

NOTICE OF PENALTY ORDER
25-DPAX-239-PEN

December 24, 2024

Bill Scimeca
Tom's Ditching & Backhoe, Inc.
1876 A Hwy 75
Caney, KS 67333

This is a notice of a penalty assessment against Tom's Ditching & Backhoe Inc. ("Tom's Ditching & Backhoe") for a violation of the Kansas Underground Utility Damage Prevention Act ("KUUDPA") and pipeline safety regulations adopted by the Kansas Corporation Commission. Tom's Ditching & Backhoe has been assessed a civil penalty in the amount of \$500. For a full description of the penalty please refer to the Penalty Order attached to this notice.

IF YOU ACCEPT THE PENALTY: You have twenty (20) days from the date of service of the Penalty Order to pay the penalty. Payments shall be payable to the Kansas Corporation Commission and mailed to the Fiscal Division of the Kansas Corporation Commission, 1500 S.W. Arrowhead Road, Topeka, Kansas 66604, and shall include a reference to Docket Number 25-DPAX-239-PEN.

IF YOU CONTEST THE PENALTY: You have the right to request a hearing to challenge the Penalty Order. A request for hearing must be made in writing, setting forth the specific grounds upon which relief is sought. You or an authorized representative of Tom's Ditching & Backhoe, may electronically file its request for hearing within fifteen (15) days from the date of service of the Penalty Order. A copy of the request for hearing must be provided to the Litigation Counsel listed below.

IF YOU FAIL TO ACT: Pursuant to K.A.R. 82-14-6(j), failure to submit a written request for a hearing within fifteen (15) days from date of service of the Penalty Order will be considered an admission of noncompliance. **Failing to request a hearing or pay the civil assessment may result in further penalties.**

Respectfully,

/s/ Ahsan A. Latif

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

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

Before Commissioners: Andrew J. French, Chairperson
 Dwight D. Keen
 Annie Kuether

In the Matter of the Investigation of Tom’s)
Ditching & Backhoe Inc., Regarding)
Violations of the Kansas Underground Utility)
Damage Prevention Act (KUUDPA) (K.S.A.) Docket No. 25-DPAX-239-PEN
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. REGULATORY FRAMEWORK

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.* K.S.A. 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 66-1814.

2. Pursuant to K.A.R. 82-14-6, 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 is authorized to impose civil penalties and injunctive actions against any person or entity subject to and found in violation of KUUDPA, or any rule and regulation, or any order of the Commission. Each violation is subject to a civil penalty, not to

exceed \$200,000, for each day the violation persists, with a maximum civil penalty of \$2,000,000 for any related series of violations.¹

4. Pursuant to K.A.R. 82-1-237, the Commission has the authority to investigate a party under its jurisdiction and order a hearing on its own motion when the Commission believes the party is in violation of the law or any order of the Commission. K.A.R. 82-1-6(m) provides a show cause hearing may be held by the Commission when all other reasonable measures have failed to produce operator compliance, or when non-compliance presents an imminent danger to persons or property.

II. JURISDICTION

5. Tom's Ditching & Backhoe Inc. ("Tom's Ditching & Backhoe") operates as an excavator as defined by K.S.A. 66-1802.

6. Tom's Ditching & Backhoe is a statutorily defined excavator that engages directly in excavation activities within the state of Kansas. K.S.A. 66-1802 defines excavation as "any operation in which earth, rock or other material below the surface is moved or otherwise displaced by any means." Pursuant to K.S.A. 66-1813, which authorizes the Commission to administer and enforce the KUUDPA, Tom's Ditching & Backhoe is subject to the Commission's jurisdiction regarding compliance with KUUDPA's obligations (e.g., K.S.A. 66-1803), and may be subject to penalties issued pursuant to K.S.A. 66-1812.

III. NONCOMPLIANCE

7. On August 30, 2024, Staff conducted an onsite investigation of the excavation operations of Tom's Ditching & Backhoe at the excavation site in the area of North State Avenue and West Rose Avenue in Caney, Kansas.

¹ See K.S.A. 66-1812; K.A.R. 82-14-6.

