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STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PIPELINE SAFETY) CAUSE NO. 44275
DIVISION'S INVESTIGATION OF RIETH-RILEY)
CONSTRUCTION CO., INC. IN PIPELINE)
SAFETY DIVISION CASE NUMBER 3065) APPROVED:

NOV 25 2013

ORDER OF THE COMMISSION

Presiding Officers:
David E. Ziegner, Commissioner
David E. Veleta, Administrative Law Judge

On September 10, 2012, the Indiana Utility Regulatory Commission's ("Commission") Pipeline Safety Division ("Division") found that Rieth-Riley Construction Company, Inc. ("Rieth-Riley") had violated a provision of Indiana Code chapter 8-1-26. On October 23, 2012, the Underground Plant Protection Advisory Committee ("Advisory Committee") recommended a warning letter for Rieth-Riley based on the Division's finding.¹ On November 30, 2012, Rieth-Riley filed its request for public hearing pursuant to Indiana Code § 8-1-26-23(k) with the Commission. Petitions to intervene were filed by the Division, Northern Indiana Public Service Company ("NIPSCO"), and the Board of Directors for Utilities of the Department of Public Utilities of the City of Indianapolis, as successor trustee of a public charitable trust, d/b/a Citizens Gas ("Citizens"), all of which were subsequently granted.

Pursuant to public notice duly given and published, proof of which was incorporated into the record by reference and placed in the Commission's official file, a public hearing was held in this Cause on April 30, 2013 at 9:30 a.m. in Room 222 of the PNC Center, 101 W. Washington Street, Indianapolis, Indiana. At the hearing, the parties presented their prefiled testimony and the witnesses were cross-examined. No member of the general public appeared or sought to participate in these proceedings.

Based upon the applicable law and the evidence of record, the Commission now finds:

1. Notice and Jurisdiction. Due, legal and timely notice of the public hearing in this Cause was given and published as required by law. Rieth-Riley is a person responsible for an excavation within the meaning of Indiana Code § 8-1-26-20, and requested a public evidentiary hearing pursuant to the provisions of Indiana Code § 8-1-26-23(k). Accordingly, the Commission has jurisdiction over Rieth-Riley and the subject matter of this proceeding.

2. Background. Rieth-Riley was awarded a contract on a sanitary sewer project known as the 86th and Washington Sanitary Project (the "Project"). The Project required Rieth-Riley to break up and remove concrete directly above a marked underground gas facility to

¹ Rieth-Riley was notified of the finding of violation and warning letter on October 30, 2012.

install a sewer line. In breaking up and removing the concrete, Rieth-Riley utilized a trackhoe with a bucket. On June 12, 2012, Rieth-Riley's trackhoe bucket struck and damaged Citizens' underground gas facility when it pulled a portion of gas pipeline from the ground. The Division found that Rieth-Riley violated Indiana Code § 8-1-26-20(b)²; specifically, Rieth-Riley failed to maintain two (2) feet clearance with mechanized equipment. The Advisory Committee recommended that Rieth-Riley receive a warning letter for violating Indiana Code § 8-1-26-20(a)(2).

3. Evidence Presented.

A. Division's Evidence. Howard Friend, a Senior Pipeline Engineer in the Division, summarized his investigation of the Advisory Committee's Case No. 3065. Mr. Friend testified that he determined Rieth-Riley was removing concrete and the gas line was under the concrete. He stated that when removing concrete, the proper procedure is for an excavator to "spot" the utility or remove the concrete by saw cut or jackhammer above the marked facility prior to using mechanized equipment. He stated that Rieth-Riley failed to do this, instead using a backhoe or trackhoe to remove the concrete by scooping it. Mr. Friend testified that using Rieth-Riley's method, the ground below is impacted, and any underground facilities in the immediate area can be hit, which is what occurred in this instance. He stated that according to Rieth-Riley, the gas pipeline was approximately four to five inches beneath a nine inch thick slab of concrete.

Mr. Friend explained that the Division is required to determine if any violations occurred under Indiana Code chapter 8-1-26. He explained that under Indiana Code § 8-1-26-20(b), it is a violation if the excavator fails to maintain two feet of clearance from the cutting edge or point of mechanized equipment. He stated that exposure of the line may be accomplished only by the use of hand excavation, air cutting, or vacuum excavation. He testified that because Rieth-Riley used a backhoe or trackhoe, he determined that there was a violation of Indiana Code § 8-1-26-20(b).

B. Rieth-Riley's Evidence. Tim Boyd, a superintendent with Rieth-Riley, stated that he was part of Rieth-Riley's crew performing work on the Project. He testified that yellow markings were present at the site to show where the underground gas facility was located.

Mr. Boyd testified that the Project required Rieth-Riley to remove the concrete roadbed to replace the sanitary sewer line. He stated that it was not possible to remove the concrete with hand tools in order to expose the dirt below. He indicated that Rieth-Riley could use hammers and chisels, but the amount of time it would take to break up the pavement would be so lengthy and expensive that projects could never be completed.

Mr. Boyd testified that Rieth-Riley could not have used air cutting or vacuum excavation to break up and remove the pavement. He stated that those methods work on softer materials like dirt, but not concrete. He stated that a jackhammer or saw cutting would have to be utilized

² The Division alleges in its Exhibit G that Rieth-Riley violated "Indiana Code 8-1-26-20(b): Failure to maintain two (2) feet clearance with mechanized equipment." However, the correct citation is to Indiana Code § 8-1-26-20(a)(2).

to first break up the concrete, but that Rieth-Riley chose to use a trackhoe to break up the concrete into manageable size pieces, scoop them up, and transport them from the site.

Mr. Boyd testified that by using a trackhoe, Rieth-Riley could control how deep the ground was penetrated by the bucket within a few inches. He stated the trackhoe only needs a depth the width of the bucket to get beneath and lift up the pavement. He indicated that an experienced operator, such as the one on site that day of the facility damage, can lift and remove pavement with little more than three to four inches of clearance beneath the pavement.

Mr. Boyd explained that while Rieth-Riley is always concerned about and cautious to avoid striking underground facilities, there are no hand excavation, air cutting, or vacuum excavation procedures that can be used to cut and remove concrete. He testified that Rieth-Riley would have used one or more of those means to excavate the dirt below the concrete as required by law, but there simply is no feasible means of breaking up and removing the concrete without mechanical tools.

Mr. Boyd confirmed he was present at the Project site when the trackhoe struck the gas line, but that he was not in the immediate vicinity of the trackhoe. He indicated that when the strike occurred, he immediately went to the location and viewed the scene. He stated that the concrete pavement being broken up and removed was approximately nine inches thick where the strike occurred and that the gas facility that was struck appeared to be approximately four to five inches below the bottom of the concrete. This is why he believes it was struck by the trackhoe bucket when it scooped beneath the pavement. He stated that it was apparent that the strike occurred when they saw the exposed facility and smelled the gas being discharged.

Mr. Boyd testified that Citizens was on site when the buried facility was struck. He stated that if there was an underground gas line in the way of Rieth-Riley's construction project, the Citizens representative would cut the line after Rieth-Riley exposed it and then would repair it after Rieth-Riley had passed that point.

Mr. Boyd further explained that Rieth-Riley has had an on-going problem with facilities that are buried at widely-varying depths. He noted that typically the underground lines are buried at least eighteen to thirty inches below the concrete, which allows for work to be completed without striking them. However, there can be great variations in depth over a short distance such as the ten to twelve inch variation in utility depth over twelve to fifteen feet seen in this Project.

