

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

NC 405

PUBLIC UTILITY COMMISSION OF
OREGON,

Complainant,

v.

CITY OF PORTLAND ACTING
THROUGH BUREAU OF
ENVIRONMENTAL SERVICES,

Defendant.

ORDER

DISPOSITION: COMPLAINT SEEKING PENALTIES DENIED

SUMMARY

This order addresses a complaint filed by the Staff of the Public Utility Commission of Oregon against the City of Portland's Bureau of Environmental Services (Portland BES) for alleged violations of Oregon Utility Notification Center (OUNC) rules.¹ We deny Staff's request for penalties against Portland BES and find that the OUNC's rules are not sufficiently clear as applied to the facts of this case. We encourage the OUNC to clarify its rules to further the effective implementation of the statute, which sought to materially improve public safety.

¹ Portland BES is an agency of the City of Portland, and the complaint was filed against the City of Portland for actions allegedly taken by Portland BES. The City of Portland is the defendant in this matter, but at times this Order refers to the City of Portland as a standalone entity, particularly where the authority or an action in question belongs to the City of Portland or another agency of the city rather than Portland BES.

PROCEDURAL HISTORY

On February 24, 2023, Staff filed a complaint against Portland BES seeking penalties for violations of rules adopted by the OUNC. On April 28, 2023, Portland BES filed an answer to the complaint.²

On March 30, 2023, the Commission held a case management conference. On May 17, 2023, Administrative Law Judge (ALJ) Sarah Spruce issued a memorandum establishing the schedule for these proceedings, including deadlines for testimony and briefs and the date for the hearing. On April 25, 2023, the Oregon Association of Clean Water Agencies (ACWA) filed a petition to intervene, and on June 13, 2023, the League of Oregon Cities (LOC) filed a petition to intervene, both of which were granted. Over the course of the proceeding, the parties filed testimony and exhibits.

On September 6, 2023, Staff submitted a motion to waive the evidentiary hearing, which was granted. On October 4, 2023, ALJ Spruce issued a set of bench requests to Portland BES and Staff. On October 30, 2023, Portland BES filed responses to the bench requests, and on November 3, 2023, Staff filed responses to the bench requests. Portland BES also filed a reply to the other party's responses to the bench requests. On April 30, 2024, the Commission held oral arguments. Portland BES and Staff each filed opening briefs, and LOC and ACWA jointly filed an opening brief.

On May 24, 2024, Portland BES filed a motion to correct the transcript and a motion to allow additional testimony.³ The testimony addressed e-mails between a real estate agent and an OUNC contractor regarding homeowner registration with the OUNC. On May 31, 2024, Staff filed a response to the motion and supplemental responsive testimony, stating that it did not oppose admitting Portland BES's motion provided that the Commission also admitted its supplemental testimony.⁴

COMPLAINT AND ANSWER

Staff alleges that Portland BES failed to respond to an OUNC ticket within two business days of notification of a location request submitted by Environmental Works, LLC, for an area including a right-of-way (ROW) in an alley intersecting with NE 28th Avenue and running parallel to NE Ainsworth Street (The Alley ROW) in Portland. Staff maintains that Portland BES did not provide the locating service, nor did it notify the excavator of

² On March 10, 2023, Portland BES filed a motion requesting an extension of time to May 1, 2023, to respond to Staff's complaint. Chief ALJ Nolan Moser granted the extension on March 10, 2023.

³ The motion to correct the transcript identified statements that were misattributed to other parties at the hearing. The motion to correct the transcript is granted.

⁴ The record in this docket was closed May 1, 2024. The motion of Portland BES is granted, and the record reopened for the limited purpose of admitting Exhibits City of Portland/700-702 and Exhibit Staff/400.

unlocatable facilities. Staff argues that Portland BES was the operator of the sewer and wastewater system used to service Portland residents and sewer and wastewater services, including the facilities located in the Alley ROW. Staff alleges that Portland BES violated OAR 952-001-0070 by failing to mark with reasonable accuracy all of the locatable underground facilities, provide marks of unlocatable facilities, or notify the excavator that it does not have any underground facilities in the area of the proposed excavation within 2 business days of notification of the locate ticket by the OUNC.

Portland BES denies that it failed to respond to the OUNC ticket, stating that it marked the locations of its locatable underground facilities along NE 28th Ave. Portland BES maintains that it does not own, operate, or use the lateral connecting the property at issue to the city sewer system and denies that it provides or has ever provided service to the property through facilities located in the Alley ROW. Portland BES admits that the property at issue is connected to the system used by the city of Portland to provide service to the property. Portland BES maintains that it was not the operator for purposes of the OUNC rules of any facilities that may be located in the Alley ROW and denies that it violated OAR 952-001-0070.

LEGAL BACKGROUND AND CONTEXT

In 1995, the Oregon Legislature revised the statutes governing the excavation and underground facilities to create the OUNC, among other changes. Prior to the revisions adopted in 1995, the statutes required owners of underground facilities to take one of the following actions within 48 hours of receiving a notification from an excavator:

- a. Mark with reasonable accuracy all of its locatable underground facilities within the area of the proposed excavation ***;
- b. Provide the excavator the best description available to the owner of the unlocatable underground facilities in the area of the proposed excavation;
- c. Notify the excavator that in the area of the proposed excavation there are underground sewer or storm drain facilities which are not marked because those facilities are at a depth greater than the excavator plans to dig; or
- d. Notify the excavator that the owner does not have any underground facilities in the area of the proposed excavation.⁵

The revised statutes require all operators of underground facilities to subscribe with the OUNC. The Legislature defined “operator” as any person, public utility, municipal corporation, political subdivision of the state or other person with control over

⁵ Former ORS 757.561(1) (1995), *repealed by* Or Laws 1995, c 691, §8.

underground facilities.⁶ The law directs the OUNC to “[a]dopt rules according to ORS chapter 183 that regulate the notification and marking of underground facilities to prevent damage to underground facilities.”⁷ These rules must be consistent with the Oregon Utilities Coordinating Council Standards Manual of March 31, 1995, insofar as is practicable.⁸ The revised statutes provide for penalties of up to \$1,000 for the first violation and up to \$5,000 for each subsequent violation of any OUNC rule.⁹

Under the revised statutes, the Commission may investigate complaints and has sole discretion to seek penalties for violation of rules adopted by the OUNC.¹⁰ The Commission may seek penalties only in response to a complaint alleging a violation of rules adopted by the OUNC.¹¹ Additionally, the revised statutes provide that no penalty may be imposed except by an order consistent with ORS 756.500 to ORS 756.610, which govern Commission procedures for complaints, investigations, and hearings.¹²

In 1997, the OUNC adopted rules establishing the requirements for operators and excavators. The OUNC rules define an “operator” as “any person, municipal corporation, political subdivision of the state with control over underground facilities [and] includes any person, as defined in ORS 756.010, having the right to bury underground facilities in any public right-of-way, or in any utility easement.”¹³ The OUNC rules require operators or their designated agents to take one of the following actions within two business days of an excavator notifying the OUNC:

- a. Mark within 24 inches of the outside lateral dimensions of both sides of all its locatable underground facilities within the area of proposed excavation ***;
- b. Provide marks to the excavator of the unlocatable underground facilities in the area of 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 ***.¹⁴

During the proceeding which ended with the OUNC Board adopting OAR 952-001-0010 through OAR 952-001-0090, the then-Chief of Pipeline Safety for the Commission and member of the OUNC Board Jack Dent submitted written comments explaining the

⁶ ORS 757.542(5).

⁷ ORS 757.552(2)(c).

⁸ ORS 757.552(2)(c).

⁹ ORS 757.993(1).

¹⁰ ORS 757.993(8).

¹¹ ORS 757.993(8).

¹² ORS 757.993(4).

¹³ OAR 952-001-0010(15).

