponding communication and subsequent action are recorded in the operator’s file a copy of which is sent to the operator. This information is not filed with the Commission; rather it is kept in the operator’s file. Staff believes the process as proposed in the rules, establishes necessary communication and record without added process.

Both MidAmerican and NorthWestern also request a meeting period after an incident prior to the filing of a report. Again, Staff believes current draft procedural rules already address the need. With that being said, Staff supports added communications. Due to the formal nature of an incident versus a routine inspection Staff sees the potential need for added process after an incident more so than after a routine inspection. Staff proposes the following additional rule that will, hopefully mitigate the operator concerns, utilize current procedures and not prohibit a Staff inspector from the creation of an independent report.

Post-Incident Investigation Operator/Inspector Meeting.

Upon the conclusion of the inspector’s investigation and all laboratory or other tests and discovery and before the inspector’s filing of a formal incident report, either the operator and/or the inspector may request a meeting to discuss investigation findings and incident report contents.

3) Time Frame Extension by Commission: The proposed rule at issue is as follows

Regardless of the inspection type, the inspector shall complete a post inspection report within a reasonable time upon completion of the inspection itself. The report shall include a summary of probable noncompliance issues if any exist. As applicable, the inspection report may include a remediation plan wherein specific corrective action and a reasonable time frame for completion shall be stated when probable noncompliance issues exist. The completion time frame for remediation measures may be extended by the Commission.

Staff agrees with submitted comments. Staff prefers the ability to extend time frames without the need to schedule the issue for a commission meeting. Originally, Staff proposed giving itself the ability to extend timeframes and later amended it to its current format. If legally appropriate, Staff supports delegating remediation timeframes to Staff within the rule itself.

4) Incident Investigation: Staff understands the operators' heightened concern regarding incident investigation. Certainly, issues of civil damages and ultimately a showing of fault or liability may be an issue for the operator. After an incident, however, PUC inspectors not only have an obligation to inspect for pipeline safety rule compliance but also play a role in public safety. Due to the dual roles, Staff finds it important to communicate with both the public and the Commission. The PUC's docket process accomplishes both. Without a docket, communication with the Commission is disallowed due to ex parte rules.

Additionally, based on guidance from PHMSA, Staff believes the operator is obligated under CFR 192.617 to determine probable cause and report it to the inspector. Relying on the civil court for that action is not consistent with the federal rules. The language of CFR Title 49 Part 192.617 is as follows:

Each operator shall establish procedures for analyzing accidents and failures, including the selection of samples of the failed facility or equipment for laboratory examination, where appropriate, for the purpose of determining the causes of the failure and minimizing the possibility of a recurrence.

Staff agrees it is important to operate within the scope of the federal rules, but adds public safety to the scope of work. Further, Staff argues part of its job, according to the federal code is to determine if cause was properly determined. Staff does not intend to conduct an independent analysis regarding cause or fault but is required to analyze the operator's process. The proposed rule was drafted according to Staff's interpretation of its authority under the law in compliance with federal rules and state statutes and based on the following Minnesota rule:

7530.1400 REPORTABLE INCIDENT INVESTIGATION. After a reportable incident, the office may interview personnel, view failed equipment or pipe, issue a subpoena for failed equipment or pipe relating to the incident, for independent preservation, order independent laboratory tests of failed pipe or equipment, view related documents, and take other investigatory measures as needed to complete a comprehensive independent investigation.

5) Incident Notification: Staff agrees with operator concerns regarding the two hour time to notify the Commission of an incident and asks the Commission to replace the 2 hour time with “as soon as reasonably possible.”

6) Business Days: Staff agrees all timeframes in the rules should be modified to reflect business days.

