

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

TOM WEIS	)	
	)	
_____	)	CASE NO.
	)	2022-00169
ALLEGED VIOLATION OF UNDERGROUND	)	
FACILITY DAMAGE PREVENTION ACT	)	

ORDER

The Commission’s Division of Inspections (DOI) initiated this investigation against Tom Weis on June 17, 2022,<sup>1</sup> for an alleged violation of the Kentucky Underground Facility Damage Prevention Act (Act) codified at KRS 367.4901 through KRS 367.4917. DOI alleged that on October 29, 2020 at 4211 West Fifth Street Road, Owensboro, Kentucky 42301, Mr. Weis violated KRS 367.4911(1) of the Act by failing to request a locate ticket prior to his excavation at the property mentioned above.<sup>2</sup> DOI further alleged that Mr. Weis damaged a four-inch steel natural gas main causing release of natural gas while in the process of removing a tree at the edge of a slough with a trac-hoe.<sup>3</sup>

The Commission filed its proof of successful service upon Mr. Weis on July 26, 2022,<sup>4</sup> and July 28, 2022.<sup>5</sup>

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<sup>1</sup> Opening Order (Ky. PSC June 17, 2022).

<sup>2</sup> Opening Order (Ky. PSC June 17, 2022), Appendix A.

<sup>3</sup> Opening Order (Ky. PSC June 17, 2022), Appendix A.

<sup>4</sup> See Notice of Filing (Ky. PSC July 26, 2022).

<sup>5</sup> See Notice of Filing (Ky. PSC July 28, 2022).

A hearing was held before the Commission on July 29, 2022, at its offices at 211 Sower Boulevard, Frankfort, Kentucky, concerning the allegation that Mr. Weis violated KRS 367.4911(1). Mr. Weis appeared at the hearing and participated by video conferencing technology. At the conclusion of the hearing, DOI and Mr. Weis both requested that this matter be submitted for a decision by the Commission on the record.

### TESTIMONY

The Commission first heard the testimony of Ms. Linda Bridwell. Ms. Bridwell testified that as part of her official duties as Executive Director of the Commission, she maintains the records for the Commission.<sup>6</sup> Ms. Bridwell confirmed the accuracy and authenticity of DOI's report attached as an appendix to the Commission's June 17, 2022 Order.<sup>7</sup> DOI's report alleged that Mr. Weis violated KRS 367.4911(1)(a).<sup>8</sup> Further, DOI alleged that this was Mr. Weis's second violation of the Act, having been cited for another offense on January 25, 2020, in incident number 32396.<sup>9</sup>

The Commission next heard the testimony of Mr. James Stallins. Mr. Stallins is an employee of Atmos Energy (Atmos), the owner and operator of the gas main that Mr. Weis allegedly damaged.<sup>10</sup> Mr. Stallins testified that he was familiar with this particular

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<sup>6</sup> Hearing Video Transcript (HVT) of the July 29, 2022 Hearing at 10:01:35 a.m.

<sup>7</sup> HVT of the July 29, 2022 Hearing at 10:02:38 a.m.; see also Notice of Filing (Ky. PSC Aug. 24, 2022), DOI Hearing Exhibit 1.

<sup>8</sup> HVT of the July 29, 2022 Hearing at 10:03:40 a.m.

<sup>9</sup> HVT of the July 29, 2022 Hearing at 10:03:58 a.m.; Notice of Filing (Ky. PSC Aug. 24, 2022), DOI Hearing Exhibit 1.

<sup>10</sup> HVT of the July 29, 2022 Hearing at 10:05:25 a.m.

incident.<sup>11</sup> Mr. Stallins personally participated in this investigation.<sup>12</sup> Per Mr. Stallins, no locate ticket was requested, which would have been valid as of October 29, 2020, for the property where Atmos's gas main was damaged.<sup>13</sup> During his testimony, Mr. Stallins reviewed the photographs included in Attachment 3 of DOI's report and confirmed that the photographs depicted where the damage to Atmos's gas main occurred.<sup>14</sup> Mr. Stallins identified a permanent locate marker for Atmos's gas main in the last photograph included in DOI's report.<sup>15</sup> Mr. Stallins testified that the permanent locate marker pole was present when he arrived.<sup>16</sup> Mr. Stallins met with Mr. Weis and his son the day after the damage occurred at a nearby church.<sup>17</sup> Mr. Weis advised Mr. Stallins that he did not have a locate ticket,<sup>18</sup> even though he was aware of the law requiring a locate ticket prior to digging.<sup>19</sup> Mr. Stallins testified that gas was present in the underground facility (i.e., the gas main) and that gas was released.<sup>20</sup> The damage to the underground facility cost Atmos \$300,523.44.<sup>21</sup> As a result of the damage to the gas main, 650 Atmos customers lost gas

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<sup>11</sup> HVT of the July 29, 2022 Hearing at 10:05:40 a.m.

<sup>12</sup> HVT of the July 29, 2022 Hearing at 10:06:28 a.m.

<sup>13</sup> HVT of the July 29, 2022 Hearing at 10:06:33 a.m.

<sup>14</sup> HVT of the July 29, 2022 Hearing at 10:07:55 a.m.

<sup>15</sup> HVT of the July 29, 2022 Hearing at 10:08:15 a.m.

<sup>16</sup> HVT of the July 29, 2022 Hearing at 10:08:25 a.m.

<sup>17</sup> HVT of the July 29, 2022 Hearing at 10:08:45 a.m.

<sup>18</sup> HVT of the July 29, 2022 Hearing at 10:09:18 a.m.

<sup>19</sup> HVT of the July 29, 2022 Hearing at 10:09:28 a.m.

<sup>20</sup> HVT of the July 29, 2022 Hearing at 10:09:42 a.m.

<sup>21</sup> HVT of the July 29, 2022 Hearing at 10:10:30 a.m.

service.<sup>22</sup> During Chairman Chandler's questioning, Mr. Stallins acknowledged that it was an oversight on his part when he failed to mark on the gas excavation damage report form<sup>23</sup> that gas was present in the line or that gas had escaped.<sup>24</sup>

The Commission next heard the testimony of the Commission's assistant general counsel, Ms. Tina Frederick. Ms. Frederick provided guidance for the 811 program.<sup>25</sup> She also provided guidance for this particular incident.<sup>26</sup> Ms. Frederick testified that she had received documents from Mr. Tim Owens, an Atmos representative, regarding their procedures for locating lines that ran through standing water.<sup>27</sup> Atmos's policy is to send their locate ticket contractor out to mark lines just as in any locate ticket request, but if they are unable to locate lines, then it would be Atmos's responsibility to provide further investigation.<sup>28</sup> Atmos would not refuse to do a locate request that involved standing water.<sup>29</sup>

The Commission then heard the testimony of Mr. Weis. Mr. Weis testified that the incident involved in this case occurred on his son's property.<sup>30</sup> Mr. Weis conceded that he did not call 811 to request a locate ticket before he began excavation work on his son's

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<sup>22</sup> HVT of the July 29, 2022 Hearing at 10:11:30 a.m.

<sup>23</sup> Opening Order (Ky. PSC June 17, 2022), Appendix A, Attachment 1.

<sup>24</sup> HVT of the July 29, 2022 Hearing at 10:13:45 a.m.

<sup>25</sup> HVT of the July 29, 2022 Hearing at 10:18:08 a.m.

<sup>26</sup> HVT of the July 29, 2022 Hearing at 10:18:14 a.m.

<sup>27</sup> HVT of the July 29, 2022 Hearing at 10:18:55 a.m.

<sup>28</sup> HVT of the July 29, 2022 Hearing at 10:20:15 a.m.

