

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on January 24, 2001

COMMISSIONERS PRESENT:

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

CASE 99-M-1624 - In the Matter of the Rules and Regulations of  
the Public Service Commission, Contained in  
16 NYCRR, Part 753 - Protection of Underground  
Facilities, filed in C 95-M-1007.

MEMORANDUM AND RESOLUTION  
ADOPTING AMENDMENTS TO 16 NYCRR PART 753

(Issued and Effective February 9, 2001)

BY THE COMMISSION:

INTRODUCTION

On October 27, 1998<sup>1</sup>, we issued a Notice of Proposed Rulemaking (NPRM) proposing amendments to 16 NYCRR Part 753 - Protection of Underground Facilities. Due to the extensive comments received, additional revisions were proposed and a second NPRM was issued on April 4, 2000.

The most significant proposed amendment is the addition of a new Subpart 6 entitled Enforcement Procedures, which would describe the procedures used to assess penalties for violations. Several revisions were also proposed to the existing regulations.

Nine organizations, listed in Appendix A, commented on the proposed rules. Provided below is a discussion of the substantive comments. The final rules we adopt are contained in the attached resolution.

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<sup>1</sup> 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.

ANALYSIS OF COMMENTS

COMMENTS ON SUBPART 6 GENERALLY

Delegation of Authority

The NPRM solicited comments on the question of whether the Commission could, and if so, should, delegate to Staff authority to issue final orders. Southern Energy, National Fuel and the NYGG were opposed to the delegation of the Commission's authority.

Southern Energy argues that we are authorized to delegate our statutory authority only when delegation has been expressly authorized by the Legislature. While §119-b(6) of the Public Service Law (PSL) authorizes us to delegate authority to Staff to examine and inspect excavation and demolition methods, Southern Energy claims that neither General Business Law nor the PSL authorize the Commission to delegate its authority to issue penalty determinations.

National Fuel makes a similar argument, and points out that even without authority to issue penalty determinations, Department Staff would still play an active role in enforcement by making recommendations to the Commission based on its analysis of circumstances surrounding an alleged violation.

The Gas Group comments that Commission involvement is a necessary step for maintaining order in the process by having a top level central body ensuring that enforcement is performed on a fair and consistent basis

We will not delegate penalty determination to our Staff. These issues have not been so time consuming that delegation would be beneficial, and we have an important, ongoing interest in monitoring efforts to protect utilities' underground facilities. Accordingly, at this time, we will not delegate this function. We will continue the current process for matters where penalties are sought, which is for Staff to issue a Notice of Probable Violation (NOPV) to the respondent. Respondents will be given an opportunity to dispute the NOPV in writing or in an informal hearing. If the respondent or Staff does not wish to

enter into a Consent Order, the information will be presented to us for our determination

The Commission's Authority to Collect Fines

NYSTA contends that we lack the authority to *order* an operator to pay the determined fine. The NPRM referred to a letter from an Assistant Attorney General providing an opinion that the statutory provision allowing the Attorney General to commence an action to recover a penalty is a permissive provision, and as a result, does not restrict our ability to order entities to pay penalties. NYSTA disagrees with the Assistant Attorney General's opinion, and claims that if we had the authority to order excavators and operators to pay penalties, there would be no reason for the Legislature to allow the Attorney General to commence an action to recover Part 753 penalties. NYSTA states that our role is to investigate violations, seek to settle matters voluntarily through consent agreements, and determine penalty amounts for referral to the Attorney General. NYSTA further states that it fears that excavators could challenge or ignore a Commission determination and the Attorney General's office would not be geared up to assume the necessary enforcement actions. The responsibility for penalty collection should be vested with the Office of the Attorney General, NYSTA claims, because it would be more likely to provide adequate staffing resources to facilitate effective enforcement. Moreover, it argues that division of authority is appropriate because it ensures that all excavators and operators, whether regulated utilities or not, face the same level of enforcement for similar violations.

Article 36 of the General Business Law and PSL §119-b, when viewed along with Sections 8 and 11 of the PSL, vest the Commission with the authority to determine a civil penalty against any excavator or any operator. The fact that PSL §119-b allows the Attorney General to commence an action to recover a penalty does not mean that other remedies are not available, and Commission action is a reasonable remedy given the statutory scheme.

Standards for Determining Penalty Levels

NYSTA argues that the proposed rule should set out clear standards for determining penalty levels. It notes that the statute delineates such standards: nature, circumstances and gravity of the violation, history of prior violations, and effect on public health, safety or welfare, but these standards are neither included nor clarified within the proposed rule. NYSTA asserts that the proposed rule provides no guidance as to when Staff should issue a field citation, a warning letter or a NOPV, or what level of penalty should be associated with different violations.

