

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.	:	

**REPLY BRIEF OF THE STAFF  
OF THE ILLINOIS COMMERCE COMMISSION**

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TABLE OF CONTENTS

I. QUALITY’S INITIAL BRIEF CONTAINS FACTUAL ERRORS..... 2

II. QUALITY’S ARGUMENTS REGARDING OTHER AUTHORITIES ARE IRRELEVANT..... 3

III. QUALITY’S ATTACKS ON STAFF’S WITNESSES ARE BASELESS ..... 4

IV. SAW-CUTTING IS “EXCAVATION” OR “DEMOLITION” UNDER THE ACT ..... 5

V. CONCLUSION ..... 9

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Staff of the Illinois Commerce Commission (“Staff”), by and through its counsel, pursuant to Section 200.800 of the Illinois Commerce Commission’s (“Commission”) Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Reply Brief in the above-captioned proceeding.

On June 29, 2005, the Commission initiated the instant proceeding pursuant to the Illinois Underground Utility Facilities Damage Prevention Act (the “Act”), 220 ILCS 50/1 et seq., against Quality Saw & Seal, Inc. (“Quality”). The proceeding was initiated pursuant to Section 11(m) of the Act, 220 ILCS 50/11(m), and 83 Ill. Adm. Code 265.310 to determine (1) whether Quality willfully violated Section 4(d) of the Act, 220 ILCS 50/4(d), on or about August 10, 2004, 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 Notice System (“JULIE”), and (2) whether a penalty should be assessed. On September 21, 2005, Initial Briefs (“IB”) were filed in this matter by Staff and Quality. Staff hereby submits this Reply Brief in response to certain arguments and/or claims made by Quality in its Initial Brief.

Staff’s Initial Brief identified and responded to many, if not most, of the arguments raised in Quality’s Initial Brief. In this Reply Brief, Staff has incorporated many of those responses by reference or citation to Staff’s Initial Brief. However, in the interest of brevity, Staff has not raised and repeated every argument and response previously addressed in Staff’s Initial Brief. Thus, the omission of a response to an argument that Staff previously addressed simply means that Staff stands on the position taken in Staff’s Initial Brief because further or additional comment is neither needed nor warranted. As explained in detail below and in Staff’s Initial Brief, the arguments raised by Quality lack merit and should be rejected.

#### **I. QUALITY’S INITIAL BRIEF CONTAINS FACTUAL ERRORS**

Quality states that the top of the damaged gas line was in the bottom of the concrete pavement. (Quality IB, p. 5.) Quality further states that its photographs “show the gas service buried in the bottom of the concrete pavement.” (Id.) It is Staff’s opinion that this is incorrect. As testified by Staff witness Ted Andersen (ICC Staff Exhibit 2.0, p. 3), and as shown in Quality’s own photographs (Quality Exhibits 2.1-2.4), the gas service was beneath the pavement and not imbedded or buried in the concrete.

As such, had Quality taken the precaution of not cutting full depth over the marked facility, North Shore Gas Company's ¾ inch gas service would not have been damaged.

In addition, Quality states that the location of the gas service violates 49 CFR 192.361, as it was found with less than 18 inches of cover. (Quality IB, p. 5.) The implication is that because the facility may not have been in compliance with 49 CFR 192.361, Quality could not be found in violation of the Act for damaging the facility. This argument is misleading. The Act contains no provision which recognizes facility depth as required by any code or statute. The tolerance zone as defined Section 2.3 of the Act only establishes a lateral zone of safety, 18 inches on either side of the facility markings, outside of which an excavator need not take extra precautions. There is no such zone established with regard to depth. Therefore, when excavating in the tolerance zone, Section 4(b) of the Act requires excavators to assume they will encounter a facility at any depth and use extra caution.

Quality also claims that its "expert" witnesses testified that saw-cutting does not remove pavement. (*Id.*, pp. 6-9.) This is incorrect. As Staff has demonstrated, the saw blade does remove material. (Staff IB, p. 13.) If no material were removed, there would be no cut in the pavement.

