

1500 SW Arrowhead Road
Topeka, KS 66604-4027

Shari Feist Albrecht, Chair
Jay Scott Emler, Commissioner
Pat Apple, Commissioner



Phone: 785-271-3100
Fax: 785-271-3354
<http://kcc.ks.gov/>

Sam Brownback, Governor

VIA CERTIFIED MAIL

NOTICE OF PENALTY ORDER

15-DPAX-179-PEN

November 4, 2014

Tom Giefer
Kansas Heavy Construction
20817 W 45th Terrace
Shawnee KS 66218

This is a notice of penalty assessment for violation of the Kansas Underground Utility Damage Prevention Act (KUUDPA) discovered during an investigation conducted on April 8, 2014, by Kansas Corporation Commission Staff. For a full description of the violation and penalty please refer to the Order that is attached to this notice.

IF YOU ACCEPT THE PENALTY:

You have been assessed a \$500 penalty. You have twenty (20) days from service of the Penalty Order to pay the fine amount. Checks or Money Orders should be payable to the Kansas Corporation Commission. Payments shall be mailed to the Fiscal Section of the Kansas Corporation Commission, 1500 SW Arrowhead Road, Topeka, Kansas 66604, and shall include a reference to the docket number of this proceeding. Credit card payments may be made by calling the Fiscal Office at 785-271-3113.

IF YOU CONTEST THE PENALTY:

You have the right to request a hearing. Requests for hearings must be made in writing, setting forth the specific grounds upon which relief is sought. The company must submit an original and seven copies of the request for hearing to the Commission's Executive Director at 1500 SW Arrowhead Road, Topeka, Kansas 66604, within fifteen (15) days from the date of service of this Notice of Probable Noncompliance and Proposed Penalty Order.

IF YOU FAIL TO ACT:

Pursuant to K.A.R. 82-14-6(j), failure to pay or provide a written request for a hearing within fifteen (15) days or in the alternative, to pay the civil assessment in twenty (20) days, will be considered an admission of noncompliance and result in the Penalty Order becoming a final order.

Respectfully,

Robert A. Fox, #10260
Chief Litigation Counsel
(785)271-3118

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Shari Feist Albrecht, Chair
 Jay Scott Emler, Commissioner
 Pat Apple, Commissioner

In the Matter of the Investigation of **Kansas**)
Heavy Construction, of Shawnee, Kansas,)
Regarding Violation(s) of the Kansas)
Underground Utility Damage Prevention Act)
(KUUDPA) (K.S.A. 66-1801, *et seq.*, and)
K.A.R. 82-14-1 through 82-14-5), and the)
Commission's Authority to Impose Penalties)
and/or Sanctions (K.S.A. 66-1,151).)

Docket No. 15-DPAX-179-PEN

PENALTY ORDER

The above-captioned matter comes before the State Corporation Commission of the State of Kansas (Commission). The Commission, being duly advised in the premises, and after having examined its files and records, finds and concludes as follows:

I. JURISDICTION AND BACKGROUND

1. The Commission has jurisdiction and authority to administer and enforce the Kansas Underground Utility Damage Prevention Act (KUUDPA), as provided in K.S.A. 66-1801 *et seq.* Likewise, Kansas law grants the Commission full power and authority to do all things necessary and convenient in its exercise of its authority and jurisdiction pursuant to K.S.A. 2013 Supp. 66-1815 and amendments thereto.

2. In its enforcement of KUUDPA, pursuant to K.A.R. 82-14-6, as amended, the Commission may investigate an entity under the Commission's jurisdiction and order a hearing on the Commission's own motion when the Commission believes the entity is in violation of the law or any order of the Commission.

3. The Commission shall impose civil penalties and injunctive actions against any person subject to and found in violation of the provisions of KUUDPA, or any rule and regulation, or any order of the Commission. Each violation is subject to a penalty, not to exceed \$25,000, for each day the violation persists, with a maximum civil penalty of \$500,000 for any related series of violations. K.S.A. 66-1812, 66-1,151 and amendments thereto; and, K.A.R. 82-14-6.

