

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 98-M-0132 - In the Matter of the Rules and Regulations of the Public Service Commission Contained in 16 NYCRR, Proposed Amendments to Chapter VII, Subchapter F, Part 753 - Protection of Underground Facilities, filed in C 95-M-1007.

NOTICE OF PROPOSED RULEMAKING

(Issued October 27, 1998)

NOTICE is hereby given that the Commission is proposing to amend the rules relating to the protection of underground Facilities contained in 16 NYCRR Chapter VII, "Provisions Affecting Two or More Kinds of Public Service", Subchapter F, "Miscellaneous", Part 753, "Protection of Underground Facilities". The proposed amendments would add a new Subpart 6, "Enforcement Procedures", and make several minor revisions to Subparts 1 through 5.

Any person making comments should file five copies with Debra Renner, Acting Secretary, Public Service Commission, Three Empire State Plaza, Albany, New York, 12223-1350, to be received by January 6, 1999, or 45 days after publication in the State Register, whichever is later.

(SIGNED)

JOHN C. CRARY
Secretary

STATE OF NEW YORK
DEPARTMENT OF PUBLIC SERVICE

March 26, 1998

TO: THE COMMISSION

FROM: GAS & WATER DIVISION, ELECTRIC DIVISION,
COMMUNICATIONS DIVISION, OFFICE OF GENERAL COUNSEL

SUBJECT: CASE 98-M-0132 - In the Matter of the Rules and
Regulations of the Public Service Commission Contained
in 16 NYCRR, Proposed Amendments to Chapter VII,
Subchapter F, Part 753 - Protection of Underground
Facilities, filed in C 95-M-1007.

RECOMMENDATION: The Commission should issue a Notice of Proposed
Rulemaking to solicit comments on proposed
revisions and additions to 16 NYCRR Part 753 -
Protection of Underground Facilities.

SUMMARY

In January 1997 the Commission adopted a new damage prevention code to implement Section 119-b of the Public Service Law, which was amended by Chapter 685 of the Laws of 1994 and Chapter 445 of the Laws of 1995. 16 NYCRR Part 753 became effective on February 5, 1997. It superseded the Labor Department's rules contained in 12 NYCRR Part 53 - CONSTRUCTION, EXCAVATION AND DEMOLITION OPERATIONS AT OR NEAR UNDERGROUND FACILITIES.

The 1994 and 1995 amendments to the Public Service Law and General Business Law also gave the Public Service Commission new authority regarding enforcement of the damage prevention code. Department staff held discussions with the New York State Department of Law (Attorney General's office) about how the two agencies could coordinate enforcement efforts. This Notice of Proposed Rulemaking (NPRM) is the outcome of those discussions.

The intent of the NPRM is to add a new Subpart to Part 753, to be entitled Enforcement Procedures. It would spell out the process the Department would use to assess penalties for violations of Part 753, including the alleged violator's due process options if they opt to contest the allegations. Staff

also proposes to use this opportunity to add a few new provisions to the previously adopted regulations and to make several corrections and clarifications.

The benefits of the revised rules would be improved public and worker safety through better compliance with the regulations. The deterrent effect of the enforcement procedures, on parties who might be tempted to take short cuts during construction near underground facilities, is expected to have as much or more value than whatever money will be collected for the State's General Fund. The deterrent effect will also serve to level the competitive playing field for the majority of excavators who work in a safe manner in compliance with the rules.

LEGISLATIVE AUTHORITY

The Commission's authority to adopt these enforcement procedures is derived from the following excerpts from Section 119-b of the Public Service Law (PSL) and Article 36 of the General Business Law.

PSL §119-b Protection of underground facilities.

2. The commission shall adopt rules and regulations to implement and carry out the requirements of article 36 of the general business law established for the protection of underground facilities. Such rules and regulations shall include, but not be limited to, requirements for notice, one-call notification systems, participation of operators in such systems, designation and marking of the location of underground facilities and the verification of the designated or marked location of underground facilities, support for underground facilities and obligations of excavators to protect underground facilities under such article, including the use of hand-dug test holes at underground facilities furnishing gas or liquid petroleum products and such other matters as may be appropriate for the protection and security of property, life or public health, safety or welfare.

6. The commission shall have power, through the inspectors or duly authorized employees of the department, to examine and inspect excavation and demolition methods used by any person within fifteen feet in any direction of any underground pipeline used for conveying natural gas or of any underground telephone, electric, steam or water facility used for providing service and to order compliance with the standards for excavation and demolition near underground facilities contained in regulations adopted by the commission to implement and carry out the requirements of article thirty-six of the general business law established for the protection of underground facilities.
8. In the event a violation of such rules and regulations occurs and such violation is subject to a civil penalty pursuant to article thirty-six of the general business law, the commission shall determine the amount of the penalty after consideration of the nature, circumstances and gravity of the violation, history of prior violations, effect on public health, safety or welfare, and such other matters as may be required and shall send a copy of its determination to the excavator, operator, commissioner of labor and attorney general. Upon receipt of such determination, the attorney general may commence an action to recover such penalty.

