MEMORANDUM

TO: **FILE NO. GW-2010-0120**

FROM: Dale W. Johansen
MO PSC Natural Gas Pipeline Safety Staff
/s/ Dale W. Johansen

SUBJECT: Summaries of Stakeholder Comments Regarding Topics Discussed During the 03/09/10 Stakeholder Roundtable on Proposed Revisions to Chapter 319, RSMo

DATE: June 15, 2010

The purpose of this Memorandum and the attached document is to provide the Commission and interested underground facility damage prevention stakeholders with summaries of the written comments submitted to File No. GW-2010-0120 (by interested stakeholders or by the Staff on behalf of interested stakeholders) regarding the topics discussed during the 03/09/10 Stakeholder Roundtable. Additionally, the final entry in the comment summaries related to each of the topics commented upon consists of "Staff Comments" provided by the PSC's Natural Gas Pipeline Safety Staff (Staff).

The attached document does not include summaries of the participant comments made during the 03/09/10 Stakeholder Roundtable, since those comments were also generally addressed in the written comments and since the audio portion of the recording of the roundtable is incomplete.

If stakeholders that submitted written comments have concerns that the summarized comments included in the attached document misrepresent their comments, those concerns should be sent to Staff member Dale Johansen via e-mail at dale.johansen@psc.mo.gov. If stakeholders submit any such concerns, the Staff will in turn submit a document including those concerns to File No. GW-2010-0120.

Additionally, the Staff is working on further changes to the Chapter 319 proposed revisions document, which will be based upon the above-referenced stakeholder comments, as well as an overview document that will identify all changes made to the Staff's original draft of the Chapter 319 proposed revisions document. Once the Staff completes the next version of the Chapter 319 proposed revisions document and the related overview document, the Staff will submit those documents to File No. GW-2010-0120.

Lastly, there are several matters addressed in the attached document for which the Staff encourages interested stakeholders to submit additional comments. Any such additional stakeholder comments should be sent to Staff member Dale Johansen at the above-noted e-mail address. If stakeholders submit any such comments, the Staff will in turn submit a document including summaries of those comments to File No. GW-2010-0120.

Attachment: Summaries of Stakeholder Comments Regarding Topics Discussed During the 03/09/10 Stakeholder Roundtable on Proposed Revisions to Chapter 319, RSMo

SUMMARIES OF STAKEHOLDER COMMENTS REGARDING TOPICS DISCUSSED DURING THE 03/09/10 STAKEHOLDER ROUNDTABLE ON PROPOSED REVISIONS TO CHAPTER 319, RSMO

LIST OF STAKEHOLDERS THAT SUBMITTED WRITTEN COMMENTS

Associated General Contractors of Missouri (MO AGC)

Associated General Contractors of St. Louis (St. Louis AGC)

AT&T Missouri (AT&T)

City of St. Louis Water Division (St. Louis Water) *

City Utilities of Springfield (City Utilities)

Empire District Electric Company (Empire) * *

Missouri Utilities (MO Utilities)
(Laclede Gas Company, Missouri Gas Energy & AmerenUE)

SITE Improvement Association of St. Louis (SITE)

* In addition to the comment summaries set out herein, St. Louis Water's comments included objections to two originally proposed sections that were removed from the Chapter 319 proposed revisions document prior to the 03/09/10 Stakeholder Roundtable (excavation completion notices and marking completion notices), as well as comments that were directed toward language in proposed subsection 319.040.2 (rebuttable presumption of negligence) that was changed prior to the 03/09/10 Stakeholder Roundtable.

* * Except for the comment summaries set out herein, Empire noted in its comments that it is supportive of the comments submitted by Laclede Gas (the Missouri Utilities).

COLOR CODING FOR PROPOSED CHANGES SHOWN

Bold/Blue/Underline Font	Proposed Additions
~~**Bold/Red/Strikethrough Font**~~	Proposed Deletions
Light Green Shading	Proposed Changes Resulting from the Nine Federal Damage Prevention Program Elements & Related Matters
Light Yellow Shading	Proposed "Clean Up" Changes & Renumbering Needed Due to Other Changes
Tan Shading	Proposed "Desired" Changes Based Primarily on Review of State Laws in Georgia, Indiana, Texas & Virginia
Pale Blue Shading	Stakeholder Proposed Changes

319.015 – Definitions of Sewer System Related Terms

(2) "Collecting sewers", sewer lines, including force lines, gravity sewers, interceptors, laterals, trunk sewers, manholes, lampholes and necessary appurtenances;

(15) "Sewer service line", a sewer pipe extending from a customer's structure to a collecting sewer, which conveys wastewater from the structure to the collecting sewer;

(16) "Sewer service connection", the connection of a sewer service line to a collecting sewer;

(17) "Sewer system", includes all pipes or conduits, pumps, pumping stations, canals, lagoons, plants, structures and appliances, and all other real estate, fixtures and personal property, excluding sewer service lines, owned, operated, controlled or managed in connection with or to facilitate the collection, carriage, treatment and disposal of sewage for municipal, domestic or other beneficial or necessary purpose, except that the term shall not include a system that has less than twenty-five sewer service connections;

(18) "Sewer system owner", any person who owns, operates, controls or manages a sewer system as defined by this section;

MO AGC

The MO AGC states that it supports these provisions.

CITY UTILITIES

City Utilities states that it supports the efforts to eliminate the cross-bore damage issue, and that it believes that sewer system owners and operators should be responsible for locating their connections. City Utilities also states that it does not support allowing sewer operators to avoid liability for damages when they do not know where their connections are.

MO UTILITIES

The MO Utilities state that they are supportive of the efforts to address the cross-bore damage issue and to develop ways to get needed information and assistance from sewer system owners/operators, and that better information will help in avoiding damage to the subject sewer facilities.

STAFF COMMENTS

The Staff notes that these proposed definitions are directly related to proposed section 319.032 (see pages 16 & 17 for stakeholder and Staff comments regarding that matter), and the Staff also notes that it believes the definitions are appropriate as currently written.

319.015 – Definition of Excavation

~~(4)~~(5) "Excavation", any operation in which earth, rock or other material in or on the ground is moved, removed or otherwise displaced by means of any tools, equipment or explosives and includes, without limitation, backfilling, grading, trenching, digging, ditching, drilling, well-drilling, augering, boring, tunneling, scraping, cable or pipe plowing, plowing-in, pulling-in, ripping, driving, and demolition of structures, except that, the use of mechanized tools and equipment to break and remove pavement and masonry down only to the depth of such pavement or masonry, the use of pressurized air or water to disintegrate and suction to remove earth, rock and other materials, the tilling of soil for agricultural or seeding purposes, and the installation of marking flags and stakes for the location of underground facilities that are not driven shall not be deemed excavation. Backfilling or moving earth on the ground in connection with other excavation operations at the same site shall not be deemed separate instances of excavation. For railroads regulated by the Federal Railroad Administration, "excavation" shall not include any excavating done by a railroad when such excavating is done entirely on land that the railroad owns or on which the railroad operates, or in the event of an emergency, excavating done by a railroad on adjacent land;

ST. LOUIS AGC

The St. Louis AGC suggests the change highlighted in pale blue above, which is consistent with provisions currently contained in 319.037.2.

STAFF COMMENTS

The Staff believes this proposed change is reasonable and plans to include language regarding it in the next draft of its Chapter 319 proposed revisions document. ***However, the Staff also encourages other interested stakeholders to submit comments regarding this suggested change to the Staff at their earliest convenience.***

319.015 – Definition of Marking

~~(6)~~ (7) "Marking", the use of paint, flags, stakes, or other clearly identifiable materials to show the field location of underground facilities, or the area of proposed excavation, in accordance with the color code standard of the American Public Works Association. Unless otherwise provided by the American Public Works Association, the following color scheme shall be used: blue for potable water; purple for reclaimed water, irrigation and slurry lines; green for sewers and drain lines; red for electric, power lines, cables, conduit and lighting cables; orange for communications, including telephone, cable television, alarm or signal lines, cable or conduit; yellow for gas, oil, steam, petroleum or gaseous materials; white for proposed excavation; pink for temporary marking of construction project site features such as centerline and top of slope and toe of slope;

AT&T

AT&T suggests changing this definition to include a reference to the "Missouri Marking Standards" adopted by the MOCS Board of Directors (and as revised from time to time) rather than the current reference to the color code standard of the American Public Works Association. (As it is presented, the Staff assumes this suggestion would also include deleting the second sentence of the definition.)

CITY UTILITIES

City Utilities notes that it has adopted the Common Ground Marking Standards and the Missouri Common Ground Steering Team Addendums. City Utilities also notes that its experience in putting these standards to the test has been successful, even when it has been necessary to use out-of-state crews to assist in restoring service to its customers after major outages such as a significant ice storm.

