

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

NC 405

In the Matter of

OREGON PUBLIC UTILITY COMMISSION,

Complaint,

vs.

CITY OF PORTLAND ACTING THROUGH  
BUREAU OF ENVIRONMENTAL  
SERVICES,

Defendant.

**STAFF OPENING BRIEF**

1           **I.       Introduction.**

2           The issue presented in this docket is whether the City of Portland (City) is responsible  
3 under the One Call System developed by the Oregon Utility Notification Center for locating  
4 underground facilities used in providing City wastewater services and located in a public right of  
5 way (ROW), when those facilities are not owned by City, i.e., were installed by a customer to  
6 reach a sewer main line. The City asserts it is only responsible for locating such facilities when it  
7 owns the facilities or has otherwise “accepted” the facilities pursuant to City Code. Staff disagrees.  
8 The City is responsible for performing locates for all wastewater facilities used by the City to  
9 provide City wastewater services when the facilities are located in the City controlled and owned  
10 ROWs, whether the facilities are owned, or classified as “accepted” facilities, by the City.

11           The mission of the OUNC is to “operate and maintain a state-of-the-art-one-call system for  
12 the State to reduce damages to underground facilities and to promote public safety related to  
13 excavation issues.<sup>1</sup> In pursuit of this goal, the OUNC sought authority from the Oregon legislature  
14 to require “operators” of underground facilities rather than the “owners” to locate the facilities  
15 when the facilities are located on public property. This shift of responsibility from underground  
16 facility owners to operators was a legislative policy choice, which the OUNC implemented under  
17 OAR Ch. 952.

18           The City’s primary objection to the requirement to locate privately-owned wastewater  
19 facilities on public property appears to be a complaint that it is inappropriate to shift to the City the  
20 cost of locating wastewater facilities the City does not own or has otherwise accepted into its  
21 system. The City’s complaint ignores the fundamental reason underlying creation of the OUNC;  
22 safety. Requiring owners, rather than operators, of underground utility facilities located on public  
23 property to perform OUNC locates would do little to promote public safety. And, to the extent the  
24 legislative choice to require operators to locate privately-owned facilities on public property causes  
25 the operators to incur costs they would not incur if the owners of the facilities had the burden, the

26 \_\_\_\_\_  
<sup>1</sup> Staff/100, Hennessy/2.

1 operators are able to incorporate the cost of the locates into the rates they charge customers.

2 **II. History of the Oregon Utility Notification Center and One Call System.**

3 Prior to 1995, several telephone service providers throughout the State acted as one-call  
4 centers for locating services. These various providers would accept notifications of proposed  
5 excavations and then distribute the notifications to affected utilities so the utilities could locate any  
6 underground facilities where the proposed excavations were to take place.<sup>2</sup> In 1995, the Oregon  
7 legislature adopted Senate Bill (SB) 559 creating the OUNC as an independent not-for-profit  
8 public corporation and requiring the OUNC to adopt administrative rules to implement a one-call  
9 process for a person to give notification of proposed excavation activities and for utility operators  
10 to mark the presence and direction of buried underground facilities.<sup>3</sup> The OUNC adopted its first  
11 set of administrative rules in 1997.

12 The mission of the OUNC is to “operate and maintain a state-of-the-art-one-call system for  
13 the state to reduce damages to underground facilities and to promote public safety related to  
14 excavation issues.”<sup>4</sup> In addition to providing a One Call System for locating underground utilities  
15 in proposed excavation sites, the OUNC conducts trainings on how to perform locates and  
16 excavator safety and does outreach to promote public awareness of the one-call program.<sup>5</sup>  
17 Currently, the OUNC’s One Call Center is located in Portland and is staffed by about 50 persons.  
18 The One Call Center is available to process locate requests seven days a week, 24 hours a day. It  
19 accepts locate requests by telephone (through the 811 number) and online.<sup>6</sup>

20 The OUNC board of directors has selected a qualified vendor to operator the One Call  
21 System. The One Call System vendor maintains a subscriber database of “notification boundaries”  
22 that represent polygons or areas of general locations for underground facilities. The notification

23

---

24 <sup>2</sup> Staff/100, Hennessy/2.