GBL Article 36 - CONSTRUCTION AND EXCAVATION NEAR
UNDERGROUND FACILITIES.

§765. Penalties and liabilities.

1. Civil penalties.

- a. 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.

Department Staff has held meetings and had conversations with representatives of the Attorney General's office (AG) regarding how the two agencies can work together to enforce Part 753. The AG's office has stated its opinion that the statutes envision a regulatory scheme wherein investigation and evidence gathering is conducted by Department Staff for use by the Commission in its determination of a suitable penalty. The AG's office has also indicated that it would have no objection to the establishment of a procedure whereby the determination issued by the Commission includes instructions to the violator regarding remittance of the penalty imposed. These instructions could contain an additional notice that failure to remit the penalty in a timely fashion could result in the commencement of a civil action by the AG's office.

THE ENFORCEMENT PROCESS

The proposed new Subpart 6 would codify the steps in the enforcement process. The following describes how the process would work.

The Department would initiate the process by issuing a Notice of Probable Violation (NOPV) to the alleged violator. NOPV is an elaborate name for a letter to the alleged violator (Respondent) listing the regulations he or she is believed to have violated, the Respondent's options, the maximum penalty for which they are liable and the proposed penalty. Attached to the letter would be a proposed Consent Order (described below) and a copy of the field citation^{1/} if applicable.

^{1/} Department field staff issue field citations when they discover violations during investigations of facility damages or inspection of construction sites. The majority of enforcement actions would be based upon citations, although an action could be initiated based on other sources of information, such as a complaint. In cases where a field citation was previously issued, an additional copy would just be attached to the NOPV.

If the Respondent chooses to contest the alleged violations, his options are to respond in writing presenting evidence to refute or mitigate the alleged violation, or to request an informal conference with Department Staff at which he could do the same. If the Respondent does not choose to contest the violation, he would sign the Consent Order and remit the penalty.

A Consent Order is an agreement, signed by the Respondent and Department Staff, acknowledging that a violation occurred and agreeing to pay the penalty. A key point is that the Respondent acknowledges that a violation occurred but does not admit that he or she committed the violation. This is intended to help streamline the process by eliminating a potential barrier to signing Consent Orders; that an admission of guilt could disadvantage them in other legal proceedings over liability, property damage, or recovery of repair costs.

Once signed, a Consent Order would not be appealable. However, it is negotiable up to that time. As a hypothetical example, an excavator might agree to provide training on the code requirements to his employees in order to improve future compliance, and if Staff agrees it would be beneficial, a clause to that effect could be added to the Consent Order and the monetary penalty reduced.

In cases where the Respondent contests the violation, supervisory staff will evaluate all the evidence, including any provided by the Respondent in writing or at an informal conference, and make a written evaluation and recommendation for a Final Order.

To further streamline the process, Staff recommends that the Commission delegate the authority to determine a penalty amount, and issue the corresponding Final Order, to the Director level. If the designee is authorized pursuant to Section 8 of the PSL, such designee is empowered by Section 11 to issue an order which would have the same force and effect as a One-

Commissioner Order. Such Orders would have to be confirmed by the full Commission at the next regularly scheduled session in accordance with established procedures for One-Commissioner Orders.

The benefits of delegating this authority are that Staff would not have to prepare a formal full Session Item for each enforcement action, the Commission would not have its Session Calendar burdened by these items, and the timeline from commencement to conclusion of an enforcement proceeding should be substantially shorter.

If a Respondent desired to further appeal a Final Order, it could be done in accordance with existing provisions of PSL for appealing Orders of the Commission.

Copies of a model NOPV, a model Final Order, a model Consent Order and a blank Field Citation form are attached to this memorandum. The circumstances of some particular violations or damage incidents may result in NOPV's, Consent Orders or Final Orders that look different than these. However, Staff anticipates that boilerplate language similar to the model documents could be used in the majority of cases.

PROPOSED REVISIONS TO SUBPARTS 1 THROUGH 5

Subpart 1

Several new definitions of terms used in the new Subpart 6 are added (Commission, Department, Enforcement Action, Notice of Probable Violation, Respondent) and several existing definitions are amended. The definition of "excavation" is revised to include fence post and pile driving, tree root removal, sawcutting and jackhammering. The definition of "hand dug test holes" is revised to clarify that vacuum excavation techniques are acceptable. "Village" is added to the definition of "local governing body". Finally, the public holidays recognized by the state are added to the definition of "working days".

