COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

KENTUCKY FRONTIER GAS, LLC	)	
	)	
_____	)	CASE NOS.
	)	2019-00280
ALLEGED VIOLATION OF UNDERGROUND	)	2019-00309
FACILITY DAMAGE PREVENTION ACT	)	2019-00314
		2019-00315
		2019-00316
		2019-00317
		2019-00318
		2019-00319
		2019-00320
		2019-00321
		2019-00322
		2019-00323
		2019-00324

NOTICE OF FILIING

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

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Public Service Commission
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DATED NOV 18 2019

cc: Parties of Record

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COMMISSION STAFF'S POST-HEARING BRIEF

Kentucky Frontier Gas, LLC (Frontier) is the owner and operator of natural gas distributions that serve approximately 5,032 customers in 13 counties in eastern Kentucky. Frontier is a jurisdictional utility subject to the Commission's plenary authority under KRS Chapter 278, including the Commission's jurisdiction under KRS 278.495(2) to enforce federal minimum pipeline safety standards. As the owner and operator of underground natural gas facilities in Kentucky, Frontier is also subject to the provisions of the Underground Facility Damage Prevention Act of 1994, KRS 367.4901 through KRS 367.4917 (Damage Prevention Act).

Under the Damage Prevention Act, the Commission has authority to investigate and assess civil penalties for any violation of the Act that results in excavation damage to an underground facility used to transport natural gas or hazardous liquid subject to federal

pipeline safety laws, 49 U.S.C. § 60101, *et seq.* Pursuant to this authority, the Commission's Division of Inspections (DOI) investigates reports received from operators pursuant to KRS 367.4909(4) of damage to underground facilities used to transport gas or hazardous liquid. Following investigation, DOI cited Frontier for violations of the Damage Prevention Act in connection with thirteen separate incidents of gas pipeline damage. The alleged violations were not resolved administratively, and the Commission opened the above-captioned cases to conduct formal investigations into the incidents and Frontier's alleged violations of the Act. Although 13 separate cases were opened, the Commission by Order entered November 8, 2019, consolidated the cases (811 Cases) for purpose of hearing.

On October 31, 2019, the Commission held a formal conference to discuss with counsel common issues of fact or law in the Cases and any outstanding evidentiary and legal issues. Following the conference, counsel for Frontier and DOI agreed upon a Joint Stipulation that sets forth agreed upon facts, a threshold legal issue at issue in all the Cases, and issues at issue in only some of the Cases. This Joint Stipulation was entered into the record on November 8, 2019.

The Commission conducted a public hearing on November 8, 2019, on the issues remaining following entry of the Joint Stipulation. On November 12, 2019, On August 21, 2019, the Commission entered a post-hearing scheduling order for the submission of briefs by DOI and Frontier. DOI submits this Brief in compliance therewith.

Background

The General Assembly enacted the Damage Prevention Act to establish an effective underground damage prevention procedure in recognition that an effective

damage prevention program results in public and workplace safety and protection of consumer services.[1] The Act requires an excavator to notify each operator with underground facilities in the vicinity of intended excavation of the work schedule not less than two working days nor more than ten working days prior to commencing work.[2] Contacting the Kentucky Contact Center, a multimember protection notification center, satisfies this requirement.[3]

The Damage Prevention Act provides that upon receiving a normal excavation locate request, an operator shall:

> (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
>
> (d) Notify the requesting party if underground facilities are not in conflict with the excavation or demolition.[4]

The Act defines the approximate location of an underground facility as:

> (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

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[1] KRS 367.4901.

[2] KRS 367.4911(1)(a).

[3] *Id.*

[4] KRS 367.4906(6) (emphasis added).

> records and shall require notification from the operator of the inability to accurate locate the facility . . . .[5]

Threshold Legal Issue

On November 8, 2019, the parties filed a Joint Stipulation into the record to simplify issues for the hearing. The Joint Stipulation provides that in each of the incidents, with the exception of two incidents with unique circumstances,[6] (1) the pipeline that was damaged by excavation was non-metallic without tracer wire; and (2) Frontier Gas did not provide temporary markings (paint/flags) but verbally provided the general location of the pipeline to the contractor on site when it responded to the locate request.

