

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
	:	
-vs-	:	
	:	
Quality Saw & Seal, Inc.	:	
	:	05-0407
	:	
Determination of Liability under the Illinois	:	
Underground Utility Facilities Damage	:	
Prevention Act.	:	

**RESPONSE OF THE STAFF OF THE ILLINOIS  
COMMERCE COMMISSION TO MOTION TO DISMISS**

Pursuant to 83 Ill. Adm. Code 200.190, Staff of the Illinois Commerce Commission (“Staff”), by and through its undersigned attorney, hereby files its Response to the Motion to Dismiss and Memorandum in support thereof filed by Quality Saw & Seal, Inc. (“Quality Saw” or “Respondent”) on July 12, 2005.

**I. INTRODUCTION**

The instant proceeding was initiated on June 29, 2005, by the Illinois Commerce Commission (“Commission”) pursuant to the Illinois Underground Utility Facilities Damage Prevention Act, 220 ILCS 50, (the “Act”) to determine whether, on or about August 10, 2004, Quality Saw violated Section 4(d) of the Act by excavating at 2180 Kipling Lane, Highland Park, Illinois, without giving proper notice to owners and operators of the underground utility facilities through the State-Wide One-Call System

("JULIE"). While excavating in the street in front of the aforementioned residence, Respondent damaged a ¾ inch steel gas service owned and operated by North Shore Gas Company. In addition to a determination regarding whether a violation of the Act had occurred, the Commission ordered that a determination be made regarding whether a penalty should be assessed against Respondent.

Pursuant to proper notice, a Prehearing Conference was held in this matter by a duly authorized Administrative Law Judge ("ALJ") in the Commission's Springfield offices on July 12, 2005. At that time, Staff counsel and the ALJ were served with hard copies of Quality Saw's Motion to Dismiss Pursuant to 83 Ill. Adm. Code 200.190 ("Motion to Dismiss") and Memorandum in support thereof ("Memorandum"), which were filed later that day by the Chief Clerks Office via the Commission's e-Docket system.<sup>1</sup> Quality Saw's Motion to Dismiss requests dismissal of the instant proceeding "on the ground that saw-cutting concrete paving material is not an 'excavation' as defined by Section 2.3 of the Act and that, therefore, no violation occurred." (Motion to Dismiss, p. 2.) Staff respectfully disagrees with Respondent because, as explained below, not only are the facts undisputed but also the legal arguments presented in its Motion to Dismiss are flawed.

## **II. STANDARD FOR REVIEW OF A MOTION TO DISMISS**

The standards applicable to motions to dismiss in Illinois courts are well-established. In considering a motion to dismiss, a court must "accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts" and

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<sup>1</sup> Quality Saw also filed a Motion to Transfer on Grounds of Forum Non Conveniens ("Motion to Transfer") in a similar manner on July 12, 2005. Staff filed its Response on July 26, 2005; Quality Saw filed its Reply on August 2, 2005. On August 4, 2005, the ALJ denied Quality Saw's Motion to Transfer.

“construe the allegations in the complaint in the light most favorable to the plaintiff.” *Young v. Bryco Arms*, 213 Ill. 2d 433, 441 (2004); see also *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 364 (2004). The question presented by a motion to dismiss is “whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted”; and “a trial court is to dismiss the cause of action only if it is clearly apparent that no set of facts can be proven which will entitle the plaintiff to recovery.” *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 808 N.E. 2d 957, 961-962 (2004).

In the instant proceeding, if all facts alleged are true (in fact, Respondent admits that it “damaged a ¾ inch plastic gas service owned and operated by North Shore Gas Company while saw-cutting paving material in connection with a roadway rehabilitation project” (Memorandum, p. 1)), and viewed in a light most favorable to Staff, the allegations in the Commission’s Citation Order are sufficient to state a cause of action upon which relief can be granted. As such, dismissal of the proceeding on the facts is not appropriate and should not be considered.

### **III. SAW-CUTTING MEETS BOTH THE DEFINITION OF “EXCAVATION” AND “DEMOLITION” UNDER THE ACT**

As Staff will demonstrate, the legal analysis provided in Respondent’s Memorandum is clearly flawed. The legal issue involved is whether saw-cutting a road surface falls under the definitions of “excavation” or “demolition” under Sections 2.3 and 2.4 of the Act, respectively. Respondent believes the legal issue is limited to whether saw-cutting is an “excavation” within the meaning of the Act. (Memorandum, p. 2.) Staff finds it noteworthy that Quality Saw apparently has dropped its prior argument that

saw-cutting does not meet the definition of “demolition”. Both the June 8, 2005 Staff Report and the Citation Order in this proceeding state that Quality Saw admits that it did not call for a locate request, since it does not consider saw-cutting to be excavation or demolition and, therefore, was not required to call JULIE. (Staff Report, p. 2; Citation Order, p. 2.)

According to Section 2.3 of the Act,

“Excavation” means any operation in which earth, rock, or other material in or on the ground is moved, removed, or otherwise displaced by means of any tools, power equipment or explosives, and includes, without limitation, grading, trenching, digging, ditching, drilling, augering, boring, tunneling, scraping, cable or pipe plowing, and driving but does not include farm tillage operations or railroad right-of-way maintenance or operations or coal mining operations regulated under the Federal Surface Mining Control and Reclamation Act of 1977 or any State law or rules or regulations adopted under the federal statute, or land surveying operations as defined in the Illinois Professional Land Surveyor Act of 1989 when not using power equipment. (Emphases added.)

Staff’s position is that the road surface being saw-cut should be considered other material in or on the ground that is being removed or displaced using power equipment. In addition, the saw-cutting activity does not fall under any of the exceptions enumerated in Section 2.3. Thus, excavation includes the saw-cutting of a paved road.

Respondent cites several cases which indicate that in construing the meaning of a statute, a court should ascertain and give effect to the intent of the legislature. (Memorandum, pp. 2-3.) Staff agrees. The construction of a statute is a question of law. *In re Estate of Dierkes*, 191 Ill. 2d 326, 330, 730 N.E. 2d 1101 (2000). The cardinal rule of statutory interpretation, to which all other rules are subordinate, is to ascertain and give effect to the intent of the legislature. *People v. Maggette*, 195 Ill. 2d 336, 348, 747 N.E. 2d 339 (2001). The best indication of legislative intent is the

statutory language, given its plain meaning. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 479, 639 N.E. 2d 1282 (1994). Staff believes the plain meaning of the statute is that saw-cutting a road surface involves material in or on the ground (the road surface) that is being removed or displaced using power equipment. Staff also believes that if the legislature had intended saw-cutting to be an exception, it would have listed saw-cutting as an exception.

Respondent's arguments regarding *ejusdem generis* are equally misplaced. (Memorandum, pp. 3-5.) Staff believes the list contained in Section 2.3 is exhaustive and, therefore, Respondent's discourse on "other such like" things is not relevant. Likewise irrelevant are Respondent's references to Federal, Florida and Georgia statutes. (Memorandum, pp. 6-7.) References to statutes that are not controlling in Illinois demonstrate the weakness of Respondent's position.

Staff further believes that saw-cutting meets the definition of "demolition" under the Act. Section 2.4 of the Act provides that,

"Demolition" means the wrecking, razing, rending, moving, or removing of a structure by means of any power tool, power equipment (exclusive of transportation equipment) or explosives. (Emphasis added.)

Staff believes that the saw-cutting of a paved road is a "rending, moving, or removing of a structure" and, thus, meets the definition of demolition under Section 2.4 of the Act. Furthermore, it has been long-held that a paved road can be defined as a "structure". In *The City of Rock Island v. The Industrial Commission*, 287 Ill. 76, 79, 122 N.E. 82 (1919), the Illinois Supreme Court held that, "[t]he maintaining and repairing of such public roads or of public streets in cities are the maintaining and repairing of a

“structure”. . .” Therefore, saw-cutting also meets the definition of “demolition” under Section 2.4 of the Act.

**IV. CONCLUSION**

For the reasons set forth above, Staff respectfully requests that the Commission deny Respondent’s Motion to Dismiss.

Respectfully submitted,

A handwritten signature in black ink that reads "Linda M. Buell". The signature is written in a cursive style and is positioned to the left of a vertical red line.

LINDA M. BUELL

Counsel for the Staff of the Illinois  
Commerce Commission

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