

Finally, it is important for the Commission to understand that Northern believes that its design of the Rutland Street Station is consistent with industry norms and complies with all applicable gas safety regulations. Like many regulator stations, the Rutland Street Station is constructed below ground in concrete vaults. No code provision requires pilot vents to be extended above-ground, and reasonable minds can differ as to whether a particular station should be equipped with pilot vent extension that remain within the vault or that extend above-ground. Each station must be considered on a case-by-case basis, based on its unique set of field conditions and circumstances. Staff's only basis for issuing its NOV was an after the fact ("hindsight") review of a flooding incident that occurred as the result of unforeseeable circumstances after a successful 20+ year operating history. Absent that incident, there would have been no basis for a finding that the design of the regulator station failed to comply with any provisions of 49 C.F.R. Part 192.

For all of these reasons, as well as others discussed herein, Northern respectfully requests that the Commission allow Northern to accept the NOV (except for the objectionable condition) and reject Staff's request to expand the basis for the NOV and increase the NOV's civil penalty.

DISCUSSION

A. Northern is Willing to Accept the Dover NOV, Except for the Set Point Condition that Relates Solely to the New Hampshire Avenue NOV.

The Dover NOV seeks to impose a civil penalty of \$17,500.² (Exh. 2, Tab 28, pp. 5-6.) Northern is prepared to remit the \$17,500 civil penalty assessed by the NOV. The Dover NOV also includes the following condition, which is duplicated verbatim in the New Hampshire Avenue Station NOV:

² Northern provided a comprehensive discussion of the background facts in a letter filed with the Commission on August 10, 2015 in this proceeding. Accordingly, the Company will not repeat that background here. Staff filed a responsive letter with the Commission on August 12, 2015.

Section 2 L, subsection 6, of Unutil's Operating and Maintenance Manual shall be amended within 30 days to specifically preclude setting of pressures of monitor regulators so that MAOP is not exceeded. Although Unutil's practice is to set monitor regulators so that they are below the MAOP, the manual should be clarified to specifically preclude the possible interpretation of the current language that a 10% buildup is allowable over the MAOP. Unutil shall notify the Safety Division of the amended language once completed, noting where the previous language and amended language has been modified.

(*Id.* at p. 5; the "Set Point Condition."³)

Although Northern is willing to pay the Dover NOV's \$17,500 civil penalty, it is not willing to accept the Set Point Condition Staff included in that NOV. That condition, which Staff intentionally included in both NOVs,⁴ has no logical connection to the Dover NOV. Rather, that condition is central to the dispute concerning the New Hampshire Avenue Station NOV, and whether the Company has properly established its set points for the regulators at that station.

Staff contends that the Commission cannot allow Northern to accept the NOV on the terms that Northern has proposed. Boiled down to its essence, Staff's argument is that Northern cannot accept any portion of the NOV because Staff has withdrawn its Consent Agreement. (Tr. D1 at 7:2-13.) Staff's argument confuses the NOV and the Consent Agreement. Northern is not seeking to accept the Consent Agreement, and therefore the status of the Consent Agreement is irrelevant.⁵ Rather, Northern is willing to accept the terms of the NOV, except for the Set Point Condition, and pay the NOV's civil penalty. Staff cites no authority for the proposition that the Commission is prohibited from allowing Northern to accept the NOV as the Company proposes.

³ The Set Point Condition is duplicated in the New Hampshire Avenue Station NOV in Exhibit 2, Tab 29, p. 4.

⁴ In response to a question of whether the inclusion of the Set Point Condition in the Dover NOV was a typographical error, Staff confirmed that "the 'set point' conditions" . . . are not a typo but were intentionally included to make sure the company understood the importance of never exceeding MAOP."

⁵ Even if the Consent Agreement for the Dover NOV had not been withdrawn, Northern would not be willing to accept it for the same reason it cannot agree to accept the Dover NOV in its entirety: it contains the Set Point Condition.

The Set Point Condition has no relevance to the Dover NOV. The issue with the Dover NOV is whether the Company's pilot vent extension design at the Rutland Street Station was reasonable for the conditions at that station. The Rutland Street Station was designed and constructed with pilot vents that were extended within the vault. Staff contends that the vents should have extended outside the vault and above ground. (Exh. 2, Tab 28, p. 2.) The Set Point Condition, on the other hand, focuses solely on regulator set points. The imposition of a condition that has no bearing on the alleged design defect would be unjust and unreasonable. *See Appeal of Northern New England Tel. Operations, LLC*, 75 A.3d 1102 (N.H. 2013) (citing RSA 541:13 and discussing standard of review for Commission decisions).

