



CITY OF  
**PORTLAND, OREGON**  
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February 29, 2024

VIA EMAIL - [puc.filingcenter@puc.oregon.gov](mailto:puc.filingcenter@puc.oregon.gov)  
Public Utility Commission of Oregon  
ATTN: Filing Center  
201 High Street SE, Suite 100  
P.O. Box 1088  
Salem, OR 97308-1088

Re: NC 405 - In the Matter of Public Utility Commission of Oregon v. City of  
Portland

Dear Filing Center:

The City of Portland respectfully submits its Closing Brief regarding NC 405.

Sincerely,

*/s/ Eric Shaffner*

Eric Shaffner  
Deputy City Attorney

ES/ks

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

4 **NC 405**

5 PUBLIC UTILITY COMMISSION OF  
6 OREGON,

7 Complainant,

8 v.

9 THE CITY OF PORTLAND,

10 Defendant.

11 **DEFENDANT’S CLOSING BRIEF**

12 **INTRODUCTION**

13 Many of the arguments in the opening brief of the Public Utility Commission (“the  
14 PUC”) were addressed in the City’s opening brief. For example, the PUC argues that the  
15 legislative history proves that “the operator of ‘underground facilities’ need not be the owner  
16 of the underground facilities to have the legal obligation to locate those facilities under the  
17 One Call System.”<sup>1</sup> But as the City explained in its opening brief, the scenario described in  
18 the legislative history did not match the situation here:

19 The comments in the legislative history argued that “[t]he operator of the  
20 sewer main (city or service district) would have the best knowledge of where  
21 the lateral would be (they installed it or controlled the installation) . . . .”

22 Here, the City did not install or control the installation of the Private Lateral.<sup>2</sup>

23 Some of the PUC’s other arguments lack evidence or context and do not merit discussion.<sup>3</sup>

24 The remainder are addressed below.

25 <sup>1</sup> Staff Opening Brief at 6, ll. 22-24.

26 <sup>2</sup> Defendant’s Opening Brief at 14, ll. 3-6 (internal citations omitted).

<sup>3</sup> See, e.g., Staff Opening Brief at 9, ll. 17-19 (“Staff has no reason to doubt the City has a similarly complete map of underground facilities throughout the City used for City-provided wastewater service.”).

1 **ARGUMENT**

2 I.

3 The PUC purports to summarize the City’s position as follows: “The City’s primary  
4 objection to the requirement to locate privately-owned wastewater facilities on public  
5 property appears to be a complaint that it is inappropriate to shift to the City the cost of  
6 locating wastewater facilities the City does not own or has otherwise accepted into its  
7 system.”<sup>4</sup> But the City’s position is much more than a policy argument. The City’s position  
8 is that the OUNC was not empowered to assign ownership or operation of underground  
9 facilities,<sup>5</sup> much less to direct, by implication, the expenditure of public money on private  
10 infrastructure.<sup>6</sup>

11 II.

12 The PUC reversed its own position on the accuracy of the City’s locate. In its  
13 complaint, the PUC alleged that the City  
14 failed to mark with reasonable accuracy all of the locatable underground  
15 facilities or provide marks of unlocatable facilities or notify excavator that no  
16 facilities exist in the NE Ainsworth – NE Jarrett St. Right of Way or notify  
17 excavator that any facilities within the Right of Way are unlocatable within  
18 two business days of notification of OUNC locate ticket number 21334979.  
19 In its opening brief, by contrast, the PUC now says that the City located too much  
20 infrastructure, arguing that “the underground facilities located by [the City’s utility locator]  
21 are not in the excavation area indicated in the ticket.”<sup>7</sup>

22 In the PUC’s telling, “The facilities [the City’s utility locator] located are located on  
23 NE 28th Avenue and north of the intersection of SE 28th Ave and the Ainsworth [right-of-

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25 <sup>4</sup> *Id.* at 1, ll. 18-21.

26 <sup>5</sup> Defendant’s Opening Brief at 18, ll. 5-12.

<sup>6</sup> *Id.* at 17, ll. 22-23, to 18, ll. 1-4.

<sup>7</sup> *Id.* at 6, ll. 3-4.

1 way].”<sup>8</sup> The PUC appears to be referring to the two public sewer mains and two public  
2 sewer branches listed<sup>9</sup> and shown<sup>10</sup> in the City’s Answer. According to the PUC,<sup>11</sup> at least  
3 three of those facilities are outside of the reverse-L-shaped polygon indicated on the locate  
4 ticket.<sup>12</sup>

5 To the extent that the polygon was intended to be an exact representation of the  
6 excavation area, and to the extent that either or both of the public sewer branches were  
7 outside of that area, the City acknowledges that the excavator might have gotten more than  
8 they sought. But those branches are integral components of the public sewer main to which  
9 they are connected and one of them provides service to the property at issue in this matter.  
10 As for the public sewer mains, it is clear from the map<sup>13</sup> the City provided that they run the  
11 full length of SE 28th Avenue, north to south. They are thus, it is true, “north of the  
12 intersection . . . ,” but it is equally true that they are south of it and within it. The City  
13 appears to be damned if it does not locate but also damned if it does.

14 III.

15 The PUC professes not to understand the City’s rationale for locating only City-  
16 owned and -operated underground facilities, despite the clear language in the Oregon  
17 Administrative Rules<sup>14</sup> and the City’s fiduciary obligations to its ratepayers,<sup>15</sup> as discussed in  
18 its response testimony. For example, the PUC wrote, “According to the City it is only  
19 obligated to perform locates for privately-owned sewer facilities in City ROWs if the sewer  
20 facilities have been ‘accepted’ as part of the City’s wastewater system pursuant to the process  
21 outlined in City Code.”<sup>16</sup> But what the PUC fails to grasp is that, as explained in the City’s

22 <sup>8</sup> *Id.* at 6, ll. 4-6.

23 <sup>9</sup> Defendant’s Answer, Ex. B, at 2, ll. 6-9.

24 <sup>10</sup> *Id.*, Ex. A.

25 <sup>11</sup> Staff Opening Brief at 6, ll. 6-7.

26 <sup>12</sup> Staff/101, Hennessy/7.

<sup>13</sup> Defendant’s Answer, Ex. A.

<sup>14</sup> City of Portland/300, Hofmann/1-2.

<sup>15</sup> City of Portland/200, Suto/4-5.

<sup>16</sup> Staff Opening Brief at 6, ll. 11-13.

1 response testimony,<sup>17</sup> once a facility has been “accepted” by the City, it is no longer  
2 privately-owned. From then on, the City will operate, maintain, and, when called upon,  
3 locate the facility.

#### 4 IV.

5 The PUC makes a number of doomsday predictions about the impacts of the City’s  
6 locates policy:

7 A system that relies on utility customers to locate underground facilities in  
8 public ROWs is an ineffective means of protecting excavators, the general  
9 public, or buried facilities from damages caused by excavation activities.

10 Many wastewater service customers, which includes renters, will have no  
11 knowledge whatsoever of the facilities used to provide them with wastewater  
12 services. And, customers of City wastewater services are unlikely to know  
13 how to locate underground facilities in a ROW or have the necessary  
14 equipment to perform a locate. It would not be prudent to create a One Call  
15 system that relies on the original owner of underground facilities to pass along  
16 to future owners or tenants, information about OUNC requirements and  
17 underground facilities and to perform locates. If this is how the One Call  
18 System is operated, it should be expected that the efficacy of the One Call  
19 System will deteriorate significantly as wastewater service customers fail to  
20 subscribe upon purchasing property or signing a lease or fail to perform  
21 locates because they do not know how.<sup>18</sup>

22 But the PUC ignores the fact that a property owner becomes an “operator” once an  
23 encroachment permit has been issued by the City, giving the owner “control over [their]  
24 underground facilities,”<sup>19</sup> and, as such, is required to subscribe to the Oregon Utility

25 <sup>17</sup> City of Portland/200, Suto/1, ll. 12-23.

26 <sup>18</sup> Staff Opening Brief at 8, ll. 6-17.

<sup>19</sup> ORS 757.542(5).

1 Notification Center (“the OUNC”).<sup>20</sup>

2 The remainder of the PUC’s arguments above were addressed in the City’s response  
3 testimony. In particular, as Ms. Gualotunia explained, having a private sewer lateral in the  
4 public right-of-way located and mapped ensures that the property owner will have the  
5 relevant information to provide to plumbers and excavators,<sup>21</sup> and the fact that the  
6 encroachment permit is recorded in the chain of title<sup>22</sup> ensures that future owners can obtain  
7 that information. The result is that, far from abandoning property owners to their own  
8 devices, as in the PUC’s portrayal, the City empowers them and furthers the OUNC’s goal of  
9 “prevent[ing] damages to underground facilities and . . . promot[ing] public safety related to  
10 excavation issues.”<sup>23</sup>

11 V.

12 The PUC’s statement that “[t]he City’s argument is predicated on several  
13 unsupportable assumptions” requires some debunking:<sup>24</sup>

- 14 • *“(1) every owner of private facilities in ROWs . . . is aware the facilities exist”*: The  
15 City assumes no such thing. But once a private sewer lateral is discovered in the  
16 public right-of-way, whether as part of a property sale or because an excavator  
17 damages the facility, the City requires the owner either to remove the facility and  
18 replace it with a legal connection to the public sewer or to request an encroachment  
19 permit. Having one fewer unknown hazard in the public right-of-way, as discussed,  
20 helps fulfill the OUNC’s mission.
- 21 • *“(2) every owner of such facilities will obtain an encroachment permit”*: If an owner  
22 wants to keep their existing connection, they may seek an encroachment permit. If

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24 <sup>20</sup> ORS 757.557(1) and OAR 952-001-0010(15).

<sup>21</sup> City of Portland/100, Gualotunia/4-5.

<sup>22</sup> City of Portland/101, Gualotunia/1.

<sup>23</sup> Oregon 811 Utility Notification Center, “Standards Manual,” at 5, *available at*  
<https://digsafelyoregon.com/wp-content/uploads/2019/05/Standards-Manual-1-1-19.pdf>.

<sup>24</sup> Staff Opening Brief at 10, ll. 17-23.

1 they do not, they will be required to remove the encroaching pipe.

- 2 • *“(3) every owner regardless of whether they have an encroachment permit, will*  
3 *register with the OUNC”*: An owner who receives an encroachment permit from the  
4 City will register with the OUNC. An owner who does not receive an encroachment  
5 permit will be required to remove the encroaching pipe and replace it with a legal  
6 connection, for which registration with the OUNC will be unnecessary because the  
7 public sewer branch will be located by the City in response to future OUNC tickets.  
8 There will be no private sewer lateral in the public right-of-way to burden future  
9 owners of the property.
- 10 • *“(4) every owner will have a system in place to provide locating and marking*  
11 *response to notification tickets in a 48 business hour period, i.e., will have a*  
12 *contractor on call or have educated themselves on how to locate facilities for*  
13 *purposes of the One Call program”*: The “system” for a property owner who  
14 receives an encroachment permit is simple. They either mark the facility themselves  
15 or contact a sewer contractor from the list supplied by the City,<sup>25</sup> provide the  
16 contractor with the map that was required when the permit was approved, and pay for  
17 a locate. For future property owners, there may be some delay while they access their  
18 records or request a copy of the encroachment permit from the City or the County  
19 Recorder, but the property owner and the excavator can agree to postpone excavation  
20 up to ten days.<sup>26</sup> Property owners often do not know of the existence of properly-  
21 recorded easements on their properties, either, but are nevertheless held to their terms.

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26 <sup>25</sup> City of Portland/103, Gualotunia/1-5.

<sup>26</sup> OAR 952-001-0070(2).

1 VI.

2 The PUC may not understand that private facilities do not become part of public  
3 systems merely because they are connected to those systems. As the PUC argued, “Without  
4 the privately-owned facilities connecting the Complainant’s facilities on private property to  
5 the city-owned facilities, there is no wastewater service. Thus, the privately-owned facilities  
6 have to be part of the system the City uses to provide wastewater services.”<sup>27</sup>

7 Of course, statements like those confirm the City’s suspicion that the PUC is seeking  
8 to foist privately-owned, sub-standard, non-conforming sewer laterals onto the City. But the  
9 City, not the PUC, gets to determine which facilities make up its sewer system and which do  
10 not. The Portland City Council defined that system as follows:

11 “Public Sewer” means the entire City sewage, sludge, and stormwater  
12 collection, conveyance, treatment, pollution reduction, reuse, and disposal  
13 systems, including all pipes, ditches, sumps, manholes, and other system  
14 components that:

- 15 1. Have been designed for the collection and transport of stormwater,  
16 wastewater, or sanitary sewage received from street inlets, sewer  
17 service laterals and common private sewer systems; and
- 18 2. Were
  - 19 a. Constructed by the City’s Bureau of Environmental  
20 Services; or
  - 21 b. Accepted by the City’s Bureau of Environmental Services  
22 under Section 17.32.055.<sup>28</sup>

23 A property receives service from the public sewer branch in the adjacent public right-of-way.  
24 The City does not provide service from there to the structures on the property, as evidenced

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26 <sup>27</sup> Staff Opening Brief at 11, ll. 13-15.

<sup>28</sup> PORTLAND, OR., CODE § 17.04.010 W., available at <https://www.portland.gov/code/17/04>.



1 by the fact that the City does not maintain infrastructure beyond the end of the public sewer  
2 branch<sup>29</sup> and does not charge a fee for the existence of the private sewer lateral. The City  
3 only charges for the connection of that lateral to the public sewer branch and for the  
4 property's use of the public system, writ large.<sup>30</sup>

5 **CONCLUSION**

6 For the reasons stated above, the complaint should be dismissed.

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8 Dated this 29th day of February, 2024.

9 Respectfully submitted,

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11 */s/ Eric Shaffner*

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<sup>29</sup> City of Portland/200, Suto/2-3.

26 <sup>30</sup> PORTLAND, OR., CODE, Ch. 17.36, "Sewer User Charges," available at  
<https://www.portland.gov/code/17/36>.