

[Service Date February 21, 2003]

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND	)	DOCKET NOS. UG-020230 &
TRANSPORTATION COMMISSION	)	UG-020232
	)	
Complainant,	)	
	)	SECOND SUPPLEMENTAL
v.	)	ORDER; ORDER REJECTING
	)	SETTLEMENT AGREEMENT
BASIN FROZEN FOODS, INC.,	)	
	)	
Respondent.	)	
.....	)	

**Synopsis:** This order rejects an agreement proposed by Basin Frozen Foods and Commission Staff to settle the issues in a complaint proceeding. Given the seriousness of the alleged violations contained in the complaint, and given that some of these alleged violations are repeat violations and/or involve threats to public safety, the proposed settlement agreement is unsatisfactory because it does not contain any admission of the alleged violations. The parties may propose a new settlement agreement, consistent with this decision, or the Commission will schedule further adjudicative proceedings.

**I. PROCEDURAL STATUS**

1 **PROCEEDINGS:** The Washington Utilities and Transportation Commission’s Pipeline Safety Staff conducted a Natural Gas Pipeline Inspection and an Anti-Drug and Alcohol Misuse Prevention Program Inspection of Basin Frozen Foods on April 15 – 17, 2002. On August 28, 2002, the Commission issued a Complaint alleging that Basin violated Commission rules and Federal Regulations incorporated into those rules.

2 **SETTLEMENT AGREEMENT:** On November 25, 2002, the Commission Staff and Basin filed a Settlement Agreement that proposes to resolve all issues framed by the Complaint.

- 3 **PARTIES:** Kevin Weber, President, Warden, WA represents respondent Basin Frozen Foods, Inc. Donald T. Trotter, Senior Assistant Attorney General, Olympia, represents the pipeline safety staff of the Washington Utilities and Transportation Commission.

## II. BACKGROUND

### A. Procedural History

- 4 In Docket No. UG-020230, Commission Staff (Staff) conducted a Standard Natural Gas Transmission Pipeline Inspection of Basin Frozen Foods, Inc.'s (Basin) pipeline. In Docket No. UG-020232, Staff conducted an Anti-Drug and Misuse Prevention Program Inspection. Both inspections took place on April 15-17, 2002, and included a review of operations, maintenance, procedures, records, and pipeline facilities. As a result of these inspections, Staff issued a Violation Report listing allegations that Basin violated WAC 480-93-018, WAC 480-93-082, WAC 480-93-120, WAC 480-93-124, WAC 480-93-180, WAC 480-93-184, WAC 480-93-200 and WAC 480-03-010, some sections of which adopt and incorporate Title 49 of the Code of Federal Regulations (CFR), Parts 191, 192, and 199. Specific violations of portions of 49 CFR 191, 192, and 199 were alleged.
- 5 On August 28, 2002, the Washington Utilities and Transportation Commission (Commission), on its own motion, filed a complaint against Basin in Docket Nos. UG-020230 and UG-020232. The complaint alleges that Basin Frozen Foods, Inc. failed to comply with and violated federal and state pipeline safety regulations.
- 6 The Commission convened a prehearing conference in this docket at Olympia, Washington on October 24, 2002 before Administrative Law Judge C. Robert Wallis.<sup>1</sup>
- 7 The parties agreed on a procedural schedule at the prehearing conference. The parties' schedule was based on designating an initial 30-day period for discussions of potential settlement. If their discussions achieved settlement,

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<sup>1</sup> Judge Wallis presided because of the temporary unavailability of Judge Schaer, who presided at remaining portions of the hearing.

the parties agreed that the last day to file a stipulation would be November 25, 2002, with a hearing on the proposal to be held December 12, 2002. The parties did file a Settlement Agreement (Agreement) on November 25, 2002. Due to scheduling conflicts, the hearing on the proposal was not held until January 9, 2003.

