



STATE OF WASHINGTON

UTILITIES AND TRANSPORTATION COMMISSION

1300 S. Evergreen Park Dr. S.W., P.O. Box 47250 • Olympia, Washington 98504-7250

(360) 664-1160 • TTY (360) 586-8203

May 25, 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. TT&E, LLC*  
Commission Staff's Response to Request for Mitigation Hearing.  
Docket D-170116

Dear Mr. King:

On April 21, 2017, the Utilities and Transportation Commission (commission) issued a \$46,000 Penalty Assessment in Docket D-170116, against TT&E, LLC (TT&E) for 10 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 initially recommended that a \$56,000 penalty be levied against TT&E for committing 12 violations of RCW 19.122. The recommendation also included a requirement for National Utility Contractor Association (NUCA) Dig Safe Training for all employees, including ownership and management.

Staff reviewed the Safety Committee's recommendation and could not support two of the violations. After removing these two violations, which each carried a maximum amount of \$5,000, staff recommended a total penalty against TT&E of \$46,000. This was for nine violations of RCW 19.122.030(2) for failing to provide the required notice to a one-number locator service not less than two business days before excavating, and one violation of RCW 19.122.050(1) for failing to notify a utility operator of damage to an underground facility. Staff's research indicated that TT&E had a significant history of requesting utility locates and that the violations were the result of company negligence, not a lack of knowledge of the requirements of Washington state's dig law.

Even under these circumstances, staff believed that enforcing the entire \$46,000 penalty against TT&E would be financially burdensome and recommended that the commission suspend \$25,000 of the penalty on the conditions that the company commit no further violations of

Respect. Professionalism. Integrity. Accountability.

RCW 19.122, and that all company personnel attend NUCA training. The commission agreed with staff's modifications to the Safety Committee recommendation and assessed a penalty of \$46,000, with an offer to suspend \$25,000 of the penalty on the two previously stated conditions.

On May 9, 2017, the commission received a response from TT&E's attorney, Russel Hermes, requesting a mitigation hearing. The response did not provide any additional information or support for the hearing request. On May 19, 2017, the commission issued a Notice of Opportunity to File Written Response with a deadline of May 26, 2017.

On May 24, 2017, the commission received a letter from Mr. Hermes which provided five points of contention for which TT&E believed they deserved a mitigation hearing. Staff will address each of these arguments below.

### **Excavation of New Developments:**

*TT&E asserts that the need for utility locates in new developments is both illogical and unreasonable, because no expectation exists that utilities will be located in virgin ground. The company also states that the statutes are silent regarding excavating in new developments.*

RCW 19.122.030(2), states in part, that an excavator must provide the notice required by subsection (1) to a one-number locator service not less than two business days prior to excavating. Subsection (1) states that before commencing excavation, the excavator must mark the boundary of the excavation area with white paint, then provide notice of the scheduled excavation to all facility operators through a one-number locator service. Additionally, RCW 19.122.020(8) defines "excavation" as any operation, including the installation of signs, in which earth, rock, or other material on or below the ground is moved or otherwise displaced.

The fact that TT&E feels this law is both illogical and unreasonable is irrelevant. By definition, TT&E was performing an excavation and failed to request utility locates prior to commencing work as required by law. There is no exemption from requesting utility locates for new developments because a person should be able to assume that there are no utilities in the ground. There are a few types of activities that are exempt from the notification requirement, which are covered under RCW 19.122.031, but TT&E's actions do not fall under any of the defined exemptions.

The additional argument that the statutes are silent regarding excavating in new developments is both baseless and without merit, because the statute specifically covers when an excavator **is** required to request utility locates, which is any time they are performing an excavation. To infer that because the statutes do not specifically address a certain situation is both an arbitrary and invalid argument. The statute clearly defines when an excavator is required to request locates prior to excavating and TT&E failed to do so.

### **Performing Post-Foundation Work:**

*TT&E states that excavators are routinely asked to perform additional work on a site after completing the initial foundation work. This additional work often consists of sewers, water, driveways, and walkways. TT&E believes that if an excavator installs the foundation and utilities and marked their location, presumably there should be no reason to call for locates if the same excavator then performs additional work on the site.*

This argument is flawed for one main reason. RCW 19.122.030(6)(c) states that a facility operator's markings of underground facilities expire 45 calendar days after the date that the excavator provided notice to a one-number locator pursuant to subsection (1). For excavations that occur after 45-days, an excavator is required to provide additional notice to a one-number locator service pursuant to subsection (1). There is no exemption for calling in locates if you were the person or company who originally installed the utility. In all of the violations against TT&E where they had previously requested utility locates, they were found to be excavating well over 45-days from the original request date.

TT&E's reliance on their belief that "presumably" there should be no reason to call for locates again if you were the excavator who installed the utilities is not a valid legal argument. Assuming that an excavator properly requested locates and installed utilities on a job site, then as long as the excavator maintained the locating marks and returned to the job site within 45 days of requesting the original locates there would not be a violation. This did not occur on any of the violations committed by TT&E. They either did not call and request utility locates at all, or they were excavating on expired locates.