ISSUES UNIQUE TO NORTHWESTERN ENERGY

1) Use of PHMSA forms for routine inspections: NorthWestern Energy argues the PHMSA forms should be used in routine inspections. Staff agrees forms consistent with federal regulations are important. Staff further agrees the operators should be aware of the inspections forms used by the Commission. Staff believes both concerns are, in practice not an issue. Inspection plans for the coming year are released at least 3 months prior to the inspection season. As a result operators have at least 3 months to prepare for an inspection. Additionally, operators are given a copy of the inspection forms prior to the actual on site inspection. While the inspection forms are based on PHMSA regulations, they have been tailored to work in South Dakota. Audits by PHMSA of the South Dakota pipeline program have indicated that our inspection forms are satisfactory. It is well within the jurisdiction of our state program to tailor forms to work best in our state and for our staff. If, however, the Commission finds it necessary Staff requests rewording the proposed rule to state “Annually state inspection forms based on PHMSA forms will be used to inspect the operator.”

2) Company records: NorthWestern Energy expresses concern regarding sending operations and maintenance records outside the company properties. Staff respects this concern and offers the Commission’s confidentiality rules provide the protection necessary. Both the Commission and Staff are sensitive to confidential company records and handle such material routinely in its normal business.

3) Use of CFR Title 49 Part 190 for inspection reports: NorthWestern suggests the use of CFR Title 49 Part 190 to better define the three categories of potential noncompliance. The three categories and the rule at issue are as follows:

The inspector shall categorize potential noncompliance in one of the following three categories to be specified in the inspection report:

- (1) *A notice of probable violation may be issued if the inspector has good cause to believe a serious or repeat violation of applicable pipeline safety standards*

has occurred. The written notice of violation shall include a statement of the statute, rule, or regulation allegedly violated by the pipeline operator and a description of the factual basis on which the allegation is based. If a civil penalty is proposed, the report shall state the amount of the proposed civil penalty. A warning in subdivision (2) may be elevated to a notice of probable violation by the pipeline program manager if warning items are not remedied in a timely fashion;

- (2) A warning may be issued for a potential probable violation of a less serious nature or a first time violation. The warning may include specific corrective actions that must be taken to correct the situation and the time frame within which such actions shall be completed; and*
- (3) A notice of concern may be used to inform the operator where best industry practices are not being followed but no direct code violation exists. The notice of concern designation shall be used for informational purposes only to aid the pipeline operator in managing as safe and effective pipeline as possible. No pipeline operator action is required.*

Staff argues the rule above contains adequate definitions to properly categorize potential compliance issues. Although not formalized in rule, the proposed categories and definitions above have been used by the commission pipeline safety staff since at least 2006 and do not represent a change in the pipeline safety program. Finally, Staff specifically sees a challenge in using Part 190 definitions when South Dakota has not adopted Part 190 in its pipeline program.

ISSUES UNIQUE TO MIDAMERICAN ENERGY

1) Reply to a warning: MidAmerican does not believe the rules clearly explain the proper reply to a written warning. The referenced rule is below:

*Upon receipt of a written notice of probable violation **or warning**, the pipeline operator shall respond to the inspector within 30 days in any one of the following ways:*

- (1) Admit to the probable violation and agree to the proposed civil penalty or corrective action, or both, if they exist. Civil penalties shall be subject to commission approval;*
- (2) A written dispute of the reported probable violations at which time the pipeline operator may request a hearing before the commission if the dispute cannot be resolved with the inspector; or*
- (3) A written dispute of the proposed civil penalty or proposed corrective action, or both, at which time the pipeline operator may request a hearing before the commission.*

Staff submits the rule does address warnings and does not believe any additional language is necessary.

2) **Corrective action without admission of guilt:** Staff agrees the company should have the option to take the corrective action without an admission of guilt. Staff believes a simple change to the rule copied in (1) above will facilitate this reply option. If operators are allowed to respond in any “one or combination of the following ways,” the problem should be resolved.

3) **Incident report sent to operators:** MidAmerican expresses concern the rules do not explicitly dictate a copy of the incident report shall be sent to the operators. Staff certainly does not intend to keep the report from the operator. Rather, Staff believes the rules of civil procedure require a copy of the report be served on the operator as a party to a docket. It is unnecessary to explicitly require, through rule, a copy of the report be sent to the operator. Further, MidAmerican asks a copy of the report be sent via mail. The Commission’s service rules require the report be e-filed. Staff does not see benefit in the submission of a hard copy when service rules currently, without additional process, provide structure.

