

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

Before Commissioners: Mark Sievers, Chairman
Thomas E. Wright

In the Matter of the Investigation of **Bob**)
Bergkamp Construction Co., Inc. of)
Wichita, Kansas, Regarding the Violation of)
the Kansas Underground Utility Damage) Docket No. 12-DPAX-730-SHO
Prevention Act, and the Commission's)
Authority to Impose Penalties and Injunctive)
Relief.)

ORDER APPROVING STIPULATED SETTLEMENT AGREEMENT

The above-captioned matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having examined its files and records, and being duly advised in the premises, the Commission makes the following findings:

I. Background

1. On April 16, 2012, Staff of the Commission (Staff) filed a motion, with an attached Report and Recommendation (R&R), seeking to initiate a show cause proceeding against Bob Bergkamp Construction, Inc. (Respondent) for the purpose of obtaining a Commission order assessing civil penalties against Respondent for a violation of the Kansas Underground Utility Damage Prevention Act (KUUDPA).¹

2. In its motion, Staff stated that on or about January 31, 2012, Respondent struck a Kansas Gas Service (KGS) high-pressure 8-inch steel pipeline with large dirt-moving equipment in Riley County, near Manhattan, Kansas, at or near the north side of the intersection of K-18 Highway and County Road 418, resulting in the release of 4,504 MCF of natural gas and \$29,000 in repair costs.² Staff also stated that Respondent had a valid Kansas One-Call ticket at the time of the damage and that the pipeline was properly marked by KGS.³ However, Staff's

¹ Docket No. 12-DPAX-730-SHO, Staff's Motion to Show Cause (Apr. 16, 2012).

² *Id.* at ¶¶ 2-3.

³ *Id.* at ¶ 4.

investigation revealed that the manner in which the equipment operator used the machinery within the tolerance zone was unreasonable under the circumstances existing at the time of the excavation; therefore, the excavator was in violation of its duty to exercise reasonable care as required by K.S.A. 66-1809.⁴ Staff noted that Respondent has been a professional excavator in the industry for over fifty years and is very familiar with the requirements of KUUDPA.⁵ Staff requested the Commission order Respondent to appear before the Commission to Show Cause why this Commission should not assess a civil penalty against Respondent in the amount of \$5,000, as recommended by Staff.⁶

3. On April 23, 2012, the Commission issued an Order to Show Cause. In its Order, the Commission found the following:

- a. Pursuant to K.S.A. 66-1802(d), the Commission has jurisdiction over Respondent as an excavator;
- b. The investigation appeared to show Respondent committed one violation of the KUUDPA as defined by K.S.A. 66-1809(a);
- c. Violations of KUUDPA are subject to civil penalties not to exceed \$25,000 for each day the violation occurred;
- d. Staff's recommended civil penalty of \$5,000 was based on the gravity of noncompliance, the severity of damage to the pipeline, and experience of Respondent;
- e. A hearing on Respondent's alleged violation may be necessary and shall be scheduled for June 14, 2012; and
- f. Respondent has until close of business on May 14, 2012, to file its Answer or otherwise plead regarding the alleged violation.

4. On May 10, 2012, Counsel for Respondent, Milo M. Unruh, Jr., forwarded a letter to Staff responding to Staff's Motion to Show Cause.

⁴ Staff's Errata to Motion to Show Cause (Apr. 18, 2012), ¶ 1.

⁵ Staff's Motion to Show Cause, ¶ 5.

⁶ *Id.* at ¶ 6.

5. On June 4, 2012, Counsel for Staff, Judy Jenkins, and counsel for Respondent (the Parties) filed a Joint Motion for Approval of Stipulated Settlement Agreement. A Stipulated Settlement Agreement (SA) was attached to the Parties joint motion as Attachment 'A'.

II. Provisions of the Settlement Agreement

6. The SA resulted from discussions among the Parties.⁷
7. The SA begins with a summary of the proceedings in this docket.⁸
8. Terms of the SA are briefly summarized as follows:
 - Jurisdiction: The Commission has jurisdiction and authority over this matter,⁹
 - Stipulations: Adoption of the SA is in the public interest and the Commission should approve the following stipulations:
 - Respondent stipulates to the facts and alleged violations as cited in Staff's Motion and attached R&R and Staff's Errata to Motion to Show Cause;¹⁰
 - Respondent agrees to continue to contact the Kansas One Call notification center prior to conducting any excavation activities as provided in K.S.A. 66-1802 and 66-1803;¹¹
 - Respondent agrees to address the reasonable care concerns by continuing to hold "daily toolbox safety briefings" with its staff every morning prior to the commencement of any construction activities at the job site. The project Superintendent will conduct the briefings and each company employee involved in any construction activity at the work site will attend. Briefings will address any possible utility conflicts that might be encountered throughout that work day and Superintendent will address appropriate cautionary steps to be taken during any excavation phase of the project so as to avoid hitting or damaging any underground utilities at the project site;¹²
 - During the briefings described above, Superintendent shall designate an employee to be responsible for confirming the location of and depth of potential underground utilities located at work site and employee shall share this information with the Foreman prior to commencement

⁷ Joint Motion for Approval of Stipulated Settlement Agreement (June 4, 2012), ¶ 5.

⁸ *Id.* at ¶¶ 1-5.

⁹ SA, ¶ 9.

¹⁰ *Id.* at ¶ 10(i).

¹¹ *Id.* at ¶ 10(ii).

¹² *Id.* at ¶ 10(iii).

of excavation work. This confirmation shall be documented in the company's safety records.¹³

- Respondent agrees to take all necessary and appropriate steps to protect the markings identifying the location of any and all underground utilities so that equipment operators will have knowledge of the presence of the underground utility;¹⁴
- Respondent agrees to pay to the Commission a civil penalty in the amount of \$3,500 for the violation of KUUDPA.¹⁵

9. The Parties have agreed that the terms of the agreement constitute a fair and reasonable resolution of the issues raised in this proceeding.

III. Findings and Conclusions

10. The Commission has full power and authority to administer and enforce the KUUDPA.¹⁶

11. The Commission approves the SA in its entirety. The Commission has reviewed the SA attached to the Joint Motion for Approval of Stipulated Settlement Agreement and concludes that the terms and provisions are an appropriate and reasonable disposition of this matter. The Commission adopts and incorporates by reference the terms of the SA.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

A. The Joint Motion to Approve the Stipulated Settlement Agreement entered into by Bob Bergkamp Construction Co., Inc. and Staff of the Commission is hereby granted. The Stipulated Settlement Agreement is approved in its entirety and is hereby incorporated by reference.

B. The parties have fifteen days, plus three days if service is by mail, from the date the order was served in which to petition the Commission for reconsideration of any issues decided herein. K.S.A. 66-118b; K.S.A. 2011 Supp. 77-529.

C. 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.

¹³ *Id.* at ¶ 10(iv).


¹⁴ *Id.* at ¶ 10(v).

¹⁵ *Id.* at ¶ 10(vi).

¹⁶ K.S.A. 66-1801, *et seq.*

Sievers, Chmn.; Wright, Com.

Dated: JUN 19 2012


ORDER MAILED JUN 19 2012

Patrice Petersen-Klein
Executive Director

RB

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

NAME AND ADDRESS	NO. CERT. COPIES	NO. PLAIN COPIES
MILO M. UNRUH, JR. ARN MULLINS UNRUH KUHN & WILSON, LLP 330 R.H. GARVEY BUILDING 300 WEST DOUGLAS WICHITA, KS 67202-2978		
RAY BERGMEIER, LITIGATION COUNSEL KANSAS CORPORATION COMMISSION 1500 SW ARROWHEAD ROAD TOPEKA, KS 66604-4027 ***Hand Delivered***		
JUDY JENKINS, LITIGATION COUNSEL KANSAS CORPORATION COMMISSION 1500 SW ARROWHEAD ROAD TOPEKA, KS 66604-4027 ***Hand Delivered***		

ORDER MAILED JUN 19 2012

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.