

DM 03-117

METRA INDUSTRIES

Order Affirming Penalties

and

**Order to Show Cause Why the Commission Should Not Prohibit All
Regulated Utilities from Doing Business with Metra Industries,
Inc. for Having Violated the Underground Utility Damage
Prevention Program**

O R D E R N O. 24,180

June 3, 2003

I. BACKGROUND

Metra Industries, Inc. (Metra) is a foreign corporation incorporated in the state of New Jersey and registered to do business in New Hampshire. Its principal place of business is 50 Muller Place, Little Falls, New Jersey, 07424 and Mr. Gary Stivaly serves as President. Its registered agent is National Corporation Research, Ltd., 63 Pleasant Street, Concord, NH 03301.

Northern Utilities, Inc., a natural gas utility doing business in New Hampshire, reported to the Underground Utility Damage Prevention Program, as required by the New Hampshire Public Utilities Commission (Commission) pursuant to N.H. Code Admin. Rule Puc 807.01, probable violations at its facilities as follows:

1) On September 24, 2002, Northern reported a probable violation at Lowell and Roosevelt Avenues, Dover, New Hampshire;

2) On November 5, 2002, Northern reported a probable violation at 15 Maple Street, Dover, New Hampshire;

3) On November 20, 2002, Northern reported a probable violation on 11 Gardner Street, Exeter, New Hampshire;

4) On November 22, 2002, Northern reported a probable violation at 7 Gardner Street, Exeter, New Hampshire; and

5) On December 19, 2002, Northern reported a probable violation at Buzzell and Auburn Streets, Exeter, New Hampshire.

The reports alleged that Metra did not adequately maintain the excavation markings of natural gas facilities previously marked by an operator, constituting a probable violation of RSA 374:53 and, that Metra caused damage within the boundaries of marked facilities, constituting a probable violation of RSA 374:55, V.

The Safety Division of the Commission, pursuant to N.H. Code Admin. Rule Puc 806.02, based upon the reports filed with the Commission by Northern Utilities, issued, by certified mail, Notices of Probable Violation (NOPV) to Metra pertaining to the above alleged violations. The NOPVs were issued as follows:

1) NOPV No. 02216 regarding the September 24, 2002 probable violation at Lowell and Roosevelt Avenues, Dover, New

Hampshire was issued on December 16, 2002. Metra Construction of 50 Muller Place, Little Falls, New Jersey received the NOPV, as evidenced by the signed mail receipt, but did not date the receipt;

2) NOPV No. 02254 regarding the November 5, 2002 probable violation at 15 Maple Street, Dover, New Hampshire was issued on December 31, 2002. Metra Industries of 2120 Commonwealth Avenue, Newton, Massachusetts received the NOPV on January 3, 2003, as evidenced by the signed and dated certified mail receipt;

3) NOPV No. 02255 regarding the November 20, 2002 probable violation on 11 Gardner Street, Exeter, New Hampshire was issued on December 31, 2002 and was received by Metra Industries of 2120 Commonwealth Avenue, Newton, Massachusetts on January 3, 2003, as evidenced by the signed and dated certified mail receipt;

4) NOPV No. 02256 regarding the November 22, 2002 probable violation at 7 Gardner Street, Exeter, New Hampshire was issued on December 31, 2002 and was received by Metra Industries of 2120 Commonwealth Avenue, Newton, Massachusetts on January 3, 2003, as evidenced by the signed and dated certified mail receipt; and

5) NOPV No. 02280 regarding the December 19, 2002 probable violation at Buzzell and Auburn Streets, Exeter, New Hampshire was issued on January 21, 2003 and was received by

Metra Industries of 50 Muller Place, Littlefalls, New Jersey on January 24, 2003, as evidenced by the signed and dated certified mail receipt.

The NOPVs set forth detailed descriptions of the probable violations alleged, referencing New Hampshire Statutes and Administrative Rules violated by Metra, and indicated the date and location of each violation. The Safety Division also advised Metra that civil penalties were likely to be imposed pursuant to RSA 374:55 and Puc 806.07 in the event of an unfavorable judgment and informed Metra of its statutory rights and alternatives for resolving the complaints.

Metra did not respond in any manner to any of the Safety Division's NOPVs. Based upon the evidence before it and the lack of any response from Metra, the Safety Division, pursuant to its authority under N.H. Code Admin. Rule Puc 806.04(a), issued Notices of Violation (NOV) to Metra. The NOVs, pursuant to Puc 806.04(b)(3) and 806.07(a) and (b), assessed civil penalties as follows:

- 1) NOV No. 02216 regarding the September 24, 2002 probable violation at Lowell and Roosevelt Avenues, Dover, New Hampshire was issued on February 19, 2003 and imposed a \$500 penalty. Metra received the NOV on February 24, 2003, as evidenced by the signed and dated certified mail receipt;

- 2) NOV No. 02254 regarding the November 5, 2002 probable violation at 15 Maple Street, Dover, New Hampshire was

issued on April 11, 2003 and imposed a \$300 penalty. Metra received the NOV on April 21, 2003, as evidenced by the signed and dated certified mail receipt;

3) NOV No. 02255 regarding the November 20, 2002 probable violations on 11 Gardner Street, Exeter, New Hampshire was issued on April 11, 2003 and imposed a \$600 penalty. Metra received the NOV on April 21, 2003, as evidenced by the signed and dated certified mail receipt;

4) NOV No. 02256 regarding the November 22, 2002 probable violation at 7 Gardner Street, Exeter, New Hampshire was issued on April 11, 2003 and imposed a \$400 penalty. Metra received the NOV April 21, 2003, as evidenced by the signed and dated certified mail receipt; and

5) NOV No. 02280 regarding the December 19, 2002 probable violation at Buzzell and Auburn Streets, Exeter, New Hampshire was issued on April 11, 2003 and imposed a \$700 penalty. Metra received the NOV on April 21, 2003, as evidenced by the signed and dated certified mail receipt.

Metra, once again, completely failed to provide any response to NOVs Nos. 02216; 02254; 02255; and 02256. Metra provided a partial, though nonconforming, response to NOV No. 02280, by way of a copy of a letter to Underwood Engineers, Inc., the engineering company hired by the Town of Exeter in connection with the High Street Sewer project. In that letter, Metra did not deny the alleged violations but requested all

future contacts by the Commission about the violation be forwarded to Underwood Engineers for resolution.

Recently, Northern Utilities has reported a sixth probable violation. On May 19, 2003, Northern reported that Metra was excavating at 70 Dennett Street in Portsmouth, New Hampshire on May 15, 2003 without a valid Dig Safe ticket. Northern's report and Safety Division's investigation revealed that Metra failed to follow prescribed notification procedures.

II. COMMISSION ANALYSIS

New Hampshire RSA 374:48-56, Underground Utility Damage Prevention System, more commonly referred to as the Dig Safe program, protects the public from hazards associated with damaged underground facilities. The Commission is responsible for enforcing compliance with RSA 374:48-56.

The Commission's rules require that a recipient of a NOPV or NOV provide a timely and specific response. See, N.H. Code Admin. Rules Puc. 806.03 and 806.05. Based upon the record before us, we find that Metra completely failed to respond to the NOPVs duly issued by the Safety Division by failing, within 30 days of receipt, to either submit in writing evidence refuting the probable violation, requesting in writing an informal conference with Commission Staff, or executing a consent agreement with the Commission resolving the dispute. See N.H. Code Admin. Rule Puc 806.03.

We also find that Metra completely failed to respond to the NOVs duly issued by the Safety Division by failing, within 10 days of receipt, to either sign a consent agreement and remit a civil penalty or file a written request for a hearing before the Commission. See N.H. Code Admin. Rule Puc 806.05.

We note that the Metra Industries, Inc. is registered to do business in the state of New Hampshire and has an address of 50 Muller Place, Little Falls, New Jersey. NOPV Nos. 02254, 02255, and 02256 list Metra Industries, Inc. at 2120 Commonwealth Avenue, Newton, Massachusetts, which we understand is a satellite office of the New Jersey corporation. No Metra corporation with a Massachusetts address is registered to do business in New Hampshire.

We are disturbed by Metra's apparent disregard for the Commission's regulatory authority as well as for the safety of the public. We find that Metra presents a serious risk to the public's safety in New Hampshire. For this reason, we will affirm the penalties imposed by the NOVs and will consider whether all utilities under the jurisdiction of the Commission should be barred from doing business with Metra.

In addition, we request that the Attorney General institute such action as necessary to collect the fines we have assessed, and, pursuant to RSA 374:55, VII, we will assess

Metra for all expenditures which may be incurred by the Attorney General to collect these civil penalties.

Based upon the foregoing, it is hereby

ORDERED, that METRA INDUSTRIES, INC. of 50 Muller Place, Little Falls, New Jersey, and METRA INDUSTRIES of 2120 Commonwealth Avenue, Newton, Massachusetts appear before the New Hampshire Public Utilities Commission at its offices at 8 Old Suncook Road, Concord, New Hampshire on June 24, 2003, at 10:00 a.m. to show cause why the Commission should not order utilities regulated by the Commission to not do business with Metra; and it is

FURTHER ORDERED, that the Executive Director provide a copy of this Order to the Attorney General and request that he institute such action as necessary to collect the fines we have assessed; and it is

FURTHER ORDERED, that, pursuant to RSA 374:55, VII, Metra is assessed for all expenditures which may be incurred by the Attorney General to collect the civil penalties we have imposed; and it is

FURTHER ORDERED, that the Executive Director of the Commission shall cause a copy of this order to be served on Metra or its agent at both addresses listed above by U.S. Post Office Priority Mail with Delivery Confirmation, no later than June 10, 2003; and it is

FURTHER ORDERED, that the Executive Director of the Commission shall cause a copy of this order to be mailed by first class mail to all regulated utilities in New Hampshire; and it is

FURTHER ORDERED, that the Executive Director of the Commission shall cause a copy of this order to be mailed by first class mail to all municipalities in New Hampshire.

By order of the Public Utilities Commission of New Hampshire this third day of June, 2003.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Debra A. Howland
Executive Director and Secretary