



State of Utah
Department of Commerce
Division of Public Utilities

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February 2, 2017

Mr. Alan K. Mayberry
Associate Administrator for Pipeline Safety
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
1200 New Jersey Avenue SE, Suite E22-321
Washington, DC 20590
(VIA FEDEX)

Dear Mr. Mayberry:

Pursuant to 49 C.F.R. Part 198.59, the State of Utah (State) contests the Pipeline and Hazardous Materials Administration's (PHMSA) December 28, 2016 determination that "enforcement of Utah's excavation damage prevention law is **INADEQUATE**."¹ PHMSA made this determination based upon the State "responding no to the following evaluation criterion:

In the previous calendar year, did the State assess civil penalties and/or other sanctions for violations?"²

The State requests that PHMSA review and reconsider its determination and find that the State's enforcement of Utah's damage prevention law prior to the date of the audit was adequate. The State's actions prior to the audit were consistent with 49 C.F.R. § 198.55(a)(3). The State provides the following information to assist PHMSA as it reconsiders its determination.

The State takes its pipeline safety responsibilities very seriously and supports PHMSA's evaluation program. Since receiving the Letter, the State has begun to refine its protocols to improve its performance. Steps the State is taking are presented below.

Background

The Utah Division of Public Utilities (Division), its Pipeline Safety Section, and the Attorney General's Office work together with operators and excavators to promote and protect the public

¹ PHMSA letter dated December 28, 2016, to the Honorable Sean D. Reyes, Attorney General of Utah (Letter), p. 1 (emphasis in the original). The Utah's Attorney General received the Letter on January 4, 2017.

² Letter at p. 1.

safety relating to damage to underground utility facilities. One of the Division's statutory objectives is to "promote the safe, healthy, economic, efficient, and reliable operation of all public utilities and their services, instrumentalities, equipment, and facilities."³ The Pipeline Safety Section plays an important role in meeting this objective. The Pipeline Safety Section participates in enforcing the State's damage prevention laws by conducting investigations, educating operators and excavators, and supporting the Attorney General's Office's enforcement activities. In addition, through delegation from the federal government,⁴ the Pipeline Safety Section inspects intrastate natural gas pipelines for compliance with the Natural Gas Pipeline Safety Act and related federal and state legislation and regulations, and participates in related enforcement activities with the Attorney General's Office.⁵

The Attorney General's Office provides at least one Assistant Attorney General to support the Utah Division of Public Utilities, including the Pipeline Safety Section.⁶ Utah's damage prevention law⁷ permits enforcement by the Attorney General or by an excavator or operator "if the attorney general does not bring an action."⁸

On April 28, 2016, PHMSA audited the State's enforcement of Utah's excavation damage prevention law. PHMSA representatives met with members of the Pipeline Safety Section, the Assistant Attorney General working with Pipeline Safety, and a representative of Blue Stakes of Utah.

The State's Enforcement Procedures Are Adequate

As authorized by Utah's damage prevention statute and through an informal agreement with Questar Gas Company (Questar Gas), operator of Utah's largest local distribution company, the State oversaw the assessment of penalties against excavators who violated Utah's damage prevention statutes and damaged Questar Gas' pipeline. When facilities were damaged, Questar Gas would assess the penalties simultaneously with its demand for compensation for its damaged facilities, remitting penalty proceeds to the State's General Fund.

Since the April 28, 2016 audit, these assessments have been made through a letter, copy enclosed, from the relevant Assistant Attorney General, more transparently identifying the Attorney General's enforcement of the damage provisions. The letter contains information about Utah's damage prevention laws, stresses the importance of compliance with those laws, and discusses enforcement, including that Questar Gas is empowered by statute to enforce Utah's damage prevention laws. The letter emphasizes that Questar Gas does not retain the funds but instead forwards the funds to the Public Service Commission of Utah for deposit into the State's General Fund. A similar letter has been provided to an excavator for its use in assessing and collecting penalties and will be made available to any excavator or operator upon request.

In 2016, penalties were assessed 15 times, totaling \$14,500, which upon collection has been or will be deposited into Utah's General Fund.

³ Utah Code Ann. § 54-4a-6(1).

⁴ See 49 U.S.C. § 60105 and

https://primis.phmsa.dot.gov/comm/FactSheets/States/UT_State_PL_Safety_Regulatory_Fact_Sheet.htm.

⁵ See Utah Code Ann. § 54-13-1 et seq.

⁶ Utah Code Ann. § 54-4a-4 (2016).

⁷ See Utah Code Ann. § 54-8a-1 et seq. (2016).

⁸ See Utah Code Ann. § 54-8a-12 (2016).

The State has directly imposed penalties and sanctions upon Questar Gas when it is at fault. In 2011, the State assessed civil penalties in the maximum amount allowable and imposed sanctions against Questar Gas for violating Utah's damage prevention laws in 2009.⁹ Questar Gas paid the full amount of the penalties and fulfilled the conditions of the sanctions, which included increased educational and monitoring requirements. Questar Gas continues to file quarterly damage reports. In addition, the State stood ready to assess appropriate penalties and/or sanctions pertaining to violations by operators or excavators affecting intrastate natural gas pipelines other than Questar Gas.