Here, the Set Point Condition has no connection to the design deficiency alleged in the Dover NOV and the Commission should allow Northern to accept the NOV without the unjust and unreasonable condition.

B. Staff Should Be Prohibited From Expanding the Scope of the NOV During the Hearing and Seeking a Higher Civil Penalty.

As noted above, the Dover NOV seeks to impose a civil penalty of \$17,500. During the hearing, Staff announced for the first time that they were seeking to increase the penalty to \$117,500, a difference of \$100,000. (Tr. D1 at 40:17-23.) Staff also provided a lengthy description of additional facts upon which they base this significant increase in the civil penalty, including allegations related to regulator stations other than Rutland Street Station. (*Id.* at 26:06 – 32:13; Exh. 2, Tabs 19, 20.) Thus, Staff seeks to expand the NOV in two significant ways: the factual basis for the NOV (including other regulator stations), and the civil penalty.

Staff should be prohibited from revising the NOV substantially during the hearing for at least two reasons. First, there is nothing in the Commission’s Puc.500 rules governing NOVs that allows the Staff to revise the NOV during the hearing. Section 511.08, which provides the standards applicable to NOVs, plainly requires Staff to include in its written NOV “[t]he factual and statutory basis” for the NOV, as well as “[t]he civil penalty, if any, proposed to be imposed.” Puc.511.08(b)(1), (3). The clear intent of Section 511.08 is to provide notice to the operator of the legal and factual basis supporting the code violation alleged in the NOV, as well as the penalty to which the operator is potentially exposed. Nothing in Puc.500 allows the Staff to expand the scope of the NOV after it has issued, let alone during the hearing on its merits. Allowing Staff to make these substantial amendments is beyond the Commission’s regulations governing NOVs and would constitute a clear error of law. *See Appeal of Northern New England Tel. Operations, LLC*, 75 A.3d at 1106-1107 (discussing standard of review).

Second, even if the Commission’s Puc.500 rules were interpreted such that Staff could revise and expand its NOV, fundamental notions of procedural Due Process guaranteed by the New Hampshire⁶ and United States⁷ Constitutions prohibit Staff from doing so during the hearing on the merits. “Where governmental action would affect a legally protected interest, the due process clause of the New Hampshire Constitution guarantees to the holder of the interest the right to be heard at a meaningful time and in a meaningful manner.” *Appeal of Pennichuck Water Works*, 992 A.2d 740, 756 (N.H. 2010) (quotation marks omitted); *Appeal of Town of Nottingham*, 904 A.2d 582, 594 (N. H. 2006) (“where issues of fact are presented for resolution by an administrative agency due process requires a meaningful opportunity to be heard” (quotation marks and

⁶ N.H. Const. pt. I, art. 15.

⁷ U.S. Const. amend. XIV, § 1.

brackets omitted)). A fundamental requirement of the constitutional right to be heard is notice sufficient to afford the party an opportunity to protect its interest through the presentation of objections and evidence. *See City of Claremont v. Truell*, 489 A.2d 581, 585 (N.H. 1985); *Sununu v. Clamshell Alliance*, 448 A.2d 431, 434 (N.H. 1982).

Staff's attempt to revise the NOV during the hearing by expanding the basis for the violation to include other regulator stations and increase the civil penalty by \$100,000 failed to provide the Company with sufficient notice and would deprive the Company of Due Process under both the United States and New Hampshire Constitutions. *Appeal of Concord Steam Corp.*, 543 A.2d 905, 429 (N.H. 1988) (holding that where public utility had insufficient notice of a potential factual finding by PUC, allowing "post-hearings acceptance" of evidence submitted by public utility "was not a constitutionally sufficient substitute for full consideration in hearings and briefs" and observing that "[i]n making conclusive findings without affording the [utility] a meaningful opportunity to be heard, the PUC thus failed to satisfy its obligation of meticulous compliance with the requirements of due process"); *Duclos v. Duclos*, 587 A.2d 612, 613-14 (N.H. 1991) (holding that notice of default hearing did not provide adequate notice that merits of divorce, such as distribution of assets, would be heard); *Petition of Smith*, 652 A.2d 154, 158-159 (N.H. 1994) (Due Process requires a reasonably complete statement of the information upon which the action is based); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795 (1983) (holding that mortgage was a "substantial property interest" and therefore mortgagee was entitled to actual notice of tax sale which had extinguished lien on property as a matter of law when redemption period expired).