Robert Montel, Rieth-Riley's safety manager, testified that striking, or the potential striking, of underground utilities is a safety issue that falls within the scope of his responsibilities. He stated that he is aware that Rieth-Riley used a trackhoe on the Project to break up and remove the pavement within the marked two foot boundary lying over top of the buried facility. In response to Mr. Friend's position that Rieth-Riley should have used saw-cutting and jackhammering tools to break up the concrete rather than the trackhoe, Mr. Montel stated there were problems with that method. First, he stated that saw cutters and jackhammers are both mechanical tools which, according to Indiana Code § 8-1-26-20, are prohibited within the two foot facility boundary. Second, he stated that Mr. Friend's testimony is inconsistent with

prior determinations by the Commission. Third, Mr. Montel opined that the use of saw-cutting and jackhammering increases the risk of creating sparks that could ignite the gas in the event a buried facility is struck, making it more dangerous to the workers and the public than other potential means of performing the work. Additionally, he stated that the use of saw cutting, jackhammering and then vacuum excavation, even if permitted by law, is an incredibly slow process that would substantially delay and increase the costs of public works projects. He stated that Mr. Friend's method was both impractical and inefficient.

Kurt Youngs, Owner and President of Youngs Excavating, Inc. ("Youngs Excavating") and President of the Indiana Chapter of the National Utility Contractors Association ("NUCA"), offered testimony on behalf of Rieth-Riley. He testified that he was not present when Rieth-Riley damaged the pipeline but later learned of the facts relating to it. He stated that he was "very aware" of the laws regarding Indiana's 811 program and the requirements that contractors call to have buried utilities located before performing virtually all excavation.

Mr. Youngs testified that, because of his involvement with NUCA, he regularly comes into contact with asphalt and concrete paving companies. He stated that based upon his experience with Youngs Excavating and the knowledge he has gained interacting with those and other similar contractors in the industry, he believes facilities under concrete or asphalt cannot be accessed by use of hand tools, air cutting or vacuum excavation. He stated that none of those means is sufficiently powerful to break up and remove it. He indicated that the problem Rieth-Riley faces with this reported incident is common throughout the industry. He stated that as it currently stands, there are no approved methods under Indiana Code § 8-1-26-20 that can break up or remove asphalt or concrete.

Mr. Youngs testified that the NUCA has other concerns relating to this issue. He stated that the excavating contractor is responsible for all of the fines but that it is entirely common for the underground facilities to be very shallow and/or of varying depths. He stated the utility companies share no part in the blame or fines despite their part in burying the utilities at varying depths that often do not meet the standard minimum depths. Mr. Youngs testified that this is a big problem for road and paving contractors such as Rieth-Riley and the members of NUCA. He stated that more often, utilities are being buried in state and federally owned right-of-ways, which means that incidents such this one will become more common. He stated that it is incumbent upon the Commission, utilities and contractors to resolve this issue in a manner that does not place the entire burden and liability for this issue on the contractors.

Mr. Youngs testified these operator issues are further compounded by inconsistent direction by the Division. He stated that in this case, he had reviewed the written testimony of Mr. Friend. He explained that Mr. Friend has testified that the use of saw cutters and jackhammers are appropriate when that is contradictory to the language contained within Indiana Code § 8-1-26-20(a)(2) that permits only the use of hand tools, air cutting and vacuum excavation within the two foot marked area above the facility. He stated that Mr. Friend's solution is not economically viable on these types of projects due to the considerable delay it would cause. He stated that NUCA's research has shown the provisions of Indiana Code chapter 8-1-26 to be less unified and balanced than most states. He opined that until we can achieve

equity in the law, Indiana contractors and, most importantly, the safety of their employees and the public, are being put unnecessarily at risk.

C. **NIPSCO's Evidence.** Danny G. Cote, Vice President of Pipeline Safety and Compliance for the gas distribution segment of NiSource Inc., provided testimony on behalf of NIPSCO. He provided an overview of the commercial infrastructure location process in the field and explained the capabilities of infrastructure locating technology currently in commercial use. He also addressed the extent to which requiring depth readings as part of a facilities locate project are consistent with regulatory practices in other jurisdictions.

Mr. Cote testified he is familiar with the process of locating underground infrastructure on a commercial basis, from the perspective of an operator, an excavator, and entity performing locates in the field. He has spent a great deal of time in the field with locate and excavation crews under a wide variety of conditions and has personally assisted in the evaluation of countless damages. Mr. Cote testified it is important to recognize that not all technology is suitable for deployment in the field under the conditions and with the time constraints imposed by the one call process. He stated that the volume of locate tickets, as well as the highly variable and frequently severe field conditions encountered, dictates that the equipment used be reliable, durable and accurate in a manner consistent with the applicable standards. He stated there may well be technology with the theoretical ability to perform with a great deal of accuracy that is not suitable for use under field conditions.

Mr. Cote described the process by which commercial locators or in-house utility locate departments generally perform locates in the field. He stated the locator attaches his or her locating equipment to either the tracer wire or to other metallic surfaces on either end of a facility. He testified that the equipment emits an electronic signal that follows the tracer wire or the pipe itself (in the case of steel or iron pipe) that is picked up by a handheld scanning device and the locator follows the signal and marks the line with flags or paint to identify the facility.

Mr. Cote explained the use of tracer wire, which is a thin conductor buried with plastic piping for the specific purpose of providing a means to accomplish facilities location. He noted that a tracer wire is not physically attached to the pipe; it is typically installed on the top side of the pipe when in trenching installations, but may ultimately wind up in a variety of locations near the pipe if the installation is accomplished by boring or with excavation equipment. He stated that tracer wire is not perfect. It can be subject to corrosion, breakage, and separation from the pipe due to age and physical forces, but it is the first choice technique typically used to locate plastic facilities. Mr. Cote testified that if a tracer wire or other metallic facilities are not available or are not functional, locaters can identify facility locations through facility maps, utility records or through test holes or "potholing."

Mr. Cote provided an overview of the equipment currently used in the field by commercial locators. He stated that NiSource contracts with commercial locators for approximately sixty percent of its gas distribution companies, and services rendered by locate contractors may be awarded for specific service locations in some instances. Mr. Cote testified that these technologies do not permit the accurate measurement of facility depth. He stated that any depth reading available through the use of this equipment is subject to the strength of the

signal received by the scanner and can be impacted by soil conditions, facility depth, condition of the tracer wire, surface conditions, the length of the tracer wire segment, the presence of other utilities in close proximity, and a variety of other factors. As a result, depth readings obtained from this equipment are simply not reliable. He stated that the only reason why a depth reading would be useful to an excavator would be to allow for the use of mechanized equipment above a specified depth -- a dangerous practice regardless of depth.

Mr. Cote testified that because the practice of installing tracer wire has changed over the years for many utilities, there is no constant relationship between the depth of the tracer wire and the depth of the gas pipe. Therefore, even if equipment was available that could provide accurate depth measurements one hundred percent of the time, and even if there were none of the vulnerabilities and short-comings with tracer wire that were previously described, it would still be impossible to provide consistently accurate pipeline facility elevations. He notes an ever increasing percentage of gas distribution infrastructure is composed of plastic pipe which makes any attempt to mandate depth of facilities marking along with horizontal markings fatally flawed.

Mr. Cote testified that based on his experience and participation in a number of pipeline safety organizations with nationwide scope, he is not familiar with any state that requires the provision of depth readings as part of a locate. In his experience, an additional requirement placed on utilities to provide accurate marking of the depth would make the one call laws unenforceable by requiring performance in the field that is not technically feasible.

D. Citizens' Evidence. Paul D. Puckett, Citizens' Director of Gas Transmission and Distribution Operations, generally described the processes Citizens follows when a contractor requests that it identify and mark underground facilities. He explained that Citizens has a contract with USIC Locating Services, Inc. ("USIC"), the largest provider of underground utility locating services in North America, to identify and mark its underground gas facilities when a locate request is received from Indiana 811. He stated the locate request is processed and within two working days from the request date, USIC will locate and mark all Citizens underground facilities in the requested area with yellow flags and paint. Mr. Puckett testified that these processes were followed in this matter.

Mr. Puckett noted that Mr. Boyd does not seem to be certain of his assertion that the damaged service line was no deeper than 4-5 inches below the bottom of the pavement. He pointed out that earlier in Mr. Boyd's testimony he states the facility that was struck appeared to be approximately 4-5 inches below the bottom of the concrete and that Mr. Boyd admits he was not in the immediate vicinity when the line was struck by Rieth-Riley's trackhoe operator. Mr. Puckett believes it would be impossible to determine with precision the depth of the line that was pulled from the ground by Rieth-Riley's trackhoe. He stated that approximately twenty feet of pipe was completely pulled out of the ground and Rieth-Riley's own report indicates that it exposed lines on both sides of the road where it was excavating at depths of approximately eighteen inches. He stated that it is reasonable to conclude the damaged facility was buried at a similar depth.

Mr. Puckett stated that it is possible the service line was shallower at the point at which it was struck by Rieth-Riley. He stated there are a variety of reasons the depth of a line can

fluctuate over time. Most notably in this case, the gas service was installed more than forty years ago in 1969 according to federal rules regulating gas pipelines, which required service lines to be installed at a minimum depth of eighteen inches in the public right of way and twelve inches on private property. He stated that Citizens' records indicate that the service line was originally installed at a depth of thirty-six inches at the main tie-in close to where the damage occurred. Over the course of over forty years, there may have been several street/surfacing projects that could have lowered the grading of the road and affected the depth of the gas line as well as other underground facilities.

Mr. Puckett agreed with Mr. Friend's conclusion that Rieth-Riley should have made a better effort to expose the gas service at the marked locations where it was utilizing its trackhoe to dig into and under the street. Mr. Puckett concluded that it is important to confine the review of this incident to the facts presented in this specific case. He stated that in his opinion, the witnesses testifying on behalf of Rieth-Riley make some very broad generalizations and raise issues that are well beyond the scope of this proceeding. In contrast, he opined that the incident under review is fairly straightforward and that Rieth-Riley's choice not to take precautionary measures such as those discussed by Mr. Friend resulted in its striking and damaging an underground pipeline that was properly marked by USIC. He opined that the finding of the Division should be affirmed.

E. Division's Rebuttal Evidence. Mr. Friend disagreed with Rieth-Riley's assertions that his determination in this case is inconsistent with Case 3553. He explained that in that case, the excavator used saw cuts and broke up the concrete in order to excavate. He explained that at the time of his review, he was taking a literal interpretation of Indiana Code § 8-1-26-20 that no matter what, "mechanized equipment" was prohibited. He stated that later that month, Division staff internally discussed the scenario and concluded that despite technically being a violation of statute, it was impossible to get through concrete without the use of mechanized equipment. Therefore, the Division would only find violations where the method used was unsafe, such as using a trackhoe. He explained that the Division rescinded its finding of violation in Case 3553 and the Advisory Committee rescinded its recommended civil penalty.

Mr. Friend testified that Indiana Code § 8-1-26-20(a)(2) prohibits exposing the facility within two feet in any manner other than hand excavation, air cutting, or vacuum excavation. He stated that Rieth-Riley is correct that in actuality, if a facility is under concrete, you cannot remove the concrete using any of the statutorily permitted methods. He stated, however, that the Division will not find a statutory violation where the excavator has no permissible way to remove the concrete, as long as the excavator is utilizing a safe and prudent method of concrete removal.

Mr. Friend stated the Division does not consider the use of a trackhoe to be a safe and prudent method of concrete removal. He stated there are various levels of training and experience that trackhoe operators receive and that they may not be able to remove concrete with great accuracy. He stated that even if they are extremely accurate, they still have to contend with the clearance distance of the bucket, which can be several inches. He stated that if the gas line is close to the concrete, using this method of removal makes it impossible to avoid the gas line. He

testified that in this case, even with over twenty years of experience on the machinery, the trackhoe operator still hit the line.

