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PUBLIC SERVICE COMMISSION

COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

In the Matter of:

BLUE JAY COMMUNICATIONS, INC.)	
)	
_____)	CASE NO.
)	2019-00278
ALLEGED VIOLATION OF UNDERGROUND)	
FACILITY DAMAGE PREVENTION ACT)	

POST-HEARING BRIEF OF BLUE JAY COMMUNICATIONS, INC.

Blue Jay Communications, Inc. (“Blue Jay”) submits this post-hearing brief pursuant to the Commission’s January 24, 2020 order:

I. INTRODUCTION

This case is about the reading of a statute, KRS § 367.4911(10), which states, in pertinent part:

367.4911 Excavator or person responsible for excavation to notify operator of work schedule; responsibilities of excavator

(10) When excavation or demolition is necessary within the approximate location of the underground facility, the excavator shall hand-dig or use nonintrusive means to avoid damage to the underground facility.

The Kentucky Public Service Commission Division of Inspections (“Inspections”) alleges that Blue Jay violated this statute when it damaged a natural gas line owned by Louisville Gas & Electric (“LG&E”) on October 31, 2018. Blue Jay contends that it complied with the statute by hand-digging to locate the gas line before using mechanized

equipment in the area. Inspections argues that the statute prohibits the use any mechanized equipment in the “Approximate Location” of the gas line.¹

II. FACTS

The parties have stipulated to the material facts. (See Joint Stipulation filed January 24, 2020). On October 31, 2018, Blue Jay was installing underground cable as a contractor for Spectrum in Louisville. Blue Jay notified LG&E of its work, and the gas line was marked as required. Blue Jay then hand-dug in various locations where the gas line was marked, exposing the line.

After the line was exposed, Blue Jay used underground boring equipment to install the cable. This cable is mechanically pulled from a spool. It cannot be pulled by hand. The stipulation contains a diagram showing the direction of the boring which crossed Wynbrooke Circle. A copy of the diagram is attached as Exhibit 1. Blue Jay hand dug in the Approximate Location, exposing the line. Blue Jay’s boring underground boring head then passed by the gas line with no issues. When the boring equipment was pulled out, it struck the gas line.

III. ARGUMENT

The Commission’s role here is like that of judge whose job is to “interpret and apply the law.” *Commonwealth ex re. Beshear v. Commonwealth Officer of the Governor ex rel. Bevin*, 498 S.W.3d 355, 370 (Ky. 2016). The task is “to read the statutes and discern their meaning, and nothing more.” *Id.* First, a court looks at the language of the

¹ KRS § 367.4903 (11) defines “Approximate Location” as:

(a) For underground metallic facilities and underground nonmetallic facilities with metallic tracer wire, a distance not to exceed the combined width of the underground facility plus eighteen (18) inches measured from the outer edge of each side of the underground facility; ...

statute and gives it its plain meaning. *Kentucky Employees Retirement System v. Seven Counties Services, Inc.*, 580 S.W.3d 530 (Ky. 2019). “[I]f the meaning is plain, then the court cannot base its interpretation on any other method or source. In other words, we assume that the Legislature meant exactly what it said, and said exactly what it meant.” *University of Louisville v. Rothstein*, 532 S.W.3d 644, 648 (Ky. 2017) (citations omitted). Simply put, if the language is clear and there is no ambiguity, there is no need for construction of the statute. *Jackson v. Commonwealth*, 530 S.W.3d 925 (Ky.App. 2017). Where there is ambiguity, the court may then resort to legislative history, tools of construction and interpretation by other courts. *Delphi Automotive Systems, LLC v. Capital Community Economic/Indus. Development Corp., Inc.* 434 S.W.3d 481 (Ky. 2014).

Turning to the language of KRS § 367.4911(10), the first question is: *What does the plain language of the statute require?*

(10) When excavation or demolition is necessary within the approximate location of the underground facility, the excavator shall hand-dig or use nonintrusive means to avoid damage to the underground facility.

The parties agree that the Blue Jay was excavating within the Approximate Location. The parties also agree that Blue Jay hand-dug in the Approximate Location to expose the gas line. This was done expose the gas line to avoid damaging it. Blue Jay fully complied with the plain language of the statute.

In the Investigation Report appended to the August 27, 2019 Order in this matter, Inspections offers no explanation of how exactly it believed the statute was violated.

Rather, the report states that the investigator spoke to Gino Pulito, an attorney for Blue Jay, and “agreed to provide Mr. Pulito a summary of what we believe should have been done by BJC.” Blue Jay received that explanation by email dated June 14, 2019, attached as Exhibit 2. This explanation interprets the statute as follows:

This section [KRS § 367.4911 (10)] requires an excavator performing work in the approximate location of an underground facility to hand-dig or use non-intrusive means to avoid damage to the underground facility. It does not appear that Blue Jay Communications located the underground line by hand digging or “post-holing” prior to boring.

Exhibit 2. No mention was made of any prohibition against boring in the Approximate Location. Rather, the statute is characterized as requiring exactly what Blue Jay did—expose the gas line in the Approximate Location.

This case is not about Blue Jay’s civil liability for damage to the gas line. Whether it acted prudently in withdrawing the boring equipment is not the issue. The only question is whether it complied with the statute by hand-exposing the gas line. It did.

Evidently, Inspections believes the statute is ambiguous requiring new language to clarify its meaning:

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.

(Commission Staff’s Post-Hearing Brief, p. 6). What the statute *really* means—so goes this argument—is that under no circumstances can mechanized equipment be used within the Approximate Location, regardless of any hand-digging or potholing. In Blue Jay’s

case this requires an impossible task: hand-pulling and hand-installing an underground cable. The statute does not say that, nor does it intend such a result.

Even if the statute were ambiguous, one need look no further than Inspections' own records for a common sense reading of the statute. The investigation file was made part of the record on November 1, 2019. LG&E emailed the following narrative to Inspections:

Narrative:

A contractor (Blue Jay Communications) was boring in new Spectrum TV duct when they hit the bottom of a 2" plastic gas pipeline. The contractor stated that they spotted the top of the main to measure the depth before boring but still did not give enough room for the bore. The LG&E Damage Investigator explained to the contractor that they need to hand expose the facility at a minimum of 18" around and both sides so they see clearly and have enough time to adjust if there bore head location is off as this would give them time to react before a damage is caused. The 2" gas pipeline was located accurately and marks were visible.

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This description comports with the statute. Indeed, it is precisely what was explained to Blue Jay's counsel. Exhibit 2. The hand-digging allows a better view of the area so that the excavator can clearly see the underground facility. Blue Jay located the gas line by hand-digging prior to boring. That is what the statute requires--nothing more. In fact, this hand-digging worked just as LG&E described, because Blue Jay did not contact the gas line while actually excavating. As noted by LG&E—the real aggrieved party here—this hand-digging is what the law requires. There is no statute preventing the use of mechanized equipment.

Rather than clarifying the law, Inspections' position begs the question. *If this were, indeed, the intent, why was this not plainly stated by the Legislature?* If the Legislature had wanted to outlaw the use of mechanized equipment near underground utilities, it could easily have done so by explicitly saying it. The Underground Facility

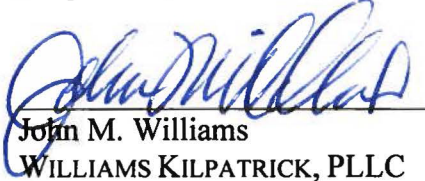
Damage Prevention Act, KRS §§ 367.4901, *et seq.*, was adopted in 1994. Similar statutes exist in other states. For example, that is precisely what the Commonwealth of Virginia did in its law where it specifically states that one of the duties of an excavator is “[n]ot utilizing mechanized equipment within two feet of the extremities of all exposed utility lines.” Va. Code Ann. § 56.265.24. North Carolina adopted a similar prohibition. N.C. Gen. Stat. § 87-122(10). Kentucky could have adopted similar language but chose not to do so. Inspections urges the Commission to read into read new language into the statute, effectively amending it read like these other state laws.