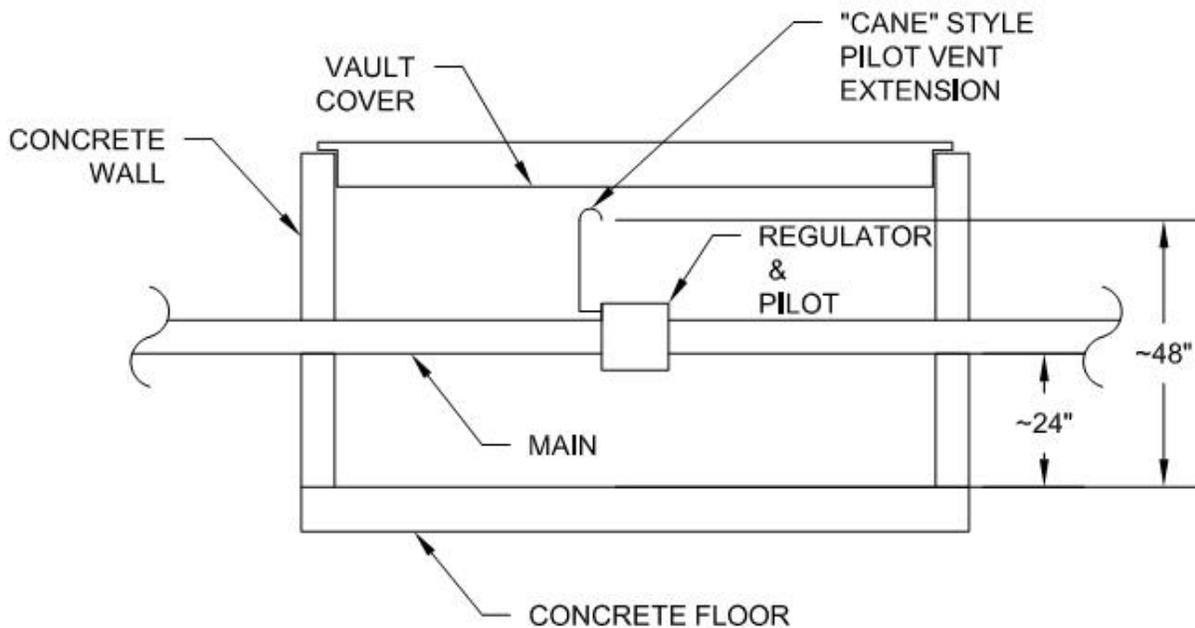
C. Staff Cannot Meet its Burden of Proof to Establish the Factual Predicate that Allegedly Supports the Imposition of a Higher Civil Penalty.

Even if the Commission were inclined to allow Staff to effectively amend its NOV during the hearing, Staff cannot meet its burden of proof that the Rutland Street regulator vaults have previously filled with water as they did on August 13, 2014.

During the hearing, Staff introduced Company maintenance records that document when the vaults at the Rutland Street Station were pumped. (Ex. 2, Tab 19.) Northern has always acknowledged that the Rutland Street vaults periodically collect water and require pumping as part of routine maintenance. It should be no surprise that underground vaults (which are constructed with concrete walls and floors) periodically collect water during rainstorms and during the snow melt. The water is pumped from the vaults as part of routine maintenance.

The collection of water in the vaults typically does not hamper the operation of the regulator station. To better understand why, it is helpful to consider the simplified cross-sectional diagram of a Rutland Street Station regulator vault in Figure 1, below.

Figure 1: Simplified Cross-Section of Rutland Street Station Vault



As Figure 1 shows, the regulator and main are about 24” off the floor of the vault. The regulator’s pilot has a vent that must be open to atmospheric pressure so the pilot and regulator will work properly. The Rutland Street pilot vents were equipped with “cane” style vent extensions.⁸ As shown in the diagram, the extensions effectively raised the vent to a height of approximately 48” from the vault floor. The vent extensions allow the regulator to work properly even if the regulator is completely submerged. The extensions will allow about 48” of water to accumulate in the vault before the vent is submerged and the regulator will no longer function properly.

