

STATE OF KANSAS

CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027



PHONE: 785-271-3100
FAX: 785-271-3354
<http://kcc.ks.gov/>

GOVERNOR JEFF COLYER, M.D.
SHARI FEIST ALBRECHT, CHAIR | JAY SCOTT EMLER, COMMISSIONER | PAT APPLE, COMMISSIONER

NOTICE OF PENALTY ASSESSMENT
18-DPAX-378-PEN

March 13, 2018

Wade Wasinger
Heartland Pool and Spa Services, LLC
14810 W 89th St
Lenexa, Kansas 66215

This is a notice of penalty assessment against Heartland Pool and Spa Services, LLC for violation of the Kansas Underground Utility Damage Prevention Act (KUUDPA) discovered during an investigation conducted on November 27, 2017, 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 the date of service of the Penalty Order to pay the fine amount. Checks 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 (18-DPAX-378-PEN) of this proceeding.

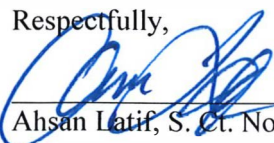
IF YOU CONTEST THE PENALTY:

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 may electronically file its request for hearing within fifteen (15) days from the date of service of this Penalty Order, and e-mail or mail a copy of the request for hearing to the Litigation Counsel listed below. If the company does not have access to the internet, it 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 Penalty Order, and provide a copy to the Litigation Counsel listed below.

IF YOU FAIL TO ACT:

Pursuant to K.A.R. 82-14-6(i) and (j), failure to submit a written request for a hearing within fifteen (15) days or, in the alternative, to pay the civil assessment in twenty (20) days from the date of service of this Penalty Order, will be considered an admission of noncompliance and result in the Penalty Order becoming a Final Order and the Commission may order further sanctions.

Respectfully,


Ahsan Latif, S. Ct. No. 24709
Litigation Counsel
(785)271-3118
a.latif@kcc.ks.gov

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

Before Commissioners: Shari Feist Albrecht, Chair
 Jay Scott Emler
 Pat Apple

In the Matter of the Investigation of **Heartland**)
Pool and Spa Services, LLC, of Lenexa,)
Kansas, Regarding Violation(s) of the Kansas) Docket No. 18-DPAX-378-PEN
Underground Utility Damage Prevention Act)
(KUUDPA) (K.S.A. 66-1801, *et seq.*, and)
K.A.R. 82-14-1, *et seq.*), 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, 66-1815 grants the Commission full power and authority to adopt all necessary rules and regulations for carrying out the provisions of K.S.A. 66-1801 through 66-1816, *et seq.*

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 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 27, 2017 Commission Staff (Staff) investigated the activities and operations of Heartland Pool and Spa Services, LLC (Respondent). See Report and Recommendation of Staff dated February 28, 2018, a copy of which is attached hereto as Attachment "A". As a result of this investigation, Staff reports the following:

- a. On November 27, 2017, Staff performed an onsite inspection at 15216 Monrovia St in Overland Park, Kansas. Staff's investigation discovered the Respondent caused damage to an Atmos Energy 1-1/4" PE gas service line. No injuries or additional property damage occurred.
- b. Staff learned during its independent investigation that Respondent had not provided Atmos with a notice of intent to excavate and Kansas One Call had not been called.
- c. On December 14, 2017, 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, including identification of any errors in the Notice of Probable Noncompliance. The violation cited is as follows:

K.S.A. 66-1804(a) & (e)

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 no 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.

(e) The notice of intent of excavation shall contain the name, address and telephone number of the person filing the notice of intent, the name of the excavator, the date the excavation activity is to commence and the type of excavation being planned. The notice shall also contain the specific location of the excavation.

- d. Staff has not received a written response from Respondent in violation of K.A.R. 82-14-6. Pursuant to K.A.R. 82-14-6(e), failure to respond to the Notice of Probable Noncompliance within 30 days shall constitute an admission to all factual allegations made by the Commission Staff and may be used against the Respondent in future proceedings.

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. 2016 Supp. 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 Heartland Pool and Spa Services, LLC failed to comply with this requirement of law warrants the assessment of a civil penalty.

7. Staff recommends the Commission issue Heartland Pool and Spa Services, LLC 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) and (d). Accordingly, the Commission finds it has jurisdiction over Respondent to enforce the KUUDPA.

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

11. The Commission concludes Respondent shall be assessed a civil penalty, pursuant to K.S.A. 66-1812, in the amount of \$500 for violation of the Kansas Underground Utility Damage Prevention Act. The Commission finds and concludes Respondent shall be afforded an opportunity to request a hearing on the assessment of this civil penalty. Pursuant to K.A.R. 82-

14-6(j), the Commission finds and concludes Respondent shall have 15 days from the date of service of this Penalty Order to request a hearing on the matter. Pursuant to K.A.R. 82-14-6(i), and (j), the Commission finds and concludes Respondent's failure to pay the assessed civil penalty within 20 days or request a hearing within 15 days from the date of service of this Penalty Order shall be considered an admission of noncompliance. To ensure uniformity and consistency among Commission proceedings, the Commission finds and concludes any hearing on this matter before the Commission shall be conducted in a manner consistent with the Kansas Administrative Procedure Act, K.S.A. 77-501 *et seq.*

THE COMMISSION THEREFORE ORDERS THAT:

A. Heartland Pool and Spa Services, LLC, of Lenexa, Kansas, 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.A.R. 82-14-6(j) and amendments thereto, any party may request a hearing by electronically filing its request within fifteen (15) days from the date of service of this Penalty Order, and e-mail or mail a copy of the request for hearing to the Litigation Counsel listed on the Notice of Penalty Assessment. If the company does not have access to the internet, it must submit an original and seven copies of the request for hearing to the Commission's Secretary to the Commission at 1500 SW Arrowhead Road, Topeka, Kansas 66604, within fifteen (15) days from the date of service of this Penalty Order, and provide a copy to Litigation Counsel. 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. Any hearing on this matter before the Commission shall be conducted in a manner consistent with the Kansas Administrative Procedure Act, K.S.A. 77-501, *et seq.*

C. On March 13, 2018, this Penalty Order was mailed via certified mail, return receipt number 70161970000105744011. Service of this Order is complete upon the date delivered shown on the Domestic Return Receipt.

