

CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027PHONE: 785-271-3100
FAX: 785-271-3354
<http://kcc.ks.gov/>

GOVERNOR JEFF COLYER, M.D.

SHARI FEIST ALBRECHT, CHAIR | JAY SCOTT EMLER, COMMISSIONER | DWIGHT D. KEEN, COMMISSIONER

NOTICE OF PENALTY ASSESSMENT

19-DPAX-193-PEN

November 20, 2018

Nathan Wright
d/b/a E&M Underground
1414 Sloan Ave
Pleasant Hill, Missouri 64080

This is a notice of penalty assessment against Nathan Wright, d/b/a E&M Underground for violation of the Kansas Underground Utility Damage Prevention Act (KUUDPA) discovered during an investigation conducted on August 22, 2018, 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 Division of the Kansas Corporation Commission, 1500 S.W. Arrowhead Road, Topeka, Kansas 66604, and shall include a reference to the docket number (19-DPAX-193-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,

A handwritten signature in blue ink that reads "Carly R. Masenthin".

Carly R. Masenthin, S. Ct. No. 27944
Litigation Counsel
(785)271-3361
c.masenthin@kcc.ks.gov

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

Before Commissioners: Shari Feist Albrecht, Chair
 Jay Scott Emler
 Dwight D. Keen

In the Matter of the Investigation of Nathan)	
Wright, d/b/a E&M Underground, of)	
Pleasant Hill, Missouri,)	
Regarding)	Docket No. 19-DPAX-193-PEN
Violation(s) of the Kansas Underground Utility)	
Damage Prevention Act (KUUDPA) (K.S.A.)	
66-1801, <i>et seq.</i> , and K.A.R. 82-14-1, <i>et seq.</i>),)	
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 66-1814, *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 August 22, 2018 Commission Staff (Staff) investigated the activities and operations of Nathan Wright, d/b/a E&M Underground (Respondent). See Report and Recommendation of Staff dated November 5, 2018, a copy of which is attached hereto as Attachment "A". As a result of this investigation, Staff reports the following:

- a. On August 22, 2018, Staff performed an onsite inspection at 9015 Hardy Street in Overland Park, Kansas. Staff's investigation discovered the Respondent caused damage to a Kansas Gas Service (KGS) 3/4" PE gas service line. No injuries or additional property damage occurred.
- b. Staff learned during its independent investigation that Respondent had not provided Kansas Gas Service (KGS) with a notice of intent to excavate and Kansas One Call had not been called to obtain locate marks.
- c. On August 31, 2018, 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. 2017 Supp. 66-1802(c) and (d). Additionally, based upon the available facts, Staff recommends the Commission find Respondent failed to obtain a valid locate ticket and 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 Nathan Wright, d/b/a E&M Underground failed to comply with this requirement of law warrants the assessment of a civil penalty.

7. Staff recommends the Commission issue Nathan Wright, d/b/a E&M Underground 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 obtain a locate ticket and failing to provide a

notice of intent of excavation. As a result of this failure, Respondent damaged underground facilities of Kansas Gas Service (KGS).

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.

12. 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. 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.*

13. 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.

THE COMMISSION THEREFORE ORDERS THAT:

A. Nathan Wright, d/b/a E&M Underground, of Pleasant Hill, Missouri, 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. 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.* Furthermore, if a request for hearing is not filed, 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. 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).

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 the date of service of this Order. Checks shall be payable to the Kansas Corporation Commission. Payments shall be mailed to the Fiscal Division 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 (19-DPAX-193-PEN) of this proceeding.

E. 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.

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; Keen, Commissioner

Dated: 11/20/2018



Lynn M. Retz
Secretary to the Commission

CRM/vj

ATTACHMENT “A”

STATE OF KANSAS



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

PHONE: 785-271-3220
FAX: 785-271-3357
<http://kcc.ks.gov/>

GOVERNOR JEFF COLYER, M.D.

SHARI FEIST ALBRECHT, CHAIR | JAY SCOTT EMLER, COMMISSIONER | DWIGHT D. KEEN, COMMISSIONER

REPORT AND RECOMMENDATION UTILITIES DIVISION

TO: Chair Shari Feist Albrecht
Commissioner Jay Scott Emler
Commissioner Dwight D. Keen

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

DATE: November 5, 2018

SUBJECT: Docket Number: 19-OPAX-193-PEN
In the Matter of the Investigation of E&M Underground 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) / CK-18-OC-1113

EXECUTIVE SUMMARY:

Staff is recommending a civil penalty be issued to E&M Underground (E&M) in the amount of \$500 for violation of KUUDPA. E&M did not provide a notice of intent to excavate prior to excavating on August 22, 2018, in Overland Park, Kansas. Failure to provide proper notice of intent before excavating is a violation of K.S.A. 66-1804. A Notice of Probable Noncompliance (PNC) was issued to E&M on August 31, 2018. E&M has not responded to the PNC within 30 days as required by K.A.R. 82-14-6 (c). A copy of the PNC is included as Attachment I.

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 damaged a Kansas Gas Service 3/4" PE gas service line with a mini excavator while reburying conduit at 9015 Hardy Street. Because E&M never requested locates, the utility operator was unable to

provide the location at which E&M would be required to carefully excavate to avoid damage to an underground facility at any depth. E&M failed to comply with this requirement of the law and warrants the assessment of a civil penalty.

B. Culpability:

E&M 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 E&M in the past two years.

D. Response of excavator regarding noncompliance(s):

Response to the PNC as required by K.A.R. 82-14- 6(c) has not been received by Staff. The failure of a party to submit a timely response within 30 days to a Notice of Probable Noncompliance constitutes an admission to all factual allegations made by the commission staff, as per K.A.R. 82-14-6(e).

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 E&M Underground in the amount of \$500 for violation(s) of K.S.A. 66-1804.

Attachment

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



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

Shari Feist Albrecht, Chair
Jay Scott Emler, Commissioner
Dwight D. Keen, Commissioner

Jeff Colyer, M.D., Governor

**Nathan Wright
E&M Underground
1414 Sloan Ave
Pleasant Hill, MO 64080**

August 31, 2018

KCC Investigation #: CK-18-OC-1113

Subject: Pipeline Investigation

Dear Nathan Wright:

Pursuant to K.S.A. 66-1801, et. Seq. the Kansas Corporation Commission (KCC) has jurisdiction and authority to investigate and to issue civil penalties for violations of the Kansas Underground Utility Damage Prevention Act (KUUDPA).

On August 22, 2018, the Kansas Corporation Commission's Pipeline Safety Staff conducted an investigation into excavation activities which are believed to involve your company. As a result of this investigation, Staff has identified possible violations committed by E&M Underground. The findings of this investigation are described on the attached form(s).

Kansas law, K.A.R. 82-14-6(c), requires the recipient of this notice to provide a written response to any Notice of Probable Noncompliance. After reviewing the findings, please respond in at least one of the following ways:

- 1) Submit written explanation, a statement of general denial, or other materials contesting the allegations;
- 2) Submit a signed acknowledgement of Commission Staff's findings of noncompliance; or,
- 3) Submit a signed proposal for the completion of any remedial action that addresses the Commission Staff's findings of noncompliance.

Pursuant to K.A.R. 82-14-6(e), failure to respond within 30 days to this Notice of Probable Noncompliance shall constitute an admission to all factual allegations made by the Commission Staff and may be used against the respondent in future proceedings

Please return the evaluation form(s) with any supporting documentation within thirty (30) days of receipt of this report to the address or email below. Any response submitted by email must include an electronic signature and date.

**Kansas Corporation Commission
Pipeline Safety Section
1500 SW Arrowhead Road
Topeka, KS 66604-4027
kccsafetyresponse@kcc.ks.gov**

Please feel free to contact me directly if you have questions or concerns.

Sincerely,

**Leo Haynos /s/
Chief Engineer
(785) 271-3278
l.haynos@kcc.ks.gov**

ATTACHMENT I

PROBABLE NONCOMPLIANCE

Investigation: CK-18-OC-1113

Company: E&M Underground

Division:

Regulation:

66-1804 (a) & (e) 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.

(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.

PROBABLE NONCOMPLIANCE DESCRIPTION:

On 8/22/2018, E&M Underground damaged a KGS 3/4" PE gas service line with a mini excavator while reburial conduit at 9015 Hardy St, in Overland Park, Kansas. After performing a search in the One-Call database, no ticket was found for the work being performed by this contractor during this time frame.

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: 08/22/2018

Inspected By: CK

CERTIFICATE OF SERVICE

19-DPAX-193-PEN

I, the undersigned, certify that the true copy of the attached Order has been served to the following parties by means of first class mail/hand delivered on 11/21/2018.

CARLY MASENTHIN, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
Fax: 785-271-3354
c.masenthin@kcc.ks.gov

NATHAN WRIGHT, OWNER
NATHAN WRIGHT
D/B/A E&M UNDERGROUND
1414 SLOAN AVE
PLEASANT HILL, MO 64080

/S/ DeeAnn Shupe

DeeAnn Shupe