

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

| | | |
|----------------------------------|---|------------|
| KENTUCKY FRONTIER GAS, LLC |) | CASE NOS. |
| |) | 2019-00280 |
| _____ |) | 2019-00309 |
| |) | 2019-00314 |
| ALLEGED VIOLATION OF UNDERGROUND |) | 2019-00315 |
| FACILITY DAMAGE PREVENTION ACT |) | 2019-00316 |
| |) | 2019-00317 |
| |) | 2019-00318 |
| |) | 2019-00319 |
| |) | 2019-00320 |
| |) | 2019-00321 |
| |) | 2019-00322 |
| |) | 2019-00323 |
| |) | 2019-00324 |

ORDER

The above thirteen cases were initiated by the Commission's Division of Inspections as a result of alleged violations by Kentucky Frontier Gas LLC (Frontier) of the Underground Facility Damage Prevention Act [sometimes hereinafter referred to as the "Act"] set out in KRS 367.4901 through KRS 367.4917. Frontier has denied that it violated the Act in each case and has asserted that the facts and law support its position that each case should be dismissed. The incidents which gave rise to the allegations arose between October 6, 2018 and March 28, 2019. Frontier was cited for an alleged violation of the Act on a previous occasion and availed itself of the Division's penalty mitigation program for first time offenders by paying a \$250 penalty and causing at least one of its employees to attend on its behalf a two hour training program conducted by its staff at the Commission's offices in Frankfort. Penalty mitigation is available only to first time offenders and is therefore not available to Frontier in any of these cases.

JURISDICTION

The Commission has jurisdiction to regulate the safety of natural gas facilities in Kentucky and to enforce minimum federal pipeline safety standards pursuant to KRS 278.495(2) and KRS 278.992(1)¹ as well as to investigate and assess civil penalties for violations of the Act which relate to an underground facility used to transport natural gas or hazardous liquids subject to federal pipeline safety laws, as set out in 49 U.S.C. Sec. 60101, et.seq., by operation of KRS 367.4917(6). Penalties range from a low of \$250 for the first offense, no more than \$1,000 for the second offense committed within one year to a high of \$3,000 for the third and any subsequent offense. An additional penalty of \$1,000 may be assessed where the violation results in damage to an underground facility containing any flammable, toxic, corrosive, or hazardous material or results in the release of any flammable, toxic, corrosive, or hazardous material.²

PROCEDURAL HISTORY OF THESE CASES

Subsequent to the filing of the initiating orders Frontier was duly served with process and filed a statement with the Commission setting out its position and defenses.

¹ The Kentucky Public Service Commission is also vested with authority pursuant to KRS 278.992(1) to investigate and assess civil penalties for violations of federal pipeline safety regulations including the failure of an operator to provide temporary markings of buried pipelines in the area of excavation activity before the activity begins as required by 49 CFR Sec. 192.614(b) and (c). The maximum civil penalty per violation under federal regulations is \$209,002 for each day the violation continues up to a maximum of \$2,090,022 as set out in 49 CFR Sec. 190.223. The alleged violations which are the subject of these proceedings could have been brought pursuant to the Commission's jurisdiction over enforcement of federal pipeline safety laws and regulations but the Division of Inspections elected to pursue these actions under state statutes, the violations of which are subject to lesser civil penalty assessments.

² KRS 367.4917(4).

A formal conference was held on October 31, 2019 which led to the consolidation of all but two of the cases for purposes of the hearing. By orders entered on February 11 and 12, 2020 all of the cases were consolidated for purposes of entering a decision and final order on the merits. Stipulations of fact between the Division and Frontier served to divide the cases into four groups for a decision without the necessity of presenting evidentiary testimony. The two cases to which the stipulations also apply but which the parties determined would require sworn testimony because of the existence of alleged disputed issues of fact were 2019-00319 and 2019-00320.

A hearing was held at the offices of the Commission in Frankfort, Kentucky on November 8, 2019 after which the parties were provided a briefing schedule. All post hearing briefs have now been filed in the record and the cases stand submitted for a decision on the merits. The burden of proof is on the Division to establish that Frontier violated the Act and in cases where an enhanced civil penalty is sought pursuant to KRS 367.4917(4) to prove that the violation in each instance was a causative factor in excavation damage to a pipeline which contained flammable, toxic, corrosive, or hazardous material or resulted in the release thereof into the environment. The stipulations filed by the parties are set out below.

JOINT STIPULATION

The Commission's Division of Inspections (DOI) and Kentucky Frontier Gas, LLC (Frontier), make the following stipulations regarding common issues and facts.

