STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission to Investigate Whether a Penalty Should Be Imposed on Talisman Energy USA, f/k/a Fortuna Energy, Inc., for Violations of an Order or Regulation Adopted Under the Authority of the Public Service Law Requiring that Natural Gas Be Odorized	:	Case 12-G-0221

RESPONSE OF TALISMAN ENERGY, USA, INC. TO THE ORDER TO SHOW CAUSE

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Table of Contents

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I. INTRODUCTION

On June 14, 2012, the Public Service Commission of the State of New York, ("Commission") commenced a proceeding and issued an order to show cause ("OTSC") in the above-referenced proceeding, directing Talisman Energy USA Inc. ("Talisman" or "the Company") to show cause within twenty (20) days "why the Commission should not commence a penalty action against it for failure to comply with §§ 25(1) and 65(1) of the Public Service Law, 16 NYCRR §255.625(a) and conditions in Commission orders requiring it to design, construct, test, operate and maintain its pipelines in accordance with the provisions of 16 NYCRR Part 255 applicable to steel transmission lines." OTSC at Ordering Clause 1. In this response, Talisman will demonstrate that a penalty action is neither legally supportable nor warranted by the facts.

The OTSC states by way of introduction that:

> Our Staff has recently become aware that Talisman Energy USA (Talisman or Company) f/k/a Fortuna Energy, Inc. (Fortuna) is not odorizing transmission lines it constructed and is operating in New York. Numerous Commission Orders require such odorization.

OTSC at Ordering Clause 1. The OTSC concludes, therefore, that Talisman was in violation of the Commission's prior orders, the regulations requiring odorization of transmission lines and New York State Public Service Law (alternatively, "PSL") § 25(1) (requiring adherence to Commission orders and regulations) and PSL § 65(1) (requiring safe and adequate service).

The OTSC further directed Talisman to "file with the Secretary a statement of the current status of compliance with 16 NYCRR Part 255 and, to the extent it is not compliant, its plans to comply with that regulation." OTSC at Ordering Clause 2.

On several occasions, Talisman requested, and the Secretary kindly granted, extensions of time to allow settlement discussions between Talisman and New York State Department of Public Service ("Department" or "DPS") Staff ("Staff") to occur. On December 10, 2010, Secretary Brilling granted a final extension for such discussions to January 28, 2013. Although Talisman and Staff met on several occasions in an effort to settle this matter, ultimately the parties were unable to reach a settlement. Consequently, Talisman is filing this response to the OTSC in accordance with the established procedural schedule.[1]

The OTSC concedes that Talisman's system is a gathering system and not transmission. Nevertheless, it points to a series of orders issued under Public Service Law Article VII which granted Certificates of Environmental Compatibility and Public Need ("construction certificates") to Talisman and its predecessor companies in which steel transmission line standards in Part 255 of the Department's safety regulations were applied to these gathering lines

[1] As discussed herein, the penalties threatened in the OTSC would likely be so penal in nature that they would invoke the protections typically afforded in a criminal action and as such, even though this would be a civil enforcement action, Talisman would have to be afforded the full spectrum of criminal due process rights in this proceeding and in any subsequent penalty action. We have serious doubts as to whether those Constitutional protections could be validly provided in either proceeding. By filing this response, Talisman does not waive any of those Constitutional protections, expressly reserves them, and explicitly claims the right to assert them at any time, in this case and in any subsequent case or penalty action related to these facts.

because they were to be operated at pressures above 300 pounds per square inch gauge ("psig"). The reasoning behind the threshold limit of 300 psig was never explained. Moreover, the Commission has never issued regulations governing high pressure gathering lines for which it recognized a need over a decade ago. Further, when Talisman and its predecessors made applications for construction of the lines they clearly indicated the operation of the lines would not include odorization. Finally, Talisman has met with DPS inspectors for several years during routine inspections where inspectors knew, or should have known, that the operating system was not odorized and they never questioned this aspect of the operations. Nevertheless, because the orders attempted to hold Talisman and its predecessors[2] to steel transmission line standards, the OTSC incorrectly concludes that Talisman also should have odorized the lines under Section 255.625 of the regulations. In the OTSC's view, Talisman violated PSL Sections 25(1) and 65, the terms of the orders granting the construction certificates and the Department's safety regulations.

Talisman disagrees with the position enunciated in the OTSC. Although the OTSC claims that Talisman has violated orders, regulations and the Public Service Law, the essence of the violation claimed in the OTSC boils down to the sole complaint that gas carried in Talisman's gathering lines is not odorized.

Talisman will demonstrate that odorization is neither required by the plain language of the Department's regulations, nor was it clearly required in any of the orders granting construction certificates for the various gathering line segments. Indeed, the word "odorization" is never mentioned in such orders. Furthermore, to the extent that the OTSC equates meeting

[2] As the Order relates, Talisman was formerly known as Fortuna Energy, Inc. ("Fortuna"). In addition, Talisman and/or Fortuna also acquired the gathering systems owned by other operators and assumed the Article VII construction certificates obtained by those entities.

steel transmission line standards with a requirement to odorize the gas in Talisman's system, that conclusion lacks merit. If the Commission meant to instruct Talisman to odorize its system in the orders granting construction certificates, it should have plainly said so. Talisman and its predecessors designed and constructed the gathering systems in question to the more rigorous steel transmission line standards but, as the notices of intent for those gathering line segments clearly indicated, odorization equipment was not contemplated for those lines.

