

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
12/06/2010 Stakeholder Roundtable on Proposed Revisions to Chapter 319, RSMo

DATE: January 7, 2011

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 following:

- (1) the written comments submitted to File No. GW-2010-0120 (by interested stakeholders or by the PSC Staff on behalf of interested stakeholders) regarding the topics discussed during the 12/06/2010 Stakeholder Roundtable; and
- (2) a meeting involving members of the PSC pipeline safety staff and a member of the Missouri One Call System staff.

The attached document does not include summaries of the participant comments made during the 12/06/2010 Stakeholder Roundtable, since those comments were also generally addressed in the stakeholders' written comments.

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.

Lastly, to complete the current record, it should be noted that the Staff is working on further changes to the Chapter 319 proposed revisions document, which will be based upon the stakeholder comments summarized in the attached document. The Staff will submit that document to File No. GW-2010-0120 once it is completed.

Attachment

MO PSC CHAPTER 319 REVISION PROJECT

SUMMARY OF ROUNDTABLE 3 WRITTEN COMMENTS

ASSOCIATED GENERAL CONTRACTORS OF MISSOURI (AGC)

The AGC supports proceeding with introduction of proposed legislation, but also states that proposed subsections 319.026.10, 319.026.11 & 319.026.12 need additional work.

A T & T MISSOURI (A T & T)

- 1) A T & T states that it is unable to support the current proposal, and that it shares the concerns expressed by the MTIA in its comments.
- 2) A T & T additionally states that it has a significant concern regarding the proposed reporting requirements (section 319.055), and states the belief that the reporting requirements will not apply equally to all parties and that they will only add unnecessary costs to regulated utilities while not addressing a major cause of damages to those utilities' facilities (excavators who do not call in for locates).

EXXONMOBIL PIPELINE COMPANY (EMPC)

- 1) EMPC states that it agrees with the vast majority of the proposed revisions, but does have several concerns, as are described in items 2 – 6 below.
- 2) Subsection 319.015(5) (definition of "Excavation") – EMPC does not support excluding hydro excavation from this definition due to its experience with damage caused to steel pipeline coatings and non-steel pipelines.
- 3) Subsection 319.015(5) (definition of "Excavation") – EMPC does not support the exemptions for "railroad excavating" in the current law, or any of the other exemptions in the current law.
- 4) Subsection 319.025.1 – EMPC suggests changes to the first sentence to more simply state what is required by the current language.
- 5) Subsection 319.026.10 – EMPC states that the proposed language is confusing in light of current language in the statute that requires tickets to be refreshed every 10 days. (**Note:** Provisions in the current law do not require tickets to be refreshed every 10 days.)*
- 6) Section 319.050 – EMPC states the concern that a two-hour response to an emergency situation is quite quick due to the fact that many locations could be rural and far from base offices. (**Note:** Provisions in the current law do not absolutely require facility operators to be on site and locate their facilities within two hours, but do require a response to the excavator that provides available information about the facility locations and that provides a notice of when the facilities will be located.)*

* The information included in these "Notes" was provided to the ExxonMobil representative that submitted the company's comments via an e-mail message that Dale J. sent to the representative on 12/17/10.

MISSOURI GAS UTILITIES (MO GAS UTILITIES)

(Laclede Gas, Missouri Gas Energy, Atmos Energy, Ameren Missouri)

- 1) The MO Gas Utilities are highly supportive of reasonable efforts to further protect critical utility infrastructure through enhancements to the underground facility notification, marking and excavation procedures set forth in Chapter 319.

While the MO Gas Utilities believe the protection of all types of underground facilities is important, they have no objection to affording additional protections to pipeline facilities, so long as those protections are effective and reasonable.

With certain suggested revisions (see items 2 – 6 below), the MO Gas Utilities believe the draft legislation would actually move the ball forward on providing additional protection to critical facilities without imposing unnecessary or excessively burdensome requirements on either excavators or facility owners. Without the suggested revisions, the MO Gas Utilities believe the draft legislation would do more harm than good and should not be pursued.

- 2) Subsection 319.015(15) (definition of "Reportable event") & Section 319.055 – To avoid confusion with natural gas incidents that must be reported under the Commission's pipeline safety rules, the MO Gas Utilities suggest that the term "Reportable event" be changed to "Damage event", with consistent changes also being made to section 319.055.

Additionally, the MO Gas Utilities suggest that the requirement to report "near misses" and excavator "down-time" should be eliminated since there is no practical way to determine or verify whether or to what extent such events have occurred.

