ASSOCIATED GENERAL CONTRACTORS OF MISSOURI, INC.

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Rec'd. 8/30/10

August 30, 2010

Mr. Dale Johansen
Energy – Safety/Engineering
Missouri Public Service Commission
200 Madison Street, P.O. Box 360
Jefferson City, MO 65102-0360

Dear Mr. Johansen:

AGC of Missouri has reviewed the document you forwarded on June 15 regarding revisions of Missouri's "Underground Facility and Damage Prevention Act" (319.010 – 319.050 RSMo). AGC's "One Call Task Force" of contractor members met on August 4 to review the latest PSC Draft. AGC submitted two previous letters of comment to the PSC on December 15, 2009 and April 20, 2010 on earlier drafts of revisions to the Act.

Although many of the sections in the June 15 Draft appeared in earlier drafts in substantially the same form, the overall scope and impact of the proposed legislation on construction contractors engaged in excavation has changed due to statutory changes proposed by other "stakeholders" since the last draft upon which AGC commented. There are about fifteen "New Issues" introduced into the June 15 Draft, including comments and proposed statutory amendments submitted by:

- Missouri Utilities
  - Laclede Gas Company
  - Missouri Gas Energy
  - Union Electric, d/b/a AmerenUE
- AT&T

AGC of Missouri is pleased to participate in the statutory revision process with the Public Service Commission and all stakeholders. AGC shares the PSC's goal of assuring that Missouri's "One Call" law is compliant with the nine elements of the PIPES Act as administered under a rule still currently under development by the US DOT's Pipeline and Hazardous Material Safety Administration (PHMSA).

AGC also supports making changes in current law which promote prevention of damage to underground facilities from excavations and protect the safety of workers performing excavations and workers and members of the general public near the site of excavations. However, AGC also asks that the PSC and other stakeholders recognize that requirements imposed in a revised "One Call Law" have a direct and real impact on the operational costs, effectiveness and efficiency of all parties subject to the law. If a new requirement is not necessary to meet the PIPES Act standard and adds nothing to preventing damage to underground facilities and protecting workers and public safety, but imposes additional costs and operational burdens to an entity subject to the law, that change should not be proposed or adopted. We do not believe that "lots of other states do it" is a sufficient reason to change a provision in the current Missouri "One Call Law." If there is a problem in Missouri we should fix it, but unnecessary burdens to parties operating under the Missouri law should be avoided.

Unfortunately we believe that many of the latest proposals by stakeholders for amendments to the Missouri law do not meet the philosophy stated above. Missouri Utilities and/or AT&T have submitted eight new proposals which are reflected in the June 15 Draft. AGC of Missouri strongly opposes seven of those proposals. We note that the PSC staff notes it supports or is likely to support four of the eight proposals and place them in the PSC legislation.

We would ask that the PSC recognize that the Missouri Utilities/AT&T proposals have been submitted late in the "stakeholders" process and have not been fully vetted by the entire stakeholders group. Many of these ideas have never been discussed in a "Stakeholders Meeting." It has been a substantial period of time since the March 9, 2010 Stakeholders Meeting and the attention of many participants has most likely been focused on other issues. Many stakeholders may not even be aware of the new proposals.

The PSC staff has done an excellent job to date in building consensus toward introduction of 2011 One Call legislation. However, we caution that inserting over a dozen major controversial changes in the draft to be presented to a legislative

sponsor without agreement from all parties will not facilitate the passage of 2011 One Call legislation.

If a bill were to be heard before a legislative committee with all of the late changes currently proposed, AGC of Missouri would testify in opposition. We believe many of these issues can be worked out, but not without further input from all stakeholders.

Please consider the attached specific comments from AGC of Missouri on the June 15, 2010 Draft. In regard to sections commented upon in AGC's December 15, 2009 or April 20, 2010 letter of comment, those comments are noted and presented in summary form. Any new information is identified. Comments on new issues in the June 15, 2010 Draft are stated in full.

We will be pleased to work with all concerned toward consensus on 2011 One Call legislation.

