

**DEPARTMENT OF STATE
PUBLIC SERVICE COMMISSION**

Statutory Authority: 26 Delaware Code, Section 209(a) (26 Del.C. §209(a))

FINAL

ORDER NO. 9658

8002 Rules to Establish an Excavation Damage Prevention Program

IN THE MATTER OF THE ADOPTION
OF RULES TO ESTABLISH AN
EXCAVATION DAMAGE PREVENTION
PROGRAM
(OPENED OCTOBER 22, 2019)

PSC DOCKET NO. 19-0713
(REGULATION DOCKET NO. 8002)

AND NOW, this 21st day of October 2020, the Delaware Public Service Commission ("Commission") determines and orders the following:

WHEREAS, on August 29, 2018, the Governor of Delaware signed into law Senate Bill 189 (with Senate Amendment 2), thereby amending the *Underground Utility Damage Prevention and Safety Act* ("*Damage Prevention Act*"), which is codified at 26 Del. C. §§ 801-813¹; and

WHEREAS, the new law: (i) requires operators of underground utility lines to notify the Commission of any facilities damage caused by excavation resulting in damages exceeding \$3,000 (other than underground pipeline operators, who must report all excavation damage to facilities); (ii) directs the Attorney General and the Commission to review the notifications of excavation damage to determine any violations; and (iii) authorizes the Attorney General or the Commission to impose penalties appropriate to the circumstances and gravity of the violation; and

WHEREAS, on October 22, 2019, by Order No. 9471, the Commission opened this docket to promulgate regulations governing the Commission's enforcement of the *Damage Prevention Act* and directed Staff to conduct meetings with interested stakeholders to discuss the content of the regulations and to provide the Commission with proposed regulations no later than June 3, 2020; and

WHEREAS, in compliance with Order No. 9471, Staff drafted proposed regulations, met with interested stakeholders, accepted written comments until April 27, 2020, and produced a final draft of the proposed regulations -- entitled *Rules to Establish an Excavation Damage Prevention Program* ("*Proposed Regulations*") -- for consideration by the Commission; and

WHEREAS, on June 3, 2020, Staff presented the *Proposed Regulations* to the Commission and, by Order No. 9595, the Commission: (i) directed the Commission Secretary to transmit a Notice of Proposed Rulemaking ("Notice") regarding the *Proposed Regulations* to the Registrar of Regulations for publication in the July 1, 2020 edition of the *Delaware Register of Regulations* and to publish the Notice in the *News Journal* and the *Delaware State News* by July 1, 2020; (ii) established a deadline for written public comment of August 3, 2020; and (iii) designated a hearing examiner to conduct an evidentiary hearing on the *Proposed Regulations* (unless no material objections to the *Proposed Regulations* were received by August 3, 2020); and

WHEREAS, the Registrar of Regulations, the *News Journal*, and the *Delaware State News* each published the required Notice; and

WHEREAS, the Commission received no written public comments on the *Proposed Regulations* by the August 3, 2020 deadline; and

WHEREAS, on September 30, 2020, the Commission conducted a duly-noticed² hearing on the *Proposed Regulations* during which (1) Staff witness Matthew Hartigan, the Commission's Deputy Director, testified that the *Proposed Regulations* comply with the changes to the *Damage Prevention Act* made by Senate Bill 189 (with Senate Amendment 2) and adoption thereof would be in the public interest and (2) the Commission voted to adopt the proposed amendments to the regulations on the condition that it received no material objections to the *Proposed Regulations* by the October 15, 2020 deadline for public comment,³ which deadline was included in the notice of the September 30, 2020 hearing; and

¹ Subchapter II of Chapter 8 authorizes the Commission to establish its pipeline safety compliance program, which is enforced through regulations promulgated by the Commission in 2009 and codified at 26 Del. Admin. C. § 8001. See PSC Regulation Docket No. 61.

² Notice was published in the September 1, 2020 edition of the *Delaware Register of Regulations* and sent to the service list via DelaFile.

³ Under 29 Del. C. § 10118(a), the opportunity for public written comment must be extended for a minimum of 15 days after the final public hearing on a proposed regulation.

WHEREAS, the Commission received no written public comments on the *Proposed Regulations* by the October 15, 2020 deadline;

**NOW, THEREFORE, IT IS HEREBY ORDERED BY THE AFFIRMATIVE
VOTE OF NO FEWER THAN THREE COMMISSIONERS:**

1. That, because no material objections to the *Proposed Regulations* were received by the initial August 3, 2020 deadline, the Commission hereby revokes its delegation of this matter to a hearing examiner, pursuant to Order No. 9595.