25 <sup>3</sup> ORS 757.552(1).

26 <sup>4</sup> <https://digsafelyoregon.com/about-ounc/mission-history/>

<sup>5</sup> Staff/100, Hennessy/2.

<sup>6</sup> Staff/100, Hennessy/2.

1 boundaries are created and supplied by subscribers, who are the operators of underground  
2 facilities.<sup>7</sup> With one exception, ORS 757.557 requires all operators of “underground facilities” to  
3 “subscribe” to the OUNC.<sup>8</sup> “Operators” are any person, public utility, municipal corporation,  
4 political subdivision of the state, or other person with control over underground facilities.<sup>9</sup>  
5 “Underground facilities” are facilities used in connection with the storage or conveyance of  
6 electrical energy, water, sewage, petroleum products, gas, gaseous vapor, or hazardous liquids.<sup>10</sup>

7         Subscribing to the OUNC includes an information exchange between the subscribing  
8 operator and the One Call Center. The Center will initially collect contact information, billing  
9 information, and mapping information that defines the notification boundaries for an operator.  
10 Once the operator is subscribed, they will receive notifications requesting locating and marking  
11 services for excavations the One Call Center has determined to be within the operator’s  
12 notification boundary. A subscribing operator will also receive general information or update  
13 notices as determined by the One Call Center at the request of the OUNC board of directors.<sup>11</sup>

14         An excavator’s non-emergency notification to the One Call Center must occur at least two  
15 business days and not more than ten business days prior to excavation. An excavator notifying the  
16 One Call Center of a proposed excavation for locating and marking services must delineate the  
17 area of proposed excavation by giving information and marking instruction. Delineation can  
18 include the use of pre-marking in white paint within both public rights of way and underground  
19 easements. The purpose of delineation is to identify the area of proposed excavation so operators  
20 will know where to respond with locating and marking services.<sup>12</sup>

21         Upon receipt of the notification of a planned excavation, the One Call Center will issue the

---

22 <sup>7</sup> Staff/100, Hennessy/3.

23 <sup>8</sup> ORS 757.557(4) provides that operators of underground facilities that are located entirely on private  
24 property and that provide services exclusively for the use of the residents or owners of the property need  
not “subscribe” with OUNC, i.e, register underground facilities.

25 <sup>9</sup> ORS 757.542(5).

26 <sup>10</sup> ORS 757.542(6).

<sup>11</sup> Staff/100, Hennessy/5-6.

<sup>12</sup> Staff/100, Hennessy/3.

1 excavator a reference ticket number, a copy of the received notification information, and a list of  
2 operator subscribers that were identified as having underground facilities within the proposed  
3 excavation area. The One Call Center determines the list of affected operators based on  
4 information previously provided to the One Call center, i.e., the operator-provided notification  
5 boundaries. The One Call Center will also notify operators with underground facilities in the  
6 proposed excavation area to perform the locate service.<sup>13</sup>

7         Once notified, operators generally have two business days to provide locate services. To  
8 perform locate service, the operator must, within the area of the proposed excavation area, (1)  
9 mark its locatable underground facilities indicating the name, initials, or logo of the operator of the  
10 facilities; (2) provide marks or notification indicating unlocatable facilities using the best  
11 information available, including as-constructed drawings or other facility records maintained by  
12 the facility operator, indicating the name, initials, or logo of the operator of the facilities; or (3)  
13 notify the excavator that the operator does not have any underground facilities in the area of the  
14 proposed excavation.

15         **III. Argument.**

16         **A. The City did not locate underground facilities used to provide wastewater service**  
17         **located on a public Right-of-Way.**

18         The City, through the Bureau of Environmental Services (BES), provides water and sewer  
19 services in the City and is subscribed to OUNC as an operator of underground facilities used to  
20 provide those services. BES violated One Call requirements by failing to perform locate services  
21 for underground facilities located on a public Right of Way (ROW) in NE Portland after receipt of  
22 a January 15, 2022 locate request submitted to the OUNC by Environmental Works, LLC  
23 (hereinafter referred to as “Excavator”), notifying OUNC of a planned excavation at 2928 NE  
24 Ainsworth, Portland, Oregon.<sup>14</sup>

25

---

26 <sup>13</sup> Staff/100, Hennessy/4.

<sup>14</sup> Staff/100, Hennessy/6.

1 The specific excavation project involved replacing a portion of sewer lateral and the  
2 installation of a cleanout located within the Ainsworth Right-of-Way (“Ainsworth ROW”). The  
3 Ainsworth ROW is public property and controlled by the City of Portland. The owner of property  
4 adjacent to the Ainsworth ROW, who is served by the sewer facility in the Ainsworth City of  
5 ROW (“Property Owner”), hired the excavator to replace a portion of the sewer lateral and install a  
6 “cleanout.”<sup>15</sup> The Property Owner owns and is served by underground wastewater facilities  
7 located in the Ainsworth ROW. The underground facilities in the Ainsworth ROW connects the  
8 facilities on customer’s property to BES’s main sewer line located on NE 28<sup>th</sup> Avenue, a street  
9 intersected by the Ainsworth ROW. The request for locate included the following:

10 Please locate all facilities including sewer on the entire property including all  
11 ROWs and easements. Especially need the alley way approach to the easy  
marked outcorner lots, please mark all sides. Flags and Paint please.<sup>16</sup>

12 Upon receipt of the Excavator’s Notification, the OUNC created Ticket Number  
13 21334979 and notified BES of the locate request the same day. The ticket shows the excavation  
14 area was limited to the Ainsworth ROW and a small portion of NE 28<sup>th</sup> Avenue where the  
15 Ainsworth ROW intersects that was no wider than the width of the ROW.<sup>17</sup> The ticket conveys  
16 in writing the specific request to locate facilities in the ROW.

17 Lynda Hoffman, a Maintenance Supervisor for BES, acknowledges the City received  
18 Oregon One Call Ticket Number 21334979 on November 15, 2021.<sup>18</sup> On or about November  
19 16, 2021, Carmen Scott, then a PBOT Utility Locator, responded to the ticket by locating City  
20 infrastructure on SE 28<sup>th</sup> Avenue.

- 21
- AAN316-AAN340 24” CIPP Combo Main on NE 28<sup>th</sup>;
  - AAN315-AAN341 24” VSP Combo Main on NE 28<sup>th</sup>;
  - AHU933 4” Lateral- 14’ City Ownership From Curb to Main; and
  - AHU932 6” Lateral- 14’ City Ownership From Curb to Main.
- 22  
23

---

24 <sup>15</sup> Staff/100, Hennessy/6.

25 <sup>16</sup> Staff/100, Hennessy/6.

26 <sup>17</sup> Staff/101, Hennessy/8.

<sup>18</sup> NC 405 Defendant’s Answer, Ex. B, p. 2 (Declaration of Lynda Hoffman in Support of Defendant City of Portland’s Answer).

1 A map provided by the City shows the location of underground facilities Ms. Scott  
2 located on SE 28<sup>th</sup> Avenue.<sup>19</sup> A comparison of the map with the excavation area indicated by the  
3 ticket, shows that with possibly one exception, the underground facilities located by Ms. Scott  
4 are not in the excavation area indicated in the ticket.<sup>20</sup> The facilities Ms. Scott located are  
5 located on NE 28<sup>th</sup> Avenue and north of the intersection of SE 28<sup>th</sup> Ave and the Ainsworth  
6 ROW. It is possible the lateral located on 28<sup>th</sup> Avenue closest to the Ainsworth ROW (AHU  
7 933) is in the excavation area, but there's no doubt the other three facilities are not.

