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January 18, 2023

Attn: Executive Director and Secretary Amanda Maxwell

RE: PENALTY ASSESSMENT: D-220826
PENALTY AMOUNT: \$5,000
Investigation # 8659

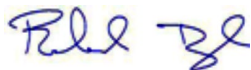
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Records Management
01/18/23 13:21:40
State Of WASH.
UTIL. AND TRANSP.
COMMISSION

Dear Ms. Maxwell:

Attached please find the enclosed Challenge which we are filing on behalf of James Bourazak at ELM Locating and Utility Services.

Regards,

DOYLE LOW LLP



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VIA EMAIL
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January 18, 2023

PENALTY ASSESSMENT: D-220826
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Investigation # 8659

TO: RAYNE PEARSON
Director, Administrative Law Division

This Challenge is filed on behalf of One Call Locators, Ltd., a Montana corporation, dba ELM Locating & Utility Services (hereafter "ELM") who contractually provides locating services to PSE, and who was responsible for the locate at issue. While PSE has paid the fine in an abundance of caution, this Challenge is filed within the 15 days set forth in the decision. Please accept this request to contest the violation *See* RCW 81.04.405. The basis for ELM's request for hearing and request that the Commission review the evidence supporting our dispute of the violation follows.

Basis for the Commission's ruling:

The Washington Utilities and Transportation Commission (Commission) believes that Puget Sound Energy (PSE or Company) has violated the Revised Code of Washington (RCW) 19.122.030(3)(a) by failing to mark the boundary of the excavation area with white paint.

Challenger:

This challenge is being filed by ELM. The signatory to this challenge is James Bourazak, ELM's Chief Executive Officer. As Chief Executive Officer, I oversee the operations of ELM nationwide. ELM is in the business of locating underground utilities, an activity that is, for public safety reasons, regulated by law.

ELM contracts with certain utility companies, such as PSE, to locate their underground utility lines. ELM located the lines on behalf of PSE that are at issue in this challenge.

For clarification, ELM is filing this challenge as the company who located the lines on behalf of PSE. This is not being filed on behalf of PSE and ELM does not represent PSE in this capacity.

Of note, PSE has paid the fine as the decision indicated the fine was due and payable. That should have no effect on the propriety of this request for review, which is separately contemplated in the decision.

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Getting this challenge correct is very important as complainant excavator (Interwest) has filed a civil action against PSE for which ELM is indemnifying PSE. Interwest is trying to use this UTC fine as evidence in that civil case. Thus, getting this decision correct has a serious financial interest to ELM.

Challenge to ruling:

The conclusion of the Commission misstates the law and ignores the facts of this case. *The decision states that the obligation to mark with white paint was on PSE.* That is not correct. The obligation to mark the boundary of the excavation area with white paint is on the excavator not the facility operator.

RCW 19.122.030

Excavator and facility operator duties before excavation.

(1)(a) Unless exempted under RCW 19.122.031, before commencing any excavation, ***an excavator must mark the boundary of the excavation area with white paint applied on the ground of the worksite***, then provide notice of the scheduled commencement of excavation to all facility operators through a one-number locator service. [Italics-bold added.]

In this case, the excavator did not put “new” paint on the ground as part of the Locate Request at issue and instead relies on prior white paint in the area to meet its statutory obligation. In fact, Interwest has taken the position that it could rely on prior placed white paint for purposes of a new locate request.

ELM believes that under the statute, an excavator has to white line every new ticket. See language above. If ELM is correct, Interwest’s documentation and position that it had marked the area in white paint before commencing excavation is not correct, and should not have been relied upon by the Commission.

This decision gives excavators a “loophole” defense to a safety requirement included in the statute for when an excavator does not comply with the intent and wording of the statute. That cannot possibly be the intent of the Commission. In fact, the decision ends noting, “The Committee determined, and Staff agreed, that the white paint on the ground takes precedence over the wording that is included in the description on a locate description.” The requirement of the excavator placing white paint on the ground as part of its locate request is foundational to the intent and focus on safety in the statute.

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ELM takes safety very seriously and is proud to have one of the best safety ratings in the industry. As shown by the facts in this case, not adhering to the intent and wording of the statute will cause problems and damages in the future; just as has occurred here.

The excavator is subject to the specific obligations and strict liability imposed by RCW 19.122.040. Towards that end, it is also undisputed that Interwest failed to identify the precise location of PSE's utility line. See, "(5) An excavator must not excavate until all known facility operators have marked or provided information regarding underground facilities as provided in this section. RCW 19.122.040 (5)." As a result, Interwest dug into and damaged PSE's underground power line. Interwest's failure to comply with its mandatory duty under the Act renders it liable per RCW 19.122.040 (3) and (4).

The Commission further found, "Puget Sound Energy admitted to marking locates according to the descriptions on the locate ticket, not according to the white-lining or the polygons attached to the ticket." This is not possible as there was no white lining on the ground, and no polygons either. At the time of the damage, the ELM locators, placing locate marks for PSE, did not have access to the polygons, neither does the Washington 811 law mention the need to utilize a polygon to provide locate marks. These are errors of law. Again, it is the excavator, not PSE, who failed to mark the ground with white paint as part of this locate request. Also, clarification is needed as to Interwest's locate request which notes that white paint was present. That is not correct factually, following the discussion of the statute above.

Please see following photo of the damage area, from an earlier locate, which clearly shows that the damage area was outside of the white paint placed by the excavator.

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On review, it will be explained how that while Interwest has photos taken prior to the incident that clearly show white paint that the white paint was from earlier expired tickets, 6 months earlier, and therefore could not be relied upon according to the statute. See, “

(6)(a) Once marked by a facility operator, an excavator is responsible for maintaining the accuracy of the facility operator's markings of underground facilities for the lesser of:

(i) **Forty-five calendar days from the date that the excavator provided notice to a one-number locator service** pursuant to subsection (1) of this section; or...” RCW 19.122.040 (6)(a)(i). [Emphasis added.]

In summary, ELM agrees that there needed to be white paint on the ground, but the statute required that paint to be placed there by the excavator not PSE (or ELM). Moreover, Interwest’s

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reliance on white paint placed 6 months prior on the ground was misleading and does not overcome its clear violation of the statute.

ELM respectfully submits that it has identified material issues of law and fact which require consideration of evidence and resolution in a hearing. ELM requests that the Commission grants this request, and that the Commission will review the evidence supporting its dispute of the violation in a Brief Adjudicative Proceeding before an administrative law judge.

Thank you for your time. We are in this together as we focus on excavation safety for the benefit of others.

ELM Locating & Utility Services


JAMES BOURAZAK

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
PENALTY ASSESSMENT D-220826 Investigation #8659

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**):

See attached letter from James Bourazak.

- 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: 01/18/2023 [Month/Day/Year], at San Francisco, CA [City, State]

ELM
Name of Respondent (Company) – please print


Signature of Applicant