

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

MOODY EXCAVATING LLC

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ALLEGED VIOLATION OF UNDERGROUND  
FACILITY DAMAGE PREVENTION ACT

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CASE NO.  
2021-00256

NOTICE OF FILING

Notice is given to all parties that the Commission's Division of Inspection's Brief has been filed into the record of this proceeding.



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Linda C. Bridwell, PE  
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DATED   AUG 26 2021  

cc: Parties of Record

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COMMISSION STAFF’S POST-HEARING BRIEF

In response to a request made by the Commission during the August 19, 2021 hearing in this matter, the Commission’s Division of Inspections (DOI) submits this Post-Hearing Brief. DOI has been asked whether the statutory violations that were cited in the Investigation Report for Damage Incident number 32150<sup>1</sup> are mutually exclusive, or if it is possible for an excavator to violate both statutory provisions simultaneously.

Background

Columbia Gas of Kentucky, Inc. (Columbia Kentucky) submitted a report of underground facilities damage to DOI alleging that on September 23, 2019, Moody Excavating LLC (Moody) damaged a one-inch gas service.<sup>2</sup> Investigation conducted by DOI indicates that a locate request for the scope of this excavation was submitted on

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<sup>1</sup> Opening Order, (Ky. PSC June 24, 2021) Appendix, Investigation Report.

<sup>2</sup> *Id.*

August 26, 2019, by Economy Home Improvement (EHI).<sup>3</sup> Moody did not obtain a locate request connected with this excavation.<sup>4</sup>

Tom Moody, owner of Moody, explained to DOI that he considered himself to be an hourly worker for EHI. EHI's owner, John Book, provided DOI with invoices for work performed by Moody and represented to DOI that no W-2's were given to Tom Moody in connection with the work that resulted in the damage. EHI maintained it considered Moody to be a subcontractor, not an hourly employee. DOI agrees that the submission of invoices for work performed is consistent with a subcontractor arrangement, not an arrangement for hourly employment. The first item on an invoice from Moody dated September 23, 2019, and billed to "EHI John Book Job" says, "Dig drain line and backfill, hit gas line (no charge)."<sup>5</sup> The invoice is signed by "Tom Moody."<sup>6</sup>

The circumstances and the evidence supplied by EHI indicate that Moody was working as a subcontractor for EHI, not as an hourly employee of EHI. Therefore, DOI found that Moody violated two provisions of the Underground Facilities Damage Prevention Act of 1994<sup>7</sup> (the Act), KRS 367.4911(1)(a) and KRS 367.4911(2)<sup>8</sup>. KRS 367.4911(1)(a) requires each excavator, or person responsible for excavation, planning excavation, or demolition work to notify each affected operator of the excavator's intended work and work schedule at least two full working days, and no more than 10 working days

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

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

<sup>5</sup> *Id.*, Attachment 2.

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

<sup>7</sup> KRS 367.4901 through KRS 367.4917.

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

prior to commencing work. KRS 367.4911(2) states that locate requests are valid for 21 calendar days from the day of the initial request.

The penalty assessed by DOI for the violations was \$1,250. This is because DOI historically does not assess penalties per violation of the Act. DOI assesses penalties per damage to an underground facility. It is possible, and indeed very common for DOI to determine that the facts surrounding a particular damage incident involve more than one violation of the Act. Regardless of the number of violations of the Act that DOI finds attributable to a given party in an incident of underground facility damage, the practice of DOI has been to assess only one penalty to a particular party for any incident of damage. This is because KRS 367.4917(4) states:

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.

DOI has traditionally interpreted “offense” to reference the damage to a facility that must occur before the \$1,000 fine can be imposed, not the actual violation of the Act.

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. This provision appears to DOI to require damage to occur before a fine can be imposed, even though that is not expressly stated. This is due to the use of the word “offense” and due to the fact that the amount of the fine

increases with each additional violation.<sup>9</sup> DOI determined a correct interpretation of these provisions, when read together, was that fines were to be imposed per damage or “offense” not per violation of the Act.

Thus, regardless of whether Moody violated KRS 367.4911(1)(a) or KRS 367.4911(2), or both of those provision, the penalty assessed by DOI would be the same, \$1,250. This incident of damage was the first incident reported to the Commission involving Moody. The underground facility that was damaged contained natural gas. Therefore, the \$250 dollar penalty under KRS 367.4917(1) and the \$1,000 penalty under KRS 367.4917(4) were assessed.

#### Discussion

DOI agrees that the best practice is for each excavator to always submit its own locate request. However, there is one circumstance in which a locate request can be submitted by one individual or entity, and the actual excavation work can be done by a second individual or entity, without violating any provision of the Act. KRS 367.4911(4) states:

If more than one 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.

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<sup>9</sup> The General Assembly passed House Bill 303 in the 2020 General Session. Among other things, that bill removes the word “offense” from KRS 367.4917(1) and KRS 367.4917(4) and replaces it with “violation.” The Act does not define “violation.” Therefore, DOI is evaluating how to interpret and enforce these provisions when House Bill 303 goes into effect on January 1, 2022.

Therefore, a general contractor, engineer, or homeowner planning excavation can submit a locate request, and then engage the services of a subcontractor to do the actual excavation work, if that subcontractor is the only excavator on site for the duration of the locate request. Providing the general contractor, engineer, or homeowner planning the excavation and obtaining the locate request does not perform any actual excavation, and only one subcontractor conducts excavation at the site, the locate request obtained by the general contractor, engineer, or homeowner is valid for the subcontractor.

