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April 20, 2010

Steven C. Reed, Secretary
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65101

RE: Case No. GW-2010-0120
Repository Docket for Materials Relating
to the Underground Facility Damage
Prevention Project

Dear Mr. Reed:

This letter is submitted in response to the Commission's request for written comments on agenda items for the March 9, 2010 Damage Prevention Stakeholder Roundtable. Associated General Contractors of Missouri submitted comments to the Commission's docket through a December 15, 2009 letter. This letter addresses "Suggested Changes Based Upon Stakeholder Comments – 3/5/10" which were not previously commented upon in AGC's December 15, 2009 letter and items listed as "Not Yet Done" in the two page list of "Suggested Changes" presented at the March 9 meeting. We request AGC of Missouri's December 15, 2009 letter also be considered except as those comments may be amended or clarified through this letter.

Since the March 9 meeting, the Commission's "Suggested Changes" have been discussed in an AGC Legislative Committee meeting and these specific comments reviewed and approved by a "One Call Task Force" of contractors with significant experience in excavation and underground damage prevention.

Additional comments are presented on the following pages by the number assigned various "Suggested Changes" for purposes of the March 9 meeting.

AGC/MO COMMENTS TO MO PSC . . . SUGGESTED CHANGES . . . 03/05/10

Item Number 3/5/10 Suggested Changes	Section(s)	Subject Summary or Text	AGC/MO Comment
2), 11) & 12)	319.015 (20) 319.026.6 319.026.7	Implementation of a "forty-five (45) day life of ticket" requiring excavator to make a new notice even if markings are still visible and useable.	<p>Although the time period for "life of ticket" has been extended from 15 days in the earlier PSC draft to 45 days in the 3/5/10 draft, AGC's original explanation of objections in our December 15, 2009 letter (pages 2-4) still apply.</p> <p>This provision is a "liability trap" for excavators. AGC of Missouri members often work on long-term projects of six months or a year or more. So if an AGC contractor fails to make a new notice within the required period of between ten and two days prior to the expiration date of the previous notice expiring, a "rebuttable presumption" of negligence applies under 319.040.1 RSMo if damage occurs.</p> <p>Current law requires an excavator to wait two working days to begin excavation after making notice and may require a second notice and an additional working day waiting period if the facility owner does not respond. For projects in progress where facility location has already been identified and avoided, a two to three day delay in work at the site is an unnecessary disruption of the project and a cost to the excavator. For example, at the beginning of a specific project a contractor made notice and based on marked location a determination was made tat the contractor's work was not in conflict with facilities at the site. The contractor has avoided and will continue to avoid excavation in that area. Periodic notices every forty-five days, remarking by the facility owner and costly delays to the contractor serve no useful purpose. Additional costs accrue to the facility owner, notification center and contractor with no additional benefit in protecting facilities.</p> <p>We note that in the 3/5/10 draft of "Chapter 319 Proposed Revisions" "ticket life provisions are highlighted in green indicating that the change is required by the "Nine Federal Damage Prevention Program Elements" of the PIPES Act. We do not understand why the "life of ticket" provisions are indicated as a change mandated by the "Nine Elements" of the "PIPES" Act. The first "Element" requires "enhanced communication between operators and excavators." Current Missouri law already requires effective communication between excavators and "facility owners" including:</p> <ul style="list-style-type: none"> ➤ 319.025.1 RSMo – Initial notice of excavation. <p>(Continued Next Page)</p>

Item Number 3/5/10 Suggested Changes	Section(s)	Subject Summary or Text	AGC/MO Comment
			<p>➤ 319.025.4 RSMo – Clarification of area of excavation upon owner's request by:</p> <ul style="list-style-type: none"> • Marking, "white lining"; • Providing project plans; or • Meeting on site <p>➤ 319.026.2 RSMo – Notice of excavation must include detailed information on excavator and excavation.</p> <ul style="list-style-type: none"> • Direction to site of excavation if not on a public street. <p>➤ 319.026.5 – Notice by excavator to owner of incorrectly located facilities.</p> <p>➤ 319.026.6 – Notice requesting remarking if marking are not "visible and useable."</p> <p>➤ 319.030.1 – Excavator may request meeting on site regarding location of "appurtenances".</p> <p>➤ 319.630.3 RSMo – Excavator must make "no response" notice if facilities not marked within two working days.</p> <p>➤ 319.045.1 RSMo – Notice by excavator of accidental damage, including encasements, etc.</p> <p>Why these numerous requirements for communication by the excavator to the facility owner would be found ineffective under the Nine Elements is not understood.</p> <p>AGC of Missouri continues to oppose the proposed change regarding "life of ticket".</p>
3), 4), 5), 6), 7), 16)	<p>319.015 (2), (15), (16), (17) & (18)</p> <p>319.032</p>	<p>Definition of "Collecting Sewers", "Sewer Service Line", "Sewer Service Connection", "Sewer System" & "Sewer System Owner"</p> <p>Providing "best available information" as to location of sewer service connections and other provisions regarding trenchless excavation.</p>	<p>AGC of Missouri supports these provisions in 3/5/10 "Suggested Changes".</p>

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17)	.319.040 .1 and .2	.1 "Rebuttable Presumption of Negligence" – Excavator	AGC of Missouri supports the removal of "as required by this chapter" in the long standing current law. Upon the Commission's explanation at the March 9 meeting, we withdraw the objections stated in our December 15, 2009 letter. We recognize that as written in current law, the "rebuttable presumption" applies to other current sections in statute other than the Underground Facility Damage Prevention Law and would also apply to unrelated sections which may be added to Chapter 319 in the future. We support making this correction.
		.2 "Rebuttable Presumption of Negligence" – Underground Facility Owner	AGC of Missouri's December 15, 2009 letter commented that we did not support that rebuttable presumption provision because of the inexact language as what "failure to respond" would mean to a court in making a determination of liability by a facility owner based on the "rebuttable presumption" provision. We agree "failure of an underground facility owner to inform an excavator of the approximate location" or "failure to be a notification center participant" is a more exact standard upon which to apply the "rebuttable presumption." We support including an underground facility owner "rebuttable presumption" provision in "Suggested Changes" and would be pleased to work with the Commission and other stakeholders on the exact language.
18)	Enforcement (Current Law) - Civil Penalties (319.045 .3 & .4) - Enforcement (319.045 .3 & .4)	No provision in suggested changes.	AGC of Missouri agrees that actual enforcement under Missouri's law will not meet Element #7 of the "PIPES Act" requiring "fair and consistent enforcement of the law." The fact that the state is not actually exercising the state's existing civil penalty authority will not meet new federal requirements. Please see AGC's comment about the Missouri law's current penalty structure and enforcement responsibilities in our December 15, 2009 letter (pages 8-10). AGC of Missouri supports effective enforcement of our One Call Law, but not just enforcement against excavators. Effective enforcement must also fairly address violations by utility owners, locating services and the notification center.

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21)		Damage Prevention Review Board. (Not currently in "Suggested Changes.")	<p>For reasons expressed in our December 15, 2009 letter AGC of Missouri has serious reservations about equitable enforcement through a "Board", especially as proposed in the Commission's 10/08/09 "Proposed Changes."</p> <p>We still oppose a Board with direct authority to levy civil penalties. In fact, we question if Missouri law would even allow such penalties. We cannot think of other Boards in Missouri state government with such powers. Findings of violation by the Missouri Department of Natural Resources' environmental Commissions still require referral to and prosecution by the Attorney General. DNR has authority for "administrative penalties" under the Clean Air Law, but to our knowledge they are seldomly applied.</p> <p>If an investigatory and hearing function is created in a new enforcement provision, those functions are not properly filled by a part-time Board. We will be happy to work with the Commission and other stakeholders toward more effective enforcement, but do not support a "Board" as that mechanism.</p>
19)	319.055	Reporting by Facility Owners	AGC recognizes that Element 9 of the "PIPES Act" requires "analysis of data to continually evaluate/improve program effectiveness." We leave to the Commission and facility owners the best means of collecting data for analysis. However, in regard to "damage reports" AGC believes it is important to identify the type of excavator reporting damage (contractor, facility owner, home owner, etc.)
20)	319.060	Standards for Locating Services	Adequately trained and effective "third party locators" are essential to damage prevention. Again, we will be happy to work with the Commission and facility owners as to the best means of achieving these goals.
22)	319.070	Effective January 1, 2012, facilities installed to be locatable and location documented in "as built" drawings.	AGC of Missouri supports these requirements as desirable goals. However, we recognize various technical challenges to facility owners in compliance. We will be pleased to work with the Commission and other stakeholders on these provisions.

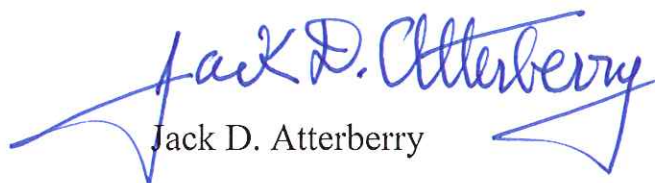
Item Number 3/5/10 Suggested Changes	Section(s)	Subject Summary or Text	AGC/MO Comment
24)	---	White Lining by Excavator (No current provisions in 3/5/10 "Suggested Changes.")	<p>AGC of Missouri believes that 310.025.4 RSMo is a reasonable approach. If a facility owner cannot determine the location of excavation from the excavator's notice, that section requires the excavator to further identify location by marking or by providing project plans.</p> <p>A requirement to "white line" in all circumstances is unnecessary and burdensome and will place many excavators in violation of law. For example, if the excavator is to excavate and grade several acres, it is impossible to mark the entire area of excavation.</p> <p>This is a provision which will require careful consideration, if provisions of current law are found inadequate to protect facilities.</p>
25)	---	"Hand Digging" by Excavator. (Not currently in "Suggested Changes.")	<p>This is another area of current law which requires cautious review if changes are considered. Please note that 319.037 RSMo regarding "trenchless excavation" provides alternative means of "confirming vertical and horizontal location" in advance of excavation, in addition to "hand digging." "Hand digging" is not effective or necessary for all excavations.</p>

AGC appreciates the opportunity to submit additional written comments on "Suggested Changes" presented at the March 9 meeting. We will be pleased to work with the Commission and other stakeholders on issues discussed.

I am sure you recognize that AGC and most of the other stakeholders attending the March 9 meeting are currently engaged in the 2010 session of the General Assembly ending May 14. It is our suggestion that the Commission defer additional meetings or other activity on your Damage Prevention Project to this summer or fall.

Thank you for your consideration of our views.

Sincerely,


Jack D. Atterberry

jda/dm

Copy: Robert M. Clayton, III
Chairman
Missouri Public Service Commission

Rob Loch
Loch Sand and Construction Co.
Chair, AGC/MO Legislative Committee

AGC/MO One Call Task Force

Ed Twehous
Rusty Crane
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