In response to Rieth-Riley's claim that saw cutting can create sparks that could ignite a gas line, Mr. Friend testified there is no danger of ignition if saw cutting is done properly. He stated that excavators should saw cut two feet away from the marks to determine the thickness of the concrete and then they could begin to jackhammer. He stated they should work their way down through the concrete in layers. He explained that determining the thickness of the concrete and removing it layer by layer provides the ability to remove the concrete without disturbing the line underneath, thus there is no risk of ignition. Mr. Friend testified the method of removal he describes is an accepted method in the industry to reduce the likelihood of pipe damage when the pipe is buried under concrete. He stated that this is the method that many contractors use.

Mr. Friend agreed with Mr. Cote's assertions regarding locating for depth. He explained that if a tracer wire breaks, the only way to locate depth is by potholing which is the process of hand digging small holes at multiple points along the length of the line to visually expose the pipe or using maps.

4. **Commission Discussion and Findings.** Indiana Code § 8-1-26-23(k) requires the Commission, upon receiving a recommendation from the Advisory Committee under Indiana Code § 8-1-26-23(h) and after notice and opportunity for a public hearing, to "(1) [u]phold or reverse the finding of a violation by the pipeline safety division under subsection (g). (2) [a]pprove or disapprove each recommendation of the advisory committee. (3) [c]ollect any civil penalties and deposit the penalties in the underground plant protection account."

Indiana Code § 8-1-26-20(a)(2), requires that a person responsible for an excavation or demolition operation under Indiana Code § 8-1-26-14 do the following:

[m]aintain a clearance between an underground facility, as marked by the operator, and the cutting edge or point of mechanized equipment. The clearance must be not less than two (2) feet on either side of the outer limits of the physical plant. However, if the clearance is less than two (2) feet, exposure of the underground facility may be accomplished only by the use of hand excavation, air cutting, or vacuum excavation."

Indiana Code § 8-1-26-20(b) states that, "[a] person who: (1) violates subsection (a) [Indiana Code § 8-1-26-20(a)]; and (2) causes damage to a pipeline facility in the area of the excavation or demolition; may be subject to a civil penalty"

The initial question we are presented with is whether the use of a trackhoe violates the requirement to expose an underground facility by the use of hand excavation, air cutting or vacuum excavation when there is less than two feet of clearance. In construing a statute, the primary goal is to determine and give effect to the intent of the Legislature. *Ind. Civil Rights Comm'n v. Alder*, 714 N.E.2d 632, 637 (Ind. 1999). When the statute is clear and unambiguous, we need not apply any rules of construction other than to require that words and phrases be given their plain, ordinary and usual meanings. *City of Carmel v. Steele*, 865 N.E.2d 612, 618 (Ind.

2007). Indiana law does not compel enforcement of a statute that is impossible to comply with. *Indiana State Board Of Medical Registration and Examination v. Seulean*, 37 N.E.2d 935, 936 (Ind. 1941). However, “if the elimination of an invalid portion of an act will leave the remainder complete in itself, sensible and capable of being executed against all alike, the remainder will be enforced.” *State v. Barrett*, 87 N.E. 7, 6 (Ind. 1909).