Threshold legal issue (all cases)

What is the scope of an operator's duty under the Underground Facilities Damage Prevention Act to respond to a normal request to locate underground non-metallic pipe that lacks tracer wire? Specifically, does KRS 367.4909 or any other statute or DOT regulation require an operator to provide temporary markings (paint/flags) of the general location of a non-metallic pipeline that lacks tracer wire, or is it sufficient for the operator

to inform the excavator of the general location of underground facilities without marking?

Fact Stipulations and Defenses

1. The parties stipulate that in the following cases, (a) there was a valid, unexpired 811 locate request from the excavator, (b) the pipeline was non-metallic without tracer wire and (c) Frontier Gas did not provide temporary markings (paint/flags) of the location of its underground lines but provided the general location of the pipeline to the contractor on site when it responded to the locate request. Damage to the pipeline occurred during excavation by the contractor:

2019-00314
2019-00321
2019-00323
2019-00324

2. The parties stipulate that in the following cases, (a) the excavation damage to the underground line occurred more than 21 days after the locate request was made; (b) the pipeline was non-metallic without tracer wire and (c) Frontier Gas did not provide temporary markings (paint/flags) of the location of its underground line but provided the general location of the pipeline to the contractor on site when it responded to the locate request:

2019-00280
2019-00315
2019-00316
2019-00317
2019-00318
2019-00319

Frontier Gas asserts as a defense the fact that in each of the incidents, the excavation damage occurred after expiration of the dig ticket. **(Defense #1)**.

3. The parties stipulate that in the following case, (a) the excavation damage to the underground line occurred less than 2 days after the locate request was made, and (b) the pipeline was non-metallic without tracer wire; (c) Frontier Gas responded to the locate request before the excavation damage occurred and did not provide temporary markings (paint/flags) of the location of its underground line (d) Frontier Gas did not provide temporary markings (paint/flags) but provided the general location of the pipeline to the contractor on site when it responded to the locate request:

2019-00309

Frontier Gas asserts as a defense the fact that the excavation activity resulting in pipeline damage commenced less than 2 days after the locate request was made. **(Defense #2).**

4. The parties stipulate that in the following cases, (a) the excavator that damaged underground facilities was a subcontractor for the entity that made the locate request and did not submit its own locate request; (b) Frontier Gas did not provide temporary markings (paint/flags) of the location of its underground line when it received the locate request from the general contractor:

2019-00317 *
2019-00318 *
2019-00322

Frontier Gas asserts as a defense the fact that the entity that engaged in the excavation activity resulting in pipeline damage did not itself submit a locate request but was a subcontractor for the entity that submitted the request. **(Defense #3).**

* Case Nos. 2019-00317 and 2019-00318 involve both Defense #1 and Defense #3.

5. The following cases have unique factual situations that warrant a hearing:

2019-00319 (pipe cut)
2019-00320 (valid dig ticket, unmarked gas line)

DISCUSSION AND ANALYSIS

Threshold Legal Issue (All Cases): What is the scope of an operator's duty under the Act to respond to a normal request to locate underground non-metallic pipe that lacks tracer wire? Specifically, does KRS 367.4909 or any other statute or DOT regulation require an operator to provide temporary markings (paint/flags) of the general location of a non-metallic pipeline that lacks tracer wire or is it sufficient for the operator to inform the excavator of the general location of the underground facilities without marking?

The General Assembly enacted the Underground Facility Damage Prevention Act for the purpose of promoting..."public and workplace safety as well as the protection of consumer services by providing an effective underground damage prevention

procedure”.³ To achieve that goal the operator as defined by statute to be the entity or individual owning or operating underground facilities used to serve the public⁴ is required to respond to locate requests within two (2) working days after receiving notification⁵ from an excavator⁶ of its intended work and work schedule⁷ together with the excavation location as well as the address, the type and extent of excavation to be performed.⁸ KRS 367.4909(6) specifically establishes the response required by an operator upon receipt of a locate request. The operator must:

- (a) Inform the excavator of the approximate location and description of any of the operator’s facilities that may be damaged or pose a safety concern because of excavation or demolition;
- (b) Inform the excavator of any other information that would assist in locating and avoiding contact with or damage to underground facilities;
- (c) Unless permanent facility markers are provided, provide temporary markings to inform the excavator of the ownership and approximate location of the underground facility; and
- (d) Notify the requesting party if underground facilities are not in conflict with the excavation or demolition.

KRS 367.4909(9) states in detail the type and color of the required markers: “temporary underground facility markers shall consist of paint, chalk, flags, stakes or any combination thereof and shall conform to the following standards of the American Public Works

³ KRS 367.4901. The Act is contained in the statutory provisions beginning with KRS 367.4901 through KRS 367.4917.

