BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Repository Docket for Materials Relating to the Underground Facility Damage Prevention Project.	)))	Case No. GW-2010-0120

COMMENTS OF MOGAS PIPELINE LLC

MoGas Pipeline LLC ("MoGas") submits the following comments on the proposed revision of Chapter 319, RSMo. MoGas is an interstate pipeline that is subject to regulation by the Pipeline and Hazardous Materials Safety Administration ("PHMSA"). MoGas is not subject to regulation by the Missouri Public Service Commission ("PSC"), but participates in the Missouri One-Call program.

I. THE PROPOSED LEGISLATION IS UNCLEAR WITH RESPECT TO INTERSTATE PIPELINES AND UNLAWFULLY SEEKS TO EXTEND THE PSC'S JURISDICTION BEYOND ENFORCEMENT OF ONE-CALL AND INTO REGULATION OVER INTERSTATE PIPELINE SAFETY

The State of Missouri may not regulate the safety of interstate pipelines that are subject to the federal Pipeline Inspection, Protection, Enforcement and Safety ("PIPES") Act of 2006:

> A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation. Notwithstanding the preceding sentence, a State authority may enforce a requirement of a one-call notification program of the State if the program meets the requirements for one-call notification programs under this chapter or chapter 61.

49 U.S.C. § 60104(c). This provision preempts states from regulating safety, design, construction, testing, and operation of interstate pipelines, absent a delegation of authority from the U.S. Department of Transportation pursuant to 49 U.S.C. § 60106(a) or § 60117(c). *See, e.g., Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006). The State of Missouri has received no such delegation from DOT. Accordingly, the PSC may only "enforce"

requirements the State of Missouri's one-call program, and may not regulate interstate pipeline safety standards in any way.

As the PSC is aware, PHMSA has set forth the "9 Elements" that should be contained in a state one-call program. 49 USC § 60134(b). In PHMSA's Advanced Notice of Proposed Rulemaking in docket PHMSA-2009-0192 (ANPRM), in which the PSC has submitted comment, PHMSA is considering whether to further define standards for state one-call programs and assume enforcement of state one-call programs that it deems "insufficient." Accordingly, MoGas strongly agrees with other stakeholders who have stated that this effort is premature. Should PHMSA continue with its rulemaking and further define standards for state one-call programs, it is highly likely that the PSC's proposed legislation will be contrary to or insufficient under such standards, and the PSC will seek to undergo this process again. The PSC should refrain from expending additional government and stakeholder resources in order to enact premature legislation without further clarification from PHMSA.

Moreover, the proposed legislation creates uncertainty and constitutes regulation of PHMSA-regulated interstate pipeline safety already covered by PHMSA. While the PSC has indicated an intention is to "carve out" regulation of items not regulated by PHMSA for PHMSA-regulated pipelines, this approach has left the obligations of those pipelines under the proposed statutes unclear. There are several specific instances in which the proposed legislation addresses, and sometimes contradicts, the PIPES Act and PHMSA requirements.

First and foremost, the proposed legislation seeks to mandate compliance by PHMSA-regulated pipelines with every single provision of the one-call statutes, including participation therein, subject to "investigation" and potential penalty enforcement. Proposed Section 319.046 provides:

> 4. Subject to the limitations set out in subsection 6 of this section, the public service commission is authorized to *investigate possible violations of sections 319.022 through 319.070* by any person subject to the provisions of those sections, and is further authorized to refer any such violations found to the attorney general for prosecution under the provisions of subsection 2 and subsection 3 of this section.
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> 5. Subject to the limitations set out in subsection 6 of this section, underground facility owners, excavators and the notification center are authorized to submit to the public service commission information supporting the investigations authorized by subsection 4 of this section, and are further authorized to request that the commission initiate an investigation authorized by subsection 4 of this section so long as the request includes information supporting the investigation.
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> 6. The authority granted by subsection 4 of this section and the authority granted by subsection 5 of this section shall extend only to situations that directly involve gas companies, gas pipelines and municipal gas systems subject to the public service commission's jurisdiction for safety purposes, *and to situations that directly involve pipeline operators subject to the provisions of 49 CFR Part 192 and 49 CFR Part 195 that are not otherwise subject to the commission's jurisdiction.*

While Subsection 6 remains unclear as to what is meant by "situations that directly involve pipeline operators" subject to PHMSA jurisdiction, it purports to permit PSC investigation of PHMSA-regulated interstate pipelines for "possible violations of sections 319.022 through 319.070" and referral to the AGs office. Section 319.022 requires participation in the one-call program, and the remaining provisions 319.022-070 set out the standards for the program. However, under PHMSA regulations, the PSC cannot require a PHMSA-regulated interstate pipeline to participate in any particular state one-call program as long as the interstate pipeline participates in a qualified program. 49 CFR § 192.614(b). Further, participation in a state one-call program does not relieve PHMSA-regulated pipelines of compliance with PHMSA damage prevention standards. *Id.* Thus, a requirement that all PHMSA-regulated interstate pipelines participate in the Missouri one-call program, be subject to the standards set forth in such program (even if contrary to PHMSA policies), and be subject to investigation and penalty

by state authorities is contrary to PHMSA regulation and violates PHMSA's exclusive jurisdiction. The State of Missouri is limited to enforcement of a one-call program, cannot force participation by PHMSA-regulated pipelines, and certainly cannot draft one-call legislation to divest PHMSA of jurisdiction. The references to PHMSA-regulated interstate pipelines should be removed from the legislation in its entirety.

In addition, the proposed statutes create requirements for written programs and measures that are already addressed by PHMSA regulations. Proposed Section 319.060 provides:

> 1. Effective January 1, 2012, underground facility owners subject to the public service commission's jurisdiction for any purpose, *and pipeline operators subject to 49 CFR Part 192 and 49 CFR Part 195 that are not otherwise subject to the commission's jurisdiction*, shall implement performance measures applicable to all persons performing underground facility locating for such owners, and shall also implement a quality assurance program to ensure their facility locating performance measures are being met.
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> 2. *The requirements of subsection 1 of this section shall only apply to the referenced pipeline operators if the pipeline and hazardous materials safety administration of the federal department of transportation has not established similar requirements applicable to such operators.*

PHMSA has already established that interstate pipelines must have a written program "to prevent damage to [the] pipeline from excavation activities" (49 CFR § 192.614(a)), a written manual addressing operations, maintenance, and emergencies, including excavation, that must be reviewed, assessed, and updated every year (49 CFR § 192.605), written procedures for continuing surveillance and investigation of failures and determination of causation (49 CFR § 192.613 and 617), and written qualification program to ensure, through evaluation, that individuals performing tasks are qualified and performing assigned activities (49 CFR § 192.805). PHMSA also already requires written procedures for locating facilities for the purpose of establishing line markers. 49 CFR § 192.707. As a whole, these requirements cover every

possible procedure for locating and marking pipelines, including for damage prevention purposes, as well as performance evaluation and measurement related thereto.

Despite these clear mandates, proposed Section 319.060(1) requires that PHMSA-regulated pipelines implement "performance measures applicable to all persons performing underground facility locating for such owners, and shall also implement a quality assurance program to ensure their facility locating performance measures are being met." These same requirements are already addressed in the PHMSA regulations mentioned above. Because the application of Subsection 2, which requires exemption for PHMSA-regulated pipelines when PHMSA regulations address "similar requirements," is always required, the inclusion of PHMSA-regulated pipelines is meaningless. Accordingly, the references to PHMSA-regulated pipelines should be removed from this statute in Subsection 1, and Subsection 2 should be deleted in its entirety.

Likewise, the proposed statutes purport to establish reporting requirements for PHMSA-regulated pipelines that are already required by PHMSA. Newly proposed Section 319.055(2) establishes new reporting requirements for pipeline operators. While no part of the legislation indicates that this applies to PHMSA-regulated interstate pipelines, PSC representatives stated in the last Roundtable that they believe it does apply to such pipelines. PHMSA already regulates reporting of incidents, annual reporting, including safety-related condition reporting. 49 CFR §§ 191.5, 191.15, 191.17, 191.23, 191.25. Because the PSC's proposed required reporting contained in Section 319.055 is already covered by PHMSA, PHMSA-regulated pipelines should not be included these requirements.

In addition, the reporting requirement of Section 319.055 appears to be duplicative of the information that should already be collected and easily obtainable from the Missouri One-call

notification center. Thus, this provision creates unnecessary burden and expense upon underground facility owners. This burden and expense is multiplied for PHMSA-regulated interstate pipelines, which already report the same information to PHMSA.

As discussed above, several of the requirements established by the proposed legislation are already clearly established under PHMSA regulations, have the potential to create standards that are contrary to PHMSA requirements, and should simply not apply to PHMSA-regulated interstate pipelines. As it currently stands, the legislation is attempting to expand PSC jurisdiction beyond "enforcement" of a state one-call system to much broader regulation of PHMSA-regulated interstate pipelines. This is impermissible under PHMSA's exclusive jurisdiction, and will create contrary standards and duplicative regulation between the federal and state agencies. Accordingly, the PSC should remove all references to PHMSA-regulated interstate pipelines contained in the proposed legislation.

II. THE LEGISLATION SHOULD ENHANCE REQUIREMENTS UPON EXCAVATORS AND PROVIDE FOR IMMEDIATE PREVENTION OF ACCIDENTS

The current statutes place monitoring and reporting obligations on facility owners, but do almost nothing to enhance obligations upon excavators, who are responsible for causing more accidents. (For example, the PSC has declined to include hand-digging requirements in the new legislation.) The purpose of these revisions should be to prevent accidents and damage. This is most effectively accomplished if preemptive measures are taken to prevent accidents, not reporting and investigation after they have occurred.

As a pipeline operator, MoGas has encountered several instances in which it found excavators planning or in the process of digging in an unsafe and imprudent manner. This commonly involves landowners. When MoGas notifies the excavator that it should not be

excavating in that manner because it is unsafe and dangerously close to the pipeline, the excavator has on occasion ignored MoGas' warnings. MoGas has even been placed in the position of having to initiate the legal process of obtaining an injunction to prevent the unsafe activity, which cannot be done in an immediate fashion. One of the most effective ways to prevent accidents in these situations would be to create laws that enable the operator to immediately stop the dangerous excavation activity without need for government involvement or the legal process.

Accordingly, MoGas proposes the following addition to Section 319.041, which is titled, "Safe and prudent excavation required":

> **319.041.** 1. Nothing in the foregoing shall relieve an excavator from the obligation to excavate in a safe and prudent manner, nor shall it absolve an excavator from liability for damage to legally installed facilities.
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> 2. If an underground facility owner discovers an excavator acting in an unsafe or imprudent manner while excavating near the underground facilities, the excavator must immediately cease excavation upon written notice from the underground facility owner. The written notice must include the date, location of the excavation activities, identification of the underground facility owner, state that the underground facility owner believes that the excavator is acting in an unsafe or imprudent manner, and request that the excavator cease excavation. Upon receipt of such notice, the excavator must immediately cease and desist excavation activities near the facilities. If the excavator fails to do so, it will be subject to the penalty provisions set forth in 319.046. In addition, an underground facility owner may obtain injunctive relief. If the underground facility owner obtains an injunction against the excavator, the excavator is responsible for all attorney's fees and costs incurred by the facility owner in doing so.

III. THE PROPOSED PRESUMPTIVE NEGLIGENCE STANDARD FOR UNDERGROUND FACILITY OWNERS IS UNNECESSARY AND GROSSLY UNFAIR

Section 319.040 sets forth a new provision for rebuttable presumption of negligence against underground facility owners.

> 2. The failure of an underground facility owner to inform an excavator of the approximate location of his or her facilities that are located in an area of excavation described in a notice of intent to excavate, as required by section 319.030, or the failure of an underground facility owner to be a notification center participant, as required by section 319.022, shall be a rebuttable presumption of negligence on the part of such owner in the event that such failure shall cause injury, loss or damage. In addition to any penalties provided herein, liability under common law may apply.

This proposal ignores the natural incentives that exist on behalf of the excavator and the underground facility. The underground facility owner bears the costs of repair of damage to its facilities (as well as associated reporting requirements, etc.), while the excavator does not. Accordingly, underground facility owners already have a wealth of incentive to avoid damage by identifying and communicating the location of facilities, while excavators have less incentive. There is no logical reason why an underground facility owner would benefit from acting in a negligent manner in locating its own facilities. Therefore, creation of a negligence presumption against facility owners is unnecessary.

Moreover, this provision establishes an unfair and evolving standard for underground facility owners, while the standard applicable to excavators is black and white. An excavator's responsibilities are clear and simple – it must "give notice of proposed excavation" in order to avoid application of the presumption. In comparison, an underground facility owner has to determine whether it has sufficiently "informed" the excavator and whether its locating is sufficiently "approximate." This will only result in increased litigation for the industry. The burden and costs of defending against application of the presumption will be much higher for underground facilities than excavators. Therefore, MoGas agrees with other stakeholders that have suggested that the PSC change this provision to only require participation in the one-call program:

2. The failure of an underground facility owner ~~to inform an excavator of the approximate location of his or her facilities that are located in an area of excavation described in a notice of intent to excavate, as required by section 319.030, or the failure of an underground facility owner~~ to be a notification center participant, as required by section 319.022, shall be a rebuttable presumption of negligence on the part of such owner in the event that such failure shall cause injury, loss or damage. In addition to any penalties provided herein, liability under common law may apply.

Should the PSC insist on keeping an unnecessary presumption of negligence provision against facility owners, it should be limited to lack of participation in the program.

IV. PSC STAKEHOLDER OUTREACH

Finally, should the PSC pursue this process, MoGas would like the PSC to consider a specific outreach effort to PHMSA-regulated pipelines that may suddenly find themselves subject to the PSC regulation contained in the proposed statutes. MoGas is concerned by the minimal participation by this body of stakeholders, as it is possible they are not regularly in contact with the PSC and are unaware of this effort.

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Respectfully submitted,

MOGAS PIPELINE LLC, by:

/s/ David G. Brown
Brown Law Office LC
1714 Brandeis Ct., Ste. A
Columbia, MO 65203
Tel: (573) 777-1188
Fax: (800) 906-6199
dbrown@brown-law-office.com