8 The City does not explain why it located facilities outside the excavation area, but does  
9 explain why it did not locate the underground facilities in the ROW. The City did not locate the  
10 facilities in the ROW because the City has classified them as “nonconforming” private sewer  
11 facilities under Portland City Code. According to the City it is only obligated to perform locates  
12 for privately-owned sewer facilities in City ROWs if the sewer facilities have been “accepted” as  
13 part of the City’s wastewater system pursuant to the process outlined in City Code. The City  
14 believes that for any other privately-owned sewer facilities located in City ROWs, the customers  
15 served by facilities must perform the locates. As put by an attorney for BES in an e-mail to the  
16 Property Owner, “the rules do not require the City to mark facilities that it does not operate.  
17 Although you are correct that the City has ultimate control over the right-of-way, that does not  
18 make it an operator of private laterals within the right-of-way.”<sup>21</sup>

19 **B. The City is obligated to locate underground facilities used to provide City**  
20 **wastewater service that are located on public property, regardless of who owns**  
21 **the underground facilities.**

22 ORS 757.542(5) is clear that the operator of “underground facilities” need not be the  
23 owner of the underground facilities to have the legal obligation to locate those facilities under the  
24 One Call System. In fact, changing from an excavation law that applied to “owners” of

25 <sup>19</sup> NC 405 Defendant’s Answer, Ex. A.

26 <sup>20</sup> NC 405 Defendant’s Answer, Ex. A.

<sup>21</sup> Staff/100, Hennessy/9.

1 underground facilities to one that applied to “operators” of underground facilities was a  
2 deliberate choice by the Oregon legislature. Although the position taken by BES is not entirely  
3 based on who owns the underground facility, it is very similar to the facility ownership  
4 requirement addressed by the Oregon legislature in 1995. As noted above, OUNC adopted rules  
5 implementing the One Call System in 1997. In the order adopting the rules, the OUNC  
6 explained that the rules were developed over a period of nearly three years and stated the Oregon  
7 Utility Coordinating Council had formed a legislative committee consisting of about original  
8 members of a wide spectrum of interested persons and the result of their work formed the  
9 nucleus of the rules adopted in the order. Attached to the order adopting the rules were  
10 comments by Jack Dent, Chief of Pipeline Safety at the OPUC. In those comments, Mr. Dent  
11 explained the new focus on the “operator” rather than “owner”:

12       The old excavation law (the current law) identified the person responsible for  
13 marking as the “owner”. What is interesting about the old law, is that “owner” was  
14 not defined, and responsibility was implied. This is of great importance, because  
the new law (SB 559), requires mandatory participation in the Center by all  
underground facility operators and defines the responsible party as the “Operator”.

15       \* \* \* \*

16       The reasoning behind changing the concept from an “Owner” to an “Operator” is  
17 because an owner may not always have control over the buried facility. Therefore  
responsibility is shifted from ownership to administrative or operational control.  
18 For example, the sewer service laterals are normally installed from the sewer main  
in the street to the building. The city or service district requires the occupant to  
19 install a lateral, to their specifications from the main to the building. The city or  
service district then asserts that the lateral is owned by the building occupant.  
20 However, the owner of the lateral has no administrative or operational control over  
the lateral in the right-of-way. It is controlled and operated by the city or sewer  
21 district. The portion of the lateral on private property, outside the right-of-way,  
becomes the responsibility of the owner, because he does have operational and  
22 administrative control.

23       As a practical matter, the occupant would rarely have knowledge of the route of the  
lateral, would not have the expertise to locate it anyway, nor would he have the  
24 equipment to perform the locate.

25       The operator of the sewer main (city or service district) would have the best  
knowledge of where the lateral would be (they installed it or controlled the  
26 installation) and they would have the expertise and equipment to perform the locate.