## **II. QUALITY'S ARGUMENTS REGARDING OTHER AUTHORITIES ARE IRRELEVANT**

Quality argues that under Illinois Department of Transportation ("IDOT") standard specifications for road and bridge construction, saw-cutting is neither excavation or demolition. (Quality IB, pp. 6-9.) Quality also claims that because IDOT has "special

expertise and authority with respect to matters involving road construction”, the Commission should defer to IDOT’s expertise. (Id., p. 13.) Staff disagrees. As stated in Staff’s Initial Brief, the Act is the relevant authority with respect to what activities require notice be provided to JULIE. IDOT has neither the authority to enforce the provisions of the Act nor the responsibility to assure safe and reliable utility service to the citizens of Illinois, as does the Commission. In this proceeding, IDOT specifications are irrelevant. (Staff IB, pp. 12-13.)

Quality also cites various federal and state laws that it believes support its contention that saw-cutting is not excavation. (Quality IB, pp. 17-18.) Staff avers that these statutes are irrelevant. Once again, it is the Illinois Act that is the controlling authority in this proceeding .

Throughout this proceeding, Quality has ignored the plain language of the Act and, even more fundamentally, has refused to acknowledge the Act as the controlling authority. While Quality ignores both the Act and the Commission’s duties under the Illinois Public Utilities Act to assure safe and reliable service to the citizens of Illinois, the Commission should not.

### **III. QUALITY’S ATTACKS ON STAFF’S WITNESSES ARE BASELESS**

Quality argues that Staff’s witnesses were unqualified to offer opinions on whether saw-cutting is excavation or demolition, while touting its own witnesses’ experience. (Quality IB, pp. 9-14.) With respect to Staff’s witnesses, Quality claims that neither Mr. Riley nor Mr. Andersen possesses any special knowledge, skill or experience qualifying him to offer an opinion on this issue. (Id., p. 13.) This attack is

clearly baseless. Staff witness Riley has managed the JULIE Enforcement Program at the Commission since its inception. (ICC Staff Exhibit 1.0, p. 1.) In this position, he is required to make determinations on the requirements of the Act on almost a daily basis. Staff witness Andersen has had claims related responsibilities with North Shore Gas Company for 18 years. As a Claims Investigator, Mr. Andersen is responsible for investigation of damage to North Shore Gas Company's facilities caused by excavation.

This baseless attack on Staff's witnesses should be skeptically viewed. The extent to which Quality goes in endeavoring to discredit Staff's witnesses is a desperate attempt to shift the focus both from the untenable position it has taken in this proceeding and from the irrelevant testimony offered by its own witnesses.

#### **IV. SAW-CUTTING IS "EXCAVATION" OR "DEMOLITION" UNDER THE ACT**

Quality continues to advance its legal arguments that have already failed in its July 12, 2005, Motion to Dismiss. Quality incorrectly maintains that saw-cutting does not meet the definitions of "excavation" or "demolition" under Sections 2.3 and 2.4 of the Act, respectively. (Quality IB, pp. 15-19.) Staff will again demonstrate that Quality's analysis is flawed.

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. . ." (Emphasis added.) "Demolition" is defined in Section 2.4 as "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's position is that saw-cutting meets the definition of excavation because 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 specifically enumerated in Section 2.3.<sup>1</sup> Thus, excavation includes the saw-cutting of a paved road. Further, Staff believes that saw-cutting meets the definition of demolition under Section 2.4 of the Act because saw-cutting a paved road is a rending, moving, or removing of a structure. (Staff IB, pp. 13-14.)

Quality relies on the doctrine of *ejusdem generis* to support its position that other material in or on the ground cannot be construed to include the removal of man-made paving material applied to the earth's surface. (Quality IB, pp. 15-17.) While Quality cites several cases in support thereof, none of these cases is directly on point. For example, Quality cites *Sierra Club v. Kenny*, 88 Ill.2d 110, 429 N.E.2d 1214 (1981), wherein the Illinois Supreme Court determined that "other material" in the phrase "gravel, sand, earth or other material" did not include timber. As the Notice of Administrative Law Judge Ruling denying Quality's Motion to Dismiss states, "While the opinion is lacking in details, perhaps the distinction was drawn between an animate object (tree) and inanimate objects (gravel, sand, earth), or perhaps their decision was based on the various timber laws mentioned in the opinion."

Quality unwisely cites *Farley v. Marion Power Shovel Co.*, 60 Ill. 2d 432, 328 N.E.2d 318 (1975). While the Court applied the doctrine of *ejusdem generis* to

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<sup>1</sup> The exceptions, in fact, have been recently increased to include roadway surface milling by Public Act 094-0623, effective date August 18, 2005, attached hereto as Attachment A.

determine that a self-propelled power shovel was not a “structure” as that term is defined in the Illinois Structural Work Act, the opinion contains damaging language for Quality. The Court states that the doctrine of *ejusdem generis* “must, of course, yield when a contrary legislative intent is apparent” and cites *Citizens Utilities Co. of Illinois v. Commerce Com.* (1971), 50 Ill.2d 35. (60 Ill.2d at 436.) The *Citizens Utilities* decision is even more damaging to Quality, when it notes:

*Ejusdem generis* is not a rule of mandatory application. “It is only a rule of construction to aid in ascertaining and giving effect to the legislative intent, and cannot be applied to defeat the evident purpose of the statute. It must yield when a contrary legislative intent is apparent.” (50 Ill.2d at 40.)

The legislative intent is clear from the very title of the Act, i.e., to prevent damage to the underground facilities of utilities in the State of Illinois. Quality’s interpretation would undermine the Act’s clear intent.

Furthermore, Quality argues that when Section 2.3 of the Act uses the term “other material in or on the ground” this cannot be construed to include the removal of man-made paving materials applied to the earth’s surface. (Quality IB, p. 17.) Staff disagrees. In Public Act 94-0623, signed into law by Governor Blagojevich on August 18, 2005, and attached hereto as Attachment A, the definition of excavation was amended to exempt roadway surface milling from being classified as excavation, thus not requiring that notice be provided under Section 4 of the Act. If, as argued by Quality, excavation cannot be construed to include the removal of man-made materials such as paving, the Legislature acted without cause as there was no need to exempt roadway surface milling. Clearly the Legislature did not view the removal of man-made

paving material as outside the scope of the definition of excavation, or the Legislature would not have made this change.

Quality's argument that saw-cutting does not meet the definition of demolition is also flawed. (Id., p. 19.) It is Staff's position 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. 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.

Finally, Staff asserts that the purpose of the Act is to prevent damage to underground utility facilities. (Staff IB, pp. 14-15.) It is not disputed that the saw-cutting performed by Quality can and did damage an underground utility facility. Had Quality not cut full-depth over the marked utility facility, the damage could have been avoided. By arguing that saw-cutting is not excavation and would therefore not require notice be provided, Quality is urging the Commission to place Quality's employees and the public in danger due to the possible consequences of damaging unmarked utility facilities. If the Commission were to conclude that saw-cutting is not excavation, that decision would have the effect of allowing any saw-cutting contractor in the State of Illinois to cut pavement and damage underground utility facilities with impunity. Saw-cutters would not need to call JULIE, would not need to worry about what utility marks were or were not on the ground and could damage any underground utility facility they pleased, and

the Commission would be powerless to penalize them for any resulting violation of the Act. (Id.) To find that saw-cutting is not excavation, when it clearly presents a hazard to underground utility facilities, would be contrary to the intent and purpose of the Act and would also result in the Commission's failure to assure safe and reliable service to the citizens of Illinois.

## V. CONCLUSION

WHEREFORE, for all the reasons set forth in its Initial Brief and this Reply Brief, Staff respectfully requests that the Commission find Quality willfully violated Section 4(d) of the Illinois Underground Utility Facilities Damage Prevention Act and impose on Quality a penalty in the amount of \$450.

Respectfully submitted,



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October 3, 2005

**Public Act 094-0623**

HB3755 Enrolled

LRB094 09311 MKM 39551 b

AN ACT concerning regulation.

**Be it enacted by the People of the State of Illinois, represented in the General Assembly:**

Section 5. The Illinois Underground Utility Facilities Damage Prevention Act is amended by changing Sections 2, 2.2, 2.3, 4, 6, 10, and 11 and by adding Sections 2.9, 2.10, and 2.11 as follows:

(220 ILCS 50/2) (from Ch. 111 2/3, par. 1602)

Sec. 2. Definitions. As used in this Act, unless the context clearly otherwise requires, the terms specified in Sections 2.1 through 2.11 ~~2.8~~ have the meanings ascribed to them in those Sections. (Source: P.A. 92-179, eff. 7-1-02.)

(220 ILCS 50/2.2) (from Ch. 111 2/3, par. 1602.2)

Sec. 2.2. Underground utility facilities. "Underground utility facilities" or "facilities" means and includes wires, ducts, fiber optic cable, conduits, pipes, sewers, and cables and their connected appurtenances installed beneath the surface of the ground by a public utility (as is defined in the Illinois Public Utilities Act, as amended), or by a municipally owned or mutually owned utility providing a similar utility service, except an electric cooperative as defined in the Illinois Public Utilities Act, as amended, or by a pipeline entity transporting gases, crude oil, petroleum products, or other hydrocarbon materials within the State, or by a telecommunications carrier as defined in the Universal Telephone Service Protection Law of 1985, or by a company described in Section 1 of "An Act relating to the powers, duties and property of telephone companies", approved May 16, 1903, as amended, or by a community antenna television system, hereinafter referred to as "CATS", as defined in the Illinois Municipal Code, as amended. (Source: P.A. 92-179, eff. 7-1-02.)

(220 ILCS 50/2.3) (from Ch. 111 2/3, par. 1602.3)

Sec. 2.3. Excavation. "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, or roadway surface milling. (Source: P.A. 92-179, eff. 7-1-02.)

(220 ILCS 50/2.9 new)

Sec. 2.9. "Forty-eight hours" means 2 business days beginning at 8 a.m. and ending at 4 p.m. (exclusive of Saturdays, Sundays, and holidays recognized by the State-Wide One-Call Notice System or the municipal one-call notice system). All requests for locates received after 4 p.m. will be processed as if received at 8 a.m. the next business day.

(220 ILCS 50/2.10 new)

Sec. 2.10. "Open cut utility locate" means a method of locating underground utility facilities that requires excavation by the owner, operator, or agent of the underground facility.

(220 ILCS 50/2.11 new)

Sec. 2.11. "Roadway surface milling" means the removal of a uniform pavement section by rotomilling, grinding, or other means not including the base or subbase.

(220 ILCS 50/4) (from Ch. 111 2/3, par. 1604)

Sec. 4. Required activities. Every person who engages in nonemergency excavation or demolition shall:

(a) take reasonable action to inform himself of the location of any underground utility facilities or CATS facilities in and near the area for which such operation is to be conducted;

(b) plan the excavation or demolition to avoid or minimize interference with underground utility facilities or CATS facilities within the tolerance zone by utilizing such precautions that include, but are not limited to, hand

excavation, vacuum excavation methods, and visually inspecting the excavation while in progress until clear of the existing marked facility;

(c) if practical, use white paint, flags, stakes, or both, to outline the dig site;

(d) provide notice not less than 48 hours (~~exclusive of Saturdays, Sundays and holidays~~) but no more than 14 calendar days in advance of the start of the excavation or demolition to the owners or operators of the underground utility facilities or CATS facilities in and near the excavation or demolition area through the State-Wide One-Call Notice System or, in the case of nonemergency excavation or demolition within the boundaries of a municipality of at least one million persons which operates its own one-call notice system, through the one-call notice system which operates in that municipality;