To the extent the Commission believes it required odorization of Talisman's gathering system, this message was not delivered, clearly or otherwise. The only mention of odorization in the construction certificate process was when Talisman or its predecessors submitted notices of intent for authorization to construct its pipelines indicating that the applicant was *not* planning to odorize these lines. Neither the Department nor the orders granting construction certificates ever responded to this specific statement. Then, over the course of the DPS's decade long history of annually conducting in-depth record audits and field inspections of Talisman's pipeline system, DPS inspectors and the Commission never commented on the fact that the gathering system was not odorized. The absence of odorization has been readily apparent to the Department both prior to construction and throughout the entire operating history of Talisman's system. The OTSC's attempt to couch the absence of odorization as a recent discovery appears, therefore, to be mistaken.

Talisman, however, recognizes that the Department may have new expectations regarding odorization of upstream pipeline gathering systems. Talisman continues to be eager to conclude this case in an amicable, responsible and productive manner. In order to accommodate the Department's concerns, Talisman is reevaluating its system to determine whether odorization is feasible. As outlined below, there are significant challenges to odorizing unprocessed natural

gas in an upstream production context. In many cases, odorizing natural gas before it has been dehydrated and compressed would lead to environmental and public safety hazards that must be considered and addressed. Talisman is evaluating methods of enhancing its leak detection system in order to accommodate the Department's desire for improved leak detection systems, and the Company has developed an innovative and environmentally-conscious means of improving its leak detection program above and beyond what is required in the Department's regulations.

Accordingly, as a component of its response to the OTSC, Talisman will be submitting, shortly after the filing of this response, a proposal regarding alternatives to odorization for portions of the pipeline system that may, under the Commission's interpretation, potentially be subject to odorization.

Talisman believes that, in light of the matters outlined above and discussed more fully below, a penalty action is not warranted, not authorized by law, and not a productive means of addressing an apparent policy shift where the Department may now desire odorization of gathering lines that are not customarily odorized. Talisman remains committed to working with the Department to address and, where possible, accommodate this policy preference, but a penalty action is not an appropriate forum for addressing this matter.

II. THE FACTS

A. About Talisman

Talisman currently operates 192 miles and approximately 84 segments of natural gas gathering pipelines in New York. Talisman has safely delivered, on average, over 70 mmscf/day of gross natural gas production since 2004. The Company currently employs nearly 100 people in its New York field office, and it contracts for services with scores of small and large New

York businesses in the Southern Tier of New York State – a region where job opportunities are scarce and the economy continues to be affected severely by market conditions. Talisman has operated, and continues to operate responsibly, a safe natural gas production and gathering operation where the majority of the infrastructure is less than 15 years old. In addition, most of the system was constructed to the more strict steel transmission line standard, construction requirements not ordinarily applied to gathering lines. Talisman has worked closely and cooperatively with the DPS for the last 10 years.

Talisman also is a dedicated contributor to the communities where it operates. Since 2009, Talisman has donated more than $100,000 to community organizations and emergency response groups and it has sponsored or co–sponsored dozens of community events. In short, Talisman has been a responsible and safe gas gathering system operator in New York, a significant employer and a dedicated member of the communities where it operates.

B. *Talisman is a Safe Operator of its Gathering System*

Talisman's system is a gathering system, and gathering systems typically are built to standards contained in 16 NYCRR §255.9. However, as a result of a series of orders granting construction certificates, Talisman's gathering system is designed and constructed to the more comprehensive standards in Part 255 that govern steel transmission lines. Talisman's system was built to steel transmission line standards because most of the segments were initially operated at pressures in excess of 300 psig and the orders issuing the construction certificates picked that number, without explanation, as the threshold above which gathering systems would have to comply with the standards governing steel transmission lines. Consequently, despite the fact that most of Talisman's gathering line segments are now operated below that pressure threshold, the system remains designed, built and maintained to the more robust standards

applicable to steel transmission lines. Talisman remains an active participant in New York's One Call program. Talisman's personnel are highly competent and well–trained, not only in the day-to-day operation of the system but also in emergency response in the unlikely event of a significant incident.

C. *Talisman is in Compliance with the Record Audit*

As part of the Department's 2012 Record Audit conducted to establish Talisman's compliance with the steel transmission safety standards, Staff identified in a letter dated July 3, 2012 eight deficiencies of 16 NYCRR Part 255, with two of those relating to odorization.[3] In a letter dated January 7, 2013, Talisman formally addressed the items noted in the record audit. With the exception of the two odorization claims that are at the heart of this proceeding, Talisman believes that the corrective action taken has fully satisfied the issues raised in the Record Audit.

D. *Odorization of Gathering Systems Will, in Many Cases, Cause Environmental and Public Nuisance Problems and Is Not Common in the Industry*

Talisman operates approximately 84 active pipeline segments, six compressor stations, and numerous sales connections to interstate transmission lines, gas storage facilities and a local distribution company. Prior to transferring custody of the gas it produces from its wells, Talisman prepares the gas for sale through dehydration and compression to sales pressure. In some cases, initial dehydration and compression occurs at the site of well production – otherwise, this occurs further downstream at one of five centralized processing stations. Following dehydration and compression, the gas is transferred to one of two interstate

[3] The majority of these deficiencies related to the timeline in which Talisman conducted certain tests or inspections. As indicated above, only two of the deficiencies related to provisions regarding the odorization of gas. We note that the alleged odorization violations are duplicative in that failure to abide by one necessarily encompasses a failure to abide by the other regulation.

transportation companies (Dominion Transmission, Inc. or Millennium Pipeline Company, LLC), a local distribution company (Corning Natural Gas Company), or to gas storage operated by Inergy Midstream, LP.

Gas gathering systems are unlike the transmission and distribution systems with which the Commission and the Department are most familiar. Talisman is concerned that the DPS might not fully recognize the important distinctions between gathering lines and transmission and distribution lines.

In distinct contrast to transmission and distribution systems, there are numerous engineering, environmental and operational obstacles to odorizing non–pipeline quality gas in an upstream production context. Raw natural gas can contain significant quantities of water that must be removed and managed via off–site disposal or recycling. When gathering gas is odorized, the water produced by dehydration would also become odorized since in would necessarily contain dissolved sulfur compounds from the added mercaptan. The addition of mercaptan, a contaminant, creates a waste disposal and transportation problem regarding the produced water and essentially eliminates any ability for the beneficial reuse or recycling of this water.

Separately, most of Talisman's compressor stations use produced natural gas to run pneumatic devices at the compressor stations and compressor engines at individual well sites. These pneumatic devices necessarily vent a small amount of gas during each device actuation. If odorized gas is vented, there would be small but continuous releases of mercaptan to the environment, which may cause nearby residents to believe that a gas leak has occurred. During initial startup, Talisman would likely respond to multiple "false alarms," but more importantly, the community would likely, over time, become desensitized to the smell of mercaptan as an

alarm triggering the need for safety input. Moreover, odorization might result in a violation of the Department's regulations at 16 NYCRR § 255.625(d), which requires that the release of mercaptan not cause a nuisance to the community.

It is Talisman's understanding that gas gathering lines are not commonly odorized in the industry. Federal pipeline safety regulations at 49 CFR §192.625 only require odorization of distribution pipelines and transmission pipelines within class 3 and 4 locations. Consequently, the industry practice nationwide has been not to odorize gathering lines.

III. A PENALTY ACTION IS NEITHER WARRANTED NOR AUTHORIZED

A. Steel Transmission Line Standards Do Not Equate to Odorization

The OTSC states:

> In 16 NYCRR §255.625(a), our regulations provide: "All gas transported in transmission lines, and distribution mains operating at 125 PSIG [pounds per square inch gauge] or more, except gas en route to storage fields, is to be adequately odorized . . . so as to render it readily detectable by the public and employees of the operator at all gas concentrations of one fifth of the lower explosive limit and above." This regulatory provision was adopted under the authority of PSL §§ 4(1), 65(1) and 66(1). At all times relevant to this investigation, this provision has been in full force and effect.

OTSC at 2-3. Based on this statement, the OTSC goes on to conclude that Talisman may be in violation of the Commission's orders and regulations because the gas in its system is not odorized. The OTSC thus proceeds from a fundamental legal misconception. The regulation states that gas *transported in distribution or transmission lines* is to be odorized. Talisman is not required to odorize its gas because that gas at issue is *transported in gathering lines*, not transmission lines or distribution mains.

The DPS's regulations are quite specific in describing what constitutes transmission, distribution and gathering lines:

> Distribution line means a pipeline other than a gathering or transmission line.
> …
> Gathering line means a pipe line that transports gas from a current production facility to a transmission line, main, or directly to an end user.
> …
> Transmission line means a pipeline, other than a gathering line, that:
> (i) transports gas from a gathering line or storage facility to a distribution center, storage facility, or directly to a large volume user that is not downstream from a distribution center; or
> (ii) operates at a hoop stress of 20 percent or more of SMYS; or
> (iii) transports gas within a storage field.

16 NYCRR §§ 255.3 (a)(3), (7) and (34).

When these express Section 255.3 definitions are considered, it is clear that gathering lines are not covered by the requirement in Section 255.625.

Section 225.625 states only that gas transported in "transmission lines" or "mains designed to operate at 125 psig or more" is "to be adequately odorized." 16 NYCRR § 255.625(a). In this case, no gas is being transported in transmission lines or distribution mains. Notably, a "transmission line" is not a "gathering line" (16 NYCRR § 255.3(a)(34)) and a "main" is a "distribution line that serves as a common source of supply for more than one service line" and is also not a gathering line. 16 NYCRR § 255.3(a)(16). If gathering lines were intended to be included with mains or transmission lines, the regulations would not have drawn so pointed and express definitional distinctions among distribution mains, transmission lines and gathering lines. As an operator of gathering lines, Talisman, therefore, has not violated any regulation.[4]

[4] Talisman notes, similarly, that 16 NYCRR §255.9(b) states that any gathering line located within 150 feet of an existing residence or place of public assembly, in a city or village or within a subdivision or shopping center "shall be designed, constructed, tested, operated and maintained in accordance with the provisions of this Part applicable to steel transmission lines." Here, again, that regulation did not transform such gathering line into a transmission line and, consequently, the odorization requirement in §255.625 would not apply.

B. *No Order Issued to Talisman or Its Predecessors Explicitly Required Odorization And Certainly Not in a Manner Specific Enough to Support a Penalty Action*

The OTSC states that the Commission has issued numerous orders requiring, as a condition of the orders, that "Fortuna [Talisman's corporate predecessor] shall design, construct, test, operate and maintain the pipeline in accordance with the provisions of 16 NYCRR Part 255, applicable to steel transmission lines." Order at 3 *citing* e.g., Case 03-T-1308, *Fortuna Energy, Inc.*, Order Granting Certificate of Environmental Compatibility and Public Need at Ordering Clause 1(q) (issued November 4, 2003); Case 03-T-1375, *Fortuna Energy, Inc.*, Order Granting Certificate of Environmental Compatibility and Public Need at Ordering Clause 1(q) (issued December 3, 2003); and Case 08-T-1023, *Fortuna Energy, Inc.*, Order Granting Certificate of Environmental Compatibility and Public Need at Order Clause 1(z) (issued October 1, 2008). Based on the conditions contained in those orders, the OTSC leaps to the erroneous conclusion that: "[t]hose conditions meant that Fortuna was required to comply with the odorization requirement with respect to the steel transmission lines operated pursuant to the orders or face the prospect of a penalty action." OTSC at 6.

As stated earlier, the OTSC makes an insupportable leap of faith when it equates the condition in numerous orders requiring that Talisman's gathering lines be "design[ed], construct[ed], test[ed], operate[ed] and maintain[ed] …in accordance with the provisions of 16 NYCRR Part 255, applicable to steel transmission lines," with the requirement in Section 255.625 that gas *transported* in transmission lines must be odorized. OTSC at Ordering Clause 1. Designing, building and operating a gathering line to transmission line standards does not legally or practically transform a gathering line into a transmission line. It remains at all times a gathering line.

Moreover, virtually all of Talisman's and its predecessors' filings seeking construction certificates contained a clear statement that no odorization equipment was to be installed on the proposed gathering line.[5] Furthermore, since the first such gathering line was certificated more than a decade ago, the DPS's safety inspectors were, or should have been, well aware that the gathering systems were not being odorized. Talisman does not dispute that the Orders issued by the Commission relating to the various filings stated that the lines were to be designed, built and operated to transmission line standards but those orders did *not* anywhere state that the lines were to be odorized. In fact, the Commission's orders concerning these pipelines generally say that "this pipeline will be required to be designed, constructed, tested, operated, and maintained in accordance with the provisions of 16 NYCRR Part 255 applicable to steel transmission lines" but omit any discussion of odorization or any requirement that gas in the lines should be odorized.

If the Commission meant to require odorization of the lines approved for Talisman and its predecessors it had only to say so in the orders granting the construction certificates. It did not do so. The absence of any language even mentioning odorization in the orders issued to Talisman and its predecessors must be contrasted with language in the Commission's 2010 *Laser* order, which explicitly stated that the application of steel pipeline standards to a gathering line also meant that the gas carried in the just authorized lines had to be odorized. The *Laser* order stated, in relevant part:

> For purposes of inspection and auditing activities, this facility and its associated facilities will be treated as a transmission line. *As a transmission line, the gas in the pipeline is required to be odorized….*

[5] *See e.g.*, Case 08-T-1023, *Fortuna Energy, Inc*., Application at Appendix 7-D Form A (Filed August 27, 2008).

Case 10-T-0350, *DMP New York, Inc. and Laser Northeast Gathering Company LLC*, Order Granting Certificate of Environmental Compatibility and Public Need at 65-66 (issued February 22, 2011) (emphasis added). Although Talisman does not agree with this construction, at least if this same language had been inserted in the orders issued to Talisman and its predecessors, they would have known that the Commission believed that odorization was viewed as a condition of meeting steel transmission line standards.[6] Instead, the orders were absolutely silent on the matter.

In fact, the plain language of Section 255.625, relating to the odorization of gas, would suggest just the opposite conclusion from that reached in *Laser*. That regulation states that "[a]ll gas transported in transmission lines, and distribution mains operating at 125 psig or more, except gas in route to storage fields, is to be adequately odorized in compliance with subdivision (c) of this section so as to render it readily detectable by the public and employees of the operator at all gas concentrations of one fifth of the lower explosive limit and above." 16 NYCRR § 255.625(a). Again, the gas in the Company's facilities is not being transported in transmission lines. It is being transported in gathering lines that are subject to transmission line standards because of the high pressures allowed for those gathering lines. Although the various orders granting construction certificates might have subjected the lines to transmission standards, they are not transmission lines, which Section 255.3(a)(34) defines as "a pipeline, *other than a gathering line*, that (i) transports gas from a gathering line or storage facility to a distribution center, storage facility, or directly to a large volume user that is not downstream from a distribution center...." 16 NYCRR § 255.3(a)(34) (emphasis added).

[6] Talisman, however, does not believe that the conclusion reached in the *Laser* order is correct because that order also erroneously viewed Laser "[a]s a transmission line" when it appears that this was a gathering line.

Clearly, Talisman's lines are gathering lines which Section 255.3 defines as a "pipe line that transports gas from a current production facility to a transmission line, main, or directly to an end user." 16 NYCRR § 255.3(a)(7). The mere assumption in the OTSC that Talisman's gathering lines required odorization is not warranted without, at a minimum, a specific statement, or notice to Talisman, such as was made in *Laser* and in the more recent *Bluestone* order, that explicitly required that gas be odorized in those gathering lines. Case 11-T-0401, et al., *Bluestone Gas Corporation of New York, Inc.,* Order Adopting the Terms of a Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need and Certificate of Public Convenience and Necessity at 32 (issued September 21, 2012). Indeed, the fact that the Commission needed to state the odorization requirement explicitly in *Laser* and *Bluestone* may be taken as evidence that odorization was <u>not</u> an apparent requirement of all earlier orders, including those obtained by Talisman and its predecessors. This is especially true where most of the applications filed by Talisman and its predecessors expressly stated that there was to be no odorization equipment installed and the orders approving those applications neither specifically addressed that fact nor made a contrary finding or directive that the lines be odorized.

The lack of any reference to odorization in the Commission's prior orders, the fact that the majority of the applications approved by those orders indicated that no odorization was to be utilized, and the core fact that gathering lines are at issue are not mere hair splitting. The penalty action provision of the Public Service Law (§§ 24 and 25) has been held to be "penal in nature in that it provides for the imposition of a fine for the violation of a PSC order." *People v. Hurley Water Co.*, 84 A.D.2d 615, 616 (3d Dep't 1981). Other courts in New York have reached the same conclusion, *viz*., that the penalty action is "penal." *People v. Whitridge*, 144 A.D. 486, 489 (1st Dept. 1911) ("This section is punitive and very highly penal, and in order to collect a penalty

or penalties under it the plaintiff must establish clearly that the defendant has committed an offense..."); *People v. Ansonia Van & Storage Co.*, 42 Misc. 2d 328, 330 (Sup. Ct. Alb. Co. 1964) ("It is clear then that penalties or forfeitures constitute, in effect, a fine for the violation of law or for the failure to comply with a provision of law...[t]hey are penal in nature and are similar to fines levied in a criminal proceeding under a statute providing for the same not in excess of a fixed sum").

When a statute or regulation is penal in nature, it has long been held that specificity is required. *People v. Liberty Light & Power Co.*, 121 Misc. 424, 427 (Sup. Ct. Alb. Co. 1923). "This action is for a penalty, a sum of money which the law exacts by way of punishment for omitting to do an act which plaintiff contends the law requires to be done. That penal statutes are to be strictly construed is elementary, and to be entitled to recover a penalty the law requires the plaintiff to make a plain case and one within the letter of the statute. Penalties are not to be imposed by implication." *Id*.

Yet that is precisely what the OTSC attempts to do – apply a penalty for violating a requirement that the Commission believes was implied but was neither stated directly nor even logically would be inferred from the text of the orders, the applicable regulations or the DPS's course of conduct. This is especially the case when: (1) the applications made by Talisman and its predecessors stated explicitly that there was no odorization equipment to be installed, (2) the orders granting the construction certificates never addressed that notification or even mentioned the word "odorization," (3) the DPS's safety personnel knew or should have known over the ten–plus years that they inspected Talisman's and its predecessors' facilities that the gas was not odorized and never raised an objection and, finally, (4) only the most recent *Laser* and *Bluestone* orders explicitly state that gathering lines that are subject to steel transmission line standards

must also odorize gas carried in those facilities. Consequently, the OTSC improperly leaps to the conclusion that Talisman knew that being subject to steel transmission standards also meant the gas in its *gathering* lines should be odorized. This is not only an insupportable conclusion but it is inconsistent with the very words of the regulations in Part 255 and the utter silence on the subject in the orders granting the construction certificates. The claimed requirement that being subject to steel transmission standards equates to odorization is therefore far too vague to support the imposition of a penalty for violation of that alleged standard.

C. *The Claimed Odorization Requirement is Void for Vagueness*

Regardless of whether the penalty sought is considered civil or penal, the Commission's potential pursuit of it, based on an amalgam of orders, regulations and suppositions, would still be subject to an analysis of whether the Commission's belief that Talisman was required to odorize its gathering system was void for vagueness.

The test of whether a penalty that is denoted a "civil penalty" takes on sufficient elements of a criminal proceeding to warrant criminal Constitutional protections was announced in *Hudson v. United States*, 522 U.S. 93, 99-100 (1997) ("Even in those cases where the legislature has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect, as to transform what was clearly intended as a civil remedy into a criminal penalty….)." Here, the tests announced in *Hudson* to establish whether a civil penalty has taken on elements of a criminal sanction seem clearly to have been met: the penalty action in the PSL is "highly penal," a penalty action is sustainable only for a "knowing violation" (akin to scienter), and the Order threatens penalties of hundreds of millions of dollars that are clearly excessive and bear no relationship to the alleged transgression. In addition to the full spectrum of Constitutional protections that *Hudson* would

confer on Talisman is the protection that an order or regulation be specific; that is not "void for vagueness."

The Court of Appeals has found that the "void for vagueness" doctrine has been considered in civil cases as well as criminal ones. *People v. Stuart*, 100 N.Y.2d 412, 420-421, n.7 (2003) (*citing Matter of Saratoga Water Servs. v Saratoga County Water Auth.*, 83 N.Y.2d 205, 213-214; *National Endowment for the Arts v Finley*, 524 U.S. 569, 580 (1998)).

The United States Court of Appeals for the Second Circuit recently observed that a void for vagueness analysis consists of two parts. First, a law violates due process "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Cunney v. Bd. of Trs. of Grand View*, 660 F.3d 612, 621 (2d Cir. 2011) (citations omitted). "Animating this first vagueness ground is the constitutional principle that individuals should receive fair notice or warning when the state has prohibited specific behavior or acts." *Id.* (citations omitted). Second, a law is unconstitutionally vague if it authorizes or even encourages arbitrary and discriminatory enforcement. Statutes must "provide explicit standards for those who apply" them to avoid "resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* (internal citations omitted). When viewed through this prism, the penalty action threatened by the OTSC fails on both grounds

1. <u>A Penalty Action Would Fail the First Test of Vagueness Because the Orders and Regulations Read Together In View of the Facts Would Not Put On Notice a Person of Reasonable Intelligence That the Gathering System Should be Odorized</u>

As the Supreme Court recently noted, in addressing the problem of vague regulatory requirements:

> This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply

> with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."

FCC v. Fox TV Stations, Inc., __U.S__, 132 S. Ct. 2307, 2317 (2012) (citations omitted).

The Court in *Fox* further pointed to its 1926 decision holding that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Id.* (*citing Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). Also citing *Connally*, the New York Court of Appeals has observed that a statute must be "informative on its face . . . to assure that citizens can conform their conduct to the dictates of the law. To this end, nothing less than "adequate warning of what the law requires' will do." *People v. New York Trap Rock Corp.*, 57 N.Y.2d 371, 378-379 (1982).

Again, whether the penalty action is viewed as civil or penal is irrelevant to the question of proper notice. *Matter of Kaur v New York State Urban Dev. Corp.*, 15 N.Y.3d 235, 256 (2010) ("It has long been settled that 'civil as well as penal statutes can be tested for vagueness under the due process clause'") (citation omitted).

Under the standard that regulatory requirements must be specific if they are to justify punishment, a penalty action for an alleged violation of the Commission's orders and odorization regulation would be unwarranted. The Commission – or its reviewing Staff – was clearly on notice that the facilities would not be odorized (in most of the applications) yet it neither addressed that fact nor mentioned in the orders granting certificates its belief that meeting transmission standards included a requirement to odorize. Surely, when a party informs a

regulator in an application that it does not intend to take some action it is incumbent on the agency to address the matter in its order approving the application if it seeks to require the applicant to modify its stated operational plan. The Commission did not do so in this case. Furthermore, Part 255 when plainly read only requires that gas transported in transmission or distribution lines be odorized and Talisman's lines are by definition gathering lines, not transmission lines. Finally, the fact that the Commission found it necessary in two recent cases to state specifically that adherence to transmission line standards meant that odorization was required, affirms the conclusion that odorization does not necessarily follow from a requirement that an application adhere to transmission standards. The Commission was forced to draw that distinction in its more recent Orders for the manifest reason that it was not clear to people of ordinary intelligence, let alone people steeped in the industry with its clear delineation between transmission, distribution and gathering lines. For all these reasons, a penalty action may not properly be brought against Talisman for failure to odorize the lines because that requirement was not at all clear in either the Commission's orders or regulations that the OTSC claims Talisman violated. In fact, a person of ordinary intelligence reading Section 255.625 would most likely conclude that gas transported in gathering lines did not have to be odorized. Consequently, the contention that Talisman is subject to a penalty because the Commission's orders and regulations required odorization fails for vagueness.

2. A Penalty Action Would Fail the Second Test of Vagueness Because the Commission Failed to Take Any Action for Over Ten Years to Notify Talisman that Its System Must be Odorized, Has Not Sought Penalties Against Other Producers and Has Enforced its Policy on an Ad Hoc Basis Rather than Through Regulations

As the New York Court of Appeals noted in *New York Trap Rock*: "[o]f equal concern is the prevention of arbitrary and discriminatory enforcement by requiring 'boundaries sufficiently distinct' for police, Judges and juries to fairly administer the law. As common sense and experience both tell us, unless by its terms a law is clear and positive, it leaves virtually unfettered discretion in the hands of law enforcement officials." *People v. New York Trap Rock Corp.* at 378-379. The *ad hoc* policy the Commission has followed for high pressure gathering lines is antithetical to the "clear and positive" approach that is required to pass due process muster. This is made all the more manifest given Talisman's specific facts.

As Talisman has demonstrated, there are considerable differences between gas gathering systems, on one hand, and transmission and distribution systems, on the other hand. That is why Talisman and its predecessors stated in their applications for construction certificates that odorization of the systems was not contemplated. If the Commission had wanted the systems odorized, it could have expressly made that point in the orders but it did not do so. A reasonable applicant would conclude that the terms of its application (with no odorization) had been adopted. Consequently, the gathering systems were built without odorization equipment. In addition, the Commission failed to raise any objection for over ten years, despite numerous inspections by its safety staff. Contrast the silence in Talisman's construction certificate orders with the more recent *Laser* and *Bluestone* orders where an odorization requirement was clearly stated. If the Commission felt it necessary to highlight the need for odorization for Laser and

Bluestone, query how Talisman was supposed to divine an odorization requirement from the silence in its orders regarding that requirement. The fact that the Commission attempted to expressly impose the odorization requirement in *Laser* and *Bluestone* provides further evidence that no such requirement was imposed on Talisman.

Furthermore, while Talisman is aware of many other gathering systems operating in New York, it lacks sufficient information or belief to know if they are odorized or whether the Commission has similarly threatened enforcement against them. Certainly any such selective enforcement would raise discrimination and additional Constitutional claims beyond vagueness.

Finally, the Commission's pursuit of its odorization agenda via separate orders rather than through clear and concise regulatory action compounded the uncertainty as to odorization requirements for gathering systems. In issuing a 2001 order granting construction authorization to a predecessor owner of Talisman's pipeline system, the Commission recognized that additional regulations were likely needed in order to address gathering lines operating in excess of 300 psig:

> These higher pressures have prompted the Gas Safety Section to reassess the regulations contained in 16 NYCRR Part 255 pertaining to gathering lines. Staff believes additional requirements for gathering lines operating in excess of 300 psig will need to be added to ensure their safe operation.
>
> Until requirements for this class of gathering lines are proposed and new rules are adopted, Staff will address safety issues on an individual basis through the certification process.

