

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: EMMETSBURG MUNICIPAL UTILITIES	DOCKET NO. P-854
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**PROPOSED DECISION AND ORDER IMPOSING
CIVIL PENALTY AND GRANTING PERMIT**

(Issued July 22, 2005)

APPEARANCES:

MS. VICTORIA J. PLACE, Attorney at Law, 309 Court Avenue, Suite 210, Des Moines, Iowa 50309, appearing on behalf of Emmetsburg Municipal Utilities.

MR. JOHN F. DWYER, Attorney at Law, 310 Maple Street, Des Moines, Iowa 50319, appearing on behalf of the Iowa Department of Justice, Office of Consumer Advocate.

MR. MICHAEL R. MAY, Attorney at Law, 1216 East Franklin, Indianola, Iowa 50125, appearing on behalf of Ag Processing, Inc.

STATEMENT OF THE CASE

On August 7, 2003, Emmetsburg Municipal Utilities (Emmetsburg) filed a petition and exhibits for a pipeline permit for an existing 4-inch diameter natural gas pipeline approximately 3.314 miles long in Palo Alto County, Iowa. (petition for permit; testimony of Mr. Bird, Mr. Shirk, Mr. Zimmerman; O'Neal report.) Emmetsburg filed amendments to its petition and exhibits and provided additional information on May 24, 2004, and March 10, 2005. (petition for permit.)

The petition is for an existing pipeline built in 1996 and placed into service on July 14, 1997, for which a permit was never requested or granted. (petition for permit; O'Neal report; testimony of Mr. Bird, Mr. Shirk, Mr. Zimmerman, Mr. O'Neal, Mr. Burnett.) The pipeline has a maximum allowable operating pressure of 367 pounds per square inch gage (psig) and actually operates at about 246 psig. (petition for permit; O'Neal report; testimony of Mr. Shirk.) It transports natural gas from a connection with a Northern Natural Gas Company transmission line at the Emmetsburg town border station to a large volume customer, Ag Processing, Inc. (AGP), located in Palo Alto County. (petition for permit; O'Neal report; testimony of Mr. Bird, Mr. Burnett.) The pipeline requires a permit because it operates at a pressure of over 150 psig and because it is a transmission line. (petition for permit; O'Neal Report; testimony of Mr. Bird, Mr. Shirk, Mr. O'Neal, Mr. Burnett.)

On May 9, 2005, the Utilities Board (Board) assigned this case to the undersigned administrative law judge, who issued an order establishing a procedural schedule, proposing to take official notice, and providing notice of the hearing on May 17, 2005. In that order, the undersigned set July 12, 2005, as the date for the hearing on the petition, and proposed to take official notice of a report concerning the pipeline prepared by Mr. Jeffrey O'Neal, utility regulatory engineer for the Board, dated April 27, 2005.

The hearing was held on July 12, 2005, in Board Conference Room 3, 350 Maple Street, Des Moines, Iowa. Emmetsburg was represented by its attorney, Ms. Victoria J. Place. Mr. John Bird, superintendent of utilities and city administrator,

Mr. David Zimmerman, retired gas foreman, and Mr. Daniel Shirk, gas foreman, testified on behalf of Emmetsburg. Mr. Gary Burnett and Mr. O'Neal testified as the inspector and engineer selected by the Board to examine the proposed route and permit application pursuant to Iowa Code § 479.11. The Consumer Advocate Division of the Department of Justice (Consumer Advocate) was represented by its attorney, Mr. John F. Dwyer. AGP was represented by its attorney, Mr. Michael R. May.

DISCUSSION REGARDING ASSESSMENT OF CIVIL PENALTY

Iowa Code § 479.31 provides that a person who violates Chapter 479 or a Board rule issued pursuant to the chapter is subject to a civil penalty not to exceed \$10,000 for each violation. The statute further provides that each day the violation continues constitutes a separate offense, but the maximum civil penalty is \$500,000 for any related series of violations. Iowa Code § 479.31. The statute provides that, in determining the amount of the penalty, the appropriateness of the penalty to the size of the company, the gravity of the violation, and the good faith of the company in attempting to achieve compliance after notification of a violation, shall be considered. Iowa Code § 479.31.

The Consumer Advocate's Position

The Consumer Advocate notes that Emmetsburg explained it failed to apply for a permit because its consultant advised it that a permit was not required because the pipeline was a distribution line. The Consumer Advocate then states that, at the time of construction of the pipeline, the law was clear that a distribution line with a

maximum operating pressure greater than 150 psig must have a permit issued by the Board prior to construction.

The Consumer Advocate argues that a reasonable civil penalty should be imposed in this case. It argues that the requirement to obtain a permit prior to constructing gas pipelines over a certain size is of fundamental importance to the safety of the public and is the starting point for effective supervision of utility service by the state. It argues that obtaining a permit long after construction cannot effectively substitute for obtaining a permit prior to construction. The Consumer Advocate argues that the permit process is in place to give the Board time to pass upon the plan, observe the geographic setting, analyze the route, scrutinize the proposed materials and methods of construction to be used, and have experienced personnel review the proposed project before it is placed in the ground. The Consumer Advocate argues that after the line is in the ground, it is too late to fully ensure that construction was done properly and in accordance with all regulatory requirements, and it is too late to order alterations in the route. Therefore, it argues, bypassing the pre-construction permit process calls for a strong regulatory response.

The Consumer Advocate disagrees with Emmetsburg's arguments that a civil penalty should not be imposed. It argues the fact a violation occurred during the watch of prior staff who are no longer with the utility is not a persuasive reason to not impose a penalty, primarily because the only reason given for failing to seek a permit was ignorance of the law. It argues that a penalty would provide the law's incentive for the utility to take greater care in improving employee knowledge, competence and

compliance in the future. It argues this is a situation in which an important and fundamental utility duty was not fulfilled in a situation in which there was no room for judgment. Therefore, the Consumer Advocate argues, this is not a situation in which a utility can do nothing now to improve the possibility of future compliance. It argues the utility has the means and ability to improve its compliance effort, and a penalty would provide additional incentive to that end.

The Consumer Advocate argues that while there is no reason to question Emmetsburg's sincerity in vowing to avoid future violations, that position is to be expected, is required, and does not merit special reward. The Consumer Advocate further argues the size of the utility in terms of customer base and resources should be used to determine the amount of the penalty, and it is not a reason not to impose a penalty. It argues that citizens should receive the law's intended protection regardless of where they live and the utility that provides service to them. It argues that both small and large utilities should be motivated to know all important utility requirements and to work with the Board when technical questions arise. The Consumer Advocate argues Emmetsburg could have quickly learned the necessity of a permit by calling the Board. It further argues the Board has an opportunity in this case to make sure utilities across the state gain a greater awareness of their duties, the resources of the Board, and the vigilance of the Board in administering safety regulations. It argues that smaller utilities will be more likely to check with the Board in the future with compliance questions if they know that payment of a civil penalty is a distinct possibility when a serious mistake is made.

Therefore, the Consumer Advocate argues, the Board should impose an appropriate penalty for the following reasons.

1. Constructing the pipeline without first obtaining a permit and allowing the Board to review and approve the project is a fundamental pipeline safety violation.
2. The violation was clear with no reason to believe there was a difficult question of interpretation whether a permit was required.
3. Board staff discovered the violation, not the utility.
4. Board staff had to follow up the initial notification with a further inquiry.
5. The violation took place within the last ten years.
6. Utilities, especially smaller utilities with limited staff, experience, and resources to contact experienced Iowa utility counsel, would become more aware of the need to confer with Board staff and would thereby improve their compliance efforts, resulting in fewer violations in the future.
7. A civil penalty is the most effective means by which the state can ensure the integrity of its statutory and regulatory requirements, a reasonable penalty for fundamental law violations creates respect for the law and the authority of the Board, and it is expected by the industry and respects the extra effort and expense most utilities incur in maintaining strong compliance programs.

Emmetsburg's Position

Emmetsburg argues that assessment of a civil penalty is not appropriate in this case. It notes the Board has held these cases are very fact-sensitive and minor changes in facts may make significant changes in the outcome.¹ Emmetsburg states the relevant facts are: it hired a consultant to supervise, design and construct the pipeline; the consultant advised the utility superintendent at the time (who is now deceased) that the pipeline was a distribution line and did not require a permit; construction began in 1996 and the pipeline was put into service July 14, 1997; the pipeline was inspected by Board inspectors every two years; the pipeline was found by Board staff to be in conformance with Board rules and Board staff found no safety issues with the pipeline; Board staff notified Emmetsburg that a permit was required on May 30, 2003; Emmetsburg immediately began preparing a permit application and filed it on August 7, 2003; and Emmetsburg does not have any other known violations of this nature.

Emmetsburg argues imposition of a civil penalty is not appropriate because it would not serve a valid punitive or deterrent purpose. It argues it attempted to comply with all requirements when it constructed the pipeline and previous staff erred only by not double-checking the advice given by its consultant and by relying on the judgment that the line was a distribution line and a permit was therefore not required.

¹ In Re: Interstate Power and Light Company, Docket No. P-850, "Order Affirming Proposed Decision and Order Granting Permit and Waiver," (November 17, 2003) (Interstate Power I).

Emmetsburg further argues that upon notification a permit was required, its current staff immediately took steps to remedy the violation. It states it now understands that a permit is required for any pipeline operating at a pressure of 150 psig or more. It also acknowledges that the pipeline may be classified as a transmission line under the 49 C.F.R. § 192.3 definition. It argues there is no safety issue with respect to the pipeline. It argues it has taken this situation very seriously and has taken steps in conjunction with its Board of Trustees to make sure no pipeline is constructed without first seeking a permit from the Board. (testimony of Mr. Bird.) Emmetsburg also argues it has not had a violation of this nature before.

Emmetsburg argues that prior case law does not support imposition of a civil penalty. It cites the following cases that involved whether a civil penalty should be assessed: In re: Corn Belt Power Cooperative, Docket No. E-21570, "Order Canceling Hearing, Accepting Compromise, and Assessing Civil Penalty," (February 1, 2002) (Corn Belt I); In re: Corn Belt Power Cooperative, Docket No. E-21519, "Order Canceling Hearing, Accepting Compromise, and Assessing Civil Penalty," (August 28, 2003) (Corn Belt II); Interstate Power I; In re: Moulton Municipal Gas Company, Docket No. P-853, "Proposed Decision and Order Granting Permit," (January 21, 2004) (Moulton); and In re: City of Lorimor, Docket No. P-852, "Proposed Decision and Order Granting Permit," (June 21, 2004) (Lorimor).

Emmetsburg argues that civil penalties were assessed in only the Corn Belt I, Corn Belt II, and Moulton cases. Emmetsburg argues that this case has similarities to each of the other cases. It argues that civil penalties were not imposed in the

Interstate Power I case for reasons that included the utility promptly filed a petition when the error was discovered, took steps to prevent future violations, did not have any other known violations, there were no safety issues, and the violation was committed by prior staff and current staff exhibited exemplary behavior.

Emmetsburg argues that in the Lorimor case, the utility hired a consultant to design the pipeline, there was testimony the consultant assumed no permit was required because the pipeline would operate at 150 psig or less, and that although the administrative law judge stated cities and companies have an affirmative duty to know what is in the law, the entire facts of the case were considered and the decision found it was not appropriate to impose a civil penalty.

Emmetsburg further argues it is a small utility, the city of Emmetsburg has a population of approximately 4,000, it has not minimized the error in judgment that led to the failure to obtain a permit, and it has acted in extreme good faith in attempting to achieve compliance. It further argues the pipeline has always been in compliance with all safety requirements. It also argues it has learned from this experience and it is not necessary to penalize Emmetsburg to deter it from making this mistake again.

Emmetsburg argues that the Consumer Advocate's position that the relevant law was clear in 1996 (when the pipeline was constructed) is incorrect. Emmetsburg notes that Mr. O'Neal's April 27, 2005, report stated that the line requires a permit because it operates at a pressure higher than 150 psig, and the line meets the definition of a transmission line under 49 C.F.R. 192.3 because it transports natural gas from another transmission line to a large volume customer that is not

downstream of a gas distribution center. Emmetsburg states the "large volume customer" definition was added to the definition of "transmission line" by an amendment effective July 1996.

Emmetsburg states the Consumer Advocate bases its argument that a civil penalty should be imposed partly on its assertion there was no reason to believe there was a difficult question of interpretation as to whether it was necessary to obtain a permit. It states the Consumer Advocate argues the law was clear that a distribution line must have a permit before beginning construction at the time Emmetsburg constructed the line.

However, Emmetsburg argues, in 1995 and 1996 when the line was planned and constructed, the converse was true. It argues the relevant rules and referenced federal definitions were changing at the time. It lists the following sequence of amendments to the laws that it says must be considered.

In May 1995, the Board amended and renumbered 199 IAC 10.14 so that it now reads:

10.16(479) When a permit is required. A pipeline permit shall be required for any pipeline which will be operated at a pressure of over 150 pounds per square inch gage, or which, regardless of operating pressure, is a transmission line as defined in ASME B31.8 or 49 CFR Part 192. Questions on whether a pipeline requires a permit are to be resolved by the board.

Emmetsburg then cites to the current 49 C.F.R. § 192.3 definitions that include the following:

Distribution line means a pipeline other than a gathering or transmission line.

Transmission line means a pipeline, other than a gathering line, that: (1) Transports gas from a gathering line or storage facility to a distribution center, storage facility, or large volume customer that is not down-stream from a distribution center; ...

Emmetsburg argues that what is critical to the analysis of the state of the law in 1995 and 1996 is that the C.F.R. definition of transmission line relied on to classify the Emmetsburg line as a transmission line did not become effective until July 1996. It argues it had been advised by its consultant that it was building a distribution line and did not need to obtain a permit. It argues that prior to that time, it had only operated distribution lines and consequently, it appears the Emmetsburg staff at that time did not question this advice. Emmetsburg argues that at the time of the planning and construction of this pipeline, the Board's rule referenced a federal definition of transmission line that did not become effective until July 1996, and it is thus incorrect to argue that the law was entirely clear and unambiguous at the time.

Emmetsburg further argues that although it is now clear that the distinction between whether the line is deemed a transmission or distribution line is not the determinative factor, it is likely that the combination in changes in state and federal definitions initially made the requirements unclear even among Board staff. Emmetsburg states that Board staff inspected the line consistently since 1997 and the earlier reports state the line was a distribution line not a transmission line, and it appears Board staff did not question

Emmetsburg's interpretation until 2003. At the hearing, Emmetsburg introduced the March 7, 2003, Federal Pipeline Safety Standards Inspection Report by Mr. Burnett in support of its argument. (Exhibit 1.)

Emmetsburg further argues that its actions and response show there is no purpose in punishing it to give it an incentive to comply in the future. It states it has accepted responsibility and as soon as it was informed of the misunderstanding, it fully complied with all requirements. It states it has complied with all applicable safety rules since the pipeline was constructed. It states its Board of Trustees is involved, and that the Board's resolution to make appropriate inquiries and comply with all regulations to prevent future violations shows it is not necessary to penalize Emmetsburg to ensure future compliance.

Emmetsburg states it clearly has a genuine appreciation of the fact that imposition of a civil penalty is a distinct possibility in the event of a serious mistake. It argues it is unnecessary to impose a penalty to make this any more clear to Emmetsburg. It argues it has complied with each applicable safety rule all along, it corrected its mistake as soon as it knew of it, and any need to impose a civil penalty has been removed. Emmetsburg cites to Interstate Power I in support of its argument.

Finally, Emmetsburg argues that since it is a municipal utility, any financial penalty would be paid by the citizens of Emmetsburg. It argues that although municipal utilities are not exempt from civil penalties, this is not the

result warranted by the facts of this case. It argues that the standard for imposition of a civil penalty in Iowa Code § 476.51 requires a showing of willfulness, defined as knowing and deliberate, with a specific intent to violate.² It argues imposition of a civil penalty in this case is not the result expected by the legislature when it gave the Board the authority to levy a civil penalty when appropriate. Emmetsburg argues that no appropriate punitive or deterrent purpose would be served by imposing a civil penalty under the facts of this case.

AGP's Position

AGP supports the position of Emmetsburg and argued against imposition of a civil penalty.

Analysis

It is important to remember that each of these cases is fact-sensitive. The pipeline at issue in this case has a maximum allowable operating pressure of 367 psig and actually operates at about 246 psig. (testimony of Mr. Shirk; petition for permit; O'Neal report.) It was constructed in October of 1996 and was put into operation on July 14, 1997. (testimony of Mr. Shirk; petition for permit; O'Neal report.)

In 1995 and 1996, when this pipeline was being planned and constructed, the law was clear that a permit was required because the pipeline had an operating

² The undersigned notes that the willfulness requirement is only in paragraph (2) of Iowa Code § 476.51, and in any event, the applicable section in this case includes no willfulness requirement. Iowa Code § 479.31.

pressure of 150 psig or more. Iowa Code §§ 479.2, 479.5 (1995 and 1995 Supp.); 199 IAC 10.16. It did not matter whether the line was considered to be a transmission or a distribution line. Furthermore, there has never been any exemption from the permit requirement in the Iowa statute or rules for pipelines with an operating pressure of more than 150 psig, regardless of whether the line is classified as a transmission or a distribution line.

In 1995 and 1996, Iowa Code § 479.3 (1995) stated that: "No pipeline company shall construct, maintain or operate any pipeline or lines under, along, over or across any public or private highways, grounds, waters or streams of any kind in this state except in accordance with the provisions of this chapter." Iowa Code § 479.5 (1995 Supp.) stated that: "[a] pipeline company doing business in this state shall file with the board its verified petition asking for a permit to construct, maintain and operate its pipeline or lines along, over or across the public or private highways, grounds, waters and streams of any kind of this state."³ The statute defined a pipeline as: "a pipe, pipes, or pipelines used for the transportation or transmission of a solid, liquid, or gaseous substance, except water, within or through this state." Iowa Code § 479.2 (1995 and 1995 Supp.) There was no exception to the requirement to obtain a permit in the statutes.

The only exception to the permit requirement was contained in Board rule 199 IAC 10.16. Prior to June 14, 1995, the rule read as follows:

³ The 1995 Iowa Code section contained an almost identical provision with only minor nonmaterial differences in wording.

Distribution mains. No petition need be made for permit to construct, operate or maintain a gas main or distribution main as technically defined in ASME B31.8—(1989) and which will be operated at a pressure of less than 150 pounds per square inch.

Effective June 14, 1995, the rule was amended to read as follows:

When a permit is required. A pipeline permit shall be required for any pipeline which will be operated at a pressure of 150 pounds per square inch gage or more, or which, regardless of operating pressure, is a transmission line as defined in ASME B31.8 or 49 CFR Part 192. Questions on whether a pipeline requires a permit are to be resolved by the board.

In both the earlier and later versions of the rule, it was clear that pipelines with an operating pressure of 150 psig or more had to obtain a permit regardless of whether they were classified as a distribution or a transmission line.

Therefore, at the time of construction, the law was clear, and had always been clear, that Emmetsburg was required to obtain a permit from the Board prior to construction because the line had an operating pressure of over 150 psig. Emmetsburg's arguments regarding any confusion over classification of the line as transmission or distribution are therefore not persuasive regarding whether the law clearly required a permit for this line at the time it was planned and constructed.

Iowa Code Chapter 479 and the Board rules in effect today require that the pipeline have a permit. The line is a transmission line with a maximum allowable operating pressure of 367 psig and actually operates at about 246 psig. (petition for permit; O'Neal report; testimony of Shirk.) Iowa Code § 479.3 states that no pipeline company shall construct, maintain, or operate any pipeline except in accordance with

chapter 479. Iowa Code § 479.5 states that a pipeline company shall file a verified petition asking for a permit to construct, maintain, and operate its pipeline. A pipeline is defined by § 479.2(2) as "a pipe, pipes, or pipelines used for the transportation or transmission of a solid, liquid, or gaseous substance, except water, within or through this state."

The only exception to the statutory requirement to apply for a permit is contained in current Board rule 199 IAC 10.16, which contains only minor changes in wording from the version adopted in 1995:

When a permit is required. A pipeline permit shall be required for any pipeline which will be operated at a pressure of over 150 pounds per square inch gage or which, regardless of operating pressure, is a transmission line as defined in ASME B31.8 or 49 CFR Part 192. Questions on whether a pipeline requires a permit are to be resolved by the board.

The rule contains a two-part test, and if a pipeline meets either of the two prongs of the test, the owner must obtain a permit for the pipeline. 199 IAC 10.16. The first prong of the test is that a pipeline permit is required for any pipeline that will be operated at a pressure of over 150 psig. The second prong of the test is that a pipeline permit is required for any transmission line as defined in ASME B31.8 or 49 CFR Part 192, regardless of operating pressure. If an owner has any question regarding whether a permit is required for a particular line, the owner has an affirmative duty to ask the Board whether a permit is required. 199 IAC 10.16.

The pipeline in this case requires a permit for two separate reasons: 1) because it operates at a pressure of over 150 psig; and 2) because it meets the

definition of a transmission line. (O'Neal report; petition for permit; testimony of Mr. Bird, Mr. Shirk, Mr. O'Neal, Mr. Burnett.) Iowa Code §§ 479.2, 479.5 (2005); 199 IAC 10.16; 49 CFR § 192.3. It meets the definition of a transmission line because it transports gas from another transmission line (and ultimately from gathering lines and/or storage facilities) to a large volume customer (AGP) that is not downstream of a gas distribution center. (O'Neal report; petition for permit; testimony of Mr. Bird, Mr. O'Neal, Mr. Burnett.) 199 IAC 10.16; 49 CFR § 192.3.

Iowa Code § 479.31 provides that in determining the amount of a penalty, the appropriateness of the penalty to the size of the company, the gravity of the violation, and the good faith of the company in attempting to achieve compliance after notification of a violation, shall be considered. Each case is fact sensitive and is to be judged on its own merits. Interstate Power I.

In the past few years, the Board and the undersigned administrative law judge have considered assessment of civil penalties in seven prior electric franchise and pipeline permit cases: Corn Belt I; Corn Belt II; Interstate Power I; Moulton; Lorimor; In re: Interstate Power and Light Company, Docket No. E-21686, "Order Canceling Hearing, Accepting Compromise, and Assessing Civil Penalty," (September 15, 2004) (Interstate Power II); and In re: MidAmerican Energy Company, Docket No. P-857, "Proposed Decision and Order Granting Permit," (May 12, 2005) (MidAmerican).

The Corn Belt and Interstate Power II cases involved failure to seek an electric franchise prior to construction rather than failure to seek a pipeline permit prior to

construction. Although there are differences in the amounts and types of penalties that may be imposed for violations of the electric franchise and pipeline permit statutes, the factors to be considered in compromising or determining the amount of the penalty are the same. Iowa Code §§ 478.24, 478.29, and 479.31. Therefore, the Corn Belt and Interstate Power II cases are sufficiently analogous so it is valid to consider them as guidance regarding the appropriate penalty in pipeline permit cases.

