COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

KENTUCKY FRONTIER GAS, LLC

Case No. 2019-00280

ALLEGED VIOLATION OF UNDERGROUND FACILITY DAMAGE PREVENTION ACT

KENTUCKY FRONTIER GAS, LLC

Case No. 2019-00309

ALLEGED VIOLATION OF UNDERGROUND FACILITY DAMAGE PREVENTION ACT

KENTUCKY FRONTIER GAS, LLC

Case No. 2019-00314

ALLEGED VIOLATION OF UNDERGROUND FACILITY DAMAGE PREVENTION ACT

KENTUCKY FRONTIER GAS, LLC

Case No. 2019-00315

ALLEGED VIOLATION OF UNDERGROUND FACILITY DAMAGE PREVENTION ACT

KENTUCKY FRONTIER GAS, LLC

Case No. 2019-00316

ALLEGED VIOLATION OF UNDERGROUND FACILITY DAMAGE PREVENTION ACT

KENTUCKY FRONTIER GAS, LLC

Case No.
2019-00317

ALLEGED VIOLATION OF UNDERGROUND
FACILITY DAMAGE PREVENTION ACT

KENTUCKY FRONTIER GAS, LLC

Case No.
2019-00318

ALLEGED VIOLATION OF UNDERGROUND
FACILITY DAMAGE PREVENTION ACT

KENTUCKY FRONTIER GAS, LLC

Case No.
2019-00319

ALLEGED VIOLATION OF UNDERGROUND
FACILITY DAMAGE PREVENTION ACT

KENTUCKY FRONTIER GAS, LLC

Case No.
2019-00320

ALLEGED VIOLATION OF UNDERGROUND
FACILITY DAMAGE PREVENTION ACT

KENTUCKY FRONTIER GAS, LLC

Case No.
2019-00321

ALLEGED VIOLATION OF UNDERGROUND
FACILITY DAMAGE PREVENTION ACT

KENTUCKY FRONTIER GAS, LLC

Case No.
2019-00322

ALLEGED VIOLATION OF UNDERGROUND
FACILITY DAMAGE PREVENTION ACT

KENTUCKY FRONTIER GAS, LLC

Case No.
2019-00323

ALLEGED VIOLATION OF UNDERGROUND
FACILITY DAMAGE PREVENTION ACT

KENTUCKY FRONTIER GAS, LLC

Case No.
2019-00324

ALLEGED VIOLATION OF UNDERGROUND
FACILITY DAMAGE PREVENTION ACT

Kentucky Frontier Gas, LLC Brief

I. Introduction

KRS 367.4901 established the "Underground Facility Damage Prevention Act of 1994 (Act) ", effective January 1, 1995. Until July 2018, the statute was enforced by state, county city and fire protection agencies. The Commission was granted enforcement authority for the Act effective July 2018. (KRS 367.4917(6). The authority of other agencies to enforce the Act is not eliminated but is preempted once the Commission initiates an enforcement action. The only other substantive change made to the Act requires operator notification to the Commission of pipeline damage due to excavation. (KRS 367.4909(4)).

The overriding issue in these cases is the requirement of an operator to "mark" unlocatable pipeline facilities. The "marking" provision of the Act did not change in July 2018. What apparently changed is the Commission's interpretation of the Act's requirements and the enforcement of that interpretation by the Commission.

II. Legal Issue

Frontier began operating as a regulated natural gas utility in 1998. Since the enactment of the Act until April 2019, there is no evidence that Frontier has been cited for any violation. [Frontier's first notice to the Commission of a violation was on November 7, 2018. It was not until April 26, 2019 that Frontier received a demand for remedial measures from the Commission for this incident. Frontier paid a fine and participated in training to resolve this matter. It is not included in the cases currently pending]. The first notice of any violation of the statute in the cases currently before the Commission was a letter dated May 14, 2019, citing a violation of KRS 367.4909(6)(a). Prior to the April 26 and May 14, 2019 letters KFG had no notice of the Commission's interpretation of any provision of the statute.

In compliance with the revised statute, Frontier notified the Commission on November 2, 2018 of pipeline damage due to excavation (Incident 21124). Frontier did not receive any response from the Commission about the incident until May 14, 2019. A letter of that date informed Frontier that it had violated KRS 367.4909(6). The letter states:

> Following receipt of the damage notification, Commission Staff (Staff) performed an investigation of the incident and prepared the attached incident report. Based on its investigation of the incident, Staff has determined that Kentucky Frontier Gas, LLC. committed the following violation(s) of the Act:
>
> KRS 367.4909 (4) Each operator shall report to the commission excavation damage to an underground facility used in the transportation of gas or hazardous liquid within thirty (30) calendar days of being informed of the damage. Each report of excavation damage shall be made by electronic mail or as otherwise prescribed by the commission.

> KRS 367.4909 (6) An operator shall, upon receiving an emergency locate request or a normal excavation locate request:
>
> (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;

It was not until May 14, 2019, 6 months after Frontier's first notice of excavation damage submitted to the Commission that it received a letter imposing a penalty for the alleged violation– Incident No. 21110, Case 2019-00280. In the interim, 12 more alleged violations occurred from November 2018 to April 2019. On July 31, 2019, Frontier received three letters alleging violations of the Act: Incident Number 31325, Case No. 2019-00317; Incident Number 31332, Case No. 2019-00318; and Incident Number 31384, Case No. 2019-00320. Each of these letters cited KRS 367.4909(6)(a) as the violation:

> KRS 367.4909 (6) An operator shall, upon receiving an emergency locate request or a normal excavation locate request:
>
> (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;

Frontier also received notices of additional violations dated the same date – July 31, 2019, which cited an additional statutory provision: Incident Number 21123, Case No. 2019-00309; Incident Number 21125, Case No. 2019-00314; Incident Number 21254, Case No. 2019-00315; Incident Number 21255, Case No. 2019-00316; Incident

Number 31348, Case No. 2019-00319; Incident Number 31465, Case No. 2019-00321; Incident Number 31468, Case No. 2019-00322; Incident Number 31516, Case No. 2019-00323; and Incident Number 31517, Case No. 2019-00324. Each of these letters cited a violation of KRS 367.4909(6)(a) and KRS 367.4909(6)(c):

> KRS 367.4909 (6) An operator shall, upon receiving an emergency locate request or a normal excavation locate request:
>
> (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;
>
> (c) An operator shall, upon receiving an emergency locate request or a normal locate request unless permanent facility markers are provided, provide temporary markings to inform the excavator of the ownership and approximate location of the underground facility.

On page 5 of its brief, DOI references 49 CFR §192.614(c)(5) and the requirements related to inclusion of marking locations as part of a damage prevention program. Frontier has not been charged with any violation of that statute or of any deficiency of its damage prevention program. As such, the reference is irrelevant to the case.

From the time of the first notice by Frontier to the Commission of damage to a pipeline facility on November 2, 2018, it was not until July 31, 2019 that Frontier was notified of a violation of KRS 367.4909(6)(c), which refers to marking pipeline locates. It received notices of violation in May of 2019 and three additional notices date July 31, 2019, none of which mentioned KRS 367.4909(6)(c). Only after receiving an additional ten letters dated July 31, 2019, was Frontier notified of a violation based in failure to

mark pipeline locates. No regulations or other information from the PSC stated its interpretation for enforcement of that requirement. The lack of notice of the change of interpretation and enforcement is problematic. Frontier had the right to know the requirements of the statute as interpreted by the Commission prior to being held in violation of the statute.

Making the issue even more confusing, when Frontier was notified of the initiation of formal proceedings to investigate the incidents and penalize Frontier, the orders contained different statutory violations. Case Nos. 2019-00280; Case No. 2019-00317; Case No. 2019-00318; and Case No. 2019-00320 refer only to a violation of KRS 367.4909(6)(a). Because these notices did not refer to a violation of "marking" of pipeline locates, Frontier had no reason to believe that its practice for locates was in violation of the statute.

