

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

NOTICE OF FILING

Notice is given to all parties that Commission Staff's Division of Inspections Post-Hearing Reply Brief has been filed into the record of these proceedings.



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DATED DEC 09 2019

cc: Parties of Record

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COMMISSION STAFF'S POST-HEARING REPLY BRIEF

1. There has been no change in the law or its interpretation, only in its enforcement.

In its post-hearing brief, Kentucky Frontier Gas, LLC (Frontier), acknowledges that the amendments to the Underground Facilities Damage Prevention Act of 1994 (Damage Prevention Act) effective July 2018 did not change the statutory provision requiring an operator to mark its underground lines in the vicinity of excavation activity.¹ The amendments just changed the manner in which the statute is enforced with respect to excavation damage to underground facilities used to transport natural gas or hazardous

¹ Kentucky Frontier Gas, LLC Brief (Frontier Brief), at 3 (stating the “‘marking’ provision of the Act did not change”).

liquid. Instead, Frontier argues “[w]hat apparently changed is the Commission’s interpretation of the Act’s requirements and the enforcement of the interpretation by the Commission.”²

DOI first notes that the Commission was only vested with authority to enforce provisions of the Damage Prevention Act as of July 2018. Whether an operator must provide temporary markings of a non-metallic pipeline lacking tracer wire where the precise location of the line is unknown is a matter of first impression for the Commission. There is no precedent on this issue.

In support of its argument that the Commission’s interpretation of the statute has changed, Frontier notes that DOI has cited it for violations of different subsections of KRS 367.4909(6). Specifically, Frontier notes that DOI initially cited it for violation of subsection (a), the failure to inform the excavator of the approximate location of its underground facilities, and only later began citing Frontier for violation of subsection (c), the failure to provide markings.³

For each of the incidents that are the subject of the above-captioned cases, DOI cited Frontier for violation of Section 6 of KRS 367.4909, which sets forth an operator’s duties upon receipt of a normal excavation locate request. Subsection 6(a) requires an operator to “[i]nform the excavator of the approximate location and description” of its facilities in the area of excavation, and Subsection 6(c) specifies the manner by which an

² Frontier Brief, at 3.

³ *Id.*, at 5-7.

operator must provide this notification. Temporary markings communicate to the excavator the approximate location of an operator's facilities, and the color of the markings communicates a description of the facilities to the excavator. An operator that does not provide markings of an underground facility in the manner required by the statute has not satisfied its obligation to inform the excavator of the approximate location and description of the facilities in violation of KRS 367.4909(6)(a). DOI has never wavered from its position that an operator cannot comply with its duty to locate and describe its facilities without providing permanent or temporary markings.

In its Post-hearing Brief, DOI noted that under federal pipeline safety regulations, an operator is required to "[p]rovide for temporary marking of buried pipelines in the area of excavation activity."⁴ Frontier argues that because it has not been charged with any violation of federal pipeline safety standards, its duty to mark under federal law is "irrelevant."⁵ DOI does not contend that Frontier should be sanctioned in these proceedings for violation of the federal requirement to mark its lines. Rather, DOI cites this very specific marking requirement to rebut Frontier's assertion that until DOI cited Frontier for failing to mark, "Frontier had no reason to believe that its practice for locates was in violation of the statute."⁶ DOI also notes that other pipeline operators in the state understood that it was not acceptable for an operator just to tell an excavator that a buried

⁴ 49 CFR § 192.614(c)(5).

⁵ Frontier Brief, at 6.

⁶ *Id.*, at 7.

pipeline is in the general vicinity and then let the excavator try to locate the operator's line.⁷

Frontier claims that because some of the individual initiating orders only cited subsection (a) of KRS 367.4909(6) and not subsection (c), the cases should be dismissed for lack of evidence.⁸ As noted above, however, evidence that Frontier failed to provide temporary markings of its facilities in these cases is conclusive evidence of a failure to inform the excavator of the approximate location and description of its facilities as required by subsection (a).

Frontier also asserts that those cases⁹ in which it was cited for KRS 367.4909(6)(a) and not (6)(c) should be dismissed, apparently arguing that it lacked notice of the factual basis of the allegation of violation. Frontier's argument, which it advanced for the first time in its post-hearing response brief, is undercut by the parties' stipulation. The Joint Stipulation clearly frames the underlying, threshold legal issue in "all cases" as whether an operator is required by KRS 367.4909 or any other statute or federal regulation "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."

⁷ Case No. 2019-00280, Nov. 8, 2019 Hearing Video Transcript (HVT) at 9:19:53-9:21:31.

