

1500 SW Arrowhead Road
Topeka, KS 66604-4027



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

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

Sam Brownback, Governor

VIA CERTIFIED MAIL

NOTICE OF PENALTY ORDER
17-DPAX-358-PEN

February 21, 2017

Mark Lambeth
d/b/a K M Construction
26931 Spring Valley Rd
Louisburg, KS 66053

This is a notice of penalty assessment for violation of the Kansas Underground Utility Damage Prevention Act (KUUDPA) discovered during an investigation conducted on November 29, 2016, 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 S.W. Arrowhead Road, Topeka, Kansas 66604, and shall include a reference to the docket number of this proceeding.

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 Secretary at 1500 S.W. Arrowhead Road, Topeka, Kansas 66604, within fifteen (15) days from the date of service of this Penalty Order.

IF YOU FAIL TO ACT:

Pursuant to K.A.R. 82-14-6(j) and K.S.A. 77-529, failure to provide a request for a hearing within fifteen (15) days, or in the alternative to pay the civil assessment within twenty (20) days, will be considered an admission of noncompliance and result in the Penalty Order becoming a Final Order.

Respectfully,

Robert Vincent, S. Ct. No. 26028
Litigation Counsel
(785)271-3273

3. The Commission shall impose civil penalties and injunctive actions against any person or entity 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 civil penalty, not to exceed \$25,000, for each day that the violation persists, with a maximum civil penalty of \$1,000,000 for any related series of violations. *See* 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 November 29, 2016, Commission Staff (Staff) investigated the activities and operations of Mark Lambeth, d/b/a K M Construction (Respondent). *See* Report and Recommendation of Staff dated January 27, 2017, a copy of which is attached hereto as Attachment “A” and is hereby incorporated by reference. As a result of this investigation, Staff reports the following:

- a. On November 29, 2016, Staff performed an onsite inspection at 16235 Manor Road in Stilwell, Kansas. Staff’s investigation discovered the Respondent caused damage to a Kansas Gas Service natural gas line. No injuries or additional property damage occurred.
- b. Staff learned during its independent investigation that Respondent had not provided Kansas Gas Service with a notice of intent to excavate and Kansas One Call had not been called.
- c. On December 15, 2016, 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:

66-1803. Excavator's duty to ascertain location of facilities. An excavator shall not engage in excavation near the location of any underground facility without first having ascertained, in the manner prescribed in this act, a location of all underground facilities in the proposed area of the excavation.

d. As of February 16, 2017, Staff has not received a written response from Respondent to the Notice of Probable Noncompliance, in violation of K.A.R. 82-14-6.

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. 66-1802(c) and (d). Additionally, based upon the available facts, Staff recommends the Commission find Respondent failed to serve notice of intent of excavation as Kansas law requires.

6. 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. KUUDPA requires the excavator to serve notice of intent of excavation at least two full working days before the scheduled excavation start date. Because providing proper and timely notice of intent and waiting the required amount of time is the most fundamental preventative measure an excavator takes, the fact that Mark Lambeth, d/b/a K M

Construction failed to comply with this requirement of law warrants the assessment of a civil penalty.

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

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

8. Pursuant to K.S.A. 66-1801 *et seq.*, the Commission has jurisdiction and authority to administer and enforce the KUUDPA.

9. The Commission finds during the incident described in Staff's Report and Recommendation, Respondent was an excavator conducting excavation activities as defined in K.S.A. 66-1802(c), (d). Accordingly, the Commission finds it has jurisdiction over Respondent to enforce the KUUDPA.

10. The Commission finds Respondent violated Kansas law governing underground utilities, including various provisions of the KUUDPA, and is therefore subject to sanctions or fines imposed by the Commission. Specifically, the Commission finds Respondent violated K.S.A. 66-1803 and K.S.A. 66-1804 by failing to provide a notice of intent of excavation. As a result of this failure, Respondent damaged underground Kansas Gas Service facilities.

11. The Commission concludes Respondent shall be assessed a civil penalty. Pursuant to K.S.A. 66-1812, the Respondent is hereby assessed a \$500 penalty for violation of the Kansas Underground Utility Damage Prevention Act.

THE COMMISSION THEREFORE ORDERS THAT:

A. Mark Lambeth, d/b/a K M Construction, of Louisburg, Kansas, is hereby assessed a \$500 civil penalty for violation of the Kansas Underground Utility Damage Prevention Act, K.S.A. 66-1801 *et seq.*

B. Pursuant to K.S.A. 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 Secretary, 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. For civil penalties exceeding \$500, a corporation shall appear before the Commission by its attorney, unless waived by the Commission for good cause shown and a determination that such waiver is in the public interest. *See* K.S.A. 77-515(c); K.A.R. 82-1-228(d)(2); K.A.R. 82-1-202(a).

D. Pursuant to K.A.R. 82-14-6, if you do not request a hearing, the payment of the civil penalty is due within twenty (20) days from the date of service of this Order. Checks and Money Orders shall be payable to the Kansas Corporation Commission. For credit card payments, include the 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.

Apple, Chairman; Albrecht, Commissioner; Emler, Commissioner

Dated: FEB 21 2017



Amy L. Green
Secretary to the Commission

REV/vj

Order Mailed Date
FEB 22 2017

ATTACHMENT "A"

**REPORT AND RECOMMENDATION
UTILITIES DIVISION**

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

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

DATE: January 27, 2017

SUBJECT: **Docket Number: 17-DPAX-358-PEN**
In the Matter of the Investigation of K M Construction, 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 82-14-6) 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 K M Construction (K M) in the amount of \$500 for violation of KUUDPA. K M did not provide a notice of intent to excavate prior to excavating. A brief timeline of events is attached (Attachment I). Failure to provide proper notice of intent before excavating is a violation of K.S.A. 66-1804. A Probable Noncompliance (PNC) was issued to K M on December 15, 2016. K & M has not responded to the PNC within 30 days as required by K.A.R. 82-14-6(c). A copy of the PNC description is attached (Attachment II).

ANALYSIS:

Rationale for Penalties:

A. Gravity of noncompliance:

Excavating without a One-Call ticket is considered a high-risk activity with the potential for significant consequences to public safety. Because providing proper and timely notice of intent is the most fundamental preventative measure an excavator takes, the fact that K M failed to comply with this requirement of the law warrants the assessment of a civil penalty.

B. Culpability:

K M is directly responsible for its actions in failing to acquire a One-Call ticket as Kansas law requires.

C. History of noncompliance:

Staff has not issued other KUUDPA Probable Noncompliance(s) to K & M in the past two years.

D. Response of excavator regarding noncompliance(s):

Response to the Notice of Probable Noncompliance has yet to be received as required by K.A.R. 82-146(c).

E. Aggravating/Mitigating Circumstances:

Staff has not determined there to be any circumstances that would cause modification of the \$500 recommended penalty amount.

RECOMMENDATION:

Staff recommends a civil penalty be issued to K M Construction in the amount of \$500 for violation(s) of K.S.A. 66-1804.

Attachments

ATTACHMENT I

Timeline:

- 11/29/2016 At approximately 10:15 a.m., Staff received an email notification from a KGS dispatcher and the Johnson County Emergency Management System indicating an excavator had damaged its natural gas line at 16235 Manor Road in Stilwell, Kansas.
- Staff arrived onsite at approximately 11:19 a.m. and subsequently conducted an on-site investigation. Staff learned from conversations on-site with KGS personnel that no notification was made to Kansas One-Call for a ticket prior to excavating. This was later confirmed through research of the Kansas One-Call database.
- Staff also interviewed Mark Lambeth, with K M, who indicated that K M did not have an active ticket at the time of the damage.
- Upon completion of the investigation and research, Staff determined that K & M had been excavating without a valid Kansas One-Call ticket and had violated KUUDPA.
- 12/15/2016 Staff issued K M a Notice of Probable Noncompliance for violating KUUDPA as stated above.
- 1/27/2017 Staff has not received K M's response to the Notice of Probable Noncompliance as required by K.A.R. 82-14-6(c).

ATTACHMENT II

PROBABLE NONCOMPLIANCE

KCC Investigation#: 7472

COMPANY: K & M Construction

DIVISION:

REGULATION:

66-1803 Excavator's duty to ascertain location of facilities.

An excavator shall not engage in excavation near the location of any underground facility without first having ascertained, in the manner prescribed in this act, a location of all underground facilities in the proposed area of the excavation.
History: L. 1993, ch. 217, S. 3; July 1

PROBABLE NONCOMPLIANCE DESCRIPTION:

On 11/29/2016, the KCC was notified of a damaged KGS 3/4" PE gas service line with a what appeared to be a shovel during an electric secondary service install by K & M Construction at 16235 Manor Rd in Stilwell, Kansas. There was no recent One-Call ticket found in the database for this company prior to the damage. It is unknown when this damage actually occurred. There was no notification made to KGS of the damage until customer realized there was no gas.

OPERATOR'S RESPONSE: (Attach verification if needed)

Operator's authorized signature: _____

Date: _____

PIPELINE SAFETY USE ONLY	
Date Reviewed: _____	Date Reviewed: _____
Supervisor: _____	Inspector: _____

Inspected by: Knight
Date inspected: 11/29/2016
Inspection type: No Locates- Excavator

CERTIFICATE OF SERVICE

17-DPAX-358-PEN

I, the undersigned, certify that the true copy of the attached Order has been served to the following parties by means of

first class mail/hand delivered on **FEB 21 2017**.

STEPHAN SKEPNEK, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
Fax: 785-271-3354
s.skepnek@kcc.ks.gov

MARK LAMBETH, OWNER
MARK LAMBETH
D/B/A K M CONSTRUCTION
26931 SPRING VALLEY RD
LOUISBURG, KS 66053
lambeth@mokancomm.net

/S/ DeeAnn Shupe

DeeAnn Shupe

Order Mailed Date

FEB 22 2017