

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on August 29, 2001

COMMISSIONERS PRESENT:

Maureen O. Helmer, Chairman
Thomas J. Dunleavy
James D. Bennett
Leonard A. Weiss
Neal N. Galvin

CASE 01-G-1057 - In the Matter of an Enforcement Proceeding
Against Scott Miller D/B/A Mountain View
Irrigation for Alleged Violation of 16 NYCRR
Part 753 - Protection of Underground Facilities,
in the Service Territory of Niagara Mohawk Power
Corporation, filed in C 15686.

ORDER DETERMINING PENALTY AND DIRECTING PAYMENT

(Issued and Effective September 6, 2001)

BY THE COMMISSION:

Respondent Information

Company Name: Scott Miller
d/b/a Mountain View Irrigation

Address: 32A Woodcliff Drive
Clifton Park, N.Y. 12065

Principal Contact: Mr. Scott Miller

Alleged Violation Specifics

Date of Violation(s): (1) May 7, 2001
(2) May 9, 2001
(3) May 10, 2001

Location(s): (1) 2 Sheridan Court, Clifton Park
(2) 2 Sheridan Court, Clifton Park
(3) 22 Mayfield, Clifton Park

Description of
Excavation Work: Installing sprinkler systems

Damaged Facilities: None

Alleged Code
Violation(s): (1) 753-3.1
(2) 753-3.3
(3) 753-3.1

Description of
Violation(s): (1)&(3) Failure to provide notice of
intent to perform excavation
(2) Commenced excavation prior to
the date provided to the one-
call notification system

Notice of Probable Violation (NOPV) Information

Date of NOPV: June 20, 2001

Proposed Penalty: (1) \$1000
(2) \$7500
(3) \$1000
\$9500

Response: None

Analysis of Evidence

Staff's investigation found that on May 7, 2001, a Niagara Mohawk Power Corporation (NMPC) utility locator observed Mountain View Irrigation (Mountain View) performing excavation work at 2 Sheridan Court, and advised them that they were digging without markouts. Shortly thereafter, Mountain View provided notice to Dig Safely New York, giving a start date of May 10. On May 9, the NMPC locator arrived to perform the markout and found that the excavation work had already been performed.

In addition, when the NMPC locator responded to 2 Sheridan Court on May 9, Mountain View made a "field request" to him to do a markout at 22 Mayfield. The locator advised him to call Dig Safely New York. On May 10, the NMPC locator observed Mountain View excavating at that location, without marks and without having notified Dig Safely New York.

A review of Department files found the following history of prior violations:

1. September 29, 1998 - Citation issued for commencing work prior to stated start date.

2. May 5, 1999 - Citation issued for providing less than 2 days notice, and commencing before markouts could be performed.
3. April 13, 1999 - Citation issued for providing less than 2 days' notice, and commencing before markouts could be performed. This resulted in a Commission Order (Case 99-G-1011) to pay a \$1000 penalty (no response to NOPV). Mountain View did not comply with the Order. The penalty was eventually collected after the case was turned over to the Attorney General's office.

No response to the NOPV was received. The NOPV stated that failure to respond would be deemed acceptance of the facts as alleged, in which case the proposed penalty would be determined.

Determinations

General Business Law, Article 36, Section 765.1 states:

Failure to comply with any provision of this article shall subject an excavator or an operator to a civil penalty of up to one thousand dollars for the first violation and up to an additional seven thousand five hundred dollars for each succeeding violation which occurs in connection with the entire self-same excavation or demolition activity within a two month period.

We find that Mountain View Irrigation did commit the violations described above. Furthermore, we find that the two alleged violations at 2 Sheridan Court, Clifton Park were in connection with the self-same excavation.

Although no underground utility damages were associated with these alleged violations, the potential for such damages, and associated injuries and property damage, exists if Mountain View persists in its behavior. In consideration of the Respondent's history of prior violations, nature circumstances and gravity of the violations, and effect on public health, safety and welfare, we determine that a penalties of \$9500 is appropriate.

The Commission orders:

1. A penalty of \$9,500 is determined against Scott Miller, D/B/A Mountain View Irrigation, pursuant to §119(b)(8) of the Public Service Law.

2. Scott Miller, d/b/a Mountain View Irrigation, is directed to remit, by certified check payable to the "Department of Public Service" the sum of \$9,500 in payment of the penalty determined. The \$9500 sum is subject to Section 18 of the State Finance Law and shall be deposited into the general fund. The check shall be addressed to:

Mr. Al Howard
Director of Finance and Budget
Department of Public Service
Three Empire State Plaza
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.

By the Commission,

(SIGNED)

JANET HAND DEIXLER
Secretary