



Oregon

Tina Kotek, Governor

Public Utility Commission

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Served at Salem, Oregon, 02/24/2023, to:

Robert Taylor

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(Also, Courtesy electronic copy to: robert.taylor@portlandoregon.gov)

NC 405

OREGON PUBLIC UTILITY COMMISSION,

Complainant,

vs.

CITY OF PORTLAND, BUREAU OF
ENVIRONMENTAL SERVICES,

Defendant.

A copy of a complaint filed against City of Portland, Bureau of Environmental Services is attached. The Public Utility Commission must receive an Answer from the defendant or its attorneys by March 16, 2023.

You must submit filings electronically to the Commission as described in OAR 860-001-0170. A copy of your filing will automatically be sent to the complainant when it is processed by the Filing Center.

To make a filing electronically, please follow the steps below:

- a. Create or convert your document to Word or text-searchable pdf format so that you can attach it to an email; and
- b. You must date and sign your document. You may use an electronic signature, such as /s/ John Doe.

Robert Taylor
February 24, 2023
Page Two

- c. In the Subject Line of the email, type “Docket NC 405, [description of your filing], [your name], and [date].
- d. Send the email to the Filing Center’s email address at PUC.FilingCenter@puc.oregon.gov;
- e. It is not necessary to send me a copy of your filing; and
- f. A copy of your filing will automatically be sent to the complainant’s representative when it is processed by the Filing Center.

PUBLIC UTILITY COMMISSION OF OREGON

/s/Cheryl Walker
Cheryl Walker
Administrative Specialist 2
Administrative Hearings Division
(971) 388-8306

Attachments: Complaint
Notice of Contested Case Rights and Procedures

c: Eric Shaffner, eric.shaffner@portlandoregon.gov

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**

3 **NC 405**

4
5 PUBLIC UTILITY COMMISSION OF
6 OREGON,

7 Complainant

8 vs.

9 City of Portland acting through Bureau of
10 Environmental Services,

11 Defendant.

COMPLAINT

12 1.

13 This proceeding is initiated by the Oregon Public Utility Commission (hereinafter
14 “Commission”) to determine whether civil monetary penalties should be assessed as provided in
15 ORS 757.993.

16 2.

17 The Commission maintains offices at 201 High Street, Suite 100, Salem, Oregon 97301

18 3.

19 Under ORS 757.993, the Commission has discretion to seek penalties for violations of rules
20 adopted by the Oregon Utility Notification Center (OUNC).

21
22 4.

23 Under ORS 757.552, OUNC has adopted rules, OAR Ch. 952, that prescribe requirements
24 for notification to OUNC of excavation activity and marking of underground facilities for the
25 purpose of preventing damage to such facilities.
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5.

Defendant is the City of Portland acting through its Bureau of Environmental Services (BES). At all material times, BES provided sewage and stormwater services to residents of Portland, Oregon.

6.

The City of Portland through BES operates underground facilities for providing sewer and wastewater services to City of Portland residents.

7.

BES provided sewage and stormwater service to Scott Donnell who resided at 2818 NE Ainsworth Street, Portland Oregon, during all times material to this Complaint.

8.

BES provided sewer and wastewater services to Scott Donnell through facilities located in the NE Ainsworth St. – NE Jarrett St. Right of Way, which are connected to and part of the system used by the City of Portland to provide wastewater and sewer services to Scott Donnell and other City of Portland residents.

9.

The facilities located in the NE Ainsworth St. – NE Jarrett St. Right of Way that are used to provide wastewater and sewer service to the resident of 2818 NE Ainsworth Street are classified by BES as a nonconforming sewer located in a public right of way under City Code section 17.32.020.O.

10.

NE Ainsworth St. – NE Jarrett St. Right of Way is a public right of way as that term is defined at City Code 17.32.020.P.

11.

The City of Portland, through BES, has jurisdiction over the NE Ainsworth Street – NE Jarrett Street Right of Way that is adjacent to the property at 2818 NE Ainsworth St, Portland,

1 Oregon.

2 12.

3 Under City Code sec. 17.32.030, no one may repair, upgrade or replace a nonconforming
4 sewer located in a public right-of-way without a permit allowing the repair, upgrade, or
5 replacement.

6 13.

7
8 Portland City Code 17.32.070.A.1 and 2. provide:

- 9 1. If any portion of an existing sewer or drainage system extends into a
10 public Right-of-Way, the property owner must obtain a permit pursuant
11 to Chapter 17.24 before beginning work within the right-of-way.
12 2. For a sewer or drainage system located in a public right-of-way that is
13 under either private or unclear ownership, the BES Chief Engineer may
14 grant or deny a permit to repair, upgrade, or replace the system as
15 provided by Section 17.32.030. Such a system may only remain in the
16 public right-of-way at the discretion of the BES Chief Engineer.

14 14.

15
16 Under ORS 757.557(1), “[e]very operator of underground facilities shall subscribe to the
17 Oregon Utility Notification Center.”

18 15.

19 Under ORS 757.542(5) “Operator” means any person, public utility, municipal
20 corporation, political subdivision of the state or other person with control over underground
21 facilities.

22 16.

23 OAR 952-001-0010(15) specifies for purposes of implementation of Oregon Utility
24 Notification Center requirements, an operator “includes any person, as defined in ORS 756.010,
25 having the right to bury underground facilities in any public right-of-way, or in any utility
26 easement.”

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17.

The City of Portland BES is subscribed to the Oregon Utility Notification Center as an operator pursuant to the requirement in ORS 757.557(1).

18.

OAR 952-001-0070 sets forth requirements for when subscribers to the OUNC are required to locate facilities in response to a notification request received from the OUNC.

19.

OAR 952-001-0070, which was in effect at all times herein relevant, specifies notification requirements for OUNC subscribers as follows:

* * * [W]ithin two business days (48 hours) after the excavator notifies the Oregon Notification Utility Center of a proposed excavation, the operator or its designated agent shall:

- a. Mark with reasonable accuracy all of its locatable underground facilities within the area of proposed excavation. All marks shall indicate the name, initials or logo of the operator of the underground facilities, and the width of facility if it is greater than two (2) inches;
- b. Provide marks to the excavator of the unlocatable underground facilities in the area of the proposed excavation, using the best information available including as-constructed drawings or other facility records that are maintained by the facility operator; or
- c. Notify the excavator that the operator does not have any underground facilities in the area of the proposed excavation. Acceptable notifications must include locate request call back information and if done using an AVR (Automatic Voice Response) must have a repeat option and call back number to hear the information again.

20.

On or about January 15, 2022, contractor Environmental Works, LLC notified the Oregon Utility Notification Center of planned excavation at 2828 NE Ainsworth, Portland, Oregon. The request for notification submitted to the OUNC included the following:

1 Please locate all utilities including sewer on the entire property including all
2 ROWs and easements. Especially need the alley way approach to the easy
3 marked outcorner lots, please mark all sides. Flags and Paint please. No
4 phone calls unless absolutely necessary.

5 21.

6 Sometime on or before January 15, 2022, the excavator used digital white lining indicating
7 the area on the NE Ainsworth – NE Jarrett Street ROW defining a general area needed for locating
8 and marking services.

9 22.

10 OUNC assigned Ticket number 21334979 to the location request submitted Environmental
11 Works, LLC.

12 23.

13 OUNC notified BES of Ticket number 21334979 locating request on January 15, 2022.
14 The specific instructions included in the locating request and set forth in paragraph 19 above
15 were conveyed to BES.

16
17 24.

18 BES did not respond to Ticket number 21334979 within two business days of notification
19 by providing locating service or notifying the excavator of unlocatable facilities.

20 25.

21 BES did not provide any response to the excavator within two days of the notification of
22 Ticket number 21334979.

23 26.

24 ORS 757.993 provides, in relevant part, that:

25
26 * * * every person who violates or procures, aids or abets in the violation of any
rule of the Oregon Utility Notification Center shall incur a penalty of not more than
\$1,000 for the first violation and not more than \$5,000 for each subsequent

violation.

27.

At all material times, Defendant was the operator as that term is defined in ORS 757.452(5) and OAR 952-001-0010(15) of the City of Portland sewer and wastewater system used to serve City of Portland residents and sewer and wastewater service customers.

28.

