

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
PENALTY ASSESSMENT D-161231

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 violations occurred and enclose \$2,000 in payment of the penalty
2. **Contest the violations.** I believe that the alleged violations did not occur for the reasons I describe below:
See Attached Letter by David S. Steele from Perkins Coie LLP.
- 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 provide above.
3. **Request mitigation.** I admit the violations, but I believe that the penalty should be reduced for the reasons set out below:
- 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 provide 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: 2-2-2017 [Month/Day/Year], at BELLEVUE, WA [City, State]

T. BRETT CONRAD
Name of Respondent (company) – please print


Signature of Applicant



February 2, 2017

David S. Steele
DSteele@perkinscoie.com
D. +1.425.635.1633
F. +1.206.359.4758

VIA WEB PORTAL, EMAIL, AND OVERNIGHT MAIL

Gregory J. Kopta
Director, Administrative Law Division
Washington Utilities and Transportation Commission
1300 Evergreen Park Drive SW
Olympia, WA 98502

Re: Puget Sound Energy's Response to Penalty Assessment D-161231

Dear Judge Kopta:

Puget Sound Energy ("PSE") responds to the "Notice of Penalties Incurred and Due for Violations of Laws and Rules," issued by the Washington Utilities and Transportation Commission ("Commission") and served on PSE on January 18, 2017. This letter constitutes a formal response to the penalty assessment and PSE respectfully contests the violations alleged. PSE denies committing the violations and requests a Commission decision based on the evidence and legal authority set forth in this letter.

As more fully described below, the penalties assessed against PSE are improper because the Commission and the Washington State Dig Law Safety Committee ("Safety Committee") incorrectly penalized PSE's conduct under RCW 19.122.030(3)(a). As to Case No. 16-014, the evidence submitted is not determinative as to whether PSE failed to mark the service line in question and in fact, demonstrates that PSE was at the site on two separate occasions to mark gas facilities in the excavation area. As to Case No. 16-015, the service line at issue was an "unlocatable underground facility" under RCW 19.122.020(28) and therefore, the Safety Committee and the Commission should have evaluated PSE's conduct under RCW 19.122.030(3)(b), which incorporates the "good faith" standard provided in RCW 19.122.030(4)(c). The Commission and the Safety Committee failed to fully consider PSE's conduct and the facts surrounding its response to the locate request, which demonstrate that PSE acted in good faith, fully complied with its statutory obligations, and that no penalty is warranted.

A. In Case No. 16-014, the Evidence Is Undeterminative as to Whether the Service Line Was Marked and Therefore No Penalty Is Warranted Under RCW 19.122.030(3)(a)

In Case No. 16-014, the Safety Committee alleges that PSE failed to properly locate a service line at the excavation site at issue. However, it is undisputed that PSE was present at the site and

provided information to the excavator regarding the location of service lines. The record shows that PSE visited the site on June 18, 2015 and July 24, 2015, to identify and mark gas facilities in the excavation area (*see* D-161231 SCWSD Complaint 16-014.pdf (emails and photographs provided by PSE to Safety Committee)). There are multiple photographs demonstrating that PSE marked numerous facilities and service lines throughout the excavation site. While there is no photograph of the specific service line at issue, it is not PSE's practice to photograph each marking made, nor is PSE required under the law to photograph every marking of every service line. The only evidence provided by the Safety Committee is one photograph showing an already excavated site with an exposed service line (*see* D-161231 Stantec Case 16-014 Documentation.pdf, at p.4). Because the ground is already excavated, it is impossible to determine that the service line was not marked by PSE, based on this photograph.

Moreover, the excavator violated RCW 19.122.030(10) which provides that "If an excavator discovers underground facilities that are not identified, the excavator must cease excavating in the vicinity of the underground facilities and immediately notify the facility operator or a one-number locator service." Upon the discovery of the alleged unmarked service line, the excavator never notified PSE and instead, in violation of RCW 19.122.030(10), continued excavating around the service line.¹ Because of this, PSE has no opportunity to demonstrate that the service line was marked.

Given (i) PSE's undisputed presence at the excavation site twice to mark facilities and provide information to the excavator about the location of service lines, (ii) that there is no actual evidence demonstrating that PSE failed to mark the service line at issue, and (iii) that the excavator violated RCW 19.122.030(10), there is an insufficient basis to penalize PSE under RCW 19.122.030(3)(a).

B. In Case No. 16-015, the Commission and the Safety Committee Incorrectly Evaluated PSE's Conduct Under RCW 19.122.030(3)(a) When the Applicable Provision was RCW 19.122.030(3)(b)

In Case No. 16-015, the Commission's allegations and penalty assessment, based on the findings and recommendations by the Safety Committee, are in error because the Commission and the Safety Committee incorrectly evaluated PSE's conduct under RCW 19.122.030(3)(a), when the applicable subsection is actually RCW 19.122.030(3)(b), as the service line in question was an "unlocatable underground facility."

Depending on the type of facility at issue, RCW 19.122.030(3) contains three distinct subsections setting forth how a facility operator must respond when notified under RCW

¹ The excavator was unable to demonstrate that it notified PSE. Instead, it states that it has generally made "multiple calls to the 811 call center" before which it believes establishes a "pattern of compliance." *See* D-161231 Stantec Case 16-014 Documentation.pdf, at p.18.

19.122.030(1). RCW 19.122.030(3)(a) pertains to a facility operator's "locatable underground facilities"; RCW 19.122.030(3)(b) pertains to a facility operator's "unlocatable or identified but unlocatable underground facilities"; and RCW 19.122.030(3)(c) pertains to "service laterals."² An "unlocatable underground facility" is "an underground facility that cannot be marked with reasonable accuracy using available information to designate the location of an underground facility." RCW 19.122.020(28). Under RCW 19.122.040(4)(c), a facility operator's "good faith" attempt to comply with RCW 19.122.030(3)(b) or (c) "[c]onstitutes 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."

In Case No. 16-015, the service line at issue turned out to be an "unlocatable underground facility." A gas service line may be an unlocatable underground facility due to damaged tracer wires or for a variety of other reasons. The facts of this case demonstrate that the gas service line at issue is properly classified as an "unlocatable underground facility" and that PSE made a good faith attempt to comply with RCW 19.122.030(3)(b). Upon notification under RCW 19.122.030(1), PSE's USIC contractor attempted to locate the service line using industry-standard technology. When the USIC contractor was unable to detect the service line in question, he requested that the PSE Public Improvement Inspector conduct a second, independent survey to identify the location of the service line.³ Ultimately, the PSE Public Improvement Inspector marked a location identified by the equipment as the location of the service line. Unfortunately, the location turned out to be incorrect and the actual service line, which went entirely undetected until excavation, was several feet away from the location identified by the PSE Public Improvement Inspector. *See* D-161231SCWSD Complaint 16-015.pdf., at pp.4-8 of PDF.

While PSE regrets that the locate turned out to be incorrect, in attempting to locate the service line, PSE met and exceeded industry standard by sending two qualified technicians to locate the line. There was nothing else PSE could do to better detect the service line, which turned out to be undetectable and therefore an "unlocatable underground facility." Furthermore, the excavator is required to "[d]etermine the precise location of underground facilities which have been marked." RCW 19.122.040(2)(a). The excavator was required by law to verify that there was a service line in the location marked by PSE, which it failed to do (*see* D-161231SCWSD Complaint 16-015.pdf., at p.8). Had it done so, PSE could have conducted a further investigation of the area to identify the location of the service line. Accordingly, under the good faith standard in RCW 19.122.030(4)(c), PSE cannot be penalized for fully complying with and exceeding the statutory requirements, and for the excavator's failure to verify the presence of the

² "Service lateral" means an underground water, storm water, or sewer facility located in a public right-of-way or utility easement that connects an end user's building or property to a facility operator's underground facility, and terminates beyond the public right-of-way or utility easement. RCW 19.122.020.

³ The USIC inspector indicated in the Investigation Report that the "service line does not tone out where it actually is for some reason." *See* D-161231SCWSD Complaint 16-015.pdf, at p.5 of PDF.

Gregory J. Kopta
February 2, 2017
Page 4

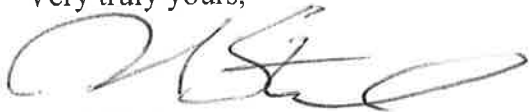
service line, even though the resulting locate turned out incorrect. Indeed, the Safety Committee conceded “that PSE through its contract locator did work to comply with the Dig Law,” (Letter from D. Christensen to W. Gould, Dec. 19, 2016) yet still incorrectly determined a penalty was warranted.

PSE is concerned by the Commission and the Safety Committee’s assessment of a penalty in this case because, as a matter of statutory and industry procedure, PSE complied fully with its obligations, which the Safety Committee does not dispute. Facility locating is an inexact science and sometimes locates turn out to be incorrect. There are numerous reasons and circumstances why an underground gas facility becomes undetectable. The Legislature recognized this by designating certain facilities such as service lines to be “unlocatable underground facilities” and establishing a good faith standard for attempts to locate these facilities. PSE should not be penalized for fully attempting in good faith to comply with its obligations to mark an unlocatable underground facility. PSE believes that the Commission and the Safety Committee are effectively holding PSE to a standard that is unsupported by the statutory requirements under Chapter 19.122 RCW. For these reasons, the penalty issued in this case is unwarranted.

C. Conclusion

PSE’s takes its statutory obligation to comply with dig safety laws seriously and strives to meet or exceed safety expectations in all circumstances. The Safety Committee and the Commission failed to fully consider the factual circumstances surrounding PSE’s response in Case No. 16-014, and in Case No. 16-015, failed to apply the correct standard to PSE’s activities. Accordingly, PSE respectfully requests that the Commission determine that the penalty assessment in this case is unwarranted.

Very truly yours,



David S. Steele

DSS:dfc

Cc: Wayne Gould, Puget Sound Energy
Brett Conrad, Puget Sound Energy
Sheree Strom Carson, Perkins Coie LLP