NYSTA cites an example where Staff issued a NOPV indicating it would recommend the Commission determine a penalty of \$1,000 (the maximum for a single violation) without any supporting analysis as to how or why this determination was made. It argues that the statute requires more and that the way to ensure consistent and appropriate penalty determinations is to require Staff to provide an explanation for the proposed penalty within each NOPV that tracks the standards listed in PSL §119-b(8). In addition to promoting consistency, NYSTA adds, objective standards also will serve to minimize drawn-out litigation over penalties.

The current policies for determining when a citation, warning letter or NOPV will be issued are as follows:

Citations are issued when Staff believes a violation has been identified. Senior Staff reviews citations and a decision is made whether to issue a warning letter or NOPV. Generally, warning letters are issued if there is no facility damage associated with the violation, and the party involved has no violations within the preceding year. If these conditions are not met, a NOPV is issued. Staff's present policy is to propose the maximum penalty in the NOPV.

However, this is a flexible guideline and exceptions are possible in appropriate circumstances. For example, even though no facility damage may have occurred, a finding may be made by Staff that a major catastrophe might have only been narrowly averted.

We agree with NYSTA that respondents should be provided a rationale for a proposed penalty when a NOPV is issued and for a final penalty determination when a Final Order is issued. PSL §119-b(8) requires that the "nature, circumstances and gravity of the violation, history of prior violations, effect on the public health, safety or welfare, and such other matters as may be required" be considered in determining the amount of penalty within the monetary limits set by the statute.

The statutory criteria for imposing penalties for violations of Part 753 will be applied fairly and consistently and the level of penalty imposed will commensurate with the severity of the violation. A description of the supporting evidence and the rationale for the recommended penalties will be set forth in all NOPV's and final orders. Final penalty recommendations are made after review and analysis of any evidence provided by the respondent in writing or at an informal conference. After weighing such evidence against the provisions of PSL §119-b(8), the final penalty may be adjusted from that proposed in the NOPV. The statute contemplates substantial discretion on the part of the Commission in the determination of penalties to be imposed.

We do not agree with NYSTA that these standards should be written into the regulations. As the Department of Law notes in its analysis, if the regulations establish specific standards with regard to the determination of a penalty and the actual amount of the penalty, we may lose our ability to assess each potential violation on a case-by-case basis. In view of the Public Service Law's broad language and the provision allowing the Commission to determine penalties based on "...such other matters as may be required...", PSL §119-b(8) clearly contemplates that the Commission be given substantial flexibility to enforce the regulations. The establishment and delineation of penalty standards in Part 753 would frustrate the flexibility of PSL §119-b(8) and the ability of Staff to address different situations and abuses that may develop over time.

Penalty Amounts

Con Edison and Tennessee Gas commented that the current penalty levels, \$1,000 for a first violation and \$7,500 for subsequent violations on the same excavation activity within a two month period, are too low to deter careless excavation and encourage use of the one call notification system. Tennessee Gas pointed to several other states with higher penalties in their statutes, and respectfully suggested the Commission consider recommending to the Legislature an increase in the range of fines that may be imposed.

An act of the Legislature is required to increase the penalty amounts. We will continue to monitor compliance and the effectiveness of the enforcement program. The Department has under consideration a proposal to increase penalties for violations of one-call rules.

COMMENTS ON SPECIFIC LANGUAGE IN SUBPART 6 OF THE REGULATIONS

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.

NFG recommended adding the following addition to the end of this paragraph: "either at the informal conference, or in writing within thirty days following the conference, at the option of the Respondent." NFG states that this revision will clarify that a respondent may either rebut evidence at a conference, through oral testimony or some other form of evidence, or at a later date if the respondent needs to perform additional research to gather facts to provide an effective rebuttal.

We agree. We will add NFG's proposed language as well as language allowing other mutually agreed to arrangements.

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 of prior violations, effect on public health, safety or welfare and such other matters as may be required, the Commission will issue a final order that includes:

Underground Facilities Protective Organization (UFPO) and Con Edison questioned what constitutes a "history of prior violations?" Con Edison notes that a field citation, warning letter and notice of probable violation all are described as dealing with a "probable violation". Even if a respondent signs a consent order, he does not admit to committing the violation. It argues that there may be a distinction between "violation" and "probable violation" that may create a legal loophole for the violator.

The considerations listed in this paragraph are those specified in PSL §119-b(8). Con Edison and UFPO argue this loophole exists with regard to respondents who avail themselves of a consent order in which they do not admit committing a violation. They also claim that a loophole exists because a field citation, warning letter or NOPV may be characterized as "probable violations" not violations per se.