<sup>29</sup> HVT of the July 29, 2022 Hearing at 10:20:38 a.m.

<sup>30</sup> HVT of the July 29, 2022 Hearing at 10:21:50 a.m.

property.<sup>31</sup> Mr. Weis explained that there were yellow flags on the other side of the road (the side with the permanent locate marker pole) and that is why he felt that he did not need to call 811.<sup>32</sup> Mr. Weis was aware that there was a gas facility in the vicinity of where he planned to remove the tree stump on his son's property.<sup>33</sup>

### LEGAL STANDARD

At the time of the incident in question, KRS 367.4911(1)(a) provided:

Each excavator, or person responsible for an excavation, planning excavation or demolition work shall, not less than two (2) full working days nor more than ten (10) full working days prior to commencing work, notify each affected operator of the excavator's intended work and work schedule. Contacting the applicable protection notification centers shall satisfy this requirement.

The 2020 versions of KRS 367.4917(1) and (4) also provided:

An excavator who fails to comply with any provision of KRS 367.4911, or an operator who fails to comply with any provision of KRS 367.4909, shall be guilty of endangering underground facilities and may be subject to a fine of two hundred and fifty dollars (\$250) for the first offense, no more than one thousand dollars (\$1,000) for the second offense within one (1) year, and no more than three thousand dollars (\$3,000) for the third and any subsequent offense.

...

Any person who violates any provision of the Underground Facility Damage Prevention Act of 1994, KRS 367.4901 to 367.4917, that involves damage to a facility containing any flammable, toxic, corrosive, or hazardous material or results in the release of any flammable, toxic, corrosive, or hazardous material shall be subject to a fine not to exceed one thousand dollars (\$1,000) for each offense. The penalties of this

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<sup>31</sup> HVT of the July 29, 2022 Hearing at 10:22:00 a.m.

<sup>32</sup> HVT of the July 29, 2022 Hearing at 10:22:50 a.m.

<sup>33</sup> HVT of the July 29, 2022 Hearing at 10:23:45 a.m.

subsection are not in conflict with and are in addition to civil damages for personal injury or property damage.

### DISCUSSION AND FINDINGS

The Commission first cautions owners and operators of underground facilities and their representatives to carefully review their underground facility damage reports submitted to the Commission. Here, Mr. Stallins conceded that he overlooked two important questions on the submission form:

- Was gas or hazardous liquids contained in the underground facility?
- Was gas or hazardous liquids released into the atmosphere?<sup>34</sup>

Neither of these questions were answered in the affirmative on the form. The Commission may only subject Mr. Weis to an additional civil penalty of \$1,000 pursuant to KRS 367.4917(4) if either of the preceding events occurred.

Atmos's narrative included the following statement: "Mr. Weis damaged a 4" steel natural gas main causing release of natural gas."<sup>35</sup> The evidence introduced at the hearing also supports the finding that natural gas was released into the atmosphere as a result of Mr. Weis damaging Atmos's gas main. Nevertheless, an owner and operator's initial submission report is the first, and most closely related in time, documentary evidence of damage to an underground facility. It is of the utmost importance that these forms accurately reflect the circumstances surrounding all damage to underground facilities.

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<sup>34</sup> Opening Order (Ky. PSC June 17, 2020), Appendix A, Attachment 1.

<sup>35</sup> Opening Order (Ky. PSC June 17, 2020), Appendix A, Attachment 1.

The facts here are not really in dispute. Mr. Weis testified that he did not call 811 before he removed the tree stump out of the pond on his son's property.<sup>36</sup> By his own admission, Mr. Weis violated KRS 367.4911(1)(a). Mr. Weis was also an "excavator" as defined in KRS 367.4903(6). Mr. Weis's actions caused significant damage, in excess of \$300,000, to Atmos's gas main. The Commission heard unrefuted testimony that natural gas was released into the atmosphere.

