

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

CITY OF FLEMINGSBURG AND CITY OF	)	
FLEMINGSBURG UTILITY SYSTEM	)	
ALLEGED FAILURE TO COMPLY WITH	)	CASE NO.
KRS 278.495 AND 49 CFR PART 192.605(A);	)	2017-00079
49 CFR PART 192.751; 49 CFR PART	)	
199.105; AND 49 CFR 199.225	)	

ORDER

On March 6, 2017, the Commission initiated this proceeding and directed the city of Flemingsburg and Flemingsburg Utility System (collectively “Flemingsburg”), a city-owned municipal utility whose operations include a natural gas system, to show cause why it should not be subject to the penalties prescribed in KRS 278.992(1) for alleged violations of 49 C.F.R. § 192.605(a), 49 C.F.R. § 192.751(a), 49 C.F.R. § 199.105(b), and 49 C.F.R. § 199.225(a). The Commission initiated this case to conduct a formal investigation of a January 28, 2016 incident in which gas leaking from a pipeline ignited and caused injury to Flemingsburg employee Mike Brown.

In its March 6, 2017 Order, the Commission directed Flemingsburg to file a response to the allegations set forth therein within 20 days and scheduled a formal hearing for June 13, 2017. Flemingsburg, which failed to timely file a response to the Commission’s Order, filed its response on April 24, 2017, and moved for an enlargement of time in which to file its answer. The Commission subsequently granted the motion for an enlargement of time and accepted Flemingsburg’s response for filing.

On May 25, 2017, Commission Staff (“Staff”) filed its first request for information to Flemingsburg, in which Staff requested Flemingsburg to provide financial statements for the city and its utility system, and on June 1, 2017, Flemingsburg filed its response. A formal hearing was held on June 13, 2017, at which Flemingsburg appeared by counsel. Flemingsburg filed responses to post-hearing requests for information on July 7, 2017, and supplemented its responses on August 28, 2017. The matter now stands submitted to the Commission for a decision.

### JURISDICTION

Flemingsburg is a city that owns and operates natural gas facilities used for the distribution of natural gas at retail. The safety of Flemingsburg’s natural gas facilities is subject to the Commission’s jurisdiction under KRS 278.495(2). KRS 278.495(2) authorizes the Commission to enforce the minimum safety standards adopted by the United States Department of Transportation (“USDOT”) pursuant to 49 U.S.C. Section 60101, *et seq.*, or any amendments thereto. Any person who violates any minimum pipeline safety standard adopted by the USDOT or any regulation adopted by the Commission governing the safety of pipeline facilities is subject to a civil penalty as prescribed in KRS 278.992(1).

### DISCUSSION

On January 28, 2016, Flemingsburg reported to the Commission an incident that occurred when gas leaking from a plastic mechanical saddle on a service line, located at 5043/5040 Main Street, Mays Lick, Kentucky, ignited. Staff conducted an investigation of the incident and submitted to the Commission an Incident Investigation Report (“Report”). According to the Report, a copy of which is attached as an Appendix to the

Commission's March 6, 2017 Order, a Flemingsburg crew first excavated the leak area and tried to stop the leak by tightening the saddle. When this failed, the decision was made to install a new service-line tap and to temporarily install a clamp over the old service-line tap. Mark Brown was using an electric impact wrench to install the clamp when a spark from the operation of the wrench ignited the leaking gas, causing a flash and explosion. Mr. Brown sustained injuries from the blast and was hospitalized overnight.

Staff determined in its Report that Flemingsburg violated four sections of the Code of Federal Regulations. Staff found that Flemingsburg, in violation of 49 C.F.R. § 192.605(a), did not follow portions of its operations and maintenance manual ("O&M Manual"). Specifically, the Report alleges that Flemingsburg failed to follow page 7, section M-1, of this O&M Manual by failing to remove each ignition source when gas is being vented into the open air; using an internal combustion generator close to the excavation; and using an electric impact wrench to make repairs with leaking gas present.<sup>1</sup> The Report alleges that Flemingsburg also failed to follow page 3, section E-1, of its O&M Manual in that there were no records in the documentation provided to Staff that Flemingsburg pressure tested the replaced pipeline to substantiate the maximum allowable operating pressures ("MAOP").<sup>2</sup>

Staff further found that Flemingsburg, in violation of 49 C.F.R. § 192.751(a), did not remove potential ignition sources during the repair of the leak.<sup>3</sup> Finally, Staff found

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<sup>1</sup> Report, at 2.