⁴ KRS 367.4903(5).

⁵ KRS 367.4909(5)(a).

⁶ KRS 367.4903(4) defines an “Excavator” as meaning any entity or individual, other than those excepted by KRS 367.4915, engaged in excavation, demolition, or timber harvesting using mechanized equipment.

⁷ KRS 367.4911(1)(a).

⁸ KRS 367.4911(3)(c) and (d).

Association uniform color code: ...(c) Gas distribution and transmission: High visibility safety yellow”. An operator is excused from compliance with the two (2) working days requirement after receipt of notification, “if extraordinary circumstances exist such as extreme weather conditions, force majeure, disasters, or civil unrest make a timely response difficult or impossible.”⁹ In such cases the operator is required to notify the excavator.¹⁰

KRS 367.4909 applies to all facility locate requests and requires the marking of the approximate location of the operator’s underground facilities without respect to the type of facility or the material of which the facility is constructed.¹¹ The statutory scheme embodied in the Act is clear and unambiguous. Frontier’s position that it was unaware from reading the Act that it was required to mark its pipelines upon request by an excavator because there is no reference to line marking in KRS 367.4903(11)(b) is not credible.¹² When both statutes are considered together as parts of a single statutory

⁹ KRS 367.4909(10).

¹⁰ *Id.*

¹¹ An underground facility is defined by KRS 367.4903(1) as follows: “underground facility” means an underground line or system used for producing, storing, conveying, transmitting, or distributing telecommunication, electricity, gas, petroleum, petroleum products, cable television, hazardous liquids, water, steam, or sewage, including storm drainage.

¹² Although not cited for a violation of the applicable federal regulation, Frontier was and is required by 49 CFR 192.614(c)(5) to “Provide for temporary markings of buried pipelines in the area of excavation activity before, as far as practicable, the activity begins”. Frontier’s own Operations and Maintenance Manual acknowledges that it locate and mark existing underground pipelines. Its Operations and Maintenance Plan at Section 691- Pipe Locators states: “Utilities have the duty to accurately locate and mark existing underground pipes, cables and other underground facilities. Accurate line locating and marking is necessary to prevent damage during excavation, both by the gas utility and others digging nearby.” (Frontier’s response to staff’s initial request

scheme designed for the purpose of protecting the public, the marking requirement is obvious.¹³ The marking of underground natural gas pipelines by the operator is the single most important requirement of the Act. It is the operator who owns and is legally responsible for maintenance of its gas pipelines. It is the operator and only the operator who knows the actual or at least the approximate location of its own pipelines and it is the operator who is required by the Act to pass that information on to homeowners and other excavators by marking such approximate location on the ground before commencement of excavation activities. KRS 367.4909(6) (a), (b) and (c) require the operator to provide specific information about the underground facility to the excavator and to mark the approximate location as provided in KRS 367.4909(9). KRS 367.4903(11)(b) does not alter the duty to mark pipelines imposed by KRS 367.4909 but rather serves to define the meaning of “approximate location “ as it applies to the marking of non-metallic pipe without tracer wire to be “as accurately as possible”.

The operator is required by the Act to mark the approximate location of a non-metallic underground facility without tracer wire as accurately as possible in response to a locate request by an excavator. Communication by an operator to an excavator of

for information at page 38, filed in case 2019-0080. See also testimony of Mike Harris, Frontier’s operations supervisor at 11:03:49 A.M. through 11:10:56 A.M.)

¹³ KRS 446.080(1) provides that “all statutes for this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature, and the rule that statutes in derogation of the common law be strictly construed shall not apply to the statutes of this state”.; see Jefferson County Board of Education et.al. v. Fell, 391 SW3d 713, 718 (KY. 2012). To determine legislative intent a court or in this case an administrative agency looks first to the language, giving the words their plain and ordinary meaning, Pearce v. University of Louisville, et.al., 448 S.W.3d 746 (Ky. 2014) and must also look to the provisions of the whole statute and its object and policy, Active Chiropractic, Inc. v. Rudd, 556 S.W.3d 561 (Ky. 2018).

the approximate location of an underground facility other than by actual marking on the ground is a violation of KRS 367.4909(6) (c).

GROUP ONE CASES & STIPULATION

Group One – Cases 2019-00314; 2019-00321; 2019-00323; 2019-00324.

