Associated General Contractors of Missouri, Inc.

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December 15, 2009

Steven C. Reed, Secretary
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65101

RE: Case No. GW-2010-0120
Repository Docket for Materials Relating to the Underground Facility Damage Prevention Project

Dear Mr. Reed:

As promised in our November 3, 2009 letter to Chairman Clayton, this letter will provide comment on the draft of legislative changes to the Underground Facility Safety and Damage Prevention Act (319.010 – 319.050 RSMo) which were the subject of the Commission's October 21, 2009 meeting. Unfortunately I was unable to attend.

AGC of Missouri's 223 members includes 76 contractor members whose work in building public works and private improvements involves excavations on large and small projects on an almost daily basis. As a result, Associated General Contractors of Missouri has an intense interest in your suggested statutory changes and a long history with "One Call" legislation, particularly in regard to passage of legislation requiring a notification center for statewide receipt and dissemination of excavation notices in 1991 and phased in mandatory participation by facility owners in 2001, which now requires all facility owners to maintain membership in the notification center. The 1991 (SB 214 & 264) and 2001 (HB 1425) legislation also enacted substantial responsibilities for excavators much in the form they appear in statute today.

It is our understanding that the Commission's current damage prevention effort is underwritten by two concerns:

1) The adequacy of Missouri's current statutes and the effectiveness of enforcement in Missouri in compliance with the "Pipeline Inspection, Protection, Enforcement and Safety (PIPES) Act of 2006"; and

2) The unacceptably high incidents of excavation damage to underground gas pipelines which the Commission reports averaged 2,765 per year in CY 2007 and CY 2008.

SKILL • INTEGRITY • RESPONSIBILITY

Our parent organization, Associated General Contractors of America, informed its chapters of the October 29, 2009 Advanced Notice of Proposed Rulemaking on implementation of the PIPES Act, with a December 14, 2009 comment deadline. Subsequently we understand the US Department of Transportation will go through up to a year or more rulemaking which will set out the standards for state damage prevention programs complying with the PIPES Act. AGC of America advises us it will be sometime in 2011 before the "PIPES Act" regulation is effective. It appears it may be well after the mid-May, 2010 adjournment of the Missouri General Assembly before we even know the exact content of the Proposed Rule.

The incident rate in Missouri for gas pipelines for CY 2007 and CY 2008 are disappointing in comparison to national trends. On August 25, 2009, the Common Ground Alliance released its 2008 Damage Information Reporting Tool (DIRT) Report which estimated total underground utility damages occurring in the US in 2008 of 200,000. The DIRT Report shows incidents of damage to have steadily decreased from 450,000 in 2004 to 256,000 in 2007, and 200,000 in 2008. It would be interesting to compare the Commission's CY 2007 and CY 2008 data and data from prior years as to whether there is an increasing or decreasing trend in Missouri.

The 2008 DIRT Report states that 73,152 incidents with a known "root cause" showed:

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

If Missouri's damage prevention statute is to be further amended it would help to know the root cause of all or a sampling of the pipeline and other accidents comprising the Commission's CY 2007 and CY 2008 data. Such information would be a helpful guide in addressing any problems in the Missouri law.

AGC of Missouri offers the following comments on specific provisions of the Commission's "Chapter 319 Proposed Changes – 10/08/09":

Section	**Subject – Summary or Text of Amendment**	**AGC/MO Comment**
319.015 (6) 319.026.6	Definition of "Extended Excavation Project" "Life of Ticket" Provision Excavation notice is valid for fifteen working days except for "extended excavation projects", where notice is valid for up to thirty working days.	**AGC of Missouri is intensely opposed** to repeal or modification of the "visible and useable" standard enacted in 2001 allowing an excavator to commence and continue work as long as markings show the location of the facility marked by the utility owner or his third party locator. The PSC's proposed change is nothing new. AGC of Missouri expressed the reasons for its opposition to a similar provision in discussions with utility owners and the Missouri One Call Systems, Inc. (MOCS) in 2004, 2005 and 2006. ***Attached is a July 18, 2005 letter stating our objections.*** Our position is

		unchanged regarding the modified provision included in the 10/08/09 PSC Draft. Adding an exception for an "extended project": • Does nothing to remove the multiple and varied reasons a contractor doing excavation may not be able to begin the excavation on the "expected date" stated in the notice of excavation or predict the date of completion: ➢ Failure of the owner of the project to give a "notice to proceed." ➢ Changes in design and work through "change orders". ➢ Discovery of "hidden conditions" at the site. ➢ Needed materials may not arrive as scheduled. ➢ Weather related delays. ➢ Failure of another contractor to complete a preceding phase of the project. • The provision will be self defeating. The provision for excavators to choose between a regular "15 working day" excavation and a "30 working day" extended project notice will lead the excavator to choose the longer notice period because of the uncertainties explained above over which he has no control. • Work done by AGC of Missouri members on larger projects may go on for months and sometimes years and is often completed in phases. For such projects contractors plan excavation notices to assure facilities will be marked when work is actually being performed. Putting a fifteen or thirty working day limit on a locate does nothing to enhance safety. If markings are "visible and useable" making another notice and waiting three working days * for the facility owner to remark what is already marked is a waste of time and money for both the contractor and facility owner. * Under 2008 amendments the day of notice does not count as a working day.

		It is the excavator's responsibility to make notice, make sure location is marked before he digs and call back if prior markings are obliterated. If excavation is done in a careful and prudent manner, the current statute assures safety without any artificial time limits on an excavator's ability to do what the job requires.
319.022 319.025	Mandatory Participation in Notification Center Provisions for phasing-in. Excavator's Notice to Non-Members in Notification Center – Prior to January 1, 2003.	The next legislation revising the One Call Law should repeal outdated language referencing phase-in dates which have now passed. The Law should simply require that all facility owners join and maintain membership in a notification center and that an excavator's notice to the notification center is notice to all facility owners.
319.026.9	Excavator's Notice of Project Completion	**AGC of Missouri opposes** this proposed amendment. The statutory requirement would double the workload of excavators, facility owners and the notification center in making and receiving notices without any added benefit to worker or public safety or protection of underground facilities.
319.030.8	Excavator's Second Notice That There Has Been "No Response" by Facility Owner. Second notice must be made *"if an excavator observes clear evidence of the presence of an unmarked underground facility at an excavation site . . ."*	The proposed amendment makes a visual observation at the site of excavation by the excavator equivalent to proceeding with the excavation without making notice and the facility being marked. **AGC of Missouri objects** to the provision for the following reasons: • What is "clear evidence" is not specified in the statute and would be totally subjective in application. If clear evidence is an above ground utility post or placard, the criteria for "clear evidence" is not specified in the legislation. • A duty for the excavator to divine the presence of an unseen underground facility creates unreasonable additional liability for the excavator for the following reasons:

		➢ Facilities may be in a common trench which are marked as to some facilities, but not all. ➢ It may be argued that the contour of the ground or the excavator's knowledge of the types of utilities servicing the area indicates "clear evidence." • AGC of Missouri sees this statutory duty for excavators to observe evidence of unmarked facilities as a liability issue which will be litigated over facility damages and third party injuries. • The excavator's duty to proceed in a "careful and prudent" manner is already established in 319.035 RSMo, 319.040 RSMo and 319.041 RSMo as well as common law. If there is an underground facility post or placard, a fire hydrant, or other obvious evidence of an underground facility at a site, and an excavator proceeds without marking and damages the facility, the excavator is liable. The proposed additional language is unnecessary.
319.030.9	Notice of Completion of Facility Marking by the Facility Owner	The proposed amendment provides that: *"Upon completing marking"* the facility owner *"shall notify the excavator . . . that his or her facilities have been marked."* **AGC of Missouri opposes** this requirement for the following reasons: • It is uncertain under the provision if the notification must also be made within two working days. • It is unclear if the excavator is authorized by subsection 8 of section 319.030 to commence the excavation without making a second notice that there has been no response, if the site of excavation has been marked but there has been no phone call or other notice indicating it has been marked.

		• A direct expense to the facility owner results from making a notice of marking. As evidenced by the complex process of alternative means of a facility owner making "positive response of no facilities" set out in Subsection 6, it may not always be easy to reach certain excavators (homeowners, part-time backhoe operators, small businesses). Costs of the "notice of response" would be costly to facility owners with no benefit and possibly costs from delays by the excavator.
319.030.10	Two Working Days for Utility Response by Marking: *"For purposes of subsections 1* [marking] *and 6* [positive response/no facilities], *a period of two working days begins at 12:00 am on the first working day following ~~when the request is made~~ the date when the notification center receives a notice of intent to excavate."*	**AGC of Missouri supports** this clarification. Language in the current statute is awkwardly worded.
319.030.11	Two Working Days for Utility Response to Request for On-Site Meeting. Language mirrors Subsection 10	**AGC of Missouri supports** this language.
319.040	Liability Provision Subsection 1 – *"The failure of any excavator to give notice of proposed excavation activities as ~~required by this chapter~~ in accordance with the provisions of sections 319.010 through 319.070 shall be a*	**AGC of Missouri opposes** this change in the statute. Although the amended language may just restate current law, a court in a future lawsuit over liability may read into amended language a specific intent of the General Assembly to change the meaning and application of the section. Current law is clear and requires no clarification.

	rebuttable presumption of negligence on his or her part in the event that such failure shall cause injury, loss or damage. In addition to any penalties provided herein, liability under common law may apply."	
	Subsection 2 – "*The failure of any underground facility owner to respond to a notice of intent to excavate in accordance with the provisions of sections 319.010 through 319.070 shall be a rebuttable presumption of negligence on his or her part in the event that such failure shall cause injury, loss or damage. In addition to any penalties provided herein, liability under common law may apply.*"	**AGC of Missouri also opposes** the addition of this language to the law. Although the intent may be merely to "level the playing field" on assignment of liability between excavators and facility owners, how the courts would interpret the intent of the General Assembly in amending the law and how the provision may be applied on a prospective basis is unknown. We believe that in practical terms the Subsection 2 language would be of no benefit to excavators in settling claims prior to litigation because whether an underground facility owner failed to respond as required by the statute is a question of fact which could only be established in court. The provision may lead to more litigation, not less. Provisions of Subsection 1 creating a rebuttable presumption if the excavator failed to make notice are much simpler to establish based on the records of the notification center, the excavator and the utility owner. In addition to Section 319.040 RSMo on rebuttable presumption for failure to make notice, we already have two other sections on liability: 319.035 RSMo - Obtaining information by notice of excavation does not excuse excavators from proceeding in a "careful and prudent manner". 319.041 RSMo - Nothing in the statute is to excuse an excavator from proceeding in a "safe and prudent manner."

		An attorney to Missouri's AGC chapters has previously advised that the sum total of statutory provisions and common law results in a "reasonable care" liability standard for excavators, facility owners, the notification center and third party locators. This would appear to be an equitable standard for all concerned. Further legislation is not needed.
319.045.3 (Repealed) 319.046 (Amended) 319.065 (New)	Civil Penalties Enforced by Attorney General Enforcement by Transfer from Attorney General to Public Service Commission Creation of an Underground Damage Prevention Review Board	**Underground Damage Prevention Review Board.** **AGC of Missouri is intensely opposed** to creation of a Board to decide on or levy civil penalties modeled after Virginia, Illinois or other states. AGC has the following objections: • The Board proposed by PSC provides for twelve members. Nine of those Board members would be either facility owners, organizations made up of facility owners, contractors to facility owners, or a regulator of facility owners. 319.065.2 provides for three construction excavator members of the Board. The make-up of the Board is slanted toward favorable outcomes for facility owners and unfavorable outcomes for excavators who are contractors. • When the idea of a Board with authority to hear cases regarding dig-ins and levy fines was first proposed in 2005, AGC reviewed the laws and experiences of other states which have established such Boards, including Virginia. Our review of the Virginia statute and operation of its "Advisory Committee" showed: ➢ The Virginia Advisory Committee considers over 100 cases per month for disposition. There is no way an investigator for the State Corporation Commission could do a thorough investigation of the "root cause" of damages to underground facilities or other complaints with such a heavy case volume.