1 If it is an “unlocatable” facility, they could provide the best information available  
2 to assist in its location.

3 Because mandatory participation is required by SB 559, if the responsibility for  
4 marking remained with the “Owner”, every person in the State of Oregon with any  
5 kind of service lateral in a right-of-way, would be required to join the Center.  
6 Hundreds of thousands of homeowners would then be forced to join the Center,  
7 which would be counter-productive.<sup>22</sup>

8 A system that relies on utility customers to locate underground facilities in public ROWs  
9 is an ineffective means of protecting excavators, the general public, or buried facilities from  
10 damages caused by excavation activities. Many wastewater service customers, which includes  
11 renters, will have no knowledge whatsoever of the facilities used to provide them with  
12 wastewater services. And, customers of City wastewater services are unlikely to know how to  
13 locate underground facilities in a ROW or have the necessary equipment to perform a locate. It  
14 would not be prudent to create a One Call system that relies on the original owner of  
15 underground facilities to pass along to future owners or tenants, information about OUNC  
16 requirements and underground facilities and to perform locates. If this is how the One Call  
17 System is operated, it should be expected that the efficacy of the One Call System will  
18 deteriorate significantly as wastewater service customers fail to subscribe upon purchasing  
19 property or signing a lease or fail to perform locates because they do not know how.

20 **C. The City is in the best position to perform locates on facilities used to provide**  
21 **wastewater services to customers.**

22 The City’s actions, and its map showing the location of both privately owned and City  
23 owned underground facilities on and near the excavation area marked in Ticket Number  
24 21334979 undermine the City’s position that it is too costly to require the City to locate  
25 privately-owned facilities located on public property. The City actually sent an employee to  
26 perform a locate after receipt of Ticket Number 21334979. This service was of little value to the  
27 excavator because the facilities located by the City employee were outside the excavation zone.

---

28 <sup>22</sup> Staff/200, Hennessy/3-4, *quoting In the Matter of the Adoption of OAR 952-01-0010 through 952-01-0090*, UNC 1, OUNC Order No. 97-001, App. B, p. 2.

1 But, importantly for this argument, it would have added little cost for the employee to locate the  
2 privately-owned facilities in the public ROW just steps away from where the City employee  
3 stood to perform the unnecessary locates.

4 The City's cost to perform unnecessary locates on at least three underground facilities  
5 outside the excavation zone is likely no more than the cost to locate the privately-owned  
6 underground facilities on the public ROW. Or, even if the locates performed by the City had  
7 been in the excavation zone marked in the ticket, the cost to locate connected (literally)  
8 underground facilities in a public ROW only steps away from the City-owned underground  
9 facilities would have added very little cost.

10 Staff does not suggest that the circumstances presented here would be present in every  
11 circumstance where the City is called upon to locate underground facilities in public ROWs.  
12 But, when these circumstances are presented, it is certainly inefficient to require two different  
13 owners of underground facilities in one utility system to locate underground facilities located in  
14 close proximity.

15 Second and more importantly, the map provided by the City shows the location of the  
16 City owned facilities on NE 28<sup>th</sup> Avenue (which are outside the excavation area) and shows the  
17 location of the underground facilities in the Ainsworth ROW.<sup>23</sup> Staff has no reason to doubt the  
18 City has a similarly complete map of underground facilities throughout the City used for City-  
19 provided wastewater service. This is the information that is crucial to a successful One Call  
20 program.

21 The City has presumably invested ratepayer money to create these maps and the City  
22 continues to accumulate information on the location of previously undiscovered facilities and  
23 new facilities. These maps are extremely valuable to the One Call System and operators charged  
24 with performing locates. Private citizens that own facilities used to supply them with utility  
25

---

26 <sup>23</sup> NC 405 Defendant's Answer, Ex. A.

1 service would not have a data base such as that owned by the City nor know how or to access it  
2 even if the data base is publicly available.

3 The fundamental purpose of the One Call system is to create a comprehensive network of  
4 responsible entities that work together to protect against unintentional damage to underground  
5 facilities to protect the public safety. This purpose is not served by a system that relies on an  
6 untold number of unidentified and likely uninformed owners of privately-owned utility facilities  
7 in public rights of way subscribing to the Oregon Utility Notification Center (OUNC) and  
8 performing locate services within 48 business hours of notification of a planned excavation.

