

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BLUE JAY COMMUNICATIONS, INC. )

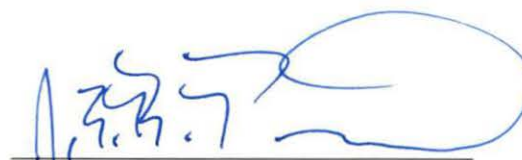
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ALLEGED VIOLATION OF UNDERGROUND )  
FACILITY DAMAGE PREVENTION ACT )

CASE NO.  
2019-00278

NOTICE OF FILING

Notice is given to all parties that Commission Staff's Division of Inspections' Post-Hearing Brief has been filed into the record of this proceeding.



J. E. B. Pinney  
Acting General Counsel  
Public Service Commission  
P.O. Box 615  
Frankfort, KY 40602

DATED FEB 14 2020

cc: Parties of Record

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COMMISSION STAFF'S POST-HEARING BRIEF

Blue Jay Communications, Inc. (Blue Jay) is a foreign corporation active and in good standing with Kentucky's Secretary of State. Blue Jay is organized under the laws of Ohio and its principal office is located at 7500 Associate Avenue, Brooklyn, Ohio. On October 31, 2018, Blue Jay was installing underground cable as a contractor for Spectrum in Louisville, Jefferson County, Kentucky. Installation of underground cable is "excavation" within the meaning of KRS 367.4903(6), which states:

"Excavation" means any activity that results in the movement, placement, probing, boring, or removal of earth, rock, or other material in or on the ground by the use of any tools or equipment, by the discharge of explosives, or by the harvesting of timber using mechanized equipment. Forms of excavating include but are not limited to auguring, backfilling, digging, ditching, drilling, driving, grading, piling, pulling-in, ripping, scraping, trenching, and tunneling. Driving wooden stakes by use of hand tools to a depth of six (6) inches or less below existing grade shall not constitute excavation;

Engaging in excavation made Blue Jay an “excavator” within the meaning of KRS 367.4903(4), which states “[e]xcavator” means any entity or individual, other than those exempted by KRS 367.4915, engaged in excavation, demolition, or timber harvesting using mechanized equipment.” As an excavator Blue Jay is subject to the provisions of the Underground Facility Damage Prevention Act of 1994 (Damage Prevention Act).<sup>1</sup>

Under the Damage Prevention Act, the Commission has authority to investigate and assess civil penalties for any violation of the Act that results in excavation damage to an underground facility used to transport natural gas or hazardous liquid subject to federal pipeline safety laws, 49 U.S.C. § 60101. *et seq.* <sup>2</sup> Pursuant to this authority, the Commission’s Division of Inspections (DOI) receives and investigates reports of damage to underground facilities used to transport natural gas or hazardous liquid. Operators of such facilities are required by KRS 367.4909(4) to report excavation damage to the Commission within thirty calendar days of being informed of the damage.

Following an investigation, DOI cited Blue Jay for violating the Damage Prevention Act on October 31, 2018, when a bore head operated by Blue Jay damaged a two inch natural gas main owned and operated by Louisville Gas and Electric Company (LG&E) at 3105 Wynbrooke Circle, Louisville, Kentucky. The alleged violation was not resolved administratively, and the Commission opened this case to

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<sup>1</sup> KRS 367.4901 through KRS 367.4917.

<sup>2</sup> KRS 367.4917(6).

conduct a formal investigation into the incident and Blue Jay's alleged violation of the Act.

Prior to a public hearing held on January 24, 2020, DOI and Blue Jay entered a Joint Stipulation into the record. At the hearing the parties acknowledged the Joint Stipulation establishes the facts upon which a decision in this case should be made. The parties further agreed the incident at issue is the first and only alleged violation of the Damage Prevention Act by Blue Jay, and that the underground facility involved in this incident contained natural gas which escaped into the atmosphere when the facility was damaged. DOI submits this Brief in compliance with the Commission's January 24, 2020 post-hearing scheduling order.

#### Background

The General Assembly enacted the Damage Prevention Act to establish an effective underground damage prevention procedure in recognition that an effective damage prevention program results in public and workplace safety and protection of consumer services.<sup>3</sup> The purpose of the Damage Prevention Act is to prevent damage to underground facilities containing natural gas or hazardous liquid, and thereby reduce the likelihood of injury to people, property, and the environment resulting from the escape and possible ignition of natural gas or hazardous liquid. The Damage Prevention Act requires an excavator to hand-dig or use nonintrusive means to avoid damage to the underground facility when excavation is necessary in the approximate

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<sup>3</sup> KRS 367.4901.

location of the underground facility.<sup>4</sup> The “approximate location” of underground metallic facilities and underground nonmetallic facilities with metallic tracer wire is defined in KRS 367.4903(11) as “. . . a distance not to exceed the combined width of the underground facility plus eighteen inches measured from the outer edge of each side of the underground facility. . .”

#### Joint Stipulation

DOI and Blue Jay have stipulated the approximate location of the gas main was properly marked by LG&E prior to Blue Jay’s excavation.<sup>5</sup> Blue Jay hand dug, or pot holed, various locations on the job site, including the approximate location of the underground facility that was ultimately damaged, to expose the location of the underground facilities marked by LG&E.<sup>6</sup> Blue Jay drove through the approximate location with a mechanized underground bore head without initially damaging the underground facility.<sup>7</sup> However, the underground facility was damaged when the boring equipment was withdrawn.<sup>8</sup> The underground facility contained natural gas, which did

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<sup>4</sup> KRS 367.4911(10).

<sup>5</sup> Joint Stipulation, No.3.

<sup>6</sup> *Id.* No. 4, 7.

<sup>7</sup> *Id.* No. 8.

<sup>8</sup> *Id.*

escape into the atmosphere.<sup>9</sup> This is the first and only alleged violation of the Damage Prevention Act involving Blue Jay.<sup>10</sup>

### Analysis

KRS 367.4811(10) states “When excavation or demolition is necessary within the approximate location of the underground facility, the excavator shall hand-dig or use other nonintrusive means to avoid damage to the underground facility.” The word “shall” in KRS 367.4811(10) carries the common, ordinary meaning of that word and is therefore a word of command<sup>11</sup>. In *Vandertoll v. Commonwealth*, the Kentucky Supreme Court found that “shall means shall.”<sup>12</sup> Blue Jay was required by the statute to hand dig or use other nonintrusive means of excavation in the approximate location of the underground facility in order to satisfy the last clause of KRS 367.4911(10), that being to avoid damage to the underground facility. According to KRS 367.4903, nonintrusive excavating means “excavation using hand tools or equipment that uses air or water pressure as the direct means to break up soil for removal by hand tools or vacuum excavation.”

Blue Jay will argue it did engage in hand digging in the approximate location by pot holing various locations of the job site, and it did so in an attempt to avoid damage to the underground facility. However, in addition to hand digging Blue Jay also used

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<sup>9</sup> Case No. 2019-00278, Order (Jan. 24, 2020).

<sup>10</sup> *Id.*

<sup>11</sup> KRS 446.080(4).

<sup>12</sup> *Vandertoll v. Com.*, 110 S.W.3d 795 (2003).



mechanized boring equipment, which is not a nonintrusive means of excavation, in the approximate location of the underground facility. The underground facility was then damaged by the boring equipment. Blue Jay's attempt to avoid damaging the underground facility by pot holing failed to protect the underground facility from damage. It makes no difference that the damage occurred upon withdrawal of the bore head from the site rather than upon driving the bore head through the earth initially. It also makes no difference that the bore head was not turning at the time of the damage. What is of significance is that a bore head was being used within the approximate location of an underground facility, and the facility was damaged. A bore head does not use air or water pressure as the direct means to break up soil for removal by hand tools or vacuum excavation, and is therefore not a nonintrusive means of excavating.

While it is accurate to point out that the language of KRS 367.4911(10) does not expressly read: "use of mechanized equipment in the approximate location of an underground facility is prohibited," it is not accurate to contend the language of the statute permits the use of such equipment in the approximate location of an underground facility. Rather, KRS 367.4911(10) sets forth what excavation methods are permitted when excavation or demolition is necessary within the approximate location of an underground facility. In this the statute is clear, hand digging and nonintrusive excavation methods are the only permissible means of excavating in the approximate location of an underground facility.

In its September 16, 2019 response to the Commission's August 27, 2019 Order initiating this proceeding, Blue Jay maintains the underground facility was closer to the surface than believed to be, and that if the facility had been buried at the expected

depth, it would not have been contacted by the bore head. The potential for variation in depths of underground facilities is one reason hand digging or nonintrusive excavation methods are required in the approximate location of underground facilities containing natural gas or hazardous liquid. The definition of "approximate location" in KRS 367.4911(11)(a) includes the width of the facility plus eighteen inches measured from the outer edge of each side of the facility. The underside of a facility is a side of the facility, the approximate location extends eighteen inches from each side of the facility, so the eighteen inches of ground beneath the underground facility is within the approximate location.

By using boring equipment within the approximate location of an underground facility, Blue Jay failed to comply with KRS 367.4911(10) and is therefore subject to the civil penalties articulated in KRS 367.4917(1):

An excavator who fails to comply with any provision of KRS 367.4911, or an operator who fails to comply with any provision of KRS 367.4909, shall be guilty of endangering underground facilities and may be subject to a fine of two hundred and fifty dollars (\$250) for the first offense, no more than one thousand dollars (\$1,000) for the second offense within one (1) year, and no more than three thousand dollars (\$3,000) for the third and any subsequent offense.

Due to the damage caused to an underground facility by Blue Jay's failure to comply with KRS 367.4911(10) Blue Jay is also subject to the civil penalty provided in KRS 367.4917(4):

Any person who violates any provision of the Underground Facility Damage Prevention Act of 1994, KRS 367.4901 to 367.4917, that involves damage to



a facility containing any flammable, toxic, corrosive, or hazardous material or results in the release of any flammable, toxic, corrosive or hazardous material shall be subject to a fine not to exceed one thousand dollars (\$1,000) for each offense . . . [.]

Conclusion

This is the first instance in which Blue Jay has failed to comply with the Damage Prevention Act, and Blue Jay has stipulated the damaged facility contained natural gas which was released into the atmosphere at the time of the damage. Therefore, it is DOI's position that Blue Jay should be assessed a civil penalty of two hundred and fifty dollars (\$250) as set forth in KRS 367.4917(1) and a civil penalty of one thousand dollars (\$1,000) as set forth in KRS 367.4917(4), for a total penalty of one thousand, two hundred, fifty dollars (\$1,250).

Respectfully submitted,

A handwritten signature in blue ink that reads "Tina Frederick". The signature is written in a cursive style and is positioned above a horizontal line.

Tina Frederick  
Staff Attorney  
Public Service Commission  
P.O. Box 615  
Frankfort, Kentucky 40602

DATED FEB 14 2020

cc: Parties of Record

Blue Jay Communications, Inc.  
7500 Associate Ave  
Brooklyn, OHIO 44144

\*John M Williams  
Williams Kilpatrick PLLC  
3151 Beaumont Centre Circle  
Suite 375  
Lexington, KENTUCKY 40513