We do not believe that the potential loophole identified by UFPO and Con Edison exists. Public Service Law §119-b(8) provides that penalties may be based on "...such other matters as may be required...". Therefore, we may consider whether the respondent has a history of prior field citations, warning letters, NOPV's and/or Consent Orders.

753-6.9 Payment of penalties:

(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.

Con Edison recommended adding language stating that cases may be referred to the Attorney General's office if payment

is not received within thirty days of the signing of a consent order.

Con Edison's proposal is not necessary. Cases are not considered resolved by a consent order until the order is fully executed and payment in full is received. If the case were not resolved, the Commission would issue a final order determining penalty and directing payment.

753-6.10 Injunctive Relief. Notwithstanding any of the enforcement procedures listed in this Subpart, if the Commission is aware or has reason to believe 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 give notice to any excavator to immediately cease and desist the excavation or demolition and may recommend to the Attorney General that they commence an action to 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.

Southern Energy argues that neither PSL or General Business Law authorize the Commission to issue a cease and desist order, nor does the Commission have authority to delegate such power to a designee.

We agree; subpart 6.10 is not included in the proposed rules.

#### COMMENTS ON SPECIFIC LANGUAGE IN SUBPARTS 1 THROUGH 5

An analysis of comments received on Subparts 1 through 5 follows:

##### Subpart 753-1 GENERAL REQUIREMENTS

###### 753-1.2 Definitions

([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.



NYGG recommended that the definition be reworded to read:

"Damage is any destruction or severance of any underground facility or its protective coating, housing or other protective device or any displacement of or removal of support from any underground facility which *could cause the facility to fail.*"

NYGAS comments that this revision states primary causes of damage first followed by secondary causes. That is, damages are caused primarily by destruction or severance of a facility. Damages caused by displacement of or removal of support are secondary causes.

We agree it makes sense to reorganize the definition to first state primary then secondary causes of damage. However, the suggestion to replace "*which would necessitate repair*" with "*could cause the facility to fail*" is not adopted. NYGAS's proposal may lead to disputes among operators, excavators and Staff over whether a condition *could cause* a facility to fail. It also defines as "damage" a condition where no actual failure or repair has occurred, but only the potential for such. Other code sections (753-3.12 and 3.13) address proper backfilling, support and protection of exposed facilities and already prohibit the types of activities that NYGAS is concerned *could cause* damages.

([e]h) Excavation: Any operation for the purpose of movement or removal of earth, rock, pavement or other materials in or on the ground by use of mechanized equipment or by blasting, [and includes] including 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.

The UFPO and Con Edison recommended that "boring" be added to the definition. UFPO points out that boring is included in Public Service Law §119-b(1)(b). The UFPO, New York Gas Group and National Fuel recommended that vacuum excavation be specifically excluded from the definition of excavation. They

point out that the NPRM proposes to allow this technique for purposes of verifying locations by hand dug test holes. However, they say, exempting it from the definition of excavation would also eliminate the need for locate requests when vacuum excavation is the (only) method used. They stated that this is desirable as it may encourage excavators to expand the use of vacuum equipment.

NYGAS also recommended that "sawcutting and jack hammering in connection with a pavement restoration of a previous excavation where only the pavement is involved" be specifically excluded from the definition of excavation. It comments that while sawcutting and jackhammering in previously undisturbed pavement might be considered excavation, use of these methods to remove temporary pavement from an already excavated hole should not be considered as such. The term "where only the pavement is involved" indicates the work would only be to the depth of the temporary pavement. If it were not excluded, this activity would require markout requests, a process that would increase costs.

We will adopt all of these recommended revisions. Vacuum excavation is often used for preliminary site investigations in the design stage to identify facility locations. Once any mechanized excavation work is about to occur, one-call notification in accordance with §753-3.1 is required, even if excavators believed to know the location of facilities as a result of vacuum excavation.

NYGAS suggested a "pavement restoration" exemption in its first round comments on the October 27, 1998 NPRM. Its recommendation was not incorporated into the April 4, 2000 NPRM because we felt its proposed wording might cause confusion. We find the wording it currently proposes to be clear, and that it can be included with the other exclusions.

([k]p) 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.

The UFPO and NYGG recommended adding "chemicals" to the list of services and materials. They note that such pipelines may be located on public property or easements.

Our definition of "operator" conforms to the definitions found in PSL §119-b.1.a.f and GBL §760.6, which do not include "chemicals" among the listed services and materials. Therefore, it is beyond our authority to amend the regulations in the manner suggested.