Based on these facts, the Joint Stipulation presents the following common legal issue: What is the scope of an operator's duty under the Damage Prevention Act to respond to a normal request to locate underground non-metallic pipe that lacks tracer wire? Specifically, does KRS 367.4909 or any other statute or DOT regulation require an operator 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?

Based on the statutory definition of "approximate location" of non-metallic tracer wire, Frontier contends that it complied with the Act by informing the excavator of the general location of the facility as accurately as possible even if it did not use flags or paint to physically mark the approximate location of the facility. DOI disagrees.

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[5] KRS 367.4903(11).

[6] These incidents are the subject of Case Nos. 2019-00317 and 2019-00318. The evidence presented at the hearing was that Case No. 2019-00317 did not involve non-metallic pipe, and that the facility at issue in Case No. 2019-0038 was non-metallic and lacked tracer wire.

DOI contends that Frontier's failure to provide temporary markings of the pipeline in each of these incidents was a violation of KRS 367.4904(11). The statutory language requiring an operator to provide temporary markings of underground facilities in the vicinity of intended excavation is plain and unambiguous. The statute imposes a mandatory requirement ("shall") to physically mark the location of each underground facility, without exception for non-metallic pipe lacking tracer wire.

The law is well settled that the purpose of statutory construction is to give effect to the intent of the legislature.[7] That intent is derived from the plain meaning of the statute's language unless the language is ambiguous.[8]

In this case, based on the plain meaning of the statutory language, the intent of the General Assembly was clear. All underground pipelines in the vicinity of intended excavation must be marked, either by permanent marker or by temporary physical marking provided by the operator in response to the locate request. Under the plain language of the statute, there are no exceptions for non-metallic pipe lacking tracer wire.

The obligation under the Damage Prevention Act of an operator of underground natural gas facilities to provide markings of all facilities is consistent with the operator's obligations under federal law. Federal minimum pipeline safety standards require each operator of a buried natural gas pipeline to carry out a "written program to prevent damage to that pipeline from excavation activities."[9] At a minimum, the damage prevention

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[7] *Shawnee Telecom Resources, Inc.*, 354 S.W.3d 542, 551 (Ky. 2011).

[8] *Richardson v. Louisville/Jefferson Cty. Metro Gov't*, 260 S.W.3d 777, 779 (Ky. 2008) (holding "we look first to the language of the statute, giving the words their plain and ordinary meaning").

[9] 49 CFR ¶ 192.614(a).

program "*must*, at a minimum[,] . . .*[p]rovide for temporary marking* of buried pipelines in the area of excavation activity before, as far as practical, the activity begins."[10] An operator that fails to provide temporary marking of an underground pipeline is subject to assessment of a civil penalty for violation of 49 CFR §192.614(c)(5).[11]

Of the thirteen 811 case, Case Nos. 2019-00314, 2019-00321, 2019-00323 and 2019-00324 involve only the threshold legal issue. DOI recommends a penalty in the amount of $4,000 for each of these incidents.

Expired Dig Ticket – Defense #1

In addition to the threshold legal issue, the parties stipulate that in 6 of the incidents that are the subject of the 811 Cases, the excavation damage occurred after the excavator's locate ticket had expired.[12] Frontier contends that in each incident, the excavator's failure to renew the locate request is a bar to liability for its failure to provide markings of the pipeline within two days of receiving the original dig ticket.[13] This argument is designated in the Joint Stipulation as Defense #1.

KRS 367.4911(8) requires an operator "to request remarking" of a pipeline at least two days in advance of the expiration of the dig ticket. In light of Frontier's policy not to

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[10] *Id.*, at (c)(5) (emphasis added).

[11] *See In the Matter of Williams Gas Pipeline – Transco*, CPF No. 1-2005-1007 (U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, July 29, 2007) (finding that operator violated 192 CFR §614(c)(5) by failing to mark the location of an underground pipeline with stakes or flags and assessing the operator a civil penalty for the violation in the amount of $100,000.)

[12] These incidents are the subject of Case Nos. 2019-00280, 2019-00315, 2019-00316, 2019-00317, 2019-00318 and 2019-00319.

[13] KRS 367.4911(8) requires an operator to request remarking of the pipeline at least two days in advance of the expiration of the dig ticket.

provide temporary marking of lines that it could not locate accurately due to poor mapping and lack of tracer wire, it would have been pointless for an excavator "to request remarking" of a line that Frontier had declined to mark in the first place. It is DOI's position that an excavator's failure to request a renewal of a dig ticket does not excuse the failure of Frontier to provide temporary marking of its facilities in response to the original, valid dig ticket.

Alternatively, at most, the fact that excavation damage occurred after expiration of a dig ticket would reduce the amount of the civil penalty that Frontier is subject to under the Damage Prevention Act. Section 1 of KRS 367.4917 provides that any person who violates any provision of the Act is subject to assessment of a civil penalty in the amount of $250 for the first offense, no more than $1,000 for the second offense within one year, and no more than $3,000 for the third and any subsequent offense. There is no causation requirement for assessment of this penalty. In contrast, Section 4 of the statute imposes an additional penalty in the amount of up to $1,000 only if the violation of the Act results in damage to an underground facility containing natural gas. Thus if the Commission were to find that the excavator's breach of the Damage Prevention Act was a superseding cause of the pipeline damage in the cases subject to Defense #1, Frontier would still be subject to assessment of a civil penalty in the amount of $3,000 per violation.

DOI recommends assessment of a penalty in the amount of $4,000 for each of the 811 Cases subject to Defense #1. Alternatively, in the event the Commission finds that Frontier's violations were not the proximate cause of the incidents of excavation damage, DOI recommends assessment of a civil penalty in the amount of $3,000 per incident.

Failure to Give 2-day Notice – Defense #2

In addition to the threshold legal issue, the parties stipulate that in the incident that is the subject of Case No. 2019-00309, the excavator commenced excavation and damaged the pipeline less than two days after it submitted its locate request. Although Frontier had in fact responded to the locate request at the time of the damage and had not provided temporary markings of the pipeline, Frontier contends that the excavator's violation of its obligations under the Damage Prevention Act is a defense in Case No. 2019-00309.

As with the incidents that occurred after expiration of a dig ticket, it is DOI's position that an excavator's breach of its obligations does not absolve Frontier of responsibility for not providing temporary markings when it did respond to the locate request. There is no evidence in the record that Frontier would have provided temporary markings had the excavator waited the full two days to commence work. Additionally, an excavator's violation of the Act does not excuse an operator of its statutory duties. At most, Defense #1 is relevant to the $1,000 penalty enhancement for violations that result in gas pipeline damage.

DOI recommends assessment of a penalty in the amount of $4,000 for Case No. 2019-00309. Alternatively, in the event the Commission finds that Frontier's violation was not the proximate cause of the incident of excavation damage, DOI recommends assessment of a civil penalty in the amount of $3,000 for this incident.

Subcontractor – Defense #3

In Case Nos. 2019-00317, 2019-00318 and 2019-00322, Frontier raises as a defense the fact that the excavator that damaged the pipeline did not submit a locate

request itself but was a subcontractor for the entity that did.[14] In each of the instances, Frontier responded to the locate request by the contractor but did not provide temporary markings of the pipeline subsequently hit by the subcontractor.

KRS 367.4911(1)(a) requires each excavator "or person responsible for an excavation" to submit a locate request. To the extent a general contractor has overall responsibility for planning and coordinating a project that includes excavation work, the Act obligates the general contractor to notify the Kentucky Contact Center of the intended excavation. Section 4 of KRS 367.4811, however, also requires each excavator working at a site to submit a locate request individually.

The Damage Prevention Act does not address contractor vs. subcontractor responsibilities. KRS 367.4811(4) does address employer-employee responsibilities:

> 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.

