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STATE OF MAINE
PUBLIC UTILITIES COMMISSION

MARK A. VANNOY
CHAIRMAN

DAVID P. LITTELL
COMMISSIONER

HARRY LANPHEAR
ADMINISTRATIVE DIRECTOR

January 9, 2015

Honorable David Woodsome, Senate Chair
Honorable Mark N. Dion, House Chair
Energy, Utilities and Technology Committee
100 State House Station
Augusta, Maine 04333

**Re: PUC Report Regarding Excavator Notification to the Dig Safe System
Pursuant to Maine's Dig Safe Law**

Dear Senator Woodsome and Representative Dion:

During its 2014 session, the Legislature enacted An Act to Make Changes to the So-called Dig Safe Law, Public Law 2013, ch. 557. Section 3 of the Act states in part that the Commission may submit a report with recommended changes to the law to the Committee by January 10, 2015, and that the Committee may report out a bill relating to the Commission's report to the Frist Regular Session of the 127th Legislature.

This language in the Act dealt with a possible inconsistency in the Dig Safe statute regarding the timeframe for excavators to notify the Dig Safe System Inc., a not-for-profit clearinghouse that notifies participating utility companies of planned excavations in ME, NH, VT, MA and RI, prior to beginning excavation and the timeframe for re-notifying the Dig Safe system if an excavation remains active beyond a certain number of days. Attached is the Commission's Report for the Committee's consideration.

If you have any questions, please do not hesitate to contact us.

Sincerely,

Mark A. Vannoy, Chairman
On behalf of the Chairman and
David P. Littell, Commissioner
Maine Public Utilities Commission

Attachment

cc: Energy, Utilities and Technology Committee Members
Deirdre Schneider, Legislative Analyst

**MAINE PUBLIC UTILITIES
COMMISSION**

**Report to the Legislature Regarding
Excavator Notification to the
Dig Safe System Pursuant to
Maine's Dig Safe Law**

January 10, 2015

I. INTRODUCTION

On April 22, 2014, L.D. 1647, An Act To Make Changes to the So-called Dig Safe Law, was enacted into law (Act). P.L 2013, ch. 557. This was a Commission initiated bill. Section 3 of the Act states in part that the Commission may submit a report with recommended changes to the law to the Joint Standing Committee of the Legislature having jurisdiction over utility matters by January 10, 2015, and that the Committee may report out a bill relating to the Commission's report to the First Regular Session of the 127th Legislature. This language in the Act dealt with a possible inconsistency in the Dig Safe statute regarding the timeframe for excavators to notify the Dig Safe System, Inc. (the Dig Safe System or DSSI) prior to beginning excavation and the timeframe for re-notifying the Dig Safe System if an excavation is ongoing (remains active) beyond a certain number of days. We explain this issue in more detail below. Section 3 of the Act directs the Commission to review its Underground Facility Damage Prevention Requirements Rule (Chapter 895) to identify ways to decrease the number of notices (Dig Safe tickets) that do not result in a marking that are issued by the Dig Safe System under Title 23, section 3360-A, subsection 1-A, and provides that the Commission may amend its rules in ways that will decrease the number of notices issued that do not result in a marking.

II. EXCAVATOR NOTIFICATION TO THE DIG SAFE SYSTEM

A. Background

Pursuant to 23 M.R.S. § 3360-A(3), an excavator is prohibited from beginning excavation without first giving notice to the Dig Safe System. Section 3360-A(3)(A) of the statute requires that an excavator notify the Dig Safe System at least 3 business days but no more than 30 calendar days prior to beginning excavation. This 30 day window for notifying DSSI and beginning excavation allows operators the time to mark-out their facilities at an excavation site while preventing excavators from waiting so long to begin excavation that new facilities might be installed during the interim. After notification, the excavator receives a Dig Safe ticket from DSSI. Prior to the 2011 legislative session, the Commission's rules further required an excavator to re-notify the Dig Safe System every 30 days which resulted in renewal of a Dig Safe ticket every 30 days on an active excavation site.¹ This requirement was added to the rule in response

¹ During the first session of the 122nd Legislature, the Legislature enacted P.L. 2005, ch. 334 (the 2005 Act). In pertinent part, the 2005 Act directed the Commission to establish by rule procedures to reduce the incidence of damage to newly installed underground facilities in active excavation areas. The 2005 Act allowed the Commission to adopt additional requirements for excavators or operators, including re-notification and marking requirements and system notification procedures. The Commission opened a rulemaking (Docket No. 2005-00549) to amend its rules pursuant to the 2005 Act, received comments from underground facility operators and

to statutory directions from the Legislature to develop regulations that would protect newly installed facilities on active excavation sites.

B. Statutory Change Made During 2011 Session

During the 2011 session, there was discussion during consideration of LD 407, An Act to Require Clarification of the Dig Safe Standards, and LD 331, Resolve Regarding Legislative Review of Portions of Chapter 895: Underground Facility Damage Prevention Requirements, a Major Substantive Rule of the Public Utilities Commission, in support of extending the renewal period to 60 days. Stakeholders generally agreed that the renewal 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 their initial mark out of the site and that the 30-day timeframe for renewal encouraged that practice. There was a concern that renewing tickets should not be used as a substitute for an excavator's responsibility to maintain marks on site. Extending the renewal period to 60 days, they argued, would decrease unnecessary mark-outs and encourage excavators to maintain their marks. Supporters of this change pointed to a similar change that had been made to Rhode Island's Dig Safe statute. As a result, 23 M.R.S. § 3360-A (3)(E) was amended during the 2011 session to read:

E. If the proposed excavation or blasting does not commence within 60 calendar days of notification under this subsection or the excavation or blasting will be expanded outside of the location originally specified in the notification, the excavator responsible for that excavation shall again notify the system as specified in paragraph A.

See P.L. 2011, ch. 72 (Section 1). 23 M.R.S. § 3360-A(3)(A) continued to read:

A. In addition to any other notices required under this section, each excavator shall notify the system of the location of the intended excavation at least 3 business days but not more than 30 calendar days prior to the commencement of excavation, except as provided in paragraph G.

C. L.D. 1647

In the Commission's view, the section of the statute that stated an excavator has to notify the Dig Safe System of the location of the intended excavation

excavators, and ultimately decided to require all excavators to re-notify the Dig Safe System at 30 day intervals while an excavation site was active. Under the amendments made to Chapter 895, any Dig Safe ticket allowed an excavator to work at a site for 30 days and then the ticket had to be renewed. Chapter 895 is a major substantive rule and, as such, the amendments that resulted from this rulemaking were approved by the Legislature prior to the rule going into effect. Resolves 2005, ch. 184.

no more than 30 days prior to beginning an excavation was inconsistent with the section of the statute that stated if the excavation does not commence within 60 days the excavator must re-notify the Dig Safe System. As a result, the Commission proposed the following changes to the statute in L.D. 1647:

23 M.R.S. §3360-A(3)(A), as amended by P.L. 2003, c. 373, §1, is further amended to read:

B. In addition to any other notices required under this section, each excavator shall notify the system of the location of the intended excavation at least 3 business days but not more than ~~30~~60 calendar days prior to the commencement of excavation, except as provided in paragraph G.

23 M.R.S. §3360-A(3)(E), as amended by P.L. 2011, c. 72, §1, is further amended to read:

E. If the proposed excavation or blasting ~~does not commence within~~ commences or continues 60 calendar days ~~after~~ notification under this subsection or the excavation or blasting will be expanded outside of the location originally specified in the notification, the excavator responsible for that excavation shall again notify the system as specified in paragraph A. The excavator shall notify the system once for each successive 60-day period.

During the discussion on LD 1647 and LD 965, An Act to Improve Maine's Underground Facility Damage Prevention Program, another Dig Safe related bill considered last session, a question came up about the first proposed change to 23 M.R.S. § 3360-A(3)(A). Interested persons stated that the 60-day period was intended to apply only to the renewal period for the tickets and not the initial notification period. As the Commission was going to be doing a rulemaking to address other aspects of L.D. 1647 during the fall/winter of 2014, we noted that we could look further at this issue as part of that process and report back on the issue during the 2015 session if necessary. As a result, this proposed change was removed from the bill and language providing that the Commission may submit a report by January 10, 2015, and the Committee may report out a bill related to the report, was added.² The second proposed change to 23 M.R.S. § 3360-A(3)(E) remained in the bill which was enacted.³

² P.L. 2013, ch. 557 (Section 3).

³ P.L. 2013, ch. 557 (Section 1).

III. COMMISSION'S PROPOSED RECOMMENDATION AND STAKEHOLDER COMMENTS

The Commission Staff reviewed the Dig Safe statutes in the other New England states and determined that they all provide that the excavator shall notify the Dig Safe System of the location of the intended excavation at least 48 or 72 hours but not more than 30 days prior to the commencement of excavation.

The change made during the 2011 session to make tickets valid for 60 days was modeled after the Rhode Island statute. The Rhode Island statute, in addition to the language cited above, provides that the excavation must commence within 30 days *and* be completed within 60 days, including Saturdays, Sundays and holidays or the excavator must re-notify Dig Safe, Inc.⁴ (*emphasis added*).

On June 23, the Commission opened a Notice of Inquiry (Docket No. 2014-00192) to solicit comments from interested stakeholders on the Commission's recommendation to address this issue as well as other issues related to the rulemaking proceeding the Commission would be doing pursuant to other sections of the Act.⁵ Comments were due by July 23, 2014.⁶

As all the New England states, including Rhode Island, require an excavator to notify the Dig Safe System no more than 30 days prior to commencing an excavation, the Commission recommended that no change be made to 23 M.R.S. § 3360-A(3)(A) and that the Commission's rule should read that the excavator shall notify the Dig Safe System of the location of the intended excavation at least 3 business days but not more than 30 calendar days prior to the commencement of excavation to be consistent with the statute.

The Commission further proposed that 23 M.R.S. § 3360-A(3)(E) should be amended to read:

E. The excavation must commence within 30 days. If the proposed excavation or blasting ~~commences or continues~~ is not completed 60 calendar days after notification under this subsection or the excavation or

⁴ R.I. Gen. Laws § 39-1.2-5 (2013).

⁵ The Chapter 895 rulemaking proceeding is Docket No. 2014-00248. The rule is major substantive and the provisionally adopted rule changes will be reviewed by the Legislature during the 2015 session.

⁶ All comments are available via the Commission's CMS system available at: <http://www.maine.gov/mpuc/online/index.shtml>

blasting will be expanded outside of the location originally specified in the notification, the excavator responsible for that excavation shall again notify the system as specified in paragraph A. ~~The excavator shall notify the system once for each successive 60-day period.~~

We invited comments on this approach or alternative approaches. The Dig Safe System and the Telecommunications Association of Maine (TAM) agreed with the Commission's recommended changes to the statute and Chapter 895 of the Commission's rules. The Dig Safe System stated in its comments that this was the intent of the interested stakeholders who proposed this change a couple years ago and that the Commission's recommended change would be consistent with the other New England states' Dig Safe statutes. The Commission did not receive any other comments on this issue.

IV. CONCLUSION

The Commission submits this report and recommended change to the Dig Safe statute for the Committee's consideration pursuant to Section 3 of P.L. 2013, ch. 557. As discussed above, the Committee may report out a bill relating to the Commission's report to the First Regular Session of the 127th Legislature. The Commission has attached draft statutory language for the Committee's consideration which would make the statutory change to 23 M.R.S. § 3360-A(3)(E) as described in this report. The Commission has also identified the necessary corresponding changes to Chapter 895 of the Commission's rules that would need to be made to be consistent with the proposed statutory change. If the Committee agrees with the Commission's recommendation to amend 23 M.R.S. § 3360-A(3)(E), which interested persons supported in the Commission's NOI (Docket No. 2014-00192), the Commission respectfully requests that the Legislature consider directing the Commission to add these additional rule changes when it finally adopts the provisionally adopted rule changes that result from the major substantive rulemaking proceeding in Docket No. 2014-00248. This would avoid the need for the Commission to have to do another major substantive rulemaking just for these couple of additional rule changes and report back to the Legislature in the 2016 session.

What the proposed changes in this report would do collectively is clarify that an excavator must notify the Dig Safe system of the location of the intended excavation at least 3 business days but not more than 30 calendar days prior to the commencement of the excavation, that the excavation must commence within 30 days and if the excavation is not completed within 60 days of the excavator's notification to the Dig Safe System then the excavator needs to renotify the Dig Safe System.

The Commission looks forward to working with the Committee as it considers this report during the 2015 session.

Commission Proposed Draft Statutory Language

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 23 MRS § 3360-A, sub-§3, ¶E, as amended by PL 2013, c. 557, §1 is further amended to read:

E. The excavation must commence within 30 days. If the proposed excavation or blasting ~~commences or continues~~ is not completed 60 calendar days after notification under this subsection or the excavation or blasting will be expanded outside of the location originally specified in the notification, the excavator responsible for that excavation shall again notify the system as specified in paragraph A. ~~The excavator shall notify the system once for each successive 60-day period.~~

Commission Proposed Corresponding Changes to Chapter 895 of the Commission's Rules to be Consistent with Proposed Statutory Change

A. Notification to the Dig Safe System (Section 4(B)(1)(a))

The Commission proposes that Section 4(B)(1)(a) of Chapter 895 of the Commission's rules be amended as follows to be consistent with the change to the statute:

Notice process. Except for emergency notifications and as provided in Subsection 4(B)(1)(a)(i), an excavator shall notify the Dig Safe System of the location of the intended excavation at least 72 hours, not including Saturdays, Sundays and legal Maine holidays, but not more than 30~~60~~ calendar days⁷, prior

⁷ The Commission also proposed correcting this error that exists in the current rule (changing the language that provides "an excavator shall notify the Dig Safe System of the location of the intended excavation at least 72 hours, not including Saturdays, Sundays and legal Maine holidays, but not more than 60 calendar days, prior to the commencement of excavation" to "...not more than 30 calendar days" (*emphasis added*) to be consistent with 23 M.R.S. § 3360-A(3)(A)) in our provisionally adopted Dig Safe rule (Docket No. 2013-00248) that the Commission did pursuant to Section 3 of P.L. 2013, ch. 557 which will be considered by the Legislature during the 2015 session. We propose the same change here so there will not be a statutory conflict as we expect the Legislature will be considering proposed changes to the Dig Safe statute in these two separate legislative vehicles, the Resolve providing legislative review of the Commission's provisionally adopted Dig Safe rule in Docket No 2014-

to the commencement of excavation. ~~The excavator shall re-notify the Dig Safe System pursuant to this subsection for each successive 60 day period. The excavation must commence within 30 days.~~

B. Renotification (Section 4(B)(1)(d))

The Commission proposes that Section 4(B)(1)(d) of Chapter 895 of the Commission's rules be amended as follows to be consistent with the change to the statute:

d. **Renotification.** If the proposed excavation or blasting ~~is not completed does not commence within~~ 60 calendar days ~~after~~ notification or the excavation or blasting will be expanded outside the location originally specified in the notification, the excavator shall renotify the Dig Safe System as specified in this section.

00248 and the bill the Committee is authorized to report to the First Regular Session of the 127th Legislature relating to this legislative report.

STATE OF MAINE

IN THE YEAR OF OUR LORD
TWO THOUSAND AND FOURTEEN

S.P. 638 - L.D. 1647

An Act To Make Changes to the So-called Dig Safe Law

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 23 MRSA §3360-A, sub-§3, ¶E, as amended by PL 2011, c. 72, §1, is further amended to read:

E. If the proposed excavation or blasting ~~does not commence within~~ commences or continues 60 calendar days ~~of~~ after notification under this subsection or the excavation or blasting will be expanded outside of the location originally specified in the notification, the excavator responsible for that excavation shall again notify the system as specified in paragraph A. The excavator shall notify the system once for each successive 60-day period.

Sec. 2. 23 MRSA §3360-A, sub-§10-A, ¶B, as enacted by PL 2011, c. 588, §11, is amended to read:

B. If the underground facilities are located on private property, provide service to a single-family residence and are owned and operated by the owner of that property:

- (1) That landowner may mark the underground facilities in accordance with paragraph D;
- (2) The excavator may wait 3 business days from the date of notification to commence the excavation or may commence the excavation upon notification;
- (3) If the excavator waits 3 business days from the date of notification or until after the underground facilities are marked, if sooner, to commence excavation or if the markings made by the landowner pursuant to subparagraph (1) fail to identify the location of the underground facilities in accordance with paragraph D, an excavator damaging or injuring underground facilities is not liable for any damage or injury caused by the excavation, except on proof of negligence; and
- (4) If the excavator does not wait until the underground facilities are marked or 3 business days from the date of notification to commence excavation, whichever occurs earlier, the excavator is liable for all damages to the underground facilities as a result of the excavation.

Sec. 3. So-called Dig Safe rule review. The Public Utilities Commission shall review Public Utilities Commission Rule Chapter 895: Underground Facility Damage Prevention Requirements to identify ways to decrease the number of notices that do not result in a marking that are issued by the damage prevention system under the Maine Revised Statutes, Title 23, section 3360-A, subsection 1-A. The commission may amend its rules in ways that will decrease the number of notices issued that do not result in a marking. The commission may submit a report with recommended changes to the law to the joint standing committee of the Legislature having jurisdiction over utility matters by January 10, 2015. The committee may report out a bill relating to the commission's report to the First Regular Session of the 127th Legislature.