([p]x) Working days: Mondays through Fridays, exclusive of public holidays. The public holidays observed by the State of New York are New Year's Day, Martin Luther King Day, President's Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day and Christmas Day. If the holiday occurs on a Saturday, it will be observed on the Friday before. If the holiday occurs on a Sunday, it will be observed the Monday after.

The UFPO and NYGG recommended adding a chart showing the specific dates public holidays are observed. For example, Memorial Day would be shown as being observed on the last Monday in May, even though Memorial Day is traditionally May 31.

We believe that specifying the dates public holidays are officially observed will ensure that there is no confusion regarding these dates. We will revise the rule as suggested.

#### Subpart 753-3 DUTIES OF EXCAVATORS

##### 753-3.1 Timing of notice for [and] excavation or demolition.

(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 member operators who have underground facilities at or near the demolition area. A pre-demolition conference may encompass one or more demolition(s) in the project 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.

Con Edison recommended changing the seven day advance request for a pre-demolition conference to fourteen days, claiming seven days is often not sufficient to perform the necessary damage prevention measures, which could include relocation of underground facilities.

Southern Energy commented that the phrase "at or near the demolition area" must be clarified, so that, an excavator knows who should receive a request for a pre-demolition conference. Southern Energy suggests that "at or within 15 feet of the demolition area" would be a reasonable provision.

NYGG recommended adding a provision stating that "Information that may be requested from an operator for design purposes as in section 753-4.14 shall not be a substitute for the notice of intent to perform excavation or demolition required by Part 753.1." NYGAS comments that it must be emphasized that making a request for design information does not relieve the excavator of the responsibility to provide notice prior to the actual excavation.

Even though this paragraph is shown as underlined in the NPRM, it is not a new proposal. It is merely relocated so that all notification provisions are grouped together. The seven day advance notice requirement has been in effect for many years. At this time, we believe it strikes a prudent balance between the needs and time schedules of excavators and the operators. Since Con Edison's suggestion would be considered a substantive change, other interested parties should have an opportunity to comment on such a proposal. We would be willing to consider this issue in a future rulemaking.

Turning to Southern Energy's concern regarding "at or near," an excavator requesting a pre-demolition conference is not expected to know which facility operators should receive the request. Excavators need only to provide the location of the proposed work site to the One-Call Center. The One-Call Center will notify the appropriate operators. The situation Southern Energy identifies has historically not been a problem.

NYGAS' suggestion to add a reminder that a "design information" request is not a substitute for an excavation notice is appropriate. We will add the suggested reminder to Section 753-3.1.

753-3.2 Detailed notice requirements.

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

Southern Energy recommended replacing "or at the request of the operator" with "or as determined by agreement of the operator and excavator." It comments that the proposed wording provides operators with unlimited discretion and may invite abuse.

We agree and will revise the rule as suggested.

753-3.2 Commencement of excavation and demolition.

New York Gas Group and National Fuel recommended adding a new paragraph, as follows:

(c) The excavator may proceed with excavation or demolition prior to the stated date of commencement once he or she has received notification from each and every operator notified by the one-call notification system that each such operator has no underground facilities located in or within 15 feet of the work area.

They point out that section 753-3.3(a) currently requires the excavator to wait until the stated commencement date, even if no underground facilities are involved, causing an unnecessary loss of time. Furthermore, they state that some excavators do not provide notification if they believe no facilities are involved. This wording will encourage excavators to call when they feel this situation exists. If the excavator is correct, it can begin work earlier than expected. If the excavator is wrong regarding the presence of facilities, potential damage to the facility and danger to the public will be avoided.

Many of the citations issued for lack of notification involve excavators who mistakenly believed no facilities were present. The proposed change would benefit excavators by allowing them to begin their work earlier than expected if their

belief is correct. It will also prevent damage to facilities and protect the public. We will revise the rule as suggested.

We note, however, that the Department has been receiving many complaints from excavators regarding operators not responding to locate requests. Often, operators are not informing excavators when there are no facilities in the area. Some excavators claim to have been told by operators that they don't have the time to bother making the notification. We remind underground facility operators of their obligation to inform excavators that facilities have been marked out or that there are no facilities near the work area (see §753-4.5).

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] shall be completed before the excavation or demolition is commenced or [may] shall be performed as the work progresses.

(a) Powered or mechanized 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 within the tolerance zone for removal of pavement or masonry but only to the depth of such pavement or masonry.

(1) Below the depth of pavement or masonry, powered equipment may be used in the tolerance zone prior to the verification of the location of facilities when agreed to in writing by the affected operator(s).

(2) Operators, or their agents and contractors working under their direction, may use powered equipment to locate their own facilities within the tolerance zone.

NYSTA, in its first round comments on the October 27, 1998 NPRM, suggested that the use of mechanized equipment be

prohibited, except where permitted by the operator, in areas with shallow cover. Our analysis<sup>1</sup> concluded that: (1) NYSTA did not indicate how the excavator is to know whether they are in a "shallow cover" area; and (2) the burden should be on the operator of shallow facilities to alert the operator and give guidance on how to excavate near its facilities. Our analysis also noted<sup>2</sup> that operators could point to §753-3.10, which requires excavators to "take reasonable precautions to prevent contact and damage...including...compliance with any reasonable directions or accepted engineering practices given by affected... operators."

NYSTA, in its comments on the April 4, 2000 NPRM, recommends adding a new subparagraph (3), which would read as follows:

In cases where operators identify that their facilities are located under shallow cover within the tolerance zone, it is deemed reasonable for such operators to require non-mechanized digging of pavement or masonry.

NYSTA states that the rule should make clear that excavators must honor requests from operators to refrain from using mechanized equipment once an operator indicates it has facilities under shallow cover. Under §753-3.6, as currently proposed, an excavator may believe it has the right to use mechanized equipment to remove pavement even after an operator requests that it refrain from doing so.

UFPO, NYGG and NNFG recommended adding the following to the lead-in paragraph of §753-3.6:

If excavation or the projected line of a bore/directional drill will intersect the tolerance zone of underground facilities furnishing gas or liquid petroleum products, verification shall be completed prior to excavation or boring/drilling within 15 feet before the designated location of the facility.

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<sup>1</sup> Case 99-M-1624, In the Matter of the Rules and Regulations of the Public Service Commission, contained in 16 NYCRR Part 753, Commission Memorandum issued with the April 4, 2000 Notice of Proposed Rulemaking at 18.

<sup>2</sup> Ibid.

They note that if the excavation or bore is going to cross a gas or petroleum facility, the excavator is currently required to hand dig to verify the facility location. They point out that their proposed wording does not require *more* hand digging, it only requires that it be performed *earlier*. Currently, they say, excavators sometimes use powered equipment up to the edge of the tolerance zone. If the facility is actually located outside the perceived tolerance zone, it may be damaged thereby compromising worker and public safety.

NYSTA's shallow facilities proposal continues to place the entire burden of dealing with shallow facilities on the excavator, rather than on the operator who installed them improperly. NYSTA's proposed wording would allow an operator to instruct an excavator not to use mechanized equipment, but not require the operator to do anything further to assist or guide the excavator.

We again point to §753-3.10(a), which allows operators to give "reasonable directions" and requires excavators to comply with the same. We also point out that §753-4.6(c) allows operators several alternatives to marking their lines with stakes or paint, such as exposing them to view themselves, providing field representation and instruction, or other mutually agreed to means. These options are also available to facility operators to prevent their shallow facilities from being damaged.

Excavators are expected to follow reasonable directions from operators to avoid damaging shallow facilities, but operators must also take steps, beyond marking their lines and saying "do not excavate", to protect their shallow facilities.

The proposal from UFPO, NYGAS and NFG to require verification by hand digging, prior to excavating within 15 feet of the marked location, would be a substantive change from the original proposal. Other interested parties, particularly excavators, should have an opportunity to comment on this suggestion before we were to adopt it as a Final Rule. We would be willing to consider this issue in a future rulemaking.



Subpart 6 ONE-CALL NOTIFICATION SYSTEMS

753-5.3 System duties. Each one-call notification system shall perform the following duties:

(b) Conduct a continuing program to:

(2) Inform operators of the responsibility to participate in the one-call notification system, to respond to a notice relating to a [proposed] planned excavation and demolition and to designate and mark facilities according to the provisions of this Part.

NYGG and UFPO commented that this section puts the onus on the One-Call Notification Systems to get all operators to join, even though the One Call Systems have no authority to enforce the code requirements. They point out that many entities still have not joined and request that the State share the responsibility to get all operators to join the One-Call systems.

The regulations require the One-Call Centers to conduct a program to inform operators of their responsibility to participate. Both One-Call Systems have conducted letter writing campaigns and other programs to encourage operator participation. We appreciate the efforts undertaken by the One-Call Centers. We have not, and do not intend, to hold the One-Call Centers responsible for the failure of recalcitrant operators to meet their obligations.

