

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
NOTICE OF PENALTIES INCURRED AND DUE
FOR VIOLATIONS OF LAWS AND RULES

PENALTY ASSESSMENT: D-210605
Investigation # 8474
UBI: 328-000-223

Contest of Violation

Basis for Violation:

On October 20, 2021, the Safety Committee heard cases 21-019, 21-020 and 21-023 against Avista and determined Avista violated RCW 19.122.030(3)(a) by failing to provide the excavator with reasonably accurate information by marking their location. The Safety Committee recommended that the Commission impose a \$5,000 penalty.

During the review, Avista acknowledged its contractor ELM failed to accurately locate its lines as requested in ticket #21205186 on June 4, 2021.

The work in question was performed by One Call Locators, Ltd., d/b/a ELM Locating and Utility Services ("ELM"), in its capacity as an independent contractor of Avista. In that capacity, ELM respectfully contests the conclusions of the Safety Committee in this instance.

Basis for Contest:

Avista's acknowledgement has been taken out of context. ELM did *not* fail to accurately locate Avista's lines as requested in ticket #21205186 on June 4, 2021 *prior to the relevant excavation*.

The original locate was completed by ELM locate technician, Ryan Weaver, on May 12th and he identified three Avista lines crossings from the median to the south side of the street. He used Avista prints which provided reasonably accurate information to ELM.

Excavation was started by M&L (the excavator) with a directional drill under the lines that ELM had located.

While M&L was directional boring, Avista, in an abundance of caution (looking at its maps), contacted ELM to check for a 4" gas line in an area in which M&L had not yet reached.

ELM met with M&L, explained the situation, and working together, M&L waited for ELM to check for a the 4" gas line.

ELM came right out to the locate area, reopened the ticket at 8:23am (immediately after speaking with the Avista inspector) and located the 4" line. The ELM locator closed the ticket at 9:37am.

M&L continued its directional boring, the 4" gas line having been identified. The excavation was completed safely and without any damage to an Avista line.

Summary of Statutory compliance:

The basis for the fine is RCW 19.122.030(3)(a) for failing to provide the excavator with reasonably accurate information by marking their location. But that factual statement is not correct. The 4" gas line, initially not located, was in fact located prior to M&L excavating across that 4" gas line. It was located based on information provided by Avista.

Reference is directed to RCW 19.122.030(2) which provides:

(2) An excavator must provide the notice required by subsection (1) of this section to a one-number locator service not less than two business days and not more than ten business days before the scheduled date for commencement of excavation, **unless otherwise agreed by the excavator and facility operators**. If an excavator intends to work at multiple sites or at a large project, the excavator must take reasonable steps to confer with facility operators to enable them to locate underground facilities reasonably in advance of the start of excavation for each phase of the work.

Here, M&L was notified, in an abundance of caution, that ELM was going to confirm whether a 4" gas line was present. M&L agreed to wait while ELM checked for the 4" gas line. This shows an agreement with the excavator as is contemplated by the Statute. RCW 19.122.030(2)

Attention is also directed to RCW 19.122.030 (4)(C):

(c) A facility operator's good faith attempt to comply with subsection (3)(b) and (c) of this section:

(i) Constitutes full compliance with the requirements of this section, and no person may be found liable for damages or injuries that may result from such compliance, apart from liability for arranging for repairs or relocation as provided in RCW 19.122.050(2);

ELM submits that the current fact situation is a terrific example of Avista, ELM and M&L working together for the public good. They worked together to second check whether the 4" gas line was marked prior to being intersected by M&L's directional bore.

There is no requirement in the statute that ELM's first locate is dispositive of its One Call obligations. Such an approach would be an artificial "gotcha" which would ignore the actual intent of the statute which is that Avista and this Safety Commission are entrusted protect your home and business prior to excavations in the State of Washington. *RCW 19.122.010 (intent)*.

Locating facilities is not a perfect science and this is why RCW 19.122.030 (4)(C) provides for good faith compliance. There is no better example of good faith working together than the manner in which ELM and Avista worked together with M&L to protect the public during this excavation.

Why Are We Before the Commission:

ELM submits it is relevant as to why this matter is even before the Safety Commission as all the Avista lines were ultimately located (in agreement with the excavator) prior to excavation and there was no damage to an Avista line. It unfortunately requires an explanation of the past history between the excavator and Avista. M&L is owned by Scot Hattenburg, and he does not like Avista, and has taken every opportunity for years to threaten, sue and harass Avista (and ELM as its locate partner). Here is the relevant portion of the most recent email from Mr. Hattenburg to ELM:

On Oct 28, 2021, at 6:01 PM, scot@mlnorthwest.com <scot@mandlconstruction.net> wrote:

Richard,

... I will say if you don't pay, I will take all of them to small claims. I will blow it up with all the emails that I have sent regarding dig safety and the gaslighting that Avista has done, because you don't care.

I am tired of dealing with your gross negligence. I will advocating for treble fines approaching \$100,000 with the Washington state dig law safety committee.... I am just done and don't want my employees or the public killed because of your negligence.

I just want A LOCATE!!!!!!!!!!!!

The reality is that in this situation all Avista lines were ultimately located prior to excavation. The public was protected and there was no damage.

Yet, in response to the approximate 1-hour delay (to which M&L agreed to wait), Avista received an invoice for M&L and August 12, 2021 demand letter from its outside counsel for \$15,195.20. A copy is attached. As to the genuineness of this claim, it is noted that while the delay was just over an hour, M&L is claiming 46 hours for "investigation and documentation" in an amount of \$4,638.90. Please note how they use the Safety Commission to justify its demand. (letter page 2).

Unfortunately for everyone, including the public, M&L is using the Safety Commission in a manner that is wasteful, petty, personal, and inconsistent with the Safety Commission's **Mission** which is to protect the people of Washington by ensuring that investor-owned utility and transportation services are safe, available, reliable, and fairly priced.

In other words, the fact ELM did not initially locate the 4" gas line is being used as part of a scheme to "game" the One Call system for personal profit. Allowing this fine to stand will

just empower M&L in a situation in which it was otherwise in agreement with Avista to wait a short time while it was determined whether there was a 4" gas line. In fact, once so notified, it had a statutory duty to wait as "the excavator must take reasonable steps to confer with facility operators to enable them to locate underground facilities reasonably in advance of the start of excavation for each phase of the work." RCW 19.122.030(2).

Even though in agreement with Avista and ELM, M&L has created an invoice and is attempting to use the threat of reporting this matter to this Safety Commission as a way to threaten Avista to pay an unjustifiable demand.

For the foregoing reasons, ELM respectfully submits that this Contest of Violation result in the \$5,000 fine against Avista being set aside.

I am Lead Investigator at ELM and I review all disputed invoices, the associated paperwork and photographs. I am responsible for maintaining ELM's materials related thereto. In the normal scope of my responsibilities, I reviewed the facts related to this locate and am the most knowledgeable ELM employee as to this locate.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jerry Beukelman". The signature is fluid and cursive, with the first name being particularly prominent.

Jerry Beukelman

Service Date: December 28, 2021

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

**NOTICE OF PENALTIES INCURRED AND DUE
FOR VIOLATIONS OF LAWS AND RULES**

PENALTY ASSESSMENT: D-210605
PENALTY AMOUNT: \$5,000
Investigation # 8474

SERVICE VIA EMAIL

UBI: 328-000-223

Avista Corporation
337 North Post St.
Spokane, WA 99201
Brian.schultz@avistacorp.com
Linda.burger@avistacorp.com

The Washington Utilities and Transportation Commission (Commission) believes that Avista Corporation (Avista) has violated the Revised Code of Washington (RCW) 19.122.030(3)(a) by failing to provide the excavator with reasonably accurate information by marking the location(s) of its underground facilities. RCW 19.122.070(1) states, in part, that violations of any provision of the chapter are subject to a civil penalty of not more than \$1,000 for an initial violation and not more than \$5,000 for each subsequent violation within a three-year period.

The Commission reviewed findings and recommendations made by the Washington State Dig Law Safety Committee (Safety Committee) and hereby notifies you that it is assessing a \$5,000 penalty (Penalty Assessment) against you on the following grounds:

On October 20, 2021, the Safety Committee heard cases 21-019, 21-020 and 21-023 against Avista and determined Avista violated RCW 19.122.030(3)(a) by failing to provide the excavator with reasonably accurate information by marking their location. The Safety Committee recommended that the Commission impose a \$5,000 penalty.

Commission staff (Staff) conducted an investigation that included reviewing documents, reports, emails submitted by the Safety Committee, and the One-Call center database, and observed the review process. During the review, Avista acknowledged it failed to accurately locate its lines as requested in ticket #21205186 on June 4, 2021. During the past 12 months, the Commission has issued Avista three Penalty Assessments of \$5,000 each for violations of RCW 19.122.030.

Staff agrees with the Safety Committee's findings of probable violation and agrees with the penalty recommendation.

- \$5,000 penalty for one violation of RCW 19.122.030(3)(a) for failing to provide the excavator with reasonably accurate information by marking the location of underground facilities.

The Commission agrees with Staff's recommendation as described above.

These facts, if not contested or if proved at a hearing and not rebutted or explained, are sufficient to support the penalty assessment.

Your penalty is due and payable now. If you believe the violation did not occur, you may deny committing the violation and contest the penalty through evidence presented at a hearing or in writing. Or, if there is a reason for the violation that you believe should excuse you from the penalty, you may ask for mitigation (reduction) of the penalty through evidence presented at a hearing or in writing. The Commission will grant a request for hearing only if material issues of law or fact require consideration of evidence and resolution in a hearing. Any request to contest the violation or for mitigation of the penalty must include a written statement of the reasons supporting that request. Failure to provide such a statement will result in denial of the request. *See* RCW 81.04.405.

If you properly present your request for a hearing and the Commission grants that request, the Commission will review the evidence supporting your dispute of the violation or application for mitigation in a Brief Adjudicative Proceeding before an administrative law judge. The administrative law judge will consider the evidence and will notify you of their decision.

You must act within 15 days after receiving this Penalty Assessment to do one of the following:

- Pay the \$5,000 penalty amount due; or
- Request a hearing to contest the occurrence of the violation; or
- Request mitigation to reduce the amount of the penalty.

Please indicate your selection on the enclosed form and submit it electronically through the Commission's web portal **within FIFTEEN (15) days** after you receive this Penalty Assessment. If you are unable to use the web portal, you may submit it via email to records@utc.wa.gov. If you are unable to submit the form electronically, you may send a paper copy to the Washington Utilities and Transportation Commission, PO Box 47250, Olympia, Washington 98504-7250.

If you do not act within 15 days, the Commission may refer this matter to the Office of the Attorney General for collection. The Commission may then sue you to collect the penalty.

DATED at Lacey, Washington, and effective December 28, 2021.

/s/Rayne Pearson
RAYNE PEARSON
Director, Administrative Law Division

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
PENALTY ASSESSMENT D-210605, Investigation #8474

PLEASE NOTE: You must complete and sign this document and send it to the Commission within 15 days after you receive the Penalty Assessment. Use additional paper if needed.

I have read and understand RCW 9A.72.020 (printed below), which states that making false statements under oath is a class B felony. I am over the age of 18, am competent to testify to the matters set forth below and I have personal knowledge of those matters. I hereby make, under oath, the following statements:

1. **Payment of penalty.** I admit that the violation occurred and enclose \$5,000 in payment of the penalty.
2. **Contest the violation.** I believe that the alleged violation did not occur for the reasons I describe below (if you do not include reasons supporting your contest here, your request will be denied):

Avista's acknowledgement has been taken out of context. Avista did **not** fail to accurately locate its lines as requested in ticket #21205186 on June 4, 2021 **prior to the relevant excavation**. See attached detailed explanation.

- a) I ask for a hearing to present evidence on the information I provide above to an administrative law judge for a decision.
- OR b) I ask for a Commission decision based solely on the information I provided above.

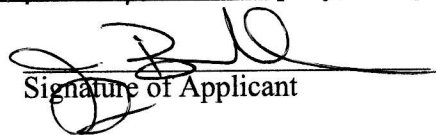
3. **Request mitigation.** I admit the violations, but I believe that the penalty should be reduced for the reasons set out below (if you do not include reasons supporting your application here, your request will be denied):

- a) I ask for a hearing to present evidence on the information I provide above to an administrative law judge for a decision.
- OR b) I ask for a Commission decision based solely on the information I provided above.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing, including information I have presented on any attachments, is true and correct.

Dated: 1/10/2022 [Month/Day/Year], at Lafayette, Co [City, State]

Jerry Benkelman
Name of Respondent (Company) – please print


Signature of Applicant

RCW 9A.72.020:

“Perjury in the first degree. (1) A person is guilty of perjury in the first degree if, in any official proceeding, he makes a materially false statement which he knows to be false under an oath required or authorized by law. (2) Knowledge of the materiality of the statement is not an element of this crime, and the actor’s mistaken belief that his statement was not material is not a defense to a prosecution under this section. (3) Perjury in the first degree is a class B felony.”