MO UTILITIES

The MO Utilities propose that this definition be revised and expanded to graphically incorporate the "Missouri Marking Standards" as adopted by the MOCS Board of Directors (and as may be revised from time to time). (As it is presented, the Staff assumes this suggestion would result in the reference to the Missouri Marking Standards being used in lieu of the current reference to the American Public Works Association color code standard.)

In addition to the above-noted suggestion, the MO Utilities also provide helpful information about the background of the development of the Missouri Marking Standards.

STAFF COMMENTS

The Staff's initial thought is that the suggested change discussed by the stakeholders is reasonable and, subject to further consideration, the Staff notes that it will likely include proposed language to implement such a change in the next draft of its Chapter 319 proposed revisions document. ***However, the Staff also encourages other interested stakeholders to submit comments regarding the suggested change to the Staff at their earliest convenience.***

319.015 – Definition of Ticket Life

(20) "Ticket life", a period of forty-five (45) days after the date a notice of intent to excavate is submitted to the notification center, after which the excavator must submit a new notice of intent to excavate to the notification center if the excavation associated with the original notice has not been completed;

MO AGC

The MO AGC notes its continued opposition to the establishment of a "life of ticket" as originally explained in its comments of 12/15/09. Further, the MO AGC states its belief that this provision is a "liability trap" for excavators, in that its members often work on long-term projects of six months or a year or more and the failure to make a new notice within the required time frame prior to the expiration of a ticket could result in a rebuttable presumption of negligence under the provisions of 319.040.1 if a facility is damaged. Additionally, the MO AGC states its belief that requiring periodic notices during an extended project could result in unnecessary delays in the work being done, as well as unnecessary additional costs to facility owners for response to additional tickets. Lastly, the MO AGC notes that it does not understand why the proposed provisions are considered to be related to the federal "nine elements" for a successful underground facility damage prevention program, and further notes how the current law encourages effective communication between excavators and facility owners.

AT&T

AT&T expresses its support for the establishment of a "ticket life" and recommends that it be set as a period of fifteen (15) working days after the date a notice of intent to excavate is submitted to the notification center.

ST. LOUIS WATER

St. Louis Water notes that it would be simpler and more practical to have a ticket life of 30 days, as compared to the original proposal for an extended excavation project that in effect included two ticket lives (one of 15 days for some projects and one of 30 days for some other projects).

CITY UTILITIES

City Utilities notes that it supported 30 days for the life of a ticket in its original comments, and that it believes this is the most common and reasonable ticket life since a large majority of excavation projects can be completed within this time.

MO UTILITIES

The MO Utilities express their support for the establishment of a "ticket life" and note that 53 of 62 one-call centers listed in the 2010 Excavation Safety Guide & Directory published by Infrastructure Resources indicated that they have some form of ticket life in their states' statutes. The MO Utilities further note that establishing a specific timeframe during which a ticket is valid forces excavators to update everyone on the status of their projects (if not completed within the established time period) and allows facility owners the opportunity to update their markings for any existing and/or any new facilities that may have been installed in the interim since the last request. However, the MO Utilities also note that the proposed forty-five (45) days falls considerably outside the normal timeframe used in most jurisdictions, which is in the range of ten (10) to thirty (30) calendar days, and recommends a ticket life of thirty (30) calendar days.

SITE

SITE continues to express its opposition to the concept of establishing a "ticket life" and notes that unforeseen factors can cause delays at a job site. SITE further notes that an additional ticket should not be necessary if the original markings are still visible, and also notes that having to call for a locate can add an unnecessary waiting period.

STAFF COMMENTS

The Staff believes the establishment of a "ticket life" for locate requests is desirable and reasonable for various reasons, and plans to continue to pursue that but with further consideration to be given to the length of time that should be used.

Additionally, with regard to the concerns expressed by the contractor stakeholders pertaining to "extended projects", the Staff notes the proposed definition of ticket life would establish a "life" for notices of intent to excavate submitted to the notification center and not for an overall project, and the Staff believes there may be some confusion regarding this distinction. For large/extended projects, there will likely be several "excavation tickets" related to such projects based upon the size of tickets currently provided for by the MOCS process that would have a "life" but the overall project could very well extend past the "life" of any particular ticket related to the overall project.

Lastly, the Staff notes that it believes the establishment of a "ticket life" is related to the federal elements set out in the PIPES Act of 2006 in that element 1 pertains to "establishing and maintaining effective communications between stakeholders from receipt of an excavation notification until successful completion of the excavation, as appropriate." Absent having a "life of ticket", or a requirement for the submission of excavation completion notices (an approach that has already been rejected by all types of stakeholders), the Staff does not believe there is a point in time that can be referred to as the point when "successful completion of the excavation" occurs.

319.026.1 – Start Date for Proposed Excavation

1. An excavator shall serve notice of intent to excavate to the notification center by toll-free telephone number operated on a twenty-four hour per-day, seven day per-week basis or by facsimile or by completing notice via the Internet at least two working days, but not more than ten working days, before the expected date of commencing the excavation activity. The notification center receiving such notice shall inform the excavator of all notification center participants to whom such notice will be transmitted and shall promptly transmit all details of such notice provided under subsection 2 of this section to every notification center participant in the area of excavation.

AT&T

AT&T suggests adding a new second sentence to read as follows:

> The excavation project must start within seven (7) calendar days of serving notice of intent to excavate to the notification center.

STAFF COMMENTS

The Staff's initial thought regarding this suggestion is that the time frame for beginning an excavation should be the same as the currently allowed "advance notice" (i.e. – ten working days), IF a required start date is to be set out in the statute.

Additionally, the Staff notes that adding a required start date in this subsection would also likely require a similar change to subsection 319.026.6, or it may be that the suggested change should be made in that subsection rather than in the suggested subsection.

Since this is the first time this suggestion has been made and since the Staff has not yet decided whether it supports the suggested change, the Staff notes that it does not plan to include proposed language to implement such a change in the next draft of its Chapter 319 proposed revisions document.

Lastly, the Staff encourages other interested stakeholders to submit comments regarding this suggested change to the Staff at their earliest convenience.

319.026.2 – Type, Scope & Mode of Work Not to Change

2. Notices of intent to excavate given pursuant to this section shall contain the following information: . . .

MO UTILITIES

The MO Utilities suggest changing 319.026.2 to read as follows:

> 2. Notices of intent to excavate given pursuant to this section shall contain the following information and shall not change during the ticket's life in order to remain valid: . . ."

In support of this suggested change, the MO Utilities note that facility owners screen locate requests for specific activities and rely on the information provided to effectively monitor and protect their facilities.

Further, the MO Utilities state that a ticket should entitle an excavator to work within a specified area and only do the type of work in a known excavation mode stated on the ticket. The MO Utilities also state that once any of those elements change the excavator should be required to secure a different ticket that more accurately portrays the work being done before continuing.

STAFF COMMENTS

The Staff's initial thought is that the suggested change is reasonable and, subject to further consideration, the Staff notes that it will likely include proposed language to implement such a change in the next draft of its Chapter 319 proposed revisions document. ***However, the Staff also encourages other interested stakeholders to submit comments regarding this suggested change to the Staff at their earliest convenience.***

319.026.2(5) – Size Limit for Area of Excavation

2. Notices of intent to excavate given pursuant to this section shall contain the following information: . . .

(5) A detailed description accepted by the notification center sufficient for the location of the excavation by any one or more of the following means: by reference to a specific street address, or by description of location in relation to the nearest numbered, lettered, or named state or county road or city street for which a road sign is posted, or by latitude and longitude including the appropriate description in degrees, minutes, and seconds, or by state plane coordinates;

AT&T

AT&T suggests a change that would limit the size of the area of excavation that can be included in a notice of intent to excavate. Specifically, AT&T suggests the following change:

> (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 a single address, by any one or more of the following means: . . ."

MO UTILITIES

The MO Utilities suggest the same change as is suggested by AT&T.

Additionally, the MO Utilities note that the current practices of Missouri One Call System (MOCS) allow the following with regard to ticket size: (1) 1 mile in the county on the same road; (2) 1/2 mile within city limits on the same street; and (3) 10 individual addresses per 100 block.

Further, the MO Utilities state that the current ticket sizes allowed by MOCS are far too large for any locator to mark within the timeframe given, and that in many cases arrangements must be made to pare the ticket size to more manageable and workable pieces to get the job done.

EMPIRE

Empire states that the 500 foot maximum area of excavation suggested by AT&T and the MO Utilities is not practical for its construction sites, that 500 feet could be less than two spans of an overhead extension, and that it prefers the ticket sizes allowed by MOCS' current practices.

STAFF COMMENTS

While the Staff understands the reasoning behind the change suggested by AT&T and the MO Utilities, it believes further discussion of this topic should take place within the context of the MOCS Operating Committee meetings to see if an agreement for changes can be reached by the MOCS members before this topic becomes the subject of proposed statutory changes. ***Also, the Staff encourages other interested stakeholders to submit comments regarding this suggested change to the Staff at their earliest convenience.***

319.026.5 – Mandatory Hand-Digging for Confirmation of Facility Location

5. If in the course of excavation the person responsible for the excavation operations discovers that ~~the owner or operator of the underground facility who is a participant in a notification center~~ a notification center participant has incorrectly located ~~the~~ an underground facility, he or she shall notify the notification center which shall inform the notification center participant. ~~If the owner or operator of the underground facility is not a participant in a notification center prior to the January 1, 2003, effective date for mandatory participation pursuant to section 319.022, the person responsible for the excavation shall notify the owner.~~ The person responsible for maintaining records of the location of underground facilities for the notification center participant shall correct such records to show the actual location of such facilities, if current records are incorrect.

AT&T

AT&T suggests adding the sentence that is set out below. (As it is presented, the Staff assumes the suggestion is that this sentence be added to the beginning of the subsection.)

> 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.

MO AGC

The MO AGC states that this is an area of the current law that requires cautious review if changes are to be considered, that 319.037 provides means of confirming the vertical and horizontal location of facilities other than hand digging, and that hand digging is not effective or necessary for all excavations.

MO UTILITIES

The MO Utilities suggest adding the same language as is suggested by AT&T to the beginning of this subsection.

Additionally, the MO Utilities note that the Infrastructure Resources summary referenced in prior comments shows that 49 of the 62 one-call notification centers indicated that their states' damage prevention statutes contain a mandatory hand-dig requirement. The MO Utilities further state that 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 would result in any facility that was inaccurately marked initially being revealed (and reported to MOCS), and that this would create an opportunity for avoiding many excavation damages. The MO Utilities also note that requiring hand-digging would result in the resolution of any facility depth issues that may exist, and that this would also reduce the number of facility damages.

EMPIRE

Empire states its preference that the current statutory provisions not be changed with regard to the possible addition of a mandatory hand-dig requirement. In this regard, Empire notes that the type of soil/rock in its service territory makes it very difficult to hand dig every time excavation is required, and that mandatory hand-digging would only increase construction costs without causing a substantial reduction in facility damages.

STAFF COMMENTS

While the Staff understands the reasoning behind the change suggested by AT&T and the MO Utilities, it believes further discussion of this topic should take place within the context of the MOCS Operating Committee meetings to see if an agreement for such a change can be reached by the MOCS members before this topic becomes the subject of proposed statutory changes. ***Also, the Staff encourages other interested stakeholders to submit comments regarding this suggested change to the Staff at their earliest convenience.***

319.026.6 and 319.026.7 – Application of "Ticket Life" Definition

6. When markings have been provided in response to a notice of intent to excavate, excavators may commence or continue to work within the area described in the notice for so long as the markings ~~are~~ continue to be visible and usable, and so long as the ticket life for the notice has not been exceeded.

7. If, prior to the end of the ticket life for a notice of intent to excavate, markings become unusable, or are no longer visible, due to weather, construction or other cause, the excavator shall contact the notification center to request remarking. Such notice shall be given in the same manner as an original notice of intent to excavate, and the ~~owner or operator~~ affected underground facility owners shall remark the site in the same manner, within the same time, as required in response to an original notice of intent to excavate.

MO AGC

See comments provided on page 5 regarding 319.015 – Definition of Ticket Life.

SITE

See comments provided on page 6 regarding 319.015 – Definition of Ticket Life.

STAFF COMMENTS

See comments provided on page 6 regarding 319.015 – Definition of Ticket Life.

319.026.7 – Remarking Limited to Facility Owners

7. If, prior to the end of the ticket life for a notice of intent to excavate, markings become unusable, or are no longer visible, due to weather, construction or other cause, the excavator shall contact the notification center to request remarking. Such notice shall be given in the same manner as an original notice of intent to excavate, and the ~~owner or operator~~ affected underground facility owners shall remark the site in the same manner, within the same time, as required in response to an original notice of intent to excavate.

AT&T

AT&T suggests adding a new second sentence to subsection 7 (as renumbered in the Staff's Chapter 319 proposed revisions document) to read as follows:

> Under no circumstances shall an excavator or non-owner (except owners authorized agent) refresh the marks provided by a facility owner or its authorized agent.

In conjunction with this proposed addition, AT&T also suggests changing the beginning of the current second sentence from "Such notice shall . . ." to "Any renewal notice shall . . ."

MO UTILITIES

The MO Utilities suggests adding a new second sentence to subsection 7 (as renumbered in the Staff's Chapter 319 proposed revisions document) to read as follows:

> In no event may an excavator refresh the marks provided by a facility owner or its authorized agent.

In conjunction with this proposed addition, the MO Utilities suggest changing the beginning of the current second sentence from "Such notice shall . . ." to "Any renewal notice shall . . ."

In support of its suggested changes, the MO Utilities note that the statute currently states how marking "renewals" are to be done but that it does not specifically state that such renewals can only be done by the underground facility owners. If non-facility were to take it upon themselves to "refresh" the markings provided, the MO Utilities are of the position that this could put others at risk and could also create potential litigation problems.

STAFF COMMENTS

The Staff's initial thought is that the suggested changes presented by AT&T and the MO Utilities are reasonable and, subject to further consideration, the Staff notes that it will likely include proposed language to implement such a change in the next draft of its Chapter 319 proposed revisions document. ***However, the Staff also encourages other interested stakeholders to submit comments regarding this suggested change to the Staff at their earliest convenience.***

319.030.3 – Liability for Damage if Depth Provided is Incorrect

3. If the excavator states in the notice of intent to excavate that the excavation will involve trenchless technology, the ~~owner or operator~~ underground facility owner shall inform the excavator of the depth, to the best of his or her knowledge or ability, of the facility according to the records of the owner ~~or operator~~.

CITY UTILITIES

City Utilities suggests that this subsection (as renumbered in the Staff's Chapter 319 proposed revisions document) be amended to make it clear that the excavator is still liable for damaging an underground facility even if the depth of the facility is different than stated by the facility owner. The reasoning for this is that it is impossible for the facility owner to know the exact depth of an underground facility because nature and other people can change the depth without the knowledge of the facility owner. Specifically, City Utilities suggests adding the following language to the end of this subsection.

> If the depth of the underground facility is different than that stated by the facility owner, it shall not relieve the excavator of liability for damage to the underground facility so long as the facility owner has notified the excavator of the approximate location of the underground facility as required by Section 319.030.

STAFF COMMENTS

The Staff's initial thought is that this suggested change is reasonable, particularly when it is considered in conjunction with the requirements of section 319.037. And, subject to further consideration, the Staff notes that it will likely include proposed language to implement such a change in the next draft of its Chapter 319 proposed revisions document. ***However, the Staff also encourages other interested stakeholders to submit comments regarding this suggested change to the Staff at their earliest convenience.***

319.030.8 – False "No Response" Notices to the Call Center

~~3.~~8. In the event that ~~a person owning or operating~~ an underground facility owner fails to comply with the provisions of subsection 1 or subsection 6 of this section after notice given by an excavator in compliance with section 319.026, the excavator, prior to commencing the excavation, shall give a second notice to the notification center as required by section 319.026 stating that there has been no response to the original notice given under section 319.026. After the receipt of the notice stating there has been "no response", the ~~owner or operator of an~~ underground facility owner shall, within two hours of the receipt of such notice, mark its facilities or contact and inform the excavator of when the facilities will be marked; provided, however, that for "no response" notices made to the notification center by 2:00 p.m. on a working day, the markings shall be completed on the working day the notice is made to the notification center, and provided that for "no response" notices made to the notification center after 2:00 p.m. on a working day or on a non-working day, the markings shall be completed no later than 10:00 a.m. on the next working day. If an underground facility owner fails to mark its facilities or contact the excavator as required by this subsection, the excavator may commence the excavation. Nothing in this subsection shall excuse the excavator from exercising the degree of care in making the excavation as is otherwise required by law.

CITY UTILITIES

City Utilities notes that the required response time is significantly shorter for situations where a facility owner has not responded to a locate request than it is for situations where previously provided facility markings need to be refreshed. As a result, City Utilities suggests that excavators sometimes falsely claim there was no response to a locate request in order to force the facility owner to remark the facilities in the shorter time period applicable to "no response" notices.