Subpart 3

Several paragraphs are repositioned so that all of the sections pertaining to making notification to the One-Call Notification Systems, including emergency excavations and demolition, are grouped together in one Section. Several revisions are made to Sections 765-3.6 and 3.7 to clarify the circumstances when hand dug test holes are required in a tolerance zone, and when powered equipment may be used to remove pavement to verify the location of facilities.

Subpart 4

A "good samaritan" clause is added to Section 753-4.6. It provides that operators of underground facilities may identify the location of privately owned facilities connected to their systems as a helpful guide to the excavator, and that doing so does not impose any liability on the facility owner for the accuracy of the private marking. Currently, there are many operators of underground facilities that take the position that their facilities end at the property line and are customer owned from that point to the building. These operators do not mark underground facilities beyond the property line because they are concerned about liability for mis-marks. This leads to situations such as a contractor calling for a markout on a client's front lawn and the electric service not being marked, putting the excavator in danger of personal injury. The proposed code language provides that the marking be done with broken rather than solid lines, to indicate it is a "best guess". Although it is not a complete solution to the problem, it represents a compromise that is better than current practices.

A provision is added requiring operators to have a means of providing information regarding the location of underground facilities for design purposes. The rules does not specify what the "means" must be. However, it does state that if an operator chooses to mark its facilities in response to such a

request, it may take up to 10 business days to do so.^{1/} Other possible means would be to mail out maps, allow the designer to come in to review maps, or arrange a meeting with the designer. The benefit would be reduced damages and interferences costs because planners could factor in the existence of underground facilities early in the design stage. Utilities would also receive an early "heads-up" that a project might impact their facilities and take steps to avoid damages such as relocating facilities, replacing deteriorating facilities in conjunction with the project, providing specifications or guidance on how to support and protect facilities, etc.

Subpart 5

A provision is added requiring One Call Notification Systems to have a means for designers to obtain information about who to contact to obtain underground facility information from operators for design purposes. This corresponds to the rule described above applicable to operators and also gives the One-Call systems flexibility in how they comply. It does not require issuing a notice to members as if it were an impending excavation requiring a markout. The One Call systems could provide the phone numbers of operator contacts orally to the caller, or mail or fax a list.

The remainder of the revisions are to correct typos, fix incorrect cross-references to other paragraphs, reposition paragraphs to more appropriate locations and to make minor revisions to clarify intent.

This memorandum has been reviewed by Peter Catalano of the Office of General Counsel.

^{1/} If and when actual excavation or demolition work becomes imminent, excavators will still be required to provide notification in accordance with § 753-3.1.

SEQRA REVIEW

We have reviewed the proposed regulations pursuant to the State Environmental Quality Review Act and its implementing regulations and find that they are Type II actions (those previously determined not to have a significant adverse effect on the environment) within the meaning of 16 NYCRR Section 7.2(b)(5).

RECOMMENDATION

Staff recommends that the Commission issue a Notice of Proposed Rulemaking to solicit comments from interested parties on the proposed revisions to Part 753.

Respectfully submitted,

Steven D. Blaney, P.E.
Associated Gas & Petroleum Engineer

Approved by:

Reviewed by:

Phillip S. Teumim
Director
Gas & Water Division

John E. Gawronski, P.E.
Chief, Gas & Petroleum Safety
Gas & Water Division

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

PROPOSED RESOLUTION

Statutory Authority
Public Service Law §119-b and General Business Law Article 36

CASE 98-M-0132 - In the Matter of the Rules and Regulations
of the Public Service Commission contained in
16 NYCRR, proposed amendments to Chapter VII,
Subchapter F, Part 753 - Protection of
Underground Facilities, filed in C 95-M-1007.

At a session of the Public Service Commission held in
the City of Albany on _____, the Commission, by
vote of its members present

RESOLVED:

1. That the provisions of Section 202(1) of the State
Administrative Procedure Act and Section 101-a(2) of the
Executive Law having been complied with, Part 753 of Chapter VII
of Title 16 of the Official Compilation of Codes, Rules and
Regulations of the State of New York is amended, effective upon
publication of a Notice of Adoption in the State Register, as
follows (Deletions are bracketed; new material is underlined):

SUBCHAPTER F - Miscellaneous.

PART 753

PROTECTION OF UNDERGROUND FACILITIES

(Statutory Authority: (Public Service Law §119-b and
General Business Law Article 36)

Subparts

753-6 Enforcement Procedures

SUBPART 753-1 GENERAL REQUIREMENTS

753-1.2 Definitions. When used in this Part, unless the
context otherwise requires, the following terms shall have the
following meanings.

(a) Commission: The Public Service Commission.

([a]b) Contact: Any defacing, scraping, impact upon an underground facility or its protective coating, housing or other protective device.

([b]c) Damage: Any displacement of or removal of support from any underground facility which would necessitate repair of such facility or any destruction or severance of any underground facility or its protective coating, housing or other protective device.