Thus while an employer's submission of a locate request will satisfy an employee's responsibility to do so, the employer's failure to submit a request will not exonerate an employee who does not submit his or her own request.

Applying this reasoning to subcontractors, a general contractor's submission of a valid locate request also serves as notification of its subcontractor's intended excavation at the site. The purpose of the notification requirement has been met. The operator has

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[14] Case Nos. 2019-00317 and 2019-00318 are also subject to Frontier's Defense #1 (expired dig ticket).

actual notice of the intended excavation, triggering its statutory duty to provide markings of buried pipelines in the vicinity of the intended work.[15]

Regardless, it is DOI's position that if a contractor has submitted a valid locate request, an operator is not relieved of responsibility for its failure to provide temporary markings in response to the contractor request simply because a subcontractor failed to obtain its own dig ticket. Simply put, it is DOI's position that an excavator's independent breach of the Act does not relieve an operator of responsibility for its own violations.

DOI recommends assessment of a penalty in the amount of $4,000 for each of the 811 Cases subject to Defense #3. Alternatively, in the event the Commission finds that Frontier's violations were not the proximate cause of the incidents of excavation damage, DOI recommends assessment of a civil penalty in the amount of $3,000 per incident.

Cases with Unique Facts

Case Nos. 2019-00319 and 2019-00320 each involve the common threshold legal issue but were not otherwise covered by the Joint Stipulation. DOI and Frontier presented evidence at the hearing concerning the incidents that are the subject of these cases.

Case No. 2019-00319 involved damage to an active gas line encased in a metal pipe that had been exposed at the site of an ongoing sewer line installation project. An employee of a construction crew for Jigsaw Enterprises, LLC (Jigsaw), apparently cut the exposed pipe, damaging the gas line as a result. Although Jigsaw submitted a locate request, the dig ticket had expired at the time the line was cut. In response to the dig

[15] An excavator, however, cannot rely on its status as subcontractor as a defense should the general contractor fail to obtain a valid dig ticket. A subcontractor is responsible for either confirming that its intended work is covered by the general contractor's dig ticket, or obtaining its own dig ticket.

ticket, Frontier advised Jigsaw of the presence of underground facilities in the area of excavation, but did not provide temporary markings of the line that was subsequently exposed and cut. In defense, Frontier raised Defense #1 and asserted that the damage that occurred was to an exposed line the location of which was obvious and did not result from excavation activity.

It is DOI's position that when Frontier received a valid locate request from Jigsaw, it had a duty to provide temporary markings of the approximate location of its facilities in the project area, including of the pipe that was subsequently exposed and cut. This Frontier failed to do. Frontier is subject to assessment under Section 1 of KRS 367.4917 of a civil penalty in the amount of $3,000 for failing to mark its facilities even if the Commission finds that Frontier's violation did not result in excavation damage to a gas pipeline.

Case No. 2019-00320 involved excavation damage to a gas service line by employees of Mountain Water District (MWD) at a site where both MWD and Frontier were installing service lines. Prior to the hearing, it was Frontier's position that the gas service line damaged by MWD was a line it had installed the previous day, and that the exact location of the line was clear from the earth disturbed when the line was installed. At the hearing, however, representatives of MWD testified that in fact a different service line had been hit, not the one installed the previous day. It is undisputed that Frontier did not mark this line in response to MWD's locate request. The incident at issue in Case No. 2019-00320 is thus subject only to the threshold legal issue raised above. DOI recommends a penalty in the amount of $4,000 for this incident.

Conclusion

In every incident that is subject to the 811 Cases, Frontier failed to provide temporary markings of underground pipelines in the vicinity of intended excavation in response to a valid locate request. Frontier took the position that if it could not locate the line within an 18-inch tolerance zone, it was preferable just to notify the excavator of the presence and general location of the line without physically marking it and avoid responsibility for mismarking. This does not satisfy Frontier's plain duty under the Damage Prevention Act and federal pipeline safety standards to provide physical marking of its buried lines in the area of intended excavation. It is also not consistent with public safety

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