D. 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).

E. 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 the date of service of this Order. Checks shall 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. 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 (18-DPAX-378-PEN) of this proceeding.

F. Unless a hearing is requested, failure to pay the \$500 civil penalty within twenty (20) days from the date of service 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.

G. 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

03/13/2018

Dated: _____

A handwritten signature in dark ink, appearing to read "Lynn M. Retz". The signature is fluid and cursive, with a long horizontal stroke extending from the end.

Lynn M. Retz
Secretary to the Commission

AAL/vj

ATTACHMENT “A”

**REPORT AND RECOMMENDATION
UTILITIES DIVISION**

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

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

DATE: February 28, 2018

SUBJECT: **Docket Number:** 18-DAAX-378-PEN
In the Matter of the Investigation of Heartland Pool and Spa, Inc. 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 Heartland Pool and Spa, Inc. (Heartland Pool) in the amount of \$500 for violation of KUUDPA. Heartland Pool 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 Heartland Pool on December 14, 2017. Heartland Pool 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 included as 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. Heartland Pool damaged an Atmos service line with a backhoe while excavating. Heartland Pool did not have a One Call ticket. Because providing proper and timely notice of intent is the fundamental preventative

measure an excavator takes, the fact that Heartland Pool failed to comply with this requirement of the law warrants the assessment of a civil penalty.

B. Culpability:

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

C. History of noncompliance:

Staff has issued no other KUUDPA Probable Noncompliance(s) to Heartland Pool in the past two years.

D. Response of excavator regarding noncompliance(s):

Response to the Notice of Probable Noncompliance as required by K.A.R. 82-14- 6 (c) has not been received by Staff. As per K.A.R. 82-14-6(e), failure to respond within 30 days to the Notice of Probable Noncompliance constitutes an admission to all factual allegations made by the Commission Staff.

E. Aggravating/Mitigating Circumstances:

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

RECOMMENDATION:

Staff recommends a civil penalty be issued to Heartland Pool and Spa, Inc. in the amount of \$500 for violation(s) of K.S.A. 66-1804.

Attachments

ATTACHMENT I

Timeline:

11/27/2017	At approximately 10:45, Staff received an email notification from Atmos, indicating an excavator had damaged its natural gas line at 15296 Monrovia St., in Overland Park, Kansas, at or around 12:00 P.M. on 11/24/2017.
11/27/2017	<p>Staff arrived onsite at approximately 12:25 P.M. and subsequently conducted an on-site investigation. Staff learned from conversations on-site with Atmos and Heartland Pool 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.</p> <p>Upon completion of the investigation, Staff determined that Heartland Pool had been excavating without a valid Kansas One-Call ticket and had violated KUUDPA.</p>
12/14/2017	Staff issued a Notice of Probable Noncompliance for violating KUUDPA as stated above.
1/11/2018	Phone conversation with Heartland Pool regarding damage and what is to be included in the response to the PNC.
1/20/2018	Response to PNC was due.
1/29/2018	Follow-up email regarding response to PNC and asking if response had been sent. Asked Heartland Pool to resend.
1/30/2018	Received an email from Heartland Pool stating the response to the PNC had been mailed to the KCC. The response could not be located.
2/20/2018	Staff has not received Heartland Pool's response to the Notice of Probable Noncompliance as required by K.A.R. 82-14-6(c).

ATTACHMENT II

PROBABLE NONCOMPLIANCE

Investigation: CK-17-OC-1139

Company: Heartland Pool and Spa

Division:

Regulation:

66-1984 (a) & (c) Notice of intent of excavation.

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.

(c) The notice of intent of excavation shall contain the name, address and telephone number of the person filing the notice of intent, the name of the excavator, the date the excavation activity is to commence and the type of excavation being planned. The notice shall also contain the specific location of the excavation.

PROBABLE NONCOMPLIANCE DESCRIPTION:

On 11/24/2017, Heartland Pool and Spa, did not notify One-Call prior to excavating at 15216 Monrovia St in Overland Park, Kansas. Heartland Pool and Spa damaged an Atmos 1-1/4" PE gas service line with a backhoe while resetting pool walls. After performing a search in the One-Call database no ticket was found for this area by this contractor during this time frame for the work that was being performed prior to the damage.

OPERATOR'S RESPONSE: (Attach verification if needed)

Operator's Authorized Signature: _____ Date: _____

PIPELINE SAFETY USE ONLY

Date reviewed: _____

Date reviewed: _____

Chief: _____

Inspector: _____

Inspection Type: One-Call Inquiry/Complaint

Date Inspected: 11/27/2017

Inspected By: CK

CERTIFICATE OF SERVICE

18-DPAX-378-PEN

I, the undersigned, certify that the true copy of the attached Order has been served to the following parties by means of
03/14/2018

first class mail/hand delivered on _____.

WADE WASINGER, MANAGING MEMBER
HEARTLAND POOL AND SPA SERVICES, LLC
14810 W 89TH ST
LENEXA, KS 66215
heartlandpool104@yahoo.com

AHSAN LATIF, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
Fax: 785-271-3354
a.latif@kcc.ks.gov

/S/ DeeAnn Shupe

DeeAnn Shupe