II. ALLEGATIONS OF NONCOMPLIANCE

4. Pursuant to the above authority, on April 8, 2014 Commission Staff (Staff) investigated the activity and operations of Kansas Heavy Construction (Respondent). See Report and Recommendation of Staff dated October 24, 2014, a copy attached hereto as Attachment "A". As a result of this investigation, Staff reports the following:

- a. On April 8, 2014, a KGS dispatcher and Johnson County Emergency Management System notified Staff that Respondent was conducting excavation activities at 5123 Cody Street in Shawnee, Kansas and in the process of replacing curbing, the excavator caused damage to an underground Kansas Gas Service 5/8 inch PE natural gas service line, resulting in one outage of service at the above address and no injuries.
- b. Upon notification of the damage, Staff arrived on-site at 5123 Cody Street, and began an investigation. Staff learned from crew on-site that Respondent had called Kansas One Call to inform them of the intent to dig, but they failed to wait the required two (2) working days to allow for the locate marks. The Kansas One Call ticket was not due for work to

begin until April 9, 2014, leaving Kansas Gas Service the full day of April 8, 2014, to mark the ticket.

- c. On April 15, 2014, Staff mailed a Notice of Probable Noncompliance notifying Respondent of the investigation results. The letter instructed Respondent to respond within thirty (30) days and to indicate whether Respondent accepted or disagreed with the findings of Staff's investigation. The notice also requested Respondent to provide written explanation of the actions taken by Respondent to prevent future KUUDPA violations. In the alternative, the Respondent could provide documentation explaining why Respondent disagreed with the findings to include identification of any errors in the Notice of Probable Noncompliance. The violation cited is as follows:

- i. Failure of an excavator to serve notice of intent of excavation at least two (2) full working days, but not more than fifteen (15) calendar days before the scheduled excavation start date, on each operator having underground facilities located in the proposed area of excavation. This failure is a violation of K.S.A 2013 Supp. 66-1804.

- d. On June 4, 2014, Staff received a written response from Respondent to the Notice of Probable Noncompliance. In its response, Respondent agreed with the information contained in the Notice of Probable Noncompliance and as a result, also agreed with Staff's finding of fault.

5. Based upon the available facts, Staff recommends the Commission find that at the time of the damage alleged herein, Respondent was an excavator conducting excavation activities as defined in K.S.A. 2013 Supp. 66-1802(c) and (d).

6. Staff also recommends the Commission issue a civil penalty of \$500 for the violation of the Kansas Underground Utility Damage Prevention Act as alleged.

III. CONCLUSIONS OF LAW

7. The Commission finds it has jurisdiction over Kansas Heavy Construction (Respondent) because it is an excavator as defined in K.S.A. 2013 Supp. 66-1802.

8. The Commission finds Respondent violated Kansas law governing underground utilities, including various provisions of the Kansas Underground Utility Damage Prevention Act, and is therefore subject to sanctions or fines imposed by the Commission.

9. Respondent is hereby assessed a \$500 penalty for violation of the Kansas Underground Utility Damage Prevention Act.

THE COMMISSION THEREFORE ORDERS THAT:

A. Kansas Heavy Construction, of Shawnee, KS 66218, is hereby assessed a \$500 civil penalty for the violation of the Kansas Underground Utility Damage Prevention Act, K.S.A. 66-1801 *et. seq.*

B. Pursuant to K.S.A. 2013 Supp. 77-529, K.S.A. 66-118b, K.A.R. 82-1-215 and amendments thereto, any party may request a hearing on the above issues by submitting a written request, consisting of an original and seven (7) copies, setting forth the specific grounds upon which relief is sought, to the Commission's Executive Director, at 1500 S.W. Arrowhead Road, Topeka, Kansas 66604 within fifteen (15) days from the date of service of this Order. If service is by certified mail, service is complete upon the date delivered shown on the Domestic Return

Receipt. *Hearings will be scheduled only upon written request.* Failure to timely request a hearing shall be considered an admission of noncompliance and result in a waiver of Respondent's right to a hearing. Furthermore, this Penalty Order will become a Final Order assessing a \$500 civil penalty against Respondent.

C. Attorneys for all parties shall enter their appearances in Commission proceedings by giving their names and addresses for the record. A corporation shall not be permitted to enter an appearance, except by its attorney.

D. Pursuant to K.A.R. 82-14-6, if you do not request a hearing, the payment of the civil penalty is due in twenty (20) days from date of service of this Order. Checks and Money Orders shall be payable to the Kansas Corporation Commission. For credit card payments, include type of card (Visa, MasterCard, Discover, or American Express), account number and expiration date. Payments shall be mailed to the Fiscal Section of the Kansas Corporation Commission, 1500 S.W. Arrowhead Road, Topeka, Kansas 66604. Credit card payments can be made by calling the Fiscal Office at 785-271-3351. The payment shall include a reference to the docket number of this proceeding.