¹⁴ OAR 952-001-0070(1).

background and history of the rules and proposed corrections to the rules.¹⁵ These comments were adopted by the Board of the OUNC and incorporated into the order.¹⁶ In these comments, Mr. Dent explains that the reasoning behind the change from owner to operator was “because an owner may not always have control over the buried facility” and responsibility was therefore shifted to the entity with administrative or operational control.¹⁷

POSITIONS OF THE PARTIES

A. Staff

Staff argues that Portland BES is the operator of the underground facilities located in the Alley ROW. Staff maintains that Portland BES provides water and sewer service in Portland, including to the owner of the property adjacent to the Alley ROW, whose property is served by sewer facilities in the Alley ROW.¹⁸ Staff maintains that these facilities are needed and used by Portland BES to provide service and the resident served by them cannot remove or repair the facilities without a permit from City of Portland agencies such as the Portland Bureau of Transportation (PBOT) and BES.¹⁹ Staff argues that Portland BES is the operator under the statutory definition and plain and ordinary meaning of operator.²⁰ Staff contends that the Alley ROW is public property controlled by the City of Portland.

Staff argues that a PBOT locator marked the location of underground facilities on NE 28th Avenue that, with one possible exception, were outside the excavation area identified in the OUNC ticket but failed to locate the facilities in the Alley ROW.²¹ Staff clarifies that though the complaint referred only to “locatable underground facilities,” it has been clear throughout these proceedings that the only issue is Portland BES’s failure to locate underground wastewater facilities used by Portland BES to provide wastewater services.²² Staff further clarifies that it does not consider Portland BES to be the operator of all underground locatable facilities.²³

¹⁵ Staff/103, Hennessy/10.

¹⁶ *In the Matter of the Adoption of OAR 952-001-0010 through 952-001-0090, Oregon Utility Notification Center*, Docket No. UNC 1, Order No. 97-001 at 2 (Apr. 9, 1997) (available at Staff/103, Hennessy/2).

¹⁷ *In the Matter of the Adoption of OAR 952-001-0010 through 952-001-0090, Oregon Utility Notification Center*, Docket No. UNC 1, Order No. 97-001, Appendix B at 2 (Apr. 9, 1997) (available at Staff/103, Hennessy/11).

¹⁸ Staff Opening Brief at 4-5.

¹⁹ Staff Reply Brief at 3.

²⁰ Staff Reply Brief at 3.

²¹ Staff Opening Brief at 5-6.

²² Staff Reply Brief at 5-6.

²³ Staff Reply Brief at 5-6; Tr. at 8-9.

Staff contends that under ORS 757.542(5) the operator of underground facilities need not be the owner of those facilities. Staff argues that the Oregon legislature made a deliberate choice to change the statute from applying to “owners” to “operators” of underground facilities in 1995. Staff maintains that Portland BES is responsible for locating all underground facilities through which it provides wastewater service if those facilities are located on public property. Staff contends that Portland BES, as the operator, does not have the authority to assign its obligation to perform locates to owners.²⁴ In response to Portland BES’s arguments about statutory construction, Staff maintains that courts ordinarily presume terms of common usage carry their plain and ordinary meaning, and that the word “its” (when establishing requirements for an operator to locate “its facilities”) can mean a possessor interest or just an association; according to Staff, it is therefore appropriate to consider the history and context of the administrative rule adopted by OUNC.

Staff argues that any system that relies on utility customers to perform locates in public ROWs (as Portland BES does for non-conforming infrastructure) would be an ineffective means of preventing damage caused by excavation activities and that customers are unlikely to know how to locate underground facilities or have the necessary equipment. Staff contends that Portland BES has maps showing the location of both privately owned and city owned underground facilities on or near the excavation site and that it would have added little cost for employees to locate the privately owned facilities in the public ROW. Staff argues that the map provided by Portland BES shows the location of the facilities in the Alley ROW. Staff maintains that Portland BES likely invested ratepayer money in creating these maps. Staff contends that these maps are extremely valuable to the One Call System and to all operators required to perform locates.²⁵ Staff asserts that private citizens who own underground facilities that supply them with utility service would not have the knowledge to access Portland BES’s database of maps.

