

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of a Penalty Assessment Against	DOCKET D-170116
TT&E, LLC	ORDER 01
in the amount of \$46,000	ORDER DENYING MITIGATION

BACKGROUND

- 1 On February 21, 2017, the Washington Dig Law Safety Committee (Safety Committee) filed with the Washington Utilities and Transportation Commission (Commission) its recommendation for penalties against TT&E, LLC (TT&E or Company) for 12 violations of RCW 19.122. The Safety Committee found that TT&E violated RCW 19.122.030(1) once by failing to mark the boundary of an excavation area in white; that TT&E violated RCW 19.122.030(2) nine times by failing to notify the one-number locating service or failing to wait two business days to begin excavation after requesting a utility locate; that TT&E violated RCW 19.122.030(5) once by excavating before all known facility operators had marked the area or provided information; and that TT&E violated RCW 19.122.050(1) once by failing to notify Puget Sound Energy and the one-number locating service of damage to underground facilities.
- 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 \$56,000. The Safety Committee further required all TT&E owners and employees to attend National Utility Contractor Association (NUCA) Dig Safe Training.
- 3 On April 24, 2017, the Commission issued a Penalty Assessment against TT&E in the amount of \$46,000 for nine violations of RCW 19.122.030 and one violation of RCW 19.122.050. The Penalty Assessment adopted the Safety Committee's recommendation, in part, but determined that two of the violations should be dismissed. The Penalty Assessment also suspended a \$25,000 portion of the penalty for a period of two years, subject to the following conditions: 1) all TT&E owners and employees must complete NUCA Dig Safe Training within one year of the date of the Penalty Assessment, and 2) TT&E must not incur any repeat violations of RCW 19.122.
- 4 On May 9, 2017, TT&E filed a response to the Penalty Assessment, admitting the violations and requesting a hearing to present evidence to support its request for mitigation of the penalty. Although the Penalty Assessment provided notice that any

request for mitigation must include a written statement, the Company failed to provide any explanation or documentation to support its request.

- 5 On May 17, 2017, the Commission issued a Notice of Opportunity to File a Written Response (Notice). Due to the substantial amount of the penalty, the Notice permitted the Company to provide a written statement to support its request for hearing by May 26, 2017.
- 6 On May 24, 2017, TT&E filed a written response and requested a hearing to revisit a number of the legal questions it raised during the hearing before the Safety Committee. TT&E argues that the Penalty Assessment failed to include any reason or justification for imposing the maximum penalties for the violations.
- 7 On May 25, 2017, Commission staff (Staff) filed a response recommending the Commission deny the Company's request for mitigation. In its response, Staff explained that TT&E has an extensive history of requesting utility locates, which demonstrates that the violations resulted from negligence rather than ignorance of the law. Staff addressed each of the Company's legal arguments – which, it contends, are without merit – and recommends the Commission deny the Company's request for a hearing. Staff maintains its recommendation that the Commission assess a \$46,000 penalty and suspend a \$25,000 portion of the penalty for a period of two years subject to the conditions set out in the Penalty Assessment.

DISCUSSION AND DECISION

- 8 As a preliminary matter, we deny the Company's request for a hearing. As noted in the Penalty Assessment, a request for hearing will be granted only if material issues of law or fact require consideration of evidence and resolution in a hearing. Here, TT&E admits the violations, but asserts there are four legal points that require further analysis. We disagree. As Staff notes in its response, TT&E's arguments are based on a misguided belief that it need not request locates under certain conditions. RCW 19.122.030(1)(a), however, unambiguously 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” prior to performing any excavation. We address each of the Company's arguments in turn.

Excavation of New Developments

- 9 In its response, TT&E argues that “the statutes are silent regarding excavating in new developments,” and contends that no reasonable expectation exists that utilities will be present at such locations. Staff notes in its response that 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. RCW 19.122.031 provides a list of exemptions to the requirements set out in RCW 19.122.030.

- 10 Contrary to TT&E's assertion, the law is not silent with respect to excavations performed on newly developed land. Rather, the law is clear that excavators must provide notice to all facility operators through a one-number locator service prior to performing *any* excavation, regardless of the location, unless that location is expressly exempt from statutory requirements. No such exemption applies here. Accordingly, we find that TT&E failed to make a compelling argument that the law is ambiguous or otherwise requires further discussion and resolution in a hearing.

Performing Post-Foundation Work

- 11 TT&E next argues that it should not be required to request new underground utility locates at locations where it has previously performed work. Staff notes in its response that RCW 19.122.030(6)(c) provides that a facility operator's markings of underground facilities expire 45 days after the date the excavator provides notice to a one-number locator service. Staff further notes that each of the violations at issue occurred well after the 45-day time period expired.

- 12 TT&E's mistaken belief that it should not be required to renew underground utility locates at locations where it has previously performed work, regardless of how much time has passed, is contrary to the plain language of the statute, and thus does not require discussion and resolution in a hearing.

Excavation Separation Requirements Regarding Plat Utilities

- 13 TT&E also argues that, because foundation excavators must typically dig 20 to 30 feet behind the sidewalk, it is highly improbable that a foundation excavator will encounter underground utilities.

- 14 Staff argues in its response that the only safe way to perform an excavation is to follow applicable laws and request utility locates at least two days prior to performing an excavation. We agree. RCW 19.122 does not grant TT&E the discretion to decide that requesting a locate is unnecessary because it believes that underground utilities are unlikely to be present. Accordingly, this issue does not require consideration of evidence and resolution in a hearing.

Completing Work on Located Projects

- 15 Finally, TT&E argues that because it often completes work commenced by other excavators, it should be permitted to rely on locates obtained by those parties.

16 Staff argues in its response that TT&E fails to raise a material legal issue. We agree. The law clearly states that any party who performs an excavation is responsible for obtaining an underground utility locate prior to commencing excavation. That responsibility is not transferable. Accordingly, we find that this issue does not require consideration of evidence and resolution in a hearing.

Penalty

17 As noted above, RCW 19.122.030(1)(a) requires excavators to mark the boundary of the excavation and provide notice of any 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.”¹ Excavators who violate these provisions without damaging an underground facility are subject to penalties of up to \$1,000 for the first violation and \$5,000 for each additional violation.² Here, the Commission assessed penalties of \$1,000 for the first violation and \$5,000 for each subsequent violation, for a total penalty of \$46,000.

18 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.³

19 TT&E argues that the Penalty Assessment failed to provide any reason or justification for imposing the maximum penalties for the violations at issue. In its response, Staff explains that the penalty amount was based on several factors. First, the Company has obtained 116 locates since January 1, 2016, which demonstrates that it is familiar with the applicable laws but chose, in some circumstances, to not follow them. Second, the 10 violations at issue occurred over a five-month period. Staff notes that although TT&E was contacted and informed about each violation immediately after it occurred, the Company failed to correct its behavior, and instead continued to violate the law. Finally,

¹ RCW 19.122.030(5).

² RCW 19.122.070(1).

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

Staff argues that suspending more than half of the penalty on condition of future compliance is a fair and reasonable approach to enforcement in this case.

- 20 We agree with Staff. First, we find that TT&E did not introduce any new information that would warrant further mitigation of the penalty. Rather than explain any set of circumstances that it would excuse its conduct, TT&E continued to eschew responsibility by arguing that it is not, or should not be, required to request underground utility locates when it deems it unnecessary to do so.
- 21 Second, we find that the \$46,000 penalty, a \$25,000 portion of which will be suspended on condition of future compliance, is fair in light of the seriousness of the violations. Companies that dig without first obtaining an underground utility locate put their employees, the public, and the facility operator's employees at risk. As Staff notes in its response, the Company has a long history of obtaining locates and is well aware of its legal obligations. Moreover, the Company received notice of each violation immediately after it occurred but failed to take corrective measures to prevent the violations from reoccurring.
- 22 Accordingly, we find that Staff's recommendation to impose a \$46,000 penalty – a \$25,000 portion of which will be suspended for a period of two years, and then waived, subject to conditions – is appropriate, and conclude that the Company's request for further mitigation should be denied. The Company must either pay the \$19,000 portion of the penalty that is not suspended or file jointly with Staff a mutually agreeable payment arrangement within 20 days of the effective date of this Order.

ORDER

THE COMMISSION ORDERS THAT:

- 23 (1) TT&E, LLC's request for mitigation is DENIED.
- 24 (2) TT&E, LLC is assessed a penalty of \$46,000. A \$25,000 portion of the penalty will be suspended for a period of two years from the date of this Order, and then waived, subject to the following conditions:
- a) All TT&E, LLC owners and employees must attend National Utility Contractor Association (NUCA) Dig Safe Training within 12 months of the effective date of this Order.
 - b) TT&E, LLC must not incur any additional violations of RCW 19.122.

- 25 (3) TT&E, LLC must either pay the \$19,000 portion of the penalty that is not suspended or file jointly with Staff a proposed payment arrangement within 20 days of the effective date of this Order.

DATED at Olympia, Washington, and effective June 5, 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.