⁸ Frontier Brief, at 7.

⁹ Case Nos. 2019-00280, 2019-00317, 2019-00318, and 2019-00320.

2. An excavator's violation of the Damage Prevention Act does not relieve an operator of its statutory duty to provide temporary markings of buried pipelines in the area of excavation activity.

Frontier argues that its failure to mark pipelines is not subject to sanction in those cases where a pipeline was subsequently damaged by an excavator with an expired dig ticket (Case Nos. 2019-00280, 2019-00315, 2019-00316, 2019-00317, 2019-00318 and 2019-00319). Frontier notes that if an operator fails to provide temporary markings in response to a locate request, an argument can be made that it would be pointless for an excavator to request another locate. Frontier argues, however, that this overlooks the possibility that the initial failure to mark was inadvertent or that new information has been discovered to allow an accurate pipe location.

DOI notes that Frontier did not present any evidence at the hearing that in the cases involving an expired dig ticket, any initial failure to locate was inadvertent or that it had discovered new information that would have allowed it to mark the line had another locate request been submitted. Moreover, Frontier does not explain why an excavator's failure to submit a renewal request would excuse its failure to provide temporary markings when the dig ticket was submitted.

Frontier also argues that in many cases, it provided accurate location information to one excavator representative, and then another excavator showed up and damaged the pipe. This argument just underscores the importance of visually marking the location of the line. Physical marking provides notice to all working in the vicinity of excavation activity.

Similarly, Frontier maintains that an excavator's commencement of excavation activities less than 2 days following submission of the locate request (Case No. 2019-

00309) excuses its failure to provide markings when it responded, prior to the damage, to the locate request. Frontier argues '[t]here is no authority to impose a penalty on Frontier for damage that occurred for failure to act prior to [expiration of the statutory two-day] time limit."¹⁰

Frontier's argument ignores the fact that in this incident, Frontier had already acted and completed what, at the time, it considered an appropriate location of its facility. The statute permits an excavator to commence work before the expiration of two days provided all operators have responded to the request. In the incident subject to Case No. 2019-00309, Frontier had responded to the locate request, albeit not in the manner prescribed by the statute, prior to the excavator's commencement of work. And in any event, as previously noted, an excavator's violation of the Damage Prevention Act does not relieve an operator of liability for its own violation of the Act.

3. A Sub-contractor's failure to submit its own locate request does not excuse an operator's failure to provide markings in response to a general contractor's locate request.

Frontier correctly notes that KRS 367.4911(4) requires each excavator working at a site to submit its own locate request. A sub-contractor that does not submit a locate request and engages in excavation activity that results in damage to an underground pipe is in violation of the statute.

Nonetheless, if a general contractor obtains a dig ticket for an entire project, the operator is put on notice of the planned excavation activity. This notice triggers the

¹⁰ Frontier Brief, at 16.

operator's statutory duty to provide markings. The operator's failure to provide markings in response to a general contractor's locate request is not excused by a subcontractor's failure to obtain its own dig ticket prior to engaging in excavation activity.

4. The fact that a pipeline is not damaged until after it is exposed does not excuse an operator's failure to provide markings in response to a locate request.

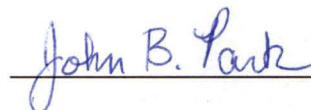
In asserting that it is not subject to assessment of a civil penalty for its failure to provide markings as required by the Damage Prevention because the damage occurred after the excavation activity (Case No. 2019-00319), Frontier injects a causal requirement not present in the statute. Section 1 of KRS 367.4917 unambiguously provides that an operator who fails to comply with any provision of KRS 367.4909 is guilty of endangering underground facilities and is subject to assessment of a civil penalty. There is no requirement that the operator's violation cause excavation damage for the operator to be subject to sanction under Section 1 for violation of the Act.

Conclusion

A recurring theme in Frontier's post-hearing brief is that it should not be assessed a civil penalty for those incidents where the excavator violated its own duties under the Damage Prevention Act. This is a fallacy of relevance. An excavator's violation of its duties does not make Frontier's failure to locate in response to a valid dig ticket any less of a violation of the statute. Letting an operator off the hook for violating the statute simply because of another's wrongful conduct would result in an unequal enforcement of the statute, penalizing some operators but not others for exactly the same violation all depending on the conduct of the excavator. For this reason, DOI is of the opinion that

assessment of civil penalties against Frontier for its failures to mark is warranted under the plain terms of the statute.

Respectfully submitted,

A handwritten signature in blue ink, reading "John B. Park", is written over a horizontal line.

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