Lastly, the MO Gas Utilities note that known facility damages can be and are tracked by facility owners and that such damages should be the primary focus of any reporting requirements that are to be implemented.

- 3) Section 319.037 – The MO Gas Utilities suggest that provisions be added to this section to require that hand-digging or "soft" excavation methods be used to confirm the horizontal and vertical position of marked pipeline facilities before power-operated equipment can be used for any excavation. According to a national one-call center survey, nearly 80% indicated that their state damage prevention statutes contain a mandatory hand-dig requirement. Also, experience in Missouri with a hand-dig requirement for excavations that involve trenchless excavation methods has shown how effective such a requirement can be for avoiding facility damages.

The MO Gas Utilities also suggest that limiting the suggested hand-dig requirement to excavations involving marked pipeline facilities would be consistent with the draft legislation's current focus on providing additional protection for such facilities, and should also serve to at least partially address the concerns of those who originally opposed adding a more widely-applicable hand-dig requirement.

- 4) Subsection 319.040.2 – The MO Gas Utilities continue to believe that this proposed new subsection creates an overly broad and inappropriate presumption of negligence for facility owners that goes well beyond anything necessary to compliment or balance the one imposed on excavators for failing to notify the call center of a potential excavation. If the presumption of negligence applicable to facility owners is not to be limited to a facility owner's failure to be a participant in the notification center, which some of the MO Gas Utilities previously suggested, the circumstances should be narrowed to instances where facility owners have actually received a notification of a proposed excavation and have nevertheless not made an attempt to inform the excavator of the approximate location of their facilities.

- 5) Subsections 319.046.4, 319.046.5 & 319.046.6 – The MO Gas Utilities state that the proposed PSC investigation & enforcement referral process should be modified to remove pipeline operators who are already subject to the PSC's safety jurisdiction. In support of this, the MO Gas Utilities note that the PSC already exercises broad safety jurisdiction over such operators, including the ability to set comprehensive safety standards and seek substantial penalties if those standards are violated. Given this existing enforcement process, the MO Gas Utilities state that nothing but jurisdictional confusion is to be gained by attempting to subject such operators to an alternative enforcement process, which presumes it is the Attorney General rather than the PSC that is responsible for enforcing certain safety-related activities of such operators.

Where the Attorney General is the proper agency to handle enforcement matters, the MO Gas Utilities believe the law should establish a 90-day timeline for a decision to be made whether prosecution of matters referred to the Attorney General will be pursued, as well as require that the Attorney General provide the PSC with an explanation of any decision not to pursue the prosecution of a PSC enforcement referral. The MO Gas Utilities believe these changes are needed to ensure that enforcement referrals from the PSC are actually addressed promptly and to ensure the optimal use of the resources of both agencies.

- 6) Section 319.060 – The MO Gas Utilities do not believe it is necessary to legislate the adoption of performance and quality assurance measures applicable to persons that locate underground facilities for facility owners. However, if such requirements are established, the MO Gas Utilities state that the requirements should be clear that performance and quality assurance measures already in effect will be sufficient to comply with such requirements.

MISSOURI PETROLEUM COUNCIL (MPC)

(A Division of the American Petroleum Institute)

- 1) The MPC will remain neutral until official legislation has been filed, but will provide more detailed comments on the suggested changes as soon as those are available.
- 2) The MPC also stated that it does have some concerns with the additional reporting requirements, as well as exemptions for certain entities.
- 3) The MPC further stated that the proposal seems to be headed in the right direction, that any move to reduce damage to underground facilities is positive, and that it looks forward to working with the stakeholders and the PSC if the proposal moves forward.

MISSOURI PUBLIC UTILITY ALLIANCE (MPUA)

- 1) The MPUA states that it does not support changes that would expand enforcement beyond what is required under existing statutory provisions or through municipal ordinance.
- 2) The MPUA states that it opposes any efforts to limit local control over city-owned utilities by adding an additional and unnecessary layer of oversight beyond that of locally-elected and publicly-appointed officials.

MISSOURI TELECOMMUNICATIONS INDUSTRY ASSOCIATION (MTIA)

- 1) The MTIA notes that it has not adopted a position on the proposed legislation and that it will not do so until a bill is introduced and reviewed by the legislative affairs committee and the board of directors.
- 2) Subsection 319.040.2 – The MTIA states that it does not like the proposed language because the "failure to perform" standard proposed is ambiguous, and because compliance is not verifiable by an independent third party (such as is the case for the rebuttable presumption of negligence that applies to excavators under subsection 319.040.1 when a call is not made to the call center).
- 3) Section 319.055
 - (a) The MTIA is concerned about the submission of the reports required by 319.055 due to the costs associated with the reporting, especially since MOCS already collects much of the information. The MTIA recommends that MOCS be "delegated" to prepare and submit the information on behalf of its members.
 - (b) The MTIA recommends that only facility damages be reported under 319.055.1.
 - (c) The MTIA encourages retention of the provisions that limit the Commission to reporting information in the aggregate and the provisions that clarify that the facility owners' reports submitted are not public information.
- 4) Section 319.060
 - (a) The MTIA states a concern that the proposed requirements only apply to PSC jurisdictional facility owners, and that there is no apparent reason to single out a subset of facility owners to which the requirements would apply.
 - (b) The MTIA states that prudent managers of underground facilities already have the required performance measures in place for their employees and contract locators, and that a government mandate requiring actions that are already being taken is not necessary.

MOGAS PIPELINE LLC (MOGAS)

- 1) MoGas notes that states are prohibited from regulating the safety, design, construction, testing and operation of interstate pipelines unless they have a special delegation of authority from the U.S. DOT, and further notes that Missouri has no such delegation. As a result, MoGas states that the PSC may only thus enforce the requirements of Missouri's one-call program and may not regulate interstate pipeline safety standards in any way.
- 2) MoGas notes that the Pipeline and Hazardous Materials Safety Administration (PHMSA) has published an Advanced Notice of Proposed Rulemaking (ANPRM) regarding the sufficiency of state one-call law enforcement programs. States that any effort to modify the Missouri one-call law is premature as a result of the PHMSA rulemaking and that it is "highly likely that the PSC's proposed legislation will be contrary to or insufficient" under the standards that will come out of that rulemaking process. MoGas thus recommends that the PSC "refrain from expending additional government and stakeholder resources in order to enact premature legislation without further clarification from PHMSA."
- 3) MoGas states the opinion that the proposed legislation creates uncertainty and constitutes regulation of PHMSA-regulated interstate pipeline safety already covered by PHMSA, and that the legislation is attempting to expand PSC jurisdiction beyond enforcement of a state one-call system to much broader regulation of PHMSA-regulated interstate pipelines.

MoGas also states that the PSC's attempt to "carve out" items not regulated by PHMSA for interstate pipelines has left the obligation of those pipelines under the proposed statutes unclear, and that there are several instances in which the proposed legislation addresses or contradicts the provisions of the federal PIPES Act of 2006 and PHMSA requirements (see items 4 – 6 below).

- 4) MoGas notes that the proposed legislation seeks to mandate compliance by PHMSA-regulated pipelines with every single provision of the one-call statutes, including participation therein, subject to investigation and potential penalty enforcement. MoGas also states that under PHMSA regulations the PSC cannot require a PHMSA-regulated pipeline to participate in any particular one-call program as long as the interstate pipeline participates in a qualified program.

MoGas further states that a requirement that all PHMSA-regulated interstate pipelines participate in the Missouri one-call program, be subject to standards set forth in such program (even if contrary to PHMSA policies), and be subject to investigation and penalty by state authorities is contrary to PHMSA regulation and violates PHMSA's exclusive jurisdiction.

MoGas states that the state of Missouri is limited to enforcement of a one-call program, cannot force participation by PHMSA-regulated pipelines, and certainly cannot draft one-call legislation to divest PHMSA of jurisdiction.

Based on the above, MoGas recommends that the references to PHMSA-regulated interstate pipelines should be removed from the legislation in its entirety.

- 5) Section 319.060 – MoGas states that PHMSA already has regulations pertaining to:

- * written programs for facility damage prevention (49 CFR Part 192.614(a));
- * written manuals for operations, maintenance and emergencies (192.605);
- * written procedures for continuing surveillance (192.613);
- * written procedures for failure investigations (192.617);
- * written operator qualification programs (192.805); and
- * written procedures for locating facilities for establishing line markers (192.707).

Based on the existence of the above-referenced PHMSA regulations, and the provisions of subsection 2 of this section, MoGas states the position that the inclusion of PHMSA-regulated pipelines in subsection 1 of this section is meaningless. Accordingly, MoGas recommends the removal of the reference to PHMSA-regulated pipelines from subsection 1 and also recommends the deletion of subsection 2.

- 6) Section 319.055 – MoGas first states that this proposed section purports to establish reporting requirements applicable to PHMSA-regulated pipelines that are already required by PHMSA. In that regard, MoGas notes that PHMSA has reporting regulations pertaining to incident reports, annual reports and safety-related condition reports (49 CFR Part 191.5, 191.15, 191.17, 191.23 and 191.25). As a result of these PHMSA regulations, MoGas states that the PSC's proposed reporting requirements are already covered by PHMSA and that PHMSA-regulated pipelines should thus not be included in the requirements.

Additionally, MoGas notes that the reporting requirements of this section appear to be duplicative of information that should already be collected and easily obtainable from the Missouri One Call System notification center. As a result, MoGas states that this section creates unnecessary burden and expense upon underground facility owners, and that this burden and expense is multiplied for PHMSA-regulated interstate pipelines since they already report the same information to PHMSA.

- 7) Subsection 319.040.2 – MoGas states that there is no logical reason why an underground facility owner would benefit from acting in a negligent manner in locating its own facilities, and that the creation of a presumption of negligence against facility owners is thus unnecessary. MoGas also states that the proposed language establishes an unfair and evolving standard for underground facility owners, while the standard applicable to excavators is black and white; that the proposal will result in increased litigation for the industry; and that the burden and cost of defending against application of the presumption will be much higher for underground facility owners than excavators.

Based on the foregoing, MoGas recommends that the proposed rebuttal presumption of negligence against facility owners be limited to lack of participation in the one-call program.

- 8) Regarding additional requirements that would specifically pertain to excavators, MoGas notes that it has experienced several instances where it found excavators planning to dig or in the process of digging in an unsafe and imprudent manner, and that these situations commonly involve landowners. In such instances, MoGas states that excavators occasionally ignore its warnings and that it has even been placed in the position of having to initiate the legal process of obtaining an injunction to prevent the unsafe activity, which cannot be done immediately.

To address such situations, MoGas proposes the addition of subsection 2 to section 319.041 under which an excavator would be required to cease an unsafe or imprudent excavation upon receiving a written notice from a facility owner requesting that the excavation cease. Also, if the excavator failed to honor the facility owner's written request to cease the excavation, the excavator would be subject to the penalty provisions set forth in section 319.046, and the facility owner would have the authority to obtain injunctive relief. If such an injunction was obtained, the excavator would be responsible for attorney's fees and costs incurred by the facility owner in doing so.

- 9) Finally, if the PSC pursues the process of changing the damage prevention law, MoGas suggests that the PSC consider a specific outreach to PHMSA-regulated pipelines that may "suddenly" find themselves subject to the PSC regulation contained in the proposed statutory changes. MoGas is concerned by the minimal participation by this body of stakeholders, as it is possible they are not regularly in contact with the PSC and are unaware of this effort.

SUMMARY OF MEETING WITH MISSOURI ONE CALL SYSTEM REPRESENTATIVE PRIOR TO ROUNDTABLE 3

During a 12/03/2010 meeting, Bill Dexheimer of Missouri One Call System, Bob Leonberger of the PSC pipeline safety staff and Dale Johansen of the PSC pipeline safety staff discussed the following questions about possible changes to Chapter 319.

Subsections 319.022.1, 319.022.2 & 319.022.3: Should the provisions of these subsections include references to the "opt-out" provisions of section 319.028 (in addition to the reference to section 319.016)?

Subsection 319.025.1: Should the provisions of this subsection include an exception for MODOT if it opts-out of notification center participation under section 319.016 and/or an exception for other facility owners if they have opted-out of notification center participation under section 319.028?

Subsection 319.022.1, Subsection 319.030.6 & Section 319.042: Should the provisions of these subsections be rewritten to mimic the changes to the definition of "Underground facility owner"?

Subsections 319.026.9, 319.030.9 & 319.030.10: Should the provisions of these subsections include an "end time" as well as a beginning time?

Subsection 319.030.7: Should the provisions of this subsection include a specific retention period for the subject records?

Subsection 319.060.1: Should the two references to "facility *locating*" in this subsection be changed to references to "facility *marking*" to accurately reflect the term that is defined in section 319.015?

Exemptions pertaining to regulated railroads currently included in the definition of "Excavation": Should the exemption pertaining to excavating "done entirely on land . . . on which the railroad operates" and the exemption pertaining to excavating "done by a railroad on adjacent land" when that excavating is done "in the event of an emergency" be removed from the law?