

## 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 Comments Regarding Proposed Changes to Chapter 319, RSMo

DATE: January 21, 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 comments that participants made during the 10/21/09 Damage Prevention Stakeholder Roundtable and summaries of the written comments that interested stakeholders have since submitted to File No. GW-2010-0120.

The Staff also notes that it is working on its responses to the above-referenced comments and its suggested changes to the Chapter 319 proposed changes document. Once the Staff completes its comment responses and suggested changes to the Chapter 319 proposed changes document, the Staff plans to submit its responses and a new draft of the proposed changes document to File No. GW-2010-0120.

Lastly, if Roundtable participants to which comments are attributed or stakeholders that submitted written comments have concerns that the summarized comments included in the attached document misrepresent the comments made/submitted, those concerns should be directed to Dale Johansen by e-mail at [dale.johansen@psc.mo.gov](mailto:dale.johansen@psc.mo.gov).

Attachment: Summary of Comments Regarding Proposed Changes to Chapter 319, RSMo

# SUMMARY OF COMMENTS ON PROPOSED CHANGES TO CHAPTER 319, RSMo

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## NOTES REGARDING COMMENT SUMMARIES

- (1) The comment summaries attributed to individuals are summaries of comments made during the 10/21/09 Damage Prevention Stakeholder Roundtable.
- (2) The comment summaries attributed to one of the entities listed at the bottom of this page are summaries of written comments submitted to File No. GW-2010-0120.

## COLOR CODING FOR PROPOSED CHANGES SHOWN (pages 6 – 23)

Note: The proposed changes shown are taken from the Chapter 319 document that was discussed at the 10/21/09 Damage Prevention Stakeholder Roundtable hosted by the PSC. This document can be found in Item 1 in the EFIS Working Docket.

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

## LIST OF ENTITIES THAT SUBMITTED WRITTEN COMMENTS

**Associated General Contractors of Missouri (AGC)**  
**Attorney General's Office (AGO)**  
**AmerenUE (UE)**  
**City Utilities of Springfield (CU)**  
**Missouri Utilities**  
(Laclede Gas, Empire District Electric, KCP&L and KCP&L GMOC)  
**Missouri-American Water Company (MAWC)**  
**Missouri Gas Energy (MGE)**  
**Missouri One Call System (MOCS)**  
**Missouri Rural Water Association (MRWA)**  
**Missouri Telecommunications Industry Association (MTIA)**  
**SITE Improvement Association of St. Louis (SITE)**  
**USIC Locating Services, Inc. (USIC)**  
(d/b/a S M & P Utility Resources)

## **GENERAL COMMENTS**

### **ASSOCIATED GENERAL CONTRACTORS OF MISSOURI**

The AGC notes that it has 223 members, with 76 of those being "contractor members whose work in building public works and private improvements involves excavations on large and small projects on an almost daily basis." The AGC further notes that it "has an intense interest in your suggested statutory changes and a long history of with "One Call" legislation, particularly in regard to passage of legislation requiring a notification center for the statewide receipt and dissemination of excavation notices in 1991 and phased in mandatory participation in 2001 . . ." The AGC also states "It is our understanding that the Commission's current damage prevention effort is underwritten by two concerns: 1) The adequacy of Missouri's current statutes and the effectiveness of enforcement in Missouri in compliance with the Pipeline Inspection, Protection, Enforcement and Safety (PIPES) Act of 2006; and 2) The unacceptably high incidents of excavation damage to underground gas pipelines which the Commission reports averaged 2,765 per year in CY2007 and CY2008."

The AGC also makes mention of the federal Advance Notice of Proposed Rulemaking regarding possible federal enforcement of state damage prevention laws and notes that it will likely be sometime in 2011 before any such rule would become effective – and then states that "passage of legislation now may be premature because the US DOT rulemaking is not complete and in effect." The AGC further states that "Missouri's current statutes appear to meet requirements of Section 2 of the PIPES Act for a comprehensive nine-point damage prevention program, except potentially for enforcement."

Additionally, the AGC notes the results of the Common Ground Alliance's (CGA) 2008 "DIRT" Report regarding the reported root causes of underground facility damages – which shows a decrease in damages over the last few years – and states that "It would be interesting to compare the Commission's CY2007 and CY2008 data and data from prior years as to whether there is an increasing or decreasing trend in Missouri." Further, the AGC states that "If Missouri's damage prevention statute is to be further amended it would help to know the root cause of all or a sampling of the pipeline or other accidents comprising the Commission's CY2007 and CY2008 data."

With regard to amending existing civil penalty provisions, the AGC suggests that underground facility damages be analyzed as to root cause and then states the following: "If the primary reason for damage is failure to make notice of excavations, excavation practices and/or locating practices by utilities, perhaps penalty provisions could be amended to establish a graduated penalty structure which penalizes habitual offenders. It may be that the current statutory penalty of \$10,000 per day per violation with a cumulative cap for \$500,000 is so large that prosecutors hesitate to bring such action. Perhaps a statute setting penalties structured as to the seriousness of specific violations by an excavator, facility owner, third party locator, notification center or other regulated party would bring more effective enforcement than the current law's large dollar amount penalties."

### **DON HILLIS – MISSOURI DEPARTMENT OF TRANSPORTATION (MODOT)**

(also MOCS board member)

Has there been any preliminary work done on a fiscal note for the proposed changes? Clearly would be costs on state/local governments and businesses. This needs to be done sooner rather than later.

### **JAY SCHULTEHENRICH – SITE IMPROVEMENT ASSOCIATION OF ST. LOUIS (SITE)**

(1) Why are the changes to the use of the term "underground facility owner" being proposed?

(2) Noted that facility "depth" matters are not addressed – either from the perspective of approximate depth being provided along with locates or from the perspective of installation standards being set for initial facility depth. Standards for initial depth of various types of facilities should be considered along with the proposal for new facilities to be locatable.

### **MISSOURI ONE CALL SYSTEM**

MOCS states its belief that "the proposed changes to 319 need further discussion and analysis prior to being submitted for possible legislative action." Additionally, MOCS states that it has identified proposed changes in addition to those for which it is submitting specific comments – such as working day, exemptions from making a request and outdated language – that while not affecting MOCS directly might affect its members in a negative manner and thus could affect MOCS in the future.

### **MISSOURI RURAL WATER ASSOCIATION**

The MRWA notes that it has over 850 member systems, and that it is offering "brief comments" due to the "very limited time" available to review the proposals. Additionally, the MRWA states that "It appears that the proposed changes to Chapter 319 creates more "government", i.e. in increased reporting requirements, new commissions, new staff, and then ultimately fees and revenue from penalties to sustain those same new personnel and activities." Further, the MRWA states that "without substantial evidence the present system is "broken" we are hard pressed to support any changes."

### **MISSOURI TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

In its introductory comments, the MTIA states that "In general, the proposal as now drafted appears to be overreaching in many respects, duplicative of existing processes, and unnecessarily burdensome to the regulated utilities." In its closing comments, the MTIA states the following:<sup>1</sup>

While we understand the Commission's desire to prevent significant damage to underground facilities, we are hard-pressed to endorse the Commission's assumption of authority over a system that is well established and functioning efficiently. The Missouri One Call board has done an excellent job overseeing excavators and working with utilities to increase the accuracy of locating facilities.

Adding yet another layer of administrative oversight will only result in additional costs to regulated companies. If the Commission's main concern is the number of incidents where damage occurs to gas utility facilities, the Commission should use its existing authority to enact rules governing gas safety that would address this concern rather than imposing additional, costly, and ultimately unnecessary regulation on all regulated utilities.

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<sup>1</sup> Taken verbatim from comments.

**RIC TELTHORST – MISSOURI TELECOMMUNICATIONS INDUSTRY ASSOCIATION (MTIA)**

(1) Expressed a concern that some of the reports required under the proposed changes would be duplicative of reports already required of telecommunications companies.

(2) Why / Is the AG's office interested in "yielding" the enforcement authority?

(3) Asked whether there are general exceptions for municipal systems not being required to use the system?

**TERESA HARTIGAN – MISSOURI GAS ENERGY (MGE)**

Need notification of "dig-overs" regarding high profile pipelines since inspections are required.

**USIC LOCATING SERVICES, INC.**

In support of its position that "the vast majority" of facility damages "are not caused by locator error", USIC includes the following excerpt from the 2008 CGA "DIRT" Report.

*Of the total number of incidents reported in 2008, more than half (73,152) had a known root cause, and were identified as follows:*

- Notification not made 37 percent*
- Excavation practices not sufficient 37 percent*
- Locating practices not sufficient 22 percent*
- Notification practices not sufficient 3 percent*
- Miscellaneous root cause 1 percent*

## **COMMENTS ON MATTERS NOT ADDRESSED IN PROPOSED CHANGES**

### **PROVISION OF FACILITY DEPTH INFORMATION**

#### **AMERENUE**

In response to comments at the Damage Prevention Stakeholder Roundtable, UE states that its policy is to not provide facility depth information mainly because it has no control over what happens after facilities are installed, and thus that the initial installation depth is not necessarily an accurate indication of the current depth of facilities.

#### **SITE IMPROVEMENT ASSOCIATION OF ST. LOUIS**

SITE states that it believes proposed section 319.070 should include "a depth requirement for all underground facilities such that all new facilities must be installed at minimum depths."

### **ADDITION OF "HAND-DIG" REQUIREMENT**

#### **MISSOURI UTILITIES**

The Missouri Utilities "believe that an effective program for reducing the number and severity of damages should include a mandatory "hand-dig" requirement." In support of this additional proposed change, the Missouri Utilities note that such a requirement exists in section 319.037 with regard to trenchless excavations, and that "this requirement has been significantly effective in preventing or at least minimizing the number of excavation damages."

However, KCP&L and KCP&L GMOC note that hand-digging around electric facilities comes with additional risk and thus "strongly advocate for additional language requiring utilities and excavators to establish criteria and safe practices for hand-digging around electric facilities, require qualified persons to perform this task, perform periodic review of such criteria and practices, and maintain records of initial and refresher training of personnel (sic) that are required to hand-dig near electric facilities."

#### **MISSOURI GAS ENERGY**

MGE states its agreement with the comments submitted by the Missouri Utilities.

### **WHITE-LINING AREA OF EXCAVATION**

#### **AMERENUE**

UE suggests adding language, possibly to Section 319.025, that would require excavators to "white-line" the area to be excavated, as this would reduce locating time by eliminating unnecessary areas to be marked.

#### **DEREK LEFFERT – MISSOURI ONE CALL SYSTEM (MOCS)**

In response to a question that came in over the Internet about why "white-lining" of the excavation area is not required, Derek noted that subsection 319.025.4 essentially requires this if it is requested by the underground facility owner.

## **PHASING-IN OF NOTIFICATION CENTER PARTICIPATION**

### **ASSOCIATED GENERAL CONTRACTORS OF MISSOURI**

The AGC states its view that "The next legislation revising the One Call Law should repeal outdated language referencing phase-in dates which have now passed."

### **SITE IMPROVEMENT ASSOCIATION OF ST. LOUIS**

SITE notes that language regarding the "phasing-in" of underground facility owners' participation in the notification center (MOCS) – which first appears in section 319.022 and also appears in a number of other sections – was originally approved to give such owners time to prepare for their participation in the notification center. SITE questions whether such language continues to be necessary, and asks "Aren't all underground facility owners required to become participants in the notification center?"

## **319.015(3) – DEFINITION OF EMERGENCY**

**(3) "Emergency", either:**

**(a) A sudden, unexpected occurrence, presenting a clear and imminent danger demanding immediate action to prevent or mitigate loss or damage to life, health, property, or essential public services. "Unexpected occurrence" includes, but is not limited to, thunderstorms, high winds, ice or snow storms, fires, floods, earthquakes, or other soil or geologic movements, riots, accidents, water or wastewater pipe breaks, vandalism, or sabotage; or**

**(b) Any interruption in the generation, transmission, or distribution of electricity, or any damage to property or facilities that causes or could cause such an interruption;**

### **MARK BOYLE – GAS WORKERS LOCAL 11-6 (GAS WORKERS)**

(1) Shouldn't hand-digging be allowed in emergency situations without the need for a notice to be made before the work begins?

(2) Why shouldn't gas service be included along with electric service in (3)(b)?

## **319.030.4 – USE OF MARKINGS TO PROVIDE LOCATION**

**4. The ~~owner or operator~~ underground facility owner shall provide the approximate location of underground facilities by use of markings. If flags or stakes are used, such marking shall be consistent with the color code and other standards for ground markings.**

### **DEREK LEFFERT – MOCS**

Suggested that a reference to the APWA color code be added to this section for consistency with other sections (see definition of "marking").

## **COMMENTS ON PROPOSED CHANGES TO CHAPTER 319**

### **319.015(4) (definition of excavation)**

*(4) "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 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;*

#### **TERESA HARTIGAN – MGE**

Provisions pertaining to railroads should be changed to require that locate requests be submitted even if excavation is being done only on land owned by the railroad or on adjacent land during an emergency.

#### **BILL GAMBLE – MISSOURI ASSOCIATION OF RAILROADS**

Any changes to provisions pertaining to railroads would need to be "fully vetted" since the current language has been around for quite some time and was subject to much negotiation.



**319.015(6) & 319.026.6 (definition of extended excavation project & ticket life)**

**319.015 (6) "Extended excavation project", an excavation that will clearly not be completed within fifteen working days after the expected start date included with a notice of intent to excavate provided to the notification center, as designated by the excavator providing the notice when the notice is provided;**

**319.026. 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 a period not exceeding fifteen working days after the expected start date provided with the notice so long as the markings continue to be visible and usable. However, if the excavation that is the subject of the notice meets the definition of an extended excavation project, and was designated as such when the notice was submitted to the notification center, then the work may continue for up to thirty working days so long as the markings ~~are~~ continue to be visible and usable.**

**ASSOCIATED GENERAL CONTRACTORS OF MISSOURI**

The AGC states that it is "intensely opposed to repeal or modification of the "visible and useable" standard enacted in 2001 allowing an excavator to commence and continue work as long as markings show the location of the facility marked by the utility owner or his third party locator." Further, the AGC notes that adding an exception for an extended project "Does nothing to remove the multiple and varied reasons a contractor doing excavation may not be able to begin the excavation on the "expected date" stated in the notice of excavation . . ."

Additionally, the AGC states that "The provision will be self defeating. The provision for excavators to choose between a regular "15 working day" excavation and a "30 working day" extended project notice will lead the excavator to choose the longer notice period because of the uncertainties . . . over which he has no control."

The AGC also states that "Work done by AGC of Missouri members on larger projects may go on for months and sometimes years and is often completed in phases. For such projects contractors plan excavation notices to assure facilities will be marked when work is actually being performed. Putting a fifteen or thirty working day limit on a locate does nothing to enhance safety. If markings are "visible and useable" making another notice and waiting . . . for the facility owner to remark what is already marked is a waste of time and money for both the contractor and facility owner."

Lastly, the AGC notes that "It is the excavator's responsibility to make notice, make sure location is marked before he digs and call back if prior markings are obliterated. If excavation is done in a careful and prudent manner, the current statute assures safety without any artificial time limits on an excavator's ability to do what the job requires."

**AMERENUE**

UE states that is believes a more appropriate time frame for a ticket life would be 30 calendar days, rather than the proposed 15 working days.

**BO MATISZIW – LACLEDE GAS COMPANY (LACLEDE)**

Shouldn't there just be a flat ticket life period (perhaps 28 to 30 days), rather than using the proposed language? Expressed a concern that excavators will inappropriately "designate" projects as extended projects due to uncertainty about how long projects might take.

## **CITY UTILITIES OF SPRINGFIELD**

CU notes that the proposed changes would introduce two types of tickets (one with a 15-day ticket life and one with a 30-day ticket life); states that it "sees no benefit in having two types of tickets"; and notes its belief that if "excavators start receiving invoices for damages after 15 working days, every ticket will become a project ticket." As a result, "CU recommends the selection of one type of ticket with a life of 30 working days."

## **ED TWEHOUS – TWEHOUS EXCAVATING & ASSOCIATED GENERAL CONTRACTORS OF MISSOURI (TWEHOUS/AGC)**

Doesn't see a great need for a "ticket life" especially if it is tied to the excavation completion notice. What we have now works, and the proposed change would be burdensome and expensive.

## **MARK BOYLE – GAS WORKERS**

Mentioned the Texas requirement for written agreement between facility owner and excavator for projects that will exceed 14 days in length.

## **MISSOURI UTILITIES**

The Missouri Utilities state that establishing a life for a locate request is a good idea and a concept that they support. Further, the Missouri Utilities note that for jurisdictions that have "ticket life" designations, the life is normally set at 28 to 30 calendar days, which is long enough to capture most projects and short enough where the marks will still be usable; and that if additional time is needed to complete a project, an extension can be provided for.

Additionally, the Missouri Utilities noted that an example of ticket life language and an extension procedure can be found in the Illinois One Call Law at [www.illinois1call.com](http://www.illinois1call.com).

## **MISSOURI-AMERICAN WATER COMPANY**

MAWC supports these proposed provisions and notes that they "would reduce the "stale ticket" problem experienced by many facility owners." Further, MAWC states that "Requiring an excavator to get new locates if project is not completed within 15 days (or 30 days for an extended project) would reduce damage to facilities and would help eliminate disputes over whether locates were visible at the time the damage occurred."

## **MISSOURI GAS ENERGY**

MGE states its agreement with the comments submitted by the Missouri Utilities.

## **SITE IMPROVEMENT ASSOCIATION OF ST. LOUIS**

SITE states that it "opposes this new definition on the basis that we oppose a "Life of Ticket" concept in the law." SITE further notes that "Construction work, performed outside, is an imperfect industry in terms of time schedules." Additionally, SITE states that "Additional notification on the part of the excavator, as contained in the draft, is burdensome." Lastly, SITE states that "Our members prefer the law the way it is currently written."

### **319.015(16) (definition of trenchless technology)**

~~(14)~~(16) "Trenchless excavation", horizontal excavation parallel to the surface of the earth which does not use trenching or vertical digging as the primary means of excavation, including but not limited to directional boring, tunneling, ~~or~~ augering, or plowing-in cable, conduit or pipe;

#### **SITE IMPROVEMENT ASSOCIATION OF ST. LOUIS**

SITE questions how "plowing-in cable, conduit or pipe" is considered trenchless since the ground is disturbed, and further notes that past interpretation of this definition "was that any construction activity breaking the surface of the ground is considered excavation, not trenchless."

### **319.015(19) (definition of working day)**

~~(17)~~(19) "Working day", every day, except Saturday, Sunday or a legally declared ~~local,~~ state or federal holiday.

#### **EWELL LAWSON – MISSOURI ASSOCIATION OF MUNICIPAL UTILITIES (MAMU)**

Removal of reference to local holidays would have a significant fiscal impact on municipalities and also take away local control of work scheduling.

### **319.026.9 (excavation completion notices)**

9. Upon completion of the excavation that is the subject of a notice of intent to excavate previously submitted to the notification center, the involved excavator shall submit a project completion notice to the notification center, including a reference to the locate request ticket number provided by the notification center for the original notice of intent to excavate. Upon receipt of an excavator's project completion notice, the notification center shall transmit a project completion ticket to the notification center participants to which it transmitted a locate request ticket for the original notice of intent to excavate.

#### **ASSOCIATED GENERAL CONTRACTORS OF MISSOURI**

The AGC states that it "opposes this proposed amendment." The AGC further notes that this proposed requirement "would double the workload of excavators, facility owners and the notification center in making and receiving notices without any added benefit to worker or public safety or protection of underground facilities."

#### **AMERENUE**

UE does not support the addition of this subsection, as it would add costs but would not result in improved safety.

#### **BO MATISZIW – LACLEDE**

Doesn't believe these notices would have much benefit, but will be burdensome and will increase costs, particularly if an additional notice goes from the call center to the facility owners.

## **CITY UTILITIES OF SPRINGFIELD**

CU notes that with an established ticket life the need for an excavation completion notice would not exist, in that the underground facility owners could assume that the excavation has been completed if a new/renewal ticket is not forthcoming.

Additionally, CU notes a large percentage of the locate requests it completes are its own and that it would thus be notifying itself that an excavation had been completed. Further, CU states that "The cost of additional programming, manpower, and notification costs makes this section too costly to member utilities."

Based on the above, CU " recommends the rejection of this provision as unnecessary and costly."

## **DON HILLIS – MODOT**

How would notices of completion of excavation be handled? Concern is related to large projects that last a long time. (Answer was that these notices would be done on a per ticket basis.)

## **ED TWEHOUS – TWEHOUS/AGC**

Noted that these notices would be very burdensome to the excavators, and also likely to the facility owners. Wondered what would be accomplished by these notices being required?

## **EWELL LAWSON – MAMU**

Noted that these notices would likely result in a significant fiscal impact on local governments.

## **JOHN LANSFORD – MOCS**

Noted that there would be increased costs related to these notices, and that they could possibly be significant, due to additional notices being sent to members.

## **MARK BOYLE – GAS WORKERS**

Should look at implementing an automated system in lieu of what is proposed (referenced North Carolina system).

## **MISSOURI UTILITIES**

The Missouri Utilities state that the activities required under the provisions of this proposed new subsection would be "unnecessary, costly, and extremely unlikely to contribute to enhanced safety." Additionally, several examples of the work-load impact on Laclede Gas are offered in support of the position that this subsection should not be added.

## **MISSOURI-AMERICAN WATER COMPANY**

MAWC states that this proposed addition "would not add any obvious safety benefit to underground facilities but would clearly increase the administrative cost and burden to excavators and owners" and thus "does not support this proposal".

## **MISSOURI GAS ENERGY**

MGE states its agreement with the comments submitted by the Missouri Utilities.

## **MISSOURI ONE CALL SYSTEM**

MOCS states that "completion of the excavation response should be rejected as it would not advance the safety of the excavation site." Further, MOCS estimates that the increased costs to its members "would be above seventy-five percent" of their costs to MOCS due to the additional member notifications that would be required.

## **SITE IMPROVEMENT ASSOCIATION OF ST. LOUIS**

SITE states that its "members find this requirement burdensome and oppose it." Additionally, SITE notes a concern as to what might happen if "the excavator fails to give notice of completion of a project", and a concern regarding this matter being covered in rules and regulations when "we don't know what those will be."

### **319.030.8 (requirement for second call to call center before excavating)**

**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, or if an excavator observes clear evidence of the presence of an unmarked underground facility at the excavation site, 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.**

#### **ASSOCIATED GENERAL CONTRACTORS OF MISSOURI**

The AGC states that "The proposed amendment makes a visual observation at the site of the excavation by the excavator equivalent to proceeding with the excavation without making notice and the facility being marked." In further regard to this matter, the AGC states that it objects to the provision for the following reasons:<sup>2</sup>

- \* What is "clear evidence" is not specified in the statute and would be totally subjective in application. If clear evidence is an above ground utility post or placard, the criteria for "clear evidence" is not specified in the legislation.
- \* A duty for the excavator to divine the presence of an unseen underground facility creates unreasonable additional liability for the excavator for the following reasons:
  - \* Facilities may be in a common trench which are marked as to some facilities, but not all.
  - \* It may be argued that the contour of the ground or the excavator's knowledge of the types of utilities servicing the area indicates "clear evidence".
- \* AGC of Missouri sees this statutory duty for excavators to observe clear evidence of unmarked facilities as a liability issue which will be litigated over facility damages and third party injuries.
- \* The excavator's duty to proceed in a "careful and prudent" manner is already established in 319.035 RSMo, 319.040 RSMo and 319.041 RSMo as well as common law. If there is an underground facility post or placard, a fire hydrant, or other obvious evidence of an underground facility at a site, the excavator is liable. The proposed additional language is unnecessary.

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<sup>2</sup> Taken verbatim from comments.

### **319.030.9 (marking completion notices)**

**9. Upon completing the marking of facilities in response to a locate request ticket, underground facility owners shall notify the excavator that submitted the notice of intent to excavate to the notification center that his or her facilities have been marked, with such notification being provided to the excavator in a manner consistent with the provisions of subsection 6 of this section.**

#### **ASSOCIATED GENERAL CONTRACTORS OF MISSOURI**

The AGC states that it "opposes this requirement" for the following reasons:<sup>3</sup>

- \* It is uncertain under the provision if the notification must also be made within two working days.
- \* It is unclear if the excavator is authorized by subsection 8 of section 319.030 to commence the excavation without making a second notice that there has been no response, if the site of excavation has been marked but there has been no phone call or other notice indicating it has been marked.
- \* A direct expense to the facility owner results from making a notice of marking. As evidenced by the complex process of alternative means of a facility owner making "positive response of no facilities" set out in Subsection 6, it may not always be easy to reach certain excavators (homeowners, part-time backhoe operators, small businesses). Costs of the "notice of response" would be costly to facility owners with no benefit and possibly costs from delays by the excavator.

#### **AMERENUE**

UE does not support the addition of this subsection, as it would add costs but would not result in improved safety.

#### **BO MATISZIW – LACLEDE**

Doesn't believe these notices would have much benefit, but will be burdensome and will increase costs, particularly if an additional notice goes from the call center to the facility owners.

#### **CITY UTILITIES OF SPRINGFIELD**

In lieu of the proposed language for this subsection, CU "recommends member utilities reporting back to the call center, then the excavator viewing his/her ticket on-line to see if all member utilities have responded."

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<sup>3</sup> Taken verbatim from comments.

## MISSOURI UTILITIES

The Missouri Utilities state that the activities required under the provisions of this proposed new subsection would be "unnecessary" and that the subsection "should be rejected." In support of this position, the Missouri Utilities note that the law already provides for a positive response to the excavator if a facility owner does not have facilities in the area of the excavation noted on the locate request; for the facility owners to mark their facilities within the area of the excavation within a prescribed time period or an agreed-upon time period; and for the excavator to make a no response call to MOCS before beginning work if it has not received a no facilities call or the facilities have not been marked.

## MISSOURI-AMERICAN WATER COMPANY

MAWC states that this proposed addition "would only increase costs for facility owners with no obvious benefit to facility safety" and thus does not support it.

## MISSOURI ONE CALL SYSTEM

MOCS states that "This section needs to be rejected as it is a duplication of existing requirements."

## SITE IMPROVEMENT ASSOCIATION OF ST. LOUIS

SITE states that it supports this proposed addition, and that "This type of information is extremely important for the excavator to know so that work can be scheduled and no delays incurred."

## TRIP ENGLAND – BRYDON, SWEARENGEN & ENGLAND

If this is to be done, the call should go to the call center rather than to the excavator to stay away from controversies about whether the follow-up call was or wasn't made.

### **319.030.10 & .11 (clarification of references to two-working day periods)**

**4.10. For purposes of subsections 1 and 6 of this section, a period of two working days begins at 12:00 a.m. on the first working day following ~~when the request is made~~ the date when the notification center receives a notice of intent to excavate.**

**11. For purposes of subsection 5 of this section, a period of two working days begins at 12:00 a.m. on the first working day following the date when a request for an on-site meeting is made.**

## ASSOCIATED GENERAL CONTRACTORS OF MISSOURI

The AGC notes that it supports the clarifications provided in subsection 10 since the "Language in the current statute is awkwardly worded." Additionally, the AGC notes its support of the proposed addition of subsection 11.



### **319.032 (location of sewer laterals)**

319.032. 1. In addition to the other requirements of section 319.030, the response to a notice of intent to excavate received by an owner or operator of a sewer system, where such owner or operator has underground facilities located in the area of the excavation identified in the notice, shall include a determination of whether sewer laterals are located or are likely to be located in the area of the excavation.

2. If the sewer system owner or operator determines that sewer laterals are located or are likely to be located in the area of the excavation identified in the notice, the owner or operator shall, to the best of his or her ability based on the best available information, inform the excavator of the approximate location of such sewer laterals up to the edge of any public right-of-way or utility easement in the area of the excavation.

3. When the response to a notice of intent to excavate by a sewer system owner or operator includes informing the excavator of the approximate location of sewer laterals that are or are likely to be located in the area of the excavation identified in the notice, the owner or operator shall provide its best available information regarding the location of such sewer laterals to the excavator in a manner that may include, but not be limited to, one of the following methods:

(1) Marking the location of locatable sewer laterals in accordance with the applicable provisions of this section, or placing a triangular green mark at the sewer main pointing in the direction of the premises served by unlocatable sewer laterals;

(2) Providing electronic copies of or delivering the information by facsimile or by other means to an agreed-upon location; or

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

4. A good faith attempt by a sewer system owner or operator to inform an excavator of the approximate location of sewer laterals shall constitute full compliance with the requirement of this section, and no person shall be found liable to any party for damages or injuries as a result of performing in compliance with this section. Providing information to an excavator about the approximate location of sewer laterals shall not in and of itself constitute ownership or operation of the sewer laterals by the sewer system owner or operator.

#### **BO MATISZIW – LACLEDE**

Should consider adding water service lines as well. City of St. Louis requires complete service line replacement (main to meter) if damage is done.

#### **CITY UTILITIES OF SPRINGFIELD**

CU states that it "views this change as positive and we support the concept." However, CU also states that it "does not support allowing the sewer operator to avoid liability when they do not know where their connections are."

#### **JAY SCHULTEHENRICH – SITE**

Need to be careful about not getting to the point where property owners would be subject to the law.

#### **MISSOURI UTILITIES**

The Missouri Utilities state that the addition of this proposed section would be a "helpful change" and that they "support the concept *to the extent it can be reasonably implemented.*" (emphasis added)

## MISSOURI-AMERICAN WATER COMPANY

MAWC states that it "strongly objects to requiring a utility to mark customer-owned sewer laterals or other utility types of service lines." MAWC further states that this proposed addition "would substantially increase the cost to facility owners and the frequency of litigation" and that the "inclusion of a safe harbor for a sewer system's "good faith" attempt to locate laterals is no comfort".

## MISSOURI GAS ENERGY

MGE states its agreement with the comments submitted by the Missouri Utilities.

## SITE IMPROVEMENT ASSOCIATION OF ST. LOUIS

SITE states that it "supports this provision as an effort to avoid disruption of sewer service to the properties served by the laterals."

## TRIP ENGLAND – BRYDON, SWEARENGEN & ENGLAND

Should not put requirements on "system owners" for providing info on facilities they don't own. This is not reasonable when considering the liability that may accrue if info provided is not accurate. Also noted that "sewer system" is not defined.

### **319.040.1 (rebuttable 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.*

## ASSOCIATED GENERAL CONTRACTORS OF MISSOURI

The AGC states that it opposes the proposed change from the phrase "as required by this chapter" to the phrase "in accordance with the provisions of sections 319.010 through 319.070". In this regard, the AGC states that "Although the amended language may just restate current law, a court in a future lawsuit over liability may read into amended language a specific intent of the General Assembly to change the meaning of the section. Current law is clear and requires no clarification."

### **319.040.2 (rebuttable presumption of negligence)**

**2. The failure of any underground facility owner to respond to a notice of intent to excavate 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.**

#### **ASSOCIATED GENERAL CONTRACTORS OF MISSOURI**

The AGC states that it "opposes the addition of this language to the law." In this regard, the AGC states that "Although the intent may be merely to "level the playing field" on assignment of liability between excavators and facility owners, how the courts would interpret the intent of the General Assembly in amending the law and how the provision may be applied on a prospective basis is unknown." Further, the AGC states that "We believe in practical terms the Subsection 2 language would be of no benefit to excavators in settling claims prior to litigation because whether an underground facility owner failed to respond as required by the statute is a question of fact which could only be established in court."

Additionally, the AGC states that "The provision may lead to more litigation, not less. Provisions of Subsection 1 creating a rebuttable presumption if the excavator failed to make notice are much simpler to establish based on the records of the notification center, the excavator and the utility owner."

Lastly, the AGC states that "An attorney to Missouri's AGC chapters has previously advised that the sum total of statutory provisions and common law results in a "reasonable care" liability standard for excavators, facility owners, the notification center and third party locators. This would appear to be an equitable standard for all concerned. Further legislation is not needed."

#### **AMERENUE**

UE believes it should be more clearly defined as to what would constitute a "failure to respond" to a notice of intent to excavate.

#### **DON HILLIS – MODOT**

Not necessarily opposed to the addition of this provision, but agrees that the language should be more specific about what constitutes "failure to respond".

#### **JAY SCHULTEHENRICH – SITE**

Language proposed is good and should be expanded to include a reference to the requirement that underground facility owners be members of the notification center. There are facility owners that are not notification center participants and this is an area where that could be addressed to encourage participation.

#### **MARK BOYLE – GAS WORKERS**

Is in favor of the proposed language due in part to utilities' use of contractors and shifting of liability to the contractors.

## **MISSOURI UTILITIES**

The Missouri Utilities state that the proposed addition "creates a vague concept of a facility owner's failure . . . to respond to a notice." Further, the Missouri Utilities state that the existing rebuttable presumption of negligence to which excavators are held "is easy to establish" and that unless there is a clearer definition of what constitutes a facility owner's "failure to respond" to a notice of intent to excavate, the proposed addition "should be rejected."

## **MISSOURI-AMERICAN WATER COMPANY**

MAWC states that proposed addition of this subsection "is a vague proposal not supported by Missouri American." MAWC further states that the current law providing for "a presumption against excavators, is clear and unambiguous because an excavator's failure is simple to establish – it arises from an excavator's simple failure to request a locate."

Additionally, MAWC states that a presumption of negligence against facility owners "could have the unintended consequence of causing increased damage to facilities, because excavators would be less cautious in their work if they could point to a minor breach by a facility owner and therefore impose a presumption of negligence."

## **MISSOURI GAS ENERGY**

MGE states its agreement with the comments submitted by the Missouri Utilities.

## **MISSOURI TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The MTIA states that "This provision is vague and would allow this negative presumption without establishing exactly what a "failure to respond" might be." Further, the MTIA states that "Establishing a presumption of liability under such vague terms where mere accusations might amount to proof of liability is unacceptable."

## **SITE IMPROVEMENT ASSOCIATION OF ST. LOUIS**

SITE supports this addition and states that "Our membership believes if the excavator is not at fault, he/she should not be held liable for the damages or injuries that may occur if an underground facility is struck." Additionally, SITE suggests that language referencing the requirement for facility owners to be participants in the notification center be added to this proposed subsection. Further, SITE suggests that the phrase "liability under common law *may* apply" – which is found in the last sentence of the proposed subsection – be changed to read "liability under common law *shall* apply". (emphasis added)

## **TRIP ENGLAND – BRYDON, SWEARENGEN & ENGLAND**

The proposed language is too vague. Need to better define what constitutes failure to respond. Expressed a concern about creating a rebuttable presumption of liability for non-compliance without the language being more specific.

**319.046 (changing enforcement from AGO to PSC and application of provisions)**

**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.

## **ASSOCIATED GENERAL CONTRACTORS OF MISSOURI**

The AGC states that it "has no position on which state entity enforces the statute as long as it is adequately and fairly enforced as to the statutory duties of all persons subject to the law." Further, the AGC notes that "Excavators who are contractors are certainly subject to Missouri statutes which is the duty of the Attorney General to enforce." Additionally, the AGC notes that "Excavators who are contractors are not currently to our knowledge subject to the jurisdiction of the Public Service Commission."

The AGC also states that "We are uncertain if the Public Service Commission could initiate an enforcement action against a contractor under current law or the proposed legislation." In addition, the AGC states that "We would reserve our opinion as to equitable enforcement mechanisms, other than the Review Board concept which we oppose, until additional details would become available about the enforcement process and exact authority of the Attorney General and/or PSC."

Lastly, the AGC suggests that "Perhaps one approach may be to allow the Public Service Commission to make a complaint of violation to the Attorney General regarding utilities regulated by the PSC."

## **ATTORNEY GENERAL'S OFFICE**

The AGO states that "we are open to the possibility of sharing *concurrent* jurisdiction" with the PSC; but the AGO also states that "We *do not*, however, believe that *completely repealing the enforcement authority of the Attorney General* would best serve the citizens of the State." (emphasis added)

## **AMERENUE**

UE believes "full enforcement of this law is important and necessary", and "believes this goal underlies the Commission's efforts in revising this statute and supports that effort."

## **BO MATISZIW – LACLEDE**

Why the change in reference to the full chapter in subsection 1 rather than keeping references to the specific sections historically referenced? Specific sections noted have been "as is" since penalty provisions have existed. Also, why not set up a special fund for use of civil penalties collected instead of the penalties going to the school fund? (Noted in response that this is being looked at but that the current understanding is that penalties collected go to the school fund per the Constitution and not per statute.)

## **MISSOURI UTILITIES**

The Missouri Utilities state that they "strongly support efforts to enforce the provisions of existing law that are designed to prevent damage to underground facilities." Further, the Missouri Utilities state that they "would support the current governmental agency charged with enforcing the provisions of Chapter 319 becoming more active in this area or, alternatively, giving the Commission authority to seek penalties in Circuit Court for facility owners and excavators that are not already subject to its regulatory jurisdiction."

### **MISSOURI-AMERICAN WATER COMPANY**

MAWC states that it "is not opposed in concept to a shift of enforcement responsibilities" from the AGO to the PSC. However, MAWC also states that it "would like to see proposed rules before providing more detailed comment."

### **MISSOURI GAS ENERGY**

MGE states its agreement with the comments submitted by the Missouri Utilities.

### **MISSOURI RURAL WATER ASSOCIATION**

The MRWA states that "We fail to understand the rationale behind the assumption that the present system by which the Missouri Attorney General's Office handles enforcement is flawed and inadequate." Further, the MRWA notes that its "membership does not indicate concern or problems with the present system." Based on these two factors, the MRWA "opposes any effort by the PSC to take the lead role in enforcement activities."

### **RUSS MITTEN – BRYDON, SWEARENGEN & ENGLAND**

Why have the intermediate step of the PSC complaint action prior to moving forward with the penalty action? Also, how does the Commission expect to exert jurisdiction over entities that are not jurisdictional utilities? Also, how is payment for actions pertaining to non-jurisdictional entities to be provided for so that regulated entities are not picking up the tab?

### **SITE IMPROVEMENT ASSOCIATION OF ST. LOUIS**

SITE's comments regarding the proposed change in enforcement authority are as follows:<sup>4</sup>

The general premise of this proposed legislation is to take the authority from the attorney general's office and give it to the Missouri Public Service Commission, which regulates private utility operations in the state. What is the response from the attorney general's office to this proposal? Though this office has done very little in terms of enforcement actions for violators of this law, to take authority from one governmental body and give it to another may not be legislative possible unless that other body (the attorney general's office) is willing to surrender its authority.

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<sup>4</sup> Taken verbatim from comments.

## **USIC LOCATING SERVICES, INC.**

USIC states that "Because USIC locates multiple facilities and multiple excavation sites it shoulders a disproportionate burden with respect to the Civil Penalties provision." Further, USIC notes that "On average, USIC performs over 200,000 locates a month in the state of Missouri." Additionally, USIC notes that it is responsible for the cost of facility damages when those damages are due to locator error, and states that "If the Civil Penalty provision remains as it is currently drafted, USIC could, in effect, be penalized twice for the same damage."

USIC also states that "Actively pursuing civil penalties against USIC in the amount of \$10,000 per violation per day will have a significant negative impact on our business, particularly with respect to our Missouri employees." In this regard, USIC "asks the Commission to reconsider the amount and application of the Civil Penalties provision" and notes that Indiana's underground facility damage statute provides for civil penalties not to exceed \$1,000 per violation.

USIC also "strongly urges the Commission to consider drafting language for inclusion in this provision that specifically addresses the abuse of the "Emergency" ticket." In this regard, USIC notes that "calling in a locate as an "emergency" that does not fall within the definition of an emergency . . . is no more than illegitimately pushing oneself to the front of the line", and states that it believes "there should be a specific penalty for those who abuse the emergency locate system." USIC further notes that these types of penalties "are currently included in other states' One Call legislation", and states that it "supports implementation of strong penalties against those who misrepresent an emergency excavation and demolition."



### **319.055 (reporting of facility damage information)**

319.055. 1. No later than February 28 of each year, each underground facility owner, as defined in section 319.015, 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; provided, however, that the first such report 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 provided in the report.

2. In addition to the report required by subsection 1 of this section, the public service commission is granted the authority to promulgate rules, in accordance with the provisions of chapter 536, RSMo, to establish requirements regarding the real-time reporting, by underground facility owners, excavators and the notification center, of damages to underground facilities and instances of purported non-compliance with the provisions of sections 319.010 through 319.070.

#### **BECKY KILPATRICK – CENTURYLINK**

Expressed a concern that the real-time reporting would result in a duplication of efforts since outage reports are already required for telecommunications companies.

#### **BO MATISZIW – LACLEDE**

What would be the use of the real-time reports regarding facility damages and purported issues of non-compliance referenced in subsection 2?

#### **CITY UTILITIES OF SPRINGFIELD**

CU notes that it already submits this type of information for its natural gas system to the PSC on an annual basis, and recommends that "the PSC require all information to be submitted through the Common Ground Alliance's Damage Information Reporting Tool (DIRT)." In support of the use of the DIRT system, CU notes that it is used nationally and thus that "performance comparisons and program effectiveness could be measured more easily with other regions of the country."

#### **JOHN LANSFORD – MOCS**

Expressed a concern that subsection 2 would **require** someone, specifically MOCS, to report instances of purported non-compliance even if it didn't directly impact them.

#### **MISSOURI UTILITIES**

Instead of crafting special rules and creating unique Missouri damage data collection requirements, the Missouri Utilities "believe the Commission should use the data set that has already been developed - at least as a starting point", with the referenced data set being the data set established by the Common Ground Alliance for its Damage Information Reporting Tool (DIRT). The Missouri Utilities also note that performance comparisons and program effectiveness could be measured more easily by the use of this data set since DIRT is used nationally.

## **MISSOURI-AMERICAN WATER COMPANY**

MAWC states that, as a facility owner, it "is not opposed in concept to the reporting of facility damage information to the Public Service Commission, although the administrative burden and cost of such reporting is not clear." However, MAWC also states that, as an excavator, it "is wary that erroneous owners' reports identifying offending excavators might be improperly used against excavators – either in civil litigation or as grounds for enforcement action" by the PSC.

## **MISSOURI GAS ENERGY**

MGE states its agreement with the comments submitted by the Missouri Utilities.

## **MISSOURI ONE CALL SYSTEM**

MOCS states that "The requirement of the call center to provide the real time notices of any infraction to 319.010 – 319.070 is a duplication of a complaint as the injured party would make a complaint and the call center may not have the information to make a complaint."

MOCS does, however, also state that it "would not be opposed to assisting in the investigation process if asked or required by either the member or the excavator." Further, MOCS states that "The requirement of making MOCS report individual infractions would be a conflict of interest between MOCS and its membership."

## **MISSOURI TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The MTIA states that additional reporting requirements would "add very real costs to utility operations" and that a requirement "to collect and maintain data and then conform them to a report format that the Commission dictates takes significant time – time that would be better spent performing far more necessary functions."

Additionally, the MTIA notes that "the telecommunications industry has been relieved of routine reporting requirements by the legislature" and that "it seems contrary to that directive to impose new obligations under this legislation without a clear demonstration of need."

The MTIA also notes that there "is no logical reason" for having different dates for the submission of the proposed annual report and the existing annual report.

Further, the MTIA states that the proposed "real-time reporting is clearly duplicative of the Commission's requirements for real-time outage reporting, again adding unnecessary compliance costs."

## **RUSS MITTEN – BRYDON, SWEARENGEN & ENGLAND**

Suggested that the reporting date should be changed to April 15 to coincide with the regular annual report filing date. Also wondered why two reports are needed (annual report and real-time reports).

### **319.060 (locating performance standards)**

**319.060. 1. The public service commission is granted the authority to promulgate rules, in accordance with the provisions of chapter 536, RSMo, to establish criteria regarding performance measures applicable to persons performing locating services for underground facility owners subject to the public service commission's jurisdiction for safety or customer service purposes and to establish criteria regarding such owners' quality assurance programs for locating services.**

**2. For the purpose of enforcing the rules 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 federal department of transportation.**

#### **AMERENUE**

UE states that it already has performance standards in its contracts with locating vendors and believes it is appropriate for the Commission to ensure sure standards are in place; however, UE does not believe it would be appropriate for the Commission to set specific quality assurance standards.

#### **BO MATISZIW – LACLEDE**

PSC authority should be limited to requiring that standards be in place and reviewing the standards that companies establish. Going so far as to set what those standards would be is getting into the management of a company.

#### **CITY UTILITIES OF SPRINGFIELD**

CU "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, CU also states its belief that "this section needs to be further defined as to what exactly the performance measures will be and stated in the state's (sic) statute."

#### **MISSOURI UTILITIES**

The Missouri Utilities state that "This proposed change should be rejected since it proposes to unnecessarily broaden the Commission's regulatory oversight and control." In this regard, the Missouri Utilities note that operators may out-source their locate function to outside firms, and that matters such as quality assurance, training and performance issues are often negotiated issues and contractually set between operator management and the locating firm.

As a result, the Missouri Utilities also state that the Commission "should not dictate" matters that should be worked out by the contracting parties. Additionally, the Missouri Utilities note that any proposed change to the statute, such as the proposed addition of 319.060, should "mitigate the potential for abrupt changes in contractual language and relationships between contracting parties."

#### **MISSOURI-AMERICAN WATER COMPANY**

MAWC notes that it currently performs all of its own locates and does not contract for locating services.

**MISSOURI GAS ENERGY**

MGE states its agreement with the comments submitted by the Missouri Utilities.

**MISSOURI TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The MTIA states that "utilities have every reason to ensure that contractors performing location services are as accurate and reliable as possible and it is clearly unnecessary to add regulatory oversight to our private contracting activities."

**USIC LOCATING SERVICES, INC.**

USIC "urges the Commission to consider drafting changes to . . . subsection (1) by replacing the language regarding "granting the authority to promulgate rules" with language such as "granting the authority to review processes and procedures" and striking the remaining language in this subsection."

**319.065 (creation of damage prevention review board)**

319.065. 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.

## **ASSOCIATED GENERAL CONTRACTORS OF MISSOURI**

The AGC states that it is "intensely opposed to creation of a Board to decide on or levy civil penalties modeled after Virginia, Illinois or other states." In support of this position, the AGC states that it has the following objections:<sup>5</sup>

- \* The Board proposed by the PSC provides for twelve members. Nine of those Board members would either be facility owners, organizations made up of facility owners, contractors to facility owners, or a regulator of facility owners. 319.065.2 provides for three construction excavator members of the Board. The make-up of the Board is slanted toward favorable outcomes for facility owners and unfavorable outcomes for excavators who are contractors.
- \* When the idea of a Board with authority to hear cases regarding dig-ins and levy fines was first proposed in 2005, AGC reviewed the laws and experiences of other states which have established such Boards, including Virginia. Our review of the Virginia statute and operation of its "Advisory Committee" showed:
  - \* The Virginia Advisory Committee considers over 100 cases per month for disposition. There is no way an investigator for the State Corporation Commission could do a thorough investigation of the "root cause" of damages to underground facilities or other complaints with such a heavy case volume.
  - \* Majority of cases are against contractor excavators with penalties levied in almost all cases. The Advisory Committee in Virginia is merely a "rubber stamp" for cases brought by the Corporation Commission.
- \* We recognize that the 10/8/09 Draft merely provides that the PSC can refer a complaint to the Review Board for a hearing, rather than authorizing the Board to levy a penalty directly. However, we still oppose establishment of a Board as an unnecessary additional step in the enforcement process.
- \* A Review Board as established in the 10/8/09 Draft will result in unavoidable conflicts of interest for Board members appointed. Cases regarding competitor companies or companies closely allied with the Board member will come before the Board. With the make-up of the Board such conflicts would be so frequent the option of a Board member recusing himself would be an inadequate remedy to such conflicts.

