



STATE OF WASHINGTON

UTILITIES AND TRANSPORTATION COMMISSION

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March 13, 2017

Steven V. King, Executive Director and Secretary  
Utilities and Transportation Commission  
1300 S. Evergreen Park Dr. SW  
P.O. Box 47250  
Olympia, WA 98504-7250

RE: *Washington Utilities and Transportation Commission v. Puget Sound Energy, Inc.*  
Commission Staff's Response to Letter Contesting Violations.  
Docket D-161231

Dear Mr. King:

On Jan. 17, 2017, the Utilities and Transportation Commission (commission) issued a \$2,000 Penalty Assessment in Docket D-161231, against Puget Sound Energy, Inc. (PSE) for two violations of RCW 19.122. These violations were based on a referral from the Washington State Dig Law Safety Committee (Safety Committee).

The Safety Committee recommended that a \$2,000 penalty be levied against PSE for committing two violations of RCW 19.122.030(3)(a): First, for failure to locate a natural gas facility; and second, for failure to locate a different natural gas service with reasonable accuracy. Staff reviewed the Safety Committee's recommendation and agreed with the Committee's decision.

On Feb. 2, 2017, the commission received a letter from PSE's attorney, David Steele, contesting the violations and requesting the commission issue a decision based solely on the information provided in the letter. Staff will address each of PSE's arguments below.

**Safety Committee Case No. 16-014**

In Safety Committee Case No. 16-014, PSE was found to have failed to locate its service line at an excavation site on Aug. 18, 2015. Staff's investigation found that the excavator properly submitted a locate request for the construction site. PSE failed to locate its underground facility as required by RCW 19.122.030(3)(a). Staff was also present at the Safety Committee review hearing on Nov. 16, 2016.

To defend against the violation, PSE first points to its undisputed presence at the excavation site on two separate occasions to mark its facilities and to provide information to the excavator about the location of

its service lines.<sup>1</sup> Staff and the Safety Committee do not dispute that PSE was on site to mark the underground utilities. The evidence nevertheless shows that PSE failed to mark the utility line that was discovered during the excavation. PSE points to no evidence that it supplied any additional information to the excavator about the location of the service lines in the area.

The second argument offered by PSE is that there is no actual evidence demonstrating that PSE failed to mark the service line at issue.<sup>2</sup> During the review hearing, the complainant in this case, Stantec Consulting, provided a picture of the excavated site with an exposed service line.<sup>3</sup> PSE argues that because the ground is already excavated in the picture, it is impossible to determine that the service line was not previously marked. Staff acknowledges that the picture of the exposed service line makes it difficult to determine whether the utility was, in fact, marked. At the same time, PSE provided no evidence to the Safety Committee to counter the allegation. Staff contends that the documents submitted in support of the allegation are sufficient to prove that the utility was not properly marked.

The final argument PSE makes is that the excavator violated RCW 19.122.030(10). Under that provision, if an excavator discovers underground facilities that are not identified, it must cease excavating and immediately notify the facility operator or a one-number locator service.<sup>4</sup> PSE claims that when the excavator discovered the alleged unmarked facility, the excavator failed to notify PSE and instead continued around the service line. This argument about the excavator's conduct was not brought before the Safety Committee for review and therefore is currently not before the commission for consideration. Nevertheless, staff will provide a response.

The excavator's requirement upon discovering an unidentified facility is to stop excavating and notify either the facility operator or a one-number locator service. PSE claims it was not notified by the excavator and, because of this, it had no opportunity to demonstrate that the service line was in fact marked. The statute states that the excavator is only required to notify *either* the facility operator or a one-number locator service. Evidence was presented to the Safety Committee that the excavator notified, or was in contact with the 811 call center regarding the discovered gas line.<sup>5</sup> The Safety Committee was satisfied with the information provided and found that the excavator had acted in accordance with the requirements of RCW 19.122.030(10).

To summarize, PSE inaccurately contends that the factual circumstances surrounding its response were not fully considered. Staff took into consideration all the information and documents submitted to the Safety Committee and came to the same conclusion. While there is not a single picture or document that removes all doubt about PSE's conduct, the totality of the information presented to the Safety Committee by the complainant, and the absence of rebuttal evidence provided by PSE, leads Staff to conclude that the penalty is warranted.

Staff concludes that PSE has provided no new information or evidence to justify dismissal or mitigation of the \$1,000 penalty issued for Safety Committee Case No. 16-014.

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<sup>1</sup> See David Steele letter dated Feb. 2, 2017, Page 2.

<sup>2</sup> See David Steele letter dated Feb. 2, 2017, Page 2.

<sup>3</sup> See D-161231 Stantec Case 16-014, Page 4.

<sup>4</sup> See David Steele letter dated Feb. 2, 2017, Page 2.

<sup>5</sup> See D-161231 Stantec Case 16-014, Page 18.

### Safety Committee Case No. 16-015

In Safety Committee Case No. 16-015, PSE was found to have failed to locate its natural gas service with reasonable accuracy at an excavation site on Sept. 16, 2015. Staff's investigation found that PSE failed to meet the requirement of locating within 24 inches of the outside dimensions of both sides of an underground facility as defined in RCW 19.122.020(23). Staff was also present at the Safety Committee review hearing on Nov. 16, 2016.

PSE first contends that the commission incorrectly evaluated its conduct under RCW 19.122.030(3)(a), which applies to "locatable underground facilities." According to PSE, the commission should have applied the subsection that pertains to "unlocatable underground facilities," RCW 19.122.030(3)(b), since the damaged service line was "unlocatable" within the meaning of that subsection

There are several issues with this claim. First, it appeared for the first time in Mr. Steele's letter dated Feb. 2, 2017, which PSE submitted after both the Safety Committee's review and staff's investigation. Mr. Steele's letter reflects a change in PSE's position. Previously, in a letter dated Nov. 2, 2015, PSE gave the following reason for denying the excavator's damage claim:

According to RCW 19.122.030 Section 3 subsection a states, a facility operator must, with respect to the facility operator's locatable underground facilities, provide the excavator with reasonable accurate information by marking their location which was completed prior to any excavation at or near this location by Frank Coluccio Construction prior to Sept. 16, 2015.<sup>6</sup>

There is no reference in PSE's denial letter to "unlocatable" facilities. Further, PSE contends in the letter that it followed the requirements of RCW 19.122.030(3)(a) by marking its *locatable* underground facilities prior to the incident occurring on Sept. 16, 2015. Staff believes that if the line was unlocatable, PSE would have made that assertion to the excavator.

PSE also failed to raise the issue in its internal Report of Damage to Gas Facilities for the Sept. 16, 2015, incident. In this report, PSE lists the circumstances causing the damage as: "locates being off by 14'. Contractor hit while installing sewer." Again, there is no suggestion that the facility was unlocatable.

Staff's final concern with PSE's first argument is that the company relies on RCW 19.122.030(4)(c) to assert a "good faith" defense.<sup>8</sup> RCW 19.122.030(3)(b) states that a facility operator must provide an excavator with available information as to the location of unlocatable or identified but unlocatable underground facilities. RCW 19.122.030(3)(c) further states that operators must designate the presence or location of service laterals if they connect end users to a main utility line and are within a public right-of-way or utility easement and the boundary of the excavation area.

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<sup>6</sup> See D-161231 SCWSD Complaint, Page 14.

<sup>7</sup> See PSE Report of Damage to Gas Facilities for Sept. 16, 2015, incident.

<sup>8</sup> See David Steele letter dated Feb. 2, 2017, Page 3. (Note: Letter incorrectly references 19.122.040(4)(c) which does not exist)

To meet the standard of a “good faith” attempt to comply with .030(3)(b) and (c), PSE needed to fulfill the requirements of .030(4)(b), which provides for three distinct ways in which a facility operator can be in compliance:

- i. Placing within a proposed excavation area a triangular mark at the main utility indicating the presence of an unlocatable facility;
- ii. Arranging to meet an excavator at a worksite to provide available information about the location of service laterals; or
- iii. Providing copies of the best reasonably available records by electronic message, mail, facsimile, or other delivery method.

PSE provided no evidence to the Safety Committee that it performed **any** of these three requirements. Therefore, PSE has not established a “good faith” defense under RCW 19.122.030(4)(c).

PSE claims there was nothing else it could do to better detect the service line. But, again, even if the commission assumes that PSE’s service line was unlocatable, PSE performed none of the three actions in .030(4)(b) needed to establish a “good faith” defense. Additionally, the commission cannot ignore that the locate completed by PSE’s Public Improvement Inspector was found to be incorrect and off by approximately 14 feet. Staff concludes that PSE is not entitled to a “good faith” defense.

PSE’s second argument is that the excavator failed to determine the precise location of the underground facilities that had been marked, as required by RCW 19.122.040(2)(a). This statement is only true as it pertains to marks placed by the facility operator that are within the reasonable accuracy threshold of 24 inches on each side of a utility. PSE incorrectly assumes that subsection (2)(a) applies to any and all marks placed by a facility operator on a job site, whether they are correct or not. This would be impractical because it would require excavators to determine where every single underground utility is precisely located, even if they are not marked in the excavation area.

A perfect example of this scenario is this case, where PSE’s locate marks were off by approximately 14 feet. The excavator was under no obligation to determine the precise location of PSE’s facilities that were not in the excavation area or path. PSE claims that if the excavator had attempted to locate the service line and not found it, then the excavator could have conducted a further investigation of the area to identify the precise location.<sup>9</sup> Due to the locate marks being so far off and not in the area being excavated, the excavator had no responsibility to attempt to locate the precise location of the service line.

To summarize, PSE’s argument that the Safety Committee and the commission failed to apply the correct standard to PSE’s activities is not valid. PSE contends that its service line was unlocatable and that it performed a “good faith” effort to mark it properly. But Staff has shown PSE marked its service line 14 feet from the actual location. If PSE believed this line was unlocatable, it needed to perform one of the three required additional actions defined in RCW 19.122.030(4)(b) to meet the “good faith” standard of compliance. PSE provided no evidence that it performed any of these actions. Finally, PSE fails to demonstrate that the excavator was obligated to determine the precise location of PSE’s facilities that were not in the excavation area or path.

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<sup>9</sup> See David Steele letter dated Feb. 2, 2017, Page 3.

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Staff's concludes that PSE has provided no new information or evidence to justify dismissal or mitigation of the \$1,000 penalty issued for Safety Committee Case No. 16-015.

Sincerely,

A handwritten signature in blue ink, appearing to read "Alan E. Rathbun", with a long horizontal flourish extending to the right.

Alan E. Rathbun  
Pipeline Safety Director