

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on August 9, 2018

COMMISSIONERS PRESENT:

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

CASE 18-G-0203 - In the Matter of an Enforcement Proceeding
Against Accadia Site Contracting, Inc. for
Alleged Violations of 16 NYCRR Part 753 -
Protection of Underground Facilities, in the
Service Territory of New York State Electric &
Gas Corporation.

ORDER DETERMINING PENALTY AND DIRECTING PAYMENT

(Issued and Effective August 15, 2018)

BY THE COMMISSION:

Respondent Information

Company Name: Accadia Site Contracting, Inc.
(Accadia, Accadia Site Contracting)

Address: 5636 Transit Road
Depew, NY 14043

Alleged Violation Specifics

Dates of Violations: October 22, 2014,
December 10, 2014,
and April 7, 2015

Locations: 663 Lincoln Avenue
Lockport, NY;

6444 Lincoln Avenue
Lockport, NY; and

771 Lincoln Avenue
Lockport, NY, respectively.

Descriptions of Excavation Work:	Water main and storm sewer installations
Damaged Facilities:	1-inch steel high-pressure natural gas service, 4-inch plastic high-pressure natural gas main, and 2-inch plastic high-pressure natural gas main
Alleged Code Violations:	Three separate violations of 16 NYCRR §753-3.8
Description of Violations:	Failure to maintain four inches of clearance between powered equipment and a buried facility.

Notice of Probable Violation (NOPV) Information

On or about November 30, 2016, copies of the NOPVs 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:	\$22,500
Responses:	Email correspondences on December 26, 2016, January 3, 2017, January 20, 2017, and March 26, 2018; an informal conference on January 4, 2017, and letters dated January 20, 2017, and March 26, 2018.

Summary of Information Provided by Respondent

For the first violation, which occurred on October 22, 2014, Accadia Site Contracting stated that the 1-inch steel high-pressure natural gas service was marked, was buried directly beneath the pavement, and was damaged while Accadia was using mechanized equipment to remove pavement. Accadia Site Contracting responded that it did not violate 16 NYCRR §753-3.8

because 16 NYCRR §753-3.6(a) allows that “[p]owered or mechanized equipment may be used within the tolerance zone for the removal of pavement or masonry but only to the depth of such pavement or masonry” and Accadia only excavated to just under the pavement. Accadia maintains, therefore, that “no penalty can be imposed.”

For the second violation, which occurred on December 10, 2014, Accadia Site Contracting responded that the 4-inch, plastic, high-pressure, natural gas main was not marked accurately, or “within two feet of the markings” (see §§753-1.2(u) and 753.3-6), and, therefore, that the “Commission is barred from imposing on Accadia a penalty for damaging [New York State Electric & Gas Corporation’s] NYSEG’s facility, because General Business Law §765(1)(b) specifically” states that “penalties provided for by this article shall not apply to an excavator who damages an underground facility due to the failure of the operator to comply with any of the provisions of this article.” Thus, Accadia believes, “no penalty lawfully may be imposed on Accadia” Site Contracting.

For the third violation, which occurred on April 7, 2015, Accadia Site Contracting stated that this incident “also resulted from NYSEG failing to comply with its statutory duty” to accurately mark its facilities. Thus, Accadia maintains, “the law prohibits the Commission from imposing on Accadia [Site Contracting] a penalty provided for by the General Business Law.”

Analysis of Evidence

16 NYCRR §753-3.8 states:

After verifying the location of an underground facility, the excavator shall not employ powered or mechanical excavating equipment closer than four inches in any direction from the staked, marked or

otherwise designated or known outside diameter or perimeter of such facility or its protective coating unless agreed to in writing by the operator of the affected underground facility.

With respect to the first violation, which occurred on October 22, 2014, Staff reviewed documentation provided by NYSEG. NYSEG recorded the depth of the natural gas service to be 30 inches, refuting Accadia's claim that the gas service was just beneath the pavement. Accadia offered no evidence that disputes NYSEG's 30-inch depth measurement. NYSEG also documented that Accadia Site Contracting had exposed the natural gas service at a previous location on this site, which meant that Accadia met the requirement that it expose the facility prior to excavating and saw the pipe's depth. Given these facts, and that Accadia Site Contracting acknowledged that it struck and damaged the natural gas service, we find that Accadia failed to maintain four inches of clearance between powered or mechanical equipment and the underground facility, thus violating 16 NYCRR §753-3.8.

For the second violation, which occurred on December 10, 2014, Staff reviewed documentation provided by NYSEG. NYSEG recorded the depth of the natural gas main to be 34 inches at this location and documented that Accadia Site Contracting struck and damaged the natural gas main with the "tooth of the bucket" that was part of Accadia's equipment. NYSEG recorded that this damage was within the two-foot tolerance zone of the marked facility.¹ Thus, Accadia Site Contracting failed to maintain four inches of clearance between powered or mechanical equipment and the underground facility.

¹ 16 NYCRR §753-3.6 does not allow any mechanized equipment to be used with the "tolerance zone" of the marked facilities. The "tolerance zone" is two feet on either side of the markings.

For the third violation, which occurred on April 7, 2015, Staff reviewed documentation provided by NYSEG, which recorded the depth of the natural gas main to be 33 inches at this location. Staff confirmed that NYSEG had marked its facilities at this location. NYSEG documented that Accadia Site Contracting had removed NYSEG's facility markings from when NYSEG had previously marked them. NYSEG also reported that its natural gas main had been completely severed at this location, which is consistent with that of powered or mechanical equipment. Therefore, we determine that Accadia Site Contracting failed to maintain four inches of clearance between powered or mechanical equipment and the underground facility.

Staff offered to resolve this matter with a reduced penalty provided Accadia Site Contracting completed training with New York 811. Accadia Site Contracting declined that offer.

Determination

We find that Accadia Site Contracting, Inc. did commit three separate violations of 16 NYCRR §753-3.8, which resulted in damage to a 1-inch steel high-pressure natural gas service, a 4-inch plastic high-pressure natural gas main, and a 2-inch plastic high-pressure natural gas main, on three separate occasions. Under General Business Law §765(1)(a), excavators who 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 violation that occurs within the following 12-month period. Therefore, in consideration of the nature, circumstances and gravity of the violation, we determine a penalty of \$22,500 is appropriate for these violations.

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 \$22,500 is determined against Accadia Site Contracting, Inc. pursuant to §119-b(8) of the Public Service Law.

2. Accadia Site Contracting, Inc. is directed to remit, by certified check payable to the "Department of Public Service," the sum of \$22,500 in payment of the penalty determined. The \$22,500 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