

REBUTTAL TESTIMONY OF
DARIN BURK
PIPELINE SAFETY PROGRAM MANAGER
ENERGY DIVISION
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission on its own motion

vs.

The City of Shawneetown

Citation for alleged violations of federal Rules incorporated by the Illinois Commerce
Commission and of 83 Ill. Adm. Code 520

October 19, 2011

1 **WITNESS IDENTIFICATION**

2 Q. **What is your name and business address?**

3 A. My name is Darin Burk. My business address is 527 E. Capitol Avenue,
4 Springfield, IL.

5 Q. **By whom are you employed and in what capacity?**

6 A. I am employed by the Illinois Commerce Commission (“Commission”) as Pipeline
7 Safety Program (“PSP”) Manager of the Energy Division. In my current position,
8 I oversee the day-to-day operations of the PSP, which performs audits and
9 inspections in accordance with the Guidelines for State Programs issued by the
10 United States Department of Transportation, Pipeline and Hazardous Materials
11 Safety Administration (“PHMSA”). The audits and inspections are conducted to
12 ensure that jurisdictional Illinois natural gas system operators are meeting the
13 minimum federal safety standards prescribed by 49 CFR §§191.1 – 191.17,
14 191.23 191.25, 192, 193, 199, Ill. Adm. Code Part 520 and by the Illinois Gas
15 Pipeline Safety Act (220 ILCS 20/1, et seq.).

16 Q. **Please describe your education and experience.**

17 A. Prior to employment with the Commission, I was a Technician employed by Utility
18 Safety and Design Inc. (“USDI”) and the Southern Cross Corporation. Both
19 Companies provide field consulting services for the natural gas industry. My
20 duties at USDI included code compliance related activities such as natural gas
21 leak detection, corrosion control monitoring, pipeline installation, polyethylene
22 pipe fusion, welding and fusion joint testing and line stopping. Since coming to
23 work in the Commission’s PSP, I have received extensive technical training at

24 the Transportation Safety Institute (“TSI”) in Oklahoma City, Oklahoma, which is
25 where state and federal pipeline safety inspectors receive technical education
26 relating to the application of and enforcement of pipeline safety standards. My
27 TSI training included subjects such as incident investigation, pipeline integrity
28 management, distribution and transmission pipeline operation and maintenance,
29 operator qualification, pipeline corrosion control, welding and joining of pipeline
30 materials, code enforcement and various other technical aspects of natural gas
31 pipeline operations. At the Commission, I held the position of Pipeline Safety
32 Analyst for 17 years and was promoted to PSP Manager in January of 2007.

33 **PURPOSE OF TESTIMONY**

34 Q. **What is the purpose of your testimony?**

35 A. I will make recommendations regarding civil penalties to be assessed to the City
36 of Shawneetown (“Shawneetown” or “City”) by the Commission.

37 Q. **Are you familiar with the facts of this case?**

38 A. Yes, I worked with Charles Gribbins to prepare the Staff report submitted to the
39 Commission that resulted in the initiating order. I have also reviewed the Direct
40 Testimony of Charles Gribbins (Staff Ex. 1.0), Direct Testimony of Mayor Terry
41 Williams (Shawneetown Ex. 1.0), the Direct Testimony of Kevin Bratcher
42 (Shawneetown Ex. 2.0) and the Supplemental Direct Testimony of:
43 Shawneetown Mayor, Terry Williams; Shawneetown City Clerk and Utility Clerk,
44 Nancy Larkin; and Shawneetown Treasurer, Chris Mills (Shawneetown Ex. 3.0).
45 I also conducted an October 11, 2011, on-site review of documentation

46 necessary to confirm that required actions to correct each violation have been
47 completed and continued compliance.

48 **Q. How is the authority to assess civil penalties granted to the Commission?**

49 A. 220 ILCS 20 required the Commission to adopt rules establishing minimum
50 safety standards for the transportation of gas and for pipeline facilities. Such
51 rules shall be at least as inclusive, as stringent, and compatible with, the
52 minimum safety standards adopted by the Secretary of Transportation under the
53 Federal Act (49 CFR Parts 192, 193 and 199). Whenever the Commission finds
54 a particular facility to be hazardous to life or property, it may require the person
55 operating such facility to take the steps necessary to remove the hazard. 220
56 ILCS 20/7 (a) states:

57 Any person violating paragraph (a) of Section 6 of this Act or any
58 rule or order issued under this Act is subject to a civil penalty not to
59 exceed the maximum penalties established by Section 60122 (a)
60 (1) of Title 49 of the United States Code ("USC") for each day the
61 violation persists. Such civil penalties do not apply to violations
62 with respect to a facility in existence on the effective date of this Act
63 unless such violation persists one year from the effective date.

64 Section 7 (b) states:

65

66 Any civil penalty may be compromised by the Commission. In
67 determining the amount of penalty to the size of the business of the
68 person charged, the gravity of the violation, and the good faith of
69 the person charged in attempting to achieve compliance, after
70 notification of the violation.

71

72 **Q. What are the maximum penalties established by 49 USC §60122 (a) (1)?**

73 A. 49 USC §60122 (a) (1) provides for assessment of a civil penalty of not more
74 than \$100,000 for each violation, and further provides that a separate violation

75 occurs for each day the violation continues. The maximum civil penalty for a
76 series of related violations is \$1,000,000.

77 Q. **Did Staff provide a recommendation as to the amount of civil penalty to be**
78 **assessed?**

79 A. Yes. Mr. Gribbins initially recommended that the maximum penalty be assessed
80 given the magnitude and duration of the violations. (Staff Ex. 1.0) Staff had
81 notified Shawneetown of the existence of the each violation, but Shawneetown
82 nonetheless allowed each violation to exist for well in excess of ten days.
83 However, Mr. Gribbins recommended that the penalty be reduced to \$5,000 per
84 code section, for a total of \$80,000 when taking into consideration the size of
85 Shawneetown's operation.

86 Q. **Do you agree with Mr. Gribbins recommendation?**

87 A. Based on the information available to Mr. Gribbins at the time of the
88 recommendation, the magnitude and duration of the violations, as well as the
89 size of the operator, I believe his recommendation was entirely justified and
90 reasonable. However, in light of additional information provided, I believe the
91 recommendation should be reconsidered.

92 Q. **Please explain.**

93 A. First I will address the good faith of the person charged in attempting to achieve
94 compliance, one of the factors enumerated in Section 7(b). Mayor Williams
95 testifies that the problems with the City gas system, which resulted in the
96 violations, were solely attributable to one City employee, who could not, or would

97 not perform his required duties as Gas Superintendent, and who moreover
98 appears to have repeatedly stated to the Mayor and to the Shawneetown Council
99 that the identified violations had been or were being rectified, when this was not
100 in fact the case. (Shawneetown Ex. 3.0, p.3) When the City discovered this, it
101 initially suspended, and eventually dismissed, that individual. (Id.) However, no
102 serious actions were taken by the City to correct the probable violations until the
103 Commission initiated citation proceedings.

104 On April 1, 2011 the City entered into a Contract with Consumers Gas Company
105 (“Consumers”), for the operation and maintenance of the City’s gas system.

106 Thereafter, Consumers began working with the PSP Staff to remedy the
107 violations. As of October 11, 2011, all but one of the probable violations
108 discussed in Mr. Gribbins testimony (Staff Ex. 1.0) had been listed as corrected.

109 Consumers has taken measures to correct the single remaining probable
110 violation and Staff will be verifying the adequacy of those measures at a later
111 date.

112 To address the “size of the business” factor, the City Treasurer, Chris Mills,
113 indicates in testimony (Shawneetown Ex. 3.0, p. 6) that the population of
114 Shawneetown was reported as 1,239 according to 2010 census figures. There is
115 no industry and only a few businesses in the City. The City gas system serves
116 approximately 425 gas customers. The City found it necessary to increase the
117 monthly gas facility charge by 125%, from \$8.00 per month to \$18.00 per month
118 for residential customers and \$25.00 per month for business customers, to cover
119 the costs of the operation and maintenance contract with Consumers.

