

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
14-DPAX-564-PEN

May 12, 2014

Charlie Brunker
Charlie Brunker Excavating, Inc.
3775 Tennessee Rd
Ottawa KS 66067

This is a notice of penalty assessment for violation of the Kansas Underground Utility Damage Prevention Act (KUUDPA) discovered during an investigation conducted on March 21, 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
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 **Charlie**)
Brunker Excavating, Inc., of Ottawa,)
Kansas, Regarding Violation(s) of the Kansas)
Underground Utility Damage Prevention Act) Docket No. 14-DPAX-564-PEN
(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).)

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 March 21, 2014 Commission Staff (Staff) investigated the activity and operations of Charlie Brunner Excavating, Inc. (Respondent). See Report and Recommendation of Staff dated June 6, 2014, a copy attached hereto as Attachment "A". As a result of this investigation, Staff reports the following:

- a. On March 21, 2014, Southern Star Central Gas Pipeline (SSCGP) notified Staff that Respondent was conducting excavation activities in Franklin County near Ottawa, Kansas, just south and east of the Intersection of Nebraska Terrace and Osborne Terrace, without having obtained valid locates and without having served a valid notice of intent to excavate to the utility.
- b. On March 21, 2014, SSCGO had arrived on site to locate its pipeline pursuant to receiving Kansas One Call locate request #14094490, called in by Respondent on March 20, 2014, with a work to begin date of March 25, 2014. Upon arrival, they found Respondent had already been doing terrace work with a bulldozer, close to completion of its project, near its 20-inch high pressure natural gas transmission pipeline and had removed

four to six inches of cover from the line. Although Kansas One-Call had been notified, the excavation took place four days prior to the excavation date and outside the scope of the locate ticket. The scope of the locate ticket called in by Respondent was for "gate and fence work" rather than terracing work.

- c. Upon completion of the investigation and research, Staff has determined that because Respondent did not allow the two full working days for SSCG to get its underground facilities marked prior to excavating, pursuant to K.S.A. 66-1804, Respondent has violated KUUDPA.
- d. 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. Except in the case of an emergency an excavator shall 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 tier 1 facilities located in the proposed area of excavation. This failure is a violation of K.S.A 2013 Supp. 66-1804.

- e. On May 29, 2014, Staff received a written response from Respondent to the Notice of Probable Noncompliance, which was after 30 days of receipt of the Notice of Probable Noncompliance. In its response, Respondent stated, "We filed a locate ticket. We cleaned out terraces into the water ways to gain better drainage. We were working T6 depth. Was no deeper then [sic] the ground had been worked. The locate ticket however was put in as fence building and not terrace work."

5. Based upon the available facts, Staff recommends the Commission find that at the time of the excavation 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 Charlie Bruner Excavating, Inc. (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. Charlie Brunker Excavating, Inc., of Ottawa, KS 66067, 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: JUN 12 2014


ORDER MAILED JUN 13 2014

Kim Christiansen
Executive Director

RAF

ATTACHMENT “A”

15, 2014 (Attachment II). On May 29, 2014, Brunker 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 to excavate is the most fundamental preventative measure an excavator takes, the fact that Brunker failed to comply with this requirement of the law warrants the assessment of a civil penalty.

B. Culpability:

Brunker is directly responsible for its actions in failing to provide proper and timely notice of intent to excavate as Kansas law requires.

C. History of noncompliance:

Staff has issued one other KUUDPA Notice of Probable Noncompliance to Brunker in the past two years. That violation was also for failing to provide notice of intent to excavate in a timely manner as required by Kansas law.

D. Response of excavator regarding noncompliance(s):

Brunker responded to the current Notice of Probable Noncompliance stating that a request for locates had been made for the property for the purpose of building a fence. In its response, Brunker did not address the fact that excavation was being performed four days before the scheduled excavation start date. Further, Brunker failed to respond within 30 days of receipt of the Notice of Probable Noncompliance, which is a violation of K.A.R. 82-14-6(c). Staff concludes that there is no extenuating circumstance in this case to mitigate the recommended penalty for failure to provide notice of intent to excavate.

E. Aggravating/Mitigating Circumstances:

Staff concludes there are no extenuating circumstances in this case to that would cause us to modify the recommended penalty amount of \$500.

