

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

Received
on

JUN 04 2012

In the Matter of Investigation of **Bob**)
Bergkamp Construction Co. Inc., of Wichita,)
Kansas, Regarding the Violation of the Kansas)
Underground Utility Damage Prevention Act,)
and the Commission's Authority to Impose)
Penalties and/or Sanctions.)

by
State Corporation Commission
of Kansas

Docket No. 12-DPAX-730-SHO

**JOINT MOTION FOR APPROVAL OF
STIPULATED SETTLEMENT AGREEMENT**

The Staff of the State Corporation Commission of the State of Kansas (Staff) and Bob Bergkamp Construction Co. Inc., (Respondent) file this Joint Motion requesting the Commission issue an order approving the attached Stipulated Settlement Agreement. In support of its Motion, Staff and Respondent state as follows:

1. On January 31, 2012, Respondent was conducting excavation activities on K-18, west of Manhattan, Kansas, at or near the north side of the intersection of K-18 Highway and Country Road 418 (aka Stagg Hill Road), causing damage to an underground 8" steel natural gas pipe, resulting in blowing gas.

2. On April 16, 2012, Staff filed *Staff's Motion to Show Cause* against respondent alleging violations of the Kansas Underground Utility Damage Prevention Act (KUUDPA).

3. On or about April 23, 2012, the Commission issued an *Order to Show Cause* against Respondent.

4. On or about May 10, 2012, Respondent forwarded to Staff an answer to the allegations contained in the *Order to Show Cause*.

5. On or about May 21, 2012, Staff Counsel, Judy Jenkins and Respondent's Legal Counsel, Milo M. Unruh, Jr. of Arn, Mullins, Unruh, Kuhn & Wilson, LLP informally discussed

the possibility of a settlement. During the informal discussions, Staff and Respondent were able to reach mutually agreeable terms in anticipated settlement of the issues. It was agreed that Staff would subsequently reduce the terms to writing and forward the draft to Respondent for approval and signature.

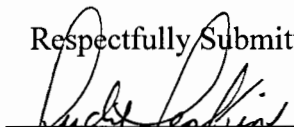
6. The resulting signed Stipulated Settlement Agreement is attached hereto as Attachment "A" and is hereby incorporated by reference. This Agreement resolves all issues identified in this proceeding between Staff and Respondent. The parties believe that the Agreement represents a reasonable and fair resolution of this matter and that the Commission should approve the Agreement.

7. Should the Commission accept the terms of the attached Stipulated Settlement Agreement, the parties waive their respective rights to cross-examine witnesses, present oral arguments, and/or written briefs to the Commission. The parties also waive their rights to request reconsideration of the Commission order approving the Agreement and waive their rights to seek judicial review of said order.

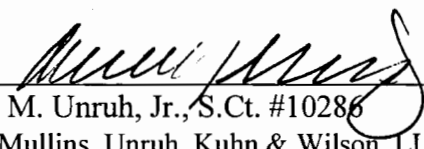
WHEREFORE, for the reasons set forth herein, Staff and Bob Bergkamp Construction Co. Inc, request this Joint Motion be granted, and that the attached Stipulated Settlement Agreement be approved.

Respectfully Submitted,

By: _____


Judy Jenkins, S. Ct. #23300
Litigation Counsel
Kansas Corporation Commission
1500 S.W. Arrowhead Road
Topeka, Kansas 66604-4027
Phone: 785-271-3181
Fax: 785-271-3167
Attorney for Commission

By: _____


Milo M. Unruh, Jr., S.Ct. #10286
Arn, Mullins, Unruh, Kuhn & Wilson, LLP
330 R.H. Garvey Building
300 West Douglas
Wichita, Kansas 67202
Phone: 316-267-5267
Fax: 316-267-5754
Attorneys for Respondent

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

In the Matter of 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/or)
Sanctions.

STIPULATED SETTLEMENT AGREEMENT

This Stipulated Settlement Agreement (Agreement) is entered into by and between the Staff of the Corporation Commission of the State of Kansas (Staff) and Bob Bergkamp Construction Co. Inc., (Respondent). The effective date of this Agreement will be the date the Commission enters an order approving or amending the terms of the Agreement.

I. JURISDICTION

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. 2011 Supp. 66-1815 and amendments thereto.

2. The Commission has the authority, pursuant to K.A.R. 82-14-6 and 82-1-237 (2003), as amended, to 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.

4. The Commission has the authority to compromise any civil penalty pursuant to K.S.A. 66-1,152.

II. BACKGROUND

5. Pursuant to the above jurisdiction and authority, on or about January 31, 2012, (Staff) received notice of a damaged underground utility facility and immediately followed up with an investigation. As a result of the investigation, Staff reported the following:

- a. 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, specifically north of the intersection of K-18 Highway and Country Road 418 (Stagg Hill Road).
- b. During the excavating activities conducted by Respondent on January 31, 2012, Respondent's equipment made contact with an 8 inch steel pipeline operated by KGS Manhattan, resulting in the release of 4,504 MCF of natural gas into the atmosphere before repair. The total cost of repairs by KGS was \$29,000.
- c. After reviewing the records of Kansas One Call, Staff discovered that Respondent had a valid Kansas One-Call ticket at the time of the damage. Staff also learned that the pipeline was properly marked by KGS.

d. Staff's investigation concluded that the manner in which the Respondent operated the heavy equipment within the tolerance zone was unreasonable under the circumstances and therefore a violation of K.S.A. 66-1809.

6. On April 16, 2012, Staff filed a *Staff's Motion to Show Cause* (Staff's Motion) supported by Staff's Report and Recommendation in this matter. The motion requested the Commission to accept Staff's request for a June 14, 2012, hearing to address the requested assessment of a \$5,000 civil penalty. Additionally, Staff filed *Staff's Errata to Motion to Show Cause* filed on April 18, 2012, which clarified the allegation contained in paragraph four (4) of the Staff's Motion.

7. On April 23, 2012, the Commission issued an *Order to Show Cause*, granting Staff's motion.

8. On May 10, 2012, Respondent forwarded to Staff a response to Staff's Motion and entered into settlement discussions with Staff. This agreement is a direct result of the on settlement discussions.

III. TERMS OF THE STIPULATED SETTLEMENT AGREEMENT

9. The parties agree that the Commission has jurisdiction and authority over this matter.

10. The parties also agree that adoption of this Agreement is in the public interest and that the Commission should approve the stipulations as set forth below:

- i. Respondent stipulates to the facts and alleged violations as cited in Staff's Motion (to include Staff's Report and Recommendation attached thereto as Attachment "A") filed in this docket on April 16, 2012, and *Staff's*

Errata to Motion to Show Cause filed on April 18, 2012, which is hereby incorporated by reference.

- ii. Additionally, 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.
- iii. Respondent further 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 briefings will be conducted by the Superintendent of the project and attended by each company employee involved in any construction activity at the work site. The agenda for the briefings will at a minimum address any possible utility conflicts that might be encountered by the company throughout that specific work day. The Superintendent will clearly address the 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.
- iv. Likewise during the daily briefings, the Superintendent shall specifically designate an employee to be responsible for confirming the location of and depth of potential underground utilities located at the work site. The employee shall then share this information with the Foreman prior to commencement of any excavation work. Additionally, confirmation of this task will be documented in the company’s safety records prepared from the daily briefings.

- v. Furthermore, 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.
- vi. Respondent also agrees to pay to the Commission a civil penalty in the amount of \$3,500, for the violation of the KUUDPA, which resulted in substantial damage.

11. Based on information Staff received during its investigation and in the settlement discussions, Staff agrees to recommend that the Commission approve this Agreement and issue an order for a civil assessment in the amount of \$3,500 which is a departure from Staff's initial recommendation of \$5,000.

12. Staff further agrees that upon approval by the Commission, and barring default proceedings pursuant to K.S.A. 77-520, this Agreement shall constitute a final resolution of this matter.

IV. RESERVATIONS

13. This Stipulated Settlement Agreement fully resolves issues specifically addressed between the parties. The parties agree that the terms of this Agreement constitute a fair and reasonable resolution of the issues addressed herein.

14. The terms and provisions of this Agreement have resulted from negotiations between the signatories and are interdependent. In the event the Commission does not approve the terms of the Agreement in total, any party has the option to terminate this Agreement and, if so terminated, none of the signatories hereto shall be bound by, prejudiced, or in any way affected by any of the terms or provisions hereof, unless otherwise provided herein.

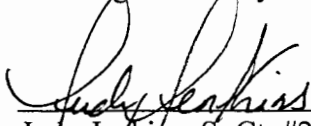
15. Unless (and only to the extent) otherwise specified in this Agreement, the signatories to this Agreement shall not be prejudiced, bound by, or affected in any way by the terms of this Agreement: (1) in any future Commission or court proceeding; (2) in any proceeding currently pending before the Commission under a separate docket; and/or (3) in this proceeding, if the Commission decides not to approve this Agreement in total or in any way conditions its approval of the same. This paragraph is not meant to limit future enforcement of this Agreement, should either party fail to fulfill all terms and provisions.

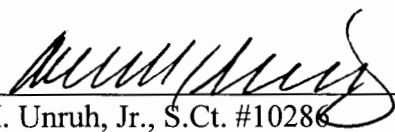
16. This Agreement does not prejudice or waive any party's legal rights, positions, claims, assertions or arguments in any proceedings in this docket, or any other proceeding before the Commission or in any court.

17. If the Commission approves this Agreement in its entirety and incorporates the same into a final order in this docket, the parties intend to be bound by its terms and the Commission's order incorporating its terms as to all issues addressed herein, and will not appeal the Commission's order.

18. This Stipulated Settlement Agreement shall be binding on all parties upon signing.

IN WITNESS WHERETO, the parties have executed and approved this Stipulated Settlement Agreement by subscribing their signatures below.

By: 
Judy Jenkins, S. Ct. #23300
Litigation Counsel
Kansas Corporation Commission
1500 S.W. Arrowhead Road
Topeka, Kansas 66604-4027
Phone: 913-371-7167
Fax: 785-271-3167
Attorney for Commission

By: 
Milo M. Unruh, Jr., S.Ct. #10286
Arn, Mullins, Unruh, Kuhn & Wilson, LLP
330 R. H. Garvey Building
300 West Douglas
Wichita, Kansas 67202-2978
Phone: 316-267-5267
Fax: 316-267-5754
Attorneys for Respondent

CERTIFICATE OF SERVICE

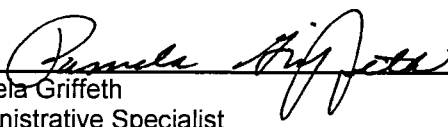
12-DPAX-730-SHO

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing Joint Motion For Approval of Stipulated Settlement Agreement with attached Stipulated Settlement Agreement was placed in the United States mail, postage prepaid, or hand-delivered this 4th day of June, 2012, to the following:

MILO M. UNRUH, JR.
ARN MULLINS UNRUH KUHN & WILSON, LLP
330 R.H. GARVEY BUILDING
300 WEST DOUGLAS
WICHITA, KS 67202-2978
Fax: 316-267-5754

RAY BERGMEIER, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027
Fax: 785-271-3354
r.bergmeier@kcc.ks.gov
Hand Delivered

JUDY JENKINS, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027
Fax: 785-271-3167
j.jenkins@kcc.ks.gov
Hand Delivered



Pamela Griffeth
Administrative Specialist