

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of a Penalty Assessment Against  WESTWARD HOE CONSTRUCTION, INC.  in the amount of \$16,000	DOCKET D-161117  ORDER 01  ORDER DENYING MITIGATION
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**BACKGROUND**

- 1 On October 3, 2016, the Washington Dig Law Safety Committee (Safety Committee) filed with the Washington Utilities and Transportation Commission (Commission) its recommendation for penalties against Westward Hoe Construction, Inc. (Westward Hoe or Company) for violations of RCW 19.122. The Safety Committee found that Westward Hoe violated RCW 19.122.030(1) by failing to request a utility locate prior to performing excavations on September 30 and November 30, 2015. The Safety Committee also found that Westward Hoe violated RCW 19.122.030(2) by failing to wait two business days to begin excavation after requesting a utility locate on both December 11, 2015, and May 24, 2016.
- 2 The Safety Committee recommended penalties of \$1,000 for the first violation, and \$5,000 for each additional violation, for a total penalty of \$16,000. The Safety Committee further recommended the Commission suspend a \$15,000 portion of the penalty for a period of one year, and then waive it, subject to the following conditions: 1) all Westward Hoe owners and employees must attend National Utility Contractor Association (NUCA) Dig Safe Training within 90 days, 2) Westward Hoe must provide a translator for its Spanish-speaking employees who attend Dig Safe Training, and 3) the Company must not incur any additional violations of RCW 19.122.
- 3 On November 10, 2016, the Commission issued a Penalty Assessment against Westward Hoe in the amount of \$16,000 for four violations of RCW 19.122.030. The Penalty Assessment adopted the Safety Committee's recommendation, in part, but suspended only a \$10,000 portion of the penalty due to the number of violations and the fact that the Company's history of requesting utility locates demonstrates that the violations resulted

from negligence rather than ignorance of the law.

- 4 On November 23, 2016, Westward Hoe filed an application for mitigation, admitting the violations and requesting a hearing. Westward Hoe failed to provide a written explanation for the violations, as required.
- 5 On November 28, 2016, the Commission issued a Notice Denying Request for Hearing and Notice of Opportunity to File a Written Response (Notice). The Notice explained that because the Company admitted the violations and presented no new information for the Commission to consider, the Company's request for a hearing was denied. The Commission construed the Company's submission as a request for mitigation and permitted the Company to file a written explanation of the circumstances that gave rise to the violations.
- 6 On December 2, 2016, Westward Hoe filed a written response to the Penalty Assessment and provided the following explanation: "under ... RCW 19.122.030, it states to wait 2 business days before excavation begins unless otherwise agreed by the excavator and facility operator. Our facility operator (Lennar) told us lots were ready to have excavation started. Our crews do not habitually question the authority of our customer (Lennar)." Westward Hoe further explained that it is a small company, and the penalty would create a financial hardship.
- 7 On December 16, 2016, Commission staff (Staff) filed a response recommending the Commission deny the Company's request for mitigation. In its response, Staff explained that Westward Hoe committed four violations of RCW 19.122.030 during an eight month period, and was notified about each violation as it occurred. Staff also noted that the Company failed to introduce any new information that warrants a penalty reduction. Staff maintains its recommendation that the Commission suspend a \$10,000 portion of the penalty for a period of one year subject to the conditions set out by the Safety Committee. Staff further recommends the Company be allowed to pay the \$6,000 portion of the penalty that is not suspended in six monthly installments between January 30 and June 30, 2017.

## DISCUSSION AND DECISION

8 RCW 19.122.030(1)(a) requires excavators to “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.” RCW 19.122.030(2) requires excavators to provide the required notice 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.” An excavator is prohibited from excavating “until all known facility operators have marked or provided information regarding underground facilities.”<sup>1</sup> Excavators who violate these provisions are subject to penalties of up to \$10,000 per violation.<sup>2</sup> Here, the Commission assessed reduced penalties of \$1,000 for the first violation and \$5,000 for each subsequent violation.

9 The Commission considers several factors when entertaining a request for mitigation, including whether the company introduces new information that may not have been considered in setting the assessed penalty amount, or explains other circumstances that convince the Commission that a lesser penalty will be equally or more effective in ensuring the company’s compliance.<sup>3</sup>

10 We find that Westward Hoe did not introduce any new information that would warrant further mitigation of the penalty. Companies that dig without first obtaining an underground utility locate put their employees, the public, and the facility operator’s employees at risk. The damage incidents at issue could have resulted in a fire or an explosion. As Staff notes in its response, the Company has a long history of obtaining locates and is well aware of its legal obligations. The Company therefore knew or should have known that it may not rely on its customer for clearance to begin excavation; under RCW 19.122.030, the term “facility operator” refers to utilities with underground facilities in the proposed excavation area, not developers or builders such as Lennar.

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<sup>1</sup> RCW 19.122.030(5).

<sup>2</sup> RCW 19.122.055(1)(a).

<sup>3</sup> Docket A-120061, Enforcement Policy for the Washington Utilities and Transportation Commission (January 7, 2013) at ¶19.

Moreover, the Company received notice of each violation immediately after it occurred but failed to take corrective measures to prevent the violations from recurring.<sup>4</sup>

- 11 Accordingly, we find that Staff's recommendation to impose a \$16,000 penalty – a \$10,000 portion of which will be suspended for a period of one year, and then waived, subject to conditions – is appropriate, and conclude that the Company's request for further mitigation should be denied. Because the Company did not have an opportunity to provide input about Staff's proposed payment plan, we decline to adopt it at this juncture. The Company must either pay the \$6,000 portion of the penalty that is not suspended or file jointly with Staff a mutually agreeable payment arrangement within 10 days of the effective date of this Order.

### **ORDER**

#### THE COMMISSION ORDERS THAT:

- 12 (1) Westward Hoe Construction, Inc.'s request for mitigation is DENIED.
- 13 (2) Westward Hoe Construction, Inc. is assessed a penalty of \$16,000. A \$10,000 portion of the penalty will be suspended for a period of one year from the date of this Order, and then waived, subject to the following conditions:
- a) All Westward Hoe Construction, Inc. owners and employees must attend National Utility Contractor Association (NUCA) Dig Safe Training within 90 days of the effective date of this Order.
  - b) Westward Hoe Construction, Inc. must provide a translator for its Spanish-speaking employees who attend Dig Safe Training.
  - c) Westward Hoe Construction, Inc. must not incur any additional violations of RCW 19.122.

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<sup>4</sup> The September 30, 2015, violation was reported on October 1, 2015; the November 30, 2015, violation was reported that same day; the December 11, 2015, violation was reported on December 21, 2015; and the May 24, 2016, violation was reported on May 25, 2016.

- 14 (3) Westward Hoe Construction, Inc. must either pay the \$6,000 portion of the penalty that is not suspended or file jointly with Staff a proposed payment arrangement within 10 days of the effective date of this Order.

DATED at Olympia, Washington, and effective December 23, 2016.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

STEVEN V. KING  
Executive Director and Secretary

**NOTICE TO PARTIES: This is an order delegated to the Executive Secretary for decision. As authorized in WAC 480-07-904(3), you must file any request for Commission review of this order no later than 14 days after the date the decision is posted on the Commission's website.**