Here, a locate request was obtained by EHI on August 26, 2019.<sup>10</sup> That locate request was valid for 21 calendar days, meaning it expired on September 16, 2019, and had been expired for seven days at the time the damage to the facility occurred on September 23, 2019. The operator of the underground facility is Columbia Kentucky. It is unclear from the information provided by Columbia Kentucky, EHI, and Moody, whether Moody was the only excavator on site before or after the locate ticket expired. If EHI or any other additional excavator did excavation work at the site from August 28, 2019 through September 16, 2019, their work would have invalidated the locate request as it pertained to Moody. Moody could have obtained its own locate request to avoid this possibility, but it did not. In any event, the locate request that was obtained was expired at the time the damage occurred.

Providing Moody was the only excavator on site while the locate request was valid, and there were no plans for an additional excavator to begin work at the same site, Moody should have requested remarking of the original locate request two days before the request expired. If Moody was the only subcontractor conducting excavation at the site

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<sup>10</sup> Investigation Report, Attachment 3

and had timely requested remarking, there would have been no violation of KRS 367.4911(2) at the time of damage.

Likewise, if Moody had submitted its own locate request two days before the expiration of EHI's locate request, there would have been no violation of KRS 367.4911(1)(a) or KRS 367.4911(2) at the time of the damage. Moody failed to comply with KRS 367.4911(1)(a) which would have provided Moody with a valid locate request regardless of the number of other excavators working at the same site. Additionally, by not requesting remarking of EHI's locate request, Moody also failed to comply with KRS 367.4911(2).<sup>11</sup> Requesting remarking would have provided Moody with a valid locate request if Moody were the only excavator working at the site.

It is hypothetically possible for an excavator to violate KRS 367.4911(1)(a) and KRS 367.4911(2). The violations would most likely not be able to occur simultaneously. However, they could occur in very rapid succession.

For example, if a general contractor obtains a locate request on January 1<sup>st</sup>, but does not do any excavation work and instead hires only subcontractor A to do the excavation work, then subcontractor A could violate KRS 367.4911(2) if neither subcontractor A nor the general contractor requests remarking of the site on or before January 20<sup>th</sup>, and continues to excavate after that date.

Continuing the example above and regardless if subcontractor A or the general contractor have requested remarking of general contractor's locate request; if on January 24<sup>th</sup> subcontractor B begins excavation at the site, while subcontractor A is still conducting

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<sup>11</sup> The actual action required by excavators in order to renew a locate request is found in KRS 367.4911(8) which states the excavator shall contact the protection notification center to request remarking two working days in advance of the expiration of each 21 day period while excavation continues.

excavation, and subcontractor A did not submit its own locate request on or before January 20th, subcontractor A has violated KRS 367.4911(1)(a). This is because there was more than one excavator conducting excavation activities at the same site, triggering the requirement for each excavator to individually notify the protection notification center for their own locate request.

Modifying the example above, if neither the general contractor nor subcontractor A contacted the protection notification center to request remarking of general contractor's locate request, and subcontractor B arrives on January 23<sup>rd</sup> instead of January 24<sup>th</sup>, and begins excavation activity after subcontractor A has already commenced excavation activity for the day, and subcontractor A continues digging on January 23<sup>rd</sup> after the arrival on site of subcontractor B, then subcontractor A has violated KRS 367.4911(1)(a) on January 23<sup>rd</sup>. That violation occurred when subcontractor A continued excavation activity at the same site as subcontractor B without obtaining its own locate request. However, subcontractor A has also violated KRS 367.4911(2) for failing to have the general contractor's locate request remarked on January 23<sup>rd</sup> while subcontractor A was the only excavator operating at the site. Therefore, it is possible for a single excavator to violate KRS 367.4911(1)(a) and KRS 367.4911(2) on the same day.

It is the presence of an additional excavator at the work site that creates a violation of KRS 367.4911(1)(a) based on an excavator's reliance on KRS 367.4911(4) combined with KRS 367.4911(1)(a), which permits the person responsible for excavation or planning excavation to submit the locate request, as opposed to the actual excavator. Here, it is unknown whether Moody was the only subcontractor doing excavation at the site at the time of the damage. However, it is known that Moody did not request remarking



of EHI's locate request, and Moody did not submit its own locate request upon the expiration of EHI's locate request. Therefore, Moody did not possess a valid locate request at the time of the damage, nor was Moody working under the valid locate request of another party as permitted pursuant to KRS 367.4911(1)(a) and 367.4911(4). Under these circumstances, DOI found violations of KRS 367.4911(1)(a) and KRS 367.4911(2).

#### Conclusion

Moody was excavating on September 23, 2019, and damaged an underground facility operated by Columbia Kentucky. The underground facility that was damaged contained natural gas. Because Moody submitted invoices for its work, the arrangement under which Moody was performing the excavation work at issue appears to be inconsistent with that of an hourly employee and instead consistent with a subcontracting arrangement with EHI. Moody acknowledged hitting the underground facility on the invoice it provided to EHI on September 23, 2019. At the time of the damage, Moody did not have a valid locate request on file with Kentucky 811, either in its own name, or in EHI's. Therefore, the \$250 dollar penalty under KRS 367.4917(1) and the \$1,000 penalty under KRS 367.4917(4) are appropriate.

Respectfully submitted  
/s/ Tina Carson Frederick  
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DATED AUG 26 2021

cc: Parties of Record

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served by U.S.mail this day of August 26, 2021 to the following:

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