

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on March 14, 2019

COMMISSIONERS PRESENT:

John B. Rhodes, Chair  
Gregg C. Sayre  
Diane X. Burman  
James S. Alesi

CASE 18-G-0754 - In the Matter of an Enforcement Proceeding  
Against National Fuel Gas Distribution  
Corporation for Alleged Violations of 16 NYCRR  
Part 753 - Protection of Underground Facilities,  
in the Service Territory of National Fuel Gas  
Distribution Corporation.

ORDER DETERMINING PENALTY AND DIRECTING PAYMENT

(Issued and Effective March 21, 2019)

BY THE COMMISSION:

Respondent Information

Company Name: National Fuel Gas Distribution  
Corporation

Address: 6363 Main Street  
Williamsville, NY 14221

Alleged Violation Specifics

Date of Violation: January 30, 2018

Location: 1723 Elmwood Avenue  
Buffalo, NY

Description of  
Excavation Work: Monitoring wells

Damaged Facility: 3-inch plastic high-pressure natural gas pipeline

Alleged Code Violation: 16 NYCRR §753-4.5(b)

Description of Violation: Failure to notify excavator the markout could not be completed by stated commencement date

Notice of Probable Violation (NOPV) Information

On or about February 23, 2018, copies of the NOPV 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.

Proposed Penalty: \$10,000

Response: Informal conference on March 12, 2018; and letters dated March 23, 2018 and November 1, 2018.

Summary of Information Provided by Respondent:

National Fuel Gas Distribution Corporation (NFG) responded to the NOPV in writing by a letter dated March 23, 2018 (NFG Response). In the NFG response, the company claims that on January 17, 2018, it received two one-call notification tickets from Trec Environmental (TE) for soil borings to commence on January 22, 2018, at 1721 and 1723 Elmwood Avenue in the City of Buffalo, New York. NFG states that its locator had difficulties completing the markout at this location due to the complexity of the site, which was a former industrial facility composed of multiple properties with unmarked addresses.

NFG asserts that it made two notifications to the excavator requesting additional information and three site visits to ensure the NFG gas facilities were "clearly located" in the proposed area of excavation. Specifically, NFG states that, on January 19, 2018, the Company's locator responded to

the site and requested an on-site meeting to identify the exact location of the excavation due to the locator's concern about snow and ice on the asphalt and whether the markings would remain intact in such conditions. On January 22, 2018, NFG's locator returned to the site to complete markouts and found that TE had commenced excavation at a third property, 1685 Elmwood Avenue, without having provided any notification of an intent to excavate at that location. NFG asserts that the Company locator performed a markout where possible, but reported that no address existed for 1723 Elmwood Avenue.<sup>1</sup> According to NFG, on January 24, 2018, the locator again returned to the site and found TE excavator personnel working on site. At that time, the TE employees showed the locator the extent of the excavation work at 1723 Elmwood, thereby allowing the locator to accurately mark NFG's facilities on the property. In the NFG Response, the company claims that, on January 30, 2018, TE "performed a soil boring outside of the work area previously communicated to the Company locator," which resulted in damage to NFG's facilities.

#### Analysis of Evidence

Sixteen NYCRR §753-4.5(b) states:

Where an operator cannot complete the staking, marking or other designation of an underground facility prior to the stated commencement date and time of the excavation or demolition, the operator shall promptly report such fact to the excavator and shall inform the excavator of a prompt and practicable completion date which in no case shall be more than two working days after the excavator's stated commencement date, unless a longer period is agreed to by both parties.

We find that NFG failed to identify and mark its facilities within the property boundaries stated on the one-call notification ticket for 1723 Elmwood Avenue. We further find

---

<sup>1</sup> The locator "coded the ticket 4," which indicates there is insufficient information to complete a mark-out.

that NFG failed to follow through on completing the requested markout in a timely manner as required by the above-recited regulation. While NFG claims to have met with the excavator and completed the markout, it is apparent that the locator did not mark entirety of the property. NFG, moreover, failed to report any projected completion through the Automated Positive Response (APR) system as required by 16 NYCRR §753-4.5(a). Consequently, there is no contemporaneous evidence that the site visit, the meeting with TE, or the complete marking actually occurred.