<sup>2</sup> *Id.* at 2–3.

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

that Flemingsburg, in violation of 49 C.F.R. § 199.105(b), 49 C.F.R. § 199.225(a) and page 3 of its Drug and Alcohol Testing policy, failed to post-accident drug test and to post-accident alcohol test its employees involved in the incident.<sup>4</sup>

In its response to the Commission March 6, 2017 Order, Flemingsburg admitted the allegations contained in the Report.<sup>5</sup> Flemingsburg also requested that Joe Edward Dunaway, Jr., Flemingsburg's Superintendent, be permitted to testify at the June 13, 2017 hearing.<sup>6</sup>

At the formal hearing on June 13, 2017, four employees of Flemingsburg testified to the incident and actions taken after the incident. Of particular note, Mr. Dunaway stated that Flemingsburg, in its response, had admitted the four allegations contained in the Commission's March 6, 2017 Order, but that Flemingsburg should not have admitted to the portion of allegation number 1, regarding Flemingsburg's alleged failure to follow page 3, section E-1 of its O&M Manual by failing to pressure test the replaced pipe to substantiate the maximum allowable operating pressures ("MAOP").<sup>7</sup> Mr. Dunaway testified that its contractor had performed the required tests.<sup>8</sup> Mr. Dunaway specifically admitted that Flemingsburg had not removed potential ignition sources during the repair of the leak.<sup>9</sup> Mr. Dunaway also accepted responsibility for not requiring drug and alcohol

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<sup>4</sup> *Id.* at 3.

<sup>5</sup> Flemingsburg's Response to Order (filed Apr. 24, 2017) ("Response") at 2.

<sup>6</sup> *Id.*

<sup>7</sup> Video Transcript of Hearing ("H.V.T.") at 1:49:37.

<sup>8</sup> *Id.*

<sup>9</sup> HVT at 2:04:04.

testing of the employees working on the gas leak at the time of the incident.<sup>10</sup> Mr. Dunaway also testified to the measures that Flemingsburg had taken since the accident to avoid such incidents in the future. These steps included amending Flemingsburg O&M Manual,<sup>11</sup> implementing accidental ignition training,<sup>12</sup> and providing respirators and other protective equipment.<sup>13</sup>

In response to Staff's post-hearing requests for information, Flemingsburg stated that testing to substantiate the MAOP of the replaced section of pipe was conducted and documented.<sup>14</sup> Flemingsburg subsequently provided documentation of pressure testing of the replaced sections of pipe.<sup>15</sup>

#### FINDINGS

Based upon a review of the evidence of record and being otherwise sufficiently advised, the Commission finds that Flemingsburg violated the following minimum federal safety standards adopted by USDOT:

1. 49 C.F.R. § 192.605(a) – 49 C.F.R. § 192.605(a) requires each operator of a natural gas pipeline to prepare and follow a manual of written procedures for conducting operations and maintenance activities and for emergency response. The Commission finds that Flemingsburg violated 49 C.F.R. § 192.605(a) by failing to follow the

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<sup>10</sup> HVT at 2:04:46.

<sup>11</sup> HVT at 2:09:16

<sup>12</sup> HVT at 2:12:15

<sup>13</sup> HVT at 2:08.

<sup>14</sup> See Response of Flemingsburg to Commission Staff's Post-Hearing Request for Information (filed Jul. 7, 2017) at 6-7.

<sup>15</sup> *Id.* at Unnumbered Attachment at (unnumbered) at 64-67.

requirement in its O&M Manual, page 7, section M-1, to remove each ignition source when gas is being vented into the open air;

2. 49 C.F.R. § 192.751(a) – 49 C.F.R. § 192.751(a) provides that when a hazardous amount of gas is being vented into the open air, an operator of a natural gas pipeline must remove each potential source of ignition from the area. The Commission finds that Flemingsburg violated 49 C.F.R. § 192.751(a) by failing to remove potential ignition sources during the repair of the leak; and

3. 49 C.F.R. § 199.105(b) – 49 C.F.R. § 199.105(b) requires an operator of a natural gas pipeline to drug test each employee whose performance could have contributed to an accident within 32 hours after an accident. The Commission finds that Flemingsburg violated 49 C.F.R. § 199.105(b) by failing to post-accident drug test its employees involved in the incident; and

4. 49 C.F.R. § 199.225(a) – 49 C.F.R. § 199.225(a) requires each operator of a natural gas pipeline to test each employee whose performance could have contributed to an accident for alcohol as soon as practicable after an accident. The Commission finds that Flemingsburg violated 49 C.F.R. § 199.225(a) by failing to post-accident alcohol test its employees involved in the incident.

Based on documentation provided by Flemingsburg after the hearing, the Commission finds that Flemingsburg complied with the requirement in its O&M Manual to pressure test the replaced section of pipe. The Commission, therefore, finds that Flemingsburg did not violate 49 C.F.R. § 192.605(a) in connection with the pressure testing of the pipe.

Based on Flemingsburg's failure to comply with 49 C.F.R. § 192.605(a), 49 C.F.R. § 192.751(a), 49 C.F.R. § 199.105(b), and 49 C.F.R. § 199.225(a), the Commission finds that Flemingsburg is subject to a civil penalty under KRS 278.992(1). KRS 278.992(1) provides that any person who violates any minimum pipeline safety standard adopted by the USDOT shall be subject to a civil penalty in an amount not to exceed the maximum civil penalty set forth in 49 C.F.R § 190.223, as of December 31, 2011, for each violation for each day that the violation persists. As set forth in 49 C.F.R. § 190.223, as of December 31, 2011, the maximum civil penalty that can be assessed for the violation of a USDOT minimum safety standard is \$100,000 per violation per day, not to exceed \$1,000,000 for any related series of violations.<sup>16</sup> The Commission finds, in light of the overlap between Flemingsburg's O&M Manual, page 7, section M-1, and 49 C.F.R. § 192.751(a), that Flemingsburg should be assessed a penalty for three separate violations. The statutory maximum civil penalty for three violations of minimum pipeline safety standards is \$300,000.

In determining the amount of the penalty, KRS 278.992(1) directs the Commission to consider "the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after notification of the violation." The Commission also finds instructive and will consider, in assessing a penalty under KRS 278.992(1), the factors used by the Associate Administrator for Pipeline Safety, United States Pipeline and Hazardous Materials Safety

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<sup>16</sup> The Commission notes that 49 C.F.R. § 190.223 has been amended since December 31, 2011. However, pursuant to KRS 278.992(1), the maximum civil penalty is the amount contained in 49 C.F.R. § 190.223 as of December 31, 2011, and not the amount set forth in subsequent amendments of the federal regulation.

Administration, to determine the amount of a civil penalty for a violation of a federal pipeline safety standard:

- (a) The Associate Administrator will consider:
  - (1) The nature, circumstances and gravity of the violation, including adverse impact on the environment;
  - (2) The degree of the respondent's culpability;
  - (3) The respondent's history of prior offenses;
  - (4) Any good faith by the respondent in attempting to achieve compliance;
  - (5) The effect on the respondent's ability to continue in business; and
- (b) The Associate Administrator may consider:
  - (1) The economic benefit gained from violation, if readily ascertainable, without any reduction because of subsequent damages; and
  - (2) Such other matters as justice may require.<sup>17</sup>

In determining the amount of the penalties, the Commission is also mindful of the dual purpose of civil penalties. “While the fines imposed may be intended to punish [the violator], they are also designed to deter similar conduct in the future.” Fines are intended to deter further violations by both the fined party and others similarly situated.

The Commission also notes that the assessment of a civil penalty for violation of minimum pipeline safety standards is a matter vested in the sound discretion of the Commission. “The assessment of a penalty is particularly delegated to the administrative agency. Its choice of sanction is not to be overturned unless ‘it is unwarranted in law’ or

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<sup>17</sup> 49 C.F.R. § 190.225.

‘without justification in fact.’ The assessment is not a factual finding but the exercise of a discretionary grant of power.”

The Commission considers the gravity of the violation to be the most important mandatory penalty assessment consideration. In this case, the Commission finds that the gravity of the Flemingsburg crew’s use of an electric impact wrench and an internal combustion generator near the section of pipe leaking gas to be high. The actions of the crew were in blatant violation of section M-1 of Flemingsburg’s O&M Manual and of 49 C.F.R. § 192.751(a) and resulted in a serious injury requiring hospitalization.

The Commission finds the gravity of Flemingsburg’s failure to drug and alcohol test the members of its crew after the incident to be less serious because the failure to test was not a causal or contributing factor to the accident and minimally affected pipeline safety. The failure, however, was a clear violation of 49 C.F.R §§ 199.105(b) and 199.225(a) and prevents the Commission from determining whether employee impairment contributed to the accident.

The Commission acknowledges Flemingsburg undertook certain measures to reduce the likelihood of such an accident occurring again in the future. The Commission finds, however, that the measures are steps that any reasonable and prudent operator would take in response to such an egregious disregard of safety requirements, and do not by themselves warrant a reduction in the penalties given the gravity of the violation.

Based on the gravity of the violations, the Commission finds that a total civil penalty of \$60,000 is appropriate. However, the Commission further finds that the financial condition of the city’s utility system warrants a suspension of a portion of the penalty. Flemingsburg’s gas distribution system is relatively small with only 1,005 service

lines. According to Flemingsburg's audited financial statements, Flemingsburg's utility operations (gas, water, and wastewater) had a net loss of \$265,992 for the fiscal year ending June 30, 2016. Assessment of the full civil penalty could impair Flemingsburg's ability to provide adequate service to its ratepayers.

Having reviewed the record and considered the assessment criteria, the Commission finds that Flemingsburg should be assessed a total civil penalty in the amount of \$60,000 calculated as follows:

Violation of 49 C.F.R. §§ 192.605(a) and 192.751(a): \$50,000

Violation of 49 C.F.R. § 199.105(b): \$5,000

Violation of 49 C.F.R. § 199.225(a): \$5,000

Of this amount, the Commission finds that \$30,000 should be suspended on the condition that Flemingsburg conducts additional training on the requirement to remove all potential ignition sources when gas is being vented into the open air and conduct supervisor training on post-incident drug and alcohol testing. The Commission finds that Flemingsburg should conduct this training within three months of the date of this Order and certify in writing to the Commission that it has completed the training within 30 days of completion thereof.

IT IS THEREFORE ORDERED that:

1. Flemingsburg is assessed a penalty in the amount of \$60,000 for violation of 49 C.F.R. §§ 192.605(a), 192.751(a), 199.105(b), 199.225(a).

2. Flemingsburg shall pay \$30,000 of the assessed civil penalty within 30 days of the date of this Order by cashier's check or money order payable to the Kentucky State Treasurer, and mailed or delivered to the Office of the General Counsel, Kentucky Public

Service Commission, 211 Sower Boulevard, Post Office Box 615, Frankfort, Kentucky 40602. The remaining \$30,000 of the civil penalty shall be suspended on the condition that Flemingsburg complies with the ordering paragraphs 3, 4, and 5 of this Order within the timeframe allowed.

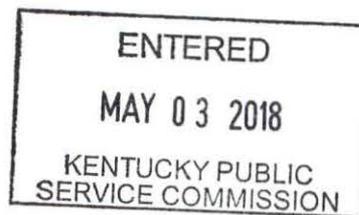
3. Within three months of the date of this Order, Flemingsburg shall provide, through a qualified third party, additional mandatory training to all employees who work on or near natural gas facilities on the requirement to remove each potential ignition source from any area where gas is being vented into the open air.

4. Within three months of the date of this Order, Flemingsburg shall provide, through a qualified third party, additional mandatory training to all supervisors of employees who work on or near natural gas facilities regarding the proper procedure for post-incident drug and alcohol testing.

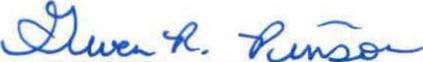
5. Within 30 days of completion of the training ordered in ordering paragraphs 3 and 4 of this Order, Flemingsburg shall certify to the Commission in writing that it has completed such training.

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By the Commission



ATTEST:

  
Executive Director

\*City of Flemingsburg Utilities  
140 W Electric Avenue  
P. O. Box 406  
Flemingsburg, KY 41041

\*City of Flemingsburg Utilities  
City of Flemingsburg Utilities  
140 W Electric Avenue  
P. O. Box 406  
Flemingsburg, KY 41041

\*Thomas MacDonald  
MacDonald, Walton & Razor, PLLC  
129 West Water Street  
Flemingsburg, KENTUCKY 41041

\*Kim Razor  
MacDonald, Walton & Razor, PLLC  
129 West Water Street  
Flemingsburg, KENTUCKY 41041