2. That, pursuant to 26 *Del. C.* § 209(a) and 29 *Del. C.* §§ 10111-10119, the Commission hereby adopts as final the proposed *Rules to Establish an Excavation Damage Prevention Program*, which are attached as Exhibit "A" and which shall be included in the Delaware Administrative Code as 26 *Del. Admin. C.* § 8002.

3. That, pursuant to 29 *Del. C.* § 10118(e), the Secretary of the Commission shall transmit a copy of this Order, including Exhibit "A," to the Registrar of Regulations for publication in the December 1, 2020 edition of the *Delaware Register of Regulations*. An exact copy of the regulations shall be published in the *Delaware Register of Regulations* as the Commission's official regulation as defined in 29 *Del. C.* § 1132.

4. That the effective date of the regulations shall be the later of December 11, 2020, or ten days after publication in the *Delaware Register of Regulations*.

5. That the Commission reserves the jurisdiction and authority to enter such further orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

J. Dallas Winslow, Chairman

/s/ Kim Drexler, Commissioner

/s/ Joann Conaway, Commissioner

Manubhai C. Karia, Commissioner (Absent)

/s/ Harold Gray, Commissioner

ATTEST: Donna Nickerson, Secretary

***Please Note: Electronic signatures ("/s/") were accepted pursuant to 6 Del.C. §12A-107(d).**

8002 Rules to Establish an Excavation Damage Prevention Program

[(Opened October 22, 2019)]

1.0 Purpose and Scope

This regulation establishes the Delaware Public Service Commission's enforcement program for violations of the Underground Utility Damage Prevention and Safety Act, which is codified at 26 **Del.C.** Ch. 8, Subchapter I ("Damage Prevention Act"). The Damage Prevention Act may be viewed online at this address: <https://delcode.delaware.gov/title26/c008/sc01/index.shtml>

2.0 Definitions

The following words and terms, when used in this regulation, have the following meaning unless the context clearly indicates otherwise:

"Approved notification center" means Utilities Service Protection of Delmarva, Inc.

"Commission" means the Delaware Public Service Commission.

"Designer" means any architect, engineer or other person, acting either as an employer or employee, who prepares a drawing for a construction or other project which requires excavation or demolition.

"Excavator" means any person, including those acting either as an employer or employee, intending to perform or performing excavation or demolition work.

"Operator" means any person who furnishes or transports materials or services by means of a utility line.

"Regulation" means the regulations set forth herein.

"Respondent" means the operator, designer, excavator, or approved notification center who is the subject of a notice of probable violation.

"Staff" means the staff of the Commission.

"Underground pipeline facility" means a buried pipeline facility used in the transportation of gas, such as propane and natural gas, or liquid petroleum products.

"Utility line" means any item of personal property which shall be buried or placed below ground or submerged for use in connection with the storage or conveyance of water, sewage, electronic, cable television, telephonic or

telegraphic communications, electric energy, oil, petroleum products, gas or other substances, and shall include, but not be limited to, pipes, sewers, conduits, cables, fiber optic conductors, valves, lines, wires, manholes, vaults, attachments and those portions of poles, pylons or other supports below ground or submerged.

“Working day” means every day, except Saturday, Sunday and state, federal and recognized operator holidays.

3.0 Duties of Operators

- 3.1 Operators shall comply with the requirements of 26 Del.C. §803. Operators of underground pipeline facilities shall also comply with the requirements of 26 Del.C. §804.
- 3.2 When providing notice of excavation damage to the Commission pursuant to 26 Del.C. §803(9) and (10), operators must complete the Commission’s “Underground Facility Damage Report,” which can be accessed via the Commission’s website at this address: <https://dep.sc.delaware.gov/underground-facility-damage-report/>. Operators may provide photographic evidence by email to DOSPSC_DAMAGES@delaware.gov.
- 3.3 Operators of utility lines shall comply with the requirements of 26 Del.C. §803(9) by providing notice to the Commission within 15 working days, or as soon as practicable thereafter if notification cannot be provided within 15 working days, of any excavation damage to utility lines which results in damage as defined in 26 Del.C. §802(2)c (i.e.; “the complete or partial severance of any utility line”) exceeding \$3,000. An operator’s uncertainty regarding whether the damage exceeds \$3,000 will not justify a delay in notification beyond 15 working days. If, after reporting excavation damage under subsection 3.3, an operator determines that the damage did not exceed \$3,000, the operator may notify staff by replying to the email notification provided by staff under Section 7.0, with an updated accounting of the actual damages. After receiving such notice, staff will not consider the damage to be reportable and will not consider such damage when evaluating whether multiple, similar violations by a respondent warrant the issuance of an NOPV under subsection 7.1.3.
- 3.4 Operators of underground pipeline facilities shall comply with the requirements of 26 Del.C. §803(10) by providing notice to the Commission as soon as practicable of any facilities damage caused by excavation which results in damage as defined in 26 Del.C. §802(2) to gas distribution and transmission lines, oil and petroleum products distribution and transmission lines, or dangerous materials, product lines or steam lines.

