

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BLUE JAY COMMUNICATIONS, INC.)

_____)
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 Reply Brief has been filed into the record of this proceeding.



Kent A. Chandler
Executive Director
Public Service Commission
P.O. Box 615
Frankfort, KY 40602

DATED MAR 13 2020

cc: Parties of Record

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COMMISSION STAFF'S POST-HEARING REPLY BRIEF

Pursuant to the post-hearing briefing schedule established by the Commission in its January 24, 2020 Order, the Commission's Division of Inspections (DOI) submits this Reply Brief.

Discussion

Blue Jay Communications, Inc. (Blue Jay), in its post-hearing brief, maintains that the damage to the underground facility at the center of this proceeding did not occur as a result of it violating KRS 367.4811(10) which states "[w]hen 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." Blue Jay argues that by hand digging and exposing the underground facility before using boring equipment, it fulfilled the requirements of the statute. This argument is contrary to

the purpose of the Underground Facility Damage Prevention Act (the Act)¹, the plain reading of KRS 367.4811(10), and time-honored canons of statutory interpretation.

The purpose of the Act, as declared by the General Assembly in KRS 367.4901, is to promote . . . “public and workplace safety as well as the protection of consumer services by providing an effective underground damage prevention procedure.” To achieve this goal, the responsibilities of excavators are clearly and unambiguously outlined in KRS 367.4911, just as the responsibilities of the owners of underground facilities (operators) are set forth in KRS 367.4909. Operators are required to provide protection notification center access to excavators.² They are also required to mark the location of their facilities within two days of receiving non-emergency locate requests.³ Operators of underground facilities containing natural gas are required to report instances of damage to their facilities to the Commission within thirty days of being informed of the damage.⁴

Excavators are required to notify each affected operator of any intended work at least two and not more than ten full working days prior commencing work.⁵ They are also required to protect and preserve temporary underground facility markers, to request remarking if excavation continues for more than nineteen days, and to notify the operator

¹ KRS 367.4901 through KRS 367.4917.

² KRS 367.4909(1).

³ KRS 367.4909(5) and (6).

⁴ KRS 367.4909(4).

⁵ KRS 367.4911(1).

upon discovery of any unmarked facility.⁶ The obvious aim of these statutes is to protect the public by reducing damage to underground facilities. Accepting Blue Jay's argument that it was free to engage in excavation using boring equipment within eighteen inches of an underground facility containing natural gas after it had exposed the top of the facility ignores the stated purpose of the Act, and the principles embodied in it.

The General Assembly limited excavation in the approximate location of underground facilities containing natural gas or hazardous liquid to hand-digging or other nonintrusive means because it judged other methods of excavation to be inherently more dangerous to public safety than hand digging and nonintrusive excavation. The legislature anticipated excavation within the approximate location of underground facilities would be necessary, and prescribed excavation methods that would comport with the stated purpose of promoting safety.

The plain language of KRS 367.4811(10) is clear, "[w]hen 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." If the legislature had intended this statute to prescribe what actions an excavator must take prior to using mechanized equipment within the approximate location of an underground facility, language to that effect would be in the statute. It is not. The statute does not say an excavator is to hand-dig or use nonintrusive means until the facility is partially or even fully exposed. The statute provides no limitations or conditions under

⁶ KRS 367.4911(6), (7), and (8).

which hand-digging or nonintrusive means are not necessary in the approximate location of underground facilities. The statute clearly and unambiguously commands an excavator to “hand-dig or use other nonintrusive means to avoid damage to the underground facility.” This language articulates the purpose of this statute (to avoid damage to the underground facility), and prescribes a means of achieving that purpose (hand-digging or using nonintrusive means). Blue Jay did not avoid damage to the underground facility, and it was not using nonintrusive means of excavation in the approximate location of the facility when the damage occurred. Blue Jay therefore failed to conduct its activity in accordance with the statute and failed to achieve the purpose of the statute.

Although canons of statutory construction are not used by courts if the meaning of the law is clear, here application of the canon of *expressio unius est exclusio alterius*, sometimes simply referred to as *expressio unius*, or “the mention of one thing implies the exclusion of another,” delivers the same result as the plain reading of the statute. The statute contains language of command, (the word “shall”), and then specifically sets forth what is required (hand-digging and nonintrusive means). No other excavation methods or combination of methods are listed in the statute, therefore they are necessarily excluded.

Kentucky’s Supreme Court has held that *expression unius* is most useful when there is a strong, unmistakable contrast between what is expressed and what is omitted.⁷ Here, there is a strong and unmistakable contrast. The language expressed in the statute

⁷ *Fox v. Grayson*, 317 S.W.3d 1, 8-10 (Ky. 2010).

permits only nonintrusive excavation methods in the approximate location of an underground facility, and all intrusive means of excavation are omitted, including boring. What is expressed is exactly the opposite of what is omitted. Therefore what is omitted cannot possibly be what the General Assembly intended.

Conclusion

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). 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). This is the first instance in which Blue Jay has failed to comply with the Damage Prevention Act, and Blue Jay has stipulated that 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 MAR 13 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