Courts “should reject a construction that is unreasonable and absurd, in preference for one that is reasonable, rational, sensible and intelligent.” *Commonwealth v. Kash*, 967 S.W.2d 37, 44 (Ky.App. 1997) (citations omitted). Statutes must be given a practical construction. *Pewee Valley Fire Protection Dist. V. South Oldham Fire Protection Dist.*, 570 S.W.2d 290 (Ky.App. 1978). Even if the statute were somehow ambiguous, the interpretation urged by Inspections is neither practical nor sensible. This interpretation would essentially outlaw mechanized excavation within eighteen inches of an underground facility, a result for which the Legislature could have easily provided.

IV. CONCLUSION

Blue Jay followed both the letter and the spirit of the law in its excavation. It hand dug in the Approximate Location just as the plain language of the statute requires. Any damage done to the gas line was not caused by a violation of the statute.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the original and ten (10) copies of this document was hand-delivered to the following:

Kentucky Public Service Commission
ATTN: Gwen R. Pinson, Executive Director
211 Sower Blvd
P.O. Box 615
Frankfort, Kentucky 40602

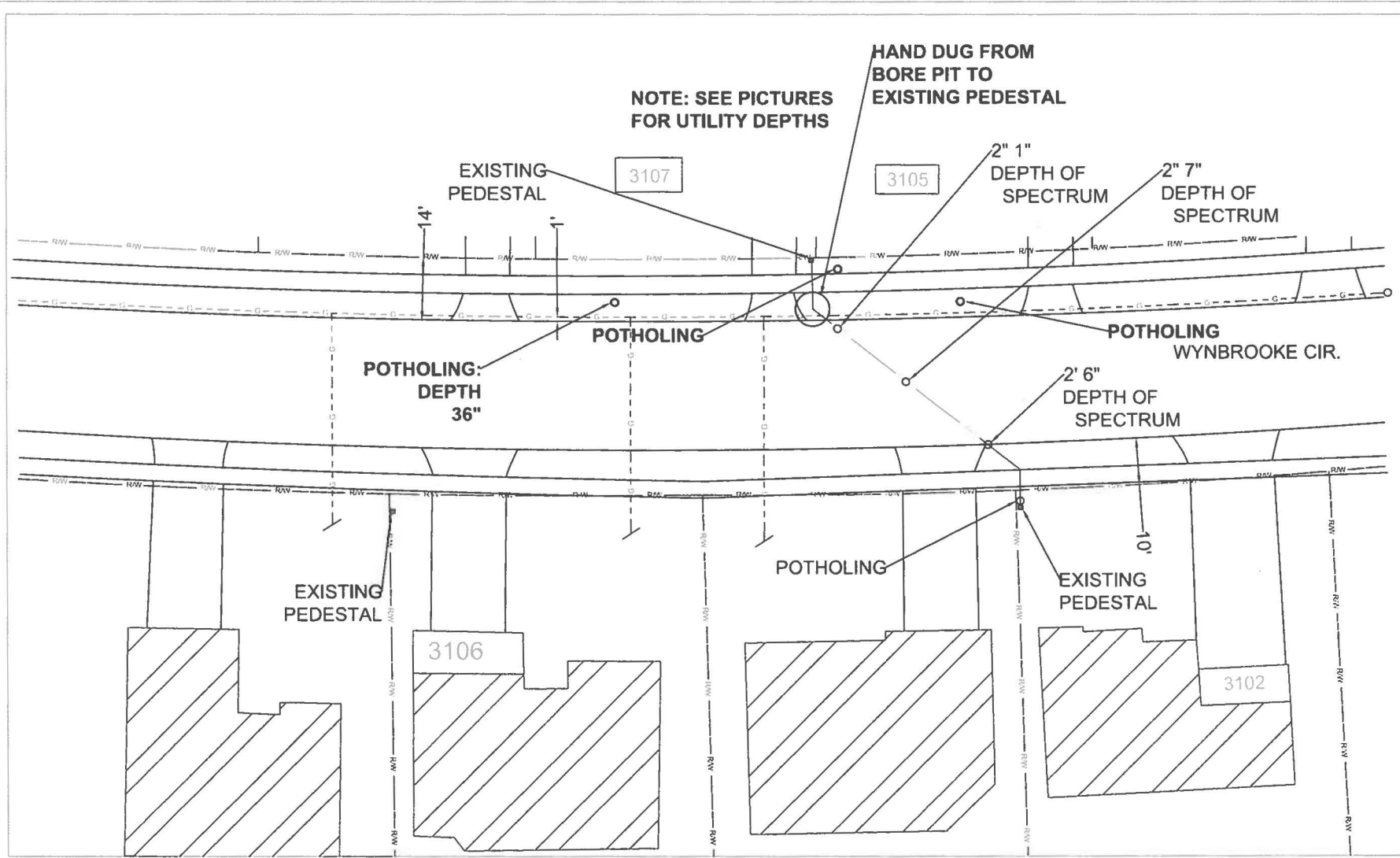
With a copy mailed to:

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

On this 6th day of March 2020.



Attorney for Blue Jay Communications, Inc.



NOTE: SEE PICTURES FOR UTILITY DEPTHS

HAND DUG FROM BORE PIT TO EXISTING PEDESTAL

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 Milwaukee, WI 53212



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 Brooklyn, OH 44144
 Ph: (216)861-2928
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DESIGNER
DONALD PLUMLEY
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APPROVED BY: DEP

AMENDMENTS

DATE	DESCRIPTION	BY

EXHIBIT 1

PROJECT
 WYNBROOKE CIR.

LOCATION
 3107 WYNBROOKE CIR.
 LOUISVILLE
 JEFFERSON

SHEET NUMBER
 1 of 1



From: Park, John B (PSC) <John.Park@ky.gov>
Sent: Friday, June 14, 2019 2:58 PM
To: ginopulito@hotmail.com <ginopulito@hotmail.com>
Subject: Blue Jay Communications, Incident #21177

Mr. Pulito,

As we discussed last week, effective July 2018 the Kentucky Public Service Commission was vested with statutory authority to enforce the Kentucky Underground Facilities Damage Prevention Act, KRS 367.4901 to 367.4917, for violations that result in damage to underground facilities that transport natural gas or hazardous liquids. Each operator of such a facility is required to report excavation damage to the Commission. Commission Staff then investigates the incident and determines whether a violation of the Act occurred.

KRS 367.4917 provides that a person who commits a violation of the Act shall be subject to a civil penalty not to exceed \$250 for the first violation, \$1,000 for the second violation within one year, and \$3,000 for the third and any subsequent violation. If the violation results in damage to an underground pipeline used to transport gas or hazardous liquid, the violator is subject to an additional civil penalty not to exceed \$1,000 per violation. A first-time offender subject to a penalty of \$1,250 may be given an opportunity to attend a training course and obtain a suspension of all but \$250 of the penalty.

On November 28, 2018, Louisville Gas and Electric Company reported excavation damage that occurred to a gas pipeline at 3105 Wynbroke Circle in Louisville, KY, on October 31, 2018. Blue Jay Communications was the excavator identified by the operator and the 811 dig ticket. Commission Investigator John E. Gowins contacted Mr. Alan Wilkins as part of Staff's investigation of this incident.

In this case, it appears the operator properly located the line. The operator reported that the excavator, Blue Jay Communications, damaged the line in the process of boring a communications line in the vicinity of the marked pipeline. Mr. Gowins is gathering information to determine if Blue Jay complied with its obligations as an excavator under the Act, in particular KRS 367.4911(10). This section requires an excavator performing work in the approximate location of an underground facility to hand-dig or use non-intrusive means to avoid damage to the underground facility. It does not appear that Blue Jay Communications located the underground line by hand digging or "post-holing" prior to boring.

Mr. Wilkins indicated to Mr. Gowins that he needed to research the November 28, 2018 incident and would get back to Mr. Gowins. If Mr. Wilkins has additional information he would like Staff to consider, please have him contact Mr. Gowins at (502) 782-2656 and provide the information by COB June 21, 2019.

Please contact me if you have any questions.

John B. Park
Staff Attorney III
Kentucky Public Service Commission
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EXHIBIT 2