

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TECO PEOPLES GAS COMPANY,

Petitioner,

vs.

Case No. 19-2743

COUGAR CONTRACTING, LLC,

Respondent.

_____ /

FINAL ORDER

Pursuant to notice, Francine M. Ffolkes, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted a final hearing in this case on July 18, 2019, by video teleconference in Tallahassee and Fort Myers, Florida.

APPEARANCES

For Petitioner: Adam D. Griffin, Esquire
Lau, Lane, Pieper, Conley
& McCreadie, P.A.
100 South Ashley Drive, Suite 1700
Tampa, Florida 33602

For Respondent: Mark Schultz, Esquire
Henderson, Franklin, Starnes
& Holt, P.A.
1715 Monroe Street
Fort Myers, Florida 33901

STATEMENT OF THE ISSUES

The two issues to be determined are whether: (1) a violation of section 556.107(1)(a), Florida Statutes, relating to a "high-priority subsurface installation" proximately caused an

"incident" under section 556.116(1)(c); and (2) if so, what fine should be imposed against the violator in an amount not to exceed \$50,000.

PRELIMINARY STATEMENT

On May 21, 2019, Sunshine State One-Call of Florida, Inc. (Sunshine 811), sent a letter to DOAH enclosing a High Priority Subsurface Installation Incident Report and Commitment prepared by the Petitioner, TECO Peoples Gas Company (Peoples Gas), alleging a violation of section 556.107(1)(a) by the Respondent, Cougar Contracting, LLC (Cougar). The letter requested an administrative hearing. Under section 556.116(3)(c), DOAH has jurisdiction over this matter, and a final hearing was scheduled for July 18, 2019. On July 12, 2019, the parties filed stipulations of fact. The parties stipulated that a violation of section 556.107(1)(a) occurred, relating to a "high-priority subsurface installation" under section 556.116(1)(b).

At the final hearing, Peoples Gas presented the testimony of Ruth Weintraub. Cougar presented the testimony of Shane Meaker. Joint Exhibits 1 through 13 were received into evidence.

A one-volume Transcript was filed with DOAH on August 5, 2019. Proposed findings of fact and conclusions of law were filed jointly by the parties and have been considered in the preparation of this Final Order.

References to the Florida Statutes are to the 2018 version, unless otherwise indicated.

FINDINGS OF FACT

Based on the stipulated facts and the evidence adduced at the final hearing, the following findings of fact are made.

Stipulated Facts (Paragraphs 1 through 24)

Sunshine 811 and the Incident

1. Sunshine 811 is the free-access notification system established by the Underground Facility Damage Prevention and Safety Act (Act). See §§ 556.101-556.116, Fla. Stat. Section 556.105(1)(a) requires an excavator, before beginning any excavation or demolition, to provide Sunshine 811 with certain information that will allow a utility company to mark on the surface of the earth the horizontal route of underground facilities in the area of the proposed excavation.

2. An excavator must notify Sunshine 811 of an upcoming excavation not less than two full business days before beginning an excavation. Such notification and resulting locate ticket remain valid for only 30 days after the notice to Sunshine 811. See § 556.105(1)(a), (c), Fla. Stat.

3. Cougar is a site-work contractor. Cougar had a subcontract with general contractor Waltbillig & Hood, who was building a storage facility on property at or around 16641 South

Tamiami Trail in Fort Myers. Among other site work, Cougar agreed to install underground storm structures.

4. On Saturday, May 18, 2019, around 10:20 a.m., an employee and agent of Cougar, Ramiro Garcia, was operating a backhoe excavator on or near the property located at or around 16641 South Tamiami Trail in Fort Myers. While digging to install a storm structure, the excavator ruptured an eight-inch steel underground gas distribution main owned and operated by Peoples Gas.

5. More than three months before the incident, on February 12, 2019, Cougar, through Jessica Armstrong, notified Sunshine 811 about an excavation to occur at 16721 South Tamiami Trail. Cougar requested utility locating for the "perimeter of new storage facility." In response, Sunshine 811 generated locate ticket number 043902987.