To address this issue, City Utilities suggests that an excavator who falsely claims there was no response to a locate request should be required to pay the reasonable costs of the remarking. City Utilities also suggests that an excavator who falsely claims there was no response to a locate request should be subject to a $100 civil penalty.

STAFF COMMENTS

Regarding the suggestion that excavators be required to pay the costs of remarking for "false" no response notices submitted to the call center, the Staff's initial thought is that such a change is reasonable, particularly when it is considered in conjunction with the provisions of current subsection 319.026.6 (proposed subsection 319.026.8) and section 319.050. As a result, the Staff will likely include proposed language to implement such a change in the next draft of its Chapter 319 proposed revisions document. ***However, the Staff also encourages other interested stakeholders to submit comments regarding this suggested change to the Staff at their earliest convenience.***

Regarding the suggestion that excavators be subject to a civil penalty for falsely claiming there was no response to a locate request, the Staff's position is that such an action would be covered by the penalty provisions in current section 319.045, and the penalty provisions in proposed section 319.046. As a result, the Staff will likely not include proposed language to implement such a change in the next draft of its Chapter 319 proposed revisions document.

319.032 – Provision of Information re: Sewer Service Connections

1. In addition to the other requirements of section 319.030, the response to a notice of intent to excavate received by a sewer system owner, when such owner has underground facilities located in the area of excavation identified in the notice and when the notice indicates that trenchless excavation methods will be used, shall include a determination of whether sewer service connections exist or are likely to exist in the area of the excavation.

2. If the sewer system owner determines that sewer service connections exist or are likely to exist in the area of the excavation identified in a notice of intent to excavate, the owner shall provide his or her best available information regarding the location of such connections to the excavator by any of the following methods:

(1) Placing a triangular green mark at the approximate location of the sewer service connection pointing in the direction of the customer structure served;

(2) Providing electronic copies of the information to the excavator;

(3) Delivering copies of the information to the excavator by facsimile or by other agreed-upon means; or

(4) Arranging to meet the excavator at the site of the excavation to provide the information.

3. Providing the best available information regarding the location of sewer service connections that exist or are likely to exist in the area of excavation identified in a notice of intent to excavate shall constitute full compliance with this section, and a sewer system owner shall not be liable to any party for damages or injuries resulting from an excavation if they are in compliance with this section.

4. Providing the best available information regarding the location of sewer service connections that exist or are likely to exist in the area of excavation identified in a notice of intent to excavate shall not in and of itself constitute ownership, operation, control or management of sewer service lines by a sewer system owner.

MO AGC

The MO AGC states that it supports these provisions.

ST. LOUIS WATER

St. Louis Water notes that the issue this provision addresses is problematic, and that the proposed language reflects that. Further, St. Louis Water states that at some level the proposal puts responsibility onto an underground facility owner for locating property they do not control or own, nor does the owner have sure knowledge of the sewer service's location of run. St. Louis Water also notes that a "good faith" effort by the facility owner to provide location information may give the excavator a false sense of security.

CITY UTILITIES

City Utilities states that it supports the efforts to require marking of the approximate location of sewer connections and laterals. However, City Utilities also states it does not support allowing sewer system owners to avoid liability for damages when they do not know where their connections are, and that sewer system owners should be required to mark the approximate location of sewer connections and laterals.

MO UTILITIES

The MO Utilities state their support for the effort in developing a reasonable way to obtain needed information on the identification and approximate location of sewer facilities and connections.

STAFF COMMENTS

The Staff believes this proposed section is needed to address a known safety issue, and that the currently proposed language is reasonable. As a result, the Staff plans to continue to pursue the implementation of this proposed section and does not plan to make any changes to the proposed language in the next draft of its Chapter 319 proposed revisions document. ***However, the Staff also notes it is open to considering alternative language for this section, so long as such language would address the issue that is the subject of this section, and encourages interested stakeholders to submit additional comments regarding this matter to the Staff at their earliest convenience.***

319.037.2 – Trenchless Excavation Requirements

2. The excavator shall not use power-driven equipment for trenchless excavation, including directional drilling, within the marked approximate location of such underground facilities until the excavator has made careful and prudent efforts to confirm the horizontal and vertical location thereof in the vicinity of the proposed excavation through methods appropriate to the geologic and weather conditions, and the nature of the facility, such as the use of electronic locating devices, hand digging, pot holing when practical, soft digging, vacuum methods, use of pressurized air or water, pneumatic hand tools or other noninvasive methods as such methods are developed. Such methods of confirming location shall not violate established safety practices.

3. Nothing in this ~~sub~~section shall authorize any person other than the owner or operator of a facility to attach an electronic locating device to any underground facility.

AT&T

AT&T suggests the changes highlighted in pale blue below.

> 2. The excavator shall not use power-driven equipment for trenchless excavation . . . until the excavator has ~~made careful and prudent efforts to confirm~~ excavated a hole and confirmed the horizontal and vertical location thereof in the vicinity of the proposed excavation through methods . . . such as ~~the use of electronic locating devices,~~ hand digging, pot holing . . . Such methods of confirming location shall not violate established safety practices. Once the horizontal and vertical location of such underground facilities is established, the hole(s) 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.
>
> 3. Nothing in this ~~sub~~section shall authorize any person other than the owner, the owners authorized agent, or operator of a facility to attach an electronic locating device to any underground facility.

MO UTILITIES

The MO Utilities state that this subsection needs to be clarified to prevent "blind" boring and to ensure that the boring device is visually observed as it crosses the identified underground facilities, due to a concern that some excavators may rely on electronic depth readings to establish the vertical position of a facility. As a result, the MO Utilities suggest the changes highlighted in pale blue below.

> 2. The excavator shall not use power-driven equipment for trenchless excavation . . . until the excavator has excavated a hole and made careful and prudent efforts to confirm the horizontal and vertical location thereof in the vicinity of the proposed excavation through methods . . . such as the use of ~~electronic locating devices,~~ hand digging, pot holing . . . Such methods of confirming location shall not violate established safety practices. Once the horizontal and vertical location of such underground facilities is established, the hole(s) 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.
>
> ~~3. Nothing in this subsection shall authorize any person other than the owner or operator of a facility to attach an electronic locating device to any underground facility.~~

CITY UTILITIES

City Utilities states the position that after the excavator has made a careful and prudent effort to confirm the horizontal and vertical location of the underground facility, the hole(s) should remain open during the boring process until the bore safely crosses the underground facility.

STAFF COMMENTS

While the Staff's initial thought is that it may support changes such as those suggested by the subject utility stakeholders, the Staff also believes the changes suggested are quite significant and thus that other stakeholders should be given the opportunity to comment on them before language regarding the changes is included in a draft of the Staff's Chapter 319 proposed revisions document. ***As a result, the Staff encourages other interested stakeholders to submit comments regarding this suggested change to the Staff at their earliest convenience.***

319.040 – Rebuttal Presumption of Negligence

1. The failure of any excavator to give notice of proposed excavation activities ~~as required by this chapter~~ in accordance with the provisions of sections 319.010 through 319.070 shall be a rebuttable presumption of negligence on his or her part 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.

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.

MO AGC

Regarding the proposed changes to subsection 1, the MO AGC states that it is now supportive of the proposed changes based upon the reasoning for the changes provided by the Staff during the 03/09/10 Stakeholder Roundtable. Regarding the proposed addition of subsection 2, the MO AGC states that the currently proposed language is a more exact standard upon which to apply the "rebuttable presumption" and that it supports including an underground facility owner "rebuttable presumption" in the law. The MO AGC further notes that it would be pleased to work with the other stakeholders on the exact language to be included in proposed subsection 2.

AT&T

Regarding proposed subsection 2, AT&T suggests the following language.

> 2. The failure of any underground facility owner to become a member of the notification center shall be a rebuttable presumption of negligence on his or her part in the event that such failure shall cause injury, loss or damage.

MO UTILITIES

The MO Utilities note that the most recent revision to proposed subsection 2 attempts to create clarity and balance, but states that instead of doing so the revision has created an overly broad and all encompassing presumption of negligence for underground facility owners. Further, the MO Utilities suggest that if balance and simplicity is what is desired, then this proposed subsection should limit the rebuttable presumption of negligence to the failure of an underground facility owner to be a notification center participant.

STAFF COMMENTS

The Staff believes the most current draft of proposed subsection 2(shown above) is appropriate and reasonable, and respectfully disagrees that it has created "an overly broad and all encompassing" rebuttable presumption of negligence for underground facility owners. The Staff further believes the two non-events addressed by the language used for proposed subsection 2 (a facility owner not marking its facilities in the area of a planned excavation set out in a notice of intent to excavate, or a facility owner not being a participant in the notification center) are both very serious matters deserving of the same additional attention as an excavator not making a call to the notification center before digging.

