

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on October 8, 1997

COMMISSIONERS PRESENT:

John F. O'Mara, Chairman
Maureen O. Helmer
Thomas J. Dunleavy

CASE 97-G-1510 - Complaint of New York State Electric and Gas
Corporation Against Thomas Torto Construction
Company Concerning Alleged Violations of 16
NYCRR Part 753, Protection of Underground
Facilities.

ORDER DETERMINING PENALTY AND DIRECTING PAYMENT

(Issued and Effective October 15, 1997)

BY THE COMMISSION:

Based on our review of staff's investigation of a complaint by NYSEG against Thomas Torto Construction Company (Torto), we have determined that a penalty of \$20,000 shall be assessed against Torto.^{1/} NYSEG claimed that Torto committed numerous violations of our regulations implementing §119(b) of the Public Service Law (PSL) and Article 36 of the General Business Law (GBL), contained in 16 NYCRR Part 753 - Protection of Underground Facilities. Torto was provided an opportunity to respond to NYSEG's allegations, and did in fact submit three explanatory letters to Staff.

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

^{1/} Staff's Investigative Report is appended hereto.

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 this subdivision and our review of the information submitted in this case, we will determine a penalty of \$20,000 to be assessed against Torto and direct its payment. The provisions of Part 753 that were violated and the applicable penalties are as follows:

| | |
|--|-----------------|
| Violation of 753-3.5 on June 16, 1997 | \$500 |
| Violations of 753-3.6 and 753-3.17 on August 4, 1997 | \$4,500 |
| Violations of 753-3.8, 753-3.10(b) and 753-3.10(d) between August 1, 1997 and August 18, 1997. | \$15,000 |
| Total | <u>\$20,000</u> |

The Commission orders:

1. A penalty of \$20,000 is determined against Thomas Torto Construction Company, pursuant to §119(b)(8) of the Public Service Law.

2. Thomas Torto Construction Company is directed to remit, by certified check payable to the "Department of Public Service" the sum of \$20,000 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 \$20,000 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,

(SIGNED)

JOHN C. CRARY
Secretary

Filed Session of October 8, 1997

STATE OF NEW YORK
DEPARTMENT OF PUBLIC SERVICE

September 30, 1997

TO: THE COMMISSION

FROM: GAS & WATER DIVISION - SAFETY SECTION

SUBJECT: CASE 97-G-1510 - Complaint of New York State Electric & Gas Corporation Against Thomas Torto Construction Company Concerning Alleged Violations of 16 NYCRR Part 753, Protection of Underground Facilities.

SUMMARY OF

RECOMMENDATION: Staff recommends that a penalty of \$20,000 be assessed against Thomas Torto Construction Company for violations of 16 NYCRR Part 753, Protection of Underground Facilities.

BACKGROUND

By letter dated August 26, 1997, New York State Electric & Gas Corporation (NYSEG) requested that the Commission take action against Thomas Torto Construction Company (Torto) for multiple violations of the Commission's regulations implementing §119(b) of the Public Service Law (PSL) and Article 36 of the General Business Law (GBL) contained in 16 NYCRR Part 753 - Protection of Underground Facilities. An attachment to that letter listed 12 incidents in which Torto damaged NYSEG natural gas mains and service lines since March of 1997.

NYSEG noted that it previously attempted to address these issues by meeting with Torto to emphasize the threat to the general public and Torto's own employees. NYSEG also sponsored a safety awareness program for contractors in May 1997. DPS Staff representatives, along with the Department of Law (DOL), the Underground Facilities Protective Organization (UFPO), the State Labor Department and NYSEG gave presentations on the Commission's regulations, UFPO's operations and safe excavation practices. Several Torto employees attended this event. Torto failed to take these lessons to heart, and due to the threat to the public and Torto's own employees, NYSEG requests that the Commission take all appropriate action within its power to convince Torto to comply with 16 NYCRR Part 753.

DPS staff has determined that Torto has routinely provided notice of intent to dig to the UFPO, the one-call notification system that covers NYSEG's territory. However, it is with respect to its actions following notification that Torto falls short. The damages Torto has caused have been due to failure to follow other applicable requirements of Part 753, such as maintaining utility location markings, verifying the location of marked facilities and maintaining proper clearance between its excavating equipment and underground facilities.

DPS field Staff responded to four of the 12 incidents referred to in NYSEG's August 26 letter and cited violations against Torto at two of those.^{1/} Upon receipt of NYSEG's letter, Staff further evaluated NYSEG's records pertaining to all 12 incidents. Staff also advised Torto by letter that it was considering recommending the assessment of monetary penalties and provided Torto an opportunity to dispute NYSEG's allegations.

This memorandum summarizes Staff's investigation and recommends the determination of a monetary penalty to be assessed against Torto.