- 8 A settlement presentation hearing was convened in Olympia, Washington before Chairwoman Marilyn Showalter, Commissioner Richard Hemstad, Commissioner Patrick J. Oshie, and Administrative Law Judge Marjorie Schaer. The Agreement was presented by a panel of witnesses including Kevin Weber, President, Basin Frozen Foods, Doug Kilpatrick, Director of the Pipeline Safety Program, policy witness for Commission Staff, and Patricia Johnson, pipeline safety engineer, field inspector for Commission Staff

## **B. Factual History**

- 9 Basin owns a six-inch natural gas pipeline, approximately 3.8 miles long, with a maximum operating pressure of 250 pounds per square inch gauge (PSIG). Basin uses the natural gas as a source of heat in its potato processing operation. Before building its own pipeline, Basin was a customer of Avista Corporation.
- 10 In 2000, Cascade Natural Gas (Cascade) filed with the Commission an application to expand its service territory, seeking overlapping authority that would allow it to serve Basin under its Tariff 700.<sup>2</sup> The Commission approved a settlement that granted Cascade authority to serve Basin. Cascade sought to provide the services outlined in its Tariff Schedule 700. At the time of that settlement, those services are were:
- Design piping system
  - Construct piping system
  - Operate and maintain customer-owned piping system
  - Design cathodic protection system
  - Install cathodic protection system
  - Operate and maintain cathodic protection system

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<sup>2</sup> *Order Accepting Settlement Agreements; Granting Revised Application*, Docket No. UG-001119 (March 2001).

- Perform leak surveys
- Repair leaks
- Locating Services
- Odorization Testing
- Prepare required reports to Commission & other Agencies, as required. Such reports may include Operation and Maintenance Plans, Written Emergency Plans, other compliance reports.

11 That settlement agreement was attached to and incorporated in the Commission's Final Order. The settlement agreement included an affidavit from Kevin Weber, president of Basin, setting forth the need for service from Cascade and stating Basin's desire to contract with Cascade to perform applicable safety inspections and maintenance on the Basin pipeline. The affidavit is dated February 21, 2001; the order approving the settlement was entered on March 30, 2001.<sup>3</sup>

12 Subsequent to the Commission's approval of Cascade's request to provide service to Basin, Commission pipeline safety staff initiated an Intrastate Transmission Standard audit of Basin's facility on April 23, 24 and 25, 2001. Staff's April 2001 inspection identified 22 alleged violations of federal and state pipeline safety regulations. On July 5, 2001, Basin sent a letter stating its intent to correct these violations by October 1, 2001.<sup>4</sup>

13 Basin did not meet its commitment to provide evidence of compliance, and the Commission Secretary entered an order on October 24, 2001, directing Basin to come into compliance and provide evidence of compliance by November 7, 2001.<sup>5</sup> The Compliance Order states:

The Commission Staff determined as a result of its inspection of the Company's manuals, records, and facilities and Commission Staff field tests that Basin is not in compliance with all pipeline safety requirements. Commission Staff identified 22 specific violations. . . .

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<sup>3</sup> *Id.*

<sup>4</sup> This letter is Appendix B to *Order Requiring Pipeline Safety Compliance*, Docket No. UG-010499 (October 2001).

<sup>5</sup> *Order Requiring Pipeline Safety Compliance*, Docket No. UG-010499 (October 2001).

Commission Staff formally notified Basin of its findings by letter.<sup>6</sup> Basin responded by letter that it would provide evidence of compliance no later than October 1, 2001. Basin has not met its commitment to provide that evidence. Therefore, the Commission Staff has asked the Commission to enter an order directing Basin to comply with pertinent laws and regulations, and directing Basin to provide evidence of its compliance, at a compliance inspection.<sup>7</sup>

On January 30, 2002, Doug Kilpatrick sent a letter to the company stating that Staff believed that the company had met the minimum intent of the Commission's order.

- 14 The current complaint stems from the company's 2002 Standard Intrastate Transmission Pipeline Inspection and Anti-drug and Alcohol Misuse Inspection. In the April 2002 inspection,<sup>8</sup> Commission Staff found 26 alleged violations, eleven of which were repeat violations from the 2001 inspection.<sup>9</sup> This is the first instance in which the Commission has served a complaint on Basin seeking to formally determine whether the alleged violations occurred, and, if yes, what sanctions are appropriate.

### III. TERMS OF SETTLEMENT AGREEMENT

- 15 Basin and Commission Staff filed a proposed Settlement Agreement (Agreement) on November 25, 2002. *Exhibit 1*. The first item of the Agreement references an executed contract between Basin and Cascade under which Cascade agreed to Operate Basin's Pipeline. A letter from Cascade as to Basin memorializing the contract is attached as Appendix A to the Agreement.<sup>10</sup> The two parties signed the contract on September 10, 2002. As

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<sup>6</sup> This letter is a part of Appendix A to *Order Requiring Pipeline Safety Compliance*, Docket No. UG-010499 (October 2001). The letter details each violation, and for each provides an example of compliance.

<sup>7</sup> *Order Requiring Pipeline Safety Compliance*, p.2.

<sup>8</sup> Docket Nos. UG-020230 and UG-020232.

<sup>9</sup> Docket No. UG-010499.

<sup>10</sup> The third paragraph of the letter states:

If this contract is ever terminated, BFF should seek another qualified operator for this pipeline. Otherwise, BFF will become responsible for operating and maintaining the pipeline to the minimum requirements of 49 CFR 19[1], 192, and 199 as well as WAC

of September 11, 2002, Cascade took current responsibility for operating and maintaining Basin's pipeline.

- 16 As operator, Cascade will be responsible for operating and maintaining Basin's pipeline in full compliance with all Washington laws and Commission rules. If Cascade ceases to operate Basin's pipeline, or if for any other reason Basin does not have a qualified operator to operate the pipeline, Basin has agreed it will shut off its pipeline until it has a qualified operator to operate the pipeline. Basin also agrees to immediately notify the Commission if Cascade ceases to be the operator of Basin's pipeline, or within two working days of receiving any notice by Cascade that Cascade will cease to be the operator.
- 17 The subsequent items of the Agreement address each of the violations in turn, and reflect Commission Staff's conclusion that Basin is currently in compliance, based on Staff's reviews of either Basin's own documentation and practices, or Cascade's documentation and practices.
- 18 There is no finding of violation in the Agreement. Basin agrees to pay the Commission \$40,000 in "penalties," in monthly payments over a one-year period.
- 19 On December 3, 2002, Commission Staff submitted a brief explaining the Agreement. *Exhibit 2*. Staff explains that, due to Basin's operating contract with Cascade, Staff is now satisfied that Basin's pipeline is in compliance with Commission laws and rules, and that future compliance problems are likely to be minimized. Staff considers the level of the penalty appropriate because it is in line with other results reached in similar Commission cases, taking into account the size of the pipeline and the range of compliance issues presented.
- 20 The Agreement groups similar alleged violations, describes Staff's conclusion that violations are cured, and lists the sections of the Violation Report (Appendix B to the Agreement) each aspect of the Agreement addresses. The most relevant sections of the CFR described in the Agreement are included in its Appendix C.

21 Among other conditions, Basin agrees to pay the Commission “penalties” totaling \$40,000.00. This amount is due and payable in eleven equal installment payments of \$3,333.33, and one installment payment of \$3,333.34. The payments are to begin March 1, 2003. Payments are due by the 15th of each successive month. Final payment will be made on or before February 1, 2004. If Basin is untimely in its payments, or if full payment is not made by Basin by February 1, 2004, the Agreement will be terminated and the matter will be set for hearing. If the Agreement is terminated due to Basin’s non-payment or untimely payment, Basin will be given a credit for the amount it paid as an offset for any monetary sanction the Commission may issue after hearing, but in no event would any sums paid by Basin be returned to Basin.

#### IV. DISCUSSION AND DECISION

22 The circumstances of the alleged violations outlined above are of grave concern to the Commission. When a pipeline's location cannot be identified, when the size of pipes is unknown and they cannot be tested for pressure, and when the numerous problems outlined above exist, the public is at risk. There is a clear link between an unidentified pipeline’s risk of explosion of unfound leaks and risk of hazard in the transportation of natural gas. There is a clear link between risk of substance-abuse impairment of key personnel and risk of hazard in the transportation of natural gas. The question the Commission faces in this docket is how to respond to those circumstances.

23 In reviewing proposed settlement of a complaint, the Commission will evaluate whether the proposal is proportional to the gravity of the apparent violations and whether the proposal sends appropriate signals to the alleged violator and to the broader community. It is appropriate to consider many factors. These include the seriousness of the violation(s); the circumstances of the violation, including whether the violation is intentional; the cooperation of the respondent and its willingness and achievements in correcting violations; the frequency of violations, and cooperation in investigations; whether or not the violation has been corrected; and the possibility of recurrence.

- 24 In this case, however, there is no admission of a violation, so the Commission is put in the awkward position of evaluating the appropriateness of a significant penalty amount (and other conditions) when there is no underlying foundation for imposing the significant penalty. We do not mean to suggest that it is never appropriate to impose sanctions without a finding of violation. But where, as here, the alleged violations are serious, are repeat-violations, and directly involve public safety, we do not feel comfortable imposing a substantial penalty without first resolving whether the respondent acknowledges committing one or more violations.
- 25 This could be resolved either through an admission, or by proceeding to fact finding. If the respondent proceeds to fact finding, we will not address appropriate sanctions until, and if, there is a finding of one or more violations. If the respondent admits one or more violations, the admission presumably will be part of a new settlement proposal for us to review.
- 26 The remainder of the settlement proposal appears reasonable, though we understand that a settlement agreement is a “package,” and changing one element may understandably cause other elements to change as well.
- 27 Finally, as part of any resolution of this matter, we would like to see specific and enforceable assurances (in addition to Basin’s contractual agreement with Cascade) that if Basin cancels its operation and management contract with Cascade, it will notify the Commission and will not operate the pipeline with unqualified personnel.

## V. FINDINGS OF FACT

- 28 Having discussed above all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary findings of fact. Those portions of the preceding discussion that include findings pertaining to the ultimate decisions of the Commission are incorporated by this reference.
- 29 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate pipeline safety.



- 30 (2) Basin Frozen Foods, Inc., is a natural gas pipeline owner and, up to the time of entering a contract with Cascade Natural Gas on September 10, 2002, was a natural gas pipeline operator.
- 31 (3) The parties to this proceeding filed a proposed Settlement Agreement on November 25, 2002. That Agreement is Exhibit One to this proceeding.
- 32 (4) The proposed agreement attempts to resolve serious allegations contained in the complaint, and would impose a significant penalty, but contains no acknowledgment of any violation(s).
- 33 (5) Approving the Agreement is not in the public interest.

## VI. CONCLUSIONS OF LAW

- 34 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, this proceeding. *Title 80 RCW, RCW 80.04.010, RCW 80.28.210, WAC 480-93-005(8), and WAC 480-93-002.*
- 35 (2) The Agreement proposed by the parties on November 25, 2002, is not in the public interest because, in a situation where Commission Staff has alleged serious, repeat rule violations that involve public safety over a series of inspections it does not acknowledge any violations of Washington statutes or Commission rules.
- 36 (3) The elements of the Agreement should not be approved and adopted by the Commission as a reasonable resolution of the issues presented by its terms. *WAC 480-09-465; WAC 480-090-466.*
- 37 (4) The proposed settlement should be rejected.

## VII. ORDER

THE COMMISSION ORDERS That

- 38 (1) The Settlement Agreement filed by the parties on November 25, 2002, is not approved.
- 39 (2) The parties may return to the Commission with a settlement agreement that addresses the concerns expressed by the Commission in this order within four weeks after the date of this order.
- 40 (3) If the parties are unable to reach agreement within the time allowed, or if they earlier inform the Commission that they are unable to do so, the Commission will schedule further proceedings in this matter.

Dated at Olympia, Washington, and effective this \_\_\_\_th day of February, 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner