

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on February 8, 2006

COMMISSIONERS PRESENT:

William M. Flynn, Chairman
Thomas J. Dunleavy
Leonard A. Weiss
Neal N. Galvin
Patricia L. Acampora

CASE 05-M-0848 - Petition of The Hallen Construction
Co., Inc. for a Declaratory Ruling Concerning
the Role of an Operator under 16 NYCRR
Part 753.

ORDER DENYING PETITION AND CLARIFYING
ONE-CALL SYSTEM NOTICE REQUIREMENTS

(Issued and Effective March 7, 2006)

BY THE COMMISSION:

INTRODUCTION

By petition dated July 12, 2005, The Hallen Construction Co., Inc. (Hallen or the company) seeks a declaratory ruling as to whether an operator may satisfy the obligation of providing notice of intent to excavate to the one-call notification system for an excavator, when that excavator is performing excavation work on behalf of the operator.¹ No responses to the petition were received within the 21-day period prescribed under the Commission's Rules of Procedure, 16 NYCRR §8.2(c).

¹ An operator is defined in 16 NYCRR §753-1.2(p) as any person who operates an underground facility to furnish electricity, gases, steam, liquid petroleum products, telephone or telegraph communications, cable television, sewage removal, traffic control systems, or water.

According to Hallen, it, like other excavators, performs excavation work on behalf of various operators and the operators often provide notice to the one-call system on its behalf.² It believes the operators should be authorized to do so.

THE PETITION

Hallen maintains that operators provide the one-call system notice of intent to excavate because they often do not determine whether excavation work will be performed by their own employees or by a contractor, such as Hallen, until the morning of the day the excavation is scheduled. This decision is made, according to Hallen, based upon the operator's need to respond to emergency calls and the availability of its employees. Since 16 NYCRR §753-3.1(a)(2) requires at least two (2), but not more than ten (10) working days between the notification to the one-call system and the commencement of planned excavation, Hallen argues that the operator would be compelled to provide the requisite notice before it makes a final decision on whether the operator will use its own employees or hire a contractor to perform the excavation. Hallen believes that if the operator were to perform the excavator's obligations under 16 NYCRR Part 753 in such instances, safety would be enhanced since it is the operator who has facilities within the planned excavation site, has control over the excavation site, and may have its own personnel monitoring the site and the excavation work.

According to Hallen, its review of prior Commission orders addressing the issue of whether a third party, such as an operator or general contractor, may satisfy the notice

² An excavator is defined in 16 NYCRR §753-1.2(i) as any person who is engaged in a trade or business which includes the carrying out of excavation or demolition, except individuals employed by an excavator and having no supervisory authority other than the routine direction of employees.

obligations on behalf of an excavator indicates that the orders are in conflict.³ Hallen cites the Palisades Mall Order,⁴ which it claims supports the notion that a general contractor, instead of the subcontractor actually performing the excavation work, may provide notice to the one-call system. According to Hallen, the Commission there only found that it was "preferable" for the subcontractor to provide the notice to the one-call system, not that notice from the sub-contractor was required.

In the Cerone Excavation Order,⁵ Hallen states, the general contractor provided notice to the one-call system, while Cerone Excavation, the subcontractor actually performing the excavation did not. The Commission cited Cerone for a violation of 16 NYCRR §753-3.2(a)(5) -- failure to provide the address and exact location of the planned excavation to the one-call system, finding that, while notice was provided by the general contractor, the notice did not include the area in which the subcontractor was actually performing the excavation work. Hallen believes that this order is consistent with the Commission's determination in the Palisades Mall Order, in that notice from the subcontractor was not explicitly required.

³ A general contractor is an individual or entity that contracts for the construction of an entire building or project, rather than a portion of the work; a subcontractor is an individual or entity that takes a portion of a contract from the general contractor or another subcontractor.

⁴ Case 98-G-0133, Palisades Mall Construction Site, Untitled Order (issued February 18, 1998). The Commission determined that the respondent violated 16 NYCRR §753-3.1(a), failure to provide notice to the one-call system.

⁵ Case 99-G-1352, Cerone Excavation, Final Order Determining Penalty and Directing Payment (issued November 23, 1999).

In the subsequent N.W.E.C. & C., Inc. Order,⁶ determining a violation of 16 NYCRR §753-3.1(a) -- failure to provide notice to the one-call system, Hallen notes that a subcontractor relied on the general contractor to provide notice of intent to excavate. Hallen interprets that order as deciding that the contractor performing the work is responsible for ensuring that proper notification was made of the intent to excavate and that the excavator must provide its own notice to the one-call system only if it is unable to determine whether notice was in fact provided. Finally, Hallen cites the more recent Sagaponak Order,⁷ in which a general contractor provided notice of intent to excavate to the one-call system, but the subcontractor actually performing the excavation work did not. The Commission determined that the subcontractor committed a violation of 16 NYCRR §753-3.1(a)(1) and stated that each excavator is required to provide notice to the one-call system.

Hallen requests that it be clarified that, under the facts stated in its petition, an operator may perform an excavator's obligations under General Business Law (GBL) Article 36 and 16 NYCRR Part 753 to provide notice. When the operator does so, Hallen continues, the operator alone should be responsible for failure to properly perform those obligations.

DISCUSSION AND CONCLUSION

Hallen's interpretation of GBL Article 36 and 16 NYCRR Part 753 will not be adopted. Our regulations require that each excavator performing excavation or demolition work must provide notice of intent to excavate to the one-call system, and that

⁶ Case 00-G-1760, N.W.E.C. & C., Inc., Final Order Determining Penalty and Directing Payment (issued November 21, 2000).

⁷ Case 03-G-0610, Diversified Services of Sagaponak, Inc., Order Determining Penalty and Directing Payment (issued May 27, 2003).

obligation cannot be met by an operator even when the excavator is performing exaction work on behalf of that operator.⁸

The Palisades Mall Order concerned an incident involving damage to a six inch gas main while a subcontractor was installing a traffic signal pole. The subcontractor failed to provide notice to the one-call notification system of its intent to excavate, because its personnel believed that notice was not required as the excavation was on private property and the general contractor's notice to the one-call system obviated the need for the subcontractor to provide notice. It was determined that the subcontractor failed to provide notice of its intent to excavate to the one-call notification system, and so had committed a violation of 16 NYCRR §753-3.1(a). The subcontractor failed to meet its obligation to ensure that proper notification was provided to the one-call center and that underground facilities in the work area, if any, were marked out and was assessed a penalty.

In the Cerone Excavation Order, a penalty was imposed against Cerone Excavation (Cerone), a subcontractor performing excavation work, for failure to specify to the one-call system the location of the proposed work area, a violation of 16 NYCRR §753-3.2(a)(5). Cerone claimed that an employee of the general contractor, Sano-Rubin, and Cerone's foreman were together when a call to the one-call system was placed requesting additional mark-outs for the area that Cerone planned to excavate. Cerone further claimed that a Sano-Rubin employee was to direct the utility locators to the area where Cerone would be excavating, but did not. Nonetheless, Cerone was penalized, albeit under 16 NYCRR §753-3.2(a)(5) instead of under 16 NYCRR §753-3.1(a)(1).

⁸ 16 NYCRR §753-3.1(a)(1).

The N.W.E.C. & C. Order concerned a subcontractor that failed to provide notice to the one-call system because its personnel thought that the general contractor had fulfilled the duty to inform the one-call system of the intent to excavate. The subcontractor, N.W.E.C. & C., Inc. (N.W.E.C. & C.) was removing underground fuel storage tanks and while the general contractor did in fact provide notice, by the time N.W.E.C. & C. began its work, the marks indicating the location of the underground facilities were difficult to detect since they had not been preserved by the general contractor.⁹ N.W.E.C. & C. damaged a gas service line. It was penalized for a violation of 16 NYCRR §753-3.1, since it failed to provide notice of its intent to excavate to the one-call system.