Staff contends that the fundamental purpose of the One Call System is to create a comprehensive network of responsible entities to protect against unintentional damage to underground facilities and protect public safety. Staff explains this purpose would be undermined if the system had to rely on numerous unidentified and likely uninformed owners of private infrastructure in public ROWs. Staff argues that Portland BES’s position assumes that every private facility owner in the ROW, including individual homeowners, is aware the facilities exist, that they will obtain an encroachment permit and register with the OUNC, and that they will have a system to provide locating and marking within 48 hours consistent with OUNC rules.²⁶

²⁴ Staff Reply Brief at 4; Tr. at 13.

²⁵ Staff Opening Brief at 9.

²⁶ *Id.* at 10.

Staff maintains that Portland BES provides wastewater services through the privately owned underground facilities, making Portland BES the operator of the facilities for purposes of performing required locates. Staff notes that the pipes owned by Portland BES do not extend to the customer's property, and therefore the wastewater services provided to the residence must be provided using the privately owned facilities connecting the wastewater facilities on private property to the wastewater facilities owned by Portland BES. Staff maintains that without the private facilities in the ROW, there would be no wastewater service and thus these privately-owned pipes in the public ROW must be part of the system Portland BES uses to provide wastewater services.²⁷ Staff argues that whether the history underlying the rules included the proper term for the facilities does not affect Portland BES's obligation. Staff maintains that it is not attempting to foist ownership or any other responsibility for these sewer laterals on Portland BES and the only question is whether Portland BES must perform locates under OUNC rules. Staff contends that it is within Portland BES's authority to determine who must maintain wastewater facilities that Portland BES does not own, but that it is within the OUNC's authority to determine who must perform locate services for underground wastewater facilities.²⁸

B. Portland BES

Portland BES maintains that it complied with the OUNC rules. Portland BES argues that the rules only require an operator to mark all of "its" locatable underground facilities, and the use of "its" indicates that it is only those facilities the operator owns.²⁹ Portland BES contends that it did mark all of its underground facilities in the area, which does not include the privately owned facilities in the Alley ROW. Portland BES further contends that under the rules, an operator is only required to notify the excavator when it has no known underground facilities in the area, and to provide marks if it has locatable or unlocatable underground facilities in the area of the proposed excavation.

Portland BES argues that the complaint assumes that a road authority like the City of Portland is the operator of all underground utilities in a public ROW because it exercises authority over that ROW. Portland BES asserts that this is contrary to basic concepts of public governance and infrastructure regulation. Portland BES argues that management tools such as street opening permits or encroachment permits do not assign infrastructure ownership or operational authority to the City of Portland for the public utilities they are issued to, and that this principle is explained in the Portland City Code.³⁰ Portland BES maintains that the change from "owner" to "operator" in the rule was intended to address

²⁷ *Id.* at 11.

²⁸ Staff Reply Brief at 4.

²⁹ City of Portland Opening Brief at 7-8 (Jan. 31, 2024).

³⁰ City of Portland Opening Brief at 11.

municipalities that were disclaiming responsibility for their own infrastructure and explains that the reference to sewer laterals in the comments from Jack Dent cited by the Staff does not accurately describe sewer infrastructure as it actually exists, with public laterals connecting with private laterals.³¹ Portland BES emphasizes that it neither installed nor controlled the installation of the private lateral in the Alley ROW. Portland BES contends that Staff's interpretation undermines the focus on municipalities installing or having control of the installation of laterals in the cited legislative history.

Portland BES also takes issue with a memorandum from the Oregon Department of Justice (DOJ) addressing responsibility for locating sewer laterals under the OUNC rules.³² This DOJ memorandum is published in OUNC's Standards Manual, which provides information on dig safe statutes, OUNC rules, marking requirements, and the complaint process, among other information.³³ Portland BES argues that the memo is misleadingly worded and is not legally binding despite appearing in the OUNC Standards Manual. Portland BES contends that the DOJ memorandum does not take into consideration a number of important factors such as governmental oversight and authority, capital asset expenditures, the fiduciary responsibility to taxpayers, or legal liability and instead inappropriately focuses on jurisdictional control similar to the earlier comments by PUC Staff Jack Dent appended to the order adopting the OUNC rules.

Portland BES also argues that Staff's arguments ignore that Portland property owners become the operator once the City issues them an encroachment permit for non-conforming infrastructure in the public ROW; under the terms of the encroachment permit, property owners are required to subscribe to the OUNC and perform location services for the infrastructure covered by the permit. Portland BES contends that it is not transferring responsibilities to property owners because Portland BES did not have the responsibility to locate these pipes in the first place and instead the encroachment permits formalize what the law already says.³⁴ Portland BES maintains that private facilities do not become part of the public water and sewer system merely because they are connected to the system. Portland BES contends that this interpretation would foist responsibility for private, non-conforming sewer laterals onto Portland BES. Portland BES argues that it cannot spend public funds on private facilities. Portland BES argues that locating these facilities for the OUNC creates a perception that it is responsible for maintaining these facilities as well, particularly when combined with the 2014 DOJ memorandum included in the OUNC Standards Manual.³⁵

³¹ City of Portland Opening Brief at 12.

³² City of Portland Opening Brief at 15-16.

³³ Oregon Utility Notification Center, *Standards Manual* at 34-35 (Jan. 1, 2019), available at <https://digsafelyoregon.com/wp-content/uploads/2019/05/Standards-Manual-1-1-19.pdf>

³⁴ Tr. at 30-31.

³⁵ Tr. at 35-38.

C. League of Oregon Cities and Association of Clean Water Agencies

LOC and ACWA argue that Staff's position would require municipalities to mark all underground facilities within a public ROW, which is contrary to the plain language of OAR 952-001-0070. LOC and ACWA maintain that the rule is clear that it only applies to underground facilities owned by the municipality. LOC and ACWA contend that Staff's interpretation has the potential to create a massive burden on municipalities. LOC and ACWA argue that even applying the rule to private utilities that connect to public utilities is untenable and would confer operational control through a rule addressing an entirely separate issue.

LOC and ACWA argue that municipalities should not be considered operators of facilities that they did not construct and are likely not consistent with development codes. LOC and ACWA maintain that, contrary to Staff's position, municipalities are allowing the property owner to use the public ROW for the non-conforming sewer and this permissive approach should not be interpreted as acceptance of a non-conforming, privately installed and operated sewer as the municipality's responsibility.

DISCUSSION

The primary issue in this case, based upon the evidence and arguments in this complaint, is whether Portland BES is the operator of the underground facilities in the Alley ROW for the purposes of the OUNC notification. This question turns on interpretation of ORS 757.542(5) and the OUNC rules, including whether the OUNC rules are consistent with the statute. Based upon the record and arguments before us, we do not find clear evidence that Portland BES is an operator under OUNC's definition.

When interpreting a statute, our goal is to determine the legislature's intent—that is, the meaning the legislature most likely intended when it enacted the statute in question.³⁶ The courts have laid out a two-step process for this inquiry. First, we begin with the text and context of the statute itself, which serves as “the best evidence of the legislature's intent.”³⁷ After considering the text and context of a statute, we also may examine legislative history to help discern legislative intent.³⁸ If ambiguity (two or more plausible interpretations of the subject text) remains as to the legislature's intent after a textual

³⁶ See, e.g. *Or. Occupational Safety and Health Div. v. CBI Servs.*, 356 Or 577, 584-85, 341 P.3d 701 (2014); see also *Oregon Public Utility Commission, In the Matter of Investigation of the Scope of the Commission's Authority to Defer Capital Costs*, Docket No. UM 1909, Order No. 18-423 at 12 (Oct. 29, 2018).

³⁷ *Portland Gen. Elec. Co. v. Bur. of Labor and Industries*, 317 Or 606, 610-11 (1993).

