

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

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| In the Matter of the Penalty Assessment |) | DOCKET PL-140180 |
| Against |) | |
| |) | ORDER 01 |
| |) | |
| MR. RANDY BUCHANAN |) | INITIAL ORDER ON BRIEF |
| |) | ADJUDICATION; GRANTING IN |
| |) | PART AND DENYING IN PART |
| In the Amount of \$5,000 |) | EVIDENTIARY OBJECTION; |
| |) | AFFIRMING PENALTY |
| |) | ASSESSMENT |
| |) | |

1 **Background.** This matter originates with a complaint submitted by Tesoro Logistics Northwest Pipeline, LLC (Tesoro) to the Review Committee of the Washington Dig Law Safety Committee (Safety Committee)¹ against Mr. Randy Buchanan (Mr. Buchanan).² In its complaint, Tesoro indicated that Mr. Buchanan dug a 3 foot deep trench with a trencher without calling in a dig ticket.³ Tesoro also asserted that the unreported trenching occurred near the companies’ 8 inch refined petroleum product pipeline.⁴ Following an informal hearing on January 16, 2014, the Safety Committee found that: (1) Mr. Buchanan violated RCW 19.122.030 when he failed to call in for a dig ticket prior to excavating on October 21, 2013, and violated RCW 19.122.033(1) by failing to contact Tesoro prior to excavating; and (2) after receiving

¹ The Legislature created the Safety Committee as “a statewide, nonprofit entity whose purpose is to reduce damages to underground and above ground facilities, promote safe excavation practices, and review complaints of alleged violations of this chapter.” RCW 19.122.130(1). The Safety Committee is composed of 13 members who: (1) review complaints, in groups of three to five members, (2) provide the Commission with notification that a person has likely committed a violation of this chapter, and (3) recommend remedial action that may include a penalty amount. RCW 19.122.130(5), (6), and (8).

² Exh. No. AJ-18.

³ Exh. No. AJ-16.

⁴ *Id.*

notification from the pipeline company of the requirement under the law not to excavate without a proper dig ticket, Mr. Buchanan continued to excavate without obtaining a dig ticket, including exposing the pipeline, sometime between October 21st and October 22nd, 2013.⁵ The Safety Committee recommended that the Commission issue a penalty assessment against Mr. Buchanan in the amount of \$5,000 for these violations.⁶

2 **Procedural History.** On March 4, 2014, the Washington Utilities and Transportation Commission (Commission) issued Penalty Assessment PL-140180 against Mr. Buchanan in the amount of \$5,000, alleging violations of RCW 19.122.030, for his failure to call for a dig ticket prior to excavation.⁷

3 On April 9, 2014, Mr. Buchanan filed a request for hearing, subsequently stating that “Tesoro Pipeline Company misrepresented information that affects [Mr. Buchanan’s] culpability.”⁸ On May 8, 2014, the Commission set this matter for a brief

⁵ Exh. No. AJ-15.

⁶ The Safety Committee also recommended the Commission pursue a misdemeanor charge against Mr. Buchanan pursuant to RCW 19.122.090. The Commission has declined to do so.

⁷ Specifically, the penalty assessment was issued in the amount of \$1,000 for the first offense and \$4,000 for continuing to excavate after receiving notification of RCW 19.122.030.

⁸ Mr. Buchanan initially filed a request for hearing on March 21, 2014, which was denied because he failed to “provide a basis for [his] request for a hearing.” Notice Denying Request for Hearing and Notice of Opportunity to Submit Reason(s) in Support of Application for Mitigation (April 2, 2014). On April 9, 2014, Mr. Buchanan filed a letter requesting reconsideration of the hearing request since “[t]here is absolutely nothing contained in the option entitled Request for hearing that suggests that failure to include specific information along with the request will result in the denial of a hearing.” Letter from William D. McCool, attorney representing Mr. Buchanan, to Gregory J. Kopta, Director, Administrative Law Division (April 8, 2014). (Emphasis omitted). The Commission issued Notice of New Opportunity to Request Hearing on April 14, 2014, authorizing Mr. Buchanan to respond with a new hearing request including a written statement of the reasons for his request. On April 24, 2014, Mr. Buchanan filed correspondence indicating that he wished “to correct a number of misstatements that have been made by representatives of Tesoro as well as an investigator for the [Commission].” Letter from William D. McCool, attorney representing Mr. Buchanan, to Gregory J. Kopta, Director, Administrative Law Division (April 22, 2014). Mr. Buchanan’s request for hearing was granted on May 8, 2014.

adjudicative proceeding (BAP)⁹ before Administrative Law Judge (ALJ) Marguerite E. Friedlander. The Commission convened the BAP hearing on May 28, 2014.

4 **Appearances.** William D. McCool, attorney, Walla Walla, Washington, represented Mr. Buchanan. Brett Shearer, Assistant Attorney General, Olympia, represented the Commission's regulatory staff (Staff).¹⁰

5 **Evidentiary objection.** Mr. Buchanan objects to the admissibility of Staff Exhibit Nos. AJ-19 through AJ-21, claiming that Staff has not presented authenticating witnesses for each of the exhibits.¹¹ Exhibit No. AJ-19 is an email from David Christensen, Vice Chair of the Safety Committee, to Zella West, a fellow member of the Safety Committee, dated January 7, 2014. In this email, Mr. Christensen described a telephone conversation he had with Mr. Buchanan, including the time and date of the informal hearing to be held on January 16, 2014. Staff's Exhibit Nos. AJ-20 and AJ-21 are a Foreign Line Crossing Report and an Inspection & Repair Report, respectively. These were prepared by Tesoro. Staff explained that these exhibits were sent to the Commission by the Safety Committee when forwarding its findings and recommendations.¹² According to Staff, the exhibits are admissible as "the best evidence reasonably attainable in light of its necessity, availability, and trustworthiness," and "exhibits derived from such a legislatively-created process should also qualify as relevant, necessary, and trustworthy so as to render them admissible under the terms of WAC 480-07-495."¹³

⁹ RCW 34.05.482 *et seq.* and WAC 480-07-610.

¹⁰ In adjudications the Commission's regulatory staff participates like any other party, while the Administrative Law Judge or the Commissioners make the decision. To assure fairness, the Commissioners and the presiding administrative law judge do not discuss the merits of the proceeding with regulatory staff or any other party without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

¹¹ At hearing, Mr. Buchanan also objected to the admissibility of Staff's Exhibit Nos. AJ-1 through AJ-14, stating that the exhibits are not self-authenticating and that Staff had failed to present any witness who could authenticate them. This objection was overruled. Friedlander, TR 47:22-48:11.

¹² Shearer, TR 52:20-22.

¹³ Letter from Brett P. Shearer, Assistant Attorney General, to Marguerite E. Friedlander, ALJ (May 29, 2014) (citing WAC 480-07-495).

6 WAC 480-07-495(1) provides that “[a]ll relevant evidence is admissible if the presiding officer believes it is the best evidence reasonably obtainable, considering its necessity, availability, and trustworthiness.” Certainly, the incident reports generated by Tesoro and marked as Exhibit Nos. AJ-20 and AJ-21 are relevant to the question of whether Mr. Buchanan violated the Commission’s statutes relating to excavation without prior notification to all facility operators through a one-number locator service. Further, Staff has shown that these reports are the best evidence reasonably obtainable, having been forwarded by and relied upon by the Safety Committee. The evidentiary objection to Exhibit Nos. AJ-21 and AJ-22 is overruled. Both exhibits are admitted to the record.

7 With regard to Exhibit No. AJ-19, Staff has not demonstrated the relevance of an email from the Vice Chair of the Safety Committee to another member regarding Mr. Buchanan’s notification of the Committee’s informal hearing date.¹⁴ The evidentiary objection to Exhibit No. AJ-19 is sustained, and this exhibit is rejected.

8 **Evidence.** Mr. Buchanan testified at hearing that he excavated a trench on his property, at an approximate depth of 32 inches, on Saturday, October 19, 2013, and Sunday, October 20, 2013.¹⁵ He admitted that he did not call the one-number locator

¹⁴ While it is arguable that the email correspondence could qualify as a judicially cognizable fact pursuant to RCW 34.05.452(5) and WAC 480-07-495(2)(a)(i)(A), and a public record under RCW 42.56.010(3), so that the potential exists to take administrative notice of Exhibit No. AJ-19, Staff did not raise this argument.

¹⁵ By Mr. Shearer:

Q Did you dig a trench on or about mid to late October on your property?

[Mr. Buchanan] Yes.

Q Do you know what the approximate depth of that trench was?

A 32 inches. 30-some inches.

Q Did you contact the Washington State Call Before You Dig Committee, or the Washington Utilities Cooperation Council I believe is the term, prior to digging?

A I didn’t know the law was what the law is.

service prior to commencing the excavation.¹⁶ Mr. Buchanan also stated that his employee, Mr. Lopez, was confronted by a Tesoro representative around this time regarding the excavation activity.¹⁷ In talking with Mr. Lopez, Mr. Buchanan testified that he understood Tesoro to have told his employee that the company wanted to inspect its pipe for damage.¹⁸ In response, Mr. Buchanan confirmed that he “dug off to the side of the pipe and exposed the pipe with a shovel very slowly.”¹⁹ Mr. Buchanan defended his actions, stating that “I’ve dug lots of stuff up, I know how to be very careful.”²⁰ He further explained that he “must have been careful enough I didn’t damage it.”²¹ With regard to the second excavation attempt, Mr. Buchanan again acknowledged that he did not call the one-number locator service prior to exposing the Tesoro pipe.²²

- 9 **Discussion.** RCW 19.122.030 provides that “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.”²³ Further, an excavator is prohibited from
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¹⁶ TR 44:7-11 and TR 60:3-6.

¹⁷ TR 42:17-43:4 and TR 58:21-59:3.

¹⁸ TR 59:18-21.

¹⁹ Buchanan, TR 59:21-23.

²⁰ Buchanan, TR 59:24-25.

²¹ Buchanan, TR 59:25-60:1.

²² Buchanan, TR 60:3-6.

²³ RCW 19.122.030(1)(a). RCW 19.122.031 specifically exempts various excavation activities from the reporting requirement in RCW 19.122.030. However, Mr. Buchanan did not raise any of the exemptions as an affirmative defense, so this Order will not address them.

excavating “until all known facility operators have marked or provided information regarding underground facilities as provided in this section.”²⁴ Violators of these provisions are subject to civil penalties “of not more than [\$1,000] for an initial violation, and not more than [\$5,000] for subsequent violation within a three-year period.”²⁵

- 10 With regard to the first allegation, Mr. Buchanan admits to excavating for two days on his property at a depth of approximately 32 inches in mid to late October, 2013. He further admits that he did not utilize the Call Before You Dig facility locator service. Mr. Buchanan states he did not know that the law had changed requiring him to call prior to excavation. The Commission determines that Mr. Buchanan violated RCW 19.122.030 and affirms the Safety Committee’s recommended penalty in the amount of \$1,000.
- 11 As to the second allegation, Mr. Buchanan testified that his employee indicated that Tesoro wanted to visually inspect its pipe once it discovered Mr. Buchanan’s trenching activity. As a result, Mr. Buchanan took it upon himself to expose the Tesoro pipe; again, without prior notification to the facility locator service or Tesoro. The Commission determines that Mr. Buchanan’s action in intentionally exposing Tesoro’s pipe on his own initiative, after being informed of the law, is a separate violation of RCW 19.122.030 and affirms the Safety Committee’s recommended penalty in the amount of \$4,000.
- 12 Neither Mr. Buchanan’s asserted expertise in excavating his property nor his belief that he is aware of the location of the subject Tesoro pipeline excuse his failures to be aware of and meet the requirements of RCW 19.122.030. These factors also do not support any mitigation of the penalty assessed.
- 13 The \$5,000 penalty is due and payable no later than July 10, 2014.

²⁴ RCW 19.122.030(5).

²⁵ RCW 19.122.070(1).

ORDER

THE COMMISSION ORDERS THAT:

- 14 (1) The penalty assessment entered on March 4, 2014, against Randy Buchanan is affirmed; it is due and payable no later than July 10, 2014.
- 15 (2) Mr. Buchanan's evidentiary objection to Staff's Exhibit No. AJ-19 is sustained, and the exhibit is rejected.
- 16 (3) Mr. Buchanan's evidentiary objections to Staff's Exhibit Nos. AJ-20 and AJ-21 are overruled, and the exhibits are admitted into the record.

DATED at Olympia, Washington, and effective June 10, 2014.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARGUERITE E. FRIEDLANDER
Administrative Law Judge

NOTICE TO PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within ten (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3) provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission fails to exercise administrative review on its own motion.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An Original and **five (5)** copies of any Petition or Answer must be filed by mail delivery to:

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