4.0 Duties of Designers

Designers shall comply with the requirements of 26 Del.C. §805.

5.0 Duties of Excavators

- 5.1 Excavators shall comply with the requirements of 26 Del.C. §806.
- 5.2 In addition to the requirement in 26 Del.C. §806(a)(8) that excavators notify operators immediately of any damage to the operator’s utility lines, excavators shall call 911 when they cause or discover a release from an underground pipeline facility.
- 5.3 Excavators may also provide notice of excavation damage or of any observed violations of the Excavation Damage Act to the Commission by completing the Commission’s “Underground Facility Damage Report”, which can be accessed via the Commission’s website at this address: <https://dep.sc.delaware.gov/underground-facility-damage-report/>. Excavators may provide photographic evidence by email to DOSPSC_DAMAGES@delaware.gov.

6.0 Duties of the Approved Notification Center

The approved notification center shall comply with the requirements of 26 Del.C. §807(b) and to operate in accordance with the Federal Pipeline Safety Regulations codified at 49 C.F.R. §198.39, et. seq.

7.0 Enforcement Procedures

- 7.1 Upon receiving notice of excavation damage, staff shall provide email notification to the person reporting the damage that it has received the filing. Staff shall review each notification of excavation damage to determine any violations by operators, excavators or the approved notification center, and may take the following actions (if warranted):
 - 7.1.1 Citation: Upon determining that a probable violation of a provision of this regulation has occurred, staff may issue a citation in writing to a respondent, notifying the respondent of the results of the on-site evaluation (if applicable) and identifying specific provisions of this regulation or the Damage Prevention Act alleged to have been violated. Unless staff and the respondent otherwise agree, the respondent shall reply in writing within 30 days of receipt of the citation. In responding to the citation, the respondent may submit a written

plan to staff specifying actions that the respondent will take to correct the alleged violation, a schedule for completion of each action step, and a final date of completion. The respondent may also request an informal conference with staff in an effort to reach a mutually acceptable resolution of the alleged violation. If staff accepts the corrective plan submitted by the respondent, the citation will be deemed resolved without the need for further escalation to a warning letter or a notice of probable violation.

7.1.2 Warning letter: Upon determining that a probable violation or violations of this regulation has occurred or is continuing, staff may issue a warning letter notifying the respondent of the probable violation and advising respondent to correct it, if it is correctable, and comply henceforth, or be subject to enforcement procedures under this regulation. Staff shall: provide the respondent with copies of all relevant documentation, including the citation (if applicable) and any written violation reports; notify the respondent of the results of the on-site evaluation (if applicable); and identify the specific provisions of this regulation or the Damage Prevention Act alleged to have been violated. Unless staff and the respondent otherwise agree, the respondent shall reply in writing within 30 days of receipt of the warning letter. In responding to the warning letter, the respondent may submit a written plan to staff specifying actions that the respondent will take to correct the alleged violation, a schedule for completion of each action step, and a final date of completion. Respondent may also request an informal conference with staff in an effort to reach a mutually acceptable resolution of the alleged violation. If staff accepts the corrective plan submitted by the respondent, the warning letter will be deemed resolved without the need for further escalation to a notice of probable violation.

7.1.3 Notice of Probable Violation

7.1.3.1 If staff has reason to believe that a material violation of this regulation has occurred, or if the respondent has failed to complete the agreed upon corrective action plan after relating to a citation or a warning letter, or if the respondent has multiple, similar violations, Staff may commence an enforcement proceeding by issuing a notice of probable violation (NOPV).

7.1.3.2 The NOPV shall include the following:

7.1.3.2.1 A listing of the provisions of this regulation or the Damage Prevention Act which the respondent is alleged to have violated, a description of the evidence on which the allegations are based, and copies of all relevant documentation, including a copy of any written violation reports and citation or citations or warning letter or letters, if applicable;

7.1.3.2.2 Notice of the response options available to the respondent under subsection 7.3 of this regulation;

7.1.3.2.3 If a penalty is proposed, the amount of the proposed penalty and the maximum penalty for which the respondent may be liable; and

7.1.3.2.4 A proposed consent order pursuant to subsection 7.4 of this regulation.

7.1.3.3 An NOPV may be amended at any time prior to the 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 subsection 7.3 of this regulation.