A plain reading of Indiana Code § 8-1-26-20(a)(2), does not permit the use of a trackhoe when exposing an underground facility where there is less than two feet of clearance. Thus, the use of a trackhoe under the circumstances presented in this Cause would violate the statute. However, witnesses from both the Division and Rieth-Riley testified that it is impossible to break up and remove pavement within two feet of an underground facility by the use of hand excavation, air cutting or vacuum excavation. Witnesses from Rieth-Riley testified that using a trackhoe was a safe method for removing concrete around an underground facility. The Division argued that a safer method would have been for Rieth-Riley to utilize saw cutting or a jackhammer to remove the concrete. Furthermore, the Division argues that “[w]hile jackhammering is not explicitly permitted, the Division’s interpretation is an acceptable nuance of the statute.” Division’s Post-Hr’g Rebuttal Br. Cause No. 44275 (August 19, 2013). We disagree. The statute does not permit the use of mechanized equipment to remove concrete within two feet of an underground facility. The legislature has provided an expansive definition for mechanized equipment as “equipment operated by means of mechanical power, including trenchers, bulldozers, power shovels, augers, backhoes, scrapers, drills, cable and pipe plows, hydroexcavators, and other equipment that may cause damage to underground facilities.” Indiana Code § 8-1-26-9. The Merriam-Webster dictionary defines a jackhammer as “a pneumatically operated percussive rock-drilling tool usually held in the hands.”³ Thus, by definition a jackhammer would fall under the definition of mechanized equipment by virtue of its mechanical operation and its ability to cause damage to underground facilities.

The evidence of record is clear that there is no practical way to break up and remove pavement within two feet of an underground facility without violating Indiana Code § 8-1-26-20(a)(2). Specifically, the portion of the statute which is impossible to comply with when breaking up and removing pavement states:

[t]he clearance must be not less than two (2) feet on either side of the outer limits of the physical plant. However, if the clearance is less than two (2) feet, exposure of the underground facility may be accompanied only by the use of hand excavation, air cutting, or vacuum excavation.

While the above portion of Indiana Code § 8-1-26-20(a)(2) is practically impossible to comply with as it concerns breaking up and removing pavement, the remaining portion of the statute is still valid. Requiring a person engaged in demolition or excavation to maintain clearance between an underground facility, as marked by the operator, and the cutting edge or point of mechanized equipment is a sensible requirement and should be capable of being executed. Such a requirement is also consistent with the overall purpose of the statute, which is to avoid damage

³ <http://www.merriam-webster.com/dictionary/jackhammer>

to underground facilities, because the failure to maintain clearance between an underground facility and mechanized equipment will most likely result in damage to the underground facility. It is undisputed that while breaking up and removing pavement, Rieth-Riley struck and removed a gas pipeline from the ground with the bucket of a trackhoe. Rieth-Riley had a legal obligation to maintain clearance between the trackhoe bucket edge and the underground facility, which it failed to do. Therefore, we uphold the Division's finding of a violation of Indiana Code § 8-1-26-20(a)(2) by Rieth-Riley.

The Advisory Committee has recommended that a warning letter is the appropriate penalty for Rieth-Riley's violation. While we are sympathetic to the challenges Rieth-Riley faces in removing pavement around underground facilities, those difficulties do not change Rieth-Riley's legal obligation to avoid damaging underground facilities. Thus, we uphold the Advisory Committee's recommendation of a warning letter.

Based upon the facts presented in this Cause, we fully expect the parties will contact the Indiana Legislature and seek to address the issues raised in this Cause concerning the ability to comply with the requirements of Indiana Code § 8-1-26-20(a)(2) as it concerns breaking up and removing pavement. In the meantime, or until the Legislature determines a need to amend or revise the law, we encourage the Division to work with, and provide guidance to, those persons responsible for excavations and demolitions in preparing the plans required by Indiana Code § 8-1-26-20(a)(1) and devising reasonable steps to be taken to avoid damage to underground facilities.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. We hereby uphold the Division's finding that Rieth-Riley violated Indiana Code § 8-1-26-20(a)(2).
2. We hereby uphold the Advisory Committee's recommendation of a warning letter.
3. This Order shall be effective on and after the date of its approval.

ATTERHOLT, MAYS AND ZIEGNER CONCUR; LANDIS NOT PARTICIPATING:

APPROVED:

NOV 25 2013

I hereby certify that the above is a true and correct copy of the Order as approved.



Brenda A. Howe
Secretary to the Commission