

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.	:	On Rehearing

**REPLY BRIEF ON EXCEPTIONS ON REHEARING OF THE  
STAFF OF THE ILLINOIS COMMERCE COMMISSION**

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Pursuant to Section 200.830 of the Illinois Commerce Commission's ("Commission") Rules of Practice (83 Ill. Adm. Code 200.830), Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, respectfully submits its Reply Brief on Exceptions on Rehearing in the instant proceeding. On May 12, 2006, Quality Saw & Seal, Inc. ("Quality") filed a Brief on Exceptions on Rehearing ("BOE on Rehearing") in response to the Administrative Law Judge's Proposed Order on Rehearing issued on April 28, 2006 ("Proposed Order on Rehearing"). Staff replies herein to the issues raised in Quality's BOE on Rehearing.

Quality's BOE on Rehearing inappropriately argues issues that are well beyond the scope of the instant rehearing proceeding. The Commission granted Quality's Petition for Rehearing in this docket, in part, and for a very limited issue. On January

26, 2006, the Administrative Law Judge notified the parties that the rehearing would be limited to “the issue of the Amendments to the Illinois Underground Utility Facilities Damage Prevention Act in Public Act 94-0623, specifically the amendment to the definition of “excavation”, and the Amendment’s impact or relevance to the issues presented in this docket.”

In its Petition for Rehearing, Quality argued that it did not have the opportunity to respond to Staff’s Reply Brief arguments regarding the change to the definition of “excavation” in the Illinois Underground Utility Facilities Damage Prevention Act (the “Act”). In Public Act 94-0623, signed into law by Governor Blagojevich on August 18, 2005, the definition of “excavation” in Section 2.3 of the Act, 220 ILCS 50/2.3, was amended. Specifically, the Section 2.3 definition was amended by exempting “roadway surface milling” from being classified as “excavation”. The central issue in this docket involved which activities are included in the definition of “excavation”; the rehearing was granted only to address the impact of the amendment on the issues in this case. Instead of addressing the limited issue of the impact of the amendment on the issues in this case, Quality improperly reargues all of the issues in the case, most of which are irrelevant to the rehearing.

In its Initial Brief on Rehearing, Staff stated that the amendment was raised in its Reply Brief to specifically rebut Quality’s Initial Brief argument, that other material in or on the ground cannot be construed to include man-made material, such as paving, applied to the earth’s surface. Staff believes that the exemption of “roadway surface milling” from the definition of “excavation” refutes Quality’s argument that pavement or

concrete is not included within the meaning of “earth, rock, or other material” as that phrase is used in Section 2.3 of the Act.

In its Brief on Exceptions on Rehearing, Quality lists fourteen exceptions to the Proposed Order on Rehearing, all but one of which Staff believes are beyond the scope of the rehearing. In fact, many of Quality’s exceptions, which specifically cite the original December 21, 2005, Final Commission Order, were not even mentioned in the Proposed Order on Rehearing, and are clearly beyond the scope of the rehearing. The thirteen irrelevant exceptions advanced by Quality deserve to be the subject of a motion to strike. However, rather than expend the Commission resources that a motion to strike would require, Staff responds below to each of Quality’s exceptions.

In Exception 1, Quality takes exception to the finding in the Proposed Order on Rehearing that there is no reason to modify the conclusion in the December 21, 2005, Final Commission Order, that the amendments to the Act pertaining to roadway surface milling in Public Act 94-0623 buttress Staff’s interpretation of the Act that the Legislature intended concrete and roadways to be included within the meaning of “earth rock or other material”. Quality argues that when this amendment is viewed in conjunction with a previous amendment to include “boring” in the statute, that the legislative intent was to bring under the protection of JULIE, operations that posed a substantial risk to buried underground facilities. Quality further states that the amendment was not designed to implicitly decide the issue of whether concrete and other man-made materials are included in the definition of excavation. (Quality BOE on Rehearing, pp. 1-3.) Staff agrees that it is not likely that when the Legislature made this change that it had the situation in this case in mind. Nevertheless, if excavation of concrete or roadways were

not intended to be covered under the Act, as Quality claims, there would have been no need for the Legislature to have added an exemption for the top surface milling of a road; it would have already been exempted.

Quality then belittles the Administrative Law Judge by questioning his expertise and attempting to minimize the danger that saw-cutting poses to underground utility facilities by characterizing the Administrative Law Judge's conclusion that saw-cutting is excavation because "somewhere, somehow an underground utility facility might be damaged." Quality further states that this view is plainly not shared by the Legislature. (Quality BOE on Rehearing, p. 3.) However, in this case, "somewhere" was 2180 Kipling Lane, Highland Park, Illinois. "Somehow" was with a saw-cutting machine owned and operated by Quality. Further, there is no "might" about it, a ¾" gas service was cut, putting the saw-cutting machine operator and the public in danger. Quality's assertion that the Legislature does not share the Administrative Law Judge's conclusion is not supported by evidence.

In Exception 2, Quality takes exception to the Proposed Order on Rehearing's determination that Quality's argument that saw-cutting of new concrete within 4 to 24 hours after it is poured has no merit and is beyond the scope of the rehearing. (Quality BOE on Rehearing, pp. 3-4.) Staff agrees with the Proposed Order on Rehearing that this issue is beyond the scope of rehearing. The saw-cutting of new concrete has nothing to do with the amendment of the Act by Public Act 94-0623. Nevertheless, as explained on pages 7-8 of Staff's Reply Brief on Exceptions, the saw-cutting of new concrete will not be "disastrously affected" as alleged by Quality (Quality BOE on Rehearing, p. 3). The solution to this "problem" is simple, the saw-cutting contractor

submits a locate request before the concrete is poured. Some marks may be covered by the new concrete, but for facilities that cross perpendicular to the pavement, marks will remain on the sides of the roadway. For facilities that run parallel, underneath the roadway, a note could be made regarding the location of those facilities prior to the concrete pour and it could also be noted whether there may be a conflict due to a facility not buried deep enough. This seems to be a small inconvenience to assure the safety of the saw-cutting operator and the public.

In Exception 3, Quality takes exception to the Administrative Law Judge's finding regarding the willfulness of the alleged violation. (Quality BOE on Rehearing, pp. 4-6.) This issue was not raised in the Proposed Order on Rehearing and is beyond the scope of the rehearing. As such, it should be disregarded.

In Exception 4, Quality takes exception to the Proposed Order on Rehearing's finding that the December 21, 2005, Final Commission Order in this case was correct. (Quality BOE on Rehearing, p. 6.) Quality provides no support for this exception. As such, there is no argument to which Staff can respond. Furthermore, since it is beyond the scope of the instant rehearing, Staff recommends that the Commission disregard Exception 4.

In Exception 5, Quality takes exception to the Commission's finding that concrete pavement is encompassed within the meaning of "earth rock or other material". Quality cites page 6 of the Order. (Quality BOE on Rehearing, pp. 6-7.) The Proposed Order on Rehearing does not have a page 6. Staff can only presume that Quality is referencing the December 21, 2005, Final Commission Order. As such, Exception 5 is

beyond the scope of the instant rehearing proceeding and should be disregarded by the Commission.

In Exception 6, Quality takes exception to the Commission's finding that the foreign state statutes cited are not similar enough in language to convince the Commission that their definitions are controlling. Quality cites page 7 of the Order. (Quality BOE on Rehearing, pp. 7-8.) The Proposed Order on Rehearing neither has a page 7 nor addresses foreign state statutes. Again, Quality appears to be referencing the December 21, 2005, Final Commission Order. As such, Exception 6 is beyond the scope of the instant rehearing proceeding and should be disregarded by the Commission.