COMMISSION AUTHORITY

PSL §119(b)(2) states:

The commission shall adopt rules and regulations to implement and carry out the requirements of article thirty-six 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

^{1/} A review of Staff's records also found that Torto was cited for violations twice in 1995.

appropriate for the protection and security of property, life or public health, safety or welfare.^{1/}

PSL §119(b)(8) states:

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 §765(1)(a) (in Article 36) states:

Failure to comply with any provision of this article shall subject an excavator or 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.

DPS has held meetings and had conversations with representatives of DOL regarding how the two agencies can work together to enforce Part 753. The DOL has stated its opinion that the statutes envision a regulatory scheme wherein investigation and evidence gathering is conducted by the DPS for use by the Commission in its determination of a suitable penalty. DOL also indicated that it would have no objection to the establishment of a procedure whereby the determination issued by the Commission contains 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 DOL.

^{1/} 16 NYCRR Part 753 - Protection of Underground Facilities, are the regulations adopted by the Commission. They became effective February 5, 1997.

ALLEGATIONS AGAINST TORTO

A synopsis of the 12 damages as reported by NYSEG follows^{1/}:

1. March 27, 1997 - 118 Leroy Street, Binghamton. Broke 1" plastic gas service with a backhoe while digging to replace catch basins. Gas facilities were correctly marked. Damage caused gas leakage and service interruption.
2. April 15, 1997 - 3607 Watson Blvd., Endicott. Broke 5/8" plastic gas service with a backhoe while replacing catch basins and manholes. Gas facilities were correctly marked. Damage caused gas leakage and service interruption.
3. May 12, 1997 - 3629 Watson Blvd., Endicott. Broke 1/2" inserted gas service with backhoe while replacing catch basins and manholes. Gas facilities were correctly marked. UFPO was called on March 24, 1997. No marks or staking were maintained in the area of the excavation. Damage caused gas leakage and service interruption.
4. May 20, 1997 - 3641 Watson Blvd., Endicott. Damaged 1/2 " inserted plastic gas service while replacing catch basins and manholes. Gas service was exposed by hand but still damaged. Gas facilities were correctly marked. Damage caused service interruption.
5. June 16, 1997 - 3660 Watson Blvd., Endicott. Damaged 2" plastic gas main with backhoe while installing sewer lateral. Gas facilities were correctly marked. Damage caused gas leakage.
6. June 18, 1997 - 3660 Watson Blvd., Endicott. Broke plastic gas service between curb box and meter with backhoe while replacing catch basins and manholes. Curb box was properly marked. Damage caused gas leakage and service interruption.
7. June 30, 1997 - 674 State Street, Binghamton. Broke 1" plastic gas service with backhoe while installing sidewalks, catch basins and manholes. Gas facilities were correctly marked. Damage caused gas leakage and service interruption. Homeowner reported no gas. No report of facility damage from excavator.

^{1/} Staff responded to incidents 4, 5, 7 and 11. Violations were issued associated with incidents 5 and 11.

8. July 1, 1997 - 676 State Street, Binghamton. Broke 1" plastic gas service at socket tee with backhoe while installing sidewalks, catch basins and curbs. Gas facilities were correctly marked. Damage caused gas leakage and service interruption. Homeowner reported no gas. No report of damage from excavator.
9. July 17, 1997 - 3647 Watson Blvd., Endicott. Broke 1" steel gas service with backhoe while replacing catch basins and manholes. Gas facilities were correctly marked. Damage caused gas leakage and service interruption.
10. July 17, 1997 - 3632 Watson Blvd., Endicott. Broke 1" plastic gas service with backhoe while replacing catch basins and manholes. Gas facilities were incorrectly marked. Damage caused gas leakage and service interruption.^{1/}
11. August 4, 1997 - Baird Ave. Binghamton. Broke 2" high volume tee off 8" plastic main with a backhoe while installing a sewer lateral. Gas facilities were correctly marked. Marks poorly maintained and barely visible.
12. August 18, 1997 - 668 State Street, Binghamton. NYSEG responded to a gas odor call and found natural gas readings above the explosive range in nearby storm sewers. A NYSEG crew located and excavated the leak. A 1" plastic gas service was severed and gas was blowing. An approximate four foot section of the gas service was missing. The severity and type of damage indicated mechanical equipment contact. On August 1, 1997, Torto had called UFPO for a markout at this address. NYSEG records indicate that Torto was the only party to request a locate for that address in July and August 1997.

NYSEG's cover letter emphasizes incident 12 as being a particularly serious threat to public safety. NYSEG reports that, based upon the type and severity of the damage, it appears that the service was ripped out by mechanical excavation

^{1/} NYSEG had attempted to collect repair costs from Torto for all incidents with the exception of number 10. This mismatch occurred because the plastic service line did not have a metal tracer wire as required by the gas pipeline safety code. This area was part of the Columbia Gas Distribution system bought out by NYSEG in the late 1980's.

equipment and then reburied. NYSEG stated that it was not notified of the damage before the service line was backfilled. Although Torto was apparently not on the scene on August 18, the fact that Torto was the only party to recently request a markout at that address, and their previous history, pointed to Torto as the offender.

