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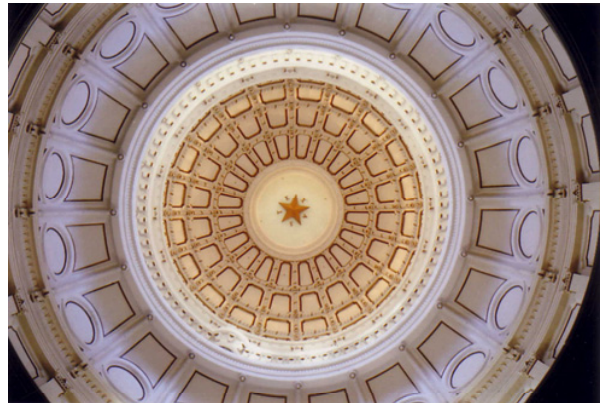


Photo by Rick & Judy Vanderpool

Quarterly Newsletter

January 15, 2005 No. 1

Foreword by Mike Miller

Welcome to the first edition of the Miller & McCarthy, P.C. Quarterly Newsletter. Its purpose is to provide the latest information on topics of current interest to our clients. The attorneys at Miller & McCarthy, P.C. focus on litigation and have a statewide practice.¹ Miller & McCarthy represent contractors and subcontractors across the state of Texas, many of whom have been involved in line cut cases.

This inaugural newsletter is dedicated to those of you who construct in and around utility lines, and is written by Murray J. Rossini, a Miller & McCarthy attorney who handles these cases. At Miller & McCarthy, we are able to immediately respond to a client's need for a timely investigation of cut lines, and in most cases we can be on the scene of an occurrence within hours of being notified. **Our line cut hotline for timely investigations and statewide representation is 214-850-5280, Murray J. Rossini or 214-675-0053, Mike Miller.** During regular business hours we can be reached at 469-916-2552 and toll-free at 1-800-338-2630.

Synopsis of Key Terms of the Texas One Call Law

A person who intends to excavate shall notify One Call not earlier than the 14th day before excavation is to begin or later than the 48th hour before the time the excavation is to begin, excluding Saturdays, Sundays, and legal holidays. (Texas Utilities Code § 251.151). There

¹Mike Miller, Greg McCarthy, and all other attorneys at Miller & McCarthy, P.C. are not certified by the Texas Board of Legal Specialization with the exception of Melinda Huff (personal injury trial law).

are seven specific requirements for the notice. (Texas Utilities Code § 251.152). There are exceptions as to who is required to make this call in the One Call Law.

The utilities operator must mark the approximate location of its facilities within 48 hours of the request, excluding Saturdays, Sundays, and legal holidays. (Texas Utilities Code § 251.157(a)(1)).

An excavator who fully complies with his duties may not be liable for damage to an underground facility that was not marked. (Texas Utilities Code § 251.157(c)).

Additionally, the excavator should "hand dig" or use other similar methods within a tolerance zone and in a manner set by company policy.

How to Investigate and Report the Scene of a Line Cut Occurrence

It is very important to properly investigate and report on any occurrence of a line cut. The following are some tips to be considered when writing an internal occurrence report.

- Stop Work. Contact One Call immediately and then notify the Safety Director.
- Use an approved company form and fully and carefully complete the form.
- Visit the scene as soon as possible. Do not leave the scene in violation of company policies.
- List all eyewitnesses and other significant persons by name, address and phone number, including the operator, the spotter if any, the foreman and the supervisor. Record the names,

addresses and phone numbers of all other relevant persons such as utility employees who are aware of facts and subcontractors with knowledge.

- Note the date and time of the occurrence, the weather, and the type of work being performed.
- Describe in the report and photograph, videotape, and measure any markings/flags carefully.
- Take photos and/or video and make sketch of occurrence scene.
- In appropriate case, a survey is desirable.
- Indicate directions, i.e., N, S, E, and W.
- Always tie measurements to a permanent point: a telephone pole, building, or curb.
- Use sketches to show measured distance of any markings or flags to the occurrence scene.
- Use sketches to show measured depth of the affected line from the surface.
- A sketch can be used to pinpoint where photos/video was taken and what direction the picture-taker was standing. Note the person taking photos or video.
- Take photos of incident along the line of cut line in both directions showing marks, flags or absence of marks or flags.
- Photographs of marks should be made with a tape measure or ruler showing distances between the occurrence and any marks or flags.
- Photograph and/or video any attempt to re-mark the scene of the occurrence.
- Mark on the sketch the location, direction and intent of the photograph (i.e., photo location point – East – shows no marks for 50 feet).

- On high profile jobs, photos showing no marks or flags may be taken prior to excavation.
- Turn in all pictures to Safety Director.
- Make narrative of what is being videoed in videos.
- Take pictures or video of repairs if possible.

Record Keeping for Possible Claim or Counterclaim

In an appropriate case, the contractor will be able to file a counterclaim or claim against a utility. Consult with legal counsel to determine if a counterclaim is appropriate for your specific situation, however, the following documentation is helpful in considering or pursuing a counterclaim or claim against a utility:

- Correspondence asking the utility to relocate or adjust its lines in advance of construction
- The construction contract that may provide that utilities will be adjusted by others
- Payroll and equipment records showing extra costs or inefficiencies
- Minutes and sign-in sheets of preconstruction or utility meetings
- Demand letters
- Notes or other records of conversations with utilities' personnel

Recent Line Cut Reported Case

Qwest Communications Int'l, Inc. v. AT&T Corp., 114 S.W.3d 15 (Tex.App.—Austin 2003, pet. filed) is a recent line cut opinion by the Austin Court of Appeals that is currently on appeal to the Texas Supreme Court. In the trial court Qwest was found to have acted with malice in damaging a competitor's lines when its subcontractor planted its own lines, and the jury assessed \$350 million in exemplary damages, which the trial court reduced to \$467,808.91. (two times the economic damages). Qwest appealed, arguing that the Plaintiff, AT&T, did not meet the clear and convincing evidence standard of proof required of exemplary damages because none of its managerial agents participated in the conduct and because there was no proof of malice.

The Austin Court of Appeals rejected these arguments, and reviewed the evidence of malice in upholding the jury's malice finding.

The *Qwest* court noted that Qwest fostered a corporate environment of rapid cable laying operations in the same right-of-way as AT&T's facilities, that Qwest's nationwide installation operations resulted in numerous other cuts, and that Qwest fostered a hurried atmosphere to finish its fiber optic system. The *Qwest* court noted that one of Qwest's operators plowed six inches from a marked line, was only on the job three days, had no training in

excavation around utilities and had no previous construction experience. In another instance in which malice was found, Qwest disregarded equipment irregularities, drilled close to AT&T's facilities and failed to keep a log of all drill readings, the court stated.

In reviewing the evidence, the court also noted that Qwest failed to provide AT&T with its construction plans upon AT&T's request, that Qwest failed to cooperate with AT&T, and that Qwest's crews were observed to be working 12 to 13 hour days, often without lunch.

This recent case demonstrates the type of evidence that could lead to a jury's malice finding in a line cut case.

Again, Miller & McCarthy's line cut hotline is 214-850-5280, Murray J. Rossini or 214-675-0053, Mike Miller.

A Favorite Quote

"I told my psychiatrist that everyone hates me. He said I was being ridiculous -- everyone hasn't met me yet."

- Rodney Dangerfield (1921-2004)

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