120 A letter from the auditors contracted by the City indicates that the Shawneetown
121 Gas Department has been operating at a loss for the past two years. The letter
122 reports that in the fiscal year ending April 30, 2011, the Shawneetown Gas
123 Department lost \$65,366 and had a cash balance of \$70,926. (Shawneetown Ex
124 3.0-B) Accordingly, I would classify the size of the business as small, and with
125 very limited revenue.

126 As of the date Mr. Gribbins filed testimony, Shawneetown had not entered into
127 the operation and maintenance contract with Consumers and Consumers had
128 not taken the actions required to correct the probable violations. It appears that
129 Mr. Gribbins' recommended penalty assessment would nearly, if not completely,
130 deplete the reported cash on hand that Shawneetown retains to meet the
131 obligations necessary to operate and maintain the natural gas system.

132 Regarding the magnitude of the violations, it should be understood that any
133 violation of the minimum safety standards under Title 49 is considered a serious
134 violation. Fortunately, PSP Staff identified the violations and brought them to the
135 attention of Shawneetown prior to the occurrence of an event resulting in
136 personal injury or property damage. Based on this fact, it would be appropriate
137 for the Commission to consider a civil penalty below the maximum allowed. The
138 ranking of the gravity of each violation should be determined individually.

139 Q. **Do you have a recommendation regarding civil penalty assessment?**

140 A. Yes. Five of the code sections cited related to requirements contained in Title
141 49 Code of Federal Regulations ("CFR") Part 199. CFR Part 199 requirements

142 pertain to Anti-Drug and Alcohol Program Testing. The specific sections violated
143 relate to testing of individuals at the appropriate testing rate, retention of records,
144 training of supervisors and display of information regarding the company policy
145 regarding the use of drugs and alcohol and information related to the employee
146 assistance program. The use of prohibited drugs, and alcohol misuse, are strictly
147 prohibited for individuals performing operations, maintenance and emergency
148 response tasks on a natural gas distribution system; however, neither system
149 failures nor serious incidents resulted from Shawneetown's failure to meet the
150 requirements. I recommend that the Commission reduce the penalty
151 assessment recommended by Mr. Gribbins by 30% for good faith effort to correct
152 the violations, 30% for the gravity of the violation (in light of the fact that no harm
153 to life or property resulted), and 30% taking into consideration the size of the
154 business of the person charged. The reduction would result in a recommended
155 penalty assessment of \$500 for each violation of 49 CFR §§199.113 (b), 199.113
156 (c), 199.117 (a) (4), 199.119 (d) and 199.241 for a total of \$2,500.

157 The violations related to 49 CFR §192.285 (a) and (b) relate to qualification of an
158 individual to make plastic pipe joints and the required inspection of such joint to
159 verify the quality of the joint. Installation of quality joints is a very important factor
160 to the integrity of a pipeline system. The gravity of this violation should be
161 considered moderate. I recommend that the Commission reduce the penalty
162 assessment recommended by Mr. Gribbins by 30% for good faith effort to correct
163 the violation, 20% for the gravity of the violation, and 30% taking into
164 consideration the size of the business of the person charged. The reduction

165 results in my recommendation of a penalty assessment of \$2,000 for violation of
166 49 CFR §192.285 (a) and (b).

167 The violation related to 49 CFR §192.481(a) was issued because Shawneetown
168 failed to conduct and record atmospheric corrosion control monitoring. The
169 monitoring is conducted of above ground, gas carrying metallic materials to
170 determine coating condition and the presence of atmospheric corrosion.

171 Consumers conducted a 100% survey of the above ground facilities shortly after
172 taking over the operation and maintenance of the system. The coatings were
173 generally found to be in need of replacement. Consumers recoated all above-
174 ground structures. They report that no serious corrosion or pitting was identified
175 on the above-ground structures. I recommend that the Commission reduce the
176 penalty assessment recommended by Mr. Gribbins by 30% for good faith effort to
177 correct the violation, 30% for the gravity of the violation, and 30% taking into
178 consideration the size of the business of the person charged. The reduction
179 would result in a recommended penalty assessment of \$500 for violation of 49
180 CFR §192.481 (a).

181 The violation related to 49 CFR §192.615 (a) resulted from Shawneetown's
182 failure to provide prompt response to notification of potential pipeline emergency.
183 Although neither personal injury nor property damage resulted from the delay,
184 failure to promptly response to such a notice is a serious violation. I
185 recommend that the Commission reduce the penalty assessment recommended
186 by Mr. Gribbins by 30% for good faith effort to correct the violation, 10% for the
187 gravity of the violation and 30% taking into consideration the size of the business

188 of the person charged. Taking into account this reduction I recommend a penalty
189 assessment of \$1,500 for failure to comply with 49 CFR §192.615 (a).

190 The violation regarding 49 CFR §192.615 (c) relates to maintaining liaison with
191 emergency responders and public officials. The reason for the liaison
192 requirement is so that public safety agencies can periodically exchange
193 information regarding their roles and responsibilities during a pipeline
194 emergency. While pipeline emergencies are rare occurrences on a municipal
195 gas system, it is import to remind the individual stakeholders of agreed roles and
196 responsibilities to be carried out in the event that a pipeline emergency does
197 occur. Although no emergency requiring stakeholder participation occurred, lack
198 of preparedness is a serious violation, with potentially very serious
199 consequences. I recommend that the Commission reduce the penalty
200 assessment recommended by Mr. Gribbins by 30% for good faith effort to correct
201 the violations, 15% for the gravity of the violation, and 30% taking into
202 consideration the size of the business of the person charged. Taking into
203 account this reduction, I recommend a penalty assessment of \$1,250 for failure
204 to comply with 49 CFR §192.615 (c).

205 The violation regarding 49 CFR Part 192.616 (e) relates to Shawneetown's
206 failure to conduct Public Awareness Program notifications regarding the location
207 and function of pipeline facilities being provided to affected municipalities, school
208 districts, businesses and residents. Although distribution of this information on a
209 timely basis is essential to an effective damage prevention program and
210 emergency response, neither damage to the pipeline facilities nor inadequate

211 emergency response resulted from the failure to comply with the requirement. I
212 recommend that the Commission reduce the penalty assessment recommended
213 by Mr. Gribbins by 30% for good faith effort to correct the violation, 25% for the
214 gravity of the violation, and 30% taking into consideration the size of the business
215 of the person charged. Taking into account this reduction I recommend a penalty
216 assessment of \$750 for violation of 49 CFR §192.616 (e).

217 The violation of 49 CFR §192.625 (f) relates to Shawneetown's failure to perform
218 required periodic sampling of the odorant added to the natural gas to ensure that
219 it can be readily detectable below specified limits to an individual with a normal
220 sense of smell. It is essential that adequate odorant concentration levels be
221 maintained in the natural gas stream. Consumers began testing the odorant
222 concentration levels in the system upon entering into the operation contract.
223 They reported that adequate levels of odorant were detected in the gas stream.
224 The failure to monitor is a serious violation: however, in this case, adequate
225 levels had been maintained. I recommend that the Commission reduce the
226 penalty assessment recommended by Mr. Gribbins by 30% for good faith effort to
227 correct the violation, 15% with regard to the gravity of the violation, and 30%
228 taking into consideration the size of the business of the person charged. Taking
229 into account this reduction I recommend a penalty assessment of \$1,250 for
230 violation of 49 CFR §192.625 (f).

231 The violation of 49 CFR §192.721 (b) was issued for Shawneetown's failure to
232 patrol mains in places or on structures where anticipated physical movement or
233 external loading could cause failure or leakage. The Shawneetown system is

234 relatively concentrated and day-to-day operations would most likely result in the
235 operator at least passing by and casually observing most areas of anticipated
236 loading. I would classify this violation as minor. I recommend that the
237 Commission reduce the penalty assessment recommended by Mr. Gribbins by
238 30% for good faith effort to correct the violation, 30% with regard to the gravity of
239 the violation, and 30% taking into consideration the size of the business of the
240 person charged. Taking into account this reduction, I recommend a penalty
241 assessment of \$500 for violation of 49 CFR §192.721 (b).

242 The violation of 49 CFR §192.747 (a) relates to Shawneetown's failure to check
243 and service each valve necessary for the safe operation of the gas system. The
244 Shawneetown natural gas system consists of 100% polyethylene main. This
245 material composition would allow Shawneetown opportunity to excavate and
246 squeeze off a pipeline in the event of an unintended release of gas. Although
247 this secondary option would result in a delay, shutdown could be achieved. The
248 gravity of this violation should be considered moderate. I recommend that the
249 Commission reduce the penalty assessment recommended by Mr. Gribbins by
250 30% for good faith effort to correct the violation, 20% for the gravity of the
251 violation, and 30% taking into consideration the size of the business of the
252 person charged. Taking into account this reduction, I recommend a penalty
253 assessment of \$1,000 for violation of 49 CFR §192.747 (a).

254 The violation regarding 49 CFR §192.807 (b) was issued due to Shawneetown's
255 failure to maintain operator qualification records. The section requires retention
256 of records supporting the qualification of each individual that performs covered

257 task on the natural gas system for a period of five years. Shawneetown could
258 not produce such records. Subsequent inspections established that the
259 individual charged with performing the covered task on the Shawneetown system
260 was incapable of successfully qualifying for many of the required tasks. I would
261 consider this a serious violation since there is no way to determine if tasks
262 performed by this individual were completed as required. I recommend that the
263 Commission reduce the penalty assessment recommended by Mr. Gribbins by
264 30% for good faith effort to correct the violation, 10% for the gravity of the
265 violation, and 30% taking into consideration the size of the business of the
266 person charged. Taking into account this reduction, I recommend a penalty
267 assessment of \$1,500 for violation of 49 CFR §192.807 (b).

268 The violation relating to 83 Ill. Adm. Code 520.10 (b) was issued for
269 Shawneetown's failure to provide an adequate training program for individuals
270 that perform tasks on the natural gas system. The Illinois Administrative Code
271 requirements were in place before the operator qualification requirements of
272 federal regulations. The Illinois Administrative Code requirements continue to be
273 relevant since operator training is not specifically required by federal regulations.
274 It is essential that operator personnel follow a training program to ensure that
275 their knowledge base remains current regarding ever changing regulatory
276 requirements associated with the safe operation of a natural gas system. I would
277 classify this violation as a moderately serious violation. I recommend that the
278 Commission reduce the penalty assessment recommended by Mr. Gribbins by
279 30% for good faith effort to correct the violation, 15% for the gravity of the

280 violation, and 30% taking into consideration the size of the business of the
281 person charged. Based upon this reduction, I recommend a penalty assessment
282 of \$1,250 for violation of Ill. Adm. Code Part 520.10 (b).

283 Q. **What is the combined total penalty assessment recommended to the**
284 **Commission?**

285 A. I recommend the Commission order Shawneetown to pay a total of \$14,000 in
286 penalty assessments for failure to comply with the requirements imposed by the
287 federal and state safety regulations outlined above.

288 Q. What is your opinion of the magnitude of your recommended penalty of \$14,000
289 to the financial situation of the Shawneetown system?

290 A. In my opinion, a penalty of \$14,000 for these violations, considering the number
291 of violations and the period of time for which they were permitted to continue
292 even after the PSP Staff identified the violations to Shawneetown, is modest. On
293 the other hand, considering the size of the Shawneetown system, and that it has
294 only 425 customers, the \$14,000 might appear to be a relatively large penalty,
295 particularly when the Shawneetown system has no source of revenue except the
296 gas bills through which its customers pay for their service. In my opinion, what
297 occurred in Shawneetown was a significant failure of municipal government
298 management of a utility system which, even though it provides conveniences and
299 services to Shawneetown residents, also should have been operated in a safe
300 manner to protect those residents from the consequences of natural gas leaks,
301 which have the potential to endanger the lives, health, safety and property of the

302 City. The system was not operated in this manner, and the municipal
303 government is ultimately responsible for those failures, regardless of to whom it
304 might have mistakenly entrusted operation of its gas system. I do not believe the
305 gravity and magnitude of these violations should be minimized and signaled as
306 unimportant by the Commission to any other municipal system operators by any
307 lesser penalty.

308 Q. **Does this complete your testimony?**

309 A Yes, it does.