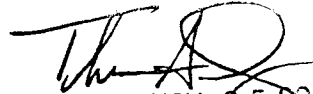
E. Failure to pay the \$500 civil penalty within twenty (20) days of the issuance of this Penalty Order will result in enforcement action against Respondent, including all sanctions, requirements, and penalties described above being enforceable without further action by the Commission.

F. The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further order or orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Albrecht, Chair; Emler, Com.; Apple Com.

Dated: NOV 04 2014



ORDER MAILED NOV 05 2014

Thomas A. Day
Acting Executive Director

RAF

ATTACHMENT “A”

**REPORT AND RECOMMENDATION
UTILITIES DIVISION**

TO: Chair Shari Feist Albrecht
Commissioner Jay Scott Emler
Commissioner Pat Apple

FROM: Christie Knight, Damage Prevention Special Investigator
Leo Haynos, Chief of Pipeline Safety
Jeff McClanahan, Director of Utilities

DATE: October 24, 2014

SUBJECT: **Docket Number:** 15-DPAK-179-PEN
In the Matter of the Investigation of Kansas Heavy Construction, LLC of Shawnee, Kansas, Regarding Violations of the Kansas Underground Utility Damage Prevention Act (KUUDPA) (K.S.A. 66-1801, *et seq.*, and K.A.R. 82-14-1 through 82-14-5), and the Commission's Authority to Impose Penalties and/or Sanctions (K.S.A. 66-1,151).

EXECUTIVE SUMMARY:

Staff is recommending a civil penalty be issued to Kansas Heavy Construction, LLC (Kansas Heavy) in the amount of \$500 for violation(s) of KUUDPA. The penalty is based on results of a Staff investigation following damage to a Kansas Gas Service (KGS) natural gas service line in Shawnee, Kansas. There was a notice of intent to excavate provided to KGS and Kansas One-Call had been notified, however, KGS was not given the required amount of time to fulfill this request. Failure to wait the required amount of time of two full working days after notification is made before excavating is a violation of K.S.A. 66-1803 and 66-1804(a).

BACKGROUND:

On April 8, 2014, Kansas Heavy damaged a KGS 5/8-inch PE natural gas service line at 5123 Cody Street in Shawnee, Kansas, while excavating to replace curbing with a mini excavator. The damage resulted in one outage of service at the above address and no injuries. A brief timeline of events is attached (Attachment I). A Notice of Probable Noncompliance was issued to Kansas Heavy on April 15, 2014 (Attachment II). On June 4, 2014, Kansas Heavy responded to the Notice of Probable Noncompliance as required by K.A.R. 82-14-6(c).

ANALYSIS:

Rationale for Penalties:

A. Gravity of noncompliance:

Excavating without locates and without ascertaining the location of all underground facilities is considered a high-risk activity with the potential for significant consequences to public safety. Because providing proper and timely notice of intent and waiting the required amount of time to excavate of two full working days after notification is made, is the most fundamental preventative measure an excavator takes, the fact that Kansas Heavy failed to comply with this requirement of the law warrants the assessment of a civil penalty.

B. Culpability:

Kansas Heavy is directly responsible for its actions in failing to wait the required amount of time prior to excavating as Kansas law requires.

C. History of noncompliance:

Staff has issued three other KUUDPA Notices of Probable Noncompliance to Kansas Heavy in the past two years. One being failure to notify 911 when gas damage occurs and two being prudent care issues.

D. Response of excavator regarding noncompliance(s):

Kansas Heavy failed to address the Staff's allegation in the Notice of Probable Noncompliance regarding the fact that work was being done before the work to begin date and no marks were present. Staff concludes that there is no extenuating circumstances in this case to mitigate the recommended penalty for failure to wait the required amount of time prior to excavating.

E. Aggravating/Mitigating Circumstances:

Staff has not determined any circumstances that would cause us to modify the recommended penalty amount of \$500.

RECOMMENDATION:

Staff recommends a civil penalty be issued to Kansas Heavy Construction, LLC in the amount of \$500 for violation(s) of KUUDPA:

- Failure of an excavator to properly serve notice of intent to excavate is a violation of K.S.A. 66-1804, Notice of intent of excavation.

