

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION, BUREAU OF	:	
INVESTIGATION AND ENFORCEMENT,	:	
	:	NO. C-2025-3056912
Complainant	:	
	:	
v.	:	
	:	
NYCE CONSTRUCTION SERVICES, INC.,	:	
	:	
Respondent.	:	

**POST-HEARING MEMORANDUM SUBMITTED ON BEHALF OF
RESPONDENT NYCE CONSTRUCTION SERVICES, INC.**

I. PROCEDURAL BACKGROUND AND SUMMARY OF RELEVANT FACTS

This administrative proceeding was initiated by the Pennsylvania Public Utility Commission, Bureau of Investigation & Enforcement (“BIE”) against Respondent, Nyce Construction Services, Inc. (“Nyce”), by Complaint filed alleging two violations of the One-Call Act, 73 P.S. Section 176 et seq. (“the Act”).

BIE’s Complaint was premised on two theories – both factually and legally flawed, as explained below – largely disregarding that Nyce had unquestionably submitted two active One-Call tickets in connection with excavation and site work at a residential development, known as Hidden Meadows, Phase III, involving a *cul-de-sac* street on which 20 residential units were being constructed (Respondent’s Exhibit No. 6).

In response to that Complaint, Nyce timely filed a detailed Answer denying any violations, and explaining the errors in BIE’s filing, which included but were

not limited to: (i) Nyce had submitted at least two One-Call tickets relating to the excavation in question and all buried utilities had been properly marked; (ii) the PPL electric conduit struck was not a buried utility but instead had actually been placed in the trench dug by Nyce the day before, (iii) the incident was the result of unfortunate operator error on the morning of the incident, having nothing to do with any failure to comply with the Act, and (iv) Nyce was not obligated to submit an Alleged Violation Report (AVR), given those Reports are only required when there has been a violation of the Act, there being none here.

On November 12, 2025, a hearing was conducted before the Honorable Administrative Law Judge Emily Ferran.

At that hearing, BIE presented one witness, Sarah Locke, who had no firsthand knowledge of whatever had occurred at the property location which led to the issuance of the Notice of Violation and/or the subsequent Complaint filed.

At the close of BIE's case, Nyce's counsel requested the Complaint be dismissed – like a nonsuit in civil proceedings -- for the complete failure of BIE to meet its burden of proof by failing to offer any evidence of what had actually occurred on the date in question. When this tribunal reserved that issue for later consideration, Respondent put on its case, which consisted of the testimony of the Company's Estimator and Project Manager, Shawn Froshour, as well as offering eight exhibits into evidence without objection.

The parties were then granted leave to submit post-hearing filings, this Memorandum being timely filed on Nyce's behalf.

II. ARGUMENT

As in any case, the analysis necessarily starts with the BIE Complaint, in which the supposed One-Call Act violations against Nyce are set forth in Paragraphs 35 and 36:

35. Respondent failed to place a valid, routine locate request ticket through POCS prior to digging the trench for the installation of the gas main line on Fountain View Circle.

If proven, this is a violation of Section 180(2.1) of the PA One Call Law, 73 P.S. Section 180(2.1). The purpose of an excavator submitting a Ticket to POCS is to “identify the location and type of facility owner lines at each work site.” NYCE’s earlier Ticket covering the entirety of the development, and which was placed 8 months prior to the excavation that gave rise to the line strike, was insufficient to constitute a locate request as it would not allow any facility owner to mark its lines. This is especially true given that the project encompassed a new development, where the underground facilities may not have been installed at the time of the February 2024 Ticket. (*emphasis added*)

As an excavator, Respondent was required to place a routine locate request ticket through POCS between 3 and 10 days before starting excavation or demolition. A diligent search of the Tickets submitted to POCS by the DPS did not return any tickets matching the location and time frame of Respondent’s October 10, 2024, excavation to install the gas main line.

The Bureau of Investigation and Enforcement’s proposed administrative penalty for this violation is \$2,500.00.

36. Respondent failed to file an AVR not more than ten business days after striking PPL’s electric primary line.

If proven, this is a violation of Section 180(16) of the PA One Call Law, 73 P.S. Section 180(16). As an excavator, Respondent was required to file an AVR not more than 10 business days after striking a line. However,

Respondent waited more than two months after the line strike to alert the Commission of the incident.

The Bureau of Investigation and Enforcement's proposed administrative penalty for this violation is \$1,000.

For the reasons which follow, these allegations are contradicted by the evidence offered, and in fact and law there is no basis for any claim that Nyce violated the Act.

First, the sentence at the beginning of Paragraph 35 is false.¹

Nyce did in fact place a "valid, routine locate request ticket through POCS," which was undeniably done on September 20, 2024, only 21 days prior to the incident which led to this proceeding.

Secondly, BIE's reference to a ticket "placed eight months prior," as being "insufficient to constitute a locate request as it would not allow any facility owner to mark its lines," is incorrect.

As Mr. Froshour testified, without rebuttal or contradiction, when the first Ticket was submitted on February 2, 2024, the lines present at that time were marked by the utility companies, and it is therefore difficult to follow how BIE can claim that marking "would not allow any facility owner to mark its lines."

Further, the September 20, 2024 Ticket was explained by Mr. Froshour as having been done because the previous markings had faded, a proper and prudent practice for which BIE now inexplicably seeks to punish Nyce.

¹The words "[i]f proven" at the beginning of the second paragraph of Paragraph 35 of the Complaint are somewhat prophetic, given that those facts were not proven, undermining BIE's entire position in this proceeding.

Thirdly, and contrary to the third paragraph of Paragraph 35, Nyce did in fact place the September 20, 2024 Ticket request between three to ten days before starting excavation or demolition on the *cul-de-sac* street, as Mr. Froshour explained, again without contradiction or rebuttal.

To be clear, the exhibits offered by both BIE as well as Nyce, demonstrated that there were in fact two One-Call tickets submitted relating to the work performed at the Hidden Meadows, Phase III *cul-de-sac* subdivision, i.e.:

-- The PUC Web Ticket Confirmation dated February 2, 2024 (Respondent's Exhibit No. 1), identified a one-year construction period, and asked that the recipients "[REMARK HIDDEN MEADOWS, PHASE III FOR WORK RESTART ENTIRE SITE WHICH WAS PREVIOUSLY DISTURBED]."²

-- Then, to refresh the lines, particularly in the anticipated area of excavation within the *cul-de-sac* street right of way – which is exactly where the incident occurred which led to this proceeding – Nyce submitted PUC Web Ticket Confirmation dated September 20, 2024, which requested: "[REMARK ALL UTILITIES IN THE RIGHT OF WAY]."³

²The February 2, 2024 Ticket confirms notifications were sent to Lehigh County Authority, Metropolitan Edison, PPL Electric, Service Electric Cable TV, UGI Utilities, TC-Astound, Verizon Eastern and Upper Macungie Township, there being no allegation that any utility provider was not properly notified for that marking.

³ Under the September 20, 2024 Ticket, notification was sent by the One-Call system to the same utility providers, other than apparently Verizon Eastern.

Nonetheless, and relevant to this proceeding, PPL was notified on both occasions, and there was no evidence presented that its utilities were not properly marked.

Fourth, Paragraph 35 of the BIE Complaint incorrectly implies an excavator, such as Nyce, is required to continually go back and resubmit One-Call tickets, notwithstanding the ongoing and seamless nature of the trenching work, and also the fact that Nyce had actually previously submitted two still-active tickets for the very same project.⁴

In other words, there was no failure of functioning of the One-Call system, particularly none due to any failure by Nyce to comply with requirements of the One-Call statute, leading to the PPL line being struck. It was merely operator error – the operator having been properly schooled by Nyce beforehand, but just having failed to act in accordance with best practices that morning, and who was terminated immediately following this incident – striking a clearly disclosed line in a trench the excavator had dug the previous day, with the PPL conduit having been installed the previous day.

In reality then, on October 11, 2024 – the date of the incident involved here -- there were actually two still-active One-Call Tickets which were applicable to

⁴ In addition to which Nyce had submitted, on May 12, 2023 (Respondent's Exhibit No. 3) the initial ticket for this *cul-de-sac* subdivision, in which it had identified the "Type of Work" as "New Houses," followed by – because that one-year duration ticket was in danger of expiring before the work would have been performed – submitted another ticket on February 2, 2024 (Respondent's Exhibit No. 1), where the "Type of Work" was identified as "New Housing Subdivision," following which, and as noted above, on September 20, 2024, yet another One-Call ticket was submitted (Respondent's Exhibit No. 4), which again, Mr. Froshour explained as having been done to refresh the markings from the February 2, 2024 ticket, as some of the prior markings had faded.

Nyce Construction's continuous project work, contradicting the first sentence of Paragraph 35 of the BIE Complaint.

