

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
	:	
-vs-	:	
	:	15-0393
James Lowry, Individually and in his	:	
capacity as owner or operator	:	
of CJ Now Plumbing	:	
	:	
Determination of Liability Under the	:	
Illinois Underground Utility Facilities	:	
Damage Prevention Act.	:	

ORDER

By the Commission:

In a Staff Report dated March 3, 2015, the Staff ("Staff") of the Illinois Commerce Commission ("Commission") describes alleged violations of the Illinois Underground Utility Facilities Damage Prevention Act ("Act") (220 ILCS 50) by James Lowry, individually and as owner or operator of CJ Now Plumbing ("CJ Now"). The report recommends that the Commission initiate a proceeding under Section 11(m) of the Act and 83 Ill. Adm. Code 265.310 to determine whether CJ Now Plumbing willfully violated Sections 4(b) and 7 of the Act and, if violations occurred, to decide what penalties should be assessed.

As noted in the Staff Report, MidAmerican Energy Company ("MEC") is an owner of "underground utility facilities," as that term is defined in Section 2.2 of the Act, located in northwestern Illinois, including gas distribution facilities installed beneath the surface of the ground in Rock Island, and is a public utility as defined in Section 3-105 of the Public Utilities Act (220 ILCS 5/3-105). JULIE, Inc., with headquarters in Joliet, is the State-Wide One-Call Notice System as defined in Section 3 of the Act.

Pursuant to 83 Ill. Adm. Code 265.100, MidAmerican Energy Company ("MEC") submitted two incident reports to the Commission Staff ("Staff"), reporting possible violations of the Act by CJ Now Plumbing. James Lowry is the owner or operator of CJ Now Plumbing, which is located at 401 9th Street, Rock Island, Illinois, 61201. CJ Now is not registered with the Illinois Secretary of State as a business corporation or limited liability company.

Incident 1 – Rock Island; One-Call Enforcement Case No. 0278-08

On December 9, 2008, MEC submitted an Incident Report to the Staff, reporting that on November 25, 2008, CJ Now violated the Act while excavating at 2601 38th Avenue, Rock Island, Illinois. In its review of this incident, Staff considered evidence submitted by MEC. CJ Now did not respond to Staff's information request and thus did not participate in the investigation. Staff alleges that CJ Now willfully violated Section 4(b) of the Act based upon the following:

- (1) On November 25, 2008, while excavating at 2601 38th Avenue, Rock Island, Illinois, CJ Now struck and damaged a 1/2-inch gas service line owned and operated by MEC. MEC reported the gas service line was accurately marked and CJ Now failed to exercise due care by exposing the facility prior to excavating with machine-operated equipment within the tolerance zone. MEC alleged that CJ Now failed to plan its excavation to avoid or minimize interference with an underground facility and consequently violated Section 4(b) of the Act.
- (2) Staff performed a JULIE data base search that spanned the period from January 1, 2008, through November 25, 2008, and found that CJ Now notified utility facility owners and operators, through JULIE, of 80 proposed excavations and updates to various tickets in that period. Staff found that on November 11, 2008, 11:35 a.m., CJ Now provided notice to facility owners and operators, through JULIE, of a planned excavation at 2601 38th Avenue, Rock Island, Illinois. JULIE assigned ticket #A3160778 to the locate request and the extent of the ticket requested that facility owners and operators locate and mark the underground utilities in the front of the property including both sides of the street. The work start date and time of ticket #A3160778 was November 13, 2008, at 11:45 a.m. Staff found that on November 25, 2008, at 1:22 p.m., CJ Now notified JULIE of the damage to MEC's gas service line by submitting damage ticket #A3301176.

On March 6, 2009, Staff issued a Notice of Violation to CJ Now regarding the violation of Section 4(b) of the Act. Staff found that CJ Now made a conscious decision to perform machine-excavation in the tolerance zone of a marked facility without first exercising due care to protect buried utility facilities at 2601 38th Avenue, Rock Island, Illinois. According to Section 11(a) of the Act, the Commission has authority to assess a penalty of up to \$2,500 for each violation of Section 4(b). Section 11(j) of the Act specifies that 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;
- (4) ability to pay penalty;
- (5) show of good faith of offender;
- (6) ability to continue business; and
- (7) other special circumstances.

Based on the criteria listed, Staff assessed CJ Now with a penalty of \$250. CJ Now did not respond to Staff's Notice of Violation, nor did it pay the penalty in lieu of a response.

The Staff Report further recounts that on June 22, 2009, pursuant to 83 Ill. Adm. Code 265.230, Staff provided notice to CJ Now that on July 9, 2009, case number 0278-08 was scheduled to be heard by the Underground Damage Prevention Advisory Committee ("Committee"). On July 9, 2009, Staff presented the matter to the Committee. No representative of CJ Now appeared. The Committee voted to adopt the Staff's recommendation contained in its March 6, 2009, Notice of Violation. In a letter dated July 14, 2009, Staff informed CJ Now of the Committee's decision. CJ Now has never responded, nor has it paid the penalty assessed.

Incident 2 – Rock Island; One-Call Enforcement Case No. 0529-13

On December 18, 2013, MEC submitted an Incident Report to the Staff reporting that on November 11, 2013, CJ Now violated the Act while excavating at 1048 22nd Street, Rock Island, Illinois. In the Incident Report, MEC stated that CJ Now struck and damaged a 2-inch plastic gas main at 1048 22nd Street, Rock Island, Illinois, while trenching with machine-operated equipment. MEC reported that the gas main was accurately marked and that CJ Now failed to exercise due care and expose the gas main prior to excavating with machine-operated equipment within the tolerance zone. MEC alleged that CJ Now failed to plan its excavation to avoid or minimize interference with an underground facility and consequently violated Section 4(b) of the Act. In addition, MEC alleged that CJ Now violated Section 7 of the Act when it attempted to restrict the flow of gas without authorization from MEC by plugging the gas with a metal object. In its review of this incident, Staff considered evidence submitted by MEC. CJ Now did not respond to Staff's information request and thus, did not participate in the investigation. Staff alleges that CJ Now willfully violated Section 4(b) and Section 7 of the Act based upon the following:

- (1) On October 29, 2013, at 7:29 a.m., CJ Now provided notice to facility owners and operators, through JULIE, of a planned excavation at 1048 22nd Street, Rock Island, Illinois. JULIE assigned ticket #X3020086 to the locate request and the extent of the ticket requested that facility owners and operators locate and mark the underground utilities in the front of the property including the street and both sides of the street. The work start date and time of ticket #X3020086 was October 31, 2013, at 8:00 a.m. Staff found that on November 11, 2013, at 8:49 a.m., CJ Now notified

JULIE of the damage to MEC's gas main by submitting damage ticket #X3150436.

- (2) In a review of photographs submitted by MEC, Staff confirmed the gas main was accurately marked at the location where the incident occurred. In addition, the photographs verified clear evidence of excavation activity by machine-operated equipment within the tolerance zone of the marked gas main. Staff also noted a metal object had been inserted into the damaged gas main in an attempt to restrict the flow of gas.
- (3) On November 11, 2013, while excavating at 1048 22nd Street, Rock Island, Illinois, CJ Now made the conscious decision to disregard the requirements of the Act and proceeded to machine-excavate within the tolerance zone of a marked facility. This action was performed without regard for the safety of their employees, the underground facility, or the general public. Consequently, Staff finds that CJ Now willfully violated Section 4(b) of the Act. In addition, CJ Now attempted to restrict the flow of gas after damaging MEC's gas main by inserting a metal object into the gas, which Staff found to be a willful violation of Section 7 of the Act.

As recounted in the Staff Report, on September 16, 2013, Staff issued a Notice of Violation to CJ Now regarding a violation of Section 4(b) and Section 7 of the Act. According to Section 11(a) of the Act, the Commission has authority to assess a penalty of up to \$2,500 for each violation.

Based on the previously identified criteria found in Section 11(j) of the Act, Staff assessed CJ Now with a penalty totaling \$1,250 for the two violations. CJ Now did not respond to Staff's Notice of Violation.

On December 29, 2014, pursuant to 83 Ill. Adm. Code 265.230, Staff provided notice to CJ Now that on January 15, 2015, case number 0529-13 was scheduled to be heard by the Underground Damage Prevention Advisory Committee ("Committee"). On January 15, 2015, Staff presented this case to the Committee. No representative of CJ Now appeared. The Committee voted to adopt the Staff's finding of violation contained in its September 16, 2014, Notice of Violation, but increased the penalty to \$5,000 based on CJ Now's continued failure to cooperate with the investigation. In a letter dated January 27, 2015, Staff informed CJ Now of the Committee's decision. CJ Now has never responded.

Statutory Provisions and Administrative Rules

Section 4(b) of the Act requires that every person engaging in nonemergency excavation or demolition:

plan the excavation or demolition to avoid or minimize interference with underground utility 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.

In addition, Section 4(h) of the Act requires an excavator to exercise due care at all times to protect underground utility facilities.

Section 7 of the Act requires that:

In the event of any damage to or dislocation of any underground utility facilities in connection with any excavation or demolition, emergency or nonemergency, the person responsible for the excavation or demolition operations shall immediately notify the affected utility and the State-Wide One-Call System and cease excavation in the area of the damage when the damaged facility is a threat to life or property or if otherwise required by law ***. The person responsible for the excavation or demolition shall not attempt to repair, clamp, or constrict the damaged utility facility unless under the direct supervision or advisement of the utility facility owner or operator. *** In the event of any damage to any underground utility facility that results in the escape of any flammable, toxic, or corrosive gas or liquid, the person responsible for the excavation or demolition shall call 9-1-1 and notify authorities of the damage. Owners and operators of underground utility facilities that are damaged and the excavator involved shall work in a cooperative and expeditious manner to repair the affected utility.

Section 11(m) of the Act provides:

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.

The Commission has adopted rules codified at 83 Ill. Adm. Code 265 to administer the Act. Section 265.310 provides in relevant part:

If, within 30 days after the date of the mailing of the letter informing the offender of the Advisory Committee's decision, the offender either refuses to pay or fails to pay the amount of the penalty assessed by the Advisory Committee, Staff shall then prepare and submit to the Commission an order initiating a proceeding to determine whether a violation has occurred and a penalty should be assessed.

Conclusion, Findings and Ordering Paragraphs

From the information contained in the Staff Report, it appears that the statutory and regulatory requirements have been met for the Commission to initiate a de novo proceeding under Article X of the Public Utilities Act (220 ILCS 5/10-101 et seq.) and under 83 Ill Adm. Code 200 and 265, to determine whether a violation has occurred and whether a penalty should be assessed.

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

- (1) the Commission has jurisdiction over the respondent and subject matter herein;
- (2) the Staff Report, dated March 3, 2015, should be made a part of the record of this proceeding;
- (3) the Commission should initiate a proceeding pursuant to Section 11(m) of the Act to determine whether Respondent has willfully violated Sections 4(b) and 7 of the Act and to determine whether a penalty should be assessed.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that a proceeding be initiated pursuant to Section 11(m) of the Illinois Underground Utility Facilities Damage Prevention Act to determine whether, on or about November 25, 2008, James Lowry, individually and as owner or operator of CJ Now Plumbing, violated Section 4(b) of the Illinois Underground Utility Facilities Damage Prevention Act by excavating at 2601 38th Avenue, Rock Island, Illinois, by performing machine excavation in the tolerance zone of a marked facility without first exercising due care to protect buried utility facilities, and, further, to determine whether, on or about November 11, 2013, James Lowry, individually and as owner or operator of CJ Now Plumbing, violated Sections 4(b) and 7 of the Illinois Underground Utility Facilities Damage Prevention Act by excavating at 1048 22nd Street, Rock Island, Illinois, by performing machine excavation in the tolerance zone of a marked facility without first exercising due care to protect buried utility facilities, and by attempting to plug a damaged gas main by inserting a metal object into the main.

IT IS FURTHER ORDERED that James Lowry, individually and as owner or operator of CJ Now Plumbing, be made a Respondent to this proceeding.

IT IS FURTHER ORDERED that James Lowry, individually and as owner or operator of CJ Now Plumbing, appear before the Commission at its offices in Springfield, Illinois, at a time and place to be established by the Administrative law Judge assigned to this proceeding, to adduce evidence with respect to the matters stated above.

IT IS FURTHER ORDERED that the Chief Clerk of the Commission serve a copy of this Order by certified mail on James Lowry, individually and as owner or operator of CJ Now Plumbing, at 401 9th Street, Rock Island, Illinois, 61201.

IT IS FURTHER ORDERED that the Staff Report dated March 3, 2015, be made a part of the record of this proceeding.

IT IS FURTHER ORDERED that the failure of the Respondent to appear may result in the entry of an order finding that the Respondent has violated Sections 4(b) and 7 of the Act, and the assessment of penalties against the Respondent.

IT IS FURTHER ORDERED that this Order is not final; it is not subject to the Administrative Review Law.

By order of the Commission this 16th day of June, 2015.

(SIGNED) BRIEN SHEAHAN

Chairman