Based on the above, the Staff plans to continue to pursue implementation of proposed subsection 2 as currently written. ***However, the Staff also notes it is open to considering alternative language for this subsection, so long as such language addresses both matters currently addressed, and encourages interested stakeholders to submit additional comments regarding this matter to the Staff at their earliest convenience.***

319.045 & 319.046 – Change of Enforcement Authority

319.045. ***1. In the event of any damage or dislocation or disturbance of any underground facility in connection with any excavation, the person responsible for the excavation operations shall immediately notify the notification center. This subsection shall be deemed to require reporting of any damage, dislocation, or disturbance to trace wires, encasements, ~~cathode~~ cathodic protection facilities, permanent above-ground stakes or markers, or other such items utilized for protection of the underground facility.***

2. In the event of any damage or dislocation or disturbance to any underground facility or any protective devices required to be reported by the excavator under subsection 1 of this section, in advance of or during the excavation work, the person responsible for the excavation operations shall not conceal or attempt to conceal such damage or dislocation or disturbance, nor shall that person attempt or make repairs to the facility unless authorized by the owner or operator of the facility. In the case of sewer lines or facilities, emergency temporary repairs may be made by the excavator after notification without the owners' or operators' authorization to prevent further damage to the facilities. Such emergency repairs shall not relieve the excavator of responsibility to make notification as required by subsection 1 of this section.

~~***3. Any person who violates in any material respect the provisions of section 319.022, 319.025, 319.026, 319.029, 319.030, 319.037, or this section or who willfully damages an underground facility shall be liable to the state of Missouri for a civil penalty of up to ten thousand dollars for each violation for each day such violation persists, except that the maximum penalty for violation of the provisions of sections 319.010 to 319.050 shall not exceed five hundred thousand dollars for any related series of violations. An action to recover such civil penalty may be brought by the attorney general or a prosecuting attorney on behalf of the state of Missouri in any appropriate circuit court of this state. Trial thereof shall be before the court, which shall consider the nature, circumstances and gravity of the violation, and with respect to the person found to have committed the violation, the degree of culpability, the absence or existence of prior violations, whether the violation was a willful act, the effect on ability to continue to do business, any good faith in attempting to achieve compliance, ability to pay the penalty, and such other matters as justice may require in determining the amount of penalty imposed.***~~ ***(See Subsections 1 & 2 of Section 319.046 below.)***

~~***4. The attorney general may bring an action in any appropriate circuit court of this state for equitable relief to redress or restrain a violation by any person of any provision of sections 319.010 to 319.050. The court may grant such relief as is necessary or appropriate, including mandatory or prohibitive injunctive relief, temporary or permanent.***~~ ***(See Subsection 3 of Section 319.046 below.)***

319.046. 1. Any person who violates in any material respect the provisions of ~~section 319.022, 319.025, 319.026, 319.029, 319.030, 319.037, or this section~~ sections 319.010 through 319.070, or who willfully damages an underground facility, shall be liable to the state of Missouri for a civil penalty of up to ten thousand dollars for each violation for each day such violation persists, except that the maximum penalty for violation of the provisions of sections 319.010 ~~to 319.050~~ through 319.070 shall not exceed five hundred thousand dollars for any related series of violations.

2. An action to recover such civil penalty may be brought by the ~~attorney general or a prosecuting attorney~~ general counsel of the public service commission on behalf of the state of Missouri in any appropriate circuit court of this state subsequent to a hearing held by the public service commission on a formal complaint brought by the public service commission on its own motion or by the staff of the public service commission, or on an enforcement referral submitted to the public service commission by the underground damage prevention review board established by section 319.065 of this chapter, and issuance of an order by the public service commission including its findings on the complaint or enforcement referral and authorizing the penalty action. Trial thereof shall be before the court, which shall consider the nature, circumstances and gravity of the violation, the findings of the public service commission, and with respect to the person found to have committed the violation, the degree of culpability, the absence or existence of prior violations, whether the violation was a willful act, the effect on ability to continue to do business, any good faith in attempting to achieve compliance, ability to pay the penalty, and such other matters as justice may require in determining the amount of penalty imposed.

3. ~~The attorney general may bring~~ Whenever the public service commission shall be of the opinion that any person is failing or omitting or is about to fail or omit to do anything required by sections 319.010 through 319.070, or is doing anything or about to do anything or permitting anything or about to permit anything to be done contrary to or in violation of sections 319.010 through 319.070, it may direct its general counsel to commence an action in any appropriate circuit court of this state for equitable relief to redress or restrain a violation by any person of any provision of sections 319.010 ~~to 319.050~~ through 319.070. The court may grant such relief as is necessary or appropriate, including mandatory or prohibitive injunctive relief, temporary or permanent.

4. The public service commission shall promulgate rules to implement this section. To facilitate the filing of a formal complaint as contemplated by subsection 2 of this section and the submission of matters for consideration by the underground damage prevention review board established by section 319.065 of this chapter, the public service commission and its staff are hereby vested with the authority necessary to investigate possible violations of the provisions of sections 319.010 through 319.070 by any person subject to those provisions; provided, however, that such authority shall not be exercised until after the public service commission promulgates a rule, in accordance with the provisions of chapter 536, RSMo, setting forth the procedures under which such investigations shall be conducted.

5. The appeal of orders of the public service commission issued pursuant to the provisions of subsection 2 of this section shall be governed by Chapter 386 of the Missouri Revised Statutes.

MO AGC

The MO AGC notes that the fact that the state is not currently exercising the state's existing civil penalty authority will not meet the requirements set out in the PIPES Act of 2006 regarding fair and consistent enforcement of the law. The MO AGC also refers back to its previous comments of 12/15/09 about the state law's current penalty structure and enforcement responsibilities. (In those comments, the MO AGC noted concerns about the level of the penalties provided for in the statute, and stated a concern that the level of the penalties might negatively impact enforcement of the law.) Further, the MO AGC states that it supports enforcement of the one call law, but that effective enforcement must fairly address violations by facility owners, locating services and the notification center, not just consist of actions for violations by excavators.

AT&T

AT&T states that facility owners have previously supplied quantitative data demonstrating that the overwhelming causal factor related to underground facility damages is the excavators having failed to call for locates or not having a valid ticket. As a result, AT&T suggests that it would be more effective to focus on increased and improved awareness of such occurrences, and methods designed to limit them, such as one or two day statewide "Damage Prevention Summits" (similar to the Arkansas and Mississippi models).

Further, AT&T states that any and all enforcement duties and responsibilities should be placed with the Attorney General's office, and that there is no need to attempt to divide and allocate enforcement duties among multiple agencies. AT&T also states that no need to do this has been demonstrated and any such allocation would lead to overlapping, if not conflicting, roles among agencies, and increased government and industry costs – and that it sees no prospect for any benefits that would offset these negative consequences.

CITY UTILITIES

City Utilities states that is supports any and all enforcement that aids in damage prevention, particularly with respect to excavators that dig without locate requests.

MO UTILITIES

The MO Utilities state that they strongly support the efforts to pursue effective change and enforcement options to Missouri's underground facility safety and damage prevention law, and that a fair, consistent and active enforcement approach is critically important to damage prevention. Further, the MO Utilities state the view that it is unfortunate that the single most important issue on everyone's mind – i.e. - enforcement – has not been fully explored or discussed. The MO Utilities also state that the participants to this proceeding need more information and candid discussion of what enforcement options may realistically exist in today's regulatory climate.

Additionally, the MO Utilities note that the Attorney General has stated his office is open to the possibility of sharing concurrent jurisdiction, but that completely repealing the Attorney General's enforcement authority would not best serve the citizens of the state. However, the MO Utilities also note that it is difficult for this docket's participants to know what concurrent enforcement options may exist without more information and discussion.

The MO Utilities also note that it was suggested during the March 9 roundtable that a small workgroup be established to identify and explore various enforcement options or combinations that may be available. In this regard, the MO Utilities state their belief that active participation of the Attorney Generals' Office, the Commission and a cross-section of interested stakeholders in such a workgroup could result in the identification of realistic options and recommendations that a larger audience could then review and consider.

STAFF COMMENTS

The Staff believes that further timely discussions regarding the enforcement issue is critical to the overall success of the "Chapter 319 Revision Project" and that the establishment of a small workgroup to initiate those discussions, and develop recommendations for further consideration by the larger audience of interested stakeholders, would be a good approach to take. As a result, the Staff plans to pursue the establishment of a small workgroup to discuss enforcement options, and will be suggesting and soliciting members for such a workgroup in the near future.

Additionally, regardless of whether a change in enforcement authority is implemented, the Staff believes that changes to the general penalty provisions are appropriate. In that regard, the Staff is considering changes to the penalty provisions that would make those provisions similar to the penalty provisions applicable to natural gas pipeline safety violations that currently exist in the statutes in section 386.572. ***However, the Staff has not yet decided whether to include such suggested changes in its next draft of the Chapter 319 proposed revisions document, or to include this matter in the discussions of the workgroup discussed above. As a result, the Staff encourages interested stakeholders to submit additional comments regarding that matter to the Staff at their earliest convenience.***

319.050 – Emergency Excavations

The provisions of sections 319.025 and 319.026 shall not apply to any excavation ~~when~~ that is necessary due to an emergency as defined in section 319.015. An excavation may proceed regarding such emergency, provided all reasonable precautions have been taken to protect the underground facilities. In any such case, the excavator shall give notification, substantially in compliance with section 319.026, as soon as practical, and upon being notified that an emergency exists, each underground facility owner in the area shall, within two hours after receiving such notice, provide markings or contact the excavator with any information immediately available to assist the excavator and shall inform the excavator if not able to mark within the two hours of when the underground facility will be marked at the site of the emergency. The excavator may be liable to ~~the owner or operator~~ an underground facility owner for costs directly associated with the locating of any such underground facility relating to a notification of an emergency that does not meet the definition of emergency as stated in section 319.015.

CITY UTILITIES

City Utilities begins its comments by stating that not all emergency repairs need to be done within two hours. In this regard, City Utilities provides an example of an electric pole that is damaged after hours but could be repaired temporarily, thus not requiring excavation until the following day when the pole is replaced. As a result, City Utilities recommends the three priority levels for emergencies that are set out below, with the priority level to be determined by the excavator. Further, for situations where the reported emergency does not meet the definition of an emergency, City Utilities recommends that the excavator be subject to a civil penalty of $100.

> Priority Level 1 – The facility owner must notify the excavator of the approximate location of the underground facility within two hours of the notice.
>
> Priority Level 2 – The facility owner must notify the excavator of the approximate location of the underground facility by 8:00 a.m. the day following the notice.
>
> Priority Level 3 – The facility owner must notify the excavator of the approximate location of the underground facility by 8:00 a.m. the second day following the notice.

MO UTILITIES

The MO Utilities state that one of the most frustrating parts of responding to emergency locate requests is having to respond to situations that may not truly be emergencies as defined in the law, particularly when facility owners are to respond to these requests within two hours even when they know that the excavator will not begin work for up to several days on an "emergency" request. The MO Utilities further state that it seems if a situation is truly an emergency that the excavating party would already be on site ready to work on it or would be there in a matter of several hours to on it. The MO Utilities also state the view that excavators that obtain extended start dates and times on emergency tickets are potentially gaming the system, using it to compensate for poor planning or scheduling and potentially drawing attention and resources from more critical activities.

The MO Utilities propose consideration of the inclusion of a reasonable timeframe within which work must begin on an emergency ticket, in an effort to place balance into this section. In this regard, the MO Utilities suggest that if a facility owner is expected to effectively "jump through hoops" on an immediate basis to respond to such requests, that the excavator making the request be expected to begin work within a reasonable timeframe of four hours.

Additionally, the MO Utilities state that if it turns out that a call is later determined to not be an emergency as defined in the law or the emergency excavation did not commence within the claimed timeframe, the offending party not only pay the direct costs associated with the emergency locate but also be subject to a civil penalty of $10,000 for falsely claiming an emergency situation.

To address the issues raised in their comments, the MO Utilities suggest the changes to the third and fourth sentences of this section that are highlighted in pale blue below.

> In any such case, the excavator shall give notification, substantially in compliance with section 319.026, as soon as practical and commence excavation activities within four hours of contacting the notification center, and upon being notified that an emergency exists, each underground facility owner in the area shall, within two hours after receiving such notice, provide markings or contact the excavator with any information immediately available to assist the excavator and shall inform the excavator if not able to mark within the two hours of when the underground facility will be marked at the site of the emergency. The excavator ~~may~~ shall be liable to ~~the owner or operator~~ an underground facility owner for costs directly associated with the locating of any such underground facility relating to a notification of an emergency that does not meet the definition of emergency as stated in section 319.015 as well as any penalties pursuant to 319.045.

EMPIRE

Empire states that it is not realistic in a large storm that it would have crews on site or that it would be able to begin excavation of any/all emergency locate requests within a specified timeframe. Empire further notes that storm restoration is not a static undertaking, and that things can change at any given time. Additionally, Empire states that by definition if it plans to excavate in less than the three day waiting period, under emergency conditions, it is an emergency ticket. Lastly, Empire states that it prefers that the current law remain unchanged.

STAFF COMMENTS

While the Staff understands, and generally agrees with, the reasoning behind the changes suggested by City Utilities and the MO Utilities, it believes further discussion of this topic should take place within the context of the MOCS Operating Committee meetings to see if an agreement for such changes can be reached by the MOCS members before suggested language to implement such changes is included in a draft of the Staff's Chapter 319 proposed revisions document.

Additionally, the Staff believes the suggested changes are significant enough that other stakeholders should be given the opportunity to comment on them before suggested language to implement such changes is included in a draft of the Staff's Chapter 319 proposed revisions document. ***As a result, the Staff encourages interested stakeholders to submit additional comments regarding this matter to the Staff at their earliest convenience.***

319.055 – Facility Damage Reporting

1. No later than April 15 of each year, each underground facility owner shall submit to the public service commission a report for the prior calendar year including, but not necessarily limited to, information regarding the number and type (routine, emergency, no response, etc.) of excavation notices it received, the source of the excavation notices, the number of excavation notices that resulted in facilities being marked, the number of third-party damages it experienced to its facilities, and the circumstances under which its facilities were damaged;

2. The first report to be submitted under the provisions of subsection 1 of this section shall not be due until after the public service commission promulgates a rule, in accordance with the provisions of chapter 536, RSMo, setting forth the specific information to be collected through the report; provided, however, that the information to be collected, and the manner in which the information is collected, must be such that the information can be aggregated and submitted to the Damage Information Reporting Tool system established by the Common Ground Alliance.

3. In addition to the report required by subsection 1 of this section, the public service commission is granted the authority to promulgate a rule, in accordance with the provisions of chapter 536, RSMo, through which it may establish a system that allows for, but does not require, the real-time reporting, by underground facility owners and excavators, of information regarding damages to underground facilities and information regarding instances of purported non-compliance with the provisions of sections 319.010 through 319.070.

MO AGC

The MO AGC states that it recognizes that Element 9 of the PIPES Act of 2006 requires "analysis of data to continually evaluate/improve program effectiveness", but further states that it will leave it to the Commission and the facility owners to determine the best means of collecting data for analysis. However, the MO AGC also states it believes it is important for "damage reports" to identify the type of excavator reporting the damage (i.e. – contractor, facility owner, home owner, etc.).

AT&T

AT&T states that it generally opposes damage reporting. However, if such reporting is required, AT&T states that it should be limited to annual summary data reporting via the Damage Information Reporting Tool (DIRT) system implemented by the Common Ground Alliance (CGA).

CITY UTILITIES

City Utilities states that since it reports all of its facility damages in the CGA's DIRT system it is uniquely qualified to comment on damage reporting. City Utilities further notes that it damages are added into the DIRT system within 48 hours of the damage, and that it finds the system to be very easy to use. However, City Utilities also recommends that the Commission Staff and the CGA develop a unique DIRT system for Missouri, and that the Commission meet with the MOCS Board of Directors to develop reports that could be used by MOCS and the Commission.

MO UTILITIES

The MO Utilities begin their comments by stating that in comparing the type of data to be reported in subsection 1 to the data fields of the DIRT report referenced in subsection 2 it is apparent that the two do not match up at all. However, the MO Utilities also note that it may be that subsection 1 is just broadly outlining the process envisioned as opposed to stating the actual data that would be collected and reported as is addressed in subsection 2.

As a result, the MO Utilities recommend that the Commission carefully evaluate the type of information it may need and reveal to the facility owners how such data would be used to reduce damages before going to much further. Additionally, the MO Utilities state that leaving these types of decisions to rulemakings may yield many unwanted or unexpected results, and that it would be more reasonable to establish from the very beginning what data will be collected, where it will be aggregated and how it will be used. The MO Utilities also state that the CGA's DIRT system represents a known, established and ready tool used by countless entities across the country, and that adopting DIRT will allow Missouri to move along the process of lowering damages sooner. Additionally, the MO Utilities note that if unique situations develop, adjustments to DIRT data and/or analysis could be made.

Regarding subsection 3, the MO Utilities state that "The need for real-time reporting of damage information and purported non-compliance with Chapter 319 continues to be unclear. What purpose would this serve? What does the Commission envision will be done with these reports? How will this draw on the Commission's resources and the resources of member utilities? The Commission already has an established complaint process where infractions to Commission rules and regulations are addressed. Will this real-time reporting process be melded into the complaint process? Absent a clearer demonstration or explanation for its need, this element should be rejected."

STAFF COMMENTS

Regarding the supposed conflict between the language of subsection 1 and subsection 2, the Staff notes that it certainly did not intend for there to be any conflict. Regarding the suggestions that the DIRT system be required for use by Missouri underground facility owners and that this be the only reporting required, the Staff notes that this would not result in Missouri-specific data being available for the facility owners, MOCS and/or the Commission to analyze and use in developing education and training activities. As a result, the Staff believes that City Utilities' suggestion that a unique DIRT system be developed for Missouri is appropriate, and the Staff also notes that this is the intent of its proposed subsections 1 and 2. However, the Staff does see a possible benefit for facility owners to submit their data to the CGA's DIRT system while a Missouri-specific system is being developed and implemented.

Based on the foregoing, the Staff notes that it will likely include language in its next draft of the Chapter 319 proposed revisions document that would provide authority for the development of a Missouri-specific DIRT-like system, but that would also result in underground facility owners using the CGA's DIRT system until such time that the Missouri-specific system is developed and implemented.

Regarding subsection 3, the Staff notes that the proposed "real-time" reporting system is intended to provide an avenue for facility owners and excavators to report facility damages and/or purported Chapter 319 non-compliances for the benefit of the Commission & Staff in carrying out the proposed enforcement of Chapter 319. To the extent it is determined that the Commission will not play a role in the enforcement of Chapter 319, it is the Staff's view that the real-time reporting system would not be needed. Lastly, the Staff does wish to note that the idea for this proposed system came from a review of the underground facility damage prevention law and a similar reporting system in the state of Texas.

319.060 – Facility Locating Performance Measures & QA Programs

1. The public service commission is granted the authority to promulgate a rule, in accordance with the provisions of chapter 536, RSMo, establishing a requirement that underground facility owners subject to its jurisdiction for any purposes develop and implement performance measures applicable to all persons performing underground facility locating for such owners, and establishing a requirement that such owners develop and implement a quality assurance program to ensure their performance measures for underground facility locating are being met.

2. For the purpose of enforcing the rule promulgated pursuant to the authority granted by subsection 1 of this section, the public service commission is granted jurisdiction over pipeline operators subject to 49 CFR Part 192 and 49 CFR Part 195 that are not otherwise subject to the public service commission's jurisdiction, but only to the extent that similar rules applicable to such pipeline operators have not been established by the pipeline and hazardous materials safety administration of the federal department of transportation.

MO AGC

The MO AGC states that adequately trained and effective "third party locators" are essential to damage prevention, and notes that it will be happy to work with the Commission and facility owners to determine the best means of achieving these goals.

AT&T

AT&T notes that it has implemented various locate performance measures to, among other things, monitor the accuracy of locates, and that it is its understanding that other facility owners have also done so. Further, AT&T states that it joins with other facility owners who uniformly agree that there is no need or justification for the Commission to perform similar activities, such as initiating a rule making intended to develop performance measures. Additionally, AT&T states that it does not believe a rule making is needed, but that if one is commenced its purpose should be strictly limited to encouraging facility owners to develop and implement their own internal performance measures, to the extent they have may not already have done so.

CITY UTILITIES

City Utilities recommends the establishment of locating measurements for locating companies and member utilities, since the quality of the locate does make a difference in damage prevention and construction productivity. However, City Utilities also states that it believes this section needs to be further defined as to what exactly the performance measures will be.

MO UTILITIES

The MO Utilities state that they have no objection in allowing individual facility owners the right to develop and implement their own locate performance measures and to develop and implement their own quality assurance programs to ensure their stated performance measures are met. Further, the MO Utilities state that these are managerial, operational and contractual issues they have dealt with for some time as underground facilities owners. Additionally, the MO Utilities ask why there is a need for a rulemaking to establish this requirement and why 319.060 couldn't be written in such a way as to state that facility owners will perform these activities? Lastly, the MO Utilities state that if the Commission wants to verify that such measures have been addressed that it could request those documents through its general regulatory authority.

STAFF COMMENTS

The Staff's initial thought regarding the comments questioning the need for a rulemaking is that this section could likely be written in a manner that would not result in the need for a rulemaking. And, subject to further consideration, the Staff notes that it will likely include language in its next draft of the Chapter 319 proposed revisions document to accomplish that, with that language also focusing only on a requirement that the underground facility owners establish their own locating standards and quality assurance programs.

319.065 – Establishment of Damage Prevention Review Board

1. There is hereby established the underground facility damage prevention review board, to be operated under the oversight and budget of the public service commission, the purpose of which is to act as an arbitrator of disputes related to the provisions of sections 319.010 through 319.070, to review reported violations of the provisions of sections 319.010 through 319.070, and to make recommendations to the public service commission regarding the imposition of civil penalties for violations of the provisions of sections 319.010 through 319.070. The board may also make recommendations to the public service commission regarding its promulgation of rules related to the provisions of sections 319.010 through 319.070, if such rules promulgation occurs after the date the board begins its operations.

2. The members of the review board, as established by the provisions of subsection 3 of this section, shall be appointed by the governor for a term not exceeding six years, with the initial members of the board to be appointed no later than June 30, 2011 and with the initial board chairman being appointed by the governor; provided, however, that the board member from the public service commission shall be appointed by the public service commission.

3. The review board shall consist of the designated number of members from each of the following interest groups:

(1) the public service commission – one member;

(2) natural gas system operators – one member;

(3) electric system operators – one member;

(4) telecommunications system operators – one member;

(5) water system operators – one member;

(6) sewer system operators – one member;

(7) the notification center – one member;

(8) state department of transportation – one member;

(9) underground utility locating companies – one member;

(10) excavators/excavator organizations – three members.

4. Compensation for members of the review board shall be limited to a daily per diem, to be determined under the provisions of subsection 5 of this section, applicable only to the days that members of the board are conducting official business.

5. Before the review board can take any official actions under the provisions of this section, the public service commission shall promulgate rules, consistent with the provisions of chapter 536, RSMo, setting forth the manner in which the board will be organized, including the establishment of standing committees, setting forth the manner in which the board will operate in carrying out the authority granted to it by subsection 1 of this section, and establishing the daily per diem compensation for board members and the procedures for payment of the per diem.

MO AGC

For the reasons expressed in its 12/05/09 comments, the MO AGC states that it has serious reservations about equitable enforcement through a "Board", especially as is currently proposed for the underground facility damage prevention review board that would be established by the provisions of this proposed section. Additionally, the MO AGC states that it opposes a board with direct authority to levy civil penalties and also questions whether Missouri law would even allow such penalties. Further, the MO AGC states that if an investigatory and hearing function is created in a new enforcement provision that those functions are not properly filled by a part-time board. Lastly, the MO AGC notes that it will be happy to work with the Commission and other stakeholders toward more effective enforcement, but reiterates that it does not support a "Board" as the mechanism to achieve that.

AT&T

See comments provided on page 21 regarding 319.045/316.046 – Change of Enforcement Authority.

CITY UTILITIES

City Utilities recommends that any member of the review board who are facility owners or operators be required to be members of MOCS.

MO UTILITIES

The MO Utilities state that the enforcement option or mode that is ultimately selected and pursued will greatly influence whether a review board is needed or not. The MO Utilities further state that if it is determined that a review board is needed, then the focus will need to be on the purpose and function of the board so as not to duplicate other efforts and to ensure prompt, fair and consistent treatment of participants to the process.

SITE

As was noted in its previous comments, SITE states that it is open to the creation of a damage prevention review board, and with the authority to act as an arbitrator to resolve disputes relative to the provisions of the law. However, SITE does note the following concerns with regard to the current proposal.

1) The review board makeup seems weighted more towards the utilities. Could an excavator get a fair and impartial examination of the facts by the review board?

2) A 12-member review board may be too large a group to handle disputes. Perhaps a subcommittee composed equally of utility and excavator members with a PSC member may be a more equitable approach.

3) Without knowing the rules and regulations that would govern the board, it is difficult for SITE to give acceptance to the proposal.

STAFF COMMENTS

The Staff believes that further discussions regarding the possible establishment of a damage prevention review board should be included along with the further discussions regarding possible changes to the Chapter 319 enforcement provisions. Accordingly, the Staff believes this topic should be included in the work of the small workgroup it anticipates being established to address the enforcement issues, as discussed in the Staff Comments on page 25 herein regarding sections 319.045/319.046.

319.070 – New Facilities to be Locatable

Beginning January 1, 2012, each underground facility owner shall install his or her facilities in a manner such that the facilities can be located through the use of electronic locating devices, or the location of facilities installed on or after January 1, 2012 shall be documented on as-built drawings, or by the use of other means such as the state plane coordinates system, such that the owner can provide the approximate location of the facilities.

MO AGC

The MO AGC states that it supports these requirements as desirable goals. However, it also states that it recognizes various technical challenges to facility owners in complying with the requirements. Further, the MO AGC notes that it will be pleased to work with the Commission and other stakeholders on these provisions.

AT&T

AT&T states that this proposed section should be deleted/rejected in its entirety. In support of this position, AT&T notes that the incidence of damages is rare when the existing notification process in properly used by excavators. Additionally, AT&T states that the requirement for electronic locating devices is unnecessary and expensive. Further, AT&T notes that the greatest causes of facility damages are excavators who do not call in for locates, as demonstrated by its response to the Staff's October 2009 Underground Facility Damage Assessment Survey, and that this proposed section does nothing to address that issue.

CITY UTILITIES

As stated in previous comments, City Utilities believes all new facilities need to be locatable through electronic locating equipment, measurement or state plane coordinates.

MO UTILITIES

As stated in previous comments, the MO Utilities note that installing new facilities so that they are locatable electronically or by measurement has been a gas industry practice for years. Additionally, the MO Utilities state that they have no objection to formally codifying this practice.

STAFF COMMENTS

The Staff believes this proposed section is reasonable and that it will assist in reducing the number of facility damages that occur. As a result, the Staff plans to continue to pursue the implementation of this proposed section and does not plan to make any changes to the proposed language in the next draft of its Chapter 319 proposed revisions document.

Additionally, the Staff notes that the proposed language allows for multiple means of providing the approximate location of newly installed underground facilities and thus that it does not require the use of electronic locating devices.

Depth of Burial Installation Standards for New Facilities

SITE

In addition to the proposed standards for new underground facilities to be locatable, as addressed by the Staff's proposed section 319.070, SITE supports the implementation of statewide minimum depth of burial requirements for new underground facilities. In this regard, SITE encourages the consideration of language used in various counties in Missouri. For example, SITE notes that Phelps County has depth requirements for cable, electric, natural gas and other utilities located along its county roadways, and that St. Charles County has minimum depth requirements for underground installations along its county roadways. Additionally, SITE states that it is important for excavators to have a certain idea of how deep facilities are buried underground and that minimum depth requirements, especially along public roadways, should assure a safer job site.

AT&T

AT&T states that Missouri currently has standards addressing this issue and thus that there is no need to further codify this matter in this legislation.

CITY UTILITIES

City Utilities states that depth standards already exist for natural gas, electric, telecommunications and water facilities, as are set out below. City Utilities also notes that it would create confusion and inconsistency if a separate set of installation standards is created.

1) The Public Service Commission has established depth standards for the installation of natural gas facilities.

2) The National Electric Safety Code has established depth standards for the installation of electric and telecommunications facilities.

3) The American Water Works Association has established depth standards for the installation of water facilities.

City Utilities further notes that it would be a problem if excavators were to assume that facilities will remain at the depth at which they are installed because facility owners cannot guarantee that a facility will remain at its original depth. For example, cover may be added or removed without the facility owner's knowledge. Lastly, City Utilities notes that once a facility is buried there is no way to determine the depth of the facility without exposing it.

MO UTILITIES

The MO Utilities state that there is no need to set out depth requirements in Chapter 319 because depth at time of installation is already established for most types of utilities regulated by the PSC, as are set out below.

1) Natural gas utilities must install their facilities in accordance with the standards set out in 4 CSR 240-40.030, which includes minimum installation depth requirements for mains and service lines (as well as for transmission lines and feeder lines).

2) Telecommunications companies must follow rules related to the safe design, installation and maintenance of their facilities, as are set out in 4 CSR 240-18.010 and 4 CSR 240-32.060. Chapter 18 establishes the safety standards and Chapter 32 addresses the design/construction standards, which includes minimum installation depth requirements for telephone feeder and distribution cables and buried cable drops.

3) Electric utilities are required to follow the requirements of the National Electric Safety Code adopted by 4 CSR 240-18.010, which include minimum installation depth requirements for various types and sizes of electric facilities depending in part on the location of the facilities.

STAFF COMMENTS

As is evidenced by the comments submitted by the various stakeholders, there are currently several state regulations and/or county ordinances that establish standards regarding the initial depth of burial of underground utility facilities. None of those standards, however, are codified in state law, at least so far as the Staff currently knows, and many of the referenced standards apply only to PSC-regulated utilities and not to all underground facility owners. Also, some of the referenced standards, such as those established by the American Water Works Association, have not been adopted by the PSC and thus do not even apply to PSC-regulated utilities.

Based on the above, the Staff believes it is reasonable to give further consideration to the establishment of statewide standards regarding the initial depth of burial of underground utility facilities that would apply to all underground facility owners as defined in Chapter 319. However, the Staff also believes further research is needed on this matter and thus does not plan to include language that would establish such statewide standards in its next draft of the Chapter 319 proposed revisions document. ***The Staff does, however, encourage interested stakeholders to submit further comments regarding this matter to the Staff at their earliest convenience.*** *In particular, the Staff is seeking the identification of any known state, county or local standards not identified in the stakeholder comments summarized herein, and comments that address the question of whether Chapter 319 is the appropriate chapter in state law wherein such standards should be "housed."*

White-Lining of Area of Excavation

MO AGC

In response to previous comments suggesting that excavators should be required to "white-line" the area of proposed excavations, the MO AGC states that it believes the provisions of 319.025.4 constitute a reasonable approach to this issue. In this regard, the MO AGC notes that if a facility owner cannot determine the location of an excavation from the notice of intent to excavate, the excavator is required to further identify the location by marking or by providing project plans. Further, the MO AGC states that a requirement to "white-line" in all circumstances is unnecessary and burdensome, and could place many excavators in violation of the law. In this regard, the MO AGC notes that if an excavator is going to excavate and grade a large area, such as several acres, it would be impossible to mark the entire area of the excavation. Lastly, the MO AGC states that this provision will require careful consideration if the provisions of the current law are found to be inadequate to protect underground facilities.

STAFF COMMENTS

The Staff believes the current provisions of 319.025.4 referenced by the MO AGC, and which were also referenced by a MOCS representative during the 10/21/09 Stakeholder Roundtable discussion of this matter, adequately address the need for "white-lining" of the area of excavation described in a notice of intent to excavate. As a result, the Staff does not plan to propose any changes to Chapter 319 pertaining to this matter.

Clarification of Public Service Commission Jurisdiction

STAFF COMMENTS

In the event the Commission is granted authority to enforce the provisions of Chapter 319, either limited or total, the Staff believes it would be appropriate to include a provision in Chapter 319 noting that such authority is specifically limited to the matters covered by Chapter 319 as it pertains to entities that are not otherwise subject to the Commission's jurisdiction. In this regard, the Staff believes that a provision similar to the ones found in section 247.172 and section 394.312 of the Missouri statutes, which pertain to water service area territorial agreements and electric service territorial agreements, would be appropriate. Excerpts from subsection 8 of section 247.172 and subsection 8 of section 394.312 are set out at the end of these comments, and represent the type of language the Staff believes would be appropriate to include in Chapter 319.

Based on the above, the Staff plans to include language in its next draft of the Chapter 319 proposed revisions document addressing this matter, but the Staff also notes it has not yet determined where such language should be placed. ***Additionally, since this is the first time this matter has been addressed, the Staff invites interested stakeholders to submit comments regarding this matter to the Staff at their earliest convenience.***

247.172.8. (fifth sentence)

Nothing in this section shall be construed as otherwise conferring upon the commission jurisdiction over the service, rates, financing, accounting or management of any public water supply district or municipally owned utility and except as provided in this section, nothing shall affect the rights, privileges or duties of public water supply districts, water corporations subject to public service commission jurisdiction or municipally owned utilities.

394.312.8 (fifth sentence)

Nothing in this section shall be construed as otherwise conferring upon the commission jurisdiction over the service, rates, financing, accounting or management of any rural electric cooperative or municipally owned utility and except as provided in this section nothing shall affect the rights, privileges or duties of rural electric cooperatives, electrical corporations or municipally owned utilities.