

**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 REPLY BRIEF

1 **I. Introduction.**

2 At issue is whether the City of Portland violated OAR 952-001-0070 by not locating
3 underground wastewater facilities located in the Ainsworth – Jarrett St. right of way (ROW) after
4 receiving an Oregon Utility Notification Center (OUNC) Ticket notifying the City of a proposed
5 excavation in the ROW. The City acknowledges it did not attempt to locate the underground
6 wastewater facilities in the ROW, but denies it violated OAR 952-001-0070, arguing the rule
7 does not and cannot require the City to provide locate services for underground facilities it does
8 not own.¹ The City relies on a statutory construction argument to support its claim OAR 952-
9 001-0070 does not require the City to locate underground facilities not owned by the City and a
10 home rule-type argument to support its claim the OUNC cannot require the City to provide
11 locate services for underground facilities it does not own or operate pursuant to the requirements
12 of its City Code.

13 **A. OAR 952-001-0070 is properly interpreted to require the City to provide locate**
14 **services for underground wastewater facilities the City does not own.**

15 To support its claim OAR 952-001-0070 is properly interpreted to require that
16 underground facility operators provide locate services only for facilities the operator owns, the
17 City argues:

18 OAR 952-0010070(1)(a) requires an operator to mark “all of its locatable
19 underground facilities” (emphasis added). That three-letter possessive
20 adjective holds outsized importance and indicates that the rule’s drafters
21 correctly understood this basic truth: A utility operator is only responsible for
22 operating, maintaining, repairing, and, in this context, locating infrastructure
23 that it owns. That understanding is reflected in the requirement for
24 “unlocatable” facilities as well, since the operator is expected to “us[e] the best
25 information available including as constructed drawings or other facility
26 records that are maintained by the facility operator”²

24 ¹ In its Opening Brief, Staff stated that the City claimed it was only required to provide locate services for
25 underground wastewater facilities the City owned or “accepted.” In its Reply Brief, the City points out
26 that Staff “failed to grasp” that facilities that are “accepted” are owned by the City. Staff appreciates the
clarification that the City will only provide locate services for underground wastewater facilities that it
owns.

² Defendant’s Opening Brief 7.

1 The City’s reliance on the “outsized importance” of the possessive adjective “its,” in its statutory
2 construction argument is misplaced because “its” does not necessarily suggest legal ownership.

3 For purposes of a statutory construction argument, a court will ordinarily presume that
4 the legislature intended terms of common usage to have their plain, natural, and ordinary
5 meaning.³ “Its” has alternative definitions in *Webster’s Third New International Dictionary*, and
6 can indicate possession or association:

7 **1** : of or belong to it or itself as possessor : inherent in it : associated or
8 connected with it * * * **2** : Of our relating to it or itself as author, doer,
9 giver, or agent : effected by it : experienced by it as subject : that it is
10 capable of * * *⁴

11 Because “its” can mean a possessor interest or just an association, it is not possible to rely
12 on the plain meaning of “its” to determine whether the operator’s obligation to mark “all of its
13 locatable underground facilities” is limited to facilities the operator owns. Instead, it is
14 appropriate to consider the history and context of the rule.

15 Comments attached to the OUNC Order adopting the locate requirements in OAR 952-
16 001- 0070 reflect the OUNC’s understanding the legislature intended to make facility
17 “operators” rather than facility “owners” responsible for locates because owners may not have
18 control over the facilities, would rarely have knowledge of the route of the facilities, and because
19 requiring “owners” of facilities, i.e., homeowners served by the facilities, to register with the
20 OUNC would be “counter-productive.”⁵ This history supports the conclusion that a wastewater
21 utility’s obligation to locate underground facilities applies to all underground facilities used by
22 the utility to provide wastewater service, i.e., are associated or connected with the wastewater
23 utility, subject to the limitation the utility need only locate its underground facilities on public

24 ³ See e.g., *Portland General Elec. Co. v. Bureau of Labor and Industries*, 317 Or. 606, 859 P.2d 1143
25 (1993).

26 ⁴ *Webster’s Third New International Dictionary*, p. 1204 (bold in original).

⁵ 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 property.

2 The City argues the comments appended to the OUNC order do not support Staff's
3 interpretation of the OAR 952-001-0070 because the comments describe a circumstance when a
4 municipality disavows ownership of underground facilities the municipality actually owns. The
5 City's argument is unavailing. The point of the comments is that ownership of the facilities is
6 not pertinent to who must perform the locate services.

7 **B. The City is the operator of the wastewater facilities in the Ainsworth-Jarrett St.**
8 **ROW for purposes of the OUNC notification requirements.**

9 Staff's analysis above begs the question of who is the "operator" of the underground
10 facilities in the Ainsworth-Jarrett St. ROW. The City of Portland acknowledges it the operator
11 of the Portland wastewater system, but asserts it is not the operator of the wastewater facility in
12 the Ainsworth-Jarrett St. ROW because it does not own it.

13 "Operator" is defined in ORS 757.542 as "any person, public utility, municipal
14 corporation, political subdivision of the state or other person with control over underground
15 facilities." The plain and ordinary meaning of "operator" is "one that produces a physical effect
16 or engages himself in the mechanical aspect of any process or activity[.]"⁶ Neither definition of
17 "operator" turns on ownership. If an entity must be an owner to be an operator, the legislature
18 would have no reason to move the obligation to perform locate services from owners of
19 underground facilities to "operators" of the facilities.

20 The underground facilities at issue are currently needed and used by the City to provide
21 wastewater service to a Portland resident. The resident served by the facilities cannot remove the
22 facilities or repair them without first receiving a permit from the City under City Code
23 17.32.030. Using the statutory definition and plain and ordinary meaning of "operator," the City
24 is the operator of these facilities.

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⁶ *Webster's Third New Int'l Dictionary*, p. 1581.

1 **C. The City’s reliance on requirements of its City Code is misplaced.**

2 The City argues the PUC cannot “foist privately-owned, sub-standard, non-confirming
3 sewer laterals onto the City[,]” and that it is the City, not the PUC, that “gets to determine which
4 facilities make up its sewer system and which do not.”⁷ Staff is not attempting to “foist” sewer
5 laterals onto the City. The only question is whether the City must perform locate services under
6 OAR Ch. 952 for underground wastewater facilities used to provide City-provided service,
7 regardless of ownership of the facilities.

8 The obligation to provide locate services for underground facilities used to provide City
9 wastewater service does not imply a requirement for the City to maintain the facilities or treat
10 them in any particular way for purposes of City government operations. It is within the City’s
11 authority to decide who must maintain wastewater facilities the City does not own. It is not
12 within the City’s authority to decide who must perform locate services for underground
13 wastewater facilities because the legislature has given that authority to the OUNC.

14 ORS 757.547 establishes the Oregon Utility Notification Center and ORS 757.552(2)(c)
15 establishes the duties of the OUNC, which include “[a]dopt[ing] rules according to ORS chapter
16 183 that regulate the notification and marking of underground facilities to prevent damage to
17 underground facilities.” The OUNC complied with that directive and has established a
18 regulatory scheme specifying operators of underground facilities must perform locates.

19 As Staff has explained, the OUNC intended to concentrate the obligation to perform
20 locate services of underground facilities in the system operators, i.e., utilities, because spreading
21 the obligation to individual owners of underground facilities would be counter-productive. The
22 City cannot disregard this State mandate and determine through its City Code or otherwise, that
23 the obligation to provide locate services for underground facilities lies with the owner of the
24 facilities rather than the “operator.”

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⁷ Defendant’s Closing Brief 7.

28.

1 Defendant is the operator of the facilities located in the NE Ainsworth St. – NE
2 Jarrett St. Right of way under ORS 757.542(5), which specifies that “operator”
3 for purposes of OAR 952001-0070 means any person, public utility, municipal
4 corporation, political subdivision of the state or other person with control over
underground facilities.

29.

5 Defendant violated OAR 952-001-0070, in that Defendant failed to mark with
6 reasonable accuracy all of the locatable underground facilities or provide marks
7 of unlocatable facilities or notify excavator that no facilities exist in the NE
8 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.

9 Staff acknowledges it would have been an improvement to include the modifier
10 “wastewater” before “locatable underground facilities,” in the final allegation of the
11 Complaint, but the absence of this qualifier is certainly not a fatal flaw that invalidates this
12 whole proceeding. The other allegations leading up to the final allegation clarify that the
13 underground facilities at issue are “the facilities located in the NE Ainsworth St. – NE Jarrett
14 St. Right of Way, which are connected to and part of the system used by the City of Portland
15 to provide wastewater and sewer services to Scott Donnell and other City of Portland
16 residents.”

17 In any event, notwithstanding the City’s argument regarding what the Complaint
18 “evinces,” the City has known the violation at issue is the failure to locate the underground
19 wastewater facilities in the NE Ainsworth – NE Jarrett St. Right of Way since the OPUC Staff
20 sent the City the Safety Inspection Report. Even if the City was not clear on the nature of the
21 allegations after receipt of the Report, the City and OPUC Staff met on two occasions to
22 discuss the failure to locate the underground wastewater facility long before the OPUC
23 issued the Complaint. Finally, Staff’s Opening and Closing Testimony are clear the violation
24 at issue concerns only the failure to locate the underground wastewater facility located in the
25 ROW.

26 Notably, the Safety Inspection Report prepared by Staff in this matter shows that the

1 Oregon Utility Notification Center also notified Northwest Natural Gas Company and
2 PacifiCorp of the pending excavation request and that these utility providers responded
3 accordingly.⁹ If the OUNC’s position is, as claimed by the City and Intervenors, that the
4 City is required to locate all underground facilities in a public ROW, PacifiCorp and NW
5 Natural would not have been notified of the excavation request.

6 **II. Conclusion.**

7 For the reasons discussed in Staff’s Opening and Closing Briefs and testimony, the
8 Commission should find the City violated OAR 952-001-0070 by not providing locate
9 services for underground wastewater facilities in the Ainsworth-Jarrett St. ROW.

10 SIGNED this 1st day of March 2024.

11 Respectfully submitted,

12 ELLEN F. ROSENBLUM
13 Attorney General

14 */s/ Stephanie S. Andrus*

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⁹ Staff/101, Hennessy/8 (June 17, 2022 Safety Inspection Report).