4) **Change in ownership:** Staff agrees with MidAmerican and requests this timeframe be extended to thirty days.

5) **Transmission line rule:** Staff believes MidAmerican’s confusion regarding this topic is based on Staff’s presentation of the rules at the recent Pipeline Safety Seminar. Staff proposes changes to its originally submitted rule based on feedback from PHMSA. Staff explained a portion of our intended changes at the seminar and understands where, without a written explanation, the confusion resulted.

Montana Dakota Utilities also had specific concern regarding this rule. Staff proposes the Transmission Line rule be reworded as follows to address both companies’ issues:

Notice requirements for pipeline construction. Each pipeline operator within the jurisdiction of the pipeline safety program shall, prior to the construction of new transmission lines of any length and new distribution mains greater than 1 mile in length or relocation or replacement of transmission lines or distribution mains greater than 1 mile in length as defined in the Code of Federal Regulations, Title 49, Part 192:

- (1) *Submit the information below to the commission’s pipeline safety program no later than 60 days prior to the commencement of construction, relocation, or replacement. Except, however, items a,b,c shall be the only required submissions for distribution line extensions:*
 - a. *Operator’s name and mailing address;*
 - b. *Estimated dates construction is scheduled to begin and end;*
 - c. *Map showing location and proposed route of pipeline;*
 - d. *Identified gas transmission Integrity Management Program high consequence area, if applicable;*

- e. *Proposed steel pipeline specifications, including size, weight, grade, wall thickness, and coating.*
- f. *Landfill gas plastic pipe specifications, including size and Standard Dimension Ratio;*
- g. *Proposed design and maximum allowable operating pressure of pipeline;*
- h. *Pressure test procedures and method of pressure test prior to operations;*
- i. *Proposed type of cathodic protection;*
- j. *Minimum burial depths of pipeline at time of construction;*
- k. *Proposed location and type of pipeline safety equipment;*
- l. *Proposed type of highway and water crossing, such as whether it will be bored and cased, bored only, or trenched;*
- m. *Written construction procedures;*
- n. *Name of construction company if known at the time of filing the Notice; and*
- o. *Operator contact name and phone number.*

- (2) *In the event of an emergency, **as defined in the Operator's operations manual**, give telephonic notice of emergency construction, relocation, or replacement to the commission's pipeline safety program.*
- (3) *Significant construction modifications shall be submitted to the pipeline safety program. ~~up until start of construction.~~*
- (4) ***Transmission lines and new distribution operators** shall submit the information below to the commission's pipeline safety program no later than 60 days prior to the commencement of operation:*
 - a. *Operation and maintenance manual*
 - b. *Emergency procedures*
 - c. *Anti- drug and alcohol plan*
 - d. *Public Awareness plan*
 - e. *Damage prevention program*
 - f. *Abnormal operations*
 - g. *Operators qualification plan*

Finally, Commission Staff proposes a final change based on conversation with our PHMSA representatives. Staff withdraws the following rule:

Landfill Gas Pipeline Classification - *Landfill gas pipelines shall be classified as gas transmission facilities unless they are operated at a hoop stress of less than twenty percent of specified minimum yield strength as defined by the Code of Federal Regulations, title 49, part 192.3 as of January 1, 2009, or plastic pipe and associated facilities which operate at less than fifty percent of the design pressure as determined by the formula specified in Code of Federal Regulations, title 49, part 192.121 as of January 1, 2009 and operate at an maximum allowable operating pressure of 50 pounds per square inch gauge or less. Landfill gas lines that are not gathering lines and not classified as transmission lines shall be classified as gas distribution pipelines.*

PHMSA recommended this rule be deleted due to the complexities in transmission versus distribution line definitions as applied to landfill gas.

Staff is available for any questions and looks forward to further discussion at a rules hearing later this summer.

Sincerely,

A handwritten signature in black ink, appearing to read "Kara Semmler". The signature is written in a cursive style with a large initial "K" and a long, sweeping underline.

Kara Semmler