

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on March 9, 2017

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair
Gregg C. Sayre
Diane X. Burman

CASE 16-G-0465 - In the Matter of an Enforcement Proceeding
Against New York Paving Inc. for Alleged
Violations of 16 NYCRR Part 753 - Protection
of Underground Facilities, in the Service
Territory of The Brooklyn Union Gas Company
d/b/a National Grid NY.

ORDER DETERMINING PENALTY AND DIRECTING PAYMENT

(Issued and Effective March 9, 2017)

BY THE COMMISSION:

Respondent Information

Company Name: New York Paving Inc. (NY Paving)

Address: 37-18 Railroad Avenue
Long Island City, NY 11101

Alleged Violation Specifics

Dates of Violations: August 19, 2014;
November 30, 2014;
January 16, 2015;
June 17, 2015;
November 16, 2015; and
May 9, 2016

Locations: 9943 163rd Drive
Springfield, NY

3759 92nd Street
Newtown, NY

259 Carteret Street
Staten Island, NY

3532 92nd Street
Newtown, NY

87 Piave Avenue
Staten Island, NY

2675 Amboy Road
Staten Island, NY

Descriptions of
Excavation Work: Road work, curbs and sidewalks

Damaged Facilities: 1¼-inch natural gas service;
6-inch natural gas main;
½-inch natural gas service;
1-inch natural gas service;
4-inch natural gas main; and
½-inch natural gas service

Alleged Code
Violations: Six separate occurrences of 753-
3.1(a)(1)

Description of
Violations: Failure to provide notice of intent to
excavate to the one-call notification
system

Notice of Probable Violation (NOPV) Information

On or about January 8, 2015, July 13, 2015, January 6, 2016, and December 23, 2016 copies of the NOPV's were mailed to the respondent by both United States Postal Service First Class Mail and certified mail, return receipt requested. The certified mail receipt was signed and returned for the NOPV's dated January 8, 2015, January 6, 2016, and December 23, 2016. While we did not receive a signed certified mail return receipt for the NOPV dated July 13, 2015, neither the First Class nor the certified mail copies were returned.

Proposed Penalties: \$52,500

Responses: Letters dated August 17, 2015, December 11, 2015, January 12, 2016, January 15, 2016, June 8, 2016, and January 17, 2017;

Informal conferences on March 9, 2015, September 25, 2015, January 27, 2016, and January 30, 2017;

Email correspondences on August 1, 2015, December 14, 2015, February 1, 2016, March 2, 2016, and June 8, 2016.

Summary of Information Provided by Respondent

Four informal conferences were held with respect to the violations listed above and those detailed in Case 16-G-0465. The conferences were held on March 9, 2015, September 25, 2015, January 27, 2016, and January 17, 2017 with respect to these and the violations cited in Case 16-G-0440. In those conferences, NY Paving argued that: it's typically hired to perform pavement restoration work; it would be inconvenienced to wait the required two working day period required in the Part 753 regulations due to the total volume of work it performs in a given year; it has better records than the facility operators; has evidence to support that no violations have occurred; and is an agent of National Grid, which absolves NY Paving of all the damage resulting from its Part 753 violations. NY Paving still believes that the shallow depth of service was the root cause of these damages and that by simply providing notice it will not prevent future similar damages from occurring. Since October 1, 2016, however, NY Paving has provided over 20,000 one-call notifications for its continuing work in the downstate areas.

Analysis of Evidence

16 NYCRR §753-3.1(a)(1) states:

Before commencing or engaging in any non-emergency

excavation or demolition, each excavator shall provide notice of the location and date of the planned excavation or demolition to the one-call notification system serving the vicinity in which the excavation or demolition is to take place.

Pursuant to 16 NYCRR §753-3.1(a)(1), the entity actually performing the excavation work is responsible for providing notice of intent to excavate to the one-call notification system. No exceptions, including inconveniences, facility records, nor agent status are provided for in this regulatory requirement. Further, in Case 05-M-0848, the Commission clarified that agents of operators, are not absolved of the responsibility to provide notice of intent.¹

In addition to the four informal conferences provided to NY Paving and the many emails Staff sent, by correspondences dated January 15, 2015 and June 13, 2016, Staff provided further opportunity for NY Paving to provide the exculpatory documentation the Company stated was in its possession related to these matters. In addition to explaining to NY Paving in detail its obligations as an excavator to abide by Part 753's requirements, Staff's June 13 letter provided another opportunity, to June 21, 2016, to provide such information. The Department received no response to the June 13 letter.

National Grid also recently met with NY Paving to conduct an incident analysis related to these damages, to reinforce the one-call requirements, and to develop a plan to address these issues prospectively. The plan includes NY Paving hiring a full-time clerk with the sole purpose of administering all of its one-call notifications; National Grid will conduct

¹ See Case 05-M-0848 - Petition of The Hallen Construction Co., Inc. for a Declaratory Ruling Concerning the Role of an Operator under 16 NYCRR Part 753, Order Denying Petition And Clarifying One-Call System Notice Requirements (issued March 7, 2006).

monthly audits of NY Paving's work to verify it's compliance with the requirements. As a result of these process improvements, National Grid believes that NY Paving is more focused on compliance with the one-call requirements and in the avoidance of underground facility damage. National Grid has seen an increase over the past few years related to pavement restoration projects and has thus far been generally satisfied with NY Paving's work. National Grid will continue in its efforts to monitor NY Paving's performance in this area, which will include additional oversight by its damage prevention investigators.

Determination

We find that New York Paving Inc. did commit the six separate violations of 16 NYCRR §753-3.1(a)(1) listed above, which resulted in damage to a 1¼-inch natural gas service, 6-inch natural gas main, ½-inch natural gas service, 1-inch natural gas service, 4-inch natural gas main, and ½-inch natural gas service. Under General Business Law §765.1, entities that fail to comply with the requirements of 16 NYCRR Part 753 are subject to a civil penalty of \$2,500 for the first offense and an additional \$10,000 for each succeeding violations that occurs within a 12-month period. Therefore, the maximum penalty for which New York Paving Inc. may be liable under the statutes for the violations listed above is \$52,500. In consideration of the nature, circumstances and gravity of the violation, we determine a penalty of \$52,500 is appropriate for these violations.

We also strongly encourage the Respondent to contact New York 811 (516-639-8606) to request a training session covering the use of the one-call notification system and Part 753 requirements. The principals of the company, any employees involved in excavation work, and any support staff that might be

involved in making notifications to the one-call center, would benefit from such training.

The Commission orders:

1. A penalty of \$52,500 is determined against New York Paving Inc. pursuant to §119-b(8) of the Public Service Law.

2. New York Paving Inc. is directed to remit, by certified check payable to the "Department of Public Service," the sum of \$52,500 in payment of the penalty determined. The \$52,500 sum is subject to Section 18 of the State Finance Law and shall be deposited into the underground facilities safety training account. The check shall be addressed to:

Ms. Carol Gnacik
Director of Finance and Budget
Department of Public Service
Three Empire State Plaza
16th Floor
Albany, N.Y. 12223-1350

3. If the check is not received within 30 days after issuance of this Order, Staff is authorized to refer the case to the New York State Department of Law with a request that an action to collect the determined penalty be brought in a court of competent jurisdiction.

4. The proceeding is continued, pending compliance with ordering clause 2, following which it should be closed.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary