



U.S. Department
of Transportation

Pipeline and Hazardous Materials
Safety Administration

1200 New Jersey Ave., SE
Washington, DC 20590

MAR 16 2020

Mr. Jerry Harman
Owner and President
Alaska Construction and Paving, Inc.
P. O. Box 874712
Wasilla, Alaska 99687

Re: CPF No. 5-2019-0006E

Dear Mr. Harman:

Enclosed please find the Final Order issued in the above-referenced case. It makes findings of violation and assesses a reduced civil penalty of \$4,400. This is to acknowledge receipt of payment of the full penalty amount, by certified check, dated September 26, 2019. This enforcement action is now closed. Service of the Final Order by certified mail is effective upon the date of mailing as provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Enclosure

cc: Mr. Dustin Hubbard, Director, Western Region, Office of Pipeline Safety, PHMSA
Mr. Greg Oczkus, Esq., Counsel for Alaska Construction and Paving, Unit #104, 2653 S.
Kihei Road, Kihei, Maui Hawaii 96753

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

request, via e-mail dated August 26, 2019,² and paid \$4,400 as a reduced penalty for Item 1 by certified check dated September 26, 2019. I have reviewed the record and hereby approve the proposed settlement, as outlined more fully below.

FINDINGS OF VIOLATION

Item 1: The Notice alleged that Respondent violated 49 C.F.R. § 196.103, which states, in relevant part:

§ 196.103 What must an excavator do to protect underground pipelines from excavation-related damage?

Prior to and during excavation activity, the excavator must:

(a) . . .

(b) If underground pipelines exist in the area, wait for the pipeline operator to arrive at the excavation site and establish and mark the location of its underground pipeline facilities before excavating;

The Notice alleged that Respondent violated 49 C.F.R. § 196.103(b) by failing to wait for ENSTAR to arrive at the excavation site and mark the location of its underground pipeline facilities before ACP began excavating. Specifically, the Notice alleged that ENSTAR arrived on site on July 3, 2017, at approximately at 10:00 a.m., to mark the location of the underground pipeline, only to discover that its one-inch service line had already been excavated and damaged.

In its Response, ACP contested the alleged violation, contending that ENSTAR was never scheduled to come to the property to do locates for the removal of the one-inch gas distribution line. Instead, ACP argued that ENSTAR was scheduled to come on site that same day, July 3, 2017, to do locates for the installation a nearby gas distribution system. Additionally, ACP stated that the locates for the one-inch distribution line had already been completed by an independent company employed by ENSTAR and other Municipality of Anchorage utilities. Furthermore, ACP noted that it had already been told by ENSTAR that the line was not energized.

As noted above, ACP withdrew its hearing request and paid a reduced civil penalty.³ Upon review of the record, I find, by a preponderance of the evidence, that Respondent violated 49 C.F.R. § 196.103(b), by failing to wait for ENSTAR to arrive at the excavation site and establish and mark the location of its underground pipeline facilities prior to excavating.

Item 2: The Notice alleged that Respondent violated 49 C.F.R. § 196.107, which states:

§ 196.107 What must an excavator do if a pipeline is damaged by excavation activity?

If a pipeline is damaged in any way by excavation activity, the excavator

² On file with PHMSA.

³ *Id.*; Operator's Request to Withdraw Hearing Request (August 25, 2019) (on file with PHMSA).

must promptly report such damage to the pipeline operator, whether or not a leak occurs, at the earliest practicable moment following discovery of the damage.

The Notice alleged that Respondent violated 49 C.F.R. § 196.107 by failing to promptly report, at the earliest practicable moment following discovery of the damage, to ENSTAR the damage that it had caused to ENSTAR's one-inch pipeline. Specifically, the Notice alleged that ENSTAR did not become aware of the damage caused by ACP until it arrived on site later on July 3, 2017.

In its Response, ACP admitted that it did not immediately notify ENSTAR because the utility was already scheduled to come to the work site that day. However, ACP indicated that when an ENSTAR representative arrived on site, ACP showed the representative where the energized one-inch line had been damaged and pinched off. Once the ENSTAR representative was informed, he called his supervisor.

Although ACP notified ENSTAR of the damage when the utility's representative arrived on site, there is no evidence that ACP promptly reported the damage to ENSTAR at the earliest practicable moment following discovery. In fact, ACP admitted that it did not immediately notify ENSTAR. Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 196.107, by failing to promptly report, at the earliest practicable moment following discovery, the damage it had caused to ENSTAR's pipeline.

Item 3: The Notice alleged that Respondent violated 49 C.F.R. § 196.109, which states:

§ 196.109 What must an excavator do if damage to a pipeline from excavation activity causes a leak where product is released from the pipeline?

If damage to a pipeline from excavation activity causes the release of any PHMSA-regulated natural and other gas or hazardous liquid as defined in part 192, 193, or 195 of this chapter from the pipeline, the excavator must promptly report the release to appropriate emergency response authorities by calling the 911 emergency telephone number.

The Notice alleged that Respondent violated 49 C.F.R. § 196.109 by failing to call the 911 emergency telephone number after the one-inch pipeline had been damaged and resulted in a release of natural gas. Specifically, the Notice alleged that despite ACP being aware that natural gas had been released and that it had performed a temporary repair of the damaged pipeline, ACP did not call 911 following the release from a PHMSA-regulated line.

In its Response, ACP did not contest the alleged violation and, in fact, admitted that it had not immediately called the 911 emergency telephone number. However, ACP claimed that it did not call because there was no emergency and ENSTAR was already scheduled to arrive on site. ACP further stated that the damaged line "was immediately crimped and taped and secured using

standard procedures.”⁴ Additionally, ACP argued that no significant amount of gas escaped when the line was cut.

While ACP claims that it took action immediately to pinch the line and presumably prevent any further release of natural gas, such action does not negate ACP’s failure to call 911 once the line had been damaged, as required by the Federal pipeline safety regulations. Therefore, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 196.109, by failing to call the 911 emergency telephone number after it had struck and damaged the one-inch ENSTAR pipeline and caused a release of natural gas.

These findings of violation will be considered prior offenses in any subsequent enforcement action taken against Respondent.

ASSESSMENT OF PENALTY

Under 49 U.S.C. § 60122, Respondent is subject to an administrative civil penalty not to exceed \$200,000 per violation for each day of the violation, up to a maximum of \$2,000,000 for any related series of violations.⁵ In determining the amount of a civil penalty under 49 U.S.C. § 60122 and 49 C.F.R. § 190.225, I must consider the following criteria: the nature, circumstances, and gravity of the violation, including adverse impact on the environment; the degree of Respondent’s culpability; the history of Respondent’s prior offenses; any effect that the penalty may have on its ability to continue doing business; and the good faith of Respondent in attempting to comply with the pipeline safety regulations. In addition, I may consider the economic benefit gained from the violation without any reduction because of subsequent damages, and such other matters as justice may require. The Notice proposed a total civil penalty of \$12,100 for the violations cited above.

Item 1: The Notice proposed a civil penalty of \$12,100 for Respondent’s violation of 49 C.F.R. § 196.103, for failing to wait for ENSTAR to arrive at the excavation site and establish and mark the location of its underground pipeline facilities before ACP began excavating. In its Response, ACP contended that there was no basis for the proposed civil penalty amount. Specifically, Respondent argued that this was not an accidental cutting of a line due to negligence on the part of ACP, but was instead supposed to be the removal of a de-energized line. Additionally, ACP stated that there was no fire, explosion, or danger or risk to the general public since the location of the line was remote. Furthermore, ACP claimed that its employees were able to quickly crimp the line and tape it off.

After a review of the Response and further discussions with ACP, the Director recommended a reduction in the gravity penalty-assessment factor “because the evidence is insufficient to establish that ACP’s conduct was the causal factor in the release.”⁶ Upon review of all of the

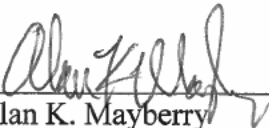
⁴ Response, at 3.

⁵ These amounts are adjusted annually for inflation. See 49 C.F.R. § 190.223.

⁶ Amended Region Recommendation, at 2 (on file with PHMSA).

evidence, I find that a reduction in the gravity factor is appropriate. Therefore, having reviewed the record and considered the assessment criteria, I assess Respondent a reduced civil penalty of **\$4,400** for violation of 49 C.F.R. § 196.103, which was paid in full by certified check on September 26, 2019.

The terms and conditions of this Final Order are effective upon service in accordance with 49 C.F.R. § 190.5.



Alan K. Mayberry
Associate Administrator
for Pipeline Safety

MAR 16 2020

Date Issued