Those orders were issued between September 9 and September 11, 2019. The testimony of Frontier's witness, Mike Harris is undisputed that Frontier was on site of each incident and informed the excavators of the approximate location of the pipeline in each incident. (Joint Stipulation) Failure to inform the excavator is the only violation alleged in Case Nos. 2019-280, 317, 318 and 320. Regardless of whether the area was marked, Frontier has not been charged with that violation in these cases. Those allegations should be dismissed for lack of evidence of a violation as stipulated.

From the period September 9 to September 11, 2019, Frontier also received orders in Case Nos. 2019-00309; 2019-00315; 2019-00316; 2019-00319; 2019-00321; 2019-00322; 2019-00323; and 2019-00324, all of which cited violations of KRS 367.4909(6)(a), but also included a reference to violation of KRS 367.4909(6)(c) – marking of locates.

As to the allegations of failure to mark the area of the pipeline, the interpretation and enforcement of that requirement has been inconsistent at best. Until the Commission began to require markings, operators had only prior experience with enforcement of the statute to rely on. From the enactment of the statute to the Commission's letters of July 31, 2019, there is no evidence Frontier was cited for failure to mark pipeline locates and no notice from the Commission of its interpretation that marking is required.

Even after the Commission's jurisdiction, the initial cited violations were not for lack of marking. Frontier's prior practices were presumably compliant with the statute and the enforcement agencies' interpretation of it, including the Commission. The practical construction of a statute by administrative officers over a long period of time is entitled to controlling weight. See Barnes v. Department of Revenue, Ky. App., 575 S.W.2d 169 (1978); also, Hagan v. Farris, Ky., 807 S.W.2d 488 (1991). The change in interpretation of the statute without notice is not enforceable:

> No deference is warranted to agency interpretation when the agency had failed to make public declaration of interpretation and had applied interpretation for only four years. Conn. Assn. of Not-for-Profit Providers for the Aging v. Dept. of Social Services, supra, at 390 n. 18, 709 A.2d 1116; *City of Hartford v. Hartford Municipal Employees Ass'n*, 259 Conn. 251, 788 A.2d 60, 69 (2002)

In these cases, the Commission's interpretation was implemented for only a few months. Had the PSC's interpretation of the marking requirement been asserted in the initial notices to Frontier, it could have modified its procedures and avoided the subsequent violations. As Mike Harris testified, after discussions with the Commission staff in July 2019 after receipt of the notices, Frontier began marking all pipeline locates. For pipeline that can be located electronically, the center line of the pipe is painted, with

implied accuracy of 18-inches either side. For unlocatable non-metallic pipe without tracer wire, an "approximate zone" is marked, usually 4-5 ft wide. Since discussions with staff in July, KFG has changed its practices, acquired additional locate equipment and participated actively in state- wide programs. (Response to PSC DR 1-12; Harris VT 13:35-39).

Regardless of the Commission's assertion that marking of locates in required by the statute, the area to be marked for non-metallic pipe without tracer wire is not specified in KRS 367.4903 (11):

> "Approximate location," when referring to an underground facility, means:(a) For underground metallic facilities and underground nonmetallic facilities with metallic tracer wire, a distance not to exceed the combined width of the underground facility plus eighteen (18) inches measured from the outer edge of each side of the underground facility; or
> (b) For nonmetallic facilities without metallic tracer wire, the underground facility shall be located as accurately as possible from field location records and shall require notification from the operator of the inability to accurately locate the facility;...
>
> 367.4909 (6)An operator shall, upon receiving an emergency locate request or a normal excavation locate request:(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
>
> 367.4911(10)When excavation or demolition is necessary within the approximate location of the underground facility, the excavator shall hand-dig or use nonintrusive means to avoid damage to the underground facility.

These statutes mandate specific marking only for pipelines with metallic tracer wire. Approximate location for untraced pipe only requires notification from the operator of the inability to accurately locate the facility. If the location cannot be accurately made, the operator must provide information to avoid damage to the pipeline. Marking is required to inform the excavator of the approximate location, but if the pipeline cannot be accurately located and the excavator is so notified, there is no area that can be marked and the statute does not require or specify any designated area to be marked. The pipeline operator must inform the excavator of information available to assist in avoiding damage to the pipeline. An unlocatable pipeline cannot be marked if the pipeline operator cannot accurately locate it.

While 18 inches is required for pipe with tracer wire, there is no standard specified for unlocatable pipe. Under current Commission enforcement, an operator has no statutory notice of the area to be marked or the actions to be taken to "locate as accurately as possible" the pipeline. Without a defined area to mark, the statute fails to identify the expected conduct. Currently, an operator cannot know the parameters for marking an unlocatable pipeline. The statute does not specify the area and the Commission has not enacted a regulation to define the area. By enforcing the marking of a statutorily undefined area, the Commission is imposing a standard of conduct not included in the statute. An administrative agency cannot add or subtract from the language used in a statute. Commonwealth v. Harrelson, 14 S.W.3d 541, 546 (Ky.2000). Because the statute does not define the area to be marked, it is unenforceable. In State Board for Elementary and Secondary Education v. Howard, 834 S.W.2d 657, 662 (Ky. 1992), the Kentucky Supreme Court stated:

> In reviewing the standard for vagueness, this Court and the United States Supreme Court have followed two general principles underlying the concept of vagueness. First, a statute is impermissibly vague if it does not place someone to whom it applies on actual notice as to what conduct is prohibited (*or in this case conduct that is alleged to be mandated*); and second, a statute is impermissibly vague if it is written in a manner that encourages arbitrary and discriminatory enforcement. (Comment added)

As Mike Harris testified, attempting to mark an unlocated pipeline can create more danger than simply informing the excavator of the approximate location. Marking an area indicates that the pipeline is within the marked area and allows the excavator to dig right up against that area without concern for damage to the pipeline. (Harris, VT 10:56).

However, if an approximate zone is described by the operator, the excavator must proceed cautiously within the described area. This is exactly what KRS 367.4911(10) anticipates. When the operator notifies the excavator of the approximate location and other information about the possible location of the pipeline, the excavator must hand dig the designated area. If the area is marked, there is no limit on the type of excavation, which increases the possibility of damage.

The statute is ambiguous as to what is to be marked and the parameters of the marking. Unlike the 18-inch mark specified for traceable pipe, there is no indication in the statute about the area to be marked for unlocatable pipe. Without any definition of the area to be marked, operators have no basis to determine the acceptable area for marking. Is 48 inches acceptable or 48 feet? Is just marking something within the general area of a suspected pipeline an allowable interpretation of the statute? Based on

rules of statutory interpretation, the Commission cannot add terms to the statute that are not included: "Further, we cannot add or subtract from the language used in a statute." Commonwealth v. Harrelson, 14 S.W.3d 541, 546 (Ky.2000). If a statute is ambiguous and susceptible to multiple interpretations or no interpretation, it is not enforceable.

> Constitutional infirmity only arises when, in the context of the particular conduct to which the statute or regulation is being applied, the statute or regulation is beyond comprehension. Essentially, the language of either the statute or regulation is so vague and indefinite as really to be no rule or standard at all or men of common intelligence must necessarily guess at its meaning and differ as to its application." . . . Emanat[ing] from the due process provisions of the United States and Kentucky Constitutions[,]"the void-for-vagueness doctrine targets the same ill as review of agency action: arbitrariness. Requiring a statute to provide " fair notice of prohibited conduct and contain reasonably clear guidelines[,]" thwarts " arbitrary and discriminatory enforcement." More specifically, " [a] statute is unconstitutionally vague if those individuals who are affected by it cannot reasonably understand what the statute requires." Curd v. Kentucky State Bd. of Licensure for Prof'l Eng'rs & Land Surveyors, 433 S.W.3d 291, 305 (2014).

Of course, a possible remedy for this statutory defect is the adoption of a regulation specifying the area to be marked. In Commonwealth, Dept. of Revenue, Finance and Administration Cabinet v. McDonald, 304 S.W.3d 62, 66 (2009), the Court said:

> [a]n administrative body shall not by internal policy, memorandum, or other form of action: (a) [m]odify a statute or administrative regulation; [or] (b) **[e]xpand upon** or limit a statute or administrative regulation...." KRS 13A.130(1). Any such action is " null, void, and unenforceable." KRS 13A.130(2). (Emphasis Added)

The Commission should adopt a regulation as provided in KRS 367.4917(7) and as KRS 13A mandates to define the parameters of the area to be marked in situations involving non-metallic pipe without tracer wire.

Only with such a regulation can operators and excavators know the area that must be marked and can be relied upon, under various circumstances involving unlocatable facilities. Without a regulation, each incident must be judged by the circumstances. Each situation could result in differing standards for marking. Such ad hoc determinations of violations are arbitrary and prohibited. Com. Transp. Cabinet Dept. of Vehicle Regulation v. Cornell, 796 S.W.2d 591,594 Ky App. (1990). See also:

> There is, however, an inherent preference for the fairness that attends agency policymaking through an exercise of the rulemaking power: "since an administrative agency has 'the ability to make new law prospectively through exercise of its rule-making powers, it has less reason [than a court] to rely upon ad hoc adjudication to formulate new standards of conduct.' " Therefore, "the 'function of filling in the interstices' of regulatory statutes 'should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.' " SEC v. Chenery Corp., 332 U.S. at 202, 67 S.Ct. at 1580; *Southwestern Bell Telephone Co. v. Public Utility Com'n of Texas*, 745 S.W.2d 918, fn. 3 (1988)

Case by case determinations of marking standards leads to lack of uniformity of enforcement. "Unequal enforcement of the law, if it rises to the level of a conscious violation of the principle of uniformity, is prohibited by this section." Kentucky Milk Marketing v. Kroger Company. 691 S.W.2d 893, 899 (Ky. 1985).

A regulation stating the area to be marked provides the only uniform standard for marking facilities. KRS 13A.100, KRS 13A.120 and KRS 13A.130, read together and in the context of the definition of "administrative regulation" contained in KRS 13A.010(2),

require the adoption of a regulation every time an agency desires to give legal effect to its issuance of any "statement of general applicability" or any "other form of action" that the agency intends to impact any group of individuals other than that agency's own personnel. Any attempt to modify or vitiate, limit or expand, any statute or administrative regulation, or to expand or limit a right guaranteed by any regulation, statute, or the state or federal Constitution using an internal policy, is void.

III. **Cases 2019-00280, 00315,00316,00317,00318, and 00319**

Cases 2019-00280, 00315, 00316, 00317, 00318, and 00319 involve damage to facilities after the expiration of the initial 21 day locate request. (Stipulation 2). There is no exception for a second 811 ticket after 21 days if operator fails to mark first request: "KRS 367.4911(2) Locate requests are valid for twenty-one (21) calendar days from the day of the initial request. . ." (8)The **excavator shall** contact the protection notification center to request remarking two (2) working days in advance of the expiration of each twenty-one (21) day period while excavation or demolition continues or if . . . "

The statute mandates a follow-up request for a locate once the 21 days has expired. There is no exception or waiver of the requirement if the operator failed to mark after the initial request. An argument has been made that if the marks were not made initially, it would be pointless to request a second marking. However, this overlooks the possibility that the initial failure was inadvertent or that new information has been discovered since the initial request which might allow a more accurate marking. In many of these cases, explicit and accurate pipe location information was given to the first excavator representative, then a different excavator showed up and damaged the pipe in

that exact spot. Regardless, if the damage occurred after the expiration of the initial 21-day period, the failure to mark could not be a factor in the cause of that damage.

Imposing a penalty based on failure to initially mark fails to consider that there is no time period in the statute for the second locate request. Once the initial 21 days has expired, the excavator could delay the project for an indefinite period, a month or 6 months or next year, without an additional notice to the operator. If damage occurs at that later date, the excavator, using the Commission's interpretation, could simply assert the failure of the operator to initially mark and escape any liability for failure to renew the notification. The necessity to renew the locate request within the time limits of the statute protect the operator from inaction by the excavator. The effect of this interpretation is to impose liability on the operator for the excavators' failure to comply with the statute. These cases are moot due to the lack of enforceability of KRS 367.4909(6)(c).

