

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on November 10, 2004

COMMISSIONERS PRESENT:

William M. Flynn, Chairman
Thomas J. Dunleavy
Leonard A. Weiss
Neal N. Galvin

CASE 04-G-1268 - In the Matter of an Enforcement Proceeding
Against Custom Top Soil, Inc. for Alleged
Violations of 16 NYCRR Part 753 - Protection of
Underground Facilities, in the Service Territory
of National Fuel Gas Corporation, filed in
C 15686.

ORDER DETERMINING PENALTY AND DIRECTING PAYMENT

(Issued and Effective November 16, 2004)

BY THE COMMISSION:

Respondent Information

Company Name: Custom Top Soil, Inc. (CTS)
Address: 320 Crabtree Lane
Cheektowaga, NY 14227

Alleged Violation Specifics

Date of Violation: December 4, 2003
Location: Mary Talbert Boulevard & Spring
Street., Buffalo, N.Y. (Construction
Site)
Description of
Excavation Work: Installation of new access road
Damaged Facilities: 3-inch plastic gas main

Alleged Code
Violation(s): 753-3.10(a),(b), and (c)

Description of
Violation(s):

- (a) Failure to take all reasonable precautions to prevent contact or damage to underground facilities;
- (b) Failure to immediately notify the operator in the event of contact or damage; and
- (c) Failure to suspend excavation in the vicinity of a underground facility that has been contacted or damaged until the advises that excavation may proceed.

Notice of Probable Violation (NOPV) Information

Date of NOPV: December 18, 2003

Proposed Penalty: \$16,000

Response: Written replies dated January 13, 2004, April 13, 2004 and June 16, 2004.
Informal conference on August 26, 2004

Summary of Evidence

16 NYCRR §§753-3.10(a),(b) and (c) state:

- (a) Excavators shall take all reasonable precautions to prevent contact or damage to underground facilities and their protective coatings, including but not limited to, compliance with any reasonable directions or accepted engineering practices given by affected underground facility operators.
- (b) In the event of contact with or damage to an underground facility, the excavator shall immediately notify the operator of the facility.

- (c) All excavation or demolition in the immediate vicinity of the contacted or damaged portion of the underground facility shall be suspended until such portion is repaired and the operator advises the excavator that excavation or demolition may proceed.

On December 4, 2003, Department of Public Service Staff (Staff) received a call from National Fuel Gas Distribution Corporation (NFG) requesting an on-site investigation concerning possible damage to its gas facilities. NFG reported that Verizon New York Inc. (Verizon) informed the company that its gas main had been exposed and physically relocated at the Construction Site. Verizon employees became aware of the damage after responding to a loss-of-service complaint and discovering damage to its facilities as well as NFG's relocated gas main.

Upon arrival at the site, Staff observed that approximately 100 feet of 3-inch plastic gas main had been moved approximately three feet above and one to two feet east of its original location, and was now resting on the temporary shoulder of a newly built roadbed. Upon inspection of the gas main, Staff found scratches and wrinkling consistent with movement by powered equipment. A CTS employee informed Staff that the gas main was located first by hand digging and then excavated and relocated with a backhoe. CTS stated that the gas main was in its way and it could not wait for NFG to relocate the main.

A NFG employee indicated to Staff that he had requested that CTS stop construction until NFG could evaluate the damage to its facility, but that CTS refused to do so. CTS also informed Staff that it would not stop work as requested by NFG. Based on these discussions with CTS and NFG, Staff issued Citations to CTS for the three code sections described above.

On January 13, 2004, a Notice of Possible Violation (NOPV) letter was issued proposing a penalty of \$16,000 for the three alleged code violations.¹ Several exchanges of correspondence between Staff and CTS followed and an informal conference was held on August 26, 2004.

At the informal conference, CTS stated that its employees moved the gas main by hand and that they do not recall stating to Staff that the gas main was moved with the backhoe. CTS maintains that at no time did it contact the gas line and, therefore, there was no violation of 16 NYCRR §753-3.10(a). CTS also claims that the alleged violation of 16 NYCRR §753-3.10(b) should be rejected by the Commission because its employees believed that the damaged Verizon line was actually an irrigation line.² However, in its January 13, 2004 letter CTS claims that it encountered the conduit for the telephone line and cracked it, but upon inspection, believed that the cable inside was not damaged.

Finally, as to the alleged violation of 16 NYCRR §753-3.10(c), CTC stated at the informal conference that its employees were about ten feet away from the exposed gas main when NFG asked CTS to stop working, but the employees continued working as they believed they were far enough away from the damaged NFG facility. In the April 13, 2004 letter CTS stated that after the utilities were exposed in the work area, its

¹ General Business Law §765(1)(a) provides for a penalty of up to \$1,000 for the first violation and an additional penalty of up to \$7,500 for each succeeding violation which occurs in connection with the entire self-same excavation or demolition activity within a two month period.

² The alleged violation of 16 NYCRR §753-3.10(b) pertains to failure to report the contact to the gas main. CTS's defense is that it didn't contact the gas line, therefore there was nothing to report to NFG.

employees moved their excavation activity several hundred feet away.

Determination

We find that Custom Top Soil, Inc. did commit violations of §753-3.10(a) and (b), which resulted in damage to a 3-inch plastic gas main. While the Respondent has no history of prior violations, in consideration of the nature, circumstances and gravity of the violation, we determine a penalty of \$8,500 is appropriate for these violations.

Staff's on-site inspection of the damaged gas main found scratches and wrinkling consistent with contact by powered equipment and the CTS employees' statement at the work site that the damaged gas main was moved by powered equipment are sufficient to reach a conclusion that a violation of 16 NYCRR §753-3.10(a) did occur. Having found that CTS did cause contact to the gas main, we also find that CTS should have reported it to NFG and, therefore, a violation of 16 NYCRR §753-3.10(b) occurred.

Alleged Violation of §753-3.10(c)

CTS has made conflicting statements as to how far away from the gas line they were working after its exposure. Because it is unclear whether CTS continued excavating in the "immediate vicinity" of the contacted gas main, and because we are determining maximum penalties for two other code sections, the Commission will not determine a penalty for this code section. However, CTS is cautioned that it must comply with operator requests to halt its work to allow an operator the opportunity to examine and repair its facilities. CTS is further cautioned that it may not move utility facilities, either by hand or

powered equipment, without the permission of the facility operator.

We also strongly encourage the Respondent to contact Dig Safely New York to request a training session covering the use of the One-Call 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 \$8,500 is determined against Custom Top Soil, Inc. pursuant to §119(b)(8) of the Public Service Law.

2. Custom Top Soil, Inc. is directed to remit, by certified check payable to the "Department of Public Service" the sum of \$8,500 in payment of the penalty determined. The \$8,500 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. Sorelle Brauth
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, pending compliance with ordering clause 2, following which it should be closed.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary