



**DEPARTMENT OF ENERGY**  
21 S. Fruit St., Suite 10  
Concord, N.H. 03301-2429

September 27, 2021

Jared Chicoine  
Interim Commissioner  
New Hampshire Department of Energy  
21 South Fruit Street, Suite 10  
Concord, New Hampshire 03301

Re: Formal Complaint regarding Abenaki Water Company  
Failure to abide by Puc 605.07 and RSA 374:48-56

Dear Commissioner Chicoine:

In accordance with Puc 204.01 *Submission of Formal Complaints*, the Division of Enforcement submits the attached complaint regarding the failure of Abenaki Water Company (Abenaki, or the Company) to comply with Puc 605.07, which requires that "[a]ll utilities shall comply with Puc 800, the underground utility damage prevention program rules." Abenaki failed to comply with Puc 605.07 because it has not operated as an active member of the One Call System of New Hampshire Underground Damage Prevention system with respect to each of its water distribution systems in New Hampshire. Based on the Division's review of filings and information provided by the Company, the period of non-compliance that is the subject of the attached complaint extended from at least May 2016 through May 2021.

RSA 365:1 allows the Department of Energy's Division of Enforcement to "make complaint to the [C]ommission" claiming Abenaki Water Company was in violation of Puc 605.07, which violation led to non-compliance with RSA 374:53 under the Underground Utility Damage Prevention System statutes. Abenaki Water Company is a water public utility as defined in RSA 362:4 with no noted exemptions for compliance with those statutes.

RSA 365:41 permits the Commission to impose a civil penalty on a utility operator if appropriate.

The Division of Enforcement has chosen to recommend this path for enforcing the Underground Damage Prevention Laws and Puc Administrative rules for the following reasons:

- 1) This allows for efficiency in evaluating 179 probable violations of the Underground Damage Prevention System.
- 2) The complaint process would take into account the size of the public water utility.
- 3) It may ultimately lead to a lower civil penalty being imposed upon Abenaki Water Company than if each violation is administered separately by the Division of Enforcement.

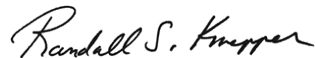
Formal Complaint regarding Abenaki Water Company  
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- 4) It is in the public interest to apply any such potential penalty to the benefit of the utility's ratepayers through a credit to bills on a per customer basis, as provided under RSA 365:41, which is a remedy not available to the Division of Enforcement.

Attached is a Division of Enforcement communication dated September 9, 2021 that outlines the basis of the complaint with relevant details regarding Abenaki's performance under New Hampshire's DigSafe statutes and rules.

The next step, if you agree, is to forward this complaint to Abenaki Water Company. The Division of Enforcement believes an appropriate time for response is 10 business days from receipt of the copy.

Sincerely,



Randall S. Knepper, P.E.  
Division of Enforcement  
Department of Energy

# STATE OF NEW HAMPSHIRE

## Intra-Department Communication

**DATE:** September 9, 2021

**AT (OFFICE):** Department of Energy

**TO:** Thomas Frantz, Division of Regulatory  
Randall Knepper, Division of Enforcement  
Paul Kasper, Division of Enforcement  
Kenneth Walsh, Division of Enforcement  
Lynn Fabrizio, Division of Enforcement  
Jayson Laflamme, Division of Regulatory

**FROM:** William F. Ruoff  
Underground Damage Prevention Specialist, Division of Enforcement

**SUBJECT:** Investigation into the Abenaki Water Company, Inc.'s  
Underground Damage Prevention Program

The following is the Department of Energy's Division of Enforcement, review and recommendation regarding Abenaki Water Company, Inc.'s participation in New Hampshire's Underground Damage Prevention Program for their five water distribution systems that operate within the State of New Hampshire. The investigation stems from information gathered through site visits and document and information requests pertaining to Docket IR 21-024.

### **Background:**

In early April 2021, during field visits to investigate the Rosebrook water distribution system ("Rosebrook") owned and operated by Abenaki Water Company, Inc. (Abenaki Water Company, Abenaki, or the Company) in Carroll, NH as part of the investigation undertaken in Docket IR 21-024, Department of Energy Staff (Staff) discovered that the Rosebrook system was not being properly marked in accordance with Puc 800 Rule requirements concerning DigSafe® requests to identify utility facilities located in or near excavation sites. As a result, Staff began research into the cause of this deficiency. Initially, Staff reviewed Department of Energy records of the Company's water systems. Staff proceeded to contact staff at the Dig Safe<sup>1</sup> One Call Center to determine if they had mapping information for the Abenaki's water distribution system in Carroll, NH. Staff learned that Abenaki had provided the Dig Safe One Call Center with information and mapping for only one of the five systems operated, namely the Company's "White Rock" water distribution system in Bow, NH. The Rosebrook system in Carroll, the "Tioga" systems in Belmont and Gilford, and the "Lakeland" system in Belmont never supplied

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<sup>1</sup> Dig Safe is a registered trade mark of Dig Safe Systems, Inc. It is often referred to as the One Call Center and is located in Wilmington, MA and acts as the central clearing house for the five states of ME, NH, VT, MA and RI.

mapping or street listings to the One Call Center, thus preventing the One Call Center from forwarding relevant excavation notifications when needed.

### **Governing Rules and Statutes for the Investigative Process:**

Appendix A lists the specific language used in the relevant statutes and rules that are applicable to this investigation. The following is a listing of the applicable statutes and rules considered.

- 1) Abenaki Water Company is a “public utility” under *RSA 362:4, Water Companies, When Public Utilities*.<sup>2</sup> Abenaki Water Company owns and operates water utility facilities that are located underground, and therefore is required to comply with the Underground Utility Damage Prevention Program, as it is, by definition, an “operator” pursuant to *RSA 374:48, Definitions*.<sup>3</sup>
- 2) Abenaki Water Company is required to comply with the New Hampshire Underground Utility Damage Prevention Puc 800 Rules pursuant to *Puc 605.07, Rules for Water Services*.<sup>4</sup>
- 3) Abenaki Water Company is required to participate in the Underground Utility Damage Prevention Program pursuant to *RSA 374:49, Damage Prevention System*.<sup>5</sup>
- 4) Abenaki Water Company is required to mark out its water mains and laterals to the property line (curb stops) pursuant to *RSA 374:53, Response by Operator*.<sup>6</sup> (Abenaki is not required to locate or mark privately owned facilities.)

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<sup>2</sup> I. Every corporation, company, association, joint stock association, partnership, or person shall be deemed to be a public utility by reason of the ownership or operation of any water or sewage disposal system or part thereof.

<sup>3</sup> IV-a. "Operator" means any public utility as defined by RSA 362:2 or RSA 362:4.

<sup>4</sup> All utilities shall comply with Puc 800, the Underground Utility Damage Prevention Program Rules.

<sup>5</sup> Each operator shall participate in an underground facility damage prevention system. The system shall operate during regular business hours throughout the year, except Saturdays, Sundays and legal holidays. The system shall receive notices of proposed excavations and transmit such notices to its members.

<sup>6</sup> Within 72 hours after receipt of notice from a proposed excavator or from the system of a proposed excavation, but not including Saturdays, Sundays, and legal holidays, an operator shall mark the location of its underground facilities in the area of the proposed excavation. An operator and an excavator may by agreement fix a later time for the operator's marking of its facilities. Once an operator has marked the location of its facilities in the area of an excavation, the excavator shall be responsible for maintaining the markings. An operator who participates in an underground facility damage prevention system shall not be required to locate underground facilities not owned by the operator; underground facilities which the owner shall not be required to locate may include, but shall not be limited to, facilities running from a house to a garage or other outbuilding.

**Dig Safe System, Inc., of which Abenaki Water Company is a member, requires its members to comply with the following mandates (see also Appendix B):**

- *To provide Dig Safe System, Inc. with service territory information to ensure proper notification of upcoming excavation projects in the vicinity of its underground facilities.*
- *To locate the underground facilities it owns or maintains after receipt of Dig Safe notices within its state's advance notification time requirement.*

**Investigation Process:**

An office discussion took place on April 16, 2021 between the Safety Bureau<sup>7</sup> and the Company regarding findings from a field visit to Carroll, NH to collect data pertaining to the Company's water distribution system as part of the investigation noted above. During the Safety Bureau's review of the information collected, Staff noted the lack of Dig Safe mark outs on the part of the water company in areas where there had been recent excavation activity. The Safety Bureau agreed that, based on those discussions, Staff would validate records available to the Department of Energy for the Company's water distribution systems.

The Safety Bureau also contacted Dig Safe and asked them to review their records for information that the Company had provided them for their five franchise water distribution systems in New Hampshire. The Dig Safe One Call Center reviewed its database and found that the Company had provided information only for the Bow "White Rock" water distribution system. Based on feedback from the Dig Safe One Call Center, the Safety Bureau created tables for each of the five Abenaki Water Company franchise systems. The Safety Bureau then began to research Dig Safe Tickets<sup>8</sup> for the period 2016 – 2021 with the assistance of Dig Safe representatives. The Safety Bureau's initial search of the database found numerous Dig Safe Tickets for both the Carroll and Gilford water systems.

The Safety Bureau scheduled a meeting on April 21, 2021 at the Company's Gilford office between Staff and Ms. Teri Kucka, an employee of the Company, to discuss the deficiencies found in the Company's compliance with the Underground Damage Prevention Program. Ms. Kucka agreed to review the tickets provided for Carroll and Gilford to confirm that their water distribution systems were in the areas described on the tickets, and to check job cards for mark outs that Company Staff had completed. From April 21–May 3, 2021, Ms. Kucka worked with Dig Safe to update the Company's information for its five franchise areas; that task was completed on May 3, 2021. The Abenaki Water Company is now regularly receiving Dig Safe Tickets for all five of its franchise areas. Staff continued to review all ticket information for each of the five franchise areas for the period from 2016 through May 3, 2021.

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<sup>7</sup> The investigation spanned the time period in which the New Hampshire Legislature created a newly formed Department of Energy separate from the Commission. As a result, drawings and conclusions referenced throughout may reference the Commission's Safety Division, which is now the Safety staff of the newly formed Department of Energy, Division of Enforcement (Safety Staff, Safety, or Safety Bureau).

<sup>8</sup> A ticket is the commonly used term for an electronic notification that is created once an intent to excavate is made to the One Call Center.

Based on its review, the Safety Bureau found 143 Dig Safe tickets in total for all of Abenaki’s water systems and another 36 Dig Safe tickets for the Company’s "Lakeland" sewer system in Belmont were not properly fulfilled and, as a result, are in violation for failure to mark facilities per RSA 374:53.

**Findings (Probable Violations) Summary:**

		<u>Tickets</u>
• Bow “White Rock Water”	Jan 2014 - May 2021	0
• Belmont “Lakeland Management Company”	May 2016 - May 2021	36
• Belmont “Tioga River Water Company”	May 2019 - May 2021	1
• Carroll “Rosebrook Water Company”	Oct 2016 - May 2021	97
• Gilford “Tioga River Water Company”	May 2019 - May 2021	9
• Belmont “L.M.C.” Sewer System	May 2016 - May 2021	36
Total Unmarked Tickets		179

**List of Tickets per System per Year**

A breakdown of the 179 probable violations was created per franchise so that areas of excavation within the proximity to water mains could be verified. Five franchise tables are shown in Appendix C that provide details of **Dig Safe Tickets** during the periods of May 2016 through May 3, 2021. These are compiled by street and represent Dig Safe requests made by excavators that were not marked by Abenaki Water Company. Each of the Company’s failures to mark out Dig Safe requests occurred because Abenaki had not provided complete and accurate franchise information to the Dig Safe System.

Puc 800 Underground Utility Damage Prevention Program (DigSafe) rules identify certain actions by “operators” per Puc 802.12 that are required to be undertaken by all public utilities.

**Findings and Potential Civil Penalties - Summary:**

Abenaki Water Company, Inc. has been in violation of the New Hampshire Underground Damage Prevention statute, RSA 374:53, and applicable Puc 800 Rules with respect to four of its five water distribution systems and its sewer system in Belmont.<sup>9</sup> A number of the identified probable violations of Puc 800 rules with respect to the Company’s operation of its water distribution systems and sewer system date back to 2016 and thus may be considered long-standing violations of the rules.

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<sup>9</sup> “Lakeland Management Company” is a sewer system owned and operated by Abenaki in New Hampshire.

**Recommendation regarding process for levying a civil penalty:**

There are two procedural paths available to the Commission regarding remedies for a utility's failure to comply with Dig Safe requirements under the Underground Utility Damage Prevention System. The first is to impose civil penalties on excavators or utilities pursuant to RSA 374:55 (III) and (VIII), which is typically done by the Division of Enforcement; the other remedy is to impose civil penalties on public utilities under RSA 365:41, as determined by the Commission. In this case, the Bureau of Enforcement recommends the latter option, as follows.

1. A civil penalty should be imposed on Abenaki pursuant to RSA 365:41 for failure to comply with applicable Puc 800 rules and state statutes (RSAs 374:49, 374:53) after applicable notice for a hearing on the Department's findings. The Division of Enforcement recommends that the Commission initiate such a proceeding. The Safety Bureau considered two potential statutory options for the Commission to consider in determining whether a civil penalty would be an appropriate remedy. Civil penalties may be applied under RSA 374:55 (III and VIII) for non-compliance of New Hampshire Underground Damage Prevention Rules. Such penalties are applicable to operators and excavators whether they are public utilities or non-public utilities. Each probable violation is separately considered and remedies for 179 probable violations would be individually determined.

A second option may be applied pursuant to RSA 365:41, which is applicable only to public utilities and requires a formal complaint and proceeding. The Safety Bureau believes this may be appropriate given the number of probable violations and the associated period of past non-compliance. This method has a lower maximum civil penalty but has never been exercised previously by the current staff of the Division of Enforcement, including in its predecessor capacity as the Safety Division of the Public Utilities Commission. Under this provision, the Department's Division of Enforcement would file a complaint and recommendation with the Commission and the Commission would open a proceeding.

**Additional Recommendations regarding Abenaki Improvements to its Damage Prevention Program:**

The Safety Bureau recommends that the following three basic requirements also be considered.

- (1) First, as a member of the Dig Safe One Call Center, Abenaki Water Company should provide the most current information and mapping of each of its five franchise water distribution systems in New Hampshire.<sup>10</sup> This will ensure all excavation notifications are sent to Abenaki and provide confidence to the excavation industry that all underground facility operators have been properly contacted.
- (2) Second, Abenaki Water Company should develop written Underground Damage Prevention Program operating policies and procedures for marking and maintaining

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<sup>10</sup> This task was accomplished by the Company on May 3, 2021.

records regarding each of its systems and facilities. **The Company should complete this task immediately to reduce risks and potential damage to its water systems.**

- (3) Third, the employees of the Company should be trained in accordance with the National Utility Locating Contractors Association (NULCA) Professional Competence Standards for Locating Technicians Fourth edition 2015. **The Company should complete this task within 6 months from the issuance of this recommendation. The Company should also establish a refresher training for its employees and contractors, as outlined in the NULCA Standards.**

#### **Proposed Penalty Option 1:**

Based on RSA 374<sup>11</sup> and applicable Puc 800 rules, a fine of up to \$500 may be imposed for each violation. This is the typical penalty amount used by the Division of Enforcement in the past. The maximum total for fines applicable to the 179 probable non-recurring violations within the four franchise areas (using the typical \$500 per violation) **would be \$89,500**. However, if the operator previously violated RSA 374:53 within the prior 12 months of any violation, the maximum fine could be up to \$5,000 and the total penalty may exceed \$89,500.

#### **Proposed Penalty Option 2:**

Under RSA 365:41,<sup>12</sup> which provides for a maximum penalty not to exceed \$250,000 or 2.5% of the Company's gross operating revenue of \$611,330, the fine **would be \$15,283**, which represents 2.5% of the Abenaki's gross operating revenue.

#### **RECOMMENDED PENALTY: Option 2 with a total fine of \$15,283.**

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<sup>11</sup> **TITLE XXXIV 374:55 Civil Penalty.** –*III. Any operator which does not mark the location of its underground facilities as required by RSA 374:53 or rules of the commission regarding tolerance zones and marking procedures shall be subject to the penalties in paragraph VIII.*

*VIII. Any excavator or operator that does not comply with RSA 374:51 through 374:54 shall be required either to complete an underground facility damage prevention program approved by the commission, or to pay a civil penalty of up to \$500. The civil penalty may be up to \$5,000 if the excavator or operator previously violated RSA 374:51 through 374:54 within the prior 12 months or if the violation results in bodily injury or property damages exceeding \$50,000, excluding utility costs.*

<sup>12</sup> **TITLE XXXIV 365:41 Penalty Against Utility.** – *Any public utility which shall violate any provisions of this title, or fails, omits or neglects to obey, observe or comply with any order, direction or requirement of the commission, shall be subject to a civil penalty, as determined by the commission, not to exceed \$250,000 or 2.5 percent of the annual gross revenue that the utility received from sales in the state, whichever is lower. Such penalties shall be applied to the benefit of the utility's ratepayers through a credit to bills, or, if the credit is of an amount determined by the commission to be insignificant on a per customer basis, to programs that benefit low income ratepayers. No portion of any fine, nor any costs associated with an administrative or court proceeding which results in a fine pursuant to this section, shall be considered by the commission in fixing any temporary, permanent, or emergency rates or charges of such utility.*



This recommendation took into account the size of the company and the size of net income. The Safety Bureau considered the following factors in determining whether the maximum penalty under RSA 365:41 is an appropriate remedy in this case.

- Abenaki did not locate underground facilities for 4 out of 5 water systems.
- Abenaki did not locate underground facilities for at least 179 occurrences that the Safety Bureau has validated for a period of approximately 5 years.
- Abenaki placed customers of the water systems at risk for interruptions of necessary fire protection and potable water service.
- Abenaki was aware of the responsibilities of participating in the One Call system since one of the 5 water systems was appropriately locating its facilities for the Dig Safe system.
- Excavators were placed at risk because they relied on participation of utilities in a statewide program.
- First responders were potentially exposed to additional damages requiring emergency services and personnel.
- While no documented damages did occur, the potential for damages was significant and spanned several years.
- Abenaki should be held to the same standards as all other public utilities in the State of New Hampshire and penalties should be imposed in a consistent and uniform manner.