Lastly, the AGC states that it "believes that civil penalties under Missouri law can and should only be imposed by a court after adequate due process and a finding of violation by the court."

## **AMERENUE**

UE suggests that the Commission consider more clearly setting forth what the review board will do, what triggers its involvement and how the board would interact with the Commission's enforcement authority.

## **BO MATISZIW – LACLEDE**

Why have so many members on the board? What are the duties and how/when would the board act? Noted that the Illinois board has five members and that its duties are pretty clearly set out in the statute.

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<sup>5</sup> Taken verbatim from comments.

## **CITY UTILITIES OF SPRINGFIELD**

CU "recommends requiring any member of the review board that is a facility owner or operator, must also be a member of Missouri One Call."

## **DEBBIE DICKENS – LAND IMPROVEMENT CONTRACTORS ASSOCIATION (LICA)**

Agrees with Ed Twehous' comments regarding the makeup of the board's membership, but also suggests that "small" excavators need to be represented on the board.

## **DON HILLIS – MoDOT**

(1) Expressed a concern about leaving too much of the details to the rulemaking process – need to know more now about where the rule might go. Doesn't see a lot of value to the board if it is only going to make recommendations to the Commission.

(2) Wondered whether any of the other states with similar boards use the guidelines of the American Arbitration Association as the basis for their dispute resolution procedures.

## **ED TWEHOUS – TWEHOUS/AGC**

Need better membership "balance" on the board – it is weighted too heavily on the utility side. Also need to have "geographic" representation on the board.

## **JAY SCHULTEHENRICH – SITE**

Agrees with Ed Twehous' comments regarding the makeup of the board's membership, and with Bo Matisziw's comments regarding the size of the board.

## **MISSOURI UTILITIES**

The Missouri Utilities state their belief that "the creation of a completely independent underground facility damage prevention compliance board would be a step in the right direction." Further, they state that such a board should be comprised of a cross-section of stakeholder experts appointed by the Governor, and that it should be "empowered to mediate and resolve Chapter 319 *compliance issues*." (emphasis added)

The Missouri Utilities also "recommend that such a board also be empowered to make recommendations to the Commission, and petition the Missouri Attorney General's Office, the Commission, or whatever governmental entity is ultimately charged with enforcement of Chapter 319 to take specific action against an offending party if it is (sic) deemed necessary."

## **MISSOURI-AMERICAN WATER COMPANY**

MAWC states that it "supports this provision generally, although the source of funding is unclear." Further, MAWC states that "The cost should be borne not only by investor-owned utilities but also by other entities, such as cooperatives and municipal utilities, that would be subject to Commission enforcement under this revised Chapter 319."

## **MISSOURI GAS ENERGY**

MGE states its agreement with the comments submitted by the Missouri Utilities.

## **MISSOURI TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The MTIA states its opinion that "this new review board is completely unnecessary and duplicative of other existing public and private sector resources." Also, the MTIA states that "Under the proposal, the PSC would have ultimate decision-making authority and has staff attorneys that are capable of providing any necessary advice and recommendations."

Further, the MTIA states that "there is no reason not to utilize the expertise of the staff and the board of the Missouri One Call System" if the PSC staff and attorneys "could not handle the assigned duties of the review board".

Lastly, the MTIA states that the duties of the proposed review board "are only vaguely spelled out" in the proposed language, that "the staff's assertion that they could further define those duties by rule is unlawful" and that administrative boards such as the proposed review board "only have the authority assigned to them by statute and that authority cannot be broadened via a rulemaking."

## **SITE IMPROVEMENT ASSOCIATION OF ST. LOUIS**

SITE states that "Conceptually, SITE supports the creation of a damage prevention review board, and with it the authority to act as an arbitrator to resolve disputes relative to provisions of the law." However, SITE also notes the following concerns with regard to 319.065(3):<sup>6</sup>

- \* The review board make-up of 10 members is weighted toward the utilities. Could an excavator get a fair and impartial examination of the facts by the review board if it is primarily composed of utility representatives?
- \* Additionally, 10 members may be too large a group to handle review of disputes. Perhaps a subcommittee composed equally of utility and excavator members with a PSC member may be a more equitable method of review.
- \* Without knowing what the rules and regulations are that would govern the damage prevention review board, it is difficult to give total acceptance to this proposal.

## **WENDY TATRO – AMERENUE**

Confused about the overall process and the general purpose of the board – need more detail about what the board will do and how it will operate.

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<sup>6</sup> Taken verbatim from comments.



### **319.070 (new facilities to be "locatable")**

**319.070. Effective January 1, 2011, all underground facilities, as defined in section 319.015, shall be installed in such a manner as to be locatable through the use of electronic locating equipment, or the location of the facilities shall be documented on as-built drawings in a manner sufficient for the underground facility owner to provide the approximate location of the facilities in response to the receipt of a notice of intent to excavate.**

#### **AMERENUE**

UE notes that it does not share its mapping information with anyone except for locating vendors, and that the mapping systems for its electric systems are "schematic" and not "as-built" and would thus not be helpful so far as providing locates is concerned. UE also notes that the requirement for having new facilities "locatable" is not a panacea that would solve all locating problems. Further, UE notes that while new gas installations include tracer wires, many existing facilities do not.

#### **BECKY KILPATRICK – CENTURYLINK**

Is there really a problem with facilities being installed in such a manner that they are not "locatable"?

#### **CITY UTILITIES OF SPRINGFIELD**

CU notes that several of its facilities "are locatable by assigning state plane coordinates to points on the underground facility." As a result, CU "recommends that another option be added to locate underground facilities by state plane coordinate points."

Further, CU states that "Failure to comply with this section shall not be a defense to any civil or criminal action or proceeding against an excavator for damage to an underground facility or failure to comply with this chapter, provided that the approximate location of the underground facility was correctly marked in accordance with the provisions of this chapter."

#### **MISSOURI UTILITIES**

The Missouri Utilities note that the practice of installing new facilities and ensuring they are locatable (either electronically or by measurement) has been a gas industry practice for years, and thus that they "have no objection to formally codifying this practice" through the addition of this proposed new section.

#### **MISSOURI-AMERICAN WATER COMPANY**

MAWC notes that its newly installed underground facilities are all locatable at the time of installation. Further, MAWC states that it "supports this provision, provided it is clear (as the current draft appears to be) that "locatability" be assessed at the time of installation – not time of damage – since tracer wires can sometimes be broken, detached or moved off a plastic pipe after installation through no fault of the owner."

#### **MISSOURI GAS ENERGY**

MGE states its agreement with the comments submitted by the Missouri Utilities.

### **MISSOURI RURAL WATER ASSOCIATION**

The MRWA states its view that the proposed changes "include mandatory installation of trace wire" and that this "seems to preclude other methods of pipe location and seems a bit restrictive." However, the MRWA also notes that this is a "preliminary draft proposal and appreciate that further refinement of ideas is needed."

### **MISSOURI TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The MTIA states that "It is unknown at this time whether this will add any significant costs to our operations."