Department Staff has also worked with the One-Call Centers and the Attorney General's office to inform facility operators of their obligation to participate in One-Call. Underground facility operators need to be aware of their obligation to join the one-call system. Failure to comply with Article 36 of the General Business Law, PSL §119-b and Part 753 of our regulations will result in the imposition of appropriate penalties. Furthermore, operators, especially municipalities, are cautioned that failure to comply with the requirements of the statute and regulations may expose them to claims by third parties which otherwise might be avoided through one-call compliance.

MISCELLENEOUS COMMENTS

The Town of Brutus, commenting in relation to tolerance zones, stated that in its experience the markers are not necessarily placed to the center of the underground facility, which requires too much handwork and man-hours to locate the facility. The Town also stated that it is also rarely informed about the depth of a facility. It suggests better control over the markings, focussing on location and depth.

The Town also commented that some consideration should be given to municipalities as the owners of the right-of-ways. The Town notes that in most cases, the underground facility owner is required to get a permit to use the right-of-way. In most instances, those permits state that facility owners are required to move, maintain or replace their underground facilities when necessary. The Town further notes that a contractor does not own the property where underground facilities are located and is there to make a profit.

Addressing the comments on tolerance zones, we note that Section 4.6 requires operators to designate their facilities accurately and with due care and that stakes or markings are to be provided preferably at the center line of the underground facility. However, we recognize that marking is not an exact science. The tolerance zone is intended to provide an additional margin of safety around an underground facility. We also stress that §753-3.7 requires that if an excavator cannot verify the location of a marked facility after a diligent search at a reasonable depth, it must notify the operator. The operator then must verify the location with its own personnel or provide prompt field assistance to the excavator.

Addressing the Town's comment regarding operators not indicating the depth of their facilities, we note that most operators do not indicate the depth of their facilities. One reason given by operators is that available locating equipment is unreliable and inconsistent for determining depth of facilities.

Furthermore, even if operators have records indicating depth of burial at time of installation, and many do not, the depth may

have changed due to grading, road resurfacing, erosion or other factors.

CONCLUSION

Having considered the comments received concerning the proposed revisions to 16 NYCRR Part 753, we will adopt the revisions as shown in the attached Resolution.

By the Commission,

(SIGNED)

JANET HAND DEIXLER  
Secretary

COMMENTING PARTIES

Central Hudson Gas & Electric Corporation  
(Central Hudson or CHG&E)

Consolidated Edison Company of New York, Inc  
(Con Edison or CENY)

National Fuel Gas Distribution Corporation  
(National Fuel or NFG)

New York Gas Group (Gas Group or NYGAS)

New York State Telephone Association (Telephone Assoc. or NYSTA)

Underground Facilities Protective Organization (UFPO)

Southern Energy New York (Southern Energy or SENY)

Town of Brutus (Brutus)

Tennessee Gas Pipeline

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

RESOLUTION BY THE COMMISSION

CASE 99-M-1624 - In the Matter of the Rules and Regulations of the Public Service Commission, contained in 16 NYCRR Part 753 - Protection of Underground Facilities, filed in C 95-M-1007.

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

At a session of the Public Service Commission held in the City of Albany on January 24, 2001, the Commission, by unanimous 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 shown in the following 18 pages (Deletions are bracketed; new material is underlined):

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

SUBCHAPTER F - Miscellaneous.

PART 753

PROTECTION OF UNDERGROUND FACILITIES

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

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 destruction or severance of any underground facility or its protective coating, housing or other protective device or 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 proceeding: A proceeding by the Commission 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, pavement or other materials in or on the ground by use of mechanized equipment or by blasting, [and includes] including but [is] not limited to,

digging, auguring, backfilling, boring, drilling, grading, plowing in, pulling in, fence post or pile driving, tree root removal, sawcutting, jackhammering, trenching and tunneling; provided, however, that the following shall not be deemed excavation:

- (1) the movement of earth by tools manipulated only by human or animal power; [and]
- (2) the tilling of soil for agricultural purposes;
- (3) vacuum excavation; and
- (4) sawcutting and jackhammering in connection with pavement restoration of a previous excavation where only the pavement is involved

[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.

(j) Field Citation: A written statement issued pursuant to subdivision 753-6.2 of this Part by an employee of the Department informing a Respondent that, in the judgment of the employee, a violation has occurred and setting forth the specific provisions allegedly violated by Respondent.

([g]k) 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 are acceptable means of exposing underground facilities.

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

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

(n) Notice of probable violation (NOPV): A written statement or letter from the Department, containing the items specified by subdivision 753-6.4(b) of this Part, to a Respondent informing him or her that an enforcement proceeding is being initiated.

([j]o) 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]p) 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]q) 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.

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

(s) Respondent: A person who the Department has served a field citation, warning letter or Notice of Probable Violation.

([m]t) 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]u) 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.

(v) Warning Letter: A written letter from the Department to a Respondent, pursuant to subdivision 753-6.3 of this Part, informing a Respondent that an alleged violation of a specific provision(s) of Part 753 has occurred or is continuing, advising the Respondent to correct it, if it is correctable, and to comply henceforth or be subject to enforcement proceedings under this Part.

([o]w) 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]x) Working days: Mondays through Fridays, exclusive of public holidays. The public holidays observed by the State of New York are as follows:

<u>New Years Day</u>	<u>January 1</u>
<u>Martin Luther King Day</u>	<u>3<sup>rd</sup> Monday in January</u>
<u>President's Day</u>	<u>3<sup>rd</sup> Monday in February</u>
<u>Memorial Day</u>	<u>Last Monday in May</u>
<u>Independence Day</u>	<u>July 4</u>
<u>Labor Day</u>	<u>1<sup>st</sup> Monday in September</u>
<u>Columbus Day</u>	<u>2<sup>nd</sup> Monday in October</u>
<u>Veteran's Day</u>	<u>November 11</u>
<u>Thanksgiving Day</u>	<u>4<sup>th</sup> Thursday in November</u>
<u>Christmas Day</u>	<u>December 25</u>

If the holiday occurs on a Saturday, it will be observed the Friday before. If the holiday occurs on a Sunday, it will be observed the Monday after.

#### SUBPART 753-3 DUTIES OF EXCAVATORS

- §753-3.1 Timing of notice for [and] excavation or 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 for [and] excavation or demolition.

(a)(1) Before commencing or engaging in any non-emergency excavation or demolition, each excavator shall provide notice of the location and date of the [proposed] planned excavation or demolition to the one-call notification system serving the vicinity in which the excavation or demolition is to take place.

(2) Such notice shall be served at least two but not more than ten working days, not including the date of the call, before the 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 member operators who have underground facilities at or near the demolition area. A pre-demolition conference may encompass one or more demolition(s) in the project 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] an excavation or demolition, he or she shall promptly [inform] communicate the cancellation to facility operators utilizing the one-call notification system. A

postponement of more than [10] 5 working days shall be considered a cancellation.

([d]e(1)) 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.

(2) Whenever an excavator postpones [the commencement date by more] an excavation or demolition 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) 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.] Information requested from an operator for design purposes shall not be a substitute for the notice of intent to perform excavation or demolition as required by this Subpart.

#### 753-3.2 Detailed notice requirements.

(a) Every notice provided by an excavator to the one-call notification system concerning [proposed] planned excavation or demolition shall contain at least the following information:

- (1) Address and exact location as well as the extent and dimensions of the [proposed] planned work area;
- (2) Brief description of the [proposed] planned excavation or demolition;
- (3) Date and time the excavation or demolition is [proposed] planned to commence.

(b) When necessary for adequate identification, or as determined by mutual agreement of the operator and excavator the excavator shall delineate the work area with white paint, white stakes or other suitable white markings.

#### 753-3.3 Commencement of excavation or demolition.

(a) The excavator may proceed with excavation or demolition on the stated date of commencement if, prior thereto, he or she has received notification from each and every operator notified by the one-call notification system that:

(1) Such operator has no underground facility located in or within 15 feet of the [proposed] work area; or

(2) That any underground facility located in or within 15 feet of the [proposed] work area has been staked, marked or otherwise designated in accordance with the provisions of Subpart 753-4 of this Part.

(b) The excavator shall not commence the [proposed] excavation or demolition on the stated commencement date if he or she has been notified by an operator that the staking, marking, or other designations of an underground facility located in or within 15 feet of the [proposed] work area will not be completed on the stated commencement date. In such case, the operator is required promptly to report such fact to the excavator and 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.

(c) The excavator may proceed with excavation or demolition prior to the stated date of commencement once he or she has received notification from each and every operator notified by the one-call notification system that each operator has no underground facilities located in or within 15 feet of the work area.

#### 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.

753-3.5 Preservation of stakes, markings or other designations. Starting on the [proposed] stated commencement date given in the excavator's notice to the one-call notification system, the excavator shall be responsible for protecting and

preserving the staking, marking or other designation until no longer required for proper and safe excavation or demolition work at or near the underground facility.

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] shall be completed before the excavation or demolition is commenced or [may] shall be performed as the work progresses.

(a) Powered or mechanized 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 within the tolerance zone for removal of pavement or masonry but only to the depth of such pavement or masonry.

(1) Below the depth of pavement or masonry, powered equipment may be used in the tolerance zone prior to the verification of the location of facilities when agreed to in writing by the affected operator(s).

(2) Operators, or their agents and contractors working under their direction, may use powered equipment to locate their own facilities within the tolerance zone.

(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.] The operator shall respond in accordance with subdivision 753-4.10 of this Part.

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] involved in 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

753-4.4 Receiving notices. Each operator shall establish a means of receiving notices of [proposed] planned excavation or demolition from the one-call notification system in accordance with the procedures of the system.

753-4.5 Operator's response to notice.

(a) Prior to the stated commencement date of the [proposed] excavation or demolition work as stated in the recorded notice, the operator shall make a reasonable attempt to inform the excavator directly that either:

- (1) The operator has no underground facility in or within 15 feet of the [proposed] work area; or
- (2) Every underground facility belonging to him or her which is located in or within 15 feet of the [proposed] work area has been staked, marked or otherwise designated in accordance with the provisions of this Subpart.

(b) Where an[d] operator cannot complete the staking, marking or other designation of an underground facility prior to the stated commencement date and time of the [proposed] 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.



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.

(b) If staking or marking are not used to indicate the location of an underground facility, the operator shall designate such location in accordance with the following:

(1) By exposing the underground facility or its encasement to view within the [proposed] work area in a manner sufficient to allow the excavator to verify the type, size, direction of run and depth of the facility;

(2) By providing field representation and instruction to the excavator in the [proposed] work area; or

(c) An operator, or its agents or contractors, 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.

753-4.7 Uniform color code. The following uniform color codes shall be utilized for staking and marking used to designate the location of underground facilities and [proposed] excavation sites:

(g) White - [Proposed e] Excavation site.

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

753-4.10 Unverifiable underground facilities. If an excavator notifies an operator that, after diligent search at a reasonable depth within the [strip of land] tolerance zone as staked, marked or otherwise designated by the operator, that he or she cannot verify the location of an underground facility, the operator shall verify such location [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 to the excavator upon his or her request.

753-4.13 Support and backfilling requirements. Where an underground facility will be disturbed or uncovered by excavation or demolition, the operator of such facility shall indicate to the excavator any preferred means of support or protection required for such facility and any special backfilling requirements or provide any other guidance for protection of an underground facility. Such information shall be furnished to the excavator before the stated date of commencement of the [proposed] work, if practical.

753-4.14 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. Such means may include, but are not limited to; provision of maps, meetings, or marking in accordance with Section 753-4.6 and shall be performed within mutually agreed to timeframes.

753-4.15 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.

#### SUBPART 753-5 One-Call Notification Systems

##### 753-5.2 Notice procedures.

Every one-call notification system shall:

(a) Establish an effective notification service for receipt of notices from excavators, including a toll-free telephone number, and for transmission of such notices to every member operator who has underground facilities in or within 15 feet of the [proposed] work area. Such notices may include:

(1) notice of a [proposed] planned excavation or demolition;  
(c) Use a standardized format to record all incoming notices or requests from excavators, including at least the following information:

- (6) Address and exact location as well as the approximate extent and dimensions of the [proposed] work area;
- (8) Brief description of the [proposed] planned excavation or demolition;
- (9) Date and time the [proposed] work is to commence;

753-5.3 System duties. Each one-call notification system shall perform the following duties:

(b) Conduct a continuing program to:

(1) Inform excavators of the one call notification system's existence and purpose and their responsibility to notify the one-call notification system of [proposed] planned excavation and demolition and to protect underground facilities;

(2) Inform operators of the responsibility to participate in the one-call notification system, to respond to a notice relating to a [proposed] planned excavation and demolition and to designate and mark facilities according to the provisions of this Part.

(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 Commission proceedings
- §753-6.7 Consent orders
- §753-6.8 Final order
- §753-6.9 Payment of penalties

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 citation: 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 letter: Upon determining that 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 procedures under this Part.

753-6.4 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 proceeding 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 a 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 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 penalty;

(b) Submit a written explanation, information or other material in response to the allegations; 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 the 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 Commission Proceeding (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 that Department Staff may have 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, either at the informal conference, in writing within thirty days following the conference, or by other mutually agreed to arrangements.

(b) Following its review of any material submitted in writing or at an informal conference, the Department will compile a case file, which will be the basis for a final order. 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 Commission may at any time resolve an outstanding NOPV with a consent order. A consent order shall be signed by the Respondent to whom it is issued, or a duly authorized representative, and shall indicate agreement with the terms thereof. A consent order need not constitute an admission that the Respondent committed the violation.

(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 upon the review of a case file 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, the Commission will issue a final order that includes:

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

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

753-6.9 Payment of penalties:

(a) Payment of a 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 Commission 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.