Sincerely,

Jack D. Atterberry
Vice President, Governmental Relations

jda/dm

Copy: Rob Loch, Chair, AGC/MO Legislative Committee
Loch Sand & Construction Company (Maryville)

AGC/MO "One Call" Task Force
Edward J. Twehous, Twehous Excavating Company (Jefferson City)
Russell Crane, Emery Sapp & Sons, Inc. (Columbia)
John Branham, Branco Enterprises, Inc. (Neosho)
Patrick Ryan, Sterling Excavation, Inc. (Jefferson City)

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AGC OF MISSOURI COMMENTS (8/30/10)
6/15/10 PSC Draft

Subject	Section (p. #)	Origin / PSC Staff Comment	Prior AGC/MO Comment	Summary – Prior AGC Comments New Comments on New Issues
"Sewer Service Lines and Connections"	319.015 (p. 2) 319.032 (p. 16)	3/5/10 Draft	4/20/10 Support	Prior AGC Comments: AGC Supports
"Pressurized Water Not Excavation"	319.015(5) (p. 3)	New Issue: AGC/St. Louis PSC: Staff supports.	None	New Issue and Comment: AGC of Missouri ***supports*** adding "pressurized water" as well as "pressurized air" to the statutory exception to the definition of excavation.
"Statutory Missouri Marking Standards"	319.015(7) (p. 4)	New Issue: Missouri Utilities and AT&T PSC: Staff likely to support.	None	New Issue and Comment: AGC of Missouri ***opposes*** reference to "Missouri Making Standards" in the statutory definition of marking. The change proposed by AT&T and Missouri Utilities potentially allows Missouri to adopt a unique color scheme for marking. The American Public Works Association color scheme is universally recognized by utility companies, third party locators and excavators in all states. The market for construction is becoming increasingly regional if not national with contractors routinely moving from state to state. Facilities and workers are better protected by the uniform APWA color scheme. The Missouri Marking Standards as developed through Missouri Common Ground are fully supported by AGC of Missouri as a cooperative effort through education of all parties in the excavation process. We simply do not support them being statutory. The purpose and scope of the Missouri Marking Standards go far beyond the APWA standard by providing common symbolism for markings, directional information and other information beyond the approximate location of the facility. The Standards have evolved as the Common Ground Steering Committee has adopted them and will continue to

				Committee has adopted them and will continue to evolve as problems arise and additional changes and additions are made. Standards that are appropriately under the purview of a privately organized consortium, however, should not be made a "statutory" requirement. If "Missouri Marking Standards" are made statutory and markings are not made accordingly, presumably the facility owner would not have complied with statutory requirements to mark "approximate location." We believe "Missouri Marking Standards" should continue to be implemented through education and cooperation through Common Ground.
"Life of Ticket" (45 Days)	319.015(20) (p. 5) 319.026.6 319.026.7 (p. 12)	10/8/09 Draft	12/15/10 4/20/10 Oppose	**Prior AGC Comments:** • A "ticket life" by specific number of days does nothing to enhance safety. Safe excavation requires that markings are "visible and useable" which can only be based on observation at the site of excavation. It is the excavator's responsibility to call for re-marking if markings are not "visible and useable" within the area of excavation. • Requiring remarking after a specific number of days causes unnecessary project delays to the excavator, in circumstances where there is no benefit to safety: ➢ Remarking is done in the same *"manner, within the same time as required in response to the original notice of intent to excavate"* (319.026.6 RSMo). Presumably the excavator awaiting remarking must stop excavation for at least "two working days" until the facility is remarked and if there is no response to the remarking notice potentially must wait up to another two working days for remarking. • "Life of ticket" has no benefit to safety when: ➢ Original markings are still "visible and useable."

				➢ Excavation has already been completed in the area which would be remarked. ➢ Original markings demonstrate that there is no conflict between the excavation and the location of underground facilities. • Presumably, if an excavator fails to make notice(s) at the end of ticket life on one or more deadlines throughout the duration of a project, the excavator is in violation and subject to a "rebuttable presumption of negligence" as if he has made no notice at all. Where the notice upon expiration of "ticket life" has no relation to damage prevention, as with circumstances stated above, such result is inequitable. • Numerous other sections of Missouri "One Call" law require effective communication between excavators and facility owners in compliance with the "Nine Federal Damage Prevention Program Elements" of the PIPES Act. **New Issue and Comment:** Missouri Utilities state in their most recent posting to the PSC's Repository Docket that their purpose in supporting a "ticket life provision" is that it: *"forces excavators to update everyone on the status of their projects (if not completed within the initial time period) and allows facility owners to update their markings for any existing and/or new facilities that may have been installed in the interim since the last request."* AGC does not necessarily object to a requirement for an excavator to update the facility owner if an excavation has not been completed in a reasonable specified time period, such as forty-five days. It is requiring the excavator to stop the excavation and await remarking as if no notice

				had ever been made to which AGC objects. As explained in AGC's prior comments there are numerous circumstances at the excavation site where multiple notices and markings do not have a safety benefit. The requirement for multiple notices and waiting periods, however, will create unnecessary costs and delays.
"Statutory Start Date of Excavation" (Within 7 Days of Notice)	319.026.1 (p. 7)	**New Issue:** AT&T PSC: Staff is undecided.	None	**New Issue and Comment:** The PSC staff's summary indicates AT&T suggests the following language be added to Section 319.026.1 RSMo: ***"The excavation project must start within seven (7) calendar days of serving notice of intent to excavate to the notification center."*** Review of the comments and proposed legislative language submitted by AT&T under an April 20, 2010 letter by Tim Judge does not reveal the above language as part of the document submitted under such cover letter. Either the suggestion was submitted under a separate filing submitted by AT&T, which should be posted to the PSC's docket, or the proposal should be removed from consideration for incorporation into proposed legislation. In any case AGC ***opposes*** the above language and any similar proposal to place a time limit from the date of notice on commencement of excavation. Such a requirement would be wholly impractical for both construction contractors and utility companies performing excavations with their own forces. First, current law does not require an excavator to commence excavation within any specific number of days. Current law requires the excavator to make notice *"at least two working days, but not more than ten working days before the **expected date** of commencing the*

				excavation activity . . .” The *“expected date of excavation”* stated in the excavator’s notice by a construction contractor may change for multiple and varied legitimate reasons, including: ➢ Failure of the owner of the project to give a “notice to proceed.” ➢ Changes in design and work through “change orders”. ➢ Discovery of “hidden conditions” at the site. ➢ Needed materials may not arrive as scheduled. ➢ Weather related delays. ➢ Failure of another contractor to complete a preceding phase of the project. Some of these unavoidable delays such as weather and delays in delivery of materials apply to utility companies as excavators as well as construction contractors. There are probably also numerous other circumstances unique to utility companies that may prevent starting excavations on the “expected date”, such as: ➢ Pulling workers off of a project due to emergency outages in other areas.
“Type, Scope & Mode of Excavation Limited by Ticket”	319.026.2 (p. 8)	**New Issue:** MO Utilities PSC: Staff is likely to support.	None	**New Issue and Comment:** Missouri Utilities proposes changing Section 319.026.2 RSMo to read: *“Notices of intent to excavate given pursuant to this section shall contain the following information* ***and shall not change during the ticket’s life to remain valid*** *. . .”* Section 319.026.2 RSMo requires a great deal of specific information, much of which may reasonably change during the course of the excavation, including: • “Date excavation activity is expected to commence” (see above);

				• "Name of person primarily responsible for conducting the excavation . . ." Both construction contractors and utilities will experience switching personnel between projects for numerous legitimate reasons. The facility owner still has detailed contact information and multiple means of contacting the excavator if necessary. AGC ***opposes*** the above language as currently written as being impractical.
"Statutory Limitation on Area of Excavation Notices"	319.026.2(5) (p. 9)	**New Issue:** AT&T and MO Utilities PSC: Staff is unfavorable.	None	**New Issue and Comment:** AT&T and Missouri Utilities suggests replacing Subdivision 5 of Section 319.026.2 RSMo with the following: *"(5) A detailed description accepted by the notification center sufficient for the location of the excavation,* ***limited in size to the smaller of 500 feet along the same road, or 150 foot radius of a single intersection, or single address****, by one or more of the following means . . ."* AGC of Missouri ***opposes*** the proposal for the following reasons: • The language proposes to control the scope of an excavator's work, rather than communication between excavator and utility to avoid damage to facilities: ➢ Excavations performed by construction contractors are specified by a contract with a third party which requires construction of an improvement in a specified area. The One Call statute cannot rewrite the excavator's contract. ➢ Only the excavator knows the exact area within which excavation is to be performed within a required time period. Artificial statutory limits on the area of excavation will only lead to excavators commencing excavation in areas for which notice has

				not been given and location marked. The excavator will not suffer contract penalties for failure to perform work in an area required by his contract. • AGC agrees with Empire Electric that work load issues for the notification center and third party locators are better managed through the Missouri One Call System, Inc. packaging notice requests from excavators under their own policies, rather than through a "one size fits all" statutory provision. The nature of the work, the excavator's timetable for performing work and the time required to mark locations should all be a part of the MOCS process in facilitating communication between the excavator and facility owner and meeting statutory requirements. • AGC contractors do not experience a current problem with facilities not being marked in a timely manner under current MOCS policies. The current law and the notification process through MOCS are working. We do not agree there are currently delays in marking due to the areas stated in excavation notices being excessive.
"Mandatory Hand Digging by Excavator"	319.026.5 (p. 10)	**New Issue:** AT&T and MO Utilities PSC: Staff is unfavorable.	None	**New Issue and Comment:** AT&T and Missouri Utilities propose addition of the following language to Section 319.026.5 RSMo: ***"The excavator shall not use power-driven equipment within the marked approximate location of such underground facilities until the excavator has made careful and prudent efforts by the use of hand tools or soft dig methods to expose and confirm the horizontal and vertical location of the marked facilities in the vicinity of the proposed excavation. "*** AGC of Missouri ***opposes*** a hand digging requirement. It is impractical in many situations,

				without added benefit to safety. In some locations in Missouri "hand digging" is impossible. That *"lots of states have such a provision in their law"* is no reason to impose the requirement in Missouri. AGC's objections include: • Many utility and highway projects upon which AGC of Missouri members perform work are within the area of paved surfaces. ➢ There is no way to "hand dig" in concrete or on an asphalt pavement. Mechanized equipment must be used for the initial excavation. ➢ The proposed language would place AGC members in violation of the statute for all projects within the travelway and shoulder on MoDOT right-of-way, on city streets and in many other locations. • AGC agrees with Empire Electric that due to the geology in many parts of Missouri, the presence of surface rock makes it impossible to utilize hand tools for excavation. The language would place excavators in violation, even though compliance is impossible. • The proposed language requires the excavator ***"to expose and confirm the horizontal and vertical location of the marked facilities"*** without regard to the depth of the existing facility and the new excavation. ➢ If the depth of the existing facility is fifteen feet, but the depth of the work to be performed by the excavator is only five feet, the requirement is unnecessary, costly and burdensome to the excavator. • OSHA regulations (1926.651 (b)(3) through (4)) already require that after a request for location has been made and facilities marked that *"the exact location of the installations shall be determined by safe and acceptable means."* [1] OSHA does not require *"hand*

[1] Construction Industry Digest, OSHA 2202, 2002 (Revised), Occupational Safety and Health Administration, US Department of Labor.)

				digging." • However, if Missouri law were to require *"hand digging"* and the excavation is at a depth of five feet or more, OSHA trenching regulations must be met. Such excavations which are not in stable rock require protection of employees by: ➢ Shoring, trench boxes and other protective systems; ➢ Keeping materials or equipment at least two feet from the edge of excavations or through the use of retaining devices. ➢ Daily inspections of excavations by a "competent person." Utilities which perform excavations with their own forces are subject to the same OSHA "Construction Industry Standards" as construction contractors. If the depth of the new excavation is less than that of the existing facility the "hand digging" requirement may needlessly expose employees to trenching hazards and unnecessarily bring the contractor or utility owner performing the new excavation under OSHA regulations. • Missouri Utilities comments, as summarized by the PSC, appear to go even beyond the proposed language by ***"making it mandatory to expose all located facilities within the marked tolerance zone that are in the path of the proposed excavation prior to using power operated equipment*** . . ." Apparently the concept is that if the excavation is a mile in length, the entire mile should be hand-dug for the entire length of the excavation. The proposed language apparently is intended to go far beyond "pot holing" or other means of the excavator "confirming location." • Comments by Missouri Utilities, as summarized by the PSC, also state that ***"hand-digging would result in the***

				resolution of any facility depth issues that may exist . . . AGC of Missouri members report that in the course of an excavation the depth of the same facility may vary significantly within the area of the same project. The only way to confirm the depth of the facility within *"the path of the excavation"* under the proposed language is to hand-dig the entire project. • "Hand digging" also does not always guarantee that a facility will not be damaged. The annual report of the Common Ground Alliance for 2009 **(CGA DIRT Analysis and Recommendations, July, 2010)** states the following: ➢ 21% of the 115,232 "facility events" (downtime, damages and near misses) involved excavation by hand tools. ➢ Although a substantial number of those damages, estimated at 61%, are thought to be due to "Notification NOT Made" (presumably by homeowners, farmers, etc.), another **15.8% of 2009 "Hand Tool" events** *"may be attributed to **excavators attempting to expose a facility to verify the markings."***
"Refreshing Markings Prohibited"	319.026.7 (p. 13)	**New Issue:** MO Utilities and AT&T PSC: Staff supports.	None	**New Issue and Comment:** Missouri Utilities and AT&T propose slightly different language as an addition to Subsection 7 of Section 319.026 in the PSC draft. Missouri Utilities language states: ***"In no event may an excavator refresh the marks provided by a facility owner or its authorized agent."*** AGC of Missouri ***supports*** the above language. We agree that only the facility owner or their authorized agents, such as a third party locator, should mark or re-mark the location of a facility. We cannot imagine that a competent excavator

				would undertake that responsibility. If the marks are no longer "visible or useable" the excavator is required to make notice for remarking. (Please note that AGC does object to the "end of ticket life" language which also appears in this Subsection.)
"Trenchless Excavation – Facility Owner Excused from Liability for Incorrect Depth"	319.030.3 (p. 14)	**New Issue:** Springfield City Utilities PSC: Staff supports.	None	**New Issue and Comment:** AGC of Missouri ***opposes*** this change. "Depth" information is even more critical than "approximate location" in trenchless excavations. The City Utilities proposal is the same thing as repealing the requirement. As locating technology continues to improve, providing accurate depth should be less of a problem. Current law (Section 319.030.1 RSMo) already provides: *"the owner or operator shall inform the excavator of the depth,* ***to the best of his knowledge or ability*** *. . ."* The statute already provides the facility owner with some variance in the degree of accuracy. In that Missouri law holds all parties in the "One Call" process to a standard of "reasonable care" facility owners already have a defense regarding liability for depth. However, the proposed language would render meaningless depth information provided for trenchless excavation projects.
"False No Response Notices by Excavator"	319.030.8 (p. 15)	**New issue:** Springfield City Utilities PSC: Staff likely to support.	None	**New Issue and Comment:** AGC of Missouri requests further information from City Utilities as to the nature of the problem it is attempting to address. The MOCS notification center we assume can readily identify whether an original notice has been made for an excavation in a specific location. If there is no original ticket number for the excavation, why would the excavator's call be treated as a second

