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MAINE PUBLIC UTILITIES COMMISSION

REPORT ON DIG SAFE

**Presented to the
Utilities and Energy Committee
February 1, 2010**

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I. SUMMARY

At the request of the Utilities and Energy Committee (U & E Committee), the Public Utilities Commission (Commission) recently reviewed its Damage Prevention Program with stakeholders. As a result of discussions held between the Commission's staff and stakeholders we propose to conduct a rulemaking process to further develop the ideas raised in these discussions and craft changes to Chapter 895 of the Commission's rules. Pursuant to Title 23 M.R.S.A. § 3360-A(13), rules adopted to implement this section are major substantive rules unless the section specifies otherwise. Accordingly, any amendments to Chapter 895 would require legislative approval prior to adoption by the Commission. Furthermore, we intend to conduct an ongoing annual stakeholder process to examine the program and maintain communications with operators and excavators.

II. BACKGROUND

During its 2009 session, the Legislature considered the need for clarification of 22 M.R.S.A § 3360-A (LD 334, An Act to Clarify the So-called Dig Safe Law). While the Legislature did not enact LD 334, the U & E Committee sent a letter to the Commission on June 2, 2009, asking the Commission to undertake a review of the Dig Safe program with interested stakeholders and submit a report of that review to the Joint Standing Committee on Utilities and Energy no later than January 31, 2010. The letter specified that the U & E Committee was interested in 1) how to improve the clarity, accuracy, and effectiveness of Dig Safe program publications and communications; 2) notification requirements under the current Dig Safe law and rules and opportunities to improve or clarify these requirements with particular attention to locations where there are no underground utilities; and 3) Dig Safe violation history, including trends in the number and type of violations and comparison to other states.

To facilitate the stakeholder discussion, the Commission issued a Notice of Inquiry (NOI) on November 6, 2009.¹ The NOI indicated the scope of the review of the Dig Safe program and was sent to the sponsor of LD 344, the Dig Safe System, Inc., all Maine utilities that may have underground facilities, all excavators having received a Dig Safe violation between January 1, 2007, and December 31, 2009, all Liquid Propane Operators with facilities in Maine, Maine Rural Water Association, Maine Municipal Association, and the Maine Water Utilities Association. Stakeholders were asked to submit written comments by December 4, 2009,² and/or attend a stakeholder meeting on December 15, 2009.³ The

¹The NOI is available in the Commissions Virtual Case File in Docket No. 2009-371.

²Written comments were submitted by Eastwood Contractors, On Target Services, Bangor Hydro Electric, Central Maine Power Co., Unitil, Pownal Road Commissioner, Telephone Association of Maine, Montville selectpersons, Propane Gas Association of New England, Great Salt Bay Sanitary District, Dig Safe System, Inc. (Dig Safe), Maine DOT, Maine Rural Water Association (MRWA), Portland Water District, Maine Municipal Association, and Maine Energy Marketers.

stakeholder meeting was well attended and industry members raised a variety of issues beyond the scope of the June 2, 2009 letter. As a result, a second stakeholder meeting was held on January 20, 2009,⁴ in order to complete the discussion of areas raised by stakeholders and discuss steps for further collaboration and review of the Commission's Damage Prevention Program.

III. DISCUSSION

Though the stakeholder discussions were far-ranging, we focus this report on the areas that the U & E Committee specifically requested that we examine. We will, however, provide a brief summary of some of the areas outside of the scope of the U & E Committee's request that were of significant interest to the stakeholders and the Commission. We intend to continue discussions with stakeholders in an upcoming Rulemaking and other regular stakeholder meetings.

A. Program Publications and Communications

The Commission provides, on its website and at training sessions, the *Dig Safe in Maine* brochure, a printable card containing selected regulations, and a fact sheet intended for distribution to private property owners. While stakeholders signaled satisfaction with these publications in general, and indeed many stated that they find them helpful, they made recommendations for minor changes and additional information that could be included. Specifically, stakeholders suggested that references to 811 and the Commission's OKTODIG⁵ database should be added to all three publications. Additionally, MRWA suggested that the Commission distributes the *Dig Safe in Maine* brochure to water utilities for inclusion in water bills. Other stakeholders suggested that the Commission focus more on distributing information during training sessions and that the Commission should distribute compliance "punch lists" to utility customers and tool rental locations. Finally, stakeholders encouraged the Commission to continue to refine and update the OKTODIG database to increase user confidence

³ The December 15, 2009 Stakeholder meeting was attended by: On Target Services, Bangor Hydro Electric, Central Maine Power Co., Unutil, FairPoint Communications NNE, Telephone Association of Maine, Montville selectpersons, Propane Gas Association of New England, Association of General Contractors, Dig Safe System, Inc., Maine DOT, Aqua Maine, Mexico Water district, Maine Rural Water Association, Portland Water District, Maine Municipal Association, and Maine Energy Marketers.

⁴ The January 20, 2010 Stakeholder meeting was attended by: On Target Services, Central Maine Power Co., Unutil, FairPoint Communications NNE, Telephone Association of Maine, R. J. Grondin & Sons, Dig Safe System Inc., Maine DOT, Maine Water Utilities Association, Aqua Maine, and Portland Water District.

⁵ Under Title 23 M.R.S.A § 3360-A, excavators are required to notify facility operators who are not members of the Dig Safe System. The Commission has developed the OKTODIG database, a directory of non-member facility operators, to assist excavators in identifying non-member operators that must be notified of pending excavations.

in the application and to expand efforts to promote information on the requirements for non-members under 22 M.R.S.A § 3360-A.

In response to these suggestions, the Commission has agreed to work with Dig Safe System, Inc. to review and update publications as suggested by stakeholders. This decision was well received by the stakeholders. Additionally, the Commission has applied for a Department of Transportation (DOT)/Pipeline and Hazardous Materials Safety Administration (PHMSA) State Damage Prevention Grant to finance the updated publications. The Commission has received a conditional notice of award regarding this grant and expects to receive final confirmation shortly after the submission of this report. Finally, the Commission has agreed to reach out to water utilities regarding publications that water utilities can insert into their bills.

B. Notification Requirements

Discussions on notification requirements, both in the written comments and at the stakeholder meetings, were very robust, however they can be distilled into a few discrete areas: ticket renewals, buffer zones, membership, and the completeness (or lack thereof) of dig safe tickets.

1. Ticket Renewals

Chapter 895 (the Dig Safe Rule) of the Commission's rules requires an excavator to renew a Dig Safe Ticket every 30 days on an active excavation site.⁶ This requirement was added to the rule in response to statutory direction from the Legislature to develop regulations that would protect newly installed facilities on active excavation sites. Stakeholders generally agreed that this requirement had been effective in preventing damage to facilities but that it was occasionally used as a means for excavators to avoid maintaining marks created during the initial mark out of the site and that the 30-day timeframe for renewal encouraged this practice. The Commission agrees that renewing tickets should not be used as a substitute for an excavator's responsibility to maintain marks on site and stakeholders expressed agreement that further discussion of extending the renewal period from 30 days to 45 or 60 days in order to decrease unnecessary mark outs and encourage excavators to maintain their marks has merit. We intend to explore this possibility in the planned rulemaking.

During the discussions, some stakeholders expressed frustration with the fact that renewal tickets often require remarking of facilities in

⁶ During the first session of the 122nd Legislature, Maine's Legislature enacted P.L. 2005, ch. 334, directing the Commission to establish by rule procedures to reduce the incidence of damage to newly installed underground facilities in active excavation areas. In Docket No. 2005-549, the Commission opened a rulemaking to amend Chapter 895. Chapter 895 is a major substantive rule. Accordingly, the amendments that resulted from this rulemaking were approved by the legislature prior to the rule going into effect. Resolve 2005, ch. 184.

an area where the excavation is complete, sometimes even on new pavement. In the rulemaking we will explore whether extending the renewal period will sufficiently decrease the frequency of this happening or whether new provisions should be considered.

2. Buffer Zones

When the Dig Safe System is notified of a pending excavation, it notifies the operators of all known facilities within 500 feet of the area described by the excavator. In addition, all members of Dig Safe are required to provide maps of their own facilities to the Dig Safe System. In order to compensate for the fact that the maps of many operators are not as accurate as they could be, all infrastructures on operators' maps are recorded in the Dig Safe System with a 500 foot buffer. According to stakeholders, this 500 foot infrastructure buffer zone creates excessive and unnecessary call outs for operators with more accurate maps. However, for operators with less accurate mapping, the 500 foot buffer is necessary. For example, a 500 foot call out buffer for an excavation in a densely developed residential neighborhood can result in the unnecessary notification of several liquid propane gas operators that typically have accurate GPS data for their facilities. Conversely, a utility with older infrastructure and less accurate mapping would prefer to be informed of any excavation within 500 feet of its facilities. The Dig Safe System indicated that buffer zones can be tailored to specific facility operators to alleviate this problem. Stakeholders supported consideration of allowing operators to set their buffer zones individually.

The Commission recognizes that when a facility operator is notified of pending excavations that may potentially affect its facilities, the notification burdens members differently based on the operator's size and number of facilities. To the extent that the Dig Safe system has the technical ability to adjust its notification practices, the issue of individual buffer zones for different Dig Safe System members deserves further consideration in the process of rulemaking proceeding.

3. Dig Safe Membership

Currently, Dig Safe Membership is not required for all underground facility operators.⁷ However, notification of all underground facility operators is required for excavation. Under Chapter 895 of the Commission's rules, excavators are required to notify nonmember operators outside of the Dig Safe System notification process. To facilitate notification of non-member facility operators, the Commission has developed the OKTODIG database. This directory of non-member operators is unique to Maine's Damage Prevention program and is designed to assist excavators in determining the presence of facilities in rural parts

⁷ 23 M.R.S.A. § 3360-A(1)(F) does not require Dig Safe System membership for "a municipality or a public utility with fewer than 5 full-time employees or fewer than 300 customers or a person that owns underground facilities on its own property for commercial or residential purposes."

of the state and the identity of non-member operators in all locations. Stakeholders expressed the concern that all excavators may not be aware of the process for notifying non-member operators and that even those who were aware of the process were concerned about the possibility that they were not aware of all of the possible underground facility operators at an excavation site. Further, there were non-member facility operators that were concerned about the possibility that they were not always getting contacted by excavators. As a result, some stakeholders expressed the opinion that membership should be mandatory for all operators of underground facilities in Maine; however, no consensus was arrived at on this issue. The stakeholders acknowledged that the cost of joining Dig Safe may be a barrier to membership for smaller utilities particularly municipal or quasi-municipal water districts.⁸ Additionally, stakeholders acknowledged that the requirements for non-members under the current rule are more lenient in some cases. For example, non-members are allowed a 36" tolerance zone when marking facilities while members are held to an 18" tolerance zone. This creates a disincentive for membership particularly for water utilities where the materials used to construct water mains makes locating facilities more difficult.

Though stakeholder participation was heavily weighted to operators, those excavators that participated strongly endorsed the benefits of mandatory membership for the efficiencies and additional safety it offered.

While the Commission agrees with stakeholders that encouraging greater participation in the Dig Safe System would benefit both excavators and facility operators, the suggestion of mandatory membership for all facility operators or even certain classes of facility operators would require greater focus and should be addressed through a more formal proceeding such as a rulemaking. We will include issues of mandatory membership in our upcoming rulemaking discussion.

There were other suggestions from stakeholders, such as creating "scholarships" for Dig Safe System membership and changes to the Dig Safe System pricing. We agree that these suggestions have merit and they will be explored in continued discussions with stakeholders.

4. Scope of Work

Facility operators and locating companies who participated in the stakeholder group meetings expressed a desire to be able to limit the marking that they perform on an excavation sites to the scope of work indicated by the excavator when it informs the Dig Safe System of pending excavation. Under the current rule, facility operators are required to mark out all facilities that they operate which are present within the bounds of the premarks made by the excavator. At

⁸ After this point was raised at the first stakeholder meeting, Dig Safe System, Inc. calculated, based on the amount of facilities operated by water districts, that the vast majority of these districts would be charged \$1 per call as Dig Safe System members are based on their size.

times, this has required facility operators to mark out areas that they believe will never actually be affected by the pending excavation. CMP in particular was a proponent of being allowed to alter the scope of the premarks made by the excavator to more accurately reflect the scope of work indicated on the original application for the Dig Safe ticket or upon discussions with the excavator. Stakeholders also stressed that some excavators, particularly the Maine Department of Transportation, apply for Dig Safe tickets for large areas that then are remarked every 30 days when it appears that excavation may not have begun at the site.

The Commission agrees that facility operators should not be required to unnecessarily mark out an excavation site that could potentially be several miles long when no actual work will occur at the location within the next 30 days. However, it is also clear that by requiring excavators to mark all facilities within an excavator's premarks, the current rule provides a certain amount of flexibility to an excavator that prevents jobs from becoming stalled whenever there are minor changes to the scope of work. This issue requires further discussion in the context of a rulemaking to explore other possible alternatives such as a waiver of the ticket renewal requirement for the MDOT.

During the meetings, operators expressed frustration that many excavators did not provide cross streets as requested on the Dig Safe Ticket. Stakeholders stated that by providing the two streets, on either side of the excavation site, that cross the street where the excavation is to occur, facility operators could more quickly respond to tickets. The Commission agrees that dig safe tickets should be filled out as completely and accurately as possible. While this is already part of our educational materials, we will consider whether it can be addressed further in our training sessions. In addition, we will devote further discussion in the context of a rulemaking to explore other possible alternatives, such as creating a violation for inaccurate or incomplete dig safe tickets.⁹

C. Dig Safe Violation History

Unitil was the only stakeholder to provide written comments describing its experience with the Damage Prevention Programs in other states. Unitil's comment indicated that Maine's program is similar to the other states in which it operates. A comparison of damage prevention programs that was compiled by the Vermont Public Service Department confirms this point. The report indicates that while the level of administrative penalties varies significantly nationwide, Maine is consistent with other New England states.¹⁰ Additionally,

⁹ While 23 M.R.S.A. §3360-A limits the violations for an administrative penalty, stakeholders suggested a change to the rule that would allow the Commission to issue a violation without a penalty.

¹⁰ New Hampshire has administrative penalties of \$500 for a first offence and then \$5,000 maximum penalty for subsequent offenses in a 12 month period; Connecticut has a single maximum penalty of \$10,000; Vermont sets maximum penalties at \$500 for a first offense, \$1,000

Maine's damage prevention program has similar tolerance zones and a waiting period that is moderately longer than the average nationally.¹¹ Furthermore, data provided by the Dig Safe System shows that Maine has a higher ratio of tickets called in per mile of facilities possibly indicating a higher level of excavation activity than in other New England states.

The Commission has requested information on trends in types of violations and overall damages from other states. We will continue to work with other states to compile this information and we will forward a more complete report to the U & E Committee upon its arrival.

D. Issues Outside the Scope of this Review

Stakeholders presented the Commission with a series of concerns and suggestion that fell beyond the scope of this review. These concerns ranged from specific technical details regarding the implementation of the rule such as using CMP pole numbers as a means of specifying excavation locations, to broader concern about stakeholder's ability to have input into the amount and frequency with which administrative penalties are assessed for violations through the formation of an advisory committee. Stakeholders also expressed concerns regarding when administrative penalties are assessed and penalty amounts. The Telephone Association of Maine in particular expressed the opinion that administrative penalties should only be assessed rarely and that the majority of the Commission's efforts should be focused solely on educating excavators or operators who commit violations.

We agree that further discussion with stakeholders and possibly rule changes on these topics would be useful. The Commission proposes continued discussions with stakeholders regarding the operational effect of these regulations and any changes in trends either in the practices of the industry or the technology available to operators and excavators.

Our greatest concern with this process to date has been the lack of participation by excavators. While several of the facility operators who participated in the stakeholder meetings also perform excavations, entities that engage solely in excavation were underrepresented. The Associated General Contractors (ACG) attended the initial stakeholder meeting but did not file any written comments and only one excavator was present at the second stakeholder meeting. Given that excavators represent, at least numerically, the majority of entities that are subject

for a second offense, \$1,500 for a third offense, and \$5,000 for subsequent offenses in a 12 month period; and Massachusetts sets administrative penalties at a maximum of \$1,000 for a first of offense and a minimum penalty of \$5,000 and a maximum of \$10,000 for each subsequent offense in a 12 month period. See, Vermont Public Service Department Final Report for DTPH56-08-SN-00011.

¹¹ The majority of states have a 48 hour waiting period after notifying a one call system such as Dig Safe System, Inc. Nine states, including Maine, have a 72 hour waiting period.

to these regulations, their participation is necessary when any changes are being considered. We view bringing more excavators into these discussions as the single greatest challenge to crafting and implementing viable changes to Chapter 895.

IV. CONCLUSION

As discussed above, while there is general agreement that many of the components of the Commission's Damage Prevention Program work well, stakeholders have proposed a variety of changes to the Damage Prevention Program. Many of these proposals would require changes to either 22 M.R.S.A. § 3360-A, Chapter 895 of the Commission's rules, or both. While the meetings with stakeholders have been productive, they have not allowed for the level of discussion and analysis that would be required to implement many of these changes.

We believe that these suggestions deserve further discussion and that continued dialogue with stakeholders is valuable. Accordingly, we will continue to meet with stakeholders to develop a list of issues to be included as proposed amendments to Chapter 895 of the Commission's rules and extend our efforts to include as many of the parties regulated under Chapter 895 as possible.