STIPULATION

The parties stipulate that in the above cases, (a) there was a valid, unexpired 811 locate request from the excavator, (b) the pipeline was non-metallic without tracer wire and (c) Frontier Gas did not provide temporary markings (paint/flags) of the location of its underground lines but provided the general location of the pipeline to the contractor on site when it responded to the locate request. Damage to the pipeline occurred during excavation by the contractor.

In the above cases Frontier failed to mark the approximate location of its pipelines as required by KRS 367.4909(6) (c) and such failure constitutes a violation of the Act which resulted in damage to the underground facilities which the Act was designed to prevent. Frontier argues that the Act is not enforceable in cases involving non-metallic pipelines without tracer wire because the definition of the term “approximate location” contained in KRS 367.4904(11) (b) is unconstitutionally vague and therefore void. Frontier’s argument is without merit.

The statute in question recognizes that location of non-metallic pipelines without tracer wire is more difficult than locating metallic pipe or non-metallic pipe with tracer wire and for that reason the operator is required to locate such lines “... as accurately as possible...”. The standard to which the operator is held under such circumstances requires a good faith attempt to reasonably locate and mark the approximate location of such pipelines and to notify the excavator that it is unable to provide an accurate location. The operator is not subject to the imposition of a civil penalty if it attempts to

mark and locate its non-metallic pipe without tracer wire as accurately as possible. Had Frontier complied with its statutory duty to provide markings the excavator would have been required by KRS 367.4911(10) to hand-dig or use nonintrusive means to avoid damage to the pipelines within the designated areas.¹⁴ If the markings were made in error and the pipelines were damaged as a result, the issue to be determined would be whether Frontier attempted to locate the pipelines as accurately as possible based on the information available to it. There is nothing vague or unclear about the standard of conduct to which the pipeline operator is to be held and the fact that it must make an estimate or best judgment as to the location does not implicate a denial of constitutional due process.¹⁵ As pointed out by Justice Scalia in *Johnson vs. United States*, 135 Sct 2551, (2015), “As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard ...to real world conduct; the law is full of instances where a man’s fate depends on him estimating rightly ... some matter of degree”.¹⁶ To paraphrase Kentucky’s highest court when it refused to declare the Consumer Protection Act unconstitutional on the basis that the words “false, misleading and deceptive” were unconstitutionally vague, the Commission is of the opinion that the words “as accurately as possible” are “generally well understood by those who want to understand them”.¹⁷

¹⁴ KRS 367.4911(10).

¹⁵ 16B Am. Jur. 2d. Constitutional Law Sec. 792.

¹⁶ *CF. Johnson v. United States*, 135 Sct. 2551 at 2561 (2015) citing *Nash v. United States*, 229 U.S. 373, 377 (1913).

¹⁷ *Dare To Be Great, Inc. v. Commonwealth*, 511 SW2d 224, 227 Ky. (1974).

In these cases Frontier made no attempt whatsoever to locate and mark its pipelines as required by the Act but rather asserts the untenable position that since it could not mark their exact location it was somehow absolved from making any attempt to do so. The Act is neither vague nor ambiguous. Having made no effort to locate by marking its own pipelines for the benefit of the excavators and the safety of their employees it cannot reasonably claim that it should be excused for obvious breaches of its statutory duty to do so.

GROUP TWO CASES & STIPULATION

Group Two – Cases 2019-00280; 2019-00315; 2019-00316; 2019-00317; 2019-00318; 2019-00319.

STIPULATION

The parties stipulate that in the above cases, (a) the excavation damage to the underground line occurred more than 21 days after the locate request was made; (b) the pipeline was non-metallic without tracer wire and (c) Frontier Gas did not provide temporary markings (paint/flags) of the location of its underground line but provided the general location of the pipeline to the contractor on site when it responded to the locate request.

Upon receipt of a normal excavation locate request an operator is required to respond within two working days¹⁸ by informing the excavator of the approximate location and description of any of its facilities that may be damaged or pose a safety concern because of excavation or demolition as well as any other information that would assist in locating and avoiding contact with or damage to them¹⁹ and unless permanent markers are in place provide temporary markers consisting of paint, chalk, flags, stakes,

¹⁸ KRS 367.4909(5)(a).

¹⁹ KRS 367.4909(6) (a) & (b).

or any combination thereof²⁰. A locate request is valid for twenty one calendar days from the day of the initial request²¹. Upon expiration of the twenty one calendar day period the locate request becomes ipso facto void and an excavator must make another locate request irrespective of whether the approximate location of the pipeline has or has not been marked. The commencement of excavation activities outside the twenty one calendar day period during which a locate request is valid is a violation of the Act by the excavator and subsequent pipeline damage in such instances is the responsibility of the excavator not the operator. Upon expiration of a locate request, no excavation or demolition is permitted by the Act and an operator's failure to mark or properly mark the approximate location of a pipeline for a prior locate request does not subject it to an enhanced civil penalty resulting from excavation damage to the pipeline under KRS 367.4917(4).