(e) provide, during and following excavation or demolition, such support for existing underground utility facilities or CATS facilities in and near the excavation or demolition area as may be reasonably necessary for the protection of such facilities unless otherwise agreed to by the owner or operator of the underground facility or CATS facility;

(f) backfill all excavations in such manner and with such materials as may be reasonably necessary for the protection of existing underground utility facilities or CATS facilities in and near the excavation or demolition area; and

(g) After February 29, 2004, when the excavation or demolition project will extend past 28 calendar days from the date of the original notice provided under clause (d), the excavator shall provide a subsequent notice to the owners or operators of the underground utility facilities or CATS facilities in and near the excavation or demolition area through the State-Wide One-Call Notice System or, in the case of excavation or demolition within the boundaries of a municipality having a population of at least 1,000,000 inhabitants that operates its own one-call notice system, through the one-call notice system that operates in that municipality informing utility owners and operators that additional time to complete the excavation or demolition project will be required. The notice will provide the excavator with an additional 28 calendar days from the date of the subsequent notification to continue or complete the excavation or demolition project.

At a minimum, the notice required under clause (d) shall provide:

(1) the person's name, address, and (i) phone number at which a person can be reached and (ii) fax number, if available;

(2) the start date of the planned excavation or demolition;

(3) the address at which the excavation or demolition will take place;

(4) the type and extent of the work involved; and

(5) section/quarter sections when the above information does not allow the State-Wide One-Call Notice System to determine the appropriate geographic section/quarter sections. This item (5) does not apply to residential property owners.

Nothing in this Section prohibits the use of any method of excavation if conducted in a manner that would avoid interference with underground utility facilities or CATS facilities.

(Source: P.A. 92-179, eff. 7-1-02; 93-430, eff. 8-5-03.)

(220 ILCS 50/6) (from Ch. 111 2/3, par. 1606)

Sec. 6. Emergency excavation or demolition.

(a) Every person who engages in emergency excavation or demolition outside of the boundaries of a municipality of at least one million persons which operates its own one-call notice system shall take all reasonable precautions to avoid or minimize interference between the emergency work and existing underground utility facilities or CATS facilities in and near the excavation or demolition area, through the State-Wide One-Call Notice System, and shall notify, as far in advance as possible, the owners or operators of such underground utility facilities or CATS facilities in and near the emergency excavation or demolition area, through the State-Wide One-Call Notice System. At a minimum, the notice required under this subsection (a) shall provide:

- (1) the person's name, address, and (i) phone number at which a person can be reached and (ii) fax number, if available;
- (2) the start date of the planned emergency excavation or demolition;
- (3) the address at which the excavation or demolition will take place; and
- (4) the type and extent of the work involved.

~~There is a wait time of 2 hours or the date and time requested on the notice, whichever is longer, A 2-hour wait time exists~~ after an emergency locate notification request is made through the State-Wide One-Call Notice System. If the conditions at the site dictate an earlier start than the ~~required 2-hour~~ wait time, it is the responsibility of the excavator to demonstrate that site conditions warranted this earlier start time.

Upon notice by the person engaged in emergency excavation Or demolition, the owner or operator of an underground utility facility or CATS facility in or near the excavation or demolition area shall communicate with the person engaged in emergency excavation or demolition within 2 hours or by the date and time requested on the notice, whichever is longer. The notice by the owner or operator to the person engaged in emergency excavation or demolition may be provided by phone Or phone message or by marking the excavation or demolition area. The owner or operator has discharged the owner's or operator's obligation to provide notice under this Section if the owner or operator attempts to provide notice by telephone but is unable to do so because the person engaged in the emergency excavation or demolition does not answer his or her telephone or does not have an answering machine or answering service to receive the telephone call. If the owner or operator attempts to provide notice by telephone or by facsimile but receives a busy signal, that attempt shall not discharge the owner or operator from the obligation to provide notice under this Section.

(b) Every person who engages in emergency excavation or demolition within the boundaries of a municipality of at least one million persons which operates its own one-call notice system shall take all reasonable precautions to avoid or minimize interference between the emergency work and existing underground utility facilities or CATS facilities in and near the excavation or demolition area, through the municipality's one-call notice system, and shall notify, as far in advance as possible, the owners and operators of underground utility facilities or CATS facilities in and near the emergency excavation or demolition area, through the municipality's one-call notice system.

(c) The reinstallation of traffic control devices shall be deemed an emergency for purposes of this Section.

(d) An open cut utility locate shall be deemed an emergency for purposes of this Section.

(Source: P.A. 92-179, eff. 7-1-02.)

(220 ILCS 50/10) (from Ch. 111 2/3, par. 1610)

Sec. 10. Record of notice; marking of facilities. Upon notice by the person engaged in excavation or demolition, the person owning or operating underground utility facilities or CATS facilities in or near the excavation or demolition area shall cause a written record to be made of the notice and shall mark, within 48 hours ~~(excluding Saturdays, Sundays and holidays)~~ of receipt of notice, the approximate locations of

such facilities so as to enable the person excavating or demolishing to establish the location of the underground utility facilities or CATS facilities. Owners and operators of underground sewer facilities that are located outside the boundaries of a municipality having a population of at least 1,000,000 inhabitants shall be required to respond and mark the approximate location of those sewer facilities when the excavator indicates, in the notice required in Section 4, that the excavation or demolition project will exceed a depth of 7 feet. "Depth", in this case, is defined as the distance measured vertically from the surface of the ground to the top of the sewer facility. Owners and operators of underground sewer facilities that are located outside the boundaries of a municipality having a population of at least 1,000,000 inhabitants shall be required at all times to locate the approximate location of those sewer facilities when: (1) directional boring is the indicated type of excavation work being performed within the notice; (2) the underground sewer facilities owned are non-gravity, pressurized force mains; or (3) the excavation indicated will occur in the immediate proximity of known underground sewer facilities that are less than 7 feet deep. Owners or operators of underground sewer facilities that are located outside the boundaries of a municipality having a population of at least 1,000,000 inhabitants shall not hold an excavator liable for damages that occur to sewer facilities that were not required to be marked

under this Section, provided that prompt notice of the damage is made to the State-Wide One-Call Notice System and the utility owner as required in Section 7. All persons subject to the requirements of this Act shall plan and conduct their work consistent with reasonable business practices. Conditions may exist making it unreasonable to request that locations be marked within 48 hours. It is unreasonable to request owners and operators of underground utility facilities and CATS facilities to locate all of their facilities in an affected area upon short notice in advance of a large or extensive nonemergency project, or to request extensive locates in excess of a reasonable excavation or demolition work schedule, or to request locates under conditions where a repeat request is likely to be made because of the passage of time or adverse job conditions. Owners and operators of underground utility facilities and CATS facilities must reasonably anticipate seasonal fluctuations in the number of locate requests and staff accordingly. If a person owning or operating underground utility facilities or CATS facilities receives a notice under this Section but does not own or operate any underground utility facilities or CATS facilities within the proposed excavation or demolition area described in the notice, that person, within 48 hours (~~excluding Saturdays, Sundays, and holidays~~) after receipt of the notice, shall so notify the person engaged in excavation or demolition who initiated the notice, unless the person who initiated the notice expressly waives the right to be notified that no facilities are located within the excavation or demolition area. The notification by the owner or operator of underground utility facilities or CATS facilities to the person engaged in excavation or demolition may be provided in any reasonable manner including, but not limited to, notification in any one of the following ways: by face-to-face communication; by phone or phone message; by facsimile; by posting in the excavation or demolition area; or by marking the excavation or demolition area. The owner or operator of those facilities has discharged the owner's or operator's obligation to provide notice under this Section if the owner or operator attempts to provide notice by telephone or by facsimile, if the person has supplied a facsimile number, but is unable to do so because the person engaged in the excavation or demolition does not answer his or her telephone or does not have an answering machine or answering service to receive the telephone call or does not have a facsimile machine in operation to receive the facsimile transmission. If the owner or operator attempts to provide notice by telephone or by facsimile but receives a busy signal, that attempt shall not serve to discharge the owner or operator of the obligation to provide notice under this Section.

A person engaged in excavation or demolition may expressly waive the right to notification from the owner or operator of underground utility facilities or CATS facilities that the owner or operator has no facilities located in the proposed excavation or demolition area. Waiver of notice is only permissible in the case of regular or nonemergency locate requests. The waiver must be made at the time of the notice to the State-Wide One-Call Notice System. A waiver made under this Section is not admissible as evidence in any criminal or civil action that may arise out of, or is in any way related to, the excavation or demolition that is the subject of the waiver.

For the purposes of this Act, underground facility operators may utilize a combination of flags, stakes, and paint when possible on non-paved surfaces and when dig site and seasonal conditions warrant. If the approximate location of an underground utility facility or CATS facility is marked with stakes or other physical means, the following color coding shall be employed:

~~Underground Facility Utility or  
Community Antenna Identification Color~~

~~Television Systems and Type~~

~~of Product~~

Facility Owner or Agent Use Only

Electric Power, Distribution and

Transmission..... Safety Red

Municipal Electric Systems..... Safety Red

Gas Distribution and Transmission..... High Visibility

Safety Yellow

Oil Distribution and Transmission..... High Visibility

Safety Yellow

Telephone and Telegraph Systems..... Safety Alert Orange

Community Antenna Television Systems.... Safety Alert Orange

Water Systems..... Safety

Precaution Blue

Sewer Systems..... Safety Green

Non-potable Water and Slurry Lines..... Safety Purple

Excavator Use Only

Temporary Survey..... Safety Pink

Proposed Excavation..... Safety White (Black

when snow is

on the ground)

(Source: P.A. 92-179, eff. 7-1-02; 93-430, eff. 8-5-03.)

(220 ILCS 50/11) (from Ch. 111 2/3, par. 1611)

Sec. 11. Penalties; liability; fund.

(a) Every person who, while engaging in excavation or demolition, wilfully fails to comply with the Act by failing to provide the notice to the owners or operators of the underground facilities or CATS facility near the excavation or demolition area through the State-Wide One-Call Notice System as required by Section 4 or 6 of this Act shall be subject to a penalty of up to \$5,000 for each separate offense and shall be liable for the damage caused to the owners or operators of the facility.

(b) Every person who, while engaging in excavation or demolition, has provided the notice to the owners or operators of the underground utility facilities or CATS facilities in and

near the excavation or demolition area through the State-Wide One-Call Notice System as required by Section 4 or 6 of this Act, but otherwise wilfully fails to comply with this Act, shall be subject to a penalty of up to \$2,500 for each separate offense and shall be liable for the damage caused to the owners or operators of the facility.

(c) Every person who, while engaging in excavation or demolition, has provided the notice to the owners or operators of the underground utility facilities or CATS facilities in and near the excavation or demolition area through the State-Wide One-Call Notice System as required by Section 4 or 6 of this Act, but otherwise, while acting reasonably, damages any underground utility facilities or CATS facilities, shall not be subject to a penalty, but shall be liable for the damage caused to the owners or operators of the facility provided the underground utility facility or CATS facility is properly marked as provided in Section 10 of this Act.

(d) Every person who, while engaging in excavation or demolition, provides notice to the owners or operators of the underground utility facilities or CATS facilities through the State-Wide One-Call Notice System as an emergency locate request and the locate request is not an emergency locate request as defined in Section 2.6 of this Act shall be subject to a penalty of up to \$2,500 for each separate offense.

(e) Owners and operators of underground utility facilities or CATS facilities (i) who wilfully fail to comply with this Act by a failure to mark the location of an underground utility

or CATS facility or a failure to provide notice that facilities are not within the proposed excavation or demolition area as required in Section 10, or (ii) who willfully fail to respond as required in Section 6 to an emergency request, after being notified of planned excavation or demolition through the State-Wide One-Call Notice System, shall be subject to a penalty of up to \$5,000 for each separate offense resulting from the failure to mark an underground utility facility or CATS facility.