6. Two days later, on February 14, 2019, Cougar, through Ms. Armstrong contacted Sunshine 811 to replace the previous locate ticket number 043902987. This time Cougar requested locating at a different address, 16641 South Tamiami Trail, but again requested utility locating for the "perimeter of new storage facility." In response, Sunshine 811 generated a new locate ticket number 045903523, which expressly "replace[d] Ticket #043902987," as Cougar requested.

7. On February 14, 2019, Peoples Gas locator, Todd Gerloski, responded at 3:10:06 p.m. to the second locate ticket number 045903523, by entering "High Priority Pipeline - Marked," which confirmed that Peoples Gas had located and marked a high priority pipeline within the excavation area.

8. The parties agree the three locate tickets with dates of February 12, 2019, locate ticket number 043902987; February 14, 2019, locate ticket number 045903523; and May 18, 2019, locate ticket number 138900287, speak for themselves.

9. Whenever, like here, an excavation site conflicts with a high-priority gas main, Peoples Gas issues and sends to the excavator an e-mail notice with the subject line "ATTENTION: High Priority Natural Gas Pipeline in Your Work Area-PLEASE READ." The notice provides the number of the locate ticket and warns among other things: "In reference to your locate request(s), **there is a high profile gas line in the area.** Excavation around this line requires increased caution to prevent significant bodily injury and/or property loss." The notice also provides the locator's contact information and states: "**This line has been marked; please call the [contact] below one (1) working day in advance of excavation so Peoples Gas can make arrangements to be on site if necessary. Note: the law requires the excavator to spot dig the facilities.**" Finally, the notice

advises that "information provided by an excavator is valid for 30 calendar days."

10. Peoples Gas's Timothy A. Easter sent this notice to Cougar's Ms. Armstrong via e-mail on February 15, 2019, at 11:02 a.m.

11. Thus, through Mr. Gerloski and Mr. Easter, Peoples Gas identified the gas main as high priority and notified Cougar about the presence of the high-priority main.

12. According to section 556.105(1)(c), locate ticket number 045903523, which replaced the original locate ticket number 043902987, expired on March 17, 2019.

13. Accordingly, when the incident occurred on May 18, 2019, Cougar was digging without a valid locate ticket, in violation of the Act.

Cougar's and Peoples Gas's Response to the Incident and the Incident's Impact on the Community

14. Immediately after rupturing the gas main, Cougar's Ramiro Garcia turned off the excavator and ordered everyone to move away from the area of damage. Mr. Garcia then called 911 and his supervisor.

15. Traffic along this section of U.S. 41 (Tamiami Trail) was shut down in both directions shortly after the 911 call, but no later than 11:15 a.m. Around the same time, the area and businesses around the damage were evacuated.

16. After receiving a report of the incident from the fire department, Peoples Gas's first responder arrived on scene at 11:06 a.m. and confirmed that the damage was to the eight-inch high-priority steel gas main, a one-way feed that serves 15,176 customers to the south and along Fort Myers Beach. To avoid losing gas service to 15,176 customers, restoration of which would require at least one visit by a Peoples Gas representative to each customer, Peoples Gas endeavored to safely keep the gas main in service while conducting the repair.

17. In order to do so, Peoples Gas relied on the assistance of several contractors, employees, and public first responders, and delivered trucks of compressed natural gas to maintain the necessary operating pressure of the gas main downstream, while Peoples Gas conducted the repair on the section of damaged pipe.

18. Around 2:15 p.m., the southbound lane of U.S. 41 was reopened. The southbound lane was closed for approximately three and one-half hours. The northbound lane remained closed.

19. Around 6:00 p.m., Peoples Gas incident commander, Greg Crawford, received a phone call from Cougar's Shane Meaker. Mr. Meaker called to offer help by offering a large track hoe to help dig around the main and assist the repair. Peoples Gas accepted the offer, and a Peoples Gas contractor operated the Cougar track hoe to assist the repair.

20. Peoples Gas successfully and safely kept the gas main in service while conducting the repair. However, gas service was lost to 17 customers, which required Peoples Gas to restore service to those customers after completing the repair.

21. The repair effort extended overnight; Peoples Gas completed the repair, and the site was "made safe" at approximately 4:00 a.m. the next day, May 19, 2019. In total, the effort to repair the damage lasted approximately 17 hours.