Frontier, is however subject to civil penalties for failing to mark the approximate location of its pipelines when requested to do so by the excavators. KRS 367.4917(1) provides for the assessment of civil penalties against an operator for failure to comply with any provision of KRS 367.4909. KRS 367.4909(6) (c) requires an operator to provide temporary markings to inform the excavator of the ownership and approximate location of its pipeline. Frontier failed to mark the locations of its pipelines when requested to do so and thereby committed statutory violations which subject it to civil penalties of up to \$3,000 per violation.

²⁰ KRS 367.4909(9) (c).

²¹ KRS 367.4911(2).

GROUP THREE CASE & STIPULATION

Group Three – Case 2019-00309.

STIPULATION

The parties stipulate that in the above case, (a) the excavation damage to the underground line occurred less than 2 days after the locate request was made, and (b) the pipeline was non-metallic without tracer wire; (c) Frontier Gas responded to the locate request before the excavation damage occurred and did not provide temporary markings (paint/flags) of the location of its underground line (d) Frontier Gas did not provide temporary markings (paint/flags) but provided the general location of the pipeline to the contractor on site when it responded to the locate request. Frontier Gas asserts as a defense the fact that the excavation activity resulting in pipeline damage commenced less than 2 days after the locate request was made. (Defense #2).

In case 2019-00309 Frontier responded to a normal excavation locate request within two working days after receiving notification by providing the general location of its pipeline but did not mark the approximate location as required by KRS 367.4909(6)(c) and (9). Within this two working day period and after Frontier's response, the excavator commenced operations which resulted in damage to the pipeline. Frontier asserts that it is absolved from the imposition of a civil penalty because the excavator commenced operations before the two working day period expired. The stipulation which provides the only facts upon which this case must be decided does not demonstrate that Frontier intended to return to the area to be excavated for the purpose of marking the approximate location of its pipeline. As with each of the thirteen cases presented, Frontier never attempted to mark its pipeline locations claiming that it had no duty to do so. It is this Commission's position and holding that the duty of an operator to mark the approximate location of its pipelines is absolute and that its failure to do so subjects it to civil penalties as prescribed by the Act.

Frontier made an ill informed decision not to mark the approximate location of any of its pipelines upon receipt of a locate request²². The stipulation entered into by Frontier does not indicate that it intended to return and mark the area of its pipeline. Frontier's position is simply that excavation should not have commenced until the entire two working day period had expired. Had Frontier provided testimony that it intended to return during the time remaining and provide markings or if its stipulated facts were susceptible to that interpretation this case might have been decided differently. Frontier's failure to provide markings and its lack of an expressed intent to do so within the two working day requirement constitutes a violation of KRS 367.4909(6)(c) and thereby subjects it to a penalty assessment.

GROUP FOUR CASES & STIPULATION

Group Four – Cases 2019-00317; 2019-00318; 2019-00322.

STIPULATION

The parties stipulate that in the above cases, (a) the excavator that damaged underground facilities was a subcontractor for the entity that made the locate request and did not submit its own locate request; (b) Frontier Gas did not provide temporary markings (paint/flags) of the location of its underground line when it received the locate request from the general contractor. Frontier Gas asserts as a defense the fact that the entity that engaged in the excavation activity resulting in pipeline damage did not itself submit a locate request but was a subcontractor for the entity that submitted the request. (Defense #3). Case Nos. 2019-00317 and 2019-00318 involve both Defense #1 and Defense #3.

²² Mike Harris, Frontier's operational supervisor testified that he believed that it was a safer practice to advise an excavator of the general location of a pipeline rather than provide markings of its approximate location. Harris' testimony at 10:55:37 A.M. et.seq. Mr. Harris testified that although Frontier's lines could possibly have been located within a 48 inch wide corridor no attempt was made to place markings at such locations on the ground. Harris' testimony at 11:03:27 A.M. to 11:20:24 A.M. and to 1124:41 A.M.

The cases which comprise Group Four contain identical facts to those presented in the cases previously considered to the extent that in each of these cases a locate request was made by a general contractor and Frontier failed to mark the approximate location of its pipelines as required by KRS 367.4909(6)(c). The excavation work in each case was performed by a subcontractor which did not submit its own separate and distinct locate request as required by KRS 367.4911(1)(a) and by subsection (4) of the same statute. Once again, Frontier seeks exoneration from a civil penalty assessment for its own statutory violations by asserting separate and distinct violations of the Act by an excavator. Conceding for the moment that the subcontractors were required, in addition to the general contractors, to make separate locate requests for the same work area as the general contractors and failed to do so, the fact remains that Frontier failed to mark its lines when requested to do so by the general contractors. The failure to mark its lines as requested, constitutes a violation of KRS 367.4909(6)(c). The fact that the subcontractors may be subjected to penalty assessments by reason of their failure to request that Frontier's pipelines be located and marked does not excuse Frontier from its failure to mark the approximate location of its pipelines when requested to do so by the general contractors.

GROUP FIVE CASES & STIPULATION

Group Five – Cases 2019-00319, 2019-00320.

The threshold stipulation applies to Group Five cases.

The following cases have unique factual situations that warrant a hearing: 2019-00319 (pipe cut); 2019-00320 (valid dig ticket, new installation).

A. Case No. 2019-00319 – Pipe Cut

In this case Jigsaw Enterprises, LLC (Jigsaw) contracted with the City of Wayland, Kentucky to construct a storm drainage system. This construction required excavation in an area where Frontier owned and operated a natural gas pipeline. Jigsaw submitted a locate request to which Frontier responded by providing the general location of its natural gas pipeline but did not provide temporary markings setting out the approximate location of the line. Subsequently, a subcontractor employed by Jigsaw exposed the pipeline without causing damage to it. For reasons neither explained in the testimony nor in any stipulation filed in the record, the subcontractor intentionally severed the line. Frontier maintains that since damage to the pipeline was the result of an intentional act by Jigsaw's subcontractor, Frontier should not be held responsible for failing to provide the temporary line location markers required by KRS 367.4909(6)(c).²³ According to Frontier, it should not be held responsible because the third party excavator willfully damaged its underground facility.²⁴ Frontier asserts that "there is no basis for imposing liability on Frontier for the failure of excavators to comply with the statute."²⁵ Frontier's argument of course must fail because a penalty assessment has not been levied as a result of damage caused by the excavator but rather because Frontier failed to mark the approximate location of its pipeline as required by the Act. The penalty statute, KRS 367.4917(1) expressly provides that "...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...".

²³ Frontier brief at page 20.

²⁴ Frontier brief at page 19.

²⁵ Frontier brief at page 20.

Frontier also asserts that the Act is unenforceable as to it because Frontier had not been given notice as to how the Public Service Commission would interpret the statute. The problem with Frontier's position is that the statute is clear and unambiguous and in no need of interpretation beyond what it plainly says. KRS 367.4909(6)(c) requires an operator to provide temporary markings depicting the approximate location of its pipelines upon request. Frontier failed to provide the required temporary markings and such failure subjects it to a civil penalty assessment by operation of KRS 367.4917(1).

B. Case No. 2019-00320 – Valid Dig Ticket & Unmarked Gas Line

On June 29, 2019 Mountain Water District (Mountain) requested a natural gas locate ticket prior to installing a water and sewer line to a double wide mobile home near Belfry, Pike County, Kentucky.²⁶ Frontier installed a natural gas service line to the same location but was unaware that another gas service line to a nearby home was in the path of the proposed Mountain excavation and neither marked the line nor advised of its general location.²⁷ On February 14, 2019 while conducting excavation activities necessary to install water and sewer service lines to its new customer, Mountain struck and damaged the Frontier natural gas service line which apparently served an adjoining residence. Frontier admitted that it was unaware of the existence of its own natural gas

²⁶ See locate ticket at Division of Inspection Exhibit 1 as well as testimony of Inspector John Gowins at 1:17:18 p.m. to 1:17:45 p.m.

²⁷ Doug Scalf testimony at 1:26:52 to 1:28:35 P.M. and 1:28:39 P.M. to 1:29:58 P.M.; and 1:30:56 P.M. to 1:31:34 P.M.; Mike Harris testimony at 1:33:30 P.M. to 1:33:48 P.M.

line and failed to mark it as required by KRS 367.4909(6) and (9).²⁸ In its brief, Frontier agreed that it failed to locate the line but offered as a defense "...the failure to locate is not an enforceable violation of the statute".²⁹

Frontier argues that it was previously unaware of how the Division of Inspections intended to enforce the Act and that since the statute is claimed to be ambiguous with respect to the marking of underground pipelines that enforcement as to it should be impermissible. This argument fails simply because the Act is clear and unambiguous. The statute requires that an operator's underground natural gas pipelines be marked in advance of excavation upon request.³⁰ The marking of underground metallic facilities and underground non metallic facilities with metallic tracer wire must not exceed the combined width of the underground facility plus 18 inches measured from the outer edge of each side of the underground facility³¹ and non metallic facilities without tracer wire shall be located as accurately as possible from field location records.³² As in each of the cases which are considered in this order, Frontier provided no temporary markings at all. In the present case, Frontier has admitted that it not only did not know the location of its natural gas service line but that it did not know the service line even

²⁸ *Id.*

²⁹ Frontier brief at page 20.

³⁰ KRS 367.4909(5), (6), and (9).

³¹ KRS 367.4903(11)(a).

³² KRS 367.4903(11)(b).

existed.³³ Frontier violated KRS 367.4909(6) and (9) by failing to mark the approximate location of its natural gas service line. Failure to provide temporary markings to inform the excavator of the ownership and approximate location of the underground facility including natural gas pipelines as required by the above statute triggers a penalty assessment authorized by KRS 367.4917(1)³⁴

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law as hereinafter set out are applicable to each of the thirteen cases consolidated for purpose of the hearing which was held on November 8, 2019 unless one or more of the cases are specifically identified by case number, in which case, the particular finding of fact or conclusion of law is to apply only to the case or cases specifically identified.

FINDINGS OF FACT

1. At all times relevant to these proceedings Frontier was the entity which owned and operated the underground natural gas pipelines used to serve the public and which were the subject of locate requests as described in the stipulations between the parties or in the testimony of witnesses at the hearing held on November 8, 2019.

2. As the entity which owned and operated the natural gas pipelines to serve the public, Frontier was an “Operator” as defined by KRS 367.4903(5).

³³ Scalf testimony at 1:39:30 PM to 1:39:36 PM. Harris testimony at 1:33:30 PM to 1:33:48 PM.

³⁴ “...an operator who fails to comply with any provision of 367.4909 shall be guilty of endangering underground facilities and may be subject to a fine of two hundred 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.

3. The Frontier underground natural gas pipelines which were the subject of 811 locate requests were “underground facilities” as defined by KRS 367.4903(1) and were used for conveying natural gas.

4. As to each of the thirteen cases referred to in this order, an excavator or person responsible for an excavation or planning excavation, not less than two (2) full working days no more than ten (10) full working days prior to commencing work notified Frontier of its intended work and work schedule by contacting the applicable protection notification center as required by KRS 367.4911.

5. On each occasion as described in the evidence or in the stipulations filed into the record by the parties, Frontier responded to the 811 locate request by providing general information as to the general location of its pipelines but did not provide temporary markings (paint/flags) of the approximate locations of the underground lines as required by KRS 367.4909(6) and KRS 367.4909(9).

6. On each occasion an 811 locate request was made, Frontier’s underground natural gas pipeline, with possibly one exception, was composed of non-metallic material without metallic tracer wire.

7. In some but not all of the cases there was a valid 811 locate request and damage to the pipelines occurred during excavation by a contractor or by a subcontractor and during the period of time that a valid unexpired 811 locate request was in effect. In other cases excavation damage occurred after a locate request had expired and in another, excavation damage occurred less than two days after the locate request was made but after Frontier responded to the request by providing information about the general location of the pipeline but did not provide temporary markings of the

approximate location of such line. In still a third group of cases excavation damage was caused by a subcontractor which did not make an 811 locate request but rather, the 811 locate request was made by the general contractor to which Frontier responded but did not provide temporary markings showing the approximate location of its pipelines. In two cases containing unique facts (2019-00319 – pipe cut and 2019-00318 valid dig ticket - unmarked gas line) 811 locate requests were responded to by Frontier but did not result in the placement of temporary markings to inform the excavator or a subcontractor excavator of the approximate location of the pipelines.

8. The term “approximate location” when referring to an underground natural gas pipeline which is non metallic without metallic tracer wire as set out in KRS 367.4903(11)(b) requires the operator to locate the pipeline as accurately as possible from field location records and to notify the excavator of its inability to accurately locate the pipeline.

9. The statutory scheme set out in the Underground Facility Damage Prevention Act requires the approximate location of such pipelines to be identified by temporary markings [KRS 367.4909(6)(c)] consisting of paint, chalk, flags, stakes or any combination thereof which conform to the American Public Works Association uniform color code [KRS 367.4909(9)].

10. In each of these consolidated cases an 811 locate request was made at some point in time and on each such occasion Frontier responded but never provided any temporary markings which purported to identify the approximate location of its pipelines as accurately as possible.