Fifth, it is undisputed the PPL line unfortunately and inadvertently struck was not one which had been previously installed and buried underground, as to which a One-Call ticket request would have resulted in marking and disclosure. To the contrary, as Mr. Froshour explained, the not-yet-connected-or-live PPL conduit with which contact was made by the excavator *had just been installed the previous day* within that same trench which Nyce had excavated.⁵ So if Nyce had submitted a One-Call request after September 20, 2024, PPL would not have come out and marked any differently than it did after the February 2, 2024 and September 10, 2024 Tickets has been submitted, *because the line which was struck was still being installed, was not live, and was not yet even part of PPL's system.*

Sixth, BIE's suggestion at the hearing that the September 20, 2024 Ticket in effect was somehow defective, because it did not identify that a gas main was being installed is an unsubstantiated and incorrect interpretation of the Act. Indeed, the statute does not require that all facilities being installed in a common trench be each separately identified, in terms of facilities to be installed. Plus,

⁵ On the issue of whether the PPL not-live-and-not-connected conduit even qualified as a "line" or "facility," it should be noted that each of those words "means an *underground* conductor or *underground* pipe or structure used and providing electric or communication service, or an *underground* pipe used in carrying, gathering, transporting or providing. . ." Yet here, the conduit struck had not been buried underground, but had only been partially covered in an open trench, at which the excavator had been working the preceding day, and had installed the conduit which was struck.

this contention completely disregards the fact that Nyce still had authority, on the date of the incident, to be operating under the one-year One-Call ticket issued February 2, 2024, which identified the Type of Work as “New Housing Subdivision.”

From a legal standpoint, the Excavator’s Duties set forth in 73 P.S. Section 178, require only that the locate request “identify the location and *type of facility owner lines at each work site* by notifying the facility owner” through the One-Call System, with that notification to occur “not less than three, no more than ten business days in advance of the beginning excavation or demolition work. . .” 73 P.S. Section 178(2.1) (*emphasis added*). In other words, the purpose of the locate request is to cause utility providers to go out and identify *already existing* facilities, not facilities proposed to be installed, for which there is no such requirement under the One-Call Act.

Moreover, Section 178(2.2) of the Act, referencing Excavator Duties, required Nyce only to provide the One-Call System with exact information to identify the work area/site, so utility facility owners would now where to mark their lines, and significantly, “[a]n excavator shall be deemed to have met the obligations of clause (2.1) if he calls the One-Call System, provides the work site and other required information and receives a serial number.”⁶

Lastly, the second violation assessed, as set forth in Paragraph 36 of the BIE Complaint, fails for two fundamental reasons.

⁶ Mr. Froshour from Nyce Construction testified that he prefers to submit the requests through the online system, rather than a telephone call.

One, Ms. Locke admitted during limited cross-examination that the obligation to submit an Alleged Violation Report (AVR) is only triggered by a violation of the One-Call Act. And for the reasons explained above, the excavator here did not fail to perform any of its duties under the Act, as a consequence of which there can be no violation of the Act, at least on the grounds stated in Paragraph 35 of BIE's Complaint.

Two, a "Report of Alleged Violation" is defined in Section 176 of the Act as "mean[ing] a recorded account of an alleged violation." Which also obviously means – consistent with Ms. Locke's testimony -- there must have been a violation of the Act in the first place, which, for reasons stated above, did not occur here, certainly not as to any excavator duties under Section 178.

III. CONCLUSION

The Complaint filed in this proceeding should be denied and dismissed.

Respectfully submitted,

LAW OFFICES OF KEVIN T. FOGERTY

Date: December 3, 2025

By: 

Kevin T. Fogerty, Esquire
Counsel for Respondent

Mill Run Office Center
1275 Glenlivet Drive, Suite 150
Allentown, PA 18106
Phone 610-366-0950
Fax 610-366-0955
PA Supreme Court I. D. No. 36667

CERTIFICATE OF SERVICE

I, Kevin T. Fogerty, Esquire, counsel for Respondent, Nyce Construction Services, Inc. in this proceeding, hereby state and certify that on Wednesday, December 3, 2025, I served, in the manner listed below, a true and correct copy of the foregoing POST-HEARING MEMORANDUM SUBMITTED ON BEHALF OF RESPONDENT NYCE CONSTRUCTION SERVICES, INC. upon the following:

VIA EMAIL

Administrative Law Judge Emily A. Farren
Pennsylvania Public Utility Commission
Office of Administrative Law Judge
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

VIA EMAIL

Grant Rosul, Esquire
Commonwealth of Pennsylvania, Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
Prosecutor

Date: December 3, 2025



Kevin T. Fogerty, Esquire