(f) As provided in Section 3 of this Act, all owners or operators of underground utility facilities or CATS facilities who fail to join the State-Wide One-Call Notice System by January 1, 2003 shall be subject to a penalty of \$100 per day for each separate offense. Every day an owner or operator fails to join the State-Wide One-Call Notice System is a separate offense. This subsection (f) does not apply to utilities operating facilities or CATS facilities exclusively within the boundaries of a municipality with a population of at least 1,000,000 persons.

(g) No owner or operator of underground utility facilities or CATS facilities shall be subject to a penalty where a delay in marking or a failure to mark or properly mark the location of an underground utility or CATS facility is caused by conditions beyond the reasonable control of such owner or operator.

(h) Any person who is neither an agent, employee, or authorized locating contractor of the owner or operator of the underground utility facility or CATS facility nor an excavator involved in the excavation activity who removes, alters, or otherwise damages markings, flags, or stakes used to mark the location of an underground utility or CATS facility other than during the course of the excavation for which the markings were made or before completion of the project shall be subject to a penalty up to \$1,000 for each separate offense.

(i) The excavator shall exercise due care at all times to protect underground utility facilities and CATS facilities. If, after proper notification through the State-Wide One-Call Notice System and upon arrival at the site of a proposed excavation, the excavator observes clear evidence of the presence of an unmarked utility or CATS facility in the area of

the proposed excavation, the excavator shall not begin excavating until 2 hours after an additional call is made to the State-Wide One-Call Notice System for the area. The operator of the utility or CATS facility shall respond within 2 hours of the excavator's call to the State-Wide One-Call Notice

System.

(j) The Illinois Commerce Commission shall have the power and jurisdiction to, and shall, enforce the provisions of this Act. The Illinois Commerce Commission may impose administrative penalties as provided in this Section. The Illinois Commerce Commission may promulgate rules and develop enforcement policies in the manner provided by the Public Utilities Act in order to implement compliance with this Act. When a penalty is warranted, the following criteria shall be used in determining the magnitude of the penalty:

- (1) gravity of noncompliance;
- (2) culpability of offender;
- (3) history of noncompliance for the 18 months prior to the date of the incident;
- (4) ability to pay penalty;
- (5) show of good faith of offender;
- (6) ability to continue business; and
- (7) other special circumstances.

(k) There is hereby created in the State treasury a special fund to be known as the Illinois Underground Utility Facilities Damage Prevention Fund. All penalties recovered in any action under this Section shall be paid into the Fund and shall be distributed annually as a grant to the State-Wide One-Call Notice System to be used in safety and informational programs to reduce the number of incidents of damage to underground utility facilities and CATS facilities in Illinois. The distribution shall be made during January of each calendar year based on the balance in the Illinois Underground Utility Facilities Damage Prevention Fund as of December 31 of the previous calendar year. In all such actions under this Section, the procedure and rules of evidence shall conform with the Code of Civil Procedure, and with rules of courts governing civil trials.

(l) The Illinois Commerce Commission shall establish an Advisory Committee consisting of a representative from each of

the following: utility operator, JULIE, excavator,

municipality, and the general public. The Advisory Committee shall serve as a peer review panel for any contested penalties resulting from the enforcement of this Act.

The members of the Advisory Committee shall be immune, individually and jointly, from civil liability for any act or omission done or made in performance of their duties while serving as members of such Advisory Committee, unless the act or omission was the result of willful and wanton misconduct.

(m) If, after the Advisory Committee has considered a particular contested penalty and performed its review functions under this Act and the Commission's rules, there remains a dispute as to whether the Commission should impose a penalty under this Act, the matter shall proceed in the manner set forth in Article X of the Public Utilities Act, including the provisions governing judicial review.

(Source: P.A. 92-179, eff. 7-1-02.)

Section 99. Effective date. This Act takes effect upon becoming law.

**Effective Date:** 8/18/2005