Case 01-T-1768, *Fairman Drilling, Inc.* Order Granting Certificate of Environmental Compatibility and Public Need at 2 (issued December 19, 2001). Two points stand out from the *Fairman* order. First, other than Staff's "belief," the Department has not articulated a basis for the seemingly arbitrary 300 psig threshold above which steel transmission standards are to apply

to gathering lines. Second, despite Commission authority to propose new regulations as promised almost twelve years ago in *Fairman*, it has yet to adopt any. Perhaps if they had been issued, the so–called odorization requirement might have been adopted therein as the sort of "clear and positive" requirement necessary to pass Constitutional muster. In their absence, however, a regulated entity should not have to guess that the application of transmission standards to a gathering line meant – in the Commission's eyes – that the gas in the gathering line had to be odorized, despite the plain words of the existing odorization regulation, which only required that gas transported in transmission lines and distribution mains has to be odorized. Indeed, by its very words in *Fairman Drilling*, the Commission conceded that, in the absence of regulations specific to gathering lines, safety issues would be addressed on an individual basis. Such an *ad hoc* approach is not conducive to due process. If the Commission had wanted high pressure gathering lines to be odorized, it need only have adopted a regulation to that effect or explicitly included that requirement in each order granting a construction certificate to a gathering line to which the order applied steel transmission line standards. Instead, no regulation was ever adopted, no such requirement was included in Talisman and its predecessors construction certificates and the *ad hoc* approach has continued. As a consequence, the DPS's regulations and orders on odorization of gathering lines remain too vague, contradictory and inconclusive to support the penalties threatened in the OTSC.

D. Given the Facts Described Above, If Talisman Is Held to Have Violated the Statute, Orders or Regulations, A Penalty Would Not Lie Because It Did Not Do So Knowingly

Section 25 of the Public Service Law provides for a penalty only in the case of a *knowing* violation. PSL § 25 (2) and (3).

The facts recited above demonstrate that, even if Talisman is held to have technically violated the PSL, an order or a regulation, such violation was not a knowing violation because Talisman legitimately and in good faith did not believe that it was required to odorize the gas in its gathering system – in other words, a penalty will not lie because Talisman could not know it was violating a regulation requiring odorization when the Commission was informed as part of the construction certificate process that odorization was not contemplated for the lines, the orders were silent on the subject, the regulations do not support such a construction, and the DPS inspectors never raised an objection to the lack of odorization for over more than a decade.

In *People v. Coe* for example, the Court of Appeals found that accidental or unintentional violations of the law do not support the imposition of penalties. 71 N.Y.2d 852, 854-855 (1988) ("In the absence of a clear legislative intent to impose strict criminal liability, such construction should not be adopted").

Other cases, reach a result similar to that reached in *Coe.* The United States Supreme Court in *Liparota v. United States* found that, absent any indication to the contrary in the language or history of the statute, the law requires a showing that the defendant knew his actions were unauthorized. 471 U.S. 419 (1985). Moreover, the Court stated that "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is universal and persistent in mature systems of law." *Id.* at 426 (citation omitted).

In *U.S. v. Golitschek*, the Second Circuit stated that "a defendant normally need not be shown to know that there is a law that penalizes the offense he is charged with committing. However, he must be proven to have whatever state of mind is required to establish that offense, and sometimes that state of mind includes knowledge of a legal requirement." 808 F.2d 195, 202 (2nd Cir. 1986). Of particular application to the instant facts, is that allowing the prosecution to

establish knowledge *by presumption* would relieve the government of its burden of proof, contrary to the requirements of due process.

Clearly, Talisman was acting in a good faith belief that it was fully compliant with the law and regulations because it and its predecessor companies had put the Commission on notice that they did not intend to odorize the gas in the lines. Despite that, the issue of odorization was never addressed in those orders. It was therefore reasonable and responsible for Talisman to believe that the Commission knew the gathering lines were not odorized and, because the orders granting the construction certificates did not require otherwise, Talisman was fully in compliance with those orders. Talisman's interpretation of Section 255.625 as not applying to gathering lines also cannot be dismissed. The plain language of that regulation states that gas transported in "transmission lines" or "distribution mains" must be odorized. As described above, Talisman's system is composed of "gathering lines." Had the Commission wished to enact new standards for certain types of "gathering lines", it could have amended its regulations via the normal administrative process to include gathering lines subject to transmission line standards. It did not do so.

Furthermore, if the Commission intended to forge new precedent by subjecting high pressure gathering lines to steel transmission line standards, it should have been more precise in its orders, especially in light of the statements in the applications that Talisman and its predecessors contemplated no odorization equipment. Similarly, the Commission did not use specific directives as it did in *Laser* and *Bluestone*. Subsequently, as noted previously, the facilities underwent numerous inspections by DPS safety inspectors without complaint about the lack of odorization for as long as ten years or more, confirming Talisman's belief that odorization was not required by the orders. All of this evidence demonstrates that Talisman did

not knowingly violate the law, the Commission's orders or the regulations; rather, Talisman was acting in good faith reliance on the unchallenged documents and information that had been submitted to the Commission, standard practice for gathering lines, and the fact that the facilities had successfully undergone Commission safety inspections going back many years.

In short, Talisman does not believe that it violated the PSL, Commission orders or the Department's regulations in any way. Such claimed violations, however, were not "knowing violations" and no penalty can attach to them under PSL Section 25.

E. *Penalty Actions Do Not Lie For the Statutory and Regulatory Bases Claimed in the Order To Show Cause*

The OTSC concluded that there are *numerous* bases for a penalty action:

> There appear to be numerous continuing violations of PSL §§ 25(1) and 65(1), 16 NYCRR §255.625(a) and the terms and provisions of orders adopted under the authority of the PSL, that could form the basis for the imposition of a substantial penalty under PSL §25(2), particularly in view of the fact that the violations are continuing.

OTSC at 6. Talisman disagrees with this claim.

First, the claimed violation of PSL Section 25(1) is not supportable, as PSL Section 25(1) is both a general directive and part of the penalty provision of the law, itself. PSL Section 25(1) says only:

> Every public utility company, corporation or person and the officers, agents and employees thereof shall obey and comply with every provision of this chapter and every order or regulation adopted under authority of this chapter so long as the same shall be in force.

PSL § 25 (1). This general statement is subservient to the more specific provisions of PSL Section 25. Those sections, however, do not authorize penalties for the alleged transgressions by Talisman.