Defendant is the operator of the facilities located in the NE Ainsworth St. – NE Jarrett St. Right of way under ORS 757.542(5), which specifies that “operator” for purposes of OAR 952-001-0070 means any person, public utility, municipal corporation, political subdivision of the state or other person with control over underground facilities.

29.

Defendant violated OAR 952-001-0070, in that Defendant failed to mark with reasonable accuracy all of the locatable underground facilities or provide marks of unlocatable facilities or notify excavator that no facilities exist in the NE Ainsworth – NE Jarrett St. Right of Way or notify excavator that any facilities within the Right of Way are unlocatable within two business days of notification of OUNC locate ticket number 21334979.

WHEREFORE, the Commission directs Defendant to file a verified answer to this Complaint within twenty (20) days from the date this Complaint is mailed to Defendant. If no verified answer or other written appearance raising a question of fact or law is filed with the Commission at its office in Salem, Oregon, within the 20-day period, the allegations of the Complaint are deemed admitted, and a penalty will be imposed in an amount of up to \$1,000 for each violation alleged.

SIGNED this 23rd day of February, 2023.

Stephanie Andrus
Stephanie S. Andrus
Sr. Assistant Attorney General

NOTICE OF CONTESTED CASE RIGHTS AND PROCEDURES

Oregon law requires state agencies to provide parties written notice of contested case rights and procedures. Under ORS 183.413, you are entitled to be informed of the following:

Hearing: The time and place of any hearing held in these proceedings will be noticed separately. The Commission will hold the hearing under its general authority set forth in ORS 756.040 and use procedures set forth in ORS 756.518 through 756.610 and OAR Chapter 860, Division 001. Copies of these statutes and rules may be accessed via the Commission's website at <https://www.oregon.gov/puc/Pages/default.aspx>. The Commission will hear issues as identified by the parties.

Right to Attorney: As a party to these proceedings, you may be represented by counsel. Should you desire counsel but cannot afford one, legal aid may be able to assist you; parties are ordinarily represented by counsel. The Commission Staff, if participating as a party in the case, will be represented by the Department of Justice. Generally, once a hearing has begun, you will not be allowed to postpone the hearing to obtain counsel.

Notice to Active Duty Servicemembers: Active Duty Servicemembers have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 503-584-3571 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll free telephone number.

Administrative Law Judge: The Commission has delegated the authority to preside over hearings to Administrative Law Judges (ALJs). The scope of an ALJ's authority is defined in OAR 860-001-0090. The ALJs make evidentiary and other procedural rulings, analyze the contested issues, and present legal and policy recommendations to the Commission.

Hearing Rights: You have the right to respond to all issues identified and present evidence and witnesses on those issues. *See* OAR 860-001-0450 through OAR 860-001-0490. You may obtain discovery from other parties through depositions, subpoenas, and data requests. *See* ORS 756.538 and 756.543; OAR 860-001-0500 through 860-001-0540.

Evidence: Evidence is generally admissible if it is of a type relied upon by reasonable persons in the conduct of their serious affairs. *See* OAR 860-001-0450. Objections to the admissibility of evidence must be made at the time the evidence is offered. Objections are generally made on grounds that the evidence is unreliable, irrelevant, repetitious, or because its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay. The order of presenting evidence is determined by the ALJ. The burden of presenting evidence to support an allegation rests with the person raising the allegation. Generally, once a hearing is completed, the ALJ will not allow the introduction of additional evidence without good cause.

Notice of Contested Case Rights and Procedures continued

Record: The hearing will be recorded, either by a court reporter or by audio digital recording, to preserve the testimony and other evidence presented. Parties may contact the court reporter about ordering a transcript or request, if available, a copy of the audio recording from the Commission for a fee set forth in OAR 860-001-0060. The hearing record will be made part of the evidentiary record that serves as the basis for the Commission's decision and, if necessary, the record on any judicial appeal.

Final Order and Appeal: After the hearing, the ALJ will prepare a draft order resolving all issues and present it to the Commission. The draft order is not open to party comment. The Commission will make the final decision in the case and may adopt, modify, or reject the ALJ's recommendation. If you disagree with the Commission's decision, you may request reconsideration of the final order within 60 days from the date of service of the order. *See* ORS 756.561 and OAR 860-001-0720. You may also file a petition for review with the Court of Appeals within 60 days from the date of service of the order. *See* ORS 756.610.