(d) Department: The Department of Public Service.

([c]e) Demolition: The total or partial wrecking, razing, rending, moving or removal of any structure.

(f) Enforcement action: An action by the Commission or a designee to determine a penalty, for violations of this part, under the authority of §119-(b)(8) of the Public Service Law.

([d]g) Emergency: Any abnormal condition which presents an immediate danger to life or property including the discontinuance of a vital utility service necessary for the maintenance of public health, safety and welfare.

([e]h) Excavation: Any operation for the purpose of movement or removal of earth, rock or other materials in or on the ground by use of mechanized equipment or by blasting, and includes but is not limited to, digging, auguring, backfilling, drilling, grading, plowing in, pulling in, fence post or pile driving, tree root removal, sawcutting, jackhammering, trenching and tunneling; provided, however, that the movement of earth by tools manipulated only by human or animal power and the tilling of soil for agricultural purposes shall not be deemed excavation.

([f]i) Excavator: Any person who is engaged in a trade or business which includes the carrying out of excavation or demolition; provided, however, that an individual employed by an excavator and having no supervisory authority other than the

routine direction of employees over an excavation or demolition, shall not be deemed an excavator for the purpose of this Part. The act of any employee or agent of any excavator acting within the scope of his or her official duties or employment shall be deemed to be the act of such excavator.

([g]j) Hand dug test holes: Excavations performed for designating, testing or verification purposes which are dug by the use of hand-held tools utilizing only human power. The use of vacuum excavation techniques is an acceptable means of exposing underground facilities.

([h]k) Local governing body: A town, village or city outside the city of New York or a county within the city of New York.

([i]l) Near: An area within 15 feet of the outside perimeter or diameter of an underground facility or its encasement.

(m) Notice of probable violation (NOPV): A written statement or letter from the Department to a Respondent informing him or her that an enforcement action is being initiated and containing the items specified by §6.4(b) of this Part.

([j]n) One-call notification system: Any organization among whose purposes is establishing and carrying out procedures to protect underground facilities from damage due to excavation and demolition, including but not limited to, receiving notices of intent to perform excavation and demolition and transmitting the notices to one or more member operators of underground facilities in the specified area.

([k]o) Operator: Any person who operates an underground facility to furnish any of the following services or materials: electricity, gases, steam, liquid petroleum products, telephone or telegraph communications, cable television, sewage removal, traffic control systems, or water.

([l]p) Person: Any individual, firm, corporation, association or partnership, cooperative association, joint venture, joint stock association, business trust, their lessees, trustees or receivers, municipality, governmental unit or public authority whether or not incorporated.

(q) Powered equipment: Any equipment energized by an engine or motor and used in excavation or demolition work.

(r) Respondent: A person on whom the Department has served a field citation, warning letter of Notice of Probable Violation.

([m]s) Tolerance zone: If the diameter of the underground facility is known, the distance of one-half of the known diameter plus two feet, on either side of the designated center line or, if the diameter of the underground facility is not known, two feet on either side of the designated center line.

([n]t) Underground facility: A facility and its attachments located underground and installed by an operator to furnish its services or materials, including but not limited to, pipelines, conduits, ducts, cables, wires, manholes, vaults, tanks, tunnels and any encasement containing such facilities. Such term shall not include oil and gas production and gathering pipeline systems used primarily to collect oil or gas production from wells.

([o]u) Work area: The area of the ground or equivalent surface which will be disturbed or removed by excavation work or affected by demolition work.

([p]y) Working days: Mondays through Fridays, exclusive of public holidays. The public holidays recognized by the State of New York are New Year's Day, Martin Luther King Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day and Christmas Day.

SUBPART 753-3 DUTIES OF EXCAVATORS

753-3.1 Timing of notice and excavation and demolition

753-3.15 [Emergency excavation or demolition

753-3.16 Pre-Demolition conferences

753-3.17] Responsibility to employees

753-3.1 Timing of notice and excavation and demolition.

(a) Before commencing or engaging in any non-emergency excavation or demolition, each excavator shall provide notice of the location and date of the proposed excavation or demolition to the one-call notification system serving the vicinity in which the excavation or demolition is to take place. Such notice shall be served at least two but not more than ten working days, not including the date of the call, before the proposed commencement date of the excavation or demolition.

(b) [Such notice shall be served at least two but not more than ten working days, not including the date of the call, before the proposed commencement date of the excavation or demolition.] Excavation or demolition which is required to be performed promptly as a result of an emergency, disaster or to correct an immediate hazard may proceed immediately without prior notification to operators, if the situation is so serious that the excavation or demolition cannot reasonably be delayed. However, excavators shall notify the one-call notification system as soon as possible that such excavation or demolition is commencing or is underway. Extreme caution shall be employed by the excavator to prevent damage to existing underground facilities and to avoid endangering persons and property.