		➢ Majority of cases are against contractor excavators with penalties levied in almost all cases. The Advisory Committee in Virginia is merely a "rubber stamp" for cases brought by the Corporation's Commission. We recognize that the 10/8/09 Draft merely provides that the PSC can refer a complaint to the Review Board for a hearing, rather than authorizing the Board to levy a penalty directly. However, we still oppose establishment of a Board as an unnecessary additional step in the enforcement process. • A Review Board as established in the 10/8/09 Draft will result in unavoidable conflicts of interest for Board members appointed. Cases regarding competitor companies or companies closely allied with the Board member will come before the Board. With the make-up of the Board such conflicts would be so frequent the option of a Board member recusing himself would be an inadequate remedy to such conflicts. AGC of Missouri believes that civil penalties under Missouri law can and should only be imposed by a court after adequate due process and a finding of violation by the court. **Enforcement by Attorney General versus the Public Service Commission**: **AGC has no position** on which state entity enforces the statute as long as it is adequately and fairly enforced as to the statutory duties of all persons subject to the law. Excavators who are contractors are certainly subject to Missouri statutes which is the duty of the Attorney General to enforce. Excavators who are contractors are not currently to our knowledge subject to the jurisdiction of the Public Service Commission. We are uncertain if the Public Service Commission could initiate an enforcement action against a contractor under current law or the proposed legislation. We would reserve our opinion as to equitable

		enforcement mechanisms, other than the Review Board concept which we oppose, until additional details would become available about the enforcement process and exact authority of the Attorney General and/or PSC. Perhaps one approach may be to allow the Public Service Commission to make a complaint of violation to the Attorney General regarding utilities regulated by the PSC.

SUMMARY

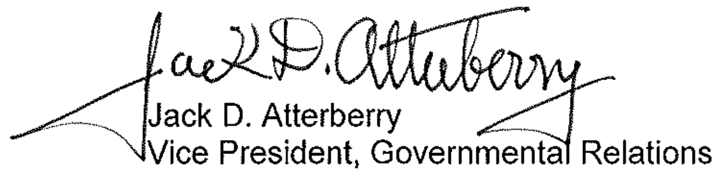
In summary AGC believes Missouri has plenty of time to assure that Missouri's damage prevention statutes will meet the standards of the PIPES Act when fully implemented in 2011. In fact passage of legislation now may be premature because the US DOT rulemaking is not complete and in effect. Missouri's current statutes appear to meet requirements of Section 2 of the PIPES Act for a comprehensive nine-point damage prevention program, except potentially for enforcement.

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

AGC of Missouri will be pleased to work with the Public Service Commission, the Attorney General and other interested parties toward more effective enforcement of the Underground Facility and Damage Prevention Act. We do not necessarily believe that additional legislation is the only means of improving compliance. Education and informational campaigns may also be effective. Where additional legislation is necessary it should be tailored to specific problems in Missouri's damage prevention efforts, not what other states may or may not do in their statutes.

We look forward to continuing to participate in the PSC's efforts. A copy of this letter will follow by mail. We trust you will share our comments with all members of the Commission, appropriate PSC staff and other stakeholders. Thank you for your consideration of our views.

Sincerely,



Jack D. Atterberry
Vice President, Governmental Relations

jda/dm:Attachment

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July 18, 2005

Ron Moran, Board President
Missouri One Call Systems, Inc.
Panhandle Eastern Pipeline
16151 North Route Z
Centralia, MO 65240

Dear Mr. Moran:

I currently serve as Chairman of the AGC of Missouri Board of Directors and previously chaired the AGC Legislative Committee during the period the 2001 One Call law was under consideration. Over the past two years Jack Atterberry of the AGC staff and I have periodically been in touch with John Lansford about planning for a joint legislative effort between One Call and contractor organizations in 2006. Since January 1, 2005 was the effective date for utility owners in third and fourth class counties becoming members of the notification center, we had always anticipated that 2006 would be the year to revisit any legislative issues requiring attention.

AGC of Missouri stands ready to meet on potential legislation as we advised One Call in January, 2005 and again after the 2005 legislative session. We are disappointed that One Call has not responded with potential dates to meet on legislation. Other contractor organizations, which should also be involved in those meetings are the Heavy Constructors Association of the Greater Kansas City Area; the Kansas City AGC Building Chapter; AGC of St. Louis and the SITE Improvement Association, St. Louis.

Through Common Ground meetings, we learned that a task force has been appointed to report to the One Call Board on revising the One Call statute regarding the period for which an excavator's notice is deemed to be good, or the "life of ticket" issue. Tom Burmeister, Safety Director for my company and Jack Atterberry of the AGC staff attended a June 8 meeting on this subject.

Discussion at the June 8 meeting was that a survey of nine other states indicates that eight of those states set a definite number of days after which a "ticket" or notice expires. I recall much discussion of this issue between contractors and utilities prior to the 2001 legislation and the misinformation that was created by One Call and some utilities taking the position that a notice is only good for ten days. Resulting 2001 legislation, which was agreed to by utilities and contractors, is the provision in current statute that notices are good as long as markings of utility location at the site are "visible and useable." (Section 319.026.6 RSMo).

Reasons for considering changes in the statute as discussed on June 8 include that other states set a definite number of days for notice expiration. Another consideration discussed was whether the number of second and subsequent notices of excavation received by the notification center is excessive and duplicative. We very much appreciate John Lansford following up after the June 8 meeting by faxing data to AGC for January through May 2005 on this question.

The AGC of Missouri Board of Directors met on July 7, in part to review legislative proposals for the 2006 session. We had considerable discussion of the expiration of notice or "life of ticket issue" regarding potential One Call legislation. We understand that the number of notices received by the notification center impacts the fees, costs and operation of the notification center. However, you should also understand that this is a major issue to contractors. Whether the excavator has made proper notice determines compliance with the law. ***The overwhelming consensus of our Board is that AGC of Missouri will oppose repeal or modification of the "as long as marks are visible standard" by replacing it with expiration of the notice after a set number of days.***

As far as other states setting a definite time period for expiration of notices, we believe that the current Missouri statute, requiring subsequent notices only when prior markings are no longer "visible and useable", is just good old "Missouri common sense." This is a better standard than a notice expiring after a set number of days, particularly from the perspective of operating costs of the notification center and utility owners.

Information provided to AGC by John Lansford on June 17 shows a total of 33,729 renewal locate requests between January 1 and May 31, 2005 compared to 1,358,338 total excavation notices. That figure for renewal notices is just 2.5% of total notice volume over a five month period. Under current law, renewal notices are apparently not a strain on the notification center. However, if the law is changed, so that a notice expires after a certain number of days, say ten days, the notification center will receive numerous duplicative notices throughout the life of the project. The typical highway, municipal utility or site preparation project worked on by AGC of Missouri members goes on for months or even a year or more. For those projects of one year, the notification center would receive thirty-six notices for the same project under a "good for ten days" rule, even though work on portions of the project are complete and utilities in the vicinity of continuing work have satisfactorily been identified for purposes of the work. Duplicative notices would be a waste of time and money for contractors, the notification center, and for utility companies sending crews out to mark projects which are already marked.

We look forward to the opportunity to meet for the purpose of discussions between contractors, utility owners and One Call about potential revisions to the law. However, I want to let you know now that AGC of Missouri has grave concerns about revising the "visible and useable" standard and setting an expiration date on excavation notices by statute.

We should get together soon to review the statute for purposes of legislative revisions. In our view, our efforts should focus on problem areas for contractors, utilities or the notification center. AGC of Missouri's perspective toward 2006 amendments to the One Call statute is "if it ain't broke, don't fix it." Lets concentrate on those areas of the law with technical flaws or which aren't working well.

I look forward to hearing from you soon.

Sincerely,

Ed Twehous
Chairman

Copy: John Lansford, Missouri One Call, Executive Director — Mailed 7/18
Jim Carson, Contractor Member, One Call Board "
Ray Daub, Contractor Member, One Call Board "
AGC of Missouri Board and Legislative Committee — emailed 7/18 – PDF
Tom Burmeister, Twehous Excavating Company "