In Exception 7, Quality takes exception to the Order's representation that "to hold as respondent suggests would give free rein to the parties throughout the state to cut into pavement and concrete without regard for the existence of utilities in the area..." (Quality BOE on Rehearing, pp. 8-11.) This representation was not raised in the Proposed Order on Rehearing. Again, Quality is referencing the December 21, 2005, Final Commission Order. As such, Exception 7 is beyond the scope of the instant rehearing proceeding and should be disregarded by the Commission.

In Exception 8, Quality "takes exception to the Commission's finding that a reasonable interpretation of the Act...requires a conclusion that saw-cutting of pavement is included in the definition of excavation..." Quality cites page 7 of the Order. (Quality BOE on Rehearing, pp. 11-13.) The Proposed Order on Rehearing neither has a page 7 nor makes this finding. Again, Quality is referencing the December 21, 2005,

Final Commission Order. As such, Exception 8 is beyond the scope of the instant rehearing proceeding and should be disregarded by the Commission.

In Exception 9, Quality takes exception to the Commission's placing no value on the Illinois Department of Transportation ("IDOT") standards in aiding the Commission in determining what activities are covered by the Act. (Quality BOE on Rehearing, pp. 12-13.) As correctly stated on page 4 of the Proposed Order on Rehearing, this was not an issue upon which rehearing was granted. As such, Exception 9 is beyond the scope of the instant rehearing proceeding and should be disregarded by the Commission.

In Exception 10, Quality takes exception to the Commission's finding that IDOT standards are not controlling when deciding if saw-cutting is excavation for purposes of the Act. Quality cites page 7 of the Order. (Quality BOE on Rehearing, p. 14.) The Proposed Order on Rehearing does not have a page 7. Again, Quality is referencing the December 21, 2005, Final Commission Order. Staff agrees with the Commission's conclusion on page 4 of the Proposed Order on Rehearing that this argument is beyond the scope of the rehearing that was granted and recommends that Exception 10 be disregarded by the Commission.

In Exception 11, Quality takes exception to the Commission's opinion of the issue addressed in *Northern Illinois Gas Company v. R.W. Dunteman Company*. Quality cites page 7 of the Order. (Quality BOE on Rehearing, pp. 14-15.) However, the Proposed Order on Rehearing does not have a page 7. Again, Quality is referencing the December 21, 2005, Final Commission Order. As such, Exception 11 is beyond the scope of the instant rehearing proceeding and should be disregarded by the Commission.

In Exception 12, Quality merely states that since the Commission did not make a finding that saw-cutting of pavement also constitutes demolition, it is not responding to that issue. Quality cites page 7 of the Order. (Quality BOE on Rehearing, p. 16.) Again, Quality is referencing the December 21, 2005, Final Commission Order. As such, Exception 12 is beyond the scope of the instant rehearing proceeding and should be disregarded by the Commission.

In Exception 13, Quality takes exception to the Commission's finding that the case law and administrative rules are clear that a utility is required only to horizontally locate its facilities, and is not required to provide a vertical locate. (Quality BOE on Rehearing, pp. 16-17.) Staff contends this is beyond the scope of the rehearing. Nevertheless, the Proposed Order on Rehearing does mention that "a JULIE locate does not require a depth locate." (Proposed Order on Rehearing, p. 4.) Staff concurs with this position. While IDOT may impose additional requirements on its permittees, the Act does not impose those same requirements and the Commission has no authority to enforce IDOT requirements. As such, Staff recommends that Exception 13 be disregarded by the Commission.

In Exception 14, Quality takes exception to the Commission's finding that there was a willful violation for the additional reason that this is a case of first impression. Quality cites pages 8 and 9 of the Order. (Quality BOE on Rehearing, pp. 17-18.) Again, Quality is referencing the December 21, 2005, Final Commission Order. As such, Exception 14 is beyond the scope of the instant rehearing proceeding and should be disregarded by the Commission.

WHEREFORE, Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in this proceeding and that the Proposed Order on Rehearing not be modified as set forth in Quality's Brief on Exceptions on Rehearing.

Respectfully submitted,

A handwritten signature in black ink that reads "Linda M. Buell". The signature is written in a cursive, flowing style.

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Commerce Commission

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