(c) At least seven working days in advance of the commencement date of a demolition, the excavator shall request a pre-demolition conference, through the one-call notification system, with all operators who have underground facilities at or near the proposed demolition area. A request for a pre-demolition conference is not a substitute for the notice of

intent to perform demolition work required by Section 753-3.1 of this Part.

([c]d) Whenever an excavator cancels the proposed commencement date he or she shall promptly inform the one-call notification system. A postponement of more than 10 days shall be considered a cancellation.

([d]e) Whenever an excavator postpones the commencement date for five or less working days, no call to the one-call notification system or operators is required. Whenever an excavator postpones the commencement date by more than five but less than ten working days, the same requirements for notice shall pertain to the revised commencement date as listed in subdivisions 753-3.1(a) and (b).

([e]f) An excavator may request a written admission of receipt of the notice of the location and date of a proposed excavation or demolition and of a new commencement date or cancellation.

753-3.2 Detailed notice requirements.

(b) When necessary for adequate identification, the excavator shall delineate the work area with white paint, white stakes or other suitable white markings.

753-3.4 Staking, marking or other designation.

(b) [An operator performing excavation or demolition work at or near his or her own underground facility shall not be required to stake, mark or otherwise designate such underground facility.

(c)] Whenever the excavator determines that a review of the staking, marking or other designation is necessary or that additional information is required, he or she shall so notify the operator or the one-call notification system.

753-3.6 Verification of underground facilities.

(a) Where an underground facility has been staked, marked or otherwise designated by the operator [within a proposed work area] and [if] the tolerance zone [of an underground facility] overlaps with any part of the work area, or the projected line of a bore/directional drill intersects the [path of an underground facility] tolerance zone, the excavator shall verify the precise location, type, size, direction of run and depth of such underground facility or its encasement. Verification may be completed before the excavation or demolition is commenced or may be performed as the work progresses. Powered equipment may not be used in a tolerance zone prior to the verification of the location of facilities within the tolerance zone, except that powered or mechanized equipment may be used for removal of pavement or masonry but only to the depth of such pavement or masonry.

(b) The verification of underground facilities furnishing gas or liquid petroleum products shall be accomplished by the excavator by exposing the underground facility or its encasement to view by means of hand dug test holes at one or more points where the work area and tolerance zone overlap, or more points as designated by the operators of such facilities. [Powered or mechanized equipment may be used for removal of pavement or masonry but only to the depth of such pavement or masonry.]

[(d) Where center line stakes or marks indicate the size of the underground facility, such facility shall be assumed to lie within a strip of land equal to the width of the facility plus four feet with the center line of such strip of land at the stakes or marks.

(e) Where center line stakes or marks do not indicate the size of the underground facility, such facility shall be assumed to lie within a strip of land four feet in width with the center line of such strip of land at the stakes or marks.

(f) Where offset stakes or remote tie-in markings indicate the size of the facility, the underground facility shall be assumed to lie in a strip of land equal to the width of the facility plus four feet with the center line of such strip of land at the center line of the facility as indicated by the stakes or markings.

(g) Where offset stakes or remote tie-in markings do not indicate the size of the underground facility, the facility shall be assumed to lie in a strip of land four feet in width with the center line of such strip of land at the center line of the underground facility as indicated by the stakes or markings.]

753-3.7 Unverifiable underground facilities. If the precise location of an underground facility cannot be verified by the excavator after diligent search at a reasonable depth within the [strip of land] tolerance zone as staked, marked or otherwise designated by the operator, the excavator shall so notify such operator as soon as possible. The operator shall verify the location of the underground facility with his or her own personnel as soon as possible or shall provide the excavator with prompt field assistance or use other means mutually agreed to by the excavator and operator. Such agreement shall be provided in writing to the excavator upon his or her request.

753-3.9 Discovery of unknown underground facilities. Where an undesignated or otherwise unknown underground facility is discovered within a work area, the excavator shall report such discovery as follows:

(b)(1) If the identity of the operator of the discovered underground facility is not known or obvious, the excavator shall report the discovery to the one-call notification system and each operator notified by the one-call notification system shall respond immediately and, in accordance with subdivision

753-4.9[(c) or](d) of this Part, determine whether or not such discovered facility is his or hers.

753-3.15 [Emergency excavation or demolition. Excavation or demolition which is required to be performed promptly as a result of an emergency, disaster or to correct an immediate hazard may proceed immediately without prior notification to operators, if the situation is so serious that the excavation or demolition cannot reasonably be delayed. However, excavators shall notify the one-call notification system as soon as possible that such excavation or demolition is commencing or is underway. Extreme caution shall be employed by the excavator to prevent damage to existing underground facilities and to avoid endangering persons and property.