RECOMMENDATION:

Staff recommends a civil penalty be issued to Charlie Brunker Excavating, Inc. 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

Utilities Division
1500 SW Arrowhead Road
Topeka, KS 66604-4027



Phone: 785-271-3220
Fax: 785-271-3357
<http://kcc.ks.gov/>

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

Sam Brownback, Governor

REPORT AND RECOMMENDATION UTILITIES DIVISION

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

FROM: Kristin Casarona, Natural Gas & Pipeline Operations Analyst
Leo Haynos, Chief of Pipeline Safety
Jeff McClanahan, Director of Utilities

RC

DATE: June 6, 2014

DATE SUBMITTED TO LEGAL: 6/6/14

DATE SUBMITTED TO COMMISSIONERS: 6/12/14

SUBJECT: Docket Number: 14-APAX-564-PEN
In the Matter of the Investigation of Charlie Brunker Excavating, Inc. of Ottawa, 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 Charlie Brunker Excavating, Inc. (Brunker) in the amount of \$500 for violation(s) of KUUDPA. The penalty is based on results of a Staff investigation following a complaint from Southern Star Central Gas Pipeline (SSCGP) regarding Brunker excavating with a bulldozer near its 20-inch high pressure natural gas transmission pipeline in Franklin County near Ottawa, Kansas, without providing proper notice of intent to excavate. There was no valid notice of intent to excavate provided to any utilities. Although Kansas One-Call had been notified, the excavation took place four days prior to the excavation date and outside the scope of the locate ticket. Failure to provide proper and timely notice before excavating is a violation of K.S.A. 66-1803 and 66-1804(a).

BACKGROUND:

On March 21, 2014, Brunker allegedly excavated with a bulldozer near a SSCGP 20-inch high pressure natural gas transmission pipeline in Franklin County, Kansas, removing four-to-six inches of ground cover from the top of the pipeline. Allegedly, SSCGP was not provided proper and timely notice of intent to excavate as required by Kansas law. A brief timeline of events is attached (Attachment I). A Notice of Probable Noncompliance was issued to Brunker on April

ATTACHMENT I

Timeline:

- 3/21/2014 At approximately 2:04 p.m., Staff received email notification from SSCGP that Brunker was excavating the same day with a bulldozer to clear terraces around its high pressure 20-inch natural gas transmission pipeline without obtaining valid locates in Franklin County near Ottawa, Kansas, just south and east of the intersection of Nebraska Ter. and Osborne Ter.
- SSCGP alleges its personnel arrived on site to locate its pipeline pursuant to receiving Kansas One Call locate request #14094490, called in by Brunker on March 20, 2014, with a work to begin date of March 25, 2014. Upon arrival, they found Brunker had already been excavating, close to completion of its project, near its 20-inch high pressure gas pipeline and had removed four-to-six inches of cover from it. SSCGP also alleges the work being done was terracing instead of the "gate and fence work" Brunker had stated on the locate request.
- SSCGP further alleges that the bulldozer operator had placed another utility company's (KGS) flags in the ground where he thought the pipeline might be instead of waiting the required time for SSCGP to get its own facility located.
- 3/28/2014 Upon completion of the investigation and research, Staff determined that Brunker had been excavating without a valid locate request and had violated KUUDPA.
- 4/15/2014 Staff issued Brunker a Notice of Probable Noncompliance for violating KUUDPA as stated above.
- 5/29/2014 Staff received Brunker's response to the Notice of Probable Noncompliance as required by K.A.R. 82-14-6(c).

ATTACHMENT II

PROBABLE NONCOMPLIANCE

KCC Investigation#:6888

COMPANY: **Charlie Brunker Excavating, Inc.** 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.

History: L. 1993, ch. 217, § 4; L. 2002, ch. 41, § 2; L. 2008, ch. 122, § 6; July 1, 2009.

PROBABLE NONCOMPLIANCE DESCRIPTION:

On 3/21/2014, Staff was notified by Southern Star Central Gas (SSCG) that Charlie Brunker Excavating, Inc. was excavating with a bulldozer to clear terraces around its high pressure 20" gas transmission pipe line without obtaining valid locates in Franklin County, Kansas, south and east of the intersection of Nebraska Ter. and Osborne Ter. near Ottawa, Kansas. There was a One Call Ticket No. 14094490 for the excavation area with a work to begin date of 3/25/2014. SSCG alleges that 4"-6" of cover had been removed from its pipeline and the excavation was almost complete when they went out to locate their pipeline on 3/21/2014: 4 days prior to the stated excavation date and 1 day after the ticket was called in to Kansas One Call (3/20/2014 at 12:01 p.m.). Because Charlie Brunker Excavating did not allow the 2 full working days for SSCG to get its underground facilities marked prior to excavating, this is a violation of the Statute K.S.A. 66-1804 Notice of intent of excavation.

OPERATOR'S RESPONSE: (Attach verification if needed)

We filed a locate ticket we cleaned out terraces into the water ways to gain better drainage. The depth we were working was no deeper than the ground had been worked. The locate ticket however was put in as fence building and not terrace work.

Operator's authorized signature: *Charlie Brunker*

Date: 5-27-14

PIPELINE SAFETY USE ONLY

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

Inspected by: **Casarona**
Date inspected: **3/21/2014**
Inspection type: **Complaint**



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

NAME AND ADDRESS	NO. CERT. COPIES	NO. PLAIN COPIES
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CHARLIE BRUNKER, PRESIDENT
CHARLIE BRUNKER EXCAVATING, INC.
3775 TENNESSEE RD
OTTAWA, KS 66067

ROBERT A. FOX, SENIOR LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027

Hand Delivered

ORDER MAILED **JUN 13 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.