

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

|                                  |   |            |
|----------------------------------|---|------------|
| COLUMBIA GAS OF KENTUCKY, INC.   | ) |            |
| _____                            | ) | CASE NO.   |
|                                  | ) | 2020-00185 |
| ALLEGED VIOLATION OF UNDERGROUND | ) |            |
| FACILITY DAMAGE PREVENTION ACT   | ) |            |

NOTICE OF FILING

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

  
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Lindsey Flora  
Deputy Executive Director  
Public Service Commission  
P.O. Box 615  
Frankfort, KY 40602

DATED OCT 23 2020

cc: Parties of Record

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COMMISSION’S DIVISION OF INSPECTIONS POST HEARING REPLY BRIEF

Pursuant to the post-hearing briefing schedule established by the Commission in its September 9, 2020 Order, the Commission’s Division of Inspections (DOI) submits this Reply Brief.

Columbia Gas of Kentucky, Inc. (Columbia Kentucky) argues it should not be held responsible for the damage occurring at Bellefontaine Road on August 19, 2019, because Columbia Kentucky’s technician could not have reasonably anticipated the precise location of the customer service line given the particular facts of the locate request.<sup>1</sup> Additionally, Columbia Kentucky maintains it made reasonable efforts to locate the line.<sup>2</sup> It is DOI’s position that the Underground Facility Damage Prevention Act of 1994 (Damage Prevention Act or the Act)<sup>3</sup> requires Columbia Kentucky to respond to a locate request by informing the excavator of the approximate location<sup>4</sup> of the line, and marking

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<sup>1</sup> Post Hearing Brief Columbia Gas of Kentucky, Inc., at 1. (filed October 16, 2020)

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

<sup>3</sup> KRS 367.4901 through KRS 367.4917.

<sup>4</sup> For metallic facilities and nonmetallic facilities with tracer wire, “approximate location” is defined as “a distance not to exceed the combined width of the underground facility plus 18 inches measured

that approximate location,<sup>5</sup> not by making what it deems to be reasonable attempts to locate the approximate location of the line. There is no language in KRS 367.4909, the statute which identifies the operators' responsibilities under the Damage Prevention Act, indicating that reasonable efforts are sufficient to meet the requirements imposed by the statute. To the contrary, KRS 367.4909(6) uses the imperative command "shall," and provides:

- (6) An operator shall, upon receiving an emergency locate request or a normal excavation locate request:
  - (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.

The word "shall" in KRS 367.4909(6) carries the common, ordinary meaning of that word and is therefore a word of command<sup>6</sup>. In *Vandertoll v. Commonwealth*, the Kentucky Supreme Court found that "shall means shall."<sup>7</sup> Columbia Kentucky had a duty to inform

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from the outer edge of each side of the underground facility." KRS 367.4903(11)(a). For nonmetallic facilities with no tracer wire, the statute requires that the underground facility "shall be located as accurately as possible from field location records and shall require notification from the operator of the inability to accurately locate the facility." KRS 367.4903(11)(b).

<sup>5</sup> KRS 367.4909(6)(a) and KRS 367.4909(6)(c).

<sup>6</sup> KRS 446.080(4).

<sup>7</sup> *Vandertoll v. Com.*, 110 S.W.3d 795 (2003).

the excavator of the approximate location of the service line in question and to mark the line's approximate location. Columbia Kentucky failed to do that and is therefore subject to the civil penalties set forth in KRS 367.4917(1) and KRS 367.4917(4).

For the reasons explored in DOI's Post-Hearing Brief, DOI does not agree that the actions of Columbia Kentucky in relation to this locate request were reasonable. However, whether those actions were reasonable or not is not relevant to a determination that the assessment of a civil penalty is appropriate in this circumstance because KRS 367.4909(6) does not require reasonable efforts, it requires notifying the excavator of the approximate location of the underground facility. Columbia Kentucky failed to do that. KRS 367.4917(1) imposes civil penalties on "an excavator who fails to comply with any provision of KRS 367.4909. . ." Likewise KRS 367.4917(4) imposes civil penalties on "[a]ny person who violates any provision of the Underground Facility Damage Prevention Act of 1994, KRS 367.4901 to 367.4917 that involves damage to a facility containing any flammable, toxic, corrosive, or hazardous material.. ." By failing to accurately mark the location of the service line, Columbia Kentucky failed to comply with the requirements of KRS 367.4909(6) and is therefore subject to the penalty set forth in KRS 367.4917(1). Because the underground facility in question contained natural gas<sup>8</sup>, a flammable material, Columbia Kentucky is subject to the penalty set forth in KRS 367.4917(4).

Respectfully submitted,

/s/ Tina Carson Frederick  
Staff Attorney  
Division of Inspections  
Kentucky Public Service Commission

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<sup>8</sup> HVT at 10:20:02-10:20:16.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served by electronic mail this 23rd day of October, 2020 to the following:

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