753-3.16 Pre-demolition conferences. At least seven working days in advance of the commencement date of the demolition, the excavator shall request a pre-demolition conference, through the one-call notification system, with all operators who have underground facilities at or near the proposed demolition area. A request for a pre-demolition conference is not a substitute for the notice of intent to perform demolition work required by Section 753-3.1 of this Part.

753-3.17] Responsibility to employees. Every excavator subject to the provisions of this Part shall make certain that all of his or her employees directly concerned with excavation or demolition are thoroughly familiar with the applicable provisions of this Part and especially the provisions of this Subpart relating to their safety.

SUBPART 753-4 DUTIES OF OPERATORS

- 753-4.14 [Consumer education programs]
Information for design purposes
753.4.15 Consumer education programs

753.4.6 Locating underground facilities.

(a) Whenever an operator's underground facilities are in or within 15 feet of a proposed work area, such facility shall be located, accurately and with due care, by means of staking, marking or other designation in accordance with the provisions of this Subpart. An operator may identify the location of a known facility connected to its facility beyond the point of the interconnection or tee, but not owned by the operator, as a helpful guide to the excavator. Such staking or marking shall be in accordance with paragraph (b) of this Section, except that surface markings shall be dotted or broken lines rather than solid lines. The identification shall not be deemed to impose any liability upon the facility owner for the accuracy of the private facility identification.

(d) An operator performing excavation or demolition work at or near his or her own underground facility shall not be required to stake, mark or otherwise designate such underground facility.

753-4.9 Operator's response to notices of contact or damage, facilities in danger [or] of failing and discovery of unknown underground facilities.

753-4.14 [Each operator of an underground gas pipeline or hazardous liquid petroleum facility shall on its own initiative or through a one-call notification system conduct a program to educate the public on the possible hazards associated with damage to facilities and on the importance of reporting gas odors and leaks. The one-call notification system may develop materials suitable for use in such programs.] Information for design purposes. Each operator shall provide a means by which

information regarding the location of underground facilities can be obtained for design purposes. If marking in accordance with Section 753-4.6 is the means selected by the operator, the operator may take up to 10 working days to complete the marking.

753-4.15 Each operator of an underground gas pipeline or hazardous liquid petroleum facility shall on its own initiatives or through a one-call notification system conduct a program to educate the public on the possible hazards associated with damage to facilities and on the importance of reporting gas odors and leaks. The one-call notification system may develop materials suitable for use in such programs.

SUBPART 753-5 One-Call Notification Systems

753-5.3 System duties.

(c) Provide a means by which contact information provided by the member operators can be obtained for the purpose of learning the location of underground facilities for design purposes.

SUBPART 753-6 - Enforcement Procedures

- 753-6.1 Scope
- 753-6.2 Field citations
- 753-6.3 Warning letters
- 753-6.4 Notice of probable violation
- 753-6.5 Respondent's options
- 753-6.6 Department action
- 753-6.7 Consent orders
- 753-6.8 Final order
- 753-6.9 Payment of penalties
- 753-6.10 Injunctive relief

753-6.1 Scope: This Subpart describes the enforcement authority and sanctions of the Public Service Commission for achieving and maintaining compliance with 16 NYCRR Part 753. It also describes the procedures governing the exercise of that authority and the imposition of those sanctions.

753-6.2 Field citations: Upon determining that a probable violation of a provision of Part 753 has occurred, the Department may issue a field citation to a Respondent, identifying specific provisions alleged to have been violated.

753-6.3 Warning letters: Upon determining that a probable violation(s) of a provision of Part 753 has occurred or is continuing, the Department may issue a warning letter notifying the Respondent of the probable violation and advising him or her to correct it, if it is correctable, and to comply henceforth, or be subject to enforcement actions under this Part.

763-6.4 Notice of probable violation:

(a) If the Department has reason to believe that a violation of Part 753 has occurred or is continuing, the Department may commence an enforcement action by issuing a Notice of Probable Violation (NOPV).

(b) The NOPV shall include:

- (1) A listing of the regulations which the Respondent is alleged to have violated, a description of the evidence on which the allegations are based and a copy of the field citation(s), if applicable;
- (2) Notice of the response options available to the Respondent under Section 753-6.5 of this Subpart;
- (3) If an administrative penalty is proposed, the amount of the proposed penalty and the maximum penalty for which the Respondent may be liable; and
- (4) A proposed Consent Order pursuant to Section 753-6.7 of this Subpart.

(c) A NOPV may be amended at any time prior to issuance of a final order. If an amendment includes any new material allegations of fact or proposes an increased administrative penalty, the Respondent shall have another opportunity to respond under Section 753-6.5 of this Subpart.