Importantly, the final rule found at 49 C.F.R. 198.55(a)(3) does not contain the calendar year limitation found in the evaluation criterion question cited as leading to the determination of inadequate but states instead:

Is the State assessing civil penalties and other appropriate sanctions for violations at levels sufficient to deter noncompliance and is the State making publicly available information that demonstrates the effectiveness of the State's enforcement program.¹⁰

The State's actions were consistent with the regulation. The State's actions were appropriate to deter noncompliance. Enforcement information was also available publicly. Therefore, the State requests that PHMSA review and reconsider its designation and find that enforcement of Utah's excavation damage prevention law was adequate.

Refining State Protocols

The State has changed its informal agreement with Questar Gas and the State will directly assess penalties equal to or greater than \$1,000 against excavators who violate Utah's damage prevention laws and damage Questar Gas' pipeline. In addition, the State will directly assess and sanction excavators who violate the damage prevention statute and damage Questar Gas' pipeline when circumstances make it appropriate for the State to do so regardless of the amount of the penalty assessed.

Pursuant to its new informal agreement with the State, Questar Gas will continue to administer the assessment of lesser penalties against excavators who violate the damage protection statute and damage Questar Gas' pipeline. Since the audit, Questar Gas coordinates with the Attorney General's Office and receives written approval to assess any penalty. The letter from the Attorney General's Office continues to accompany each gas penalty notice sent by Questar Gas.

Conclusion

⁹ Information pertaining to this enforcement action by the State is publicly available on the Public Service Commission of Utah's website at <http://psc.utah.gov/2016/06/27/docket-no-11-057-05/>.

¹⁰ 49 C.F.R § 198.55(a)(3).

Conclusion

The State believes that its enforcement procedures before the audit were appropriate to deter noncompliance, including the requirement that information was publically available.

Accordingly, for the reasons set forth above the State requests that PHMSA withdraw its determination that enforcement of Utah's damage prevention law was inadequate

Sincerely,



Chris Parker
Director, Utah Division of Public Utilities

Encl.

cc: The Honorable Gary R. Herbert, Office of the Governor, State of Utah
Thad LeVar, Chair, Public Service Commission of Utah
Al Zadeh, Lead, Pipeline Safety Section, Utah Division of Public Utilities, Utah Department
of Commerce
Paul Huntsman, President, Blue Stakes of Utah

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



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Chief Criminal Deputy

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Chief of Staff & Federal Solicitor

TYLER R. GREEN
Solicitor General

BRIDGET K. ROMANO
Chief Civil Deputy

April 18, 2016

Damage to Underground Utility Facilities - Civil Penalties

Questar Gas Company (Questar Gas) reports that your company has damaged Questar Gas' underground lines in violation of what are commonly called Utah's "Blue Stakes Laws." Questar Gas is invoicing your company for civil penalties associated with that damage. This letter explains why Questar Gas is invoicing your company for these penalties and the process in general.

The Utah Division of Public Utilities, its Pipeline Safety Section, and the Attorney General's Office work together with operators such as Questar Gas and excavators to promote and protect the public safety relating to damage to underground utility facilities. Under Utah law, both the Attorney General's Office and Questar Gas are empowered to pursue remedies, including civil penalties, against excavators who fail to comply with the Blue Stakes Laws. See Utah Code Ann. Section 54-8a-12. **Importantly, Questar Gas does not retain any civil penalties it collects from your company, but instead remits the funds to the Public Service Commission of Utah (Commission) to be deposited into the State's General Fund.**

Utah's Blue Stakes Laws can be found at Utah Code Ann. Section 54-8a-1 et seq. and also can be found through a link on the Commission's website, www.psc.state.ut.us. Penalties are imposed pursuant to Utah Code Ann. Section 54-8a-8 which states:

(1) A civil penalty may be imposed for a violation of this chapter as provided in this section.

(2) A civil penalty under this section may be imposed on:

(a) any person who violates this chapter in an amount no greater than \$5,000 for each violation with a maximum civil penalty of \$100,000 per excavation; or

(b) an excavator who fails to provide notice of an excavation in accordance with Section 54-8a-4 in an amount no greater than \$500 in addition to the amount under Subsection (2)(a).

When determining the appropriate civil penalty, Utah law requires that certain factors be taken into account. These factors include, in part, "the excavator's or operator's history of any prior violation or penalty," "any good faith of the excavator or operator," and "any other factor considered relevant." Utah Code Ann. Section 54-8a-8(4).

Pursuant to this statutory authority, Questar Gas is sending your company an invoice for civil penalties associated with the damage caused by your company. If your company does not remit payment, the Attorney General's Office may elect to recover in District Court those, and perhaps additional, civil penalties. In addition, Utah law provides that in an action brought under the Blue Stakes Laws, the prevailing party "shall be awarded its costs and attorney fees as determined by the court." Utah Code Ann. Section 54-8a-8(8)(b).

Your company's failure to comply with the Blue Stakes Laws threatened public safety. Statutory penalties are designed to help ensure excavators and others do not disregard the law. Your company must protect the public by complying with the Blue Stakes Laws.

Please contact me if you have any questions. I can be reached at (801) 366-0380 or by email at pschmid@utah.gov.

Sincerely,



Patricia E. Schmid
Assistant Attorney General for the Division of
Public Utilities

cc: Chris Parker, Director, Division of Public Utilities
Al Zadeh, Lead, Pipeline Safety
Connie Hendricks, Pipeline Safety
Abbie Magrane, Esq., Questar Gas Company