³⁸ *State v. Gaines*, 346 Or 160, 171-172 (2009).

analysis and review of legislative history, we may undertake a second-level analysis and resort to general maxims of statutory construction.³⁹

Oregon courts have identified three classes of statutory terms exact, inexact, and delegative.⁴⁰ Exact statutory terms convey a relatively precise meaning, and their applicability in a given context depends upon agency fact-finding. Inexact terms are less precise but are understood to embody a complete policy statement by the legislature despite the fact that inexact terms may be capable of contradictory applications, all of which may be within the dictionary meaning of the term. Inexact terms require the agency to apply a definition of the word that is within the legislative policy. Delegative terms express incomplete legislation, which the agency is then given the delegated authority to complete.

Under ORS 757.557, operators of underground facilities are required to subscribe to the Oregon Utility Notification Center, and under ORS 757.552(2)(c), the board of directors of the OUNC is responsible for adopting rules that regulate the notification and marking of underground facilities. Under the prior version of the statute, “owners” instead of “operators” were responsible for marking facilities or otherwise notifying excavators.⁴¹ We agree with Staff that the 1995 revision to the underground facility notification statutes, eliminating reference to owner and vesting responsibility with the “operator” was a deliberate change from an owner-responsible system to an operator-responsible system. In making this change, the legislature defined operator as “any person, public utility, municipal corporation, political subdivision of the state, or other person with control over underground facilities.”⁴² The statutory definition of operator hinges on interpretation of the term “control.” “Control” is not defined in statute, and neither “operator” nor “control” is an exact term with a precise meaning, particularly relative to facts before us in this complaint.

Nor are the terms “operator” or “control” delegative. A delegative term indicates that the legislature’s policy was incomplete and left up to the agency to complete, but here the term “operator” is defined following a deliberate change from the undefined term “owner” from the earlier statute.⁴³ The fact that the legislature defined “operator” within the statute indicates that it was intending to make a complete policy statement, despite terms within that definition being susceptible to multiple interpretations. Determining who is the operator of an underground facility rests largely on whether an entity is considered to be in control of underground facilities, which may not be obvious,

³⁹ *Id.* at 172.

⁴⁰ *CBI Servs.*, 356 Or at 585.

⁴¹ *Former* ORS 757.561 (1995), *repealed by* Or Laws 1995, c 691, §8.

⁴² ORS 757.542(5).

⁴³ *Former* ORS 757.561 (1995), *repealed by* Or Laws 1995, c 691, §8.

particularly in situations where the facility owner and service provider are two different entities. Thus, we find that the terms are inexact and that the OUNC had the authority to define the terms in a manner consistent with the legislative policy. This includes defining with more specificity than provided in the statute who has “control” and thus is an “operator” for the purposes of OUNC notifications.

In its rule, OAR 952-001-0010(15), OUNC defines operator as “any person, municipal corporation, political subdivision of the state with control over underground facilities. Operator includes any person, as defined in ORS 756.010, having the right to bury underground facilities in any public right-of-way, or in any utility easement.”⁴⁴

While the rule addresses with more specificity who is included in the list of entities that may be considered an operator, the rule does not further define who has “control.” The additional language of the rule includes certain entities “having the right to bury underground facilities in any public right of way, or in any utility easement” as operators, but does not limit those considered operators to that criterion. The definition of control is susceptible to multiple interpretations, particularly as applied to the facts of this situation. It is clear that while the City of Portland, as a municipal utility through Portland BES, is *an* operator of underground facilities, it is not clear that they are the operator of *this* underground facility for the purposes of applying the OUNC rule.