753-6.5 Respondent's options: Within 30 days after issuance of a NOPV the Respondent shall respond in one of the following ways:

(a) Sign the Consent Order and return it with payment of any proposed administrative penalty;

(b) Submit a written explanation, information or other material in answer to the allegations or in mitigation of the proposed penalty; or

(c) Request an informal conference with Department Staff.

(d) Failure of the Respondent to respond in accordance with subdivision (a), (b) or (c) shall constitute a waiver of its right to contest the allegations in the NOPV and authorizes the Commission, without further notice to the Respondent, to find facts to be as alleged in the NOPV and to issue a final order under Section 753-6.8 of this Subpart.

753-6.6 Department Action (a) If the respondent requests an informal conference, such conference will be conducted by Department Staff. The Respondent shall have the right to be represented by an attorney or other person, and shall have the right to present relevant evidence. Any evidence which indicates that the Respondent may have violated Part 753 shall be made available to the Respondent, who shall have the opportunity to rebut this evidence.

(b) Following its review of any material submitted in writing or at an informal conference, the Department will forward the case file, which will be the basis for a final order, to the Commission or a designee. The case file of an enforcement proceeding shall include:

(1) The field citations, inspection reports and any other evidence of alleged violations;

(2) A copy of the NOPV issued under Section 753-6.4 of this Subpart;

(3) Any material submitted by the Respondent in response to the NOPV or at an informal conference; and

(4) A written evaluation and recommendation for a final order.

753-6.7 Consent Orders

(a) Notwithstanding any other provision to the contrary, the Department may at any time resolve an outstanding NOPV with a consent order. A consent order must be signed by the person to whom it is issued, or a duly authorized representative, and must indicate agreement with the terms thereof. A consent order need not constitute an admission by any person that a violation has occurred.

(b) A consent order is a final order of the Commission having the same force and effect as a final order issued pursuant to Section 753-6.8 of this Subpart.

(c) A consent order shall not be appealable and shall include an express waiver of appeal or judicial review rights that might otherwise attach to a final order of the Commission.

753-6.8 Final Order Based on the review of a case file and upon considering the nature, circumstances and gravity of the violation, history or prior violations, effect on public health, safety or welfare and such other matters as may be required, the Commission or designee will issue a final order that includes:

(a) A statement of findings and determinations on all material issues;

(b) If an administrative penalty is assessed, the amount of the penalty and the procedures for payment of the penalty;

(c) A final order may enjoin a Respondent as described in Section 753-6.10.

753-6.9 Payment of penalties:

(a) Payment of an administrative penalty under this subpart must be made by certified check or money order payable to the "Department of Public Service" and sent to the Secretary to the Commission, Three Empire State Plaza, Albany, N.Y. 12223-1350.

(b) If a Respondent fails to pay the full amount of a penalty assessed in a final order within thirty days after receipt of the final order, the Department may refer the case to the Attorney General with a request that an action to collect the assessed penalty be brought in any court of competent jurisdiction.

753-6.10 Injunctive Relief

Notwithstanding any of the enforcement procedures listed in this Subpart, if the Commission is aware that any excavator is engaging in or proposing to engage in excavation or demolition in a negligent or unsafe manner, which has resulted in or is likely to result in damage to underground facilities in such a manner that life property or the continuation of operator service is endangered, the Commission or designee may enjoin such excavator from further excavation or demolition work or any aspect thereof. Nothing herein shall impair the rights of any operator or the Attorney General, pursuant to General Business Law Section 765, from seeking an injunction against any excavator engaging in or proposing to engage in excavation or demolition in a negligent or unsafe manner.

2. That the Secretary to the Commission is directed to file a copy of this Resolution with the Secretary of State.

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

Internet Address: <http://www.dps.state.ny.us>

PUBLIC SERVICE COMMISSION

MAUREEN O. HELMER

Chairman

JOHN B. DALY

Deputy Chairman

THOMAS J. DUNLEAVY

JAMES D. BENNETT



LAWRENCE G. MALONE

General Counsel

DEBRA RENNER

Acting Secretary

, 1998

NAME

STREET

CITY, N.Y. ZIP

NOTICE OF PROBABLE VIOLATION

Dear Mr. Respondent:

This Notice offers you an opportunity to present facts to refute or mitigate allegations that on or about DATE your company violated the Commission's regulations implementing section 119-b of the Public Service Law and Article 36 of the General Business Law (16 NYCRR Part 753 - Protection of Underground Facilities)

Attached to this letter you will find:

1. A copy of a Violation Sheet issued by Department Staff on DATE. The Violation Sheet lists the sections of the code you are alleged to have violated and describes the alleged violation.
2. A copy of the Department's regulations - 16 NYCRR Part 753 - Protection of Underground Facilities. The booklet contains excerpts from the Public Service Law (PSL) and General Business Law (GBL). The Commission's authority to enforce the regulations is derived from GBL Article 36, §765(1) and PSL §119-b(8).
3. A proposed Consent Order.

