

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of a Penalty Assessment Against PUGET SOUND ENERGY in the amount of \$2,000	DOCKET D-161231 ORDER 01 ORDER DENYING MITIGATION
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BACKGROUND

- 1 On November 21, 2016, the Washington Dig Law Safety Committee (Safety Committee) filed with the Washington Utilities and Transportation Commission (Commission) a recommendation for penalties against Puget Sound Energy (PSE or Company) for violations of RCW 19.122.030. The Safety Committee found that PSE violated RCW 19.122.030(3) by failing to locate its natural gas service on August 18, 2015, and failing to locate its natural gas service with reasonable accuracy on September 16, 2015. The Safety Committee recommended penalties of \$1,000 for each violation.
- 2 On January 18, 2017, the Commission issued a Penalty Assessment against PSE in the amount of \$2,000 for two violations of RCW 19.122.030 consistent with the Safety Committee’s recommendation.
- 3 On February 2, 2017, PSE filed a response to the Penalty Assessment, contesting the violations and requesting mitigation of the penalty based on the written information provided. With respect to the first violation, PSE argues that the photographic evidence provided by the Safety Committee shows an excavated site with an exposed service line, which makes it impossible to determine whether or not PSE marked the utility. PSE further contends that the excavator violated RCW 19.122.030(10) when it continued excavation upon discovery of the service line without notifying PSE, as required.
- 4 With respect to the second violation, PSE argues that the Safety Committee incorrectly evaluated its conduct under RCW 19.122.030(3)(a). PSE claims the service line in question was an “unlocatable underground facility,” and argues that its actions should be evaluated using the “good faith” standard set out in RCW 19.122.030(3)(b). PSE further argues that it exceeded industry standards by sending two technicians to locate the line, which turned out to be undetectable.
- 5 On March 13, 2017, Commission staff (Staff) filed a response recommending the Commission deny the Company’s request for mitigation of the penalty. With respect to

the first violation, Safety Committee Case No. 16-014, Staff does not dispute that PSE was present at the site to mark its underground utilities. Staff argues, however, that the documents submitted in support of the allegation sufficiently prove that the utility at issue was unmarked, and PSE provided no evidence to rebut the allegation. Staff also disagrees with PSE's assertion that the excavator violated RCW 19.122.030(10) by failing to notify the Company when it discovered its underground facility. The excavator contacted the 811 call center to report the gas line, which complies with the statutory requirements.

- 6 With respect to the second violation, Safety Committee Case No. 16-015, the Safety Committee found that PSE failed to locate its gas line with reasonable accuracy, and Staff found that PSE failed to locate its gas line consistent with the requirements set forth in RCW 19.122.020(23). Staff argues PSE failed to raise the issue that its facility was unlocatable at the Safety Committee hearing or in its internal Report of Damage to Gas Facilities. Moreover, Staff contends that even if the facility were unlocatable, PSE failed to provide any evidence that it met the "good faith" standard for compliance with RCW 19.122.030(3)(b). In sum, Staff finds that PSE failed to provide any new information or evidence that warrants dismissing or mitigating the penalty.

DISCUSSION AND DECISION

- 7 RCW 19.122.030(3)(a) requires facility operators, upon receiving notice that an excavator intends to commence excavation, to provide the excavator with reasonably accurate information by marking the location of the facility operator's locatable underground facilities. In the event the facilities are unlocatable, the facility operator must provide information to the excavator in one of three ways: 1) by placing a triangular mark within an excavation area at the main utility line pointing at the building, structure, or property in question, indicating the presence of an unlocatable underground facility, including a service lateral; 2) by arranging to meet an excavator at a worksite to provide available information about the location of the service laterals; or 3) by providing copies of the best reasonably available records by electronic message, mail, fax, or other method.¹ Facility operators who violate these provisions are subject to penalties of up to \$1,000 for the first violation, and \$5,000 for each subsequent violation within a three-year period.²
- 8 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

¹ RCW 19.122.030(4)(b).

² RCW 19.122.070(1).

convince the Commission that a lesser penalty will be equally or more effective in ensuring the company's compliance.³ We address each violation in turn.

Safety Committee Case No. 16-014

9 **Contest of Violation.** We deny the Company's contest of the first violation. In its request for mitigation, PSE elected not to request a hearing to present additional evidence. Accordingly, our decision is based solely on the evidence in the record and the parties' written responses.

10 As Staff notes in its response, the photos submitted by the complainant show an exposed gas line that was discovered upon excavation in a reportedly unmarked area. Although PSE correctly notes that it is impossible to conclusively prove that the area was unmarked because the photo was taken post-excavation, the Company also notes that it took numerous photos of the markings made at the site. The Company failed, however, to produce a photo showing that the area in question was marked prior to excavation, and therefore failed to rebut Staff's allegation. Accordingly, we find that the evidence in the record demonstrates that PSE failed to mark the underground facility at issue as required.

11 In addition, as Staff notes in its response, the issue of whether the excavator violated RCW 19.122.030(10) is not properly before us. We note, however, that excavators are not required to notify the utility directly upon discovering an unmarked facility; contacting a one-number locator service is sufficient. Here, the excavator called 811 when it discovered the facility, which satisfies the statutory requirement.

12 **Request for Mitigation.** We agree with Staff's conclusion PSE failed to introduce any new information or explain any additional circumstances that warrant a reduced penalty. As Staff notes in its response, it was aware of and previously considered all of the information set out in PSE's response. Accordingly, we find that Staff's recommendation to impose a \$1,000 penalty is appropriate, and conclude that the Company's request for mitigation should be denied.

Safety Committee Case No. 16-015

13 **Contest of Violation.** We also deny the Company's contest of the second violation. As Staff notes in its response, PSE repeatedly referred to the facility in question throughout this proceeding as locatable, and only now argues that the facility "turned out to be

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

undetectable.” Unlocatable facilities must be prospectively – not retrospectively – identified.

- 14 Because PSE made no representation to the excavator that unlocatable facilities were present at the excavation site, the “good faith” defense set out in RCW 19.122.030(4)(b) is unavailable to the Company. PSE neither placed a triangular mark indicating the presence of an unlocatable facility at the work site nor provided records describing unlocatable facilities to the excavator. Rather, PSE inaccurately marked an area of the ground as a locatable facility. Accordingly, we find that the evidence in the record supports a finding that PSE failed to accurately mark the underground facility at issue prior to excavation.
- 15 Finally, PSE argues 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). As Staff notes, this provision only applies to properly marked facilities. PSE’s interpretation unreasonably places the burden of locating all underground utilities on the excavator rather than the facility operator.
- 16 **Request for Mitigation.** We find PSE’s argument that its facility was unlocatable unpersuasive, and agree with Staff that the Company failed to introduce any new information or circumstances that warrant a reduced penalty. Accordingly, we find that Staff’s recommendation to impose a \$1,000 penalty is appropriate, and conclude that the Company’s request for mitigation should be denied.

ORDER

THE COMMISSION ORDERS THAT:

- 17 (1) Puget Sound Energy’s contest of the violations is DENIED.
- 18 (2) Puget Sound Energy’s request for mitigation is DENIED.
- 19 (3) The \$2,000 penalty is due and payable by March 31, 2017.

DATED at Olympia, Washington, and effective March 21, 2017.

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.