In Corn Belt I, Corn Belt filed a petition for a franchise to construct an electric line in December 2001, but began construction of the line prior to receiving the franchise. Board staff discovered the violation and notified Corn Belt that construction must cease immediately and not resume until a franchise was obtained from the Board. Corn Belt immediately ceased construction activities after this notification, accepted full responsibility for the violation, and by motion and affidavit, asked the Board to impose an appropriate penalty without hearing. In imposing a civil penalty of \$600, the Board stated: "While the Board finds the violation to be serious, Corn Belt's actions are mitigated by the fact it immediately ceased construction after notification from Board's staff. Corn Belt has also accepted responsibility for the violation and taken corrective action so similar violations will not occur in the future." The Board also stated: "Since this is the first time this has happened, there is no reason to assess the maximum fine." Corn Belt I, pp. 5-6.

In Corn Belt II, Corn Belt converted a segment of single circuit transmission line to double circuit without first filing a petition for amendment of its electric

franchise in February 2003. Corn Belt became aware of the violation in May 2003 and immediately notified Board staff. The Board stated it did not view the violation to be as serious as that in Corn Belt I. Although Corn Belt promptly reported the violation and began corrective action, took steps to prevent additional violations in the future, and the violation was inadvertent, the Board imposed a civil penalty of \$300 because it was the second violation by Corn Belt in less than two years. In the Corn Belt II Decision, the Board stated the following: "By bringing this action and assessing this fine, the Board puts all companies on notice that franchise requirements must be followed. However, the Board recognizes that there are some violations that may have occurred many years ago that have only recently been detected. The Board encourages companies to report any such violations immediately and to cooperate with the Board's staff in remedying such violations. Any penalties that may be imposed would likely be mitigated if the violations are self-reported and not discovered by the Board's staff. The companies should also examine their processes, like Corn Belt has, to see if additional personnel or training are needed to ensure future compliance with the Iowa statutes and Board rules." Corn Belt II Decision, p. 5.

In Interstate Power II, Interstate Power and Light Company (IPL) received a franchise from the Board for a segment of electric transmission line in 2003. Other parts of the line were to be constructed inside the city limits of Iowa Falls, so no franchise was required. Iowa Code § 478.1. However, IPL moved the line location to outside the city limits (thereby triggering the franchise requirement), and began

construction without first obtaining a franchise. Once the problem was identified, IPL ceased construction on the segment and filed a petition for a franchise. The Board imposed a civil penalty of \$1,000. In imposing the penalty, the Board stated the violation's seriousness was in between the two Corn Belt cases, but was not a self-reported violation like Corn Belt II, because IPL did not discover the error until after Board staff had made inquiries unrelated to the possible franchise violation. The Board also stated IPL immediately ceased construction activities, accepted full responsibility for the violation, requested the Board to impose an appropriate penalty without hearing, and identified specific steps it was taking to avoid future violations. The Board stated IPL did not adequately examine its processes after the warning the Board issued to all companies in Corn Belt II. The Board further stated it is serious about obtaining compliance with the requirements and again issued a warning to all companies to examine their processes. It stated that all companies "are put on notice that future violations that are not self-reported could result in significantly higher penalties." Interstate Power II, p. 6.

The Interstate Power I case involved a failure to obtain a permit for a pipeline constructed in 1980 and 1982 when a permit was clearly required as of 1982. Interstate Power did not discover it had failed to obtain the required permit until August 2002. In reaching a decision not to impose a penalty, the undersigned and the Board considered that the company discovered the violation, immediately contacted the Board upon discovery, promptly filed a petition for a permit, took steps to prevent future violations, did not have any other known violations of this nature,

constructed, operated, and maintained the pipeline in conformance with all other Board rules, and there was no safety issue associated with the pipeline. Also considered were the facts that the violation was committed by prior staff who no longer worked for the company and current staff exhibited exemplary behavior once the violation was discovered. Therefore, the proposed and final decisions held that imposition of a civil penalty would not serve a valid punitive or deterrent purpose. In its decision affirming the proposed decision and imposing no penalty, the Board stated: "The evidence supports the ALJ's findings that IPL's actions fully mitigated imposition of a civil penalty. This is consistent with the Board's decision in Corn Belt regarding self-reported violations that occurred many years ago." Interstate Power I, p. 5.

Although the Moulton case involved the failure to timely renew a pipeline permit, rather than the failure to obtain a permit when one was required, the case is sufficiently analogous so it is valid to consider it as guidance when determining whether a civil penalty should be assessed in this case, and if so, the amount of the penalty to be assessed. At the hearing in the Moulton case, the parties proposed a compromise of the civil penalty issue, in which Moulton agreed to pay a civil penalty of \$375. Moulton, p. 3. Important factors considered in Moulton included that the failure to renew the permit was a relatively recent violation and Board staff, rather than Moulton's staff, discovered the violation. Other important factors included that Moulton was a very small town with limited staff, Moulton cooperated with Board staff upon discovery of the violation and promptly filed a petition for a permit, there were

no other known violations, the pipeline had been operated and maintained in compliance with all requirements other than the failure to renew, there was no safety issue with respect to the pipeline, and Moulton implemented a procedure to ensure its permit would be timely renewed in the future. The parties' proposed compromise was approved. Moulton, p. 10.

The Lorimor case involved a transmission pipeline with a maximum allowable operating pressure (MAOP) of 150 psig that had been constructed in 1971 without a permit. There were a number of factors considered important in the decision not to impose a penalty. A permit was not required when the pipeline was constructed in 1971 because it had an MAOP of 150 psig. A permit became required because the statute changed in 1988. The decision stated that failure to seek a permit when the law changed is different than failure to seek a permit when a company takes some affirmative action such as construction of a pipeline. It stated when a pipeline company plans to construct a pipeline, it must do so in conformance with applicable law, and it therefore must learn what the law requires. There was no triggering action on the part of Lorimor that would have caused it to know the statute changed, and the decision noted the statutory change was subtle and was contained in a bill that primarily dealt with regulation of interstate pipelines. However, the decision stated that cities and counties that own pipelines continue to have an affirmative duty to know what is in the law and comply with it, even if the law changes.