22. At 4:06 a.m., on Sunday, May 19, 2019, Peoples Gas notified the sheriff's department that the scene was safe, and shortly thereafter, northbound U.S. 41 was again open to traffic. The northbound lane was closed for approximately 17 hours.

The Cost of Repair

23. Peoples Gas awaits an invoice from one of its contractors, but the preliminary cost to repair the main and restore service to the 17 customers was \$156,745.83.^{1/} This number comprises 53,930 therms of lost gas (\$53,658), material cost (\$938), equipment cost (\$9,924), overtime labor (\$3,200), double-time labor (\$15,258), lodging and meal expenses (\$453), contractor charges (\$65,018), and administrative charges (\$8,298).

Cougar's Recent History of Violations

24. On January 7, 2019, Cougar ruptured a four-inch underground gas main near Tiburon Way and Tidewater Key Boulevard

in Estero. Although Cougar had called Sunshine 811 for a locate request on October 16, 2018, for the nearby area, the locate ticket number 289810669 had expired when the incident occurred. Peoples Gas suffered \$2,571.84 in damages, and Cougar paid the claim in full.

Causation

25. If Sunshine 811 had been notified, Peoples Gas would have identified the location of the underground main with locate marks and would have sent Cougar the standard high-priority e-mail notice referenced above.

26. Mr. Meaker confirmed that Cougar's equipment operators are well trained and recognize locate marks. Had Cougar called Sunshine 811 before commencing excavation on Saturday, May 18, 2019, the operator would have seen the locate marks and may not have struck the gas main.

27. The record evidence contains a May 18, 2019, locate ticket number 138900287, which reflects that it was requested at 11:54 a.m. on Saturday, May 18, 2019, almost two hours after the incident occurred. Thus, Cougar was excavating without a valid locate ticket at the time of the incident described above.

28. Cougar's failure to notify Sunshine 811 prior to commencing work on Saturday, May 18, 2019, is the proximate cause of the incident described above.

CONCLUSIONS OF LAW

29. DOAH has jurisdiction in this section 556.116 proceeding to determine the facts and law concerning an alleged incident. See § 556.116(3), Fla. Stat.

30. Cougar's excavation on Saturday, May 18, 2019, at 10:00 a.m. without a prior call to Sunshine 811 is a violation of section 556.107(1) (a).

31. The gas main ruptured by Cougar is a "high-priority subsurface installation," as that term is defined in section 556.116(1) (b).

32. Rupture of the gas main was an "incident" as that term is defined in section 556.116(1) (c). The incident resulted in property damage and service-restoration costs in excess of \$50,000.

33. The preponderance of the evidence proved that Cougar's violation of section 556.107(1) (a) was a proximate cause of the incident.

34. Under section 556.116(3), a fine may be imposed by DOAH on the violator in an amount not to exceed \$50,000. See § 556.116(3) (c), Fla. Stat. The fine is payable to the Sunshine 811 system, and the findings in this proceeding may not be used in any civil action. See § 556.116(3) (e) and (f), Fla. Stat.

35. Thus, the purpose of this proceeding and the fine relates to the stated legislative intent of chapter 556, which is "to provide access for excavating contractors and the public to provide notification to the system [Sunshine 811] of their intent to engage in excavation or demolition." See § 556.101(2), Fla. Stat. This "[a]ids the public by preventing injury to persons or property and the interruption of services resulting from damage to an underground facility." See § 556.101(3), Fla. Stat.

36. Based on the totality of the circumstances, which includes the service-restoration costs, the impact on the community, Cougar's response to the incident, and Cougar's prior violation, a fine of \$5,000 is imposed.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that Cougar's violation of section 556.107(1)(a) was a proximate cause of the incident, and Cougar shall pay a fine in the amount of \$5,000 to the Sunshine 811 system.

DONE AND ORDERED this 28th day of August, 2019, in
Tallahassee, Leon County, Florida.



FRANCINE M. FOLKES
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of August, 2019.

ENDNOTE

^{1/} Cougar and Peoples Gas agree to this paragraph, and the pertinent exhibits on damages, solely for this DOAH hearing. Nothing admitted in this paragraph or respective exhibits may be used against Cougar or Peoples Gas in any subsequent legal proceeding.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.