Finally, the Sagaponak Order involved another subcontractor, Diversified Services of Sagaponak, Inc. (Diversified) that relied upon the general contractor to provide notice of its intent to excavate to the one-call system. Diversified was excavating for a cesspool when its equipment struck a gas service line. Employees of Diversified believed that the general contractor had provided notice to the one-call system, and that underground facilities were not within the work area, since there were no mark-outs. Nonetheless, it was decided that Diversified had not provided notice of its intent to excavate to the one-call system and violated 16 NYCRR §753-3.1, and would be penalized.

In three of the orders cited by Hallen, we found a violation of 16 NYCRR §753-3.1, failure to provide notice to the one-call system, by the subcontractor acting as excavator and determined a penalty for the violation because 16 NYCRR §753-

⁹ Pursuant to 16 NYCRR §753-3.5, excavators are required to preserve and protect the marks until no longer required for proper and safe excavation work.

3.1(a)(1) requires that, before engaging in non-emergency excavation or demolition work, each excavator shall provide notice to the one-call system of the location and date of the work. In the other order Hallen cites, the Cerone Excavation Order, we found that the subcontractor Cerone violated 16 NYCRR §753-3.2(a)(5), since the location of the work area where Cerone planned to excavate was not provided to the one-call system. That Cerone was cited for failure to properly identify the location of the work rather than for failure to notify cannot be read as a precedent for the proposition that general contractors are authorized to perform the notification.

Therefore, in each case, the excavator (i.e., the subcontractor), and not someone else (i.e., the general contractor or operator) was found liable. As a result, these cases do not support Hallen's contention that operator notice should suffice.

The requirement that each excavator itself, and not someone else, provide notice to the one-call system of intent to excavate or perform demolition work is intended to ensure that utility services are not interrupted, and to protect the safety of those performing excavation work and the general public in the vicinity of the excavation. Errors and miscommunication regarding the location of inherently dangerous excavation activities are inevitable if another entity, whether an operator or general contractor, provides notice to the one-call system on behalf of the excavator that will actually be performing the work. For example, the one-call system and or other operators may need to contact the excavator about inability to complete

mark-outs by the date the work is planned.¹⁰ If the contact were directed to an entity not actually performing the work, even though providing notice of it, the result would be that the proper party would not receive that critical information.

Hallen's petition, however, does raise concerns that operators and utilities are failing to comply with our regulations. Operators are therefore cautioned that the practice of assigning a contractor on the day excavation work is to be performed, when that contractor has not provided the one-call notice, does not conform with our regulations and may pose a threat to public safety. The excavators themselves must provide notice of excavation and demolition activities directly to the one-call system at least two (2) working days prior to performing excavation or demolition work, even if the operator has provided notice. Excavators that fail to provide proper notice of planned excavation to the one-call system are advised that they may be subject to penalties.

The Commission finds and declares:

1. The petition for declaratory ruling is denied.
2. Each excavator itself, and not someone else, must provide proper notice of intent to excavate or perform demolition work to the one-call system pursuant to 16 NYCRR §753-3.1(a) before engaging in non-emergency excavation or demolition work.
3. The practice of assigning a contractor to be the excavator on the day excavation work is to be performed, when the contractor-excavator has not itself provided notice to the

¹⁰ While the operator may, on occasion, be represented at the excavation or demolition site, the operator will not always have control over the work being performed, nor will the presence and supervision of one operator's employees ensure that facilities owned by other operators will be protected.

one-call system, does not conform to the requirement of 16 NYCRR Part 753, and may pose a threat to public safety.

4. Excavators must provide notice of excavation and demolition activities directly to the one-call system at least two (2) working days prior to performing excavation or demolition work even if an operator or general contractor has provided notice, and excavators that fail to provide proper notice may be subject to penalties.

5. This proceeding is closed.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary