

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

ORDER

This case was initiated by the Kentucky Public Service Commission's (Commission) Division of Inspection (DOI) on August 27, 2019 as a result of a claimed violation by Blue Jay Communications, Inc. (Blue Jay) of the Underground Facility Damage Prevention Act as set out in KRS 367.4901 through KRS 367.4917. Sometimes hereinafter referred to as the "Act"). DOI alleged that Blue Jay, while installing an underground cable as a contractor for Spectrum on October 31, 2018, made contact with and damaged an underground natural gas pipeline owned and operated by Louisville Gas and Electric Company (LG&E) in violation of KRS 367.4911(10) which requires that:

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.¹

¹ An underground facility is defined in KRS 367.4903(1) as follows: "... 'an underground facility' means an underground line or system used for producing, storing, conveying, transmitting, or distributing telecommunications, electricity, gas, petroleum, petroleum products, cable television, hazardous liquids, water, steam, or sewage, including storm drainage."

Blue Jay acknowledged that at the time and place of the incident in question that it was installing underground cable as a contractor for Spectrum in Louisville, Kentucky.

Blue Jay was served with process on September 6, 2019 and filed its response to the initiating Order on September 16, 2019 which acknowledged the Commission's jurisdiction over the matter in controversy and that its operations had damaged the LG&E pipeline but denied that such damage was the result of a violation of the Act.²

FACTS

In lieu of a formal hearing on the merits, the parties filed into the record joint stipulations of fact which, together with oral stipulations incorporated into the Commission's Order of January 24, 2020 and admissions contained in Blue Jay's response to the initiating Order constitute evidence upon which this case will be decided.³

At the time of the incident, Blue Jay was conducting horizontal drilling as a contractor for Spectrum in Jefferson County, Kentucky. The purpose of the horizontal drilling was to install an underground communications cable.⁴ Prior to commencement of drilling operations Blue Jay notified LG&E through the appropriate notification protection center as required by KRS 367.4911(1)(a) and LG&E thereafter properly marked the approximate location of its gas pipeline.⁵ Blue Jay hand dug or "pot-holed" various locations on the job site to expose the location of the utilities marked by LG&E or its

² Response of Blue Jay Communications, Inc. to initiating Order filed on September 16, 2019.

³ See joint stipulations, Commission Order filed in the record on January 24, 2020 and Blue Jay's response to the initiating Order filed on September 16, 2019. Counsel for Blue Jay also cited an email from LG&E damage investigator Joe Ryan to DOI inspector John E. Gowins as factual evidence to be considered by the Commission.

⁴ Blue Jay's response to initiating Order page 2, numerical paragraph 1; joint stipulations, numerical paragraph 2.

⁵ Joint stipulations numerical paragraph 3; Blue Jay response to initiating Order at page 2, numerical paragraphs 3 and 4.

locating company⁶ and then utilized mechanized underground boring equipment to complete the excavation.⁷ In its response to the initiating Order, Blue Jay stated that “the boring head traveled to the approximate depth for communication installation, and then damaged the gas line facility.”⁸ In the joint stipulations the parties agreed that, “Blue Jay initially traversed, or drove through the exposed ‘[a]pproximate [l]ocation’ with a mechanized underground bore head without damaging the gas line; however, when the boring equipment was pulled out, the bore head struck and damaged the gas line.”⁹ The withdrawal of the mechanized bore head was a dead pull, meaning that the bore head was not turning at the time.¹⁰ While the joint stipulation referred to “attached photographs of the hand dug or ‘pot-holed’ areas” in the approximate locations made prior to drilling no photographs were attached to the stipulations.¹¹ In its response to the initiating Order, Blue Jay stated that it believed that its employee conducting the investigation at the time took photographs but that no photographs had been located.¹²

⁶ Joint stipulations, numerical paragraphs 4 and 7.

⁷ Joint stipulations, numerical paragraph 5.

⁸ Blue Jay response to initiating Order at page 2, numerical paragraph 8.

⁹ Joint stipulations, numerical paragraph 8.

¹⁰ Joint stipulations, numerical paragraph 9.

¹¹ Joint stipulations, numerical paragraph 7.

¹² Response to initiating Order at page 2, numerical paragraphs 5 and 6.

DISCUSSION AND ANALYSIS

The General Assembly enacted the Underground Facility Damage Prevention Act to promote public and workplace safety and for the protection of consumer services.¹³ The Act applies to individuals and entities engaged in excavation work using mechanized equipment other than those exempted by KRS 367.4915.¹⁴ Blue Jay does not claim that any statutory exemption applies to its activities conducted on October 31, 2018. Blue Jay, in conducting horizontal drilling operations was engaged in excavation using mechanized equipment as defined by KRS 367.4903(6) and KRS 367.4903(14).¹⁵ In the course of its excavation activities, Blue Jay's equipment came in contact with and damaged LG&E's gas pipeline which resulted in natural gas escaping into the atmosphere.¹⁶ It is clear that at the time of damage to the LG&E gas pipeline, Blue Jay was an "excavator" as defined by KRS 367.4903(4) conducting excavation activities as defined by KRS 367.4903(6). The only issue to be determined is whether the damage caused by Blue Jay's excavation activities was the result of a violation of the Act and if so, the amount of the civil penalty to be assessed.

¹³ KRS 367.4901.

¹⁴ KRS 367.4903(4).

¹⁵ KRS 367.4903(6) defines excavation as "...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 inches or less below existing grade shall not constitute excavation." KRS 367.4903(14) defines the term "mechanized equipment" as meaning, "...mechanical power equipment, including trenchers, bulldozers, power shovels, augurs, backhoes, scrapers, drills, cable and pipe plows, skidders, and yarders."

¹⁶ Blue Jay response to initiating Order, page 2; joint stipulations 5 and 8; Commission Order of January 24, 2020.

KRS 367.4911(10) requires an excavator such as Blue Jay “when excavation or demolition is necessary within the approximate location of the underground facility” to “hand-dig or use nonintrusive means to avoid damage to the underground facility.” The “approximate location” within which hand-digging or the use of nonintrusive means is required by the excavator to avoid damage was in this case at least 18 inches on each side of the pipeline.¹⁷ In its memorandum brief at page 5, Blue Jay sets out a narrative of how the damage occurred in the form of an email communication from Joseph R. Ryan, manager, gas distribution integrity and compliance, for LG&E. Blue Jay noted that the email had been filed in the record on November 1, 2019. The email narrative is as follows:

“A contractor (Blue Jay Communications) was boring in new Spectrum TV duct when they hit the bottom of a two inch 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 that they see clearly and have enough time to adjust if their 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.”

In this case the approximate location within which Blue Jay was required to either hand dig or use nonintrusive means to avoid damage to the LG&E gas pipeline was at a minimum 18 inches on each side of the pipe and to a depth which would ensure that excavation would avoid damage to the pipe. Blue Jay admits that the approximate location as defined as by KRS 367.4903(11) was properly marked by LG&E. Blue Jay

KRS 367.4903(11) defines approximate location when referring to an underground facility as follows: “(a) for underground metallic facilities and underground non-metallic 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; or (b) for non-metallic facilities without metallic tracer wire, the underground facility shall be located as accurately as possible from field location records and shall require notification from the operator of the inability to accurately locate the facility.”

stipulated that it initially traversed or drove through the exposed approximate location with a mechanized underground bore head which damaged the pipeline as it was being pulled out of the bore hole.¹⁸ In its response to the initiating Order Blue Jay stated that, “the boring head traveled to the approximate depth of communications installation, and then damaged the gas line facility.”¹⁹ According to the narrative set out in the email Blue Jay referenced in its brief, only the top of the pipeline had been exposed and the excavation which caused damage to the line occurred at the bottom of the pipe. Blue Jay was required to hand dig or use nonintrusive means of excavating beneath the pipeline to a distance of at least 18 inches on each side of it. Instead, Blue Jay did not complete an excavation within the approximate location as required by statute but instead resorted to the use of mechanical equipment prohibited by KRS 367.4911(10). Hand-digging to the extent required by KRS 367.4911(10) and KRS 367.4903(11) would have created a void on each side and beneath the pipeline through which the bore head could pass and subsequently be extracted while pulling the cable through the bore hole and beneath the pipe without causing damage as occurred here. Blue Jay’s argument that the Act does not prohibit excavation by mechanical equipment within the approximate location of a pipeline is contrary to both the express and unambiguous language of the Act as well as its intent.

FINDINGS OF FACT

¹⁸ Joint stipulation at page 2, numerical paragraphs 8 and 9.

Response of Blue Jay Communications, Inc. to initiating Order at page 2, numerical paragraph 8.

1. Blue Jay was at the time the damage to the LG&E pipeline occurred on October 31, 2018 an excavator as defined by KRS 367.4903(4) which caused damage to a natural gas pipeline by means of excavation as defined by KRS 367.4903(2) and (6).

2. The natural gas pipeline was owned and operated by LG&E to serve the public and contained natural gas at the time it was damaged. As a result of the damage, natural gas was released into the atmosphere.

3. Prior to the commencement of excavation activities by Blue Jay, LG&E was notified of the proposed work and the “approximate location” of the gas line as defined by KRS 367.4903(11) was properly marked.

4. Although Blue Jay “pot-holed” various locations to expose the pipeline marked by LG&E, it failed to hand dig or use nonintrusive means to excavate within the approximate location of the line so as to avoid damage to it. Blue Jay instead used mechanized equipment to perform excavation within the approximate location in violation of KRS 367.4911(10).

5. Blue Jay’s use of mechanical directional drilling equipment within the approximate location of the LG&E underground pipeline constituted excavation as defined by KRS 367.4903(6) in that it resulted 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.

6. Blue Jay did not use nonintrusive excavating such as 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 extractor as defined by KRS 367.4903(13).

7. Blue Jay's use of mechanized equipment within the approximate location of LG&E's gas pipeline was a violation of KRS 367.4911(10) which caused damage to the pipeline and the release of natural gas into the atmosphere.

8. The incident which is the subject matter of this action represents Blue Jay's first and only alleged violation of the Act.

CONCLUSIONS OF LAW

1. Blue Jay violated KRS 367.4911(10) by conducting a mechanical excavation within the approximate location of an underground natural gas pipeline owned and operated by LG&E to serve the public. Blue Jay was required to conduct excavation within the approximate location of the natural gas pipeline by hand digging or use of nonintrusive means to avoid damage to the pipeline but failed to do so.

2. KRS 367.4917(1) provides that an excavator who fails to comply with any provision of KRS 367.4911 shall be guilty of endangering underground facilities and may be subject to a fine of not more than \$250 for the first offense. The incident which occurred on October 31, 2018 was Blue Jay's first offense and subjects it to a potential fine of \$250.

3. KRS 367.4917(4) provides that any person who violates any provision of the Act 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 \$1,000 for each offense. The LG&E pipeline at the time it was damaged by Blue Jay contained natural gas which was

released into the atmosphere thereby subjecting Blue Jay to a potential additional fine of \$1,000.

4. Blue Jay by reason of its failure to comply with the aforementioned provisions of the Underground Facility Damage Prevention Act as hereinbefore set out is subjected to a maximum fine of \$1,250.

IT IS THEREFORE ORDERED that:

1. Blue Jay Communications, Inc. be and it is hereby assessed a civil penalty of \$250 for violation of KRS 367.4911(10) and an additional civil penalty of \$1,000 for violation of KRS 367.4917(4).

2. Blue Jay Communications, Inc. shall pay the sum of \$1,250 within thirty days of the date of this Order by cashier's check or money order payable to the Kentucky State Treasurer and mailed or delivered to the office of the Kentucky Public Service Commission at 211 Sower Boulevard, Frankfort, Kentucky 40602.

THIS IS A FINAL AND APPEALABLE ORDER OF THE PUBLIC SERVICE COMMISSION.

An application for a rehearing may be filed with the Commission within 20 days after service of this Order as provided by KRS 278.400. Any appeal of this Order must be filed with the Franklin Circuit Court within 30 days after service of this Order or within 20 days after an application for rehearing has been denied by failure of the Commission to act or, within 20 days after service of the final Order on rehearing, as set out in KRS 278.410

By the Commission

Commissioner Talina Mathews did not participate in this case.

ATTEST:



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