Other important factors included that Lorimor was a very small town with a limited number of customers, one full-time employee, and one part-time employee.

The Lorimor pipeline had been inspected by Board staff for many years, and when citations were issued as a result of the inspections, Lorimor timely corrected the matters. There were no major violations of applicable requirements. It was not known why a permit was not obtained prior to construction, although an engineer testified that to the best of his knowledge, the consultants hired to design and construct the pipeline assumed no permit was required because the pipeline would be operated at 150 psig or less. Board staff discovered the line had no permit, notified the city a permit was required, and as soon as the city learned of the permit requirement, it promptly applied for one. Lorimor was cooperative with Board staff in seeking to obtain a permit once it learned one was required, and worked with Board staff to amend its petition as needed. The Lorimor pipeline conformed to all pipeline safety standards and there were no safety issues with respect to the pipeline. The city took steps to ensure the pipeline would be operated in conformance with all applicable requirements, and the city owned no other pipelines.

The MidAmerican case involved a petition for an existing transmission pipeline with an MAOP of 125 psig that was constructed in 1970. Several factors were considered in the decision not to assess a penalty. It was unclear whether a permit was required when the line was constructed. From January 1 through July 1, 1970, a permit would have been required, but as of July 1, 1970, when the statute was amended, it apparently no longer required a permit since the line had an MAOP of less than 150 psig. Between 1971 and 1988, there was confusion regarding whether pipelines that operated at less than 150 psig were required to obtain a permit, and

board decisions interpreting the statute as it existed from July 1, 1970, to July 1, 1988, were not consistent. The first time it was clear that a permit was required was in 1988 when the statute was changed, and the considerations discussed above with respect to this statutory change and civil penalty assessment in the Lorimor decision were applicable to the MidAmerican case as well.

In MidAmerican, Board staff discovered that the pipeline did not have a permit and notified the company. MidAmerican immediately researched whether there was a permit, and once it learned there was not, it promptly filed a petition for a permit with the Board. MidAmerican was cooperative with Board staff in working on obtaining a permit for the pipeline. Other important factors included that Board staff had regularly inspected the pipeline, there were only four minor safety violations that were promptly corrected, and there were no other safety issues regarding the pipeline. MidAmerican had no prior violations of the requirement to obtain a permit, it put procedures in place to ensure there would be no future violations, and it stated it consults with Board staff when there is any question whether a permit is required.

This case is not like the Lorimor and MidAmerican cases, because the law clearly required Emmetsburg to obtain a pipeline permit before it began construction of the line. In addition, the violation did not arise from a subtle change in the law without new construction by the pipeline owner. This case is not like Corn Belt II and Interstate Power I, because Emmetsburg did not discover the violation itself and report it to the Board. The cases show that self-discovery and self-reporting of a violation by the owner is a very important mitigating factor in the decision whether to

impose a civil penalty and in lowering the amount of any penalty if one is assessed. Therefore, since the law clearly required Emmetsburg to obtain a permit prior to construction, and since Emmetsburg did not self-discover and self-report the violation, it is appropriate to assess a civil penalty in this case.

In addition to the above, the following factors are important in the determination of the amount of the civil penalty. Emmetsburg's failure to file a petition for a permit prior to construction in 1996 was a serious violation. It made it impossible for Board staff to review the application and route prior to construction and impossible to observe the materials and construction while the pipeline is being constructed. (testimony of Mr. Burnett.) However, once the Board notified Emmetsburg that a permit was required, Emmetsburg staff began preparing a petition and promptly filed it. (O'Neal report; testimony of Mr. O'Neal, Mr. Burnett, Mr. Zimmerman, Mr. Bird.) Emmetsburg staff was very professional and cooperative with Board staff in getting the pipeline permitted. (testimony of Mr. Burnett, Mr. O'Neal.) Current staff was not involved in the decision that a permit was not required. (testimony of Mr. Bird, Mr. Zimmerman, Mr. Shirk.)

The town of Emmetsburg has a population of approximately 4,000. (testimony of Mr. Bird.) Emmetsburg Municipal Utilities has nine full-time staff and Mr. Bird works part-time for the utility and part-time for the city. (testimony of Mr. Bird.)

Board staff has inspected the pipeline every other year starting in 1997. (testimony of Mr. O'Neal; Mr. Burnett.)⁴ In 2001, the inspection revealed a probable violation of missing line markers. (testimony of Mr. O'Neal.) This was the only violation, and it was resolved to the satisfaction of Board staff. (testimony of Mr. O'Neal.) There are no safety problems with the pipeline and no problems with the route of the pipeline. (testimony of Mr. O'Neal, Mr. Burnett; O'Neal report; petition for permit.) Emmetsburg has no other pipelines other than the one at issue in this case that do not have a permit when one is required. (testimony of Mr. O'Neal, Mr. Bird.)

Emmetsburg has accepted responsibility for the violation and taken affirmative steps to ensure there will be no future violations. (testimony of Mr. Bird.) It has discussed this situation with its Board of Trustees and set up an internal system to review all existing and planned utility projects for compliance with all requirements. (testimony of Mr. Bird.) Emmetsburg will stay current with new requirements either internally or by hiring someone to do it and will periodically check with appropriate Board staff. (testimony of Mr. Bird.) The policy and procedure will be documented through its Board of Trustees proceedings and will therefore become part of ongoing policy. (testimony of Mr. Bird.)

Considering all of the above factors, and considering the penalties imposed in prior cases, it does not appear that imposition of a large civil penalty is necessary or

⁴ The purpose of the inspections is to inspect for compliance with federal requirements. It is not Board staff's responsibility to determine whether an inspected pipeline has a permit. The responsibility for compliance is with the owner and operator of the pipeline. Mr. Burnett testified that Board staff has become aware of the permit issue given the number of these cases lately and may check to see whether a line has a required permit. This does not change the responsibility for compliance, which remains with the owner and operator.

appropriate. Therefore, the undersigned will impose a civil penalty in the amount of \$300 to be paid within 30 days of the date of this order.