TORTO'S RESPONSE AND STAFF'S INVESTIGATION

In a letter dated September 5, 1997, Staff informed Torto that it intended to recommend that the Commission assess penalties for violations of 16 NYCRR Part 753. A penalty of \$16,000 was recommended for incident 12,^{1/} a \$1,000 penalty for incident 5 and a \$8,500 penalty for incident 11. Torto was also informed that Staff was continuing to investigate the remaining incidents. Appendix A illustrates how these sums were calculated.

Torto responded by letters dated September 15, 17 and 22, 1997. The letters indicated that Torto and NYSEG were having meetings and conversations regarding the 12 incidents.^{2/} Torto's replies indicate that it accepts responsibility for incidents 1, 2, 3, 5, 8, 9, 11 and 12, although Torto's version

^{1/} Staff's letter also expressed alarm over the circumstances and gravity of this particular incident. The failure to report the damage could easily have resulted in a serious incident and indicated to Staff a disregard for public safety.

^{2/} In early September NYSEG became aware that Torto was about to be awarded a project in the Village of Endicott. NYSEG informed the Village of its concerns regarding Torto and that it was considering going to court to obtain a stop work injunction. This, coupled with Staff's investigation, apparently compelled Torto to meet with NYSEG to resolve outstanding issues. The outcome was that Torto agreed to put his employees through a training program on Part 753 (accomplished September 16, 1997), issue a surety bond for the upcoming Endicott project, attend preconstruction meetings with NYSEG and other parties prior to the work in Endicott to discuss safety related issues, and to review outstanding damage claims for the 12 aforementioned incidents.

of the facts associated with incident 12 differs somewhat from NYSEG's.

Torto indicated the backhoe operator (no longer employed by Torto) claimed to have pulled up a rusting 1-1/2" gas service, that there were no UFPO markings, the property was an old building and there was no odor of gas. Torto further claims the backhoe operator assumed it was an old unused service line, cut out a section of pipe with a saw and continued laying the storm sewer.

Staff evaluated photos of this damaged service line which clearly show that it is made of plastic and that the end is crimped closed. NYSEG reported that this service was equipped with an excess flow valve^{1/} which apparently closed when the line was damaged. Therefore, the backhoe operators claim of lack of a gas odor appears credible. However, the discovery of and contact with the service line should have been reported to NYSEG in any event in accordance with Part 753 requirements.

DETERMINATION OF PENALTY AMOUNT

Staff's preliminary evaluation of NYSEG's records found that at least one code violation could be cited for each of the 12 incidents, with the exception of number 10. If so, a penalty of \$85,500 or higher could conceivably be applicable.^{2/} However, because proof on several alleged violations would be based on circumstantial evidence, and on an evaluation months after the fact in some instances, and because NYSEG apparently agreed to waive the damage claims on several of the incidents, the ultimate figure would be subject to debate.

^{1/} An excess flow valve automatically shuts off the flow of gas if the flow exceeds a preset level. In this situation, crimping the severed plastic and covering it with dirt allowed the pressure in the line to build back up to the point where the excess flow valve, sensing normal flow conditions, reopened as designed. This appears to be the cause of the extensive gas migration into the sewer system discovered on August 18, 1997.

^{2/} See Appendix A.

PSL §119(b)(8) requires the Commission to consider 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 when determining the amount of a penalty.

In light of the positive steps Torto has taken regarding the upcoming Endicott project (see footnote 2 on page 6), its acknowledgement of previous violations^{1/}, and the fact that its employees have received training on Part 753 requirements, Staff recommends that the Commission determine penalties for the three specific incidents^{2/} discussed in Staff's September 5, 1997 letter and that any penalties associated with the remaining incidents be held in abeyance while Staff monitors Torto's compliance with the code requirements during the Village of Endicott project and beyond. Staff further recommends that the originally suggested penalties be amended as follows:

| <u>Incident</u> | <u>Originally Suggested Penalty</u> | <u>Recommended Penalty</u> |
|-----------------|---|--------------------------------|
| 5 | \$1,000 | \$500 |
| 11 | \$8,500 | \$4,500 |
| 12 | \$16,000 | <u>\$15,000</u> |
| | | \$20,000 |

^{1/} Staff has been informed that Torto has paid NYSEG for the damages it accepted responsibility for.

^{2/} Incidents 5 and 11 for which Staff had issued violations to Torto at the time they occurred, and incident 12 because of the serious threat to public safety caused by the nature of the violations committed.

RECOMMENDATION

Staff recommends that the Commission determine a \$20,000 penalty to be assessed against Thomas Torto Construction Company for the violations of 16 NYCRR Part 753 described above and direct payment of such penalty.

This memorandum has been reviewed by Steven Blow of the Office of General Counsel.

Respectfully submitted,

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Associate Gas & Petroleum Engineer

Reviewed by:

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

Approved by:

Phillip S. Teumim
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