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April 22, 2019

US Dept. of Transportation  
Hazardous Materials  
12300 W. Dakota Ave., Suite 110  
Lakewood, CO 80228

Re: CPF 5-2019-0006E  
Alaska Construction and Paving, Inc.

Attention: Chris Hoidal  
1-720-963-3171

I am an attorney licensed in Alaska and represent Alaska Construction & Paving, Inc. (ACP). The excavation company requested an extension of time to respond to the March 5, 2019 letter (**Notice of Probable Violation and Proposed Civil Penalty**) and I have been advised that the extension has been granted.

Last summer my client received a notice of a possible violation. I filed a response with Jake Gano providing the DOT representative with a copy of the settlement check with Enstar Natural Gas, a written explanation and copies of locates. ACP is an experienced excavator and always obtains locates. The locates are provided promptly and free of charge through a utility approved locate service. I am enclosing printouts for the locates obtained for this project.

**THE PROJECT**

For over 20 years Jerry Harman has been the owner of 120 acres, approximately 100 acres of which is dedicated in perpetuity as a Wetlands Mitigation Bank. The ¼ mile access road

is along a section line which runs south from Eagle River Loop Rd. Harman's property is on the east side of the section line access. About 15 years ago Enstar install a main gas line on the west side of the access. On Harman's property was a large barn/storage warehouse which was unheated. At least 10 to 15 years ago Enstar had installed a 1-inch plastic distribution line from west to east across the section line, but the gas line was never connected to the structure.

In 2017 the remaining twenty (20) acres were being developed into 12 residential lots. Most of ACP's work occurring in 2017 related to developing the access road to MOA standards. Harman worked with an Enstar employee (Fiord Habib) coordinating installation of the gas distribution system onto the property. Harman paid \$35,000 to Enstar for the engineering design and installation of a 12-lot distribution system to his property.

The Municipality of Anchorage required elevation at the southern portion of the road access had to be lowered 3 1/2 feet mandating removal of the existing 1-inch plastic distribution line. After the road access improvements had been completed Enstar planned to bore under the new road and run three distribution lines east to Harman's 20 acres. Enstar or its contractor was to install the distribution system to the 12 lots.

It is important to note that this was not an accidental cutting of the gas line. ACP was on site specifically to remove the 1-inch plastic line from the access road. Harman first met with an Enstar representative at the Enstar offices who researched the records and who told Harman that the line was not energized. Foiaid Habib called Harman and left a phone message that APC could proceed stating that removal would cause "no challenge, whatsoever." Harman still has the phone message. Once the road improvement was completed Enstar would arrange to enter Harman's the property to do work relating to the installation of the new distribution system for the 12 lots being developed.

The removal of the plastic distribution line from across the section line easement was intended and approved by Enstar. As APC was removing the plastic line a gas leak occurred which was immediately crimped and taped off. There was never a dangerous situation. The line was in a remote and unpopulated area. There was no danger to any structures or danger of a fire.

APC admits that it did not immediately call 911 or Enstar. Enstar was already scheduled to come to the property. When the Enstar representative did in fact arrive, it was for purpose of doing the locates for the new subdivision lots. ACP showed the Enstar locator where the line had been energized and was pinched off. It was the owner and APC that brought the issue to the attention of the utility and the Enstar supervisor was called by its its locator. Subsequently Enstar dealt with the issue and APC and Enstar reached a settlement. The settlement information was provided to Jake Gano last year.

I wish to comment on certain statements of the March 5, 2019 letter which are not accurate and disputed by ACP:

1. *"An Enstar natural gas representative arrived at the site to perform a locate request and discovered the damage service line."* **Not Correct**-- the Enstar representative came to the work site in preparation of installation of the new distribution system.

The APC representatives on site notified the Enstar representative who called his supervisor. There was no concealment.

2. *"Alaska Construction and Paving, Inc. (ACP) failed to wait for Enstar natural gas to arrive at the excavation site and establish and mark the location of its underground pipeline facilities before excavating. "Not correct--* Enstar was never scheduled to come the property to do locates for removal of the distribution line. The locates had been completed by the independent company employed by Enstar and other Municipality of Anchorage utilities. The buried location of the 1-inch distribution line was shown by paint marks on the ground. Enstar had told APC that the gas line was not energized. The 1-inch distribution line had been in place for at least 10 years but never connected to a meter on the storage building.

3. *"The pipeline operator, Enstar, arrived on site on Monday, July 3, 2017 at approximately 10 AM to mark the location of the underground pipeline and discovered the 1-inch service line had already been excavated and damaged."* **Not correct—** Enstar did not come to the property to locate the distribution line where it crossed the roadway. Enstar's employee came to the site to do the locates for the installation of the 12-lot distribution system to be installed when ACP specifically brought the pinched off line to the attention of Enstar.

4. ACP agrees it did not call the 911 emergency telephone number because there was no emergency. The plastic gas line was immediately crimped and taped and secured using standard procedures. No natural gas was escaping no significant amount of gas escaped when the line was cut. 911 was not called following the release because Enstar was scheduled to be on site. I do not know how long it took between pinching off the line and the eventual arrival of the Enstar representative, but that would probably be established from the records of Enstar.

## LEGAL ISSUES

The first issue is that the distribution line on the private property which was owned by Enstar is not in interstate commerce. For a federal agency to have jurisdiction there must be interstate commerce.

The second issue is that DOT is attempting to impose a fine on the wrong entity. The responsible party is Enstar Natural Gas since Alaska Paving and Construction, Inc. was acting as Enstar's agent. Enstar was contacted about installation of a natural gas distribution system into the subdivision. The easements were granted and ownership of the system would be with the utility. The project was installation of a distribution system to the lots being developed. A condition of that installation was removal of 1-inch plastic line from the access road. Removal was at the direction of Enstar. Enstar gave APC the directive, authority and permission to remove the line from under the roadway which Enstar mistakenly believed was not energized. The principle (Enstar) is responsible and legally liable the conduct of its agent (ACP).

The third issue is whether the APC's failure to call 911 is excused by the fact that Enstar was already scheduled to be on the property as part of the project's follow up after the distribution line was being removed. As a historical practice in Alaska, often when a road excavator will be encountering this and removing distribution lines, the contractor will crimp and tape the lines without an Enstar representative being present the entire day.

The fourth issue is the proposal of over \$12,000 as a fine. There is no basis for the amount of this monetary punishment. This was not an accidental cutting of a plastic pipe because of ACP negligence. It was supposed to be the removal of an un-energized line for the benefit of utility. There was no fire or explosion. There was no danger or risk to the general public since the line was remote. Any lost gas natural gas was minimal. Last, the APC employees on-site were able to quickly crimped the plastic line and taped it off.

Last, ACP challenges the data DOT used in its algorithm to determine the amount of the fine. The proposed fine amount for the alleged violation is too high.

For these reasons ACP requests a hearing on the liability, on the amount of the proposed penalty and on the jurisdiction of DOT's punitive action.

Sincerely,

Enclosures

Cc client

A handwritten signature in black ink, appearing to be 'G. J. S.', is written over the 'Enclosures' and 'Cc client' lines.

Harman correction (4/22/19)