FINDINGS OF FACT

1. Emmetsburg is a pipeline company within the meaning of Iowa Code § 479.2. (testimony of Mr. Bird; petition for permit.)
2. On August 7, 2003, Emmetsburg filed a petition for a pipeline permit for an existing 4-inch diameter natural gas pipeline approximately 3.314 miles long in Palo Alto County, Iowa. (petition for permit; testimony of Mr. Bird, Mr. Shirk, Mr. Zimmerman; O'Neal report.) Emmetsburg filed amendments to its petition and exhibits and provided additional information on May 24, 2004, and March 10, 2005. (petition for permit.) The petition is for an existing pipeline built in 1996 and placed into service in 1997 for which a permit was never requested or granted. (petition for permit; testimony of Mr. Bird, Mr. Shirk, Mr. Zimmerman, Mr. O'Neal, Mr. Burnett; O'Neal report.) The pipeline is a transmission line with a maximum allowable operating pressure of 367 psig and operates at about 246 psig. (testimony of Mr. Shirk; petition for permit; O'Neal report.) It transports natural gas from a connection with a Northern Natural Gas Company transmission line at the Emmetsburg town border station to a large volume customer in Palo Alto County, Iowa. (petition for permit; O'Neal report; testimony of Mr. Bird, Mr. O'Neal, Mr. Burnett.)
3. The pipeline follows a route described in Exhibit A and shown on Exhibit B attached to the petition for a permit (as amended). (petition Exhibits A and B.) It begins at a connection with a Northern Natural Gas Company transmission line

at the Emmetsburg town border station and runs within public road right-of-way to one large volume customer, AGP. (petition for permit; O'Neal report; testimony of Mr. Bird, Mr. Burnett.)

4. Emmetsburg caused notice of the hearing to be published in Palo Alto County in the Emmetsburg Democrat, a newspaper of general circulation in the county, for two successive weeks. The last publication was on June 30, 2005. (proof of publication.)

5. The pipeline is necessary to supply natural gas and maintain reliable service to one existing large volume customer in Palo Alto County, Iowa. (petition for permit; testimony of Mr. Bird; O'Neal report.) Therefore, the proposed pipeline promotes the public convenience and necessity as required by Iowa Code § 479.12. (testimony of Mr. Bird; petition for permit; O'Neal report.)

6. Board staff has inspected the pipeline every other year starting in 1997. (testimony of Mr. O'Neal; Mr. Burnett.) In 2001, the inspection revealed a probable violation of missing line markers. (testimony of Mr. O'Neal.) This was the only violation, and it was resolved to the satisfaction of Board staff. (testimony of Mr. O'Neal.) There are no safety problems with the pipeline and no problems with the route of the pipeline. (testimony of Mr. O'Neal, Mr. Burnett; O'Neal report; petition for permit.) The pipeline complies with the design, construction, and safety requirements of Iowa Code Chapter 479, 199 IAC § 10.12, and 49 C.F.R. Part 192. (petition for permit; testimony of Mr. O'Neal, Mr. Bird, Mr. Shirk; O'Neal report.)

7. No further safety-related terms, conditions, or restrictions need to be imposed pursuant to Iowa Code § 479.12. (petition for permit; testimony of Mr. O'Neal, Mr. Bird, Mr. Shirk; O'Neal report.)

8. There are no problems with the location and route of the pipeline and no further terms, conditions, or restrictions regarding them need to be imposed pursuant to Iowa Code § 479.12. (petition for permit; O'Neal report; testimony of Mr. Burnett, Mr. O'Neal, Mr. Bird, Mr. Shirk.)

9. Emmetsburg has filed satisfactory proof of its solvency and ability to pay damages in the sum of \$250,000 or more pursuant to Iowa Code § 479.26 and 199 IAC 10.2(1)"d". (petition Exhibit D.)

10. No written objections to the petition for a permit were filed and no objectors appeared at the hearing. (testimony of Mr. O'Neal; Docket No. P-854 file.)

11. Emmetsburg did not discover the violation itself and report it to the Board. (testimony of Mr. Burnett, Mr. O'Neal, Mr. Bird; O'Neal Report.) Board staff notified Emmetsburg that a permit was required for the pipeline. (testimony of Mr. Burnett, Mr. O'Neal, Mr. Bird; O'Neal Report.)

12. Emmetsburg's failure to file a petition for a permit prior to construction in 1996 was a serious violation. However, once the Board notified Emmetsburg that a permit was required, Emmetsburg staff began preparing a petition and promptly filed it. (O'Neal report; testimony of Mr. O'Neal, Mr. Burnett, Mr. Zimmerman, Mr. Bird.) Emmetsburg staff was very professional and cooperative with Board staff in getting the pipeline permitted. (testimony of Mr. Burnett, Mr. O'Neal.) Current staff

was not involved in the decision that a permit was not required. (testimony of Mr. Bird, Mr. Zimmerman, Mr. Shirk.) The town of Emmetsburg has a population of approximately 4,000. (testimony of Mr. Bird.) Emmetsburg Municipal Utilities has nine full-time staff and Mr. Bird works part-time for the utility and part-time for the city. (testimony of Mr. Bird.) Emmetsburg has no pipelines other than the one at issue in this case that do not have a permit when one is required. (testimony of Mr. O'Neal, Mr. Bird.)

13. Emmetsburg has accepted responsibility for the violation and taken affirmative steps to ensure there will be no future violations. (testimony of Mr. Bird.)

CONCLUSIONS OF LAW

1. The Board has the authority to grant, amend, and renew permits for the construction, operation, and maintenance of pipelines for the intrastate transportation of natural gas. Iowa Code §§ 479.1, 479.4, 479.12, 479.18, and 479.29; 199 IAC 9 and 10.