11. In some but not all of these consolidated cases there were statutory violations of one or more provisions of the Act by the excavator and in some instances damage to the underground pipelines occurred and such damages appear to have been the legal responsibility of the excavator. In each of these cases, however, Frontier itself violated the Underground Facility Damage Prevention Act by failing to provide temporary markings of the approximate location of its pipelines and in each case Frontier was cited for such violation. Frontier will not be assessed a civil penalty for a violation of the Act by an excavator.

12. The fact that one or more excavators may also have violated the Act and become responsible for the payment of fines and civil penalties neither exonerates Frontier from responsibility for its own inaction nor serves to mitigate its penalty assessments.

13. The Act is unambiguous and clearly defines the response required by an operator upon receipt of a locate request.

14. Frontier failed to mark the approximate location of any of its underground pipelines when requested to do so in each of these consolidated cases.

15. Frontier was cited for one violation of the Act prior to the incidents which formed the basis for the thirteen cases which are the subject matter of this consolidated action. In that prior case, Frontier paid a civil penalty of \$250.

16. For purposes of KRS 367.4917(1) Frontier's failure to locate and provide temporary markings of its pipeline in Case No. 2019-00280 shall be considered for the purpose of these consolidated actions to be its second offense for which it may be assessed a civil penalty of no more than \$1000.

17. Frontier is subject to a civil penalty not to exceed \$3,000 in each of the other twelve cases which are the subject matter of these consolidated actions.

18. While each of the natural gas pipelines damaged in the thirteen separate cases more than likely contained natural gas at the time such damage occurred, there is no evidence in the record, either by way of stipulation or testimony to support such a finding.³⁵ In the absence of sworn testimony or a stipulation, the commission cannot find a violation by Frontier of KRS 367.4917(4) which would otherwise provide a penalty enhancement of \$1,000 where a violation of the Act involves damage to a pipeline containing flammable, toxic, corrosive, or hazardous material or results in their release into the environment.³⁶

19. The penalty assessments for violations of the Act in these cases are as follows:

2019-00280 -- \$1,000

2019-00309 -- \$3,000

2019-00314 -- \$3,000

2019-00315 -- \$3,000

2019-00316 -- \$3,000

³⁵ The parties through counsel agreed on the record prior to the introduction of evidence that the facts upon which the cases would be decided were to be found solely in the stipulations and the testimony of witnesses. The agreement of the parties with respect to the stipulations and testimony is found at 9:10:53 A.M. to 9:11:15 A.M.

³⁶ Even if there had been a stipulation or testimony that natural gas was present in each of the damaged pipelines, Frontier would not appear to have been subject to an enhanced civil penalty under KRS 367.4917(4) for failure to mark its lines in either the Group Two Cases or Group Five – Pipe Cut case as its failure under the facts of those cases were not causally related to the damage sustained.

2019-00317 -- \$3,000

2019-00318 -- \$3,000

2019-00319 -- \$3,000

2019-00320 -- \$3,000

2019-00321 -- \$3,000

2019-00322 -- \$3,000

2019-00323 -- \$3,000

2019-00324 -- \$3,000

The total penalty assessment is \$37,000.

CONCLUSIONS OF LAW

Frontier's failure to locate its underground pipelines in each of these thirteen consolidated cases and provide temporary markings to inform the excavator of the ownership and approximate location of its pipelines in the manner required by KRS 367.4909(6) and (9) constitute separate and distinct violations of the Underground Facility Damage Prevention Act of 1994, as amended and subject Frontier to damage assessments provided by and consistent with KRS 367.4917(1).

Frontier is, by reason of its failure to comply with the applicable provisions of the Underground Facility Damage Prevention Act as hereinbefore set out subject to a maximum civil penalty of \$37,000.

IT IS THEREFORE ORDERED that:

1. Kentucky Frontier Gas, LLC be and it is hereby assessed a civil penalty of \$37,000 for its thirteen violations of KRS 367.4909(6) and (9).

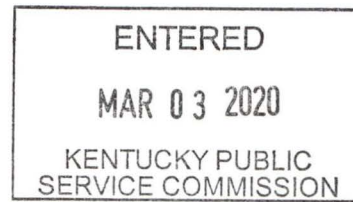
2. Kentucky Frontier Gas, LLC shall pay the sum of \$37,000 within 30 (thirty) days of the date of this order by cashier's check or money order payable to the Kentucky State Treasurer and mailed or delivered to the office of the Kentucky Public Service Commission at 211 Sower Boulevard, Frankfort, Kentucky 40602.

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.

By the Commission

Commissioner Talina Mathews did not participate in this case.



ATTEST:

A handwritten signature in blue ink, appearing to read "K. C. C.", written over a horizontal line.

Executive Director

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