Based on these dimensions, the Rutland Street Station vaults could accumulate 24” of water before the water reached the regulator. Company witnesses would testify that they have no recollection of water at the Rutland Street Station reaching the height of the regulators, other than during the August 13, 2014 rain event that contributed to the Dover NOV. The Company’s field technicians have pumped the Rutland Street vaults before the water reached a depth of 24”.⁹ As the diagram above shows, the water could accumulate to about 48” before the extended vents would be affected.

Here, Staff is unable to meet its burden that the vaults at the Rutland Street Regulator Station have periodically filled with water, and Company witnesses will testify to the contrary. Accordingly, there is no basis to support Staff’s request for an increased civil penalty.

⁸ The vent extension is a segment of tubing shaped like a cane that connects to the vent port on the pilot. The pilot serves as the “brains” or controller for the regulator.

⁹ To the extent Staff’s argument relies upon maintenance records that generically refer to “flooding,” Company witnesses would clarify that “flooding” does not mean that the vaults were completely filled with water. Rather, it generically refers to the fact that there was a significant accumulation of water in the vault.

D. The Company's Vent Extension Design at the Rutland Street Station was Sufficient During Much More Significant Rainstorms.

The rain event on August 13, 2014 resulted in about 2.49" of rainfall. Had this been only a rain event, the Rutland Street Station vaults would not have filled with water. In fact, 2.49" of water is not an unusual amount of rain to receive during a 24 hour period in the Dover area. In addition to this rainfall, the Company's witnesses would testify that: (1) there was also sidewalk and other construction on two streets adjacent to the Rutland Street Station that caused a storm drain next to the regulator vaults to become clogged with construction-related debris; (2) the clogged drain caused street flooding in the area of the regulator station; and (3) the street flooding caused the two vaults to fill completely with water. The Company's witnesses would also testify that water infiltrated the cane style vent extensions in both the worker and monitor vaults and both regulators malfunctioned.

The Company believes that, but for the construction that caused the storm drain to become clogged, the vaults at Rutland Street would not have become filled with water. The Company reaches that conclusion because the Dover area has experienced far greater rainfalls than the 2.49" of rain that fell on August 13, 2014, and those storms did not result in the vaults filling with water. These storms include:

- i. 1996: Hurricane Lili. Portsmouth experienced about 8.7" of rainfall during a 24 hour period, which is approximately 135% of the 24 hour rainfall expected for a 100-year storm in Portsmouth. The extreme storm produced rainfall that may have exceeded a 400-year event for New Hampshire. See Kim, B., *Record Precipitation Totals from the Coastal New England Rainstorm of 20-21 October 1996*, Bulletin of the American Meteorological Society, Vol. 1, No. 6 (June 1998).¹⁰
- ii. 2006: Mother's Day Flood. Central and southern New Hampshire experienced severe flooding caused by as much as 14" of rainfall in the region, which resulted in seven counties being declared disaster areas. Stafford County was one of the counties that experienced the most severe flooding and the City of Dover experienced 8-10" inches

¹⁰ Available at: <http://journals.ametsoc.org/doi/pdf/10.1175/1520-0477%281998%29079%3C1061%3ARPTFTC%3E2.0.CO%3B2>

of rainfall during this storm event. Conditions in Dover exceeded a 50-year flood on both the Isinglass and Cochecho Rivers. See Olson, S., *Flood of May 2006 in New Hampshire*, U.S. Geological Survey Open-File Report 2007-1122.¹¹

- iii. 2007: Patriot’s Day Flood. Central and southeastern New Hampshire experienced severe flooding as a result of up to 7” of rainfall from a storm that stalled off the New England coast. As a result of the flooding, a Presidential Disaster Declaration was issued on April 27, 2007 for Grafton, Hillsborough, Merrimack, Rockingham, and Strafford Counties. In addition, peak discharges equaled or exceeded a 100-year recurrence interval at 10 stream gages and a 50-year recurrence interval at 16 stream gages. See Flynn, R., *Flood of April 2007 in New Hampshire*, U.S. Geological Survey Scientific Investigations Report 2008-5120, 53.¹²

In addition to these significant storms, the Company would present evidence that there have been other rainfall events in the Dover area during 2009-2014 that deposited more rainfall than the 2.49” that fell on August 13, 2014:

STATION	STATION_NAME	DATE	PRCP (INS)
GHCND:US1NHST0019	DOVER 0.8 E NH US	3/15/2010	5.25
GHCND:US1NHST0019	DOVER 0.8 E NH US	3/31/2010	3.99
GHCND:US1NHST0019	DOVER 0.8 E NH US	2/26/2010	3.49
GHCND:US1NHST0019	DOVER 0.8 E NH US	9/13/2013	3.37
GHCND:US1NHST0019	DOVER 0.8 E NH US	11/15/2009	2.95
GHCND:US1NHST0019	DOVER 0.8 E NH US	7/14/2010	2.95
GHCND:US1NHST0019	DOVER 0.8 E NH US	6/3/2012	2.83
GHCND:US1NHST0019	DOVER 0.8 E NH US	8/26/2010	2.80
GHCND:US1NHST0019	DOVER 0.8 E NH US	8/14/2014	2.79

The Company’s witnesses would testify that these storms might have resulted in water accumulating in the regulator vaults that necessitated pumping, but that none of these storms resulted in the vaults at Rutland Street filling with water like they did on August 13, 2014. In fact, according to the New Hampshire Department of Environmental Services Stormwater Manual cited by Staff in its discovery response Staff 1-2, a 2.5” rainfall event is considered a

¹¹ Available at: <http://pubs.usgs.gov/of/2007/1122/pdf/OFR2007-1122.pdf>.

¹² Available at: <http://pubs.usgs.gov/sir/2008/5120/pdf/SIR2008-5120.pdf>.

typical one-year event for the Dover area.¹³ In other words, the Dover area should expect to experience a 2.5” rainfall during a 24-hour period at least once each year. The Company has not experienced the Rutland Street regulator vaults filling to the top with rainwater on an annual basis.

This evidence leads to only one set of conclusions: (1) the rain storm on August 13, 2014 was a typical rain event that (2) caused construction-related debris to be washed into a storm drain that clogged and (3) resulted in street flooding that (4) caused the Rutland Street vaults to fill to the top over the extended pilot vents.

Contrary to Staff’s arguments, the cane style extensions at the Rutland Street Station were adequate historically, and would have been adequate on August 13, 2014 but for the existence of the construction-related debris that clogged the storm drain that night. Even if Staff were allowed to introduce evidence of prior pumping of the Rutland Street vaults, that evidence would be explained by Company witnesses and Staff would not be able to meet its burden of proof that the vaults have periodically filled to the top.

E. Northern’s Pilot Vent Extension Design Complied with the Code and Such Designs Involve the Exercise of Engineering Judgment.

When assessing whether to allow Staff to expand the scope of the Dover NOV, the Commission may also wish to consider that Northern’s pilot vent extensions were in compliance with the Code, and that the design of regulator vent extensions must be assessed on a case-by-case basis that takes into consideration the unique circumstances of each regulator station. As such, reasonable minds could disagree as to whether a pilot vent extension design that terminates outside the vault is “better” than a design that terminates within the vault. On these points, the Company’s witnesses would offer testimony as follows:

¹³ Available at: http://des.nh.gov/organization/divisions/water/stormwater/documents/wd-08-20b_apxa.pdf.

- The Company’s pilot vent extension design that terminated inside the vault was consistent with standard industry practice and it complied fully with the provisions in 49 C.F.R. Part 192 that govern regulator station design, including Section 192.195. There is no Code provision that requires pilot vents to extend outside the regulator vault. As discussed below, it is a matter of engineering judgment whether pilot vents are extended inside or outside the vault. The circumstances for each regulator station are unique and must be considered when designing pilot vent extensions. The suitability of the design of the Rutland Street Station is confirmed by the operating history of the station during significant rain events as discussed above.
- There are trade-offs between above-ground vent extensions and vents that are extend above the pilot but remain within the vault. Pilot vent extensions that remain in the vault are protected from human interference and vehicular damage. Typically, vent extensions that remain in the vault do not suffer from water impingement. Pilot vents that extend above-ground are more susceptible to vehicle damage and human interference. For example, a motor vehicle striking an above-ground vent extension could pinch the vent line and have the same effect as submerging the vent line below water. Therefore, the decision of where to extend the pilot vents for any regulator station is a trade-off between risks. There is no “perfect design” because neither in-vault nor above-ground vents are entirely risk free.

CONCLUSION

For all of the reasons stated above, the Commission should: (1) allow Northern to accept the Dover NOV, with the exception of the Set Point Condition, and (2) reject Staff's request to expand the Dover NOV.

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