9 The City does not think requiring property owners to locate privately-owned facilities in  
10 public ROWs is an ineffective means of ensuring excavators are notified of underground  
11 facilities. The City notes that when it issues an “encroachment permit” for private facilities  
12 located in ROWs, it requires the permittee to submit a map of the facilities, register the facilities  
13 with the OUNC, and perform locate service if asked to do so. To prepare property owners for  
14 performing locate services, the City provides encroachment permittees with a list of licensed  
15 contractors who have indicated they provide sewer connection services in the Portland metro-  
16 area.<sup>24</sup>

17 The City’s argument is predicated on an several unsupportable assumptions: (1) every  
18 owner of private facilities in ROWs (“owner”) is aware the facilities exist, (2) every owner of  
19 such facilities will obtain an encroachment permit, (3) every owner regardless of whether they  
20 have an encroachment permit, will register with the OUNC, and (4) every owner will have a  
21 system in place to provide locating and marking response to notification tickets in a 48 business  
22 hour period, i.e., will have a contractor on call or have educated themselves on how to locate  
23 facilities for purposes of the One Call program. Simply put, there is no way to ensure that the  
24 owner of every privately-owned facility in a public ROW will participate in the One Call  
25 program. Consequently, excavators will inevitably dig in public areas such as ROWs,

26

---

<sup>24</sup> City of Portland/100, Gualotunia/4-5.

1 incorrectly assuming the appropriate people have been notified of the excavation and have  
2 located facilities within the excavation area. This is precisely the result the legislature and  
3 OUNC intended to prevent when they placed the obligation to locate underground utility  
4 facilities on the operator rather than the owner.

5 **D. The City’s argument it does not use the underground facilities in the Ainsworth**  
6 **ROW to provide utility service is not believable.**

7 Contrary to any argument the City may make, the privately-owned underground facilities  
8 in the Ainsworth ROW at issue in the Complaint are used by the City to provide wastewater  
9 services to the Complainant. The wastewater facilities that are owned by the City do not extend  
10 to the Complainant’s property. The wastewater services provided to the Complainant and paid  
11 for by him must, therefore, be provided using the privately-owned facilities connecting the  
12 wastewater facilities on Complainant’s private property to the wastewater facilities owned by the  
13 Company. Without the privately-owned facilities connecting the Complainant’s facilities on  
14 private property to the city-owned facilities, there is no wastewater service. Thus, the privately-  
15 owned facilities have to be part of the system the City uses to provide wastewater services.

16 To the extent BES, as operator of the Portland wastewater system, is required to locate  
17 “all of its locatable facilities within the area of proposed excavation” in a public ROW, it must  
18 locate all of the facilities used to provide wastewater service, regardless of ownership, their  
19 name, or how they are classified by BES. This includes the underground facilities wastewater  
20 facilities in the Ainsworth ROW

21 The history underlying the OUNC rules discussed above reflects the obligation to  
22 perform locates does not turn on semantics or the proper term for the facilities at issue. The  
23 history excerpted above explains that the facilities addressed by the legislation and implementing  
24 rules are those that extend from the sewer main in the street to the customer’s property. When  
25 these facilities (those that extend from the sewer main to the customers’ property) are not located  
26 on private property, they are not within the control of the customer and not operated by the

1 customer. Instead, these facilities, privately-owned or not, are operated by the service provider  
2 that provides service through the facilities. Because OAR 860-001-0070(1) requires operators of  
3 underground facilities to locate them upon receipt of a One Call ticket, the City was required to  
4 locate the underground wastewater facilities located in the Ainsworth Row.

5 **IV. Conclusion**

6 Staff recommends the Commission find the City has violated OAR 952-001-0070 by  
7 failing to mark with reasonable accuracy all of the locatable underground facilities or provide  
8 marks of unlocatable facilities in the NE-Ainsworth Right of Way after receipt of Ticket Number  
9 21334979.

10

11 SIGNED this 2<sup>nd</sup> day of February 2024.

12

Respectfully submitted,

13

ELLEN F. ROSENBLUM

14

Attorney General

15

*/s/ Stephanie S. Andrus*

16

---

Stephanie S. Andrus, OSB No. 925123  
Sr. Assistant Attorney General  
Of Counsel for Attorneys of Oregon Public  
Utility Commission Staff

17

18

19

20

21

22

23

24

25

26