

1500 SW Arrowhead Road  
Topeka, KS 66604-4027



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

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

Sam Brownback, Governor

VIA CERTIFIED MAIL

**NOTICE OF PENALTY ORDER**  
15-DPAX-487-PEN

April 28, 2015

Robert Helton  
d/b/a Elite Construction Services  
912 NW Polk St  
Topeka KS 66609

This is a notice of penalty assessment for violation of the Kansas Underground Utility Damage Prevention Act (KUUDPA) discovered during an investigation conducted on February 9, 2015, 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 \$1,000 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 Secretary 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,

  
Andrew French, #24680  
Litigation Counsel  
(785)271-3361



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 February 9, 2015 Commission Staff (Staff) investigated the activity and operations of Robert Helton, d/b/a Elite Construction Services (Respondent). See Report and Recommendation of Staff dated April 14, 2015, a copy attached hereto as Attachment "A". As a result of this investigation, Staff reports the following:

- a. On February 9, 2015, Kansas Gas Service notified Staff that Respondent was conducting excavation activities at 1523 SW Polk St in Topeka, Kansas while excavating with a backhoe to remove concrete and debris from the street, it caused damage to an underground Kansas Gas Service natural gas line. On this same day, Staff observed Respondent excavating with a pneumatic jackhammer at the corner of 1<sup>st</sup> and SW Kansas Avenue in Topeka, Kansas.
- b. Upon notification of the damage, Staff arrived on-site at 1523 SW Polk St, and began an investigation. Staff learned from crew on-site that Respondent had not called Kansas One Call to inform them of the intent to dig and to obtain a locate ticket. Further, Respondent had not called

Kansas One Call while excavating at 1<sup>st</sup> and SW Kansas Avenue, Topeka, Kansas.

- c. On February 15, 2015, 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 2014 Supp. 66-1804.

- d. On March 16, 2015, 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. 2014 Supp. 66-1802(c) and (d).

6. Staff also recommends the Commission issue a civil penalty of \$1,000 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 Robert Helton, d/b/a Elite Construction Services (Respondent) because it is an excavator as defined in K.S.A. 2014 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 \$1,000 penalty for violation of the Kansas Underground Utility Damage Prevention Act.

#### **THE COMMISSION THEREFORE ORDERS THAT:**

A. Robert Helton, d/b/a Elite Construction Services, of Topeka, KS 66609, is hereby assessed a \$1,000 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. 2014 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 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 \$1,000 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. K.S.A. 77-515(c); K.A.R. 82-1-228(d)(2); K.A.R. 82-1-202(a). For civil penalties of \$500 or less, a corporation may appear by a duly authorized representative of the corporation. K.S.A. 2014 Supp. 66-1,142b(e) and amendments thereto.

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 \$1,000 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, Commissioner; Apple Commissioner

Dated: APR 28 2015

  
Order Mailed Date APR 29 2015  
Amy L. Gilbert  
Secretary

AF

## **ATTACHMENT “A”**



**REPORT AND RECOMMENDATION  
UTILITIES DIVISION**

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

**FROM:** Jesse Springer, Pipeline Safety Engineer  
Kristin Casarona, Natural Gas & Pipeline Operations Analyst *KC*  
Leo Haynos, Chief of Energy Operations & Pipeline Safety  
Jeff McClanahan, Director of Utilities

**DATE:** April 14, 2015

**SUBJECT:** **Docket Number:** 15-OPAX-487-PEN  
In the Matter of the Investigation of Elite Construction Services of Topeka, 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 Elite Construction Services (Elite Construction) in the amount of \$1,000 for violation(s) of KUUDPA. The penalty is based on results of Staff investigations of two excavation sites following a report of damage to a Kansas Gas Service (KGS) natural gas pipeline in Topeka, Kansas. There was no notice of intent to excavate provided to any utilities and Kansas One-Call had not been notified. Failure to provide notice before excavating is a violation of K.S.A. 66-1803 and 66-1804(a).

**BACKGROUND:**

On February 9, 2015, Elite Construction hit and damaged a KGS natural gas service line at 1523 SW Polk St. in Topeka, Kansas, while excavating with a backhoe to remove concrete and debris from the street. The damage resulted in an outage of service and no injuries. Staff also observed Elite Construction excavating with a pneumatic jackhammer at the corner of 1<sup>st</sup> and SW Kansas Avenue in Topeka, Kansas, on the same date. A subsequent review of the Kansas One Call database revealed that Elite Construction was excavating without locates at this site as well. A brief timeline of events is attached (Attachment I). Two Notices of Probable Noncompliance were issued to Elite Construction on February 1, 2015, and the responses to both Notices of Probable

Noncompliance were received as required by K.A.R. 82-14-(c) on March 16, 2015 (Attachment II).

## **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 to excavate is the most fundamental preventative measure an excavator takes, the fact that Elite Construction failed to comply with this requirement of the law warrants the assessment of a civil penalty.