Department of Public Service Staff (Staff) conducted an investigation and confirmed that:

- 1) on January 17, 2018, TE requested markouts of the entirety of the properties located at 1695, 1721 and 1723 Elmwood Avenue;
- 2) on January 19, 2018, the NFG locator marked the property at 1721 Elmwood Avenue, but was unable to access 1723 Elmwood Avenue, which prompted the locator to request a meeting with TE;
- 3) on January 22, 2018, a meeting was held on site between the NFG locator and TE during which the NFG locator marked NFG's facilities at 1685 and 1695 Elmwood Avenue and was given access to 1723 Elmwood Avenue;
- 4) on January 22, 2018, the NFG locator reported to the APR system that he did not complete the markout at 1723 Elmwood Avenue because he lacked sufficient information.

NFG's locator made no further entries through the APR system and, therefore, did not provide a markout completion date within two working days (i.e., January 24, 2018) as required by Part 753-4.5(b).

Staff also confirmed that there was no evidence that TE ever received a positive response indicating that the entire property at 1723 Elmwood Avenue was completely marked or that

NFG attempted to contact TE after January 22, 2018 to establish a completion date for the markout at that building. In addition, there is no evidence that TE agreed to an extended completion date for the markout, beyond two working days after the stated commencement date as provided in 16 NYCRR §753-4.5(b), or to a narrower work scope than the original request of an entire property markout. Accordingly, Staff issued a citation against TE for failure to verify positive responses through Dig Safely New York's portal prior to commencing excavation at 1723 Elmwood Avenue, and a citation against NFG for failure to "inform the excavator of a prompt and practicable completion date which in no case shall be more than two working days after the excavator's stated commencement date, unless a longer period is agreed to by both parties."<sup>2</sup>

In the NFG Response at page 2, the company asserts that it "accurately marked [its] facilities in the area of proposed excavation." This allegation, however, is not supported by the APR responses listed on the one-call ticket for 1723 Elmwood. In NFG's last entry on that ticket, dated January 22, 2018, the locator states "NO SUCH ADDRESS. I DID MARK THE FRONT OF PROPERTIES AT 719 AND 721" [sic]. The contemporaneous evidence, then, does not show that 1723 Elmwood had been marked in accordance with the one-call ticket's parameters.

The NFG Response, at page 2, further asserts that the pipeline damage occurred "outside of the work area previously communicated to the Company locator." The controlling information regarding work location, however, is that which is shown on the one-call ticket. That ticket clearly recites that the work location is the "ENTIRE LOCATION" at 1723 Elmwood and provides a telephone number for requesting a map of the

---

<sup>2</sup> 16 NYCRR §753-4.5(b).

property. There is no indication that NFG availed itself of this information.

It is incumbent upon every operator to know the location of its facilities and to undertake a reasonable effort to ascertain the reported location of proposed excavation work. NFG did not do so here. Had NFG fulfilled its regulatory obligation to arrange a completion date with TE, it could have had another opportunity to seek TE's assistance in determining the boundaries of 1723 Elmwood and to properly mark out its facilities on "the entire property" (the markout TE had requested). If it had complied, the damage to its facilities might not have occurred.

Determination

We find that National Fuel Gas Distribution Corporation did commit a violation of 16 NYCRR §753-4.5(b), which resulted in damage to a 3-inch plastic high-pressure natural gas pipeline. Under General Business Law §765(1)(a), excavators and operators that fail to comply with the requirements of Part 753 are subject to civil penalties of \$2,500 for the first offense and \$10,000 for each succeeding violation that occurs within the following 12-month period. NFG has already been fined for two violations that occurred during the 12-month period prior to the date of the incident at issue in this matter. In consideration of the nature, circumstances and gravity of the violation, we determine a penalty of \$10,000 is appropriate for this violation.

We also strongly encourage the Respondent to contact Dig Safely New York (315-437-7394) 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 \$10,000 is determined against National Fuel Gas Distribution Corporation pursuant to §119-b(8) of the Public Service Law.

2. National Fuel Gas Distribution Corporation is directed to remit, by certified check payable to the "Department of Public Service," the sum of \$10,000 in payment of the penalty determined. The \$10,000 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:

Mr. Curtis Funk  
Director of Finance and Budget  
Department of Public Service  
Three Empire State Plaza  
16<sup>th</sup> Floor  
Albany, N.Y. 12223-1350

3. If the check is not received within 30 days after issuance of this Order, Department of Public Service 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