PSL Section 25(2) authorizes the Commission to seek a penalty for violations of the Public Service Law or an order promulgated thereunder. As we have demonstrated previously, none of the orders issued to Talisman or its predecessor companies ever specifically required odorization of its system or the various gathering line segments authorized in the construction certificates. The orders stated only that Talisman and/or its predecessor was to design, build and operate its segment to steel transmission standards - and there has been no claim that Talisman has not done so.

The OTSC claims that Talisman has violated PSL Section 65. This claim, too, is insufficient to support a penalty. Section 65 is simply another general statement as to the obligation of a gas corporation to provide safe service. Other than the claim in the OTSC that Talisman's gathering system is not safe because it is not odorized, there is no demonstration in the OTSC that Talisman is operating an unsafe gas system. In fact, the evidence is to the contrary, as Talisman is operating a system that complies with the Department's safety rules for steel transmission systems – which, as the Commission has recognized, are more stringent than those applied to a traditional gathering system designed, constructed, operated and maintained to a lower gathering line standard. *See* Case 10-T-0350, *DMP New York, Inc. and Laser Northeast Gathering Company*, Order Granting Certificate of Environmental Compatibility and Public Need at 65-66 (issued February 22, 2011). Therefore, a penalty for violation of PSL Section 65 does not lie. The OTSC simply assumes, without more, that Talisman's system is unsafe because it is not odorized. The many exceptions to the odorization requirement in the Department's regulations, however, (e.g., gathering systems, gas flowing to storage) demonstrate that this simplistic linkage of odorization with safety is far from established.

As noted above, subsection 2 of PSL Section 25 provides for penalties for violations of the Public Service Law or orders of the Commission. It, however, does not authorize statutory penalties for violations of DPS regulations, as that term is conspicuously absent from subdivision 2 of Section 25. In contrast to subsection 2 of PSL Section 25, subsection 3 of PSL Section 25 does authorize penalties for violations of the law, Commission orders *and regulations* but *only* for safety regulations and then *only* when and death or injury results from such a violation.

Given that the alleged violations of 16 NYCRR 255.625 claimed in the OTSC (related to Talisman's alleged improper failure to odorize its gathering system) did not result in either a death or injury, no penalty is authorized under subdivision 3 of PSL Section 25. This statutory interpretation is in full accord with an unpublished opinion of the State Supreme Court. *People v. Consolidated Edison Company of New York, Inc.*, (Sup. Ct, Albany County, Klein, J., March 11, 1983). The Commission is well-aware of this case and if the Commission was in disagreement with the holding therein, it was incumbent upon the Commission to seek redress from the appeals court or the Legislature. The Commission did not successfully pursue either option. The Commission cannot complain if it now lacks the power to seek penalties that the State Supreme Court had said are beyond its reach.

In all events, the penalties claimed in the OTSC do not lie against Talisman.

IV. TALISMAN'S ALTERNATE APPROACH TO ODORIZATION

In the previous sections, Talisman has demonstrated that there is no legal basis or authority to bring a penalty action for past practices and alleged violations, because, among other things, there are no "violations." Talisman acknowledges, however, that the disagreement on the merits of legal arguments that would require odorization or justify a penalty exist and that odorization, even in the setting of previously exempt gathering systems, is something the

Commission is moving towards from a policy perspective. Talisman believes, therefore, that this disagreement can be addressed more productively and practically by working with Talisman and the industry to develop a plan that recognizes the Commission's concerns, but similarly recognizes the operational and economic realities that would prevent Talisman (and other upstream producers) from odorizing its entire natural gas pipeline system.

To this end, on a prospective basis, Talisman will be proposing as an integral part of the OTSC process an alternative leak detection proposal that it will submit within a short time of the filing of this OTSC response. Although Talisman does not believe that the Department's regulations require odorization, the proposal will be designed to meet the waiver standard in Section 255.13, which recognizes that the Part 255 safety regulations are not designed to meet every contingency but requires that a proposed alternative be at least as safe as the procedures in the existing regulations in Part 255.

The Commission has ample authority to approve alternatives and has done so in the past. Upon the filing of the alternative proposal, the Company requests that it be permitted a full opportunity to demonstrate that its proposal fully satisfies the equivalent safety conditions that would otherwise govern if the Company was seeking a waiver under the regulation.

V. CONCLUSION

For the reasons expressed above, a penalty is neither warranted nor authorized. The regulations do not require odorization of gathering systems. Neither was an odorization requirement stated explicitly (or even obliquely) in the orders that Talisman is accused of violating. Indeed, the words "odorization" or odorize appear nowhere in those orders. Thus, the requirement that Talisman is accused of violating is too vague to support a penalty action. Furthermore, Talisman did not knowingly violate any requirement to odorize its gathering

system because a reasonable person would not have been aware that the Commission intended its orders to convey such a requirement, particularly in light of the fact that the Department's odorization regulation plainly applies to transmission and distribution lines and not to gathering lines. Even if the regulation were applicable to Talisman, violations of safety regulations do not warrant a penalty under PSL § 25 unless a death or injury results and no such condition exists Moreover, Talisman is a safe gathering system operator with an excellent safety record.

Notwithstanding the fact that no penalty is authorized, Talisman has always maintained a positive relationship with the Commission and the Company is desirous that the good relationship continue. For this reason, as a part of this response, Talisman will be submitting shortly an alternative proposal to full odorization of its system.

Consequently, the Commission should close the penalty proceeding without further action except as necessary to insure full consideration of the Company's forthcoming alternative proposal.

Respectfully submitted,

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