

RECEIVED

JUL 25 2019

PUBLIC SERVICE  
COMMISSION

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

CITY OF COVINGTON – ALLEGED VIOLATION	)	CASE NO.
OF UNDERGROUND FACILITY DAMAGE	)	2019-00157
PREVENTION ACT	)	

RESPONSE OF THE CITY OF COVINGTON

**I. INTRODUCTION.**

On July 5, 2019, the Kentucky Public Service Commission (“Commission”) entered an Order in this case finding evidence that the City of Covington (“City”) violated the Kentucky Underground Facility Damage Prevention Act (“Act”). Specifically, the Commission alleged the City violated KRS 367.4911(10) which states “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.” However, the Incident Report attached to said Order does not accurately document what occurred. The Incident Report indicates the underground facility was “damaged by backhoe” and “hit with an excavator.” This is not what happened.

Before proceeding with a discussion of the merits of this pending matter, it must be noted that utility providers, such as Duke Energy, must obtain constitutional franchise rights to occupy a municipality’s right of way. As of the date of this incident, Duke Energy or its predecessor organization, was not operating within the City of Covington pursuant to a valid franchise agreement because the previous agreement had expired. In other words, any gas or electric lines located within the City right of way were there illegally, perhaps even in a trespassing manner. As

such, this Commission lacks jurisdiction to enforce these regulations because the City was not on notice of the existence of certain Duke Energy infrastructure due to the absence of a valid franchise agreement.

Notwithstanding the foregoing, it should also be emphasized that the underground facility was damaged while the City was completing routine road repairs using the utmost care to protect underground facilities in the area. The City needed to use a backhoe to remove bad concrete because solid concrete roadways are extremely heavy. The City utilized an equipment operator and two (2) additional employees to observe and ensure proper equipment operation. Unfortunately, the natural gas line at issue and all others under this road were not buried appropriately or, in the alternative, built to withstand the anticipated load as required under 807 KAR 5:027. See Exhibit A. As a result, the gas line was damaged by the sheer weight of the concrete above making contact with a line directly underneath. The City did not hit this line with a backhoe and was not using the backhoe to penetrate the grade underneath this concrete when the damage occurred.

The City did not violate the Act because it was performing routine road maintenance which is exempt from application of the allegedly violated provision. Further, it is not reasonably possible to hand-dig or use nonintrusive means to remove a solid concrete roadway from the ground.

**II. THIS MATTER SHOULD BE DISMISSED FOR LACK OF JURISDICTION**

As noted in Section I herein, any facilities located in the City right of way which were damaged during this incident were effectively illegal due to the absence of a valid franchise. Therefore, this matter should be dismissed for lack of jurisdiction. At minimum, Duke Energy

should be added as a real party in interest to this matter to explain how the City would have known about the presence of the facilities without a valid franchise.

### **III. CITY ACTIVITIES EXEMPT UNDER KRS 367.4915**

The City's activities were exempt under the Act because the City was engaged in routine road maintenance. KRS 367.4915(2) provides: the requirements of KRS 367.4905 to 367.4917 shall not apply to routine road maintenance or repairs. KRS 3607.4903 defines "routine road maintenance" as preservation, including road repairs and resurfacing, and the replacement of signs, posts, and guardrails at the exact same location when no additional penetration of existing grade is necessary, but does not include road construction, installation of signs, posts, and guardrails, or any activity that requires penetration of existing grade."

Ridgecrest Lane is a city roadway which was constructed in the early 1990s. In order to repair poorly installed concrete in this roadway, the City removed the bad concrete and poured new concrete at the exact same grade. The City was not engaged in any activity involving penetration of the grade beneath the preexisting road being repaired when the gas line was damaged. As such, the City's activities were exempt from application of the Act because the City was performing routine road maintenance. Accordingly, the City did not violate KRS 367.4911(10).

### **IV. NONINTRUSIVE EXCAVATING CANNOT APPLY**

There is no reasonable method to use nonintrusive excavating to remove solid concrete roadways and this was not intended to be required. The Order alleges the City violated KRS 367.4911(10), which provides "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." Application of this provision in this instance

would mean the City could not use mechanized equipment to remove solid concrete five (5) or more inches thick. This is not reasonable nor is it a proper use of limited taxpayer funds to impose such an onerous requirement.

The Act defines “nonintrusive excavating” as “excavation using hand tools or equipment that uses air or water pressure as the direct means to break up soil for removal by hand tools or vacuum excavation.” By definition, nonintrusive excavating is meant to apply to removal of the earth itself and not removal of a concrete structure built above it. To protect underground facilities, the City uses nonintrusive excavating when penetrating the ground beneath a roadway, but cannot reasonably do so with the roadway itself.

Further, 807 KAR 5:027, Section 2 regulates gas pipeline safety and requires operators to comply with the minimum federal safety requirements for pipeline facilities set forth in 49 C.F.R. Part 192. This federal safety regulation requires service lines be installed with at least 18 inches of cover in streets, but only requires 12 inches of cover in private property. When installation at said depth is not possible, the line must be able to withstand any anticipated external load. Not surprisingly, pipeline safety requirements require additional coverage for lines run under streets since one can expect a greater external load in this area. Proper installation under streets is meant to provide protection from the roadway and would have done exactly that in this case. It would be absurd to conclude the Act requires hand-digging through solid roadways when Kentucky regulations do not require doing so; furthermore, the regulations explicitly increase the installation requirements for service lines under streets. This incident would have prevented had the requirements for safe installation been observed.

V. CONCLUSION

For the reasons set forth above, the City of Covington respectfully requests the Commission enter an order dismissing the alleged violation of KRS 367.4911(10).

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'M-P-B', is written over a horizontal line.

Michael P. Bartlett  
City Solicitor  
City of Covington  
20 West Pike Street  
Covington, Kentucky 41011  
Tel: (859) 292-2311  
Fax: (859) 292-2310  
mbartlett@covingtonky.gov

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **Response** was sent via regular first class mail to the following recipients on 7/24/2019.

**Public Service Commission**  
C/o Executive Director  
211 Sower Boulevard  
Post Office Box 615  
Frankfort, KY 40602

  
Michael P. Bartlett

