

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 7352

Petition of Department of Public Service to impose )  
penalties upon All Seasons Excavating re: probable Dig )  
Safe violation involving a Verizon New England Inc., )  
d/b/a Verizon Vermont, utility line located in Burlington, )  
Vermont, on 10/27/06 )

Hearing at  
Montpelier, Vermont  
November 27, 2007

Order entered: 2/22/2008

PRESENT: Judith M. Kasper, Esq., Hearing Officer

APPEARANCES: Laura Scanlan Beliveau, Esq.  
for Vermont Department of Public Service

Richard DREWNIAK  
for All Seasons Excavating & Landscaping, Inc.

**I. INTRODUCTION**

On May 2, 2007, the Vermont Department of Public Service ("Department") filed a Notice of Probable Violation of Underground Utility Damage Prevention System Pursuant to V.P.S.B. Rule 3.807 ("Notice"), alleging that on October 27, 2006, All Seasons Excavating & Landscaping, Inc. ("All Seasons") violated the provisions of 30 V.S.A. § 7006b when it failed to take reasonable precautions and avoid damage to underground facilities when excavating within the Safety Zone (18" on either side of a marked facility). The Notice stated that underground facilities of Verizon New England Inc. ("Verizon") located at 194 Gazo Avenue, Burlington, Vermont were damaged. The Notice requested that the Public Service Board ("Board") require All Seasons to pay a civil penalty in the amount of Four Hundred Dollars (\$400.00).

On May 22, 2007, All Seasons filed a response ("Response") to the Notice in which it contested the alleged violation, stating that the Verizon facilities in question were not marked,

and that at the time of the excavation "there was no evidence in the immediate area to let our operator know that there was a utility line in the area being excavated."<sup>1</sup>

On November 27, 2007, a technical hearing in this docket was held. In attendance were Laura Scanlan Beliveau, Esq., representing the Department, and Mr. Richard Drewniak, representing All Seasons.

Pursuant to 30 V.S.A. § 8, and based on the record and evidence before me, I present the following to the Board.

## **II. FINDINGS**

1. On Target Utility Services ("On Target") is a company that marks underground facilities for several Vermont utility companies, including Verizon. Tr. at 10 (Walker).

2. On October 25-26, 2006, in response to DigSafe ticket No. 20064300964, On Target marked in the area of Gazo Avenue, Burlington, Vermont, between its intersection with Randy Lane and its intersection with Sandra Circle, a length of approximately 1300 feet. Tr. at 53 (Drewniak).<sup>2</sup>

3. On October 26, 2006, Mr. Drewniak observed the "green belt" area (i.e., the grassy area located between the sidewalk and the street) in front of 194 Gazo Avenue and gave authorization to his crew to excavate in that green belt area because he did not see any DigSafe markings there. Tr. at 21 (Walker) and 50-51 (Drewniak).

4. On October 27, 2006, a Verizon underground facility, located in the green belt area in front of 194 Gazo Avenue, was damaged during excavation activities conducted by All Seasons. Notice at 4.<sup>3</sup>

## **III. DISCUSSION**

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1. Letter of Richard Drewniak, dated May 14, 2007, with attached letter of Lee Perry, dated March 13, 2007.
  2. The DigSafe ticket called for marking 137 through 263 Gazo Avenue. Exh. DPS-3.
  3. Although the Notice was not formally entered into the evidentiary record of this docket, the facts set forth in this finding were not disputed by any party.

The Department has alleged that All Seasons failed to take reasonable precautions and avoid damage to underground facilities when excavating within the Safety Zone (18" on either side of a marked facility) in violation of 30 V.S.A. § 7006b. That statute provides:

Any person engaged in excavating activities in the approximate location of underground utility facilities marked pursuant to section 7006 of this title shall take reasonable precautions to avoid damage to underground utility facilities, including but not limited to any substantial weakening of the structural or lateral support of such facilities or penetration, severance or destruction of such facilities. When excavation activities involve horizontal or directional boring, the person engaged in excavation activities shall expose underground facilities to verify their location and depth, in a safe manner, at each location where the work crosses a facility and at reasonable intervals when paralleling an underground facility.

The only contested factual issue to be resolved in this proceeding is whether the damaged Verizon facilities were marked prior to All Seasons engaging in excavation activities in the green belt area in front of 194 Gazo Avenue on October 27, 2006.<sup>4</sup> As discussed below, there is conflicting evidence on this point. Because this is a civil matter, the Department has the burden of showing that the area was marked, by a preponderance of the evidence.<sup>5</sup>

Mr. David Walker, an employee of On Target, and Mr. Richard Drewniak, an employee of All Seasons, have offered conflicting testimony on the question of whether the green belt area in front of 194 Gazo Avenue was marked. Mr. Walker testified that on October 24 or 26, 2007, he marked the green belt area in front of 194 Gazo Avenue.<sup>6</sup> Mr. Drewniak testified that on the night of October 26, 2006, he observed the green belt area in front of 194 Gazo Avenue and there were no marks present.<sup>7</sup> He specifically stated, "I can certainly tell you that it was not marked, because I had given the people authorization to dig in that area that day [October 27, 2007]."<sup>8</sup>

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4. Tr. at 30 (Beliveau).

5. *Livanovitch v. Livanovitch*, 99 Vt. 327, 131 A. 79 (1926).

6. Tr. at 11, 17, 25 and 35 (Walker).

7. Tr. at 42-43 and 50-52 (Drewniak).

8. Tr. at 50 (Drewniak).

In support of Mr. Walker's testimony, the Department presented a videotape made on October 26, 2007, that showed some of the markings on Gazo Avenue made by Mr. Walker.<sup>9</sup> However, that videotape did not clearly show the specific area in which the damage occurred; and, when he viewed that videotape at the technical hearing, Mr. Walker himself stated: "the video is very unclear of the original markings . . . I can't really tell, myself . . . whether the marks are clear in that one particular spot."<sup>10</sup>

In further support of Mr. Walker's testimony, the Department presented four photographs of the Gazo Avenue area which were taken on October 30, 2006, three days after the damage occurred to the Verizon facilities in that area.<sup>11</sup> Only one of the four photographs shows the specific area in which the damage occurred.<sup>12</sup> In that photograph, which shows open excavated ground, only one purported mark appears, and that mark is located at the top of the interior side of the excavated area. When Mr. Drewniak was questioned about this photograph he stated that the mark "is on the dirt and not on the grass. That would tell me that was painted on after the grass was torn up, if that is a paint mark."<sup>13</sup> By contrast, Mr. Walker testified that it is his practice to re-mark only after the damage site is filled in, and that he did not re-mark the site on October 30, 2006.<sup>14</sup> No testimony or other evidence was presented as to whether any other utility company may have come out to mark or re-mark the site after the October 27 damage occurred but before October 30, 2006, when the photograph was taken.<sup>15</sup>

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9. Exh. DPS-3.

10. Tr. at 12 and 35 (Walker).

11. Exh. DPS-1.

12. Exh DPS-1 page 3. Two of the other photographs presented by the Department in support of Mr. Walker's testimony show markings in the green belt area of Gazo Avenue on either side of the driveway of the house neighboring 194 Gazo Avenue. Exh. DPS-1 pages 1 and 2; tr. at 56-59 (Drewniak).

13. Tr. at 60 (Drewniak).

14. Tr. at 67 and 69 (Walker).

15. OnTarget testified that it did marking for Verizon in connection with the October 27, 2006, excavation. *See* also tr. at 58.

In this case, All Seasons excavated a trench in an area located between two trees in the green belt area in front of 194 Gazo Avenue.<sup>16</sup> There was no testimony or other evidence offered as to the precise size of this trench, although it appears from the photographs and video offered by the Department that this was a relatively narrow (as distinguished from expansive) trench.<sup>17</sup> Mr. Drewniak testified that he authorized his crew to excavate in the green belt area in front of 194 Gazo Avenue because on the night before the excavation, "there were no marks in that area between the trees."<sup>18</sup>

With respect to the specific locations of the markings made by On Target prior to October 27, 2006, Mr. Walker testified that "whether there was a mark in the exact spot that hit, I don't know, but we usually only put marks every 20 feet or so, and I do know there was a mark about 8 feet away, 9 feet. We went – I went back there with Dan and Terry yesterday just to refresh my mind, because a year I forget a lot. . . . We go to a lot of places, and there was a mark close to there, for sure. I do know that."<sup>19</sup> No additional testimony or other evidence was presented about On Target's general practices concerning the distance between markings. Finally, although Mr. Walker testified that he marked Verizon lines at 194 Gazo Avenue "to it and in front of it,"<sup>20</sup> no testimony or other evidence was presented that, prior to October 27, 2006, On Target had in fact put marks *every 20 feet in the green belt area* in front of 194 Gazo Avenue area.

Based on the evidence presented in this docket, I am not persuaded that it is more likely than not that the green belt area in front of 194 Gazo Avenue was marked in the location at which All Seasons excavated a trench. Mr. Drewniak explicitly stated that the green belt area in front of 194 Gazo Avenue was not marked at the location of the trench (between the two trees). Mr.

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16. Exh. DPS-2.

17. The photograph at page 3 of exh. DPS-1 appears to show the excavation in the green belt area in front of 194 Gazo Avenue, but no information concerning the dimensions of the excavation was presented. Exh. DPS-3.

18. Tr. at 51 (Drewniak).

19. Tr. at 12 (Walker).

20. Tr. at 11 (Walker).

Walker explicitly stated that he did not know whether there was a mark at the exact spot of excavation. In addition, Mr. Walker did not testify that, prior to October 27, 2006, he in fact put marks *every 20 feet in the green belt area* in front of 194 Gazo Avenue area. Moreover, neither the videotape nor the photographs offered as evidence by the Department show the exact location of markings in the green belt area in front of 194 Gazo Avenue prior to October 27, 2006.

#### **IV. CONCLUSION**

Based on the evidence in the record of this docket, I conclude that the Department has not proved, by a preponderance of the evidence, that the green belt area located in front of 194 Gazo Avenue was marked prior to All Seasons' excavation activities on October 27, 2006. I find that the conflict between the testimony of Mr. Walker and the testimony of Mr. Drewniak is not resolved by the videotape and the photographs presented by the Department.

Accordingly, I recommend that the Board deny the Department's request for imposition of a Four Hundred Dollar (\$400.00) fine against All Seasons. I further recommend that this docket be closed.

This Proposal for Decision has been circulated to the parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 12<sup>th</sup> day of February, 2008.

s/Judith M. Kasper  
Judith M. Kasper, Esq.  
Hearing Officer

**V. ORDER**

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The findings, conclusions and recommendation of the Hearing Officer are hereby adopted.
2. The Department of Public Service's request that the Public Service Board impose a Four Hundred Dollar (\$400.00) fine against All Seasons Excavating is denied.
3. This docket shall be closed.

Dated at Montpelier, Vermont, this 22<sup>nd</sup> day of February, 2008.

<u>s/James Volz</u>	)	
	)	
	)	PUBLIC SERVICE
	)	
<u>s/David C. Coen</u>	)	BOARD
	)	
	)	OF VERMONT
<u>s/John D. Burke</u>	)	

OFFICE OF THE CLERK

FILED: February 22, 2008

ATTEST: s/Susan M. Hudson  
Clerk of the Board

*NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)*

*Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.*