IV. **Case 2019-00309**

Case 2019-00309 involves excavation damage that occurred fewer than 2 days after the locate request was made. (Stipulation 3). KRS 367.4911 states:

> (1)(a)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. (Emphasis added).
> (b)An excavator may commence work before the two (2) full working days provided for in paragraph (a) of this subsection have elapsed if all affected operators have notified the person that the location of all the affected

> operators' facilities have been marked or that they have no facilities in the area of the proposed excavation, demolition, or timber harvesting.

The only exceptions in the statute that allows the excavator to begin work prior to the second day are listed in (b). None of those exceptions applies. Assessing a penalty to Frontier in this situation creates a power that is not expressed in the statute. Regardless of the actions of Frontier, the excavator violated the statute and has not been penalized. There is no authority to impose a penalty on Frontier for damage that occurred for failure to act prior to the statutory time limit. Regardless of Frontier's actions or lack of actions, the statute is explicit that the excavator cannot begin work prior to two working days. Penalizing Frontier ignores the statute and creates a penalty not contemplated by the statute. This case is moot due to the lack of enforceability of KRS 367.4909(6)(c).

V. Cases 2019-00317, 318, 322

Cases 2019-00317, 318, 322 involves damage to the pipeline by a sub-contractor, who did not obtain a locate request in its name. KRS 367.4911 states:

> (4) If more than one (1) excavator will operate at the same site, **each excavator shall notify** the protection notification centers individually. Notification by an excavator will serve as notification for any of that excavator's employees. Failure by an excavator to notify the protection notification center does not relieve individual employees of responsibility. (Emphasis added)

As with the prior cases, the statute makes no exception for sub-contractors failing to submit a locate request. Just as with the 21-day statutory limit, the violation is by the sub-contractor. The DOI on page 9 of its brief argues that a sub-contractor is the same as an employee of the contractor and is not required to request a separate locate request.

That argument makes KRS 367.4911(4) meaningless. If sub-contractors are the equivalent of an employee, the statute is unnecessary. The only reason for that section of the statute is to distinguish employees and sub-contractors. The DOI argument simply negates the meaning of the statute. See Kidd v. Board of Educ. of McCreary Cnty., 29 S.W.3d 374, 377 (Ky. App. 2000): "A fundamental principle of statutory interpretation is that the legislature intends the act to be effective as an entirety and that each part is entitled to significance and effect.... A statute must be construed so that no part of it is meaningless."

Frontier's actions do not exonerate the sub-contractor from liability. Failure of an operator to mark a request by the contractor does not presume that Frontier will fail to mark a request by the sub-contractor. For lines that were not precisely electronically locatable Frontier set up onsite meetings with the entity that submitted the 811 locate. Onsite, Frontier gave very specific line location information to the respondent, that a gas line was in this approximate 3-5 ft corridor. Frontier had no way of knowing that a subcontractor or different excavator would come to the jobsite weeks or months later, did not have any of the specific information given by Frontier to the first 811 respondent, then subsequently hit the gas line in exactly the location conveyed by Frontier. The subcontractor is required to have its own 811 ticket.

From the Commission's website psc.ky.gov/agencies/psc/industry/gas/FAQ]:

IF A CONTRACTOR DAMAGES A NATURAL GAS PIPELINE..., WHO IS SUBJECT TO ANY RESULTING PENALTIES: THE CONTRACTOR OR THE PERSON OR COMPANY THAT HIRED THEM?

> The Act places the responsibility for making the location request on the excavator.

The "excavator" in these cases is a subcontractor, legally separate from "the company that hired them", i.e. the general contractor. If somehow the subcontractor is deemed an "employee" through a contractual relationship between legal entities, the general contractor is obligated to pass along such information. The communication disconnect with the first respondent cannot be presumed to repeat weeks later with the person who will actually do the excavating. That presumption is not in the statute and cannot be imposed by the Commission. The Commission has not codified these interpretations into regulations, although KRS 367 provides that authority. These cases are moot due to the lack of enforceability of KRS 367.4909(6)(c).