The OUNC order adopting the definitions in OAR 952-001-0010, including the definition of “operator,” incorporated a memorandum from the then-Chief of Pipeline Safety for the PUC that the OUNC adopted as a statement of its reasoning.⁴⁵ Specifically, the memorandum explains that the new statute mandated participation for all operators and that the reasoning behind this change was that the owner of a facility may not always have control over the buried facility. The memorandum provides an example where a municipality requires an occupant to install a sewer service lateral to its specifications, but the lateral is owned by the occupant. The memorandum states that such an occupant would rarely have the knowledge, expertise, or equipment to perform the locate and concludes that the municipality or service district would be in the best position to perform the locate. The memorandum further notes that the mandatory participation requirement of the statute would result in thousands of homeowners having to enroll with the OUNC, which would be counterproductive.⁴⁶ While we find that this makes clear OUNC’s intent that service providers, rather than homeowners, would be considered operators under its

⁴⁴ OAR 952-001-0010(15).

⁴⁵ *In the Matter of the Adoption of OAR 952-001-0010 through 952-001-0090*, Oregon Utility Notification Center, Docket No. UNC 1, Order No. 97-001 at 2 (Apr. 9, 1997) (available at Staff/103, Hennessy/2).

⁴⁶ *In the Matter of the Adoption of OAR 952-001-0010 through 952-001-0090*, Oregon Utility Notification Center, Docket No. UNC 1, Order No. 97-001, App. B at 2 (Apr. 9, 1997) (available at Staff/103, Hennessy/2).

rule, and thus responsible for performing locates, there is no criteria or additional specificity provided in the rule or the facts presented in this case to indicate who has “control” under this rule.

Here we have a situation where both the homeowner and Portland BES, as the municipal utility service provider, have some level of control over the facility in the Alley ROW. We find that, as Staff has argued, Portland BES provides sewer service through the underground facility at issue. We appreciate Portland BES’s arguments that it only provides service up to the point of connection to private infrastructure, but for the purposes of the facility at issue Portland BES is the entity providing service to the premise through this facility located in the public ROW, whether or not it owns the facility or considers it part of the city infrastructure. Portland BES also develops, owns, and maintains the necessary maps, which appear to include the approximate location of the facility at issue here. Portland BES, as the service provider, has the ability to refuse to provide service through these facilities until they meet the appropriate standards. Certainly, Portland has represented that it may revoke encroachment permits if it is determined to be the operator for OUNC notification purposes.⁴⁷ We interpret this asserted ability to stop service and refuse service until the pipes are deemed conforming to constitute some level of control. At the same time, the homeowner also has the power and responsibility to remove or replace the facilities with conforming facilities, subject to the applicable permitting process for work in a ROW. What this illustrates is that more clarity is needed in the OUNC rule or record to implement the statute and effectuate the legislature’s intent.

We believe that the legislature left it to the OUNC, based on its expertise, to determine how “control” should be interpreted in this context. What sort of control or who has control of the underground facilities for these purposes can be addressed by the OUNC. It remains within OUNC’s purview, and is OUNC’s responsibility, to determine which entities have control for purposes of OUNC notification.

Because the OUNC rules’ definition of “operator” is not sufficiently clear as applied to the facts of this case, we are unable to determine that Portland was the operator of the facilities in the Alley ROW. Absent more information on control of underground facilities, we decline to find that Portland BES was at fault for failing to respond with respect to these facilities and thus we find no penalty is warranted.

There will continue to be a lack of clarity in responsibility and thus a challenge for the PUC to enforce locate requirements for situations like the one presented here. Given the public safety implications, this raises significant concerns. We agree with Staff that the

⁴⁷ City of Portland/100, Gualotunia/3.

City of Portland's ongoing requirement that homeowners with these non-conforming service lines register with the OUNC as a condition of their encroachment permits is not ideal and appears to run counter to the effective implementation of the safety program, and yet it will remain in place pending more clarity on control of underground facilities. We urge OUNC to prioritize necessary revisions to clarify this ambiguity and enable effective enforcement. At the same time, it is also important to emphasize that the ambiguity that exists on the narrow facts of this case does not exist for many situations where entities remain clearly responsible for performing locates under the OUNC rules.