7.2 Service. Service of the citation, warning letter, or NOPV shall only be complete upon service on the respondent's registered agent by U.S. Postal Service first class mail delivery or to a person designated by the respondent to receive service from staff by either U.S. Postal Service or by email. Staff shall serve citations, warning letters, or NOPVs by U.S. Postal Service first class mail delivery and to a person designated by the respondent to receive service from the Commission to those respondents who have requested both methods of service.

7.3 Respondent's Options

7.3.1 Within 30 days after receipt of an NOPV, the respondent shall respond in one of the following ways:

7.3.1.1 Sign the consent order and return it with payment of any proposed penalty.

7.3.1.2 Submit a written explanation, information, or other material in response to the allegations contained in the NOPV.

7.3.1.3 Request an informal conference with staff. Upon request for an informal conference, staff will establish a date, time, and location for the conference. At the informal conference, 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 staff may have which indicates that the respondent may have violated this regulation shall be made available to the respondent, who shall have the opportunity to rebut this evidence, either at the informal conference, in writing within twenty days following the informal conference, or by other mutually agreed to arrangements.

7.3.1.4 In responding to the NOPV, the respondent may submit a written plan to staff specifying actions that the respondent will take to correct the alleged violation, a schedule for completion of each

action step, a final date of completion, and payment of any proposed penalty. If staff accepts the corrective plan submitted by the respondent, staff and respondent may propose a consent order to the Commission in accordance with subsection 7.4.

7.3.2 Failure of the respondent to respond in accordance with subsection 7.3.1.1, 7.3.1.2, or 7.3.1.3 shall constitute a waiver of the respondent's right to contest the allegations in the NOPV and authorizes the Commission, upon 30 days' notice to the respondent, to find the facts to be as alleged in the NOPV and to issue a final order under subsection 7.5 of this regulation. Prior to the Commission's issuance of a final order under this subsection, the respondent may submit a written plan to the Commission specifying actions that the respondent will take to correct the alleged violation, a schedule for completion of each action step, a final date of completion, and payment of any proposed penalty. If the Commission accepts the corrective plan submitted by the respondent, the Commission may issue a consent order in accordance with subsection 7.4.

7.4 Consent Orders

7.4.1 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.

7.4.2 A consent order is a final order of the Commission having the same force and effect as a final order issued pursuant to subsection 7.5 of this regulation.

7.4.3 A consent order shall include an express waiver of appeal or judicial review rights that might otherwise attach to a final order of the Commission.

7.4.4 A consent order may include, but is not limited to, corrective action, assessment of a penalty, and mandatory education or training.

7.5 Final order

7.5.1 If staff and the respondent do not agree to a consent order, the Commission will open a docket and conduct an evidentiary hearing (either directly or by its designee) pursuant to the *Rules of Practice and Procedure of the Delaware Public Service Commission*, codified at **26 DE Admin. Code** 1001. After the conclusion of the hearing, the Commission shall issue a final order that includes the following:

7.5.2 A statement of findings and determinations on all material issues; and

7.5.3 If a penalty is assessed, the amount of the penalty and the procedures for payment of the penalty.

7.6 Assessment of Penalties

7.6.1 Except as provided in subsection 7.6.2, whoever, by action or inaction, violates a provision of this regulation shall, for the first offense, be fined not less than \$100 nor more than \$500. For each subsequent like offense, such person shall be fined not less than \$200 nor more than \$1,000 for each violation.

7.6.2 Operators of underground pipeline facilities, excavators, and the approved notification center shall, upon violation of any applicable requirements of 49 C.F.R. Part 198, Subpart C [49 C.F.R. §198.31 et seq.], be subject to civil penalties not to exceed \$10,000 for each violation for each day that the violation persists, except that the maximum civil penalty shall not exceed \$500,000 for any related series of violations.

7.6.3 In determining the amount of the fine, the Commission shall consider the nature, circumstances, and gravity of the violation and, with respect to the person found to have committed the violation, the degree of culpability, any history of prior violations, the effect on the ability to continue to do business, any good faith in attempting to achieve compliance, ability to pay the fine, and such other matters as justice may require.

7.6.4 No penalties provided for in subsection 7.6 of this regulation shall apply to any excavation or demolition done by the owner of a private residence when such excavation or demolition is made entirely on the land on which the private residence is situated and provided there is no encroachment on any operator's rights-of-way or easement. However, this exemption shall not affect the civil liability of such private residence owner pursuant to **26 Del.C.** §811.

7.7 Payment of Penalties

7.7.1 Payment of a penalty under this regulation shall be made by check or money order to the "State of Delaware" and sent to the Secretary of the Commission, 861 Silver Lake Blvd., Cannon Building, Suite 100, Dover, Delaware 19904.

7.7.2 If a respondent fails to pay the full amount of a penalty assessed in a final order within 30 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.