VI. Case No. 2019-00319

Case No. 2019-00319 involves a natural gas pipeline that was cut by the contractor after the pipeline had been excavated and exposed. Definitions for KRS 367.4903 to 367.4917 states:

> (6)"Excavation" means any activity that results in the movement, placement, probing, boring, or removal of earth, rock, or other material in or on the ground by the use of any tools or equipment, by the discharge of explosives, or by the harvesting of timber using mechanized equipment. Forms of excavating include but are not limited to auguring, backfilling, digging, ditching, drilling, driving, grading, piling, pulling-in, ripping, scraping, trenching, and tunneling. Driving wooden stakes by use of hand tools to a depth of six (6) inches or less below existing grade shall not constitute excavation;

The evidence in this incident is uncontradicted that the excavator after successfully exposing a utility pipeline, intentionally cut through that pipeline with a saw without any notice to any utility operator. The excavator knew Frontier had facilities in

the area. It knew the pipeline was possibly a gas or water pipeline. The pipe was not damaged during excavation. Thus, the damage could not have been the result of lack of marking or lack of care by the excavator in exposing the pipe.

Damage to a pipeline is defined in KRS 367.4903(2) "Damage" means weakening of structural or lateral support or penetration of a facility coating, housing, or other protective device. It also means the partial or complete dislocation or severance of underground facilities or rendering any underground facility permanently inaccessible by the placement of a permanent structure having one (1) or more stories;"

None of the statutory meanings of damage occurred during excavation. There is no liability in this statute for purposeful actions of the pipeline operator or the excavator to damage the gas pipe subsequent to the excavation of the pipe. Rather than being the result of activity envisioned by these statutes, the damage is more like vandalism. It is the result of someone knowingly damaging a facility it knew or should have known was part of a utility facility. Despite that knowledge, the excavator, without any effort to determine the ownership or nature of the pipeline, simply cut it.

The statute does not contemplate post excavation destruction of visible facilities. Contrary to Staff's assertion, Frontier had no obligation to go back and re-locate or re-mark a line that was already exposed without another 811 request. There certainly is nothing in the statute that would impose a penalty on Frontier for the unanticipated actions of someone who had been notified of utility facilities in the area and who regardless of that notice nonetheless destroyed the facility after it had been successfully excavated. The damage to the pipe was unrelated to marking , locating or even excavating the facility.

As discussed above, in each of these cases where the Commission is interpreting the terms of the statutes without any regulation identifying the basis for the interpretation, Frontier has not been given notice of the Commission's policy or the specific statutory provision supporting the policy.

In Cases 2019-00280, 315, 316, 317, 318, and 319; Case 2019-00309; 317, 318, 322; and Case No. 2019-00319, the statue prescribes a precise standard for excavators to follow in requesting a pipeline request. The time period is explicit. The renewal requirement is explicit. The sub-contractor request requirement is explicit. The definition of excavation damage is explicit. There is no basis for imposing liability on Frontier for the failure of excavators to comply with the statute. There are no exceptions in the statutes for compliance by the excavator if Frontier fails to act. When the statute prescribes a precise procedure to be followed, the Commission cannot add to or modify those procedures. U.L.H.& P. v. Public Service Commission, KY, 271 S.W.2d 361 (1954).

VII. Case 2019-00320.

This involves damage to a gas service line by Mountain Water District. After reviewing the situation, Frontier agrees that it failed to locate a service line because it was unaware of its location in the general area Mountain was digging, however, the failure to locate is not an enforceable violation of the statute.

Conclusion

Incident No. 21110, Case 2019-00280; Incident Number 31325, Case No. 2019-00317; Incident Number 31332, Case No. 2019-00318; and Incident Number 31384, Case No. 2019-00320 cite only KRS 367.4909(6)(a) as the violation. That Frontier was on site of each of these incidents and informed the excavator of the approximate location of its facilities has been stipulated. No violation of the cited statute occurred and no penalty can be imposed.