We appreciate that the task of clarifying this policy issue, while critical to public safety, will not be an easy one for the OUNC. Part of what makes this issue challenging, we understand, is the concern raised by the City and intervenors that placing the responsibility for locates on service providers who are not the owners of infrastructure suggests to the infrastructure owners that service providers are also taking on other responsibilities of ownership and maintenance. We wish to be very clear, therefore, that the determination of who is an operator under the OUNC rules confers only the narrow responsibility of notification and location under the OUNC rules. OUNC adoption of such a rule would not create any other obligation or responsibility, including ownership or maintenance of the facilities. OUNC should take care to work with entities subject to its rules to communicate this distinction as broadly and clearly as possible.

ORDER

IT IS ORDERED that:

Staff of the Public Utility Commission of Oregon's complaint against the City of Portland's Bureau of Environmental Services seeking penalties is denied.

Made, entered, and effective Mar 07 2025.



Megan W. Decker
Chair



Letha Tawney
Commissioner



Commissioner Perkins, concurring:

While we were able to come to a conclusion that we all felt comfortable with, this case points to a potential larger issue that could affect communities in all corners of the state: preventing damage to all infrastructure, including the pre-existing non-conforming private infrastructure within public right of ways.

Infrastructure was developed in communities all around the state before there were clear standards, well before our statewide “call before you dig” program and rules, and in some cases before certain public rights of way were developed. As rights of way continue to be developed, facilities which exist within them become challenges for both franchise managers and asset operators. This is further complicated in that they may not have been formally or properly documented. To make matters worse, maps of these systems may not even exist. If the maps do exist, they may not be easily found. The most common cases would be for water and sewer lines as gas infrastructure came much later, and electrical infrastructure was almost entirely above ground until relatively recently. The vast majority of these legacy systems could have been upgraded over time due to property improvements, right of way improvements, infrastructure improvements or property development or re-development. However, systems still exist like the one at issue in this case where the pre-existing non-conforming infrastructure still resides in the public right-of-way. While these systems are uncommon, in aggregate there are likely a significant number in place, and this situation warrants correction to reduce the probability of damage to the infrastructure, as well as the risk to the excavation community, infrastructure operators and the public.

As highlighted in this case, these pre-existing non-conforming systems within the public right of way exist in a gray area of the rules where ownership of and responsibility for locating the infrastructure do not clearly line up. Due to the fact that these systems were not built to modern specifications and were installed before most of the laws and rules we use today were put in place, many of the serving utilities do not identify them as falling within their responsibility to maintain or to locate (despite Staff designating the serving utility as the operator). This creates an unacceptable situation where buried infrastructure exists in the public right of way but is unlikely to be identified when a locate is called in. In order for our statewide damage prevention program to function properly, a key component of which involves the underground locating system, clarity must be created for situations such as this.

As outlined in Staff testimony, “The fundamental purpose of the One Call system is to create a comprehensive network of responsible entities that work together to protect

against unintentional damage to underground facilities to protect the public safety.”⁴⁸ Any situation in which these damage prevention objectives are not advanced falls clearly on the OUNC. And to the extent the OUNC has not fully thought through various use cases to ensure the asset’s protection, they must step forward and create remedies to definitions and identify policy hurdles which preclude these solutions. Thus, the responsibility for creating clarity for these situations falls on the OUNC. This is an understandably thorny topic as there are real concerns from the utilities about implied responsibility for infrastructure that the utilities do not claim ownership over. Being explicit about processes which prevent damage but do not incorrectly transfer maintenance, replacement or liability for the assets is critical. Ultimate resolution of this issue will require a clear process for identifying where these situations exist, developing a plan to bring the infrastructure into compliance, allowing the utility and property owner to clearly delineate responsibilities. It is incumbent upon the members and leadership of the OUNC to create clarity regarding damage prevention in these preexisting, non-conforming systems, particularly in ensuring understanding and enforceable definitions for utility owners, utility operators and property owners.



A handwritten signature in dark ink, appearing to read "Les Perkins", is positioned above a horizontal line.

Les Perkins
Commissioner

A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001- 0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.

⁴⁸ Staff/200, Hennessy/2.