				notice. AGC does not believe there is a widespread problem with false "second notices." However, if there is a problem perhaps it can be resolved through safeguards or mechanisms in the MOCS notification process.
"Trenchless Excavation Requirements"	319.037.2 (p. 18)	**New Issue:** AT&T and MO Utilities PSC: Staff likely to support.	None	**New Issue and Comment:** AT&T and Missouri Utilities propose the following amendments to Section 319.037.2 to the effect that power-driven equipment for trenchless excavation cannot be utilized until: • The excavator has *"**excavated a hole** and confirmed the horizontal and vertical location* [of existing facilities]"; and • ***"the hole shall remain open during the boring process to enable the boring device to be visually observed by the excavator as it safely crosses the identified underground facilities."*** AGC of Missouri ***opposes*** the proposed language for the following reasons: • The requirement proposes mandatory "hand digging" for all trenchless excavations regardless of the characteristics of the site of excavation and the individual circumstances and nature of the specific excavation. (See page 7 for AGC's comments in general on the practical limitations on "hand digging.") • The requirement regarding trenchless excavations which cross city streets or roadways would require disrupting the paved surface, thereby negating one of the advantages of trenchless excavation in not disrupting the use of a public roadway. • In regard to trenchless excavations where the path of the excavation is parallel to existing facilities, the proposed requirement makes it impossible to perform trenchless excavation. ➢ The proposed language requires ***"the***

				boring device to be visually observed as it safely crosses the identified underground facilities". The only means of compliance would be to trench the entire length of the "trenchless excavation." A variety of methods of confirming location for purposes of trenchless excavation as provided in current law should be maintained in the legislation. "Hand digging" is not an appropriate means of confirming location in all circumstances.
"Rebuttable Presumption of Negligence – Utility Owner"	319.040 (p. 20)	3/15/10 Draft PSC: Staff continues to support but invites alternative language.	12/15/10 4/20/10 Support	**Prior AGC Comments:** AGC supports the concept as presented in the PSC's draft. However, AGC is willing to work with others on the exact language.
"Enforcement Authority by PSC"	319.045 319.045 (p. 22)	6/15/10 Draft PSC: Suggests penalty provisions based on 386.572 RSMo. **(New Issue)**	12/15/10 4/20/10 Neutral AGC/MO: No prior comment on specific changes in penalties.	**Prior AGC Comments:** AGC's comment is that: • AGC has no position on the exact division of duties between the Public Service Commission and the Attorney General. AGC also has no objection to shared responsibilities. • The amount and application of penalties under current law should be examined and legal issues resolved as to the authority of the Public Service Commission to assess specific types of penalties (civil penalties, administrative penalties) on entities not otherwise subject to the PSC's jurisdiction, including excavators. • AGC agrees that actual enforcement under Missouri law will not meet Element #7 of the PIPES Act requiring *"fair and consistent enforcement of the law."* • AGC of Missouri supports effective enforcement of the Missouri One Call Law, but not just enforcement against excavators.

				In the June 15, 2010 Draft, the PSC for the first time provides specific language as to the Public Service Commission enforcement procedures and authority. AGC of Misosuri has no overall position on the suggested language since many of the details of a revised enforcement process must be further defined. However, AGC offers the following comments on specific details of the proposal: • The means by which an alleged violation may proceed through administrative and investigative processes to an imposition of penalty seem unclear and possibly duplicative. An action to recover a civil penalty could be brought by the Pubic Service Commission: ➢ ***"subsequent to a hearing . . . on a formal complaint brought by the public service commission on its own motion or by the staff of the public service commission . . ."*** Upon what basis would the Commission or its staff establish a "formal complaint" upon which a hearing would be conducted? Is there standing for utilities, excavators or citizens to file complaints of violations with the PSC? What "due process" must be provided to the person against whom the civil penalty is sought? The provision should require a specified period of notice to the alleged violator, rights for the alleged violator to be represented by an attorney and present evidence at the hearing. Subsection 4 provides for the PSC promulgating rules. However, the rights of alleged violators and the basic procedures of the enforcement process should be spelled out in the statute. ➢ ***"or on an enforcement referral submitted to the public service commission by the underground***