#### **B. Culpability:**

Elite Construction is directly responsible for its actions in failing to notify facility owners and Kansas One-Call of its intent to excavate prior to excavating as Kansas law requires.

#### **C. History of noncompliance:**

Staff has issued no other KUUDPA Notices of Probable Noncompliance to Elite Construction in the past two years.

#### **D. Response of excavator regarding noncompliance(s):**

Elite Construction responded to the current Notices of Probable Noncompliance and agreed with Staff's findings. In its response, Elite Construction states it will implement new standard operating procedures as a preventative measure from reoccurrence.

#### **E. Aggravating/Mitigating Circumstances:**

Staff has not determined there to be any circumstances that would cause us to modify the recommended penalty amount of \$1,000.

## **RECOMMENDATION:**

Staff recommends a civil penalty of \$500 per violation be issued to Elite Construction Services for a total amount of \$1,000 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:**

- 2/9/15                      At approximately 8:58 a.m., Staff received an email notification from Kansas Gas Service indicating an excavator had damaged its natural gas service line at 1523 SW Polk St. in Topeka, Kansas.
- Staff subsequently conducted an on-site investigation of the excavation site described above. Staff learned that Elite Construction did not have a valid Kansas One-Call ticket for the excavation work it was performing.
- At approximately 10:45 a.m., Staff conducted an on-site investigation at the intersection of 1<sup>st</sup> Street and SW Kansas Avenue in Topeka, Kansas, and found Elite Construction excavating with a pneumatic jackhammer mounted to a backhoe. Staff learned that Elite Construction also did not have a valid Kansas One-Call ticket for this excavation.
- Upon completion of the investigation and research, Staff determined that Elite Construction had been excavating at both sites described above without obtaining valid locate requests and had violated KUUDPA.
- 2/15/15                      Staff issued Elite Construction two Notices of Probable Noncompliance for violating KUUDPA as stated above.
- 3/16/15                      Staff received Elite Construction's responses to the Notices of Probable Noncompliance as required by K.S.A. 82-14-6(c).

## ATTACHMENT II

### **PROBABLE NONCOMPLIANCE**

KCC Investigation#: 7073

COMPANY: Elite Construction Services

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:

KCC staff conducted an investigation on 2/9/2015 at 1522/1523 SW Polk St. in Topeka, Kansas, where ELITE CONSTRUCTION SERVICES hit a Kansas Gas Service; gas service line with a backhoe while removing concrete and debris from street. ELITE CONSTRUCTION SERVICES did not have a valid Onecall ticket at the time of the damage. This is a violation of 66-1804 above.

#### OPERATOR'S RESPONSE: (Attach verification if needed)

*Spoke with her regarding the situation & have communicated new SOP's that are focused on compliance. We also had discussion regarding the definition of excavation etc.*

Operator's authorized signature: \_\_\_\_\_

Date: \_\_\_\_\_

#### **PIPELINE SAFETY USE ONLY**

Date Reviewed: \_\_\_\_\_ Date Reviewed: \_\_\_\_\_  
Supervisor: \_\_\_\_\_ Inspector: \_\_\_\_\_

Inspected by: Springer

Date Inspected: 2/9/2015

Inspection type: No Locates- Excavator

**PROBABLE NONCOMPLIANCE**

KCC Investigation#: 7074

COMPANY: Elite Construction Services

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:**

KCC staff conducted an investigation at 10:45am on 2/9/2015 at 1st and Kansas Ave. In Topeka, Kansas, where ELITE CONSTRUCTION SERVICES was using a pneumatic jackhammer mounted to a backhoe to bust up street concrete for street repair. ELITE CONSTRUCTION SERVICES did not have a valid Onecall ticket at the time of the investigation. This is a violation of 66-1804 above.

**OPERATOR'S RESPONSE: (Attach verification if needed)**

*Spoke with him regarding the situation & how new SOP's will eliminate this from reoccurring again. We also discussed definition of excavation etc.*

Operator's authorized signature: \_\_\_\_\_

Date: \_\_\_\_\_

**PIPELINE SAFETY USE ONLY**

Date Reviewed: \_\_\_\_\_

Date Reviewed: \_\_\_\_\_

Supervisor: \_\_\_\_\_

Inspector: \_\_\_\_\_

Inspected by: Springer

Date Inspected: 2/9/2015

Inspection type: No Locates- Excavator

IN RE: DOCKET NO. 15-DPAX-487-PEN

DATE APR 28 2015

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

NAME AND ADDRESS	NO. CERT. COPIES	NO. PLAIN COPIES
ANDREW FRENCH, LITIGATION COUNSEL KANSAS CORPORATION COMMISSION 1500 SW ARROWHEAD RD TOPEKA, KS 66604-4027 ***Hand Delivered***		
ROBERT HELTON, OWNER D/B/A ELITE CONSTRUCTION SERVICES 912 NW POLK ST TOPEKA, KS 66609		

Order Mailed Date **APR 29 2015**

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.