Incident Number 21123, Case No. 2019-00309; Incident Number 21125, Case No. 2019-00314; Incident Number 21254, Case No. 2019-00315; Incident Number 21255, Case No. 2019-00316; Incident Number 31348, Case No. 2019-00319; Incident Number 31465, Case No. 2019-00321; Incident Number 31468, Case No. 2019-00322; Incident Number 31516, Case No. 2019-00323; and Incident Number 31517, Case No. 2019-00324, and Case 2019-00320 each cited a violation of KRS 367.4909(6)(a) and KRS 367.4909(6)(c). As with the prior cases, Frontier responded with an approximate location that was accurate and no violation of KRS 367.4909(a) occurred. Any alleged violation of KRS 367.4909(6)(c) is unenforceable as the statute is ambiguous and vague.

Cases 2019-00309, 317, 318 and 322 involving a subcontractor are clearly violations of KRS 367.4911(4) by the eventual excavator, in failing to get its own 811 ticket. However, the cases involving the timeliness of or lack of a valid 811 ticket are moot because there is no violation of KRS 367.4909(6)(a) and there is no enforceable violation of KRS 367.4909(6)(c).

Case 2019-00319 involves an act not covered by the statute and for which there is no penalty.

For these reasons, Frontier asserts the cases should be dismissed for lack of a violation of KRS367.4909(6)(a) and for lack of enforceability of KRS367.4909(6)(c).

In the alternative, any penalties that might be applicable should be mitigated or waived because of the inconsistent and delayed notices to Frontier of the marking requirements. Had Frontier been notified within a reasonable time after the first incident in November 2018 of the Commission's position on marking unlocatable facilities, it could have modified its practices to mark all locates within either an 18 inch or 48 inch parameter much sooner - as it did immediately after the meeting with staff in July 2019. Additionally, Frontier has invested in locating equipment and anticipates purchasing a hydro-vac trailer to further improve locate capability. Further, Frontier employees have taken a leading role in the Eastern Kentucky region for damage prevention and public awareness campaigns by the Commission and the other gas utilities, despite the fact that Frontier is one of the smaller entities.

Frontier has shown a willingness to work with the Commission in resolving these issues. Investing in improved equipment, personnel and training is a more effective use of limited funds than continual payment of penalties. The Commission's actions against Frontier have obviously had a noticeable effect on its compliance with the locate practices. Its good faith actions should be recognized with encouragement to proceed proactively.

In various news releases preceding the Commission's assumption of enforcement for 811 violations, all of which were sent directly to Frontier and discussed at numerous industry meetings, are several statements that seemed to set the tone for all involved parties:

> "The goal... is to reduce the unacceptably high number of dangerous dig-in incidents involving natural gas pipelines. The purpose... is *not to be punitive*, but to create a greater incentive for Kentuckians to familiarize themselves with [811 laws] and to abide by them." - Chairman Michael Schmitt.
>
> "Not every incident in which a gas line is hit will result in a violation being issued and a penalty assessed, especially if 811 has been called," said John Lyons, director of the PSC Division of Inspections.

From the Commission's FAQs:

> WHAT ARE MAXIMUM PENALTIES THAT CAN BE IMPOSED ON...OPERATORS?
>
> The maximum penalty for a first offense is $1,250. A second offense within a year carries a penalty of up to $2,000. Third and subsequent offenses carry penalties of up to $4,000.

This penalty structure seems to be based on the premise that, if an entity did not learn anything the first time, each subsequent penalty will be tougher and tougher until it learns. In the cases brought here by Frontier, the incidents occurred between October 2018 and March 2019. Yet, the first investigations did not occur until April 2019 and the first notices of penalties not until May 2019. The first order by DOI to Frontier that *every* locate request for *every* approximate area of *every* unlocatable line must be painted or marked was on July 1, 2019.

With a four to nine-month delay in interpretation and enforcement after these incidents, there was no possibility for Frontier to "learn anything the first time". After the first fine was given May 1 for $1250 (that was reduced to $250 by Frontier representatives going to "school"), another dozen fines came in rapid succession, all at the maximum $4000, all for incidents that happened months before notice of the principal complaint - marking unlocatable facilities – was provided. Most of these penalties are moot due to some fatal legal flaw; but *none* of them can be deemed second ($2000) or

third offenses ($4000), when there was no possibility for changing a procedure after the first incident.

Submitted by:

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