				commission by the underground damage prevention review board established by section 319.065 . . .” The exact role of the Damage Prevention Review Board is unclear and seems possibly duplicative of the Public Service Commission enforcement procedure: ➢ Would both the Public Service Commission and Review Board hire investigators? ➢ Would both the Review Board and the Commission hold hearings? ➢ What are the “due process” rights of an alleged violator before the Review Board as compared to the Commission? • PSC staff comments state that penalty provisions are expected to be revised to provisions similar to Section 386.572 RSMo for natural gas pipeline safety violations. Will proposed “One Call” related penalties mirror Section 386.572 RSMo: ➢ By imposing penalties of similar amounts? ➢ By imposing a penalty for a single violation and a higher penalty for a “multiple series of violations”? ➢ By phasing in graduated penalties over a number of years by specified date? ➢ By imposing standards for “degree of culpability” and “good faith”? Further definition must be given to penalty provisions before stakeholders can provide meaningful feedback. • The enforcement process requires much more definition before AGC, and I am sure others, could take a position as to whether it supports or opposes the proposed changes.

				AGC of Missouri agrees with Missouri Utilities that enforcement is the critical issue that has not been explored or discussed through the PSC's "stakeholder process." The absence of enforcement is the one certainty as to Missouri's failure to meet PIPES Act standards. Many of the recent stakeholder proposals and other provisions in the draft legislation have nothing to do with PIPES Act standards. A draft of 2011 legislation which AGC, and I am sure other stakeholders, could support cannot be concluded until the critical enforcement element is in place. AGC agrees with Missouri Utilities suggestions to form a small "work group" to concentrate on the enforcement issue.
"Emergency Excavations"	319.050 (p. 20)	**New Issue:** Springfield City Utilities (Suggests varying required response times based on "Priority Level") PSC: Staff is unfavorable. **New Issue:** MO Utilities (Excavation must commence within four hours of notice.) PSC: Staff is unfavorable.	None None	**New Issue and Comment:** 1) <u>Response Time</u> AGC of Missouri understands the goals of the proposal by City Utilities, but fears that the concept may be abused by excavators which would choose the shortest response time regardless of the actual circumstance at the site of excavation. If the excavation is not a true "emergency" as defined by statute, AGC has no objection to billing the excavator for the cost of the response. However, a civil penalty of $100 could only be collected by a court. The amount of the penalty would not result in actual enforcement due to higher priorities of prosecutors and the courts. 2) <u>Excavation Must Commence</u> AGC of Missouri ***opposes*** the time deadline proposal by Missouri Utilities. AGC agrees with Empire Electric that for numerous legitimate reasons it is not always possible for excavations to commence within a certain period of time, even if there is an "emergency" as defined by statute. In an emergency situation it may be necessary to

				make notices for multiple sites due to the need to restore public services or prevent damage. Which specific site would have the highest priority for commencing excavation may change frequently due to the cause of the emergency. As stated under (1) above, AGC has no objection to an excavator being billed if it is found the circumstance is not a true "emergency" as defined by statute. When a utility owner or their representative arrives at an excavation site it will be immediately obvious as to whether an "emergency" as defined by 319.015(3) RSMo has preceded the notice. Current statute clearly does not make the excavator running behind schedule on a routine project an "emergency."
"Facility Damage Reporting by Utility Owner"	319.055 (p. 28)	3/5/10 Draft	4/20/10 Support	**Prior AGC Comments:** AGC recognizes that Element 9 of the PIPES Act requires analysis of data to improve effectivenss of the One Call program. Presumably that requirement anticipates reporting of data. AGC will leave to the Commission and facility owners the best means of assembling data. However any data collected on "damage reports" should indicate the type of excavator (construction contractor, utility contractor, utility owner, homeowner, etc.)
"Statutory Performance Measures for Locators"	319.060 (p. 30)	3/5/10 Draft	4/20/10 Support	**Prior AGC Comments:** AGC supports the goal of establishing standards for the training and operational effectiveness of third party locators, but leaves to the Commission and utility owners the best means of achieving that goal.
"Damage Prevention Review Board"	319.065 (p. 32)	10/8/09 Draft	12/15/10 4/20/10 Oppose	**Prior AGC Comments:** AGC of Missouri **opposes** the creation of a Board as outlined in prior PSC Drafts for the following reasons: • The Board proposed by the PSC is unbalanced. It has nine utility affiliated

				representatives and three excavator representatives. • Examination of actual cases processed in other states, such as Virginia where penalties are assessed for over 100 cases per month, show that no investigation of the actual "root cause" could realistically have occurred due to the overwhelming volume. • Examination of cases in other states having an enforcement Board show that almost all enforcement actions are against construction related excavators and almost never against the utility owner. • There will be unavoidable ethical conflicts for members of the Board (cases against competitors, customers, etc.). • There is no other part-time "volunteer" Board in Missouri government with authority to levy civil penalties. Environmental agencies with statutory commissions or boards utilize the citizen boards for hearings and deciding on enforcement actions but cannot levy penalties, except for authority for "administrative penalties" under the Clean Air Law which is seldom used. **New Issue and Comment:** AGC of Missouri ***opposes*** the creation of a Board unless stakeholders agree to a role for a Board as a fact-finding body as a part of an enforcement process through the PSC and/or Attorney General bringing enforcement action in the courts. Since the entire enforcement process is currently not specific in the legislation, AGC reserves its opinion as to whether a Board in any form can be supported. However, AGC offers the following additional comments on provisions in the current draft regarding the Board: • A twelve member Board is too large to be

				functional. • The membership of the Board should be evenly divided between utility and construction contractor excavators and should have independent public members. • If there is a legitimate purpose for a Board in an enforcement process, the Board should be made up of an uneven number of representatives to avoid deadlocks. • If there is to be a Board the size of the Board should be small, such as five members of seven members. • The Board would have no authority as an "arbitrator of disputes" as stated in the PSC's current draft. "Arbitration" between parties to a contract in the construction industry is common. However, in regard to excavation accidents or other matters governed by the "One Call" law, there is no "privity" of contract among the parties, so any result reached by an "arbitrator" would be unenforceable. Without authority to enforce a finding, arbitration of disputes over excavation accidents would be a waste of time. • As stated in AGC's comment regarding enforcement by the PSC, there appears to be duplication of effort and confusion over the role of the PSC and any part-time Review Board proposed by the legislation. Again, AGC of Missouri reserves its position on all elements of enforcement, until a comprehensive enforcement proposal has been formed.
"New Installations Locatable/As Built Drawings"	319.070 (p. 34)	3/5/10 Draft	4/20/10 Neutral	**Prior AGC Comments:** AGC of Missouri supports these requirements as desirable goals, but recognizes that technical challenges must be overcome in implementation.

"Depth Standards for Installation of New Facilities"				**New Issue and Comment:** AGC of Missouri ***opposes*** SITE Improvement's proposal for statutory statewide minimum depth standards. AGC agrees that unpredictable and inconsistent depths of types of facilities present uncertainties for excavators in avoiding damage to facilities. However, AGC also recognizes that differences between the characteristics of facilities, geology and other circumstances result in different legitimate reasons for some differences in depth. Just because a statute provides for a specific depth does not guarantee uniformity. Practical circumstances will still result in inconsistencies in depth. AGC agrees with City Utilities' and Missouri Utilities' comment that depth is already specified in standards applicable to natural gas, electric, telecommunication and water facilities. Establishing depth standards by statute potentially results in conflicts in standards controlled by industry associations and state rules which may change from time to time. AGC believes that working for the education of all parties as to current industry standards is a better approach than a statutory requirement. However, AGC has no objection to a statutory provision that new installations must comply with industry standards as to depth.
"Clarification of Public Service Commission Jurisdiction"	--- (p. 38)	**New Issue:** PSC suggest clarifying that new responsibility for enforcing One Call would not bring unregulated utilities (RECs, cities, etc.) under general PSC jurisdiction.	None	**New Issue and Comment:** AGC of Missouri has no position as to language for establishing authority over types of utility owners not subject to PSC jurisdiction under current law. However, AGC comments that the PSC currently also has no specific statutory authority over contractors as excavators. There may also be legal issues to be resolved before the PSC could pursue enforcement actions against construction contractor excavators.