COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

SPRIGGS CONSTRUCTION LLC ALLEGED VIOLATION OF UNDERGROUND FACILITY DAMAGE PREVENTION ACT	)))	CASE NO. 2021-00083
SPRIGGS CONSTRUCTION LLC ALLEGED VIOLATION OF UNDERGROUND FACILITY DAMAGE PREVENTION ACT	)))	CASE NO. 2021-00084
SPRIGGS CONSTRUCTION LLC ALLEGED VIOLATION OF UNDERGROUND FACILITY DAMAGE PREVENTION ACT	)))	CASE NO. 2021-00302

NOTICE OF FILING

Notice is given to all parties that the Staff brief requested by the Commission has been filed into the record of this proceeding.

Linda C. Bridwell, PE
Executive Director
Public Service Commission
P.O. Box 615
Frankfort, KY 40602

DATED JAN 14 2022

cc: Parties of Record

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COMMISSION STAFF'S POST-HEARING BRIEF

In response to a request made by the Commission in the October 9, 2021 hearing in this matter, the Commission's Division of Inspections (DOI) submits this Post-Hearing Brief. The Commission has requested a brief that addresses certain issues regarding when an excavator is subject to penalties, pursuant to KRS 367.4917, for first and then subsequent violations of KRS 367.4911. Specifically, whether it is permissible under the Underground Facility Damage Prevention Act for an excavator to be liable for the enhanced penalties in KRS 367.4917(1) for multiple violations of KRS 367.4911 prior to a determination that the excavator initially violated KRS 367.4911.

BACKGROUND

Louisville Gas and Electric Company (LG&E) submitted a report of underground facilities damage to DOI alleging that on May 21, 2019, Spriggs Construction, LLC

(Spriggs) damaged a half-inch plastic [gas] service.[1] The investigation conducted by DOI indicates that a locate request for the scope of this excavation was submitted on May 2, 2019, by Spriggs.[2] The locate request was marked accurately and timely.[3] The markings were not maintained properly by the excavator and re-marking was not requested in accordance with KRS 367.4911(8)(a). DOI investigator John Gowins, attempted to contact Spriggs multiple times but no information was provided by Spriggs and no acknowledgment of responsibility by Spriggs. A demand letter for a first offense violation was sent March 17, 2020.[4] The penalty assessed by DOI for the violations was $1,250.[5] To date, the penalty has not been paid. Administrative Enforcement proceedings were opened by an Order issued on March 01, 2021 as case number 2021-00083.

LG&E submitted a report of underground facilities damage to DOI alleging that on May 30, 2019, Spriggs damaged a two-inch plastic gas main.[6] An investigation conducted by DOI indicates that a locate request for the scope of this excavation was submitted on May 26, 2019, by Spriggs.[7] The locate request was marked accurately and timely.[8] The markings were not maintained properly by the excavator and re-marking was not requested in accordance with KRS 367.4911(8)(a). DOI investigator John Gowins

[1] Investigation Report 31674

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Investigation Report 31694

[7] *Id.*

[8] *Id.*

attempted to contact Spriggs but it resulted in no information being provided by Spriggs and no acknowledgment of responsibility by Spriggs. A demand letter for a second offense violation was sent March 17, 2020.[9] The penalty assessed by DOI for the violations was $2,000.[10] To date, the penalty has not been paid. Administrative Enforcement proceedings were opened by an Order issued on March 1, 2021 as case number 2021-00084.

Atmos Energy Company (Atmos) submitted a report of underground facilities damage to DOI alleging that on November 21, 2019, Spriggs damaged a one and one-fourth inch steel service with a boring machine.[11] An investigation conducted by DOI indicates that Spriggs had two locate tickets for the scope of this excavation, but both had expired.[12] The previous locate requests were marked accurately and timely.[13] The markings were not maintained properly by the excavator and re-marking was not requested in accordance with KRS 367.4911(8)(a). DOI investigator John Gowins attempted to contact Spriggs, but it resulted in no information being provided by Spriggs and no acknowledgment of responsibility by Spriggs. A demand letter for a third offense violation was sent June 29, 2021.[14] The penalty assessed by DOI for the violations was $4,000.[15] To date, the penalty has not been paid. Administrative Enforcement

[9] *Id.*

[10] *Id.*

[11] Investigation Report 32271

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

proceedings were opened by an Order issued on July 21, 2021 as case number 2021-00302.

At the August 19, 2021 hearing, Spriggs was advised of their responsibility to acquire counsel if they intended to contest the violations. The case was reset for October 29, 2021. At the October hearing, Spriggs' representatives appeared but had failed to retain counsel. At that time, the Commission made the request for this brief.

DISCUSSION

The question presented by the Commission is whether it is permissible under the Underground Facility Damage Prevention Act for an excavator to be liable for the enhanced penalties in KRS 367.4917(1) for multiple violations of KRS 367.4911 prior to a determination that the excavator initially violated KRS 367.4911. This question is a one of statutory construction. The General Assembly passed House Bill 303 in the 2020 General Session, which included numerous changes to the Underground Facility Damage Prevention Act. The changes outlined in HB 303 took effect in January 2022. When determining if the Act allows for an excavator to be liable for the enhanced penalties under KRS 367.4917(1) for multiple violations prior to a hearing determination of liability, the plain language of the statute as well as the legislative intent behind the drafting must be examined

Plain Language

One of the major changes to the Act in HB 303 was the removal of the word "offense" from KRS 367.4917(1) and KRS 367.4917(4) and the addition of the term "violation." The General Assembly did not include a definition for the term "violation." The

Supreme Court has provided guidelines for statutory construction that have been codified in the Kentucky Revised Statutes[16].

Because the General Assembly did not provide a definition for "violation" when they enacted HB 303 during the 2021 session, the statute must be read from a plain language perspective. When construing a statute, the Supreme Court examines the language utilized by the legislature, relying on the common meaning of the particular words chosen, with reference to dictionary definitions.[17] Additionally, when a statute is amended and the language is changed, the assumption is that the language was intentionally changed for the purpose of effecting a change in the law itself.[18] This idea is further codified in KRS Section 446.080 section (1) and section (4) which states:

> 1) All statutes of 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 are to be strictly construed shall not apply to the statues of this state…
>
> 4) All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning.

The revision of the term "offense" to the term "violation" appears to be a clarification of terms in accordance with the obligation under KRS 446.080(4). Black's Law Dictionary provides the civil definition of "offense" as, "an intentional unlawful act that causes injury or loss to another and that gives rise to a claim for damages."[19] Black's Law Dictionary

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[16] KRS 446.080

[17] Kentucky Properties Holding LLC v. Sprout (Ky, 2016) 507 S.W.3d 563.

[18] City of Somerset v. Bell (KY. App. 2005) 156 S.W.3d 321.

[19] Black's Law Dictionary provides a criminal definition for violation, but the weight of culpability cannot accurately be compared with a civil violation. When revising the KRS 189A, the legislature made

defines the term “violation” as, “an infraction or breach of the law; a transgression. The act of breaking or dishonoring the law; the contravention of a right or duty.”

The definition of violation was expanded to include the term “continuing violation” which is defined as, “an unlawful act that occurs as part of a series of related or recurring unlawful acts over a period of time.” The definition states that “each act is treated as a separate violation.”

The inclusion of continuing violation in the definition makes it appear as though altering the terminology from offense to violation was intended simply to clarify that each violation should stand on its own in a subsequent manner. This indicates that DOI’s prior use of subsequent penalties based on the use of “offense” in the statute was a correct interpretation of the legislative intent.

Additionally, looking at the phrase in the definition of violation of “over a period of time” brings attention to an additional change that occurred under House Bill 303, the implementation of a reset period. The change imposes a particular time frame for which a reset will occur regarding subsequent violations. KRS 367.4917 (1) now states that, “a violation shall be considered a first violation under this subsection if more than three hundred sixty-five (365) days have elapsed since the last incident attributable to a person in violation of KRS 367.4909 or 367.4911.”

Reading this statute with the “continuing violation” definition in mind indicates that each incident of damage should count as a separate violation subsequently for a 365-day

clear that prior convictions are counted in the assessment of subsequent penalties. This application supports our conclusion that subsequent penalties are applicable because a plea must be entered on each DUI count consecutively allowing for conviction prior to enhance the penalty even when multiple DUI offenses are pled to at the say time. The legislature has revised KRS 189A to eliminate the option of amending subsequent DUIs to lesser offenses as well as removing any option regarding mitigation of sentences in these cases.

period. Once 365 days have elapsed from the last incident of damage for a particular party, that party will be granted a reset and the count against that party will start over.

Legislative Intent

Applying plain language, and reading the Act as a whole, it appears that the intent of the legislatures for each incident of damage to constitute a violation and also be counted in subsequent order. Each subsequent violation would then receive the enhanced penalty outlined in KRS 367.4917(1). Otherwise, counting each violation on its own, would be counting the violations in a concurrent manner until adjudication.

The counting of violations prior to hearing in no way strips the party of their due process rights. A party found to be in violation of the Act is given numerous options under DOI's current procedure. The party is given the opportunity to provide evidence, discuss the violation, and have a hearing in front of the Commission to dispute the violation. If found to not be the responsible party, the violation number is amended.

Historically, DOI has assessed penalties on a per damage basis to an underground facility without consideration to the actual number of violations of the Act that DOI finds attributable to a given party. It has been the practice of DOI to assess only one penalty to a party per incident, not per individual violation. This determination was based on the previous version of KRS 367.4917(4) which stated:

> Any person who violates any provision of the Underground Facility Damage Prevention Act of 1994, 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 offence. The penalties of this subsection are not in conflict with and are in addition to civil damages for personal injury or property damage.

The revision to the statute contains a direct reference to the idea of multiple violations. The new version of the statute states, "…shall be subject to a civil penalty, in addition to the civil penalty in subsection (1) of this section, not to exceed one thousand dollars ($1,000) for each **violation**." As previously stated in other staff briefs, DOI has traditionally interpreted "offense" to reference the incident of damage to a facility which initiated an investigation before the $1,000 penalty could be imposed, not on a per violation basis as multiple violations may occur on any given incident. The interpretation of violation per investigated incident allows for a clear consecutive counting for the party.

Additionally, KRS 367.4917(1) states that any excavator who fails to comply with any provision of KRS 367.4911, or any operator who fails to comply with any provision of KRS 367.4909 may be subject to fines ranging from $250 for a first offense, to $3,000 for a third and any subsequent offence.[20] DOI interprets this provision to require damage to occur, but not adjudication, before a fine can be imposed, even though that is not expressly stated. Historically, this was as a result of the use of the word "offense" instead of "violation" and due, in part, to the fact that the amount of the fine increased with each additional violation. DOI determined that a correct interpretation of these provisions, when read together, was that fines were to be imposed per incident of damage as one overall violation of the Act triggering investigation.

These cases were three separate incidents of damage reported to the Commission involving Spriggs. Each of the three underground facilities that were damaged contained natural gas. Therefore, the violations should be counted consecutively.

Procedural

[20] KRS 367.4917(1)

DOI agrees that the best procedure would be for each case to be adjudicated before a subsequent violation was charged. However, there is no feasible way to make that a reality given the pace at which the cases come in, the inability to get cooperation on the resolution of cases from excavators, and the significant backlog facing DOI currently.

Our procedure provides the opportunity to contest, request a hearing, and comply with procedure to avoid subsequent violations being pursued without due process. Here Spriggs has not complied.

KRS 367.4917(5)(c) states:

> Failure to comply with the provisions of the Underground Facility Damage Prevention Act of 1994, KRS 367.4901 to 367.4917, may be determined at the conclusion of an investigation and shall be based on evidence available to state county, or city officials, law enforcement, or fire protection agencies which issue the citation.

DOI investigates an alleged incident of damage when the operator provides the initial report. It is not until the investigation is completed that a demand letter goes out with a penalty amount. During the investigation process, DOI investigators are reaching out to the parties to seek additional information regarding responsibility for the damage. It is up to the excavator to provide evidence regarding the damage. Many times, excavators take responsibility for the damage right away and do not wish to have an adjudication. Requiring adjudication would be detrimental to the procedure and inflate the backlog to unmanageable levels. Currently DOI needs more investigators. Requiring adjudication on every case prior to allowing for subsequent violation would be catastrophic.

Had Spriggs cooperated during the investigation portion of any of their cases, DOI may have calculated differently regarding the count of violations. Spriggs has never

provided any information on any of the three incidents of damage. Based on the information provided by the Operators in each case, DOI determined that Spriggs was liable for each incident of damage and should be assessed a first, second, and third violation penalty.

CONCLUSION

Spriggs was excavating on May 21, 2019, May 30, 2019, and November 21, 2019, at three separate locations, and damaged three separate underground facilities. Two facilities were operated by LG&E and one facility was operated by Atmos. The underground facilities that were damaged contained natural gas at the time of damage. Spriggs held valid locate tickets for the locations of the LG&E damage at the time of the damage but failed to maintain the markings or request remarking as required by KRS 367.4911 (8)(a). Spriggs did not hold a valid locate ticket for the location of the Atmos damage. Additionally, Spriggs has provided no information regarding the damage and has not hired counsel to represent them at the previous two hearings they have attended. At the time of the third incident of damage, Spriggs had not taken the appropriate steps to resolve the previous two incidents of damage.

Respectfully submitted
/S/ Jessica D. Norris Canfield
Jessica D. Norris Canfield
Staff Attorney
Office of General Counsel
Public Service Commission
P.O. Box 615
Frankfort, KY 40602

DATED JAN 14 2022

cc: Parties of Record

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by U.S. mail this the 14th day of January 2022 to the following:

Respectfully submitted
/S/ Jessica D. Norris Canfield
Jessica D. Norris Canfield
Staff Attorney
Office of General Counsel
Public Service Commission
P.O. Box 615
Frankfort, KY 40602

Spriggs Construction, LLC.

*Spriggs Construction LLC
6130 Hwy 70 N
Crossville, TENNESSEE 38571