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Paul R. LePage
GOVERNOR

STATE OF MAINE
EXECUTIVE DEPARTMENT
PUBLIC ADVOCATE OFFICE
112 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0112

Richard Davies
PUBLIC ADVOCATE

January 13, 2012

Sen. Michael Thibodeau, Senate Chair
Rep. Stacey Fitts, House Chair
Committee on Energy, Utilities and Technology
100 State House Station
Augusta, ME 04333-0100

Dear Sen. Thibodeau and Rep. Fitts,

As chairman of the Dig Safe Work Group, created by the Legislature earlier this year in Public Law chapter 72 (“An Act to Clarify the Dig Safe Standards”), I am pleased to convey to the Joint Standing Committee on Energy, Utilities and Technology the recommendations which the Work Group approved - both those sent directly to the PUC for consideration during its rulemaking proceeding (Docket No. 2011-335, Amendments to Underground Facility Damage Prevention Requirements – Chapter 895) and those recommendations which require legislative approval before they can be implemented. During its four meetings held between July 12 and September 15, 2011, the members of the Work Group conducted more than eleven hours of discussion and debate on a wide range of issues related to Maine’s Dig Safe law and rules, and voted on twelve motions for recommendations which, if approved with at least a 2/3 vote of all appointed members, would be included in the PUC rulemaking or would be forwarded to your committee for consideration during the 2012 legislative session.

The Dig Safe Work Group, comprised of 21 members¹ who were nominated in a dozen categories, and nominated (in most cases) by designated organizations, plus the chairman, were charged by the law to **“examine ways to clarify and simplify the so-called dig safe laws and rules to facilitate compliance and to eliminate regulatory uncertainty”**. The Work Group was directed to examine, at least, the following matters:

- A. Pre-excavation marking standards for excavators;
- B. Marking standards for owners and operators of underground facilities;
- C. Enforcement procedures and standards and the appropriate use of penalties; and
- D. Clarification of incident reporting and ensuring that incident investigations involve appropriate fact-finding and do not assume or require inappropriate admission of fault.

The Legislature established a requirement that for any recommendation to be approved and forwarded on to either the PUC or your committee, it must receive the affirmative votes of at least 2/3 of the appointed members of the Work Group, or a minimum of 15 affirmative votes. The Work Group has approved nine recommendations with 15 or more affirmative votes,

¹ The Dig Safe Work Group was authorized to have a 23 members (including the chair) but despite vigorous efforts by the chair and the Associated Builders and Contractors of Maine, we were unable to fill one slot (one of four slots for representatives of “persons who are builders or contractors).



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of which five have been considered by the Public Utilities Commission during a proceeding conducted during the Fall of 2011, and four recommendations which would require legislative action to be implemented and are to be considered for approval by the Legislature during the 2012 legislative session.

The discussion and debate by members was conducted in a vigorous but respectful fashion, and benefited from having greater participation by representatives of contractors subject to the Dig Safe law than has been the case in previous stakeholder groups regarding Dig Safe. As was noted by several representatives of utilities during the Work Group process, the presence of the contractor representatives and the information they brought to the discussion added greatly to the understanding by other Work Group members of how the law and rules affect the contractors. I believe our success in approving the large number of recommendations can be traced in part to this factor.

Please accept this report as the final step called for in the legislation which established the Work Group process. The members of the Dig Safe Work Group look forward to your committee's consideration of our recommendations to you, and of the provisionally-adopted rule changes to PUC Rules, Chapter 895, which come from those of our recommendations that could be directly adopted by the Commission through its rulemaking process.

We look forward to working with your committee as you consider the recommendations we have approved. I have urged the members of the Work Group to participate, as knowledgeable resources, when your committee reviews these recommendations, and expect that several members will do so. It is my belief you're your decision to bring together the "front line" people, who deal with the Dig Safe law and rules on a daily basis, to develop ways to resolve issues with the law or rules has proved a fruitful approach. While not a recommendation voted on by the Work Group, I believe the creation of a permanent "Dig Safe Advisory Board" - to annually consider ways to improve the operations and effectiveness of the Dig Safe law and rules- would be widely supported by the members of the Work Group, and should be considered by your committee in conjunction with your review of our recommendations.

Sincerely,

A handwritten signature in black ink that reads "Richard Davies". The signature is written in a cursive, flowing style.

Richard Davies

Chair, Dig Safe Work Group

**OFFICE OF THE PUBLIC
ADVOCATE
PUBLIC UTILITIES COMMISSION**

**JOINT REPORT
ON
DIG SAFE WORK GROUP
RECOMMENDATIONS**

**SUBMITTED TO THE JOINT STANDING
COMMITTEE ON
ENERGY, UTILITIES AND TECHNOLOGY**

JANUARY 15, 2013

I. Organization of the Dig Safe Work Group

Title 23, Section 3360-A, commonly referred to as the Dig Safe Law, establishes procedures that must be followed by excavators and underground facility operators before and during excavation to ensure the protection of underground facilities. In addition, Section 3360-A also establishes procedures for the Commission to implement and enforce these requirements. Pursuant to 23 M.R.S.A. § 3360-A (13), rules adopted by the Commission to implement this section are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A.

Several changes to section 3360-A have been proposed to the Legislature since 2009, resulting in stakeholder groups being convened at the direction of the Legislature. This report provides the recommendations of the most recent Dig Safe Stakeholder Group convened pursuant to Public Law 2011, ch 588 (An Act to Implement the Recommendations of the Dig Safe Work Group) (the Act).¹ Pursuant to the Act, the Legislature established a 23 member group, chaired by the Public Advocate, with members from 13 designated categories (Work Group). In eight of those categories, the legislation identified organizations from which the Public Advocate was to consider recommendations to fill the slots provided for in the Act. In the remaining categories, the Act authorized the appointment of members by industry groups at the discretion of the Public Advocate. All of the positions authorized by the law were filled through appointments directed by the Legislature or chosen by the Public Advocate. The Act

¹ Attached as Attachment A.

did not designate the Commission as a member of the workgroup. Rather, the Commission was directed to work in consultation with the work group to carry out the tasks assigned by the Act.

Meetings of the Work Group were held on June 20th, July 26th, July 19th, September 13th, October 10th, and November 27th (postponed from November 1st because several members had recovery responsibilities following Hurricane Sandy). Pursuant to Public Law 2011 ch. 588, the PUC was required to submit provisionally adopted rules reflecting changes recommended by the Work Group for the next legislative session. Ultimately, the Work Group approved no recommendations that necessitated the PUC to initiate a rulemaking proceeding. Participation in these meetings by Work Group members was high, with most members attending all five meetings, and all members attending at least three meetings. This high attendance was facilitated by allowing participation via a telephone link for those members who could not be physically present.

II. Approval Standard

Pursuant to Public Law 2011, ch. 588, the Work Group was charged with examining “*Ways to facilitate the creation of a centralized one-call system to notify the operators of underground facilities of pending excavations.*” Specifically, the Work Group was directed to examine, at least, the following matters:

- A. Creating a new apportionment of the costs of membership in the damage prevention system so that members could pay a flat fee for each notification of pending excavation;

- B. Authorizing an operator who is not a member of the damage prevention system to be subject to administrative penalties for violations of Title 23, section 3360-A;
- C. Requiring an operator who is not a member of the damage prevention system to maintain insurance when an excavator is working on that operator's underground facilities;
- D. Identifying appropriate tolerance zones for marking different types of underground facilities;
- E. Developing a process for the commission to keep records of successful markings or excavations completed by members of the damage prevention system; and
- F. Evaluating the need for an on-going advisory board to provide input to the Public Utilities Commission regarding the damage prevention system, including consideration of staffing requirements, membership, funding and the scope of responsibility for the advisory board.

Public Law 2011, ch. 588, Section 5, sub-§5, required the Work Group to report all recommendations that were approved by a 2/3 majority of the Work Group's members. During the course of 16 hours of discussion and debate, the Work Group considered five recommendations proposed by its members. Of these five recommendations, four were ultimately approved by the 2/3 majority of appointed members required. This requirement for a super-majority (at least 16 affirmative votes out of 22 members) resulted in the approval of recommendations that had broad support from the members of the Work Group. The four recommendations approved by the Work Group and included in this report for consideration by the Legislature would each require both

statutory changes and subsequent amendments to Commission rules. These recommendations are described below and accompanied by draft statutory language necessary to implement the recommendation.

III. Recommendations of the Work Group

1. Formation of a Dig Safe Advisory Board

The Work Group recommends the creation of a 22 person advisory board to provide advice and counsel to the Commission on issues surrounding the protection of underground facilities. The draft statutory language developed by the Work Group authorizes the creation of an advisory board comprising representatives of various industries and groups that operate under the Dig Safe law or are otherwise affected by its requirements.² Each of these persons would be appointed by the Governor and serve a four year term with the exception of the initial members who would serve terms between one and four years, the length of these initial terms to be selected at random. The positions on the Advisory Board are allocated to representatives of different stakeholder groups and the draft statutory language approved by the Work Group would require the Governor, when making appointments, to consider persons submitted for

² Based on the Work Group's recommendation, the Advisory Board would comprise two municipal public works officials; three persons who are builders or building contractors; three persons who are general construction contractors; two persons representing quasi-municipal water districts or sewer districts; two persons representing telephone utilities; one representative of cable television service providers; two persons representing owners or operators of underground fuel facilities; one person representing natural gas pipeline operators; one person representing investor owned transmission and distribution utilities; one person representing consumer owned transmission and distribution utilities; two persons representing municipal officials; and one person with "expertise in the underground facility damage prevention system who does not represent an active excavator or underground facility operator." Additionally, the Commission, the Office of the Public Advocate, the Department of Transportation, and DigSafe, Inc. would each have an employee representative on the Advisory Board.

appointment by Maine Municipal Association, the Associated Builders and Contractors of Maine, the Associated General Contractors of Maine, Maine Rural Water Association, Maine Water utilities Association, the Telephone Association of Maine, and the Maine Energy Marketers Association.

As proposed by the Work Group, the Advisory Board would be tasked with identifying appropriate tolerance zones for marking different types of underground facilities; reviewing and making recommendations regarding Best Management Practices; and any other issue or issues which the Advisory Board may identify as having good potential for improving the protection of underground facilities. Additionally, recommendations approved by two-thirds of the appointed members of the Work Group will be forwarded to the Commission which would be required to “promptly consider” the recommendation although it would not be required to adopt any such recommendation. Finally, the Advisory Board would make an annual report to the Legislature and also have the ability to send any recommendation the Commission declines to adopt to the Utilities, Energy, and Technology Committee. Finally, Advisory Board Appointees would not be eligible for compensation; however, the Advisory Board would be authorized to accept funds from non-state sources. Proposed legislation to implement the recommendation is attached in Attachment C.

Commission’s Observations

As proposed by the Work Group, the authorizing legislation for the Advisory Board would be enacted in Title 35-A and referenced in 5 M.R.S.A. § 12004-G as a General Government Board. Given the characteristics of the Advisory Board as proposed by the

Work Group, the Commission observes that the Advisory Board is more accurately classified as an advisory board under 5 M.R.S.A. § 12004-I. Additionally, the Commission suggests that should the Legislature elect to adopt this recommendation, that the authorizing statutes be enacted in 23 M.R.S.A. § 3360-A with all other Damage Prevention requirements. The Commission also is concerned that 22 members may make the group too large to operate effectively and efficiently and may require a larger than necessary dedication of resources.

2. Enforcement Procedures and Administrative Penalties

Under 23 M.R.S.A. § 3360-A, the Commission has limited authority to impose administrative penalties for violations of the Dig Safe law safety requirements. Pursuant to 23 M.R.S.A. § 3360-A(6-C), administrative penalties may only be imposed for 1) failure of an excavator to give notice of an excavation ; 2) performing excavation in a reckless or negligent manner that poses a threat to an underground facility; 3) excavating using mechanical means within the safety zone around an underground facility; 4) failure of an underground facility operator to mark the location of the operator's underground facilities within 3 days; 5) marking by an underground facility operator of the location of an underground facility in a reckless or negligent manner; or 6) failure of an excavator to comply with the exemption requirements for shoulder grading, borrow pits, cemeteries, or commercial timber harvesting. Prior to imposing any administrative penalty the Commission is required to consider “evidence of the record of the violator, including, to the extent applicable, the number of successful excavations undertaken by the violator or the number of locations successfully marked

by the violator during the prior 12 months.” 23 M.R.S.A. § 3360-A(6-C). Any administrative penalty imposed in light of these considerations for these specifically enumerated violations must not exceed \$500 for a first violation and no more than \$5,000 dollars for any additional violations within a 12 month period. Id.

The Work Group recommendation would limit the application of administrative penalties for violations of Section 3360-A to incidents where 1) they resulted from a policy or practice of the Dig Safe member that encourages its employees to engage in activities that violate the Dig Safe laws; 2) the specific violation caused, or had a reasonable likelihood of causing, injury or death to an individual; or 3) the specific violation caused in excess of \$50,000 in damage to underground facilities. Additionally, the Work Group recommends that the Legislature require the Commission to continue to work with the Advisory Board proposed by the Work Group to develop a “decision tree” based on industry best management practices to determine how to address violations of the Dig Safe Law.

In addition, the Work Group recommends that the discretion to determine if there is probable cause to believe that a violation of Section 3360-A be removed from investigators and vested in a “Dig Safe Reviewer” who will review all investigation reports and determine fault and make recommendations for potential penalties based on the adherence to a given excavator or operator’s best management practices and other criteria discussed above.

Further, the Work Group recommends the addition of a second informal process to resolve alleged violations before the Dig Safe Reviewer makes the determination to issue a notice that a violation is alleged to have occurred and proposes an

administrative penalty. As recommended by the Work Group, the Dig Safe Reviewer, when inclined to determine that a violation has occurred and that a penalty consisting of either training or and administrative penalty is appropriate, must first contact the excavator or operator in question, inform that excavator or operator of the inclination to propose a penalty, and request a response to that inclination from the operator or excavator before issuing any notice of an alleged violation.

Finally, in the event that the Dig Safe Reviewer issues a notice to an excavator or operator that a violation is alleged to have occurred, the Work Group recommends that the excavator or operator have the opportunity to avail themselves of a second informal review of the alleged violation before a Commission Hearing Examiner other than Commission Staff assigned as investigators or the Dig Safe Reviewer. Proposed legislation to implement the recommendation is attached in Attachment C.

Commission Observations

The Commission believes that the likely, and unintended effect of these changes is that the incentive to comply fully with Dig Safe laws will be reduced, which could in turn lead to additional facility damage. As indicated by data collected by the U. S. Department of Transportation Pipeline and Hazardous Materials Administration (PHMSA), excavation damage is a major cause of pipeline safety incidents. Between the years 1992 and 2011, excavation damage has been the single greatest cause of serious incidents causing damage to gas distribution systems, resulting in 119 fatalities, 433 injuries, and over \$42 million in damages.³ These amounts refer only to natural gas

³ U. S. Department of Transportation Pipeline and Hazardous Materials Administration, Significant Pipeline Safety Incidents by Cause. Available at:

pipelines and do not include the effect of excavation damage to electric, telecommunications, and other underground facilities or account for the amount and length of service outages. The Commission's regulation of excavation practices is intended to reduce such occurrences in Maine and to be consistent with the national effort to develop more effective methods of preventing excavation damage. These national efforts began with the Common Ground Alliance (CGA), a group comprising industry stakeholders at the national level and convened by the U. S. Department of Transportation in response to the 1998 Transportation Equity Act for the 21st Century to study and report upon damage prevention practices. The CGA, in both its initial study and continuing in its Best Practices 9.0, recommends that penalties, along with mandatory training, be available remedies for violations of damage prevention statutes.⁴ In its study, the CGA acknowledged that weak enforcement was a continuing concern in damage prevention.

Weak Enforcement of Damage Prevention Laws – Some damage prevention efforts are limited by effectively having no teeth in damage prevention laws. This can result in inconsistent one-call system practices and the possibility of higher damage rates. State practices also vary greatly regarding which groups are responsible for the actual administration and issuance of damage prevention enforcement, with wide degrees of variation in program utilization and overall impact. *Common Ground Alliance, Common Ground, Study of One-Call Systems and Damage Prevention Best Practices*, p. 168 (Aug. 1999).

http://primis.phmsa.dot.gov/comm/reports/safety/SigPSIDet_1992_2011_US.html?nocache=8100 (Last viewed January 6, 2013).

⁴ See Common Ground Alliance, Working Together to Prevent Damage, Best Practices 9.0 p. 60-61 (March 2012). Available at: <http://www.3-clickdeskreference.com/commonground/cga.htm>

The Legislature may wish to consider whether the changes to Commission's enforcement practices proposed by the Work Group would impact the consistent and effective application of damage prevention requirements by linking compliance to best practice standards created by each excavator or operator. Moreover, the Legislature may wish to consider whether the additional layers of review and consultation may add unnecessary complexity to the efforts of excavators and operators to comply with safety requirements and also render enforcement policy and practices less predictable.

3. Recommendation to require all facility operators be members of Dig Safe, Inc. (also referred to as the "Consensus" recommendation).

The "Consensus Recommendation" would require all underground facility operators to become members of Dig Safe, Inc. The recommendation:

- A. Creates a definition of "Underground Facility Participant;"
- B. Requires an "underground facility participant" to be a member of Dig Safe System, Inc.;
- C. Requires operator response to notice to locate and mark facilities;
- D. Establishes a 36 inch tolerance zone for marking facilities for conveyance of water or sewage;
- E. Prohibits the Commission from assessing an administrative penalty upon an "underground Facility participant" for any violation occurring prior to October 1, 2015;
- F. Authorizes the Commission to use penalty funds to support a one-call system for protection of underground facilities;

- G. Directs the Commission to work with the Dig Safe Advisory Board to adopt procedures for addressing violations of Title 23, section 3360-A regarding training for PUC staff investigating potential violations on best management practices, and ensuring that penalty structures are objective, predictable, and not arbitrary;
- H. Direct that any allocated but unused funds for operation and maintenance of an OKTODIG website be used to support a one-call system for protection of underground facilities by offsetting the difference between the amount paid by a utility facility participant and the amount paid to the Dig Safe System, Inc. by a utility facility operator with an equal number of miles of underground facilities
- Proposed legislation to implement this recommendation is attached in Attachment C.

Commission Observations

The Commission has no comments regarding this recommendation.

4. Recommendation to require all entities owning or operating underground facilities to be a member of OK TO DIG (also referred to as the “Fallback” recommendation).

The “Fallback” recommendation would require all entities owning or operating underground facilities to be a member of OK TO DIG, and providing for liability for certain damage. This proposal was approved by the Work Group as a “Fallback position” of the Work Group for use only if the “Consensus” recommendation (see

above) is not unanimously supported by the organizations, groups or other entities which are identified in Public Law 2011, ch. 588 (“An Act to Implement the Recommendations of the Dig Safe Work Group”) as entities authorized to nominate one or more members to serve on the 2012 Dig Safe Work Group. Its provisions include:

- A. Defines any entity that owns one or more underground facilities but is not a member of the underground facility protection system as an OK TO DIG member;
- B. Requires the Public Utilities Commission to maintain a database and website of contact information pertaining to OK TO DIG members;
- C. Establishes OK TO DIG member duties, including:
 - registering their underground facilities for inclusion in the OK TO DIG database;
 - providing the PUC with the names of each community in which their underground facilities are located;
 - providing the PUC with current 24 hour contact information to enable anyone planning to excavate in a community to contact the entity and notify them of the need to mark their facilities, and updating the contact information within 5 business days after such contact information is changed or added;
 - responding to any notices received regarding their facilities by marking those facilities, or notifying the excavator that the entity has no facilities in the area of the excavation, within the timeframes set in the law
- D. Makes OK TO DIG members liable for any damage that occurs to the OK TO DIG member’s underground facilities as well as any costs that may result from damage to the OK TO DIG member’s facilities where such damage to

underground facilities is the result of an excavation undertaken pursuant to Title 23, Section 3360-A; and

- E. Modifies Title 23, Section 3360-A, sub-section 6-B, with a new sentence which says the provisions of 6-B shall not apply if the damaged facility is owned by an OK TO DIG member as defined by Title 35-A, Section 2523, sub-section 1.

Proposed legislation to implement the recommendation is attached in Attachment C.

Commission Observations

The Commission's only comment regarding this recommendation is that it may be creating a different liability standard for a subset of non-member operators which may be controversial.

IV. Legislation

Pursuant to the Act, the Commission will be submitting legislation necessary to implement the work group's recommendations for the Legislature's consideration during the 2013 session.

V. Conclusion

The Commission, the Public Advocate and the other Work Group Members look forward to the Committee's consideration of the Work Group recommendations during the 2013 Legislation Session.

IV. Attachments

- A. Public Law 2011, Chapter 588, An Act to Implement the Recommendations of the Dig Safe Work Group
- B. Public Advocate's Nominations to Serve on Dig Safe Work Group
- C. Copies of approved recommendations, along with draft Legislation approved by the Dig Safe Work Group

Attachment A

Text of the section of Public Laws of 2011 Chapter 588 (formerly LD 1803, “An Act to Implement the Recommendations of the Dig Safe Work Group”) which creates a new Dig Safe Work Group and spells out its duties.

Sec. 6. Convene a "dig safe" work group. The Public Advocate shall convene a work group, referred to in this section as "the work group," to examine, improve and enhance the underground facility damage prevention system established in the Maine Revised Statutes, Title 23, section 3360-A, subsection 1-A and referred to in this section as "the damage prevention system."

1. Chair. The Public Advocate shall serve as the chair of the work group.

2. Membership. When appointing members, the Public Advocate shall consider a fair representation of members and nonmembers of the damage prevention system. The work group consists of 23 members as follows:

A. Twenty-two persons appointed by the Public Advocate:

(1) Two persons who are municipal public works officials, one of whom is from a municipality with a large population and one from a municipality with a small population. The Public Advocate shall consider any recommendations for appointments under this subparagraph submitted by the Maine Municipal Association;

(2) Three persons who are builders or contractors who conduct business in geographically diverse areas of the State. The Public Advocate shall consider any recommendations for appointments under this subparagraph submitted by the Associated Builders and Contractors of Maine;

(3) Three persons who are general contractors who conduct business in geographically diverse areas of the State. The Public Advocate shall consider any recommendations for appointments under this subparagraph submitted by the Associated General Contractors of Maine;

(4) One person with expertise in the damage prevention system who does not represent an active excavator or underground facility operator. The Public Advocate shall consider any person with appropriate expertise who submits a request to be appointed under this subparagraph;

(5) Two persons who represent quasi-municipal water or sewer utilities, one of whom represents a small utility and one of whom represents a large utility. The Public Advocate shall consider any recommendation for the person to represent a small utility submitted by the Maine Rural Water Association. The Public Advocate shall consider any recommendation for the person to represent a large utility submitted by the Maine Water Utilities Association;

(6) Two persons who represent telephone utilities, one of whom represents a small rural telephone utility and one of whom represents a large telephone utility. The Public Advocate

shall consider any recommendations for appointments under this subparagraph submitted by the Telephone Association of Maine;

(7) One person representing cable television service providers in the State;

(8) Two persons representing owners or operators of underground fuel facilities. The Public Advocate shall consider any recommendations for appointments under this subparagraph submitted by the Maine Energy Marketers Association;

(9) One person representing the owner or operator of a natural gas pipeline;

(10) One person representing investor-owned transmission and distribution utilities;

(11) One person representing consumer-owned transmission and distribution utilities;

(12) One person who represents the Dig Safe system. The Public Advocate shall consider any recommendations for appointments under this subparagraph submitted by Dig Safe System, Inc.; and

(13) Two municipal officials or persons representing municipal officials; and

B. The Public Advocate.

3. Convening. The Public Advocate shall convene the work group no later than 60 days following the effective date of this section.

4. Duties. The work group, in consultation with the Public Utilities Commission, shall examine ways to facilitate the creation of a centralized one-call system to notify the operators of underground facilities of pending excavations. This examination must include, but is not limited to:

A. Creating a new apportionment of the costs of membership in the damage prevention system so that members could pay a flat fee for each notification of pending excavation;

B. Authorizing an operator who is not a member of the damage prevention system to be subject to administrative penalties for violations of Title 23, section 3360-A;

C. Requiring an operator who is not a member of the damage prevention system to maintain insurance when an excavator is working on that operator's underground facilities;

D. Identifying appropriate tolerance zones for marking different types of underground facilities;

E. Developing a process for the commission to keep records of successful markings or excavations completed by members of the damage prevention system; and

F. Evaluating the need for an ongoing advisory board to provide input to the commission regarding the damage prevention system. The work group shall consider staffing requirements, membership, funding and the scope of responsibility for the advisory board.

5. Staff assistance. To the extent possible within existing resources, the Public Advocate and the Public Utilities Commission shall provide necessary staffing services to the work group.

6. Report. No later than January 15, 2013, the Public Utilities Commission and the Public Advocate shall jointly submit a report to the joint standing committee of the Legislature having jurisdiction over energy, utilities and technology matters that includes all findings and recommendations of the work group that are supported by at least 2/3 of the appointed members

of the work group. The commission shall submit to the First Regular Session of the 126th Legislature by January 15, 2013 any legislation necessary to carry out the recommendations of the work group and provisionally adopted rules pursuant to Title 23, section 3360-A, subsection 13 necessary to carry out the recommendations of the work group.

Attachment B

Appointees to serve on Dig Safe Work Group 2012 (11/26/12)

Category

1. **Municipal public works officials** - 2 names (one from large community and one from small community)

Dana Wardwell
City of Bangor
73 Harlow Street
Bangor, ME 04401
Phone: 207-992-4501
Fax: 207-942-6631
dana.wardwell@bangormaine.gov

Bob Burns
Public Works Director
Town of Gorham
75 South St., Suite 1
Gorham, Maine 04038
Phone: 207-892-9062
Fax: 207-893-2092
rburns@gorham.me.us

2. **Persons who are builders or contractors** – 3 names (from diverse areas of Maine)

Kevin Murphy
RJ Grondin and Sons
11 Bartlett Rd.
Gorham, ME 04038
k.murphy@grondinconstruction.com
(207) 854-1147

Marc Levesque
Director of Risk Management
On Target Utility Services
99 Enterprise Ave.
Gardiner, ME 04345
588-3314
mlevesque@ontargetservices.com

Bruce Hubbard
ETTI (directional boring co.)
bruce@hdd-etti.com

3. **Persons who are general contractors** – 3 names (from diverse areas of Maine)

Bruce Brown

~~Randy Gardner~~ (**resigned Oct. 2012**)

Shaw Brothers Construction
 PO Box 69
 Gorham, ME 04038
 839-2552
bbrown@shawbrothers.com

~~Gardner Construction
 505 Davis Road
 Bangor, ME 04401
randy@gardnereconstructionenterprises.com~~

Carl Wallace
 Maine Drilling and Blasting
 423 Brunswick Ave.
 Gardiner, ME 04345
 Office # 582-2338
 Cell # 212-3316
cwallace@mdandb.com

Matt Marks (**appointed 11/26/12**)
 Associated General Contractors
 188 Whitten Rd.
 Augusta, ME 04330
 622-4741
mmarks@agcmaine.org

4. Person with expertise in underground facility damage prevention – not an excavator or operator

Stan Grover
 36 Mary St.
 West Gardiner, ME 04345
 582-2512
scgmag@aol.com

5. Persons representing quasi-municipal water or sewer utilities – one small utility and one large

Kevin Ishihara
 Portland Water District (large utility)
 225 Douglass St.
 PO Box 3553
 Portland, ME 04104
 774-5961 x. 3072
kishihara@pwd.org

Dan Wells
 Superintendent
 Winthrop Utilities District
 Bowdoin St.
 Winthrop, ME 04364
 377-2712
wintutil@fairpoint.net

6. Persons who represent telephone utilities – one small rural company and one large company

Ben Sanborn (small rural company)
 Telephone Association of Maine
 PO Box 5347
 Augusta, ME 04330-5347
 (207) 314-2609
ben@sanbornesq.com

Kathleen Dumaine (large company)
 FairPoint Communications
 900 Elm St. Floor 16
 Manchester, NH 03101
 (603) 645-3343
Kathleen.dumaine@fairpoint.com

7. Person representing cable television service providers in Maine

Don Johnson
 Time Warner Cable

118 Johnson Rd.
Portland, ME 04102
(207) 253-2291 (direct line)
Don.Johnson@twcable.com

8. Persons representing owners or operators of underground fuel facilities – two representatives

Alan Dow
Champagne's Energy
844 Old Post Rd.
Arundel, ME 04046
283-1518 or 800-564-1518
adow@champagnesenergy.com

Carl Bisson
Inergy Propane
100 Warren Ave.
Portland, ME 04103
797-7910
carl.bisson@inergyservices.com

9. Person representing owner or operator of a natural gas pipeline

Sam Murray
Unitil (Northern Utilities)
1075 Forest Ave. (PO Box 3586)
Portland, ME 04102
(207) 541-2528
978-423-8534 cell
Murray@unitil.com

10. Person representing investor-owned transmission and distribution utility

Arthur Brown
Central Maine Power Co.
83 Edison Drive
Augusta, ME 04336
(207) 626-9562 office
(207) 242-8805 cell
Arthur.brown@cmpco.com

11. Person representing consumer-owned transmission and distribution utilities

Sharon Staz
Kennebunk Light and Power District
4 Factory Pasture Lane
Kennebunk, ME 04043
(207) 985-3311
sastaz@klpd.org

12. Person representing Dig Safe System

Robert Finelli
Executive Director
Dig Safe System Inc.
331 Montvale Ave.
Woburn, MA 01801
(781) 721-1191
bfinelli@digsafe.com
www.digsafe.com

13. Municipal officials, or persons representing municipal official

Mark Turner
Public Works Director
City of Waterville
6 Wentworth Court
Waterville, ME 04901
Tel: 680-4744
Fax: 877-7532
pw@waterville-me.gov or
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Attachment C-1

Dig Safe Work Group

DRAFT Recommendation #7

Presented by Ben Sanborn

Approved Nov. 27, 2012 by a vote of 17-4

Re: Developing a decision-tree based on industry best management practices for determining how to address, through consultation, training or penalties, actions resulting in violations of the Dig Safe statute

BE IT RESOLVED that the Commission shall work with the Dig Safe Advisory Board to develop a decision tree based on industry best management practices for determining how to address, through consultation, training or penalties, actions that resulted in violations of the Dig Safe statute; and

BE IT FURTHER RESOLVED that the Commission shall establish, by Rule, procedures for oversight of the dig safe program that shall include, at a minimum, the following characteristics:

- Commission staff investigating a potential dig safe violation (Dig Safe Investigators) shall provide a factual account of the result of an investigation but shall not suggest or propose any penalty or allocation of fault.
- The Commission shall delegate one or more individuals within the commission who shall review all investigation reports (Dig Safe Reviewer) to determine whether and to what extent to allocate fault and/or penalties. A Dig Safe Reviewer may not also be a Dig Safe Investigator.

- Prior to proposing to assess any training or penalties upon a Dig Safe member or Excavator, the Dig Safe Reviewer shall contact the Dig Safe member or Excavator and indicate that training or a penalty is being considered and request a response from the Dig Safe member or Excavator.
- The Dig Safe Reviewer may recommend a financial penalty if the Dig Safe Reviewer finds that
 - the dig safe violation resulted from a policy or practice of the Dig Safe member or Excavator that encourages its employees to engage in activities that violate the Dig Safe laws; or
 - the specific violation caused, or had a reasonable likelihood of causing, injury or death to an individual; or
 - the specific violation caused in excess of \$50,000 in damage to underground facilities; or
 - a financial penalty is necessary to protect the interests of the dig safe system and public safety.
- If the Dig Safe Reviewer determines that training or a penalty is appropriate, the Dig Safe Reviewer shall forward the proposed resolution to the Dig Safe member or Excavator. Upon receipt of the proposed resolution, the Dig Safe member or Excavator may request an informal review in front of a Commission Hearing Examiner. The Commission Hearing Examiner may not have acted as Dig Safe Reviewer or Dig Safe Investigator in the matter that is the subject of the review.

The Commission shall not enforce any provision of its existing policies or Rules that are inconsistent with the provisions of this Resolve. Rules adopted pursuant to this Resolve are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A.

Attachment C-2

Dig Safe Work Group

DRAFT RECOMMENDATION #4

Approved Nov. 27, 2012 on a 17-4 vote

Re: Creating a Dig Safe Advisory Board (see attached legislation), and assigning to the Advisory Board the tasks of:

- a. Identifying appropriate tolerance zones for marking different types of underground facilities;**
- b. Reviewing and making recommendations regarding Best Management Practices; and**

c. Any other issue or issues which the Advisory Board may identify as having good potential for improving the protection of underground facilities

The Dig Safe Work Group recommends that the Maine Legislature approve legislation to create a Dig Safe Advisory Board, along the lines of the attached draft legislation, and assign to this Advisory Board the tasks of:

- Identifying appropriate tolerance zones for marking different types of underground facilities;
- Reviewing and making recommendations regarding Best Management Practices;
- and
- Any other issue or issues which the Advisory Board may identify as having good potential for improving the protection of underground facilities

**Legislative proposal for a
Maine Dig Safe Advisory Board**

(Oct. 23, 2012 draft)

(offered by the Office of Public Advocate)

5 MRSA § 12004-G(30-E) is enacted to read as follows :

Public Utilities	Dig Safe Advisory Board	Not Authorized	35-A MRSA §1802
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Title 35-A Chapter 18 is enacted to read as follows:

Chapter 18. Protection of Underground Facilities

§1801. Findings. The legislature finds that the protection of underground facilities is necessary for the safety and welfare of the State and for the orderly provisioning of public utility services in the State and it declares that it is in the public interest to form an advisory board consisting of owners of underground facilities, excavators, and

representatives from the commission, Office of Public Advocate, and State department of transportation, to ensure that the protection of underground facilities is handled in an efficient, effective, and reasonable manner.

§1802. The Dig Safe Advisory Board.

1. The Dig Safe Advisory Board referenced in 5 MRSA §12004-G, subsection 30-E, shall provide advice and counsel to the commission on matters pertaining to the protection of underground facilities and the implementation of best practices in the provision of this protection.

2. Membership. The Dig Safe Advisory Board consists of 25 members as follows.

A. Twenty-two persons appointed by the Governor:

(1) Two persons who are municipal public works officials, one of whom is from a municipality with a large population and one from a municipality with a small population. The Governor shall consider any recommendations for appointments under this subparagraph submitted by the Maine Municipal Association within 20 days of the effective date of this Act;

(2) Three persons who are builders or contractors who conduct business in geographically diverse areas of the State. The Governor shall consider any recommendations for appointments under this subparagraph submitted by the Associated Builders and Contractors of Maine within 20 days of the effective date of this Act;

(3) Three persons who are general contractors who conduct business in geographically diverse areas of the State. The Governor shall consider any recommendations for appointments under this subparagraph submitted by the Associated General Contractors of Maine within 20 days of the effective date of this Act;

(4) One person with expertise in the underground facility damage prevention system who does not represent an active excavator or underground facility operator. The Governor shall consider any person with appropriate expertise who submits a request to be appointed under this subparagraph within 20 days of the effective date of this Act;

(5) Two persons who represent quasi-municipal water or sewer utilities, one of whom represents a small utility and one of whom represents a large utility. The Governor shall consider any recommendation for a person representing a small utility submitted by the Maine Rural Water Association within 20 days of the effective date of this Act. The Governor shall consider any recommendation for a person representing a large utility submitted by the Maine Water Utilities Association within 20 days of the effective date of this Act;

(6) Two persons who represent telephone utilities, one of whom represents a small rural telephone utility and one of whom represents a large telephone utility. The Governor shall consider any recommendations for appointments under this subparagraph submitted by the Telephone Association of Maine within 20 days of the effective date of this Act;

(7) One person representing cable television service providers in Maine;

(8) Two persons representing owners or operators of underground fuel facilities. The Governor shall consider any recommendations for appointments under this subparagraph submitted by the Maine Energy Marketers Association within 20 days of the effective date of this Act;

(9) One person representing the owner or operator of a natural gas pipeline;

(10) One person representing investor-owned transmission and distribution utilities;

(11) One person representing consumer-owned transmission and distribution utilities; and

(12) Two persons who are municipal officials or who represent municipal officials. The Governor shall consider any recommendations for appointments under this subparagraph submitted by the Maine Municipal Association within 20 days of the effective date of this Act.

The term of appointment for members appointed from the categories within sub-section 2, part A of this chapter shall be four years, but the terms for persons appointed to the initial advisory board shall be for one, two, three, or four years as determined by a process of random selection.

B. An employee of the commission, to be appointed by the Chair of the commission.

C. An employee of the Maine department of transportation, to be appointed by the Commissioner of the Maine department of transportation.

D. An employee of the Office of the Public Advocate, to be appointed by the Public Advocate.

E. One person who represents the Dig Safe system, to be appointed by Dig Safe System, Inc.

3. Chair. The representative of the Office of the Public Advocate shall Chair the Advisory Board.

4. Appointments; convening. All appointments must be made no later than 30 days following the effective date of this section.

5. Duties. The Dig Safe Advisory Board shall meet as often as deemed necessary by the members of the board, but no less than once per quarter in each calendar year, for the purpose of addressing issues and developing policies pertaining to the Dig Safe system and the safety of underground facilities. The Advisory Board may form subcommittees as may be necessary and useful to gather information and develop proposals for consideration by the entire Board.

6. Advisory Capacity. The Dig Safe Advisory Board shall work cooperatively with the Public Utilities Commission to ensure that Maine's Dig Safe system adopts, where appropriate, industry best practice guidelines for the protection of underground facilities pursuant to the work of any regional or national industry groups working to promote underground utility safety, including but not limited to the Common Ground Alliance. The Dig Safe Advisory Board and the Public Utilities Commission shall work cooperatively in developing and implementing any changes to Rule or policy related to the Dig Safe System in the State. In order to promote cooperation between the Dig Safe Advisory Board and the Public Utilities Commission, notwithstanding any other provisions of law, the Public Utilities Commission and the Dig Safe Advisory Board shall adhere to the following provisions regarding Rules affecting the Maine Dig Safe System:

_____ If at least 2/3 of the appointed members of the Advisory Board approve a recommendation for:

- a. a new or revised provision to the Underground Facility Damage Prevention Requirements Rule, or elimination of an existing provision of that rule, the Public Utilities Commission shall promptly consider the recommendation and advise the Advisory Board what, if any, action it will take. The Public Utilities Commission is not required to adopt, in whole or in part, any Rule proposed pursuant to this section. In the event that the Commission chooses to take no action on the recommendation, the recommendation may be sent to the legislative committee with jurisdiction over the "Protection of Underground Facilities" law (23 MRSA §3360-A) for consideration, or;
- b. a new or revised provision of the "Protection of Underground Facilities" law (23 MRSA §3360-A), the proposal shall be forwarded to both the Joint Standing

Committee of the Legislature with jurisdiction over utilities, energy and technology, for their consideration, and to the commission in order that they may offer their views on the proposal to the committee.

7. Report to the legislature. On or before January 15 of each calendar year following the effective date of this Chapter, the Dig Safe Advisory Board shall submit a report to the legislature describing the activities of the Dig Safe Advisory Board during the previous calendar year. The report shall include at a minimum a description of the topics which were discussed by the Dig Safe Advisory Board and any actions undertaken by the commission at the direction of the Dig Safe Advisory Board. The Joint Standing Committee on Energy, Utilities and Technology shall have the authority to report out legislation based on the contents of the report.

8. Compensation. Compensation is not authorized for members of the Advisory Board.

9. Authority to accept financial support. The Advisory Board is authorized to accept, receive and expend funds received from non-State sources for the purpose of supporting the work of the Advisory Board, including, but not limited to the hiring of staff or consultants. The Advisory Board shall consider and adopt a funding mechanism for supporting its work. Among the funding options it shall consider is one based on annual contributions from underground facility owners, excavators, and other entities interested in protecting underground facilities from damage. All funds received and expended to support the work of the Advisory Board shall be reported annually to the Public Utilities Commission and made public.

Attachment C-3

DSWG Consensus Legislation

(To be implemented only if unanimously supported)

Approved Nov. 27, 2012 on a 18-2 vote

Sec. 1. 23 MRSA § 3360-A(1)(F-1) is hereby enacted as follows:

F-1. “Underground Facility Participant” means an owner or operator of any underground facilities, other than a person that owns underground facilities on its own property for commercial or residential purposes, who is not an underground facility operator.

Sec. 2. 23 MRSA § 3360-A(1-A) is hereby amended as follows:

1-A. Damage prevention system. Each underground facility operator and underground facility participant shall be a member of and participate in an underground facility damage prevention system, referred to in this section as the "system." The system shall operate during regular business hours throughout the year and maintain adequate operations at all other times to receive and process emergency notifications of proposed excavations. The system shall receive notices of proposed excavations and immediately transmit those notices to underground facility operators whose facilities may be affected. The cost for operation of the system must be apportioned equitably among members, except that the costs for participation by underground facility participants must be assessed in the same manner and at the same monetary rate as costs assessed by the system on General Members as defined by the system. Nothing in this subsection prohibits a municipality, utility or other entity that owns or operates an underground facility from voluntarily becoming a member of the system. Notwithstanding subsection 1, paragraph F, a person that voluntarily becomes a member of the system or an underground facility participant is deemed an underground facility operator for the purposes of this section. The system shall not charge any underground facility participant for any activities associated with preparing and loading maps of underground facility locations when the underground facility participant first provides location specific mapping data to the system at a level of detail more precise than indexing at the municipal level.

Sec. 3. 23 MRSA § 3360-A(4) is hereby amended as follows:

4. Operator response to notice locating facilities. An underground facility operator shall, upon receipt of the notice provided for in subsection 3-A, advise the excavator of the location and size of the operator's underground facilities and all underground facilities used in furnishing electric or gas service that are connected to the operator's facilities, located in the public way and known to the operator in the proposed excavation area by marking the location of the facilities with stakes, paint or by other identifiable markings. If the underground facilities being marked are facilities used for the conveyance of water or sewage, the marking must identify a strip of land not more than 72 inches wide directly over the facility or a strip of land extending not more than 36 inches on each side of the underground facility and must indicate the depth of the

underground facility, if known. For all other underground facilities, the The marking must identify a strip of land not more than 3 feet wide directly over the facility or a strip of land extending not more than 1 1/2 feet on each side of the underground facility and must indicate the depth of the underground facility, if known. The underground facility operator shall complete this marking no later than 2 full business days after receipt of the notice. After the underground facility operator has marked the location of that operator's underground facilities in the proposed excavation area, the excavator is responsible for maintaining the markings at the location, unless the excavator requests remarking at the location due to obliteration, destruction or other removal of the markings. The underground facility operator shall remark the location within one business day following the receipt of a request to remark.

If the proposed excavation is of such length or size that the underground facility operator advises the excavator that the operator can not reasonably respond with respect to all the operator's underground facilities within 2 full business days, the excavator shall notify the operator of the specific location in which excavation will first be made and the operator shall respond with respect to the operator's underground facilities in that location within 2 full business days and for the remaining facilities within a reasonable time thereafter.

The system may adopt rules requiring, under certain circumstances, face-to-face meetings between excavators and underground facility operators.

Sec. 4. 23 MRSA § 3360-A(4-C) is hereby amended as follows:

4-C. Excavation Methods. An excavator may not use mechanical means of excavation when excavating within 36 inches of any marked underground facilities used for the conveyance of water or sewage, or within 18 inches of any other type of marked underground facilities, until the underground facilities have been exposed, except that mechanical means may be used, as necessary, for initial penetration and removal of pavement, rock or other materials requiring use of mechanical means of excavation. Once the underground facilities have been exposed, further excavation must be performed employing reasonable precautions to avoid damage to the underground facilities, including, but not limited to, any substantial weakening of structural or lateral support of the facilities or penetration or destruction of the facilities or their protective coatings. For the purposes of this subsection, "mechanical means of excavation" means excavation using any device or tool powered by an engine except air vacuum methods of excavation.

Sec. 5. 23 MRSA § 3360-A(6-E) is hereby enacted as follows:

6-E. Penalties for underground facility participants. Notwithstanding any other provisions in this Section, the Commission shall not assess an administrative penalty upon any underground facility participant for any violations of this Section, or any violations of rules adopted by the commission to implement any provisions of this Section, that occur prior to October 1, 2015.

Sec. 6. 35-A MRSA § 117(C) is hereby enacted as follows:

C. Dig Safe Penalties. For any amounts collected by the commission pursuant to Title 23, Section 3360-A(6-C), the commission may use those amounts to support a one-call system for the protection of underground facilities in the State by offsetting the difference between the amount that a utility facility participant as defined in Title 23, Section 3360-A(1)(F-1) pays to the underground damage prevention system as defined in Title 23, Section 3360-A(1-A) and the amount that a utility facility operator as defined in Title 23, Section 3360-A(1)(F) with an equal number of miles of underground facilities pays to the underground damage prevention system for support of the costs of maintaining the underground damage prevention system.

Sec. 7. The commission shall work with the Dig Safe Advisory Board to adopt procedures for addressing violations of Title 23, Section 3360-A that ensures that:

A. Commission staff investigating potential violations have been adequately trained in the industry best management practices; and

B. Penalty structures are established that are objective, predictable, and not arbitrary.

The commission shall adopt rules to implement such procedures no later than December 15, 2014. Rules adopted pursuant to this provision of law are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 8. To the extent that the Commission has allocated funds to be used for the operation and maintenance of an OKTODIG website that exceed any amounts committed to under an existing contract with a vendor for the operation and maintenance of an OKTODIG website, such excess funds shall be used to support a one-call system for the protection of underground facilities in the State by offsetting the difference between the amount that a utility facility participant as defined in Title 23, Section 3360-A(1)(F-1) pays to the underground damage prevention system as defined in Title 23, Section 3360-A(1-A) and the amount that a utility facility operator as defined in Title 23, Section 3360-A(1)(F) with an equal number of miles of underground facilities pays to the underground damage prevention system for support of the costs of maintaining the underground damage prevention system.

Sec. 9. To the extent that the Commission currently has amounts in its Regulatory Fund resulting from penalties pursuant to Title 23, Section 3360-A(6-C), the commission may use those amounts to support a one-call system for the protection of underground facilities in the State by offsetting the difference between the amount that a utility facility participant as defined in Title 23, Section 3360-A(1)(F-1) pays to the underground damage prevention system as defined in Title 23, Section 3360-A(1-A) and the amount that a utility facility operator as defined in Title 23, Section 3360-A(1)(F) with an equal number of miles of underground facilities pays to the underground damage prevention system for support of the costs of maintaining the underground damage prevention system.

Attachment C-4**Fallback Legislation**

(If Consensus Legislation is not unanimously supported)

Approved on Nov. 27, 2012 by a vote of 16-4

Sec. 1. 35-A MRSA § 2523 is hereby enacted as follows:

Section 2523. Operation of the OK TO DIG Database

1. OK TO DIG Member. An OK TO DIG Member is any entity that owns one or more underground facilities as defined in Title 23, Section 3360-A(1)(E) who is not a member of the underground damage prevention system as set forth in Title 23, Section 3360-A(1-A).

2. OK TO DIG Database. The commission shall maintain a database and website of contact information pertaining to OK TO DIG Members.

3. Member Duties. All OK TO DIG Members must:

- A. Register their underground facilities with the commission for inclusion in the OK TO DIG Database; and
- B. Provide the commission with the names of each community in which their underground facilities are located; and
- C. Provide the Commission with current 24 hour contact information which enables anyone planning to excavate in a community in which that entity's facilities are buried to notify that entity at any time of the need to mark its facilities; and
- D. In the event contact information is added or changed, provide the commission with updated contact information within 5 business days from when such contact information is added to or changed, and
- E. Respond to any notices received regarding their facilities by marking those facilities, or notifying the excavator that the entity has no facilities within the area of the planned excavation, within the timeframes set forth in Title 23, Section 3360-A(4) for underground facility operators.

4. Damage Liability. OK TO DIG Members shall be liable for any damage that occurs to the OK TO DIG Member's underground facilities as well as any costs that may result from the damage to the OK TO DIG Member's underground facilities where such damage to the

underground facilities is the result of an excavation undertaken pursuant to Title 23, Section 3360-A.

5. Rule. The commission shall adopt rules necessary to implement this section. Rules adopted under this section are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 2. 23 MRSA § 3360-A(6-B) is hereby amended as follows:

6-B. Failure to notify. An excavation that is made without the excavator providing any or all of the notices required by this section that results in any damage to an underground facility or facilities is prima facie evidence in any civil or administrative proceeding that the damage was caused by the negligence of the excavator. This provision shall not apply if the damaged facility is owned by an OK TO DIG Member as defined in Title 35-A, Section 2523(1).