8. Staff subsequently issued Tom’s Ditching & Backhoe a notice of probable noncompliance (“PNC”) on September 3, 2024, notifying Tom’s Ditching & Backhoe of the investigation results.²

9. On September 4, 2024, Staff received a response from Tom’s Ditching & Backhoe agreeing with Staff’s findings.³

10. Staff concluded that Tom’s Ditching & Backhoe had requested locates, but began excavating prior to the due date for those locates and the facilities were not completely marked prior to the excavation at North State Avenue and West Rose Avenue in Caney, Kansas resulting damage to an Atmos 2” natural gas main line while doing electrical work.

11. Staff found Tom’s Ditching & Backhoe Home is directly liable for its actions in failing to provide a notice of intent before excavating as required K.S.A. 66-1803 and 66-1804.

12. Commission technical staff (“Staff”) submitted to the Commission’s Litigation Division Staff’s Report and Recommendation (including all Exhibits to it, the “R&R”), attached as **Attachment A** and incorporated by reference, on December 5, 2024, recommending a civil penalty of \$500 to be assessed against Tom’s Ditching & Backhoe due to Tom’s Ditching & Backhoe’s failure to take precautions to conduct an excavation in a careful and prudent manner causing damage to an Atmos 2” natural gas main line while doing electrical work.⁴

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

13. The Commission finds it has full power and authority under K.S.A. 66-1815(a) to adopt all necessary rules and regulations for carrying out the provisions of KUUDPA.

² See Exhibit 1 of the R&R.

³ *Id.*

⁴ Staff’s Report and Recommendation, p. 1 (Dec. 5, 2024).

14. The Commission finds that Tom's Ditching & Backhoe was operating as an excavator, as defined in K.S.A. 66-1802, during the incident at issue.

15. The Commission finds that, pursuant to K.A.R. 82-14-6(a), Staff was authorized to serve a PNC on Tom's Ditching & Backhoe after Staff conducted their investigation regarding the damaged gas main.

16. The Commission finds that by excavating prior to the due date for locates to be marked at the Excavation Site, Tom's Ditching & Backhoe violated K.S.A. 66-1803 and 66-1804.

17. The Commission finds that Tom's Ditching & Backhoe responded to the PNC within thirty (30) days as required by K.A.R. 82-14-6(a) and did not dispute Staff's findings.

18. The Commission concludes that Tom's Ditching & Backhoe violated K.S.A. 66-1803 and 66-1804 and that Staff's recommendation the excavator be assessed a \$500 civil penalty is reasonable.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

A. A civil penalty in the amount of \$500 is assessed against Tom's Ditching & Backhoe Inc. for violating the Kansas Underground Utility Damage Prevention Act, K.S.A. 66-1801 *et seq.*

B. Pursuant to K.A.R. 82-14-6(j), Tom's Ditching & Backhoe Inc. may request a hearing to challenge the allegations set forth in this Penalty Order by electronically filing its request for hearing with the Commission within fifteen (15) days from the date of service of this Penalty Order, and e-mailing or mailing a copy of the request for hearing to the Litigation Counsel listed on the Notice of Penalty Assessment. 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 Tom's Ditching & Backhoe Inc.'s right to a hearing. A request for hearing must comply with the provisions of K.A.R. 82-1-232(b).

C. Pursuant to K.A.R. 82-14-6(i), if Tom's Ditching & Backhoe Inc. does not request a hearing, payment of the civil penalty is due within twenty (20) days from the date of service of this Penalty Order. Payments shall be made payable to the Kansas Corporation Commission and mailed to the following address:

Fiscal Division
Kansas Corporation Commission
1500 S.W. Arrowhead Road
Topeka, Kansas 66604

The payment shall include a reference to Docket Number 25-DPAX-239-PEN.

D. 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 Tom's Ditching & Backhoe Inc., including all sanctions, requirements, and penalties described above being enforceable without further action by the Commission.

BY THE COMMISSION IT IS SO ORDERED.