The maximum penalty for which you may be liable under the statutes is \$----. Be advised that we intend to determine a penalty of \$--- for said violation(s).

If you wish to dispute the allegations in this notice, your options are as follows:

1. Respond in writing with a complete statement of all relevant facts, including a description of the precautions you took to protect the underground facilities.
2. Request an informal conference with Department Staff. At such a conference, you would have an opportunity to present evidence to dispute or mitigate the allegations. You may be represented by an attorney at the conference if you desire.

If you do not choose to dispute the alleged violation, you should sign the enclosed Consent Order and return it accompanied by a check for \$--- made payable to the Department of Public Service and addressed to the Director of Finance and Budget, Department of Public Service, Three Empire State Plaza, Albany, N.Y. 12223-1350.

Failure to exercise one of the options described above within 30 days of the date of this letter will be deemed to be acceptance of the facts as alleged, in which case we will issue a Final Order as provided for in §753-6.8, with the penalty amount as indicated above.

Very truly yours,

John E. Gawronski, P.E.
Chief, Gas & Petroleum Safety

Enclosures

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 98-G-0000 Enforcement Proceeding against _____
Company for violations of 16 NYCRR Part 753,
Protection of Underground Facilities.

FINAL ORDER DETERMINING PENALTY AND DIRECTING PAYMENT

(Issued and Effective _____)

BY THE COMMISSION:

On DATE, the Department of Public Service issued
a Notice of Probable Violation (NOPV) to RESPONDENT for
alleged violation(s) of 16 NYCRR Part 753 - Protection of
Underground Facilities. Specifically, it was alleged that on DATE,
RESPONDENT violated §753-?.(x)(y) by failing to _____
_____.

The NOPV informed RESPONDENT that it had the right
to submit evidence to refute or mitigate the alleged violation,
either in writing or at an informal conference with Staff.

By letter dated DATE, RESPONDENT explained that
_____ occurred.

PSL §119(b)(8) provides:

In the event a violation of such rules and regulations
occurs and such violation is subject to a civil penalty
pursuant to article thirty-six of the general business
law, the commission shall determine the amount of the
penalty after consideration of the nature,
circumstances and gravity of the violation, history of
prior violations, effect on public health, safety or
welfare, and such other matters as may be required and
shall send a copy of its determination to the
excavator, operator, commissioner of labor and attorney
general. Upon receipt of such determination, the
attorney general may commence an action to recover such
penalty.

Based upon the factors set forth in Public Service Law, and our review of the information submitted in this case, we find that:

1. _____
2. _____

Therefore, we will determine a penalty of \$--- to be assessed against RESPONDENT and direct its payment.

The Commission orders:

1. A penalty of \$--- is determined against RESPONDENT pursuant to §119(b)(8) of the Public Service Law.

2. RESPONDENT is directed to remit, by certified check payable to the "Department of Public Service" the sum of \$---in payment of the penalty determined. The check shall be sent to the Director of Finance and Budget, Department of Public Service, Three Empire State Plaza, Albany, N.Y. 12223-1350, and the Secretary shall be so advised in writing within 30 days of the issuance of this Order. The \$--- sum is subject to Section 18 of the State Finance Law.

3. If the penalty 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. This proceeding is continued.

By the Commission,

COMMISSION DESIGNEE

CONSENT ORDER

1. This document is a Consent Order entered into between the New York State Department of Public Service and NAME (RESPONDENT).

2. The Respondent acknowledges that a violation of 16 NYCRR Part 763-#.%(@) occurred on or about DATE at LOCATION. The Respondent's acknowledgement does not constitute an admission that the Respondent committed the violation indicated in this paragraph.

3. The Department hereby imposes upon the Respondent a civil penalty of \$---, pursuant to §119-b(8) of the Public Service Law and Article 36, §765(1) of the General Business Law, in recognition of the acknowledgement set forth in paragraph 2. The Respondent hereby agrees, upon signing and returning this Consent Order to the Department, to attach payment of the penalty by check or money order payable to the "Department of Public Service" and addressed to the Director of Finance and Budget, Department of Public Service, Three Empire State Plaza, Albany, N.Y. 12223-1350.

4. The Respondent further agrees that, in the event the Department determines that the Respondent subsequently commits or acknowledges a violation of 16 NYCRR Part 753, such subsequent violation or acknowledgement may constitute a subsequent offense as set forth in General Business Law, Article 36, §765(1).

5. The Department and the Respondent also agree that this Consent Order shall constitute a Final Order of the Commission. The Respondent hereby expressly waives any and all right of appeal or judicial review that might otherwise attach to a Final Order of the Commission.

NAME

DATE

John E. Gawronski, P.E.
Chief of Gas and Petroleum Safety

DATE

Exhibit C