### **Excavation Separation Requirements Regarding Plat Utilities:**

*TT&E's argument here is that foundation excavators typically must dig at least 20-30 feet behind sidewalks and therefore will be located at least 10-20 feet away from power and natural gas lines servicing the house. The company believes that this separation renders it highly improbable that the foundation excavator will interfere with the utilities.*

This is a seriously flawed argument from TT&E. There is no exemption or allowance in the law for an excavator to rely on their analysis that it is "highly improbable" that they will hit or interfere with a utility. As previously addressed, RCW 19.122.030(2) requires two days notification prior to performing an excavation and TT&E failed to do so. It is completely irrelevant that the company feels they are excavating 10 to 20 feet way from where utilities should be.

It should be abundantly clear why this logic is both unpractical and dangerous. This would allow excavators to operate under the assumption that utility lines are always going to be installed in the proper place and therefore there is no need to request locates. The law is very clear on this matter and for a good reason. The only safe way to perform an excavation is to follow the applicable law and request utility locates two days prior beginning work regardless of whether a company thinks it is "highly improbable" they will hit a utility line.

### **Completing Work on Located Properties:**

*TT&E makes the claim that occasionally an excavator will be hired to finish a job started by another excavator and that if the locates requested by the previous excavator are used then this would be a violation of the law.*

The company fails to make any type of real argument on this point and once again appears to be stating their opinion that they don't agree with the law. RCW 19.122.030 requires that the excavator must provide notice to all facility operators through a one-number locator service. Under RCW 19.122.020(10), "excavator" is defined as any person who engages directly in excavation. TT&E refers to Safety Committee case number 16-032 where they were found to be excavating under a different company's locates. In this case, a company named Provident Electric requested locates for a job but TT&E was the contractor doing the actual excavating. Since TT&E was the company directly engaged in the excavation they were required to request their own locates in order to be in compliance. Whether or not TT&E agrees with this practice is immaterial and should not be given consideration as a mitigating circumstance.

### **Arbitrary Determination of Penalties:**

*The final argument TT&E presents is that the penalties imposed by the commission are not justified and no reason was provided for assessing the maximum amount of \$5,000 per violation. The company bases their argument on the belief that the commission must exercise discretion in some fair, discernable, and logical way when choosing to penalize the maximum amount allowed under the law.*

There are multiple reasons why this argument is inaccurate and not credible. First, staff's investigation indicated that TT&E has a positive history of requesting utility locates. Over the approximately five-month period of time from their first violation on June 29, 2016, until their tenth violation on Dec. 1, 2016, TT&E requested 52 other utility locates. Since Jan. 1, 2016, TT&E has requested a total of 116 utility locates in the state of Washington. This led staff to conclude that the violations were the result of negligence on the company's part as opposed to a lack of knowledge regarding the requirements of Washington state's dig law.

Secondly, the number of violations that occurred over a short period of time led staff to determine that the company was choosing to not follow the law when it was inconvenient for them. TT&E committed ten violations over a five-month period. After each violation was discovered a company representative was contacted by PSE and notified that they were in violation of the dig law, yet they continued to conduct excavations without requesting locates. This was the most troubling aspect for staff as the company was provided multiple opportunities to change their behavior but chose not to do so.

Finally, the fact that staff realized the potential financial burden of enforcing the full \$46,000 penalty, and offered to suspend \$25,000 of it with conditions, demonstrates a fair and reasonable approach to enforcement. There was no requirement for staff to offer this deal, but in evaluating the facts of this case, and the best way to achieve the commission's goal of future compliance, staff believed this offer was warranted and in effect was a chance for the company to mitigate the penalty amount.

## Summary

All of TT&E's arguments for why they should be granted a mitigation hearing fail to address material issues of law or fact which would require consideration of evidence and resolution in a hearing. All of the company's arguments are based on their belief that they should not have to request locates under certain conditions. They provide no valid legal disputes, or even interpretation issues, when referring to the violations for which they committed. Simply put, the company disagrees with having to request locates when they believe it is "highly probable" that they won't hit any utilities. The law is quite clear, unless exempted under RCW 19.122.031, all excavators must submit notice to a one-number locator service at least two days prior to beginning an excavation.

With regards to the penalty amount imposed, staff believes it is fair and justified considering all of the elements of the violations. Staff took into consideration the company's track record of requesting utility locates, the total number of violations over a short period of time, and the failure to change their excavating practices after being advised multiple times to do so by a facility operator.

Staff's concludes that TT&E has provided no new information or evidence to justify a mitigation hearing. Staff recommends the commission deny the mitigation hearing request and impose the original penalty amount of \$46,000, while still offering the option to suspend \$25,000 on the conditions of the company attending training and not having any further violations of RCW 19.122 over the next two years.

Sincerely,

Sean C. Mayo  
Pipeline Safety Director