Mr. Weis's excavation work was not emergency work within the scope of KRS 367.4907 or the definition of "[e]mergency" as defined in KRS 367.4903(7), and no exception to the call requirement is applicable to this case.

Moreover, this is Mr. Weis's second violation of the Act, thereby increasing his potential civil penalty to an aggregate of \$2,000.

There is, however, one mitigating factor that would merit the imposition of a civil penalty less than the maximum provided by law. Mr. Weis testified that he was engaging in this work for personal reasons, to help his son by removing a tree stump from his son's property, rather than for commercial purposes. The Commission has previously reduced civil penalties for violations of the Act perpetrated by homeowners rather than commercial excavators.<sup>37</sup> While Mr. Weis was not the owner of the property where the underground facility was damaged, his son was the owner. Accordingly, the Commission finds that Mr. Weis's civil penalty should be reduced because he was engaging in excavation work for noncommercial purposes.

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<sup>36</sup> HVT of the July 29, 2022 Hearing at 10:22:00 a.m.

<sup>37</sup> See, e.g., Case No. 2021-00164, *In the Matter of: Robbie Puckett* (Ky. PSC June 23, 2021), Order at 2.

## CONCLUSIONS OF LAW

1. Mr. Weis violated KRS 367.4911(1)(a) by failing to contact all protection notification centers (i.e., calling 811) prior to beginning excavation work at 4211 West Fifth Street Road, Owensboro, Kentucky 42301, on October 29, 2020.

2. As a consequence of Mr. Weis's failure to contact 811, Mr. Weis damaged an underground facility containing natural gas that resulted in natural gas being released into the atmosphere.

3. KRS 367.4917(1) provides that an excavator who fails to comply with any provision of KRS 367.4911 shall be guilty of endangering underground facilities and may be subject to a fine of \$1,000 for the second offense.

4. KRS 367.4917(4) provides that any person who violates any provision of the Act that involves damage to a facility containing any flammable, toxic, corrosive, or hazardous material or results in the release of any flammable, toxic, corrosive, or hazardous material shall be subject to a fine not to exceed \$1,000 for each offense

5. Mr. Weis is subject to a civil penalty of \$2,000 for his violation of KRS 367.4911(1)(a) by operation of KRS 367.4917(1) and (4), subject to a reduction of \$1,000 because of Mr. Weis's violation of the Act occurred while he was doing noncommercial excavation on his son's property.

IT IS THEREFORE ORDERED that:

1. Mr. Weis is assessed a civil penalty of \$1,000 for his violation of KRS 367.4911(1)(a).

2. Within 30 days of the date of service of this Order, Mr. Weis shall pay \$1,000 by cashier's check or money order payable to the Kentucky State Treasurer. The



payment shall be mailed or hand delivered to the office of the Kentucky Public Service Commission at 211 Sower Boulevard, Frankfort, Kentucky 40602.

3. Record of payment of the civil penalty assessed in this Order shall be filed in the post-case correspondence file of this proceeding.

4. This case is closed and removed from the Commission's docket.

THIS IS A FINAL AND APPEALABLE ORDER OF THE PUBLIC SERVICE COMMISSION.

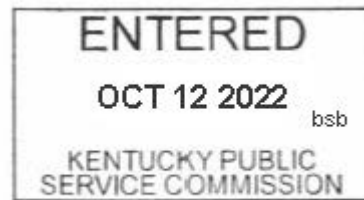
An application for a rehearing may be filed with the Commission within 20 days after service of this Order as provided by KRS 278.400. Any appeal of this Order must be filed with the Franklin Circuit Court within 30 days after service of this Order or within 20 days after an application for rehearing has been denied by failure of the Commission to act or, within 20 days after service of the final Order, as set out in KRS 278.410.

PUBLIC SERVICE COMMISSION

  
Chairman

\_\_\_\_\_  
Vice Chairman

  
Commissioner



ATTEST:

  
Executive Director

\*Tom Weis  
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