French, Chairperson; Keen, Commissioner; Kuether, Commissioner

Dated: 12/24/2024



Lynn M. Retz
Executive Director

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ATTACHMENT “A”

Andrew J. French, Chairperson
Dwight D. Keen, Commissioner
Annie Kuether, Commissioner

Laura Kelly, Governor

**REPORT AND RECOMMENDATION
UTILITIES DIVISION**

TO: Andrew J. French, Chairperson
Dwight D. Keen, Commissioner
Annie Kuether, Commissioner

FROM: Suzanne M. Balandran, Public Service Administrator
Paul Owings, Chief of Pipeline Safety
Jeff McClanahan, Director of Utilities

DATE: December 5, 2024

SUBJECT: Docket Number:
In the Matter of the Investigation of Tom's Ditching and Backhoe 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:

As a result of the investigation in Case Number AR-24-OC-1078, Staff recommends that a civil penalty in the amount of \$500 be assessed to Tom's Ditching and Backhoe Inc. (Tom's Ditching) for violation(s) of the Kansas Underground Utility Damage Prevention Act (KUUDPA). Tom's Ditching failed to wait two full days prior to excavation at North State and West Rose Avenues, in Caney, Kansas. Failure to wait two full days before excavating is a violation of K.S.A. 66-1804. Staff issued a Notice of Probable Noncompliance (PNC) to Tom's Ditching on September 3, 2024. Tom's Ditching did not dispute Staff's allegation in their response to the PNC on September 4, 2024 as required by K.A.R. 82-14-6 (c). The response is included as Exhibit 1.

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. This excavator was installing underground electrical lines in the near vicinity of an Atmos main line. Because Tom's Ditching did not wait the two full days prior to excavating, the utility operator was unable to provide the location at which Tom's Ditching would be required to carefully excavate to avoid damage to an underground facility at any depth. Tom's Ditching failed to comply with the law and warrants the assessment of a civil penalty.

B. **Culpability:**

Tom's Ditching is directly liable for its actions in failing to provide a notice of intent before excavating as required by Kansas law.

C. **History of noncompliance:**

Staff has not issued any Notices of Probable Noncompliance for violations of KUUDPA to Tom's Ditching.

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

Response to the PNC as required by K.A.R. 82-14- 6(c) was received by Staff. Tom's Ditching agreed with Staff's findings as is documented in Attachment 1. Tom's Ditching acknowledged that Tom's Ditching began excavation prior to waiting two full days.

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 assessed to Tom's Ditching in the amount of \$500 for violating K.S.A. 66-1804.

Attachment

EXHIBIT 1

Company: Tom's Ditching and Backhoe, Inc

Division:

Regulation:

66-1804 (a) Notice of intent of excavation; requirements.

(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 20 calendar days before the scheduled excavation start date, on each operator having underground tier 1 facilities located in the proposed area of excavation.

PROBABLE NONCOMPLIANCE DESCRIPTION:

On 08/30/2024, KCC Staff was notified of excavation work resulting in a damage to an Atmos gas line around the area of North State Avenue and West Rose Evenue in Caney, Kansas. Atmos alleges that Tom's Ditching & Backhoe, Inc. damaged an Atmos 2" natural gas main line while doing electrical work. Tom's Ditching & Backhoe, Inc. had a One-Call ticket (#24447714) in the One-Call database however the damage occurred prior to the 09/04/2024 due date and facilities were not completely marked prior to the damage.

OPERATOR'S RESPONSE: (Attach verification if needed)

These alligations a correct and true. We got in to big of a hurry and started digging ahead of schedule. In the future, management will do better to maintain a schedule that is in alignment with the timeline of the locate requests.

Operator's Authorized Signature: Will Hall Date: 9/3/2024

PIPELINE SAFETY USE ONLY:	
Date reviewed: _____	Date reviewed: _____
Chief: _____	Inspector: _____

Inspection Type: One Call Inquiry/Complaint
Date Inspected: 08/30/2024
Inspected By: AR

CERTIFICATE OF SERVICE

25-DPAX-239-PEN

I, the undersigned, certify that a true copy of the attached Order has been served to the following by means of first class mail and electronic service on 12/24/2024.

AHSAN LATIF, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
ahsan.latif@ks.gov

Tom Scimeca, PRESIDENT
Tom's Ditching and Backhoe, Inc
1876-C US Highway 75
Caney, KS 67333
toms.ditching@totalcsi.com

/S/ KCC Docket Room
KCC Docket Room