Attachments

ATTACHMENT I

Timeline:

- 4/8/2014 At approximately 3:08 p.m., Staff received an email notification from KGS dispatcher and Johnson County Emergency Management System indicating a damaged line at 5123 Cody Street in Shawnee, Kansas.
- Staff arrived on-site at approximately 4:25 p.m. and subsequently conducted an on-site investigation of the excavation site described above. Staff learned from conversations on-site with Kansas Heavy that notification was made to Kansas One Call for a ticket prior to excavating, however, the ticket was not due for work to begin until 4/9/2014. This was later confirmed through research of the Kansas One Call database that there was, in fact, a Kansas One Call ticket obtained by Kansas Heavy at this address prior to excavating, however, there were no locate marks present as KGS had the full day yet of 4/8/2014 to mark this ticket #14121794.
- Upon completion of the investigation and research, Staff determined that Kansas Heavy had been excavating without waiting the required amount of two full working days after the notification has been made and had violated KUUDPA.
- 4/15/2014 Staff issued Kansas Heavy a Notice of Probable Noncompliance for violating KUUDPA as stated above.
- 6/4/2014 Staff received Kansas Heavy's response to the Notice of Probable Noncompliance as required by K.A.R. 82-14-6(c).

ATTACHMENT II

PROBABLE NONCOMPLIANCE

KCC Investigation#:6891

COMPANY: Kansas Heavy Construction, LLC DIVISION:

REGULATION:

66-1804 Notice of intent of excavation.

(a) Except in the case of an emergency, an excavator shall serve notice of intent of excavation at least two full working days, but not more than 15 calendar days before the scheduled excavation start date, on each operator having underground tier 1 facilities located in the proposed area of excavation.

(b) An excavator may serve notice of intent of excavation at least two full working days, but not more than 15 calendar days before the scheduled excavation start date, on each operator of tier 2 facilities located in the proposed area of excavation.

PROBABLE NONCOMPLIANCE DESCRIPTION:

On 4/8/2014, Kansas Heavy Construction, LLC damaged a KGS 5/8" PE gas service line with a mini excavator while replacing curbs at 5123 Cody St in Shawnee, Kansas. There is a One-Call ticket #14121794 with a due date of 4/9/2014. This ticket had not yet been located by the facilities, therefore, Kansas Heavy was digging prior to the due date and did not have a valid locate. This is a violation of the Statute K.S.A. 66-1804 Notice of intent of excavation. (a) Except in the case of an emergency, an excavator shall serve notice of intent of excavation at least two full working days, but not more than 15 calendar days before the scheduled excavation start date, on each operator having underground tier 1 facilities located in the proposed area of excavation. (b) An excavator may serve notice of intent of excavation at least two full working days, but not more than 15 calendar days before the scheduled excavation start date, on each operator of tier 2 facilities located in the proposed area of excavation.

OPERATOR'S RESPONSE: (Attach verification if needed) LINE WAS IN CURB AND DAMAGED
AFTER CURB WAS REMOVED. WHY CAN'T SERVICE LINES BE AT LEAST 2' DEEP.

Operator's authorized signature: _____

Date: 5/29/14

PIPELINE SAFETY USE ONLY

Date Reviewed: _____ Date Reviewed: _____
Supervisor: _____ Inspector: _____

Inspected by: Knight
Date Inspected: 4/8/2014
Inspection type: 2 Day Limit

KANSAS CORPORATION COMMISSION

JUN 04 2014

UTILITIES DIVISION

PLEASE FORWARD THE ATTACHED DOCUMENT (S) ISSUED IN THE ABOVE-REFERENCED DOCKET
TO THE FOLLOWING:

NAME AND ADDRESS	NO. CERT. COPIES	NO. PLAIN COPIES
ROBERT A. FOX, CHIEF LITIGATION COUNSEL KANSAS CORPORATION COMMISSION 1500 SW ARROWHEAD RD TOPEKA, KS 66604-4027 ***Hand Delivered***		
Tom Giefer, MANAGING MEMBER KANSAS HEAVY CONSTRUCTION, LLC 20817 W 45TH TERRACE SHAWNEE, KS 66218		

ORDER MAILED NOV 05 2014

The Docket Room hereby certified that on this _____ day of _____, 20____, it caused a true and correct copy of the attached ORDER to be deposited in the United States Mail, postage prepaid, and addressed to the above persons.