2. Iowa Code § 479.3 states that no pipeline company shall construct, maintain, or operate any pipeline except in accordance with chapter 479. Iowa Code § 479.5 states that a pipeline company shall file a verified petition asking for a permit to construct, maintain, and operate its pipeline. A pipeline is defined by § 479.2(2) as "a pipe, pipes, or pipelines used for the transportation or transmission of a solid, liquid, or gaseous substance, except water, within or through this state."

3. The only exception to the statutory requirement to apply for a permit is contained in Board rule 199 IAC 10.16:

When a permit is required. A pipeline permit shall be required for any pipeline which will be operated at a pressure of over 150 pounds per square inch gage or which, regardless of operating pressure, is a transmission line as defined in ASME B31.8 or 49 CFR Part 192. Questions on whether a pipeline requires a permit are to be resolved by the board.

The rule contains a two-part test, and if a pipeline meets either of the two prongs of the test, the owner must obtain a permit for the pipeline. 199 IAC 10.16. The first prong of the test is that a pipeline permit is required for any pipeline that will be operated at a pressure of over 150 psig. The second prong of the test is that a pipeline permit is required for any transmission line as defined in ASME B31.8 or 49 CFR Part 192, regardless of operating pressure.

4. The pipeline in this case requires a permit for two separate reasons: 1) because it operates at a pressure of over 150 psig; and 2) because it meets the definition of a transmission line. (O'Neal report; petition for permit; testimony of Mr. Bird, Mr. Shirk, Mr. O'Neal, Mr. Burnett.) Iowa Code §§ 479.2, 479.5 (2005); 199 IAC 10.16; 49 CFR § 192.3. It meets the definition of a transmission line because it transports gas from another transmission line (and ultimately from gathering lines and/or storage facilities) to a large volume customer (AGP) that is not downstream of a gas distribution center. (O'Neal report; petition for permit; testimony of Mr. Bird, Mr. O'Neal, Mr. Burnett.) 199 IAC 10.16; 49 CFR § 192.3.

5. The Board has jurisdiction over Emmetsburg and over the petition for a natural gas pipeline permit it has filed. Iowa Code §§ 479.2, 479.3, 479.5, 479.6, 479.12, and 479.18.

6. Since the pipeline was constructed in 1996 and Emmetsburg will not disturb any agricultural land, it is not required to file a land restoration plan. Iowa Code § 479.29; 199 IAC 9.

7. The petition of Emmetsburg for issuance of a permit for the natural gas pipeline in this docket should be granted. Iowa Code §§ 479.11, 479.12, and 479.26; 199 IAC 10.

8. Iowa Code § 479.31 provides that a person who violates Chapter 479 or a Board rule issued pursuant to the chapter is subject to a civil penalty not to exceed \$10,000 for each violation. The statute further provides that each day the violation continues constitutes a separate offense, but the maximum civil penalty is \$500,000 for any related series of violations. Iowa Code § 479.31. The statute provides that in determining the amount of the penalty, the appropriateness of the penalty to the size of the company, the gravity of the violation, and the good faith of the company in attempting to achieve compliance after notification of a violation, shall be considered. Iowa Code § 479.31.

9. In 1995 and 1996, when this pipeline was being planned and constructed, the law was clear that a permit was required because the pipeline had an operating pressure of 150 psig or more. Iowa Code §§ 479.2, 479.5 (1995 and 1995 Supp.); 199 IAC 10.16.

10. Self-discovery of a violation by the owner and prompt reporting of the violation to the Board is a very important mitigating factor in the decision whether to impose a civil penalty and in lowering the amount of any penalty if one is assessed.

Corn Belt I; Corn Belt II; Interstate Power I; Moulton; Lorimor; Interstate Power II; and MidAmerican. In this case, Emmetsburg did not discover the violation itself.

11. As discussed in the body of this decision, considering the entire circumstances and prior decisions, it is appropriate to impose a civil penalty in this case, although it is not necessary or appropriate to impose a large civil penalty. Iowa Code §§ 479.5, 479.31 (2005); Iowa Code § 479.5 (1995 and 1995 Supp.); Corn Belt I; Corn Belt II; Interstate Power I; Moulton; Lorimor, Interstate Power II, and MidAmerican.

12. If an owner has any question regarding whether a permit is required for a particular pipeline, the owner has an affirmative duty to ask the Board whether a permit is required. 199 IAC 10.16.

IT IS THEREFORE ORDERED:

1. Official notice is taken of the report dated April 27, 2005, filed in this docket by Mr. Jeffrey O'Neal, regulatory engineer for the Board.

2. Pursuant to Iowa Code Chapter 479, the petition for a pipeline permit filed by Emmetsburg in this docket is granted. A permit will be issued if this proposed decision and order becomes the final order of the Board.

3. Pursuant to Iowa Code § 479.31, Emmetsburg is assessed a civil penalty in the amount of \$300. Payment in the form of a check made payable to the Iowa Utilities Board shall be forwarded to the Executive Secretary of the Iowa Utilities Board at 350 Maple Street, Des Moines, Iowa 50319-0069. Payment is due within 30

days of the date of this order. The docket number listed on this order shall be listed on the check or in the accompanying correspondence.

4. Arguments made by the parties not addressed specifically in this order are rejected, either as not supported by the evidence or as not being of sufficient persuasiveness to warrant comment.

5. The Board retains jurisdiction of the subject matter in this docket.

6. This proposed decision will become the final decision of the Board unless appealed to the Board within 15 days of its issuance or the Board votes to review the decision on its own motion. Iowa Code § 17A.15(3); 199 IAC § 7.8(2).

UTILITIES BOARD

/s/ Amy L. Christensen
Amy L. Christensen
Administrative Law Judge

ATTEST:

/s/ Margaret Munson
Executive Secretary, Deputy

Dated at Des Moines, Iowa, this 22nd day of July, 2005.