

Prepared Testimony of
Stephen M. DeFrank
Chairman
Pennsylvania Public Utility Commission,
before the

House Consumer Protection, Technology, and Utilities
Committee

September 17, 2024



Pennsylvania Public Utility Commission
400 North Street
Harrisburg, Pennsylvania 17120
Telephone (717) 787-4301
<http://www.puc.pa.gov>

Introduction

Good morning, Chairman Matzie, Chairman Marshall, and members of the House Consumer Protection, Technology & Utilities Committee. I am Stephen DeFrank, Chairman of the Pennsylvania Public Utility Commission (Commission or PUC). I appreciate the opportunity to offer testimony on behalf of the PUC as you continue the important process of considering the reauthorization of Act 50 of 2017, which established the Underground Utility Line Protection Law, commonly referred to as the PA One Call Law.

The PA One Call Law seeks to protect public health and safety by preventing excavation, demolition, and design work from damaging underground lines and facilities used to provide essential utility service. Among the key changes implemented through the enactment of Act 50 was the transfer of enforcement authority of the PA One Call Law from the Pennsylvania Department of Labor and Industry to the Commission, as such enforcement authority is consistent with the PUC's regulatory functions.

As you are aware, Act 50 expires on December 31, 2024. Based on our nearly seven years of enforcement experience, the Commission emphasizes the importance of reauthorizing the PA One Call Law to achieve the public safety goal of further reducing the instances of underground damaged facilities. Line hits are best prevented when all parties involved – facility owners, designers, excavators, and project owners – adhere to the PA One Call Law.

The Committee asked the Commission to discuss the proposed amendments to the PA One Call Law set forth in House Bill 2189, sponsored by Chairman Matzie. To start this conversation, I will provide an overview of the Commission's enforcement processes related to the PA One Call Law. I will then discuss several amendments proposed by House Bill 2189 that the Commission welcomes, as well as three priorities that the Commission hopes the General Assembly will address in the reauthorization of the PA One Call Law.

Overview of the Commission's Enforcement Process of the PA One Call Law

The PA One Call Law created a Damage Prevention Committee, or DPC, consisting of members from the Pennsylvania Department of Transportation, the One Call System, utilities, excavators, municipalities, and municipal authorities. As Chairman, I am authorized to designate a representative from the Commission's professional staff to serve as a member of the DPC. The Commission's

representative is Terri Cooper Smith, who is an experienced pipeline safety supervisor in the PUC's Bureau of Investigation and Enforcement.

The PUC's Bureau of Investigation and Enforcement has established a One Call section that is staffed with five damage prevention investigators and one supervisor. The One Call section reports to the manager of Pipeline and Electric Safety, the Director of the Bureau of Investigation and Enforcement, and ultimately, the Commission's Executive Director. The section reviews alleged violations of the PA One Call Law and compiles findings and recommended actions for the DPC. The damage prevention investigator may recommend issuance of a warning letter, issuance of an informal determination that imposes an administrative penalty, or completion of damage prevention educational requirements. The DPC considers the investigators' recommendations and acts upon them at regularly scheduled meetings.

A person who is subject to an informal determination of the DPC may accept or reject the result. If rejected, the informal determination is returned to the damage prevention investigator for further action, if appropriate. Such action may include a referral to Commission prosecutory staff, which is also a part of the PUC's Bureau of Investigation and Enforcement.

If prosecutory staff determine that violations of the PA One Call Law are substantiated, staff will either attempt to resolve the matter through settlement negotiations and present a settlement agreement to the Commission or file a formal complaint. Upon the filing of a formal complaint, the matter is referred to the Commission's Office of Administrative Law Judge for litigation. For alleged violations involving injury or death, the Commission's prosecutory staff is authorized to file a formal complaint without the DPC first considering the alleged violation.

The PUC Commissioners ultimately consider the settlement agreement or decision of the presiding Administrative Law Judge, if the matter is litigated. The PA One Call Law authorizes the Commission to enter orders that impose administrative penalties on stakeholders who violate the Law. An administrative penalty may not exceed \$2,500 per violation. However, if the violation results in injury, death, or property damage costing \$25,000 or more, the Commission may impose an administrative penalty not to exceed \$50,000. A person aggrieved by a Commission order may seek judicial review of the Commission's decision by the Commonwealth Court.

House Bill 2189

Now that I have presented an overview of the Commission's enforcement process of the PA One Call Law, I would like to discuss several specific amendments proposed by House Bill 2189 that the Commission views as important to clarify the existing law and enhance damage prevention efforts.

First, House Bill 2189 would amend the definition of "alleged violation" and add a definition of "violation" to distinguish an alleged violation from a violation that has been adjudicated by the Commission. The current definition of "alleged violation" indicates in a conclusory manner that a person has failed to fulfill an obligation of the PA One Call Law. The proposed amended definition of alleged violation, however, more accurately describes the stage of the process where the term "alleged violation" is used. Namely, alleged violations are set forth in reports issued by damage prevention investigators. Persons subject to alleged violation reports have the option to either not contest them by paying an administrative penalty and acknowledging the findings or present their position before the DPC. At the procedural stage where the term "alleged violation" is used, the violations are assertions that have not been proven. House Bill 2189 makes this distinction.

Next, House Bill 2189 proposes to eliminate an exemption for a reporting requirement for facility owners. Currently, facility owners are required to submit a report of an alleged violation through the One Call System not more than thirty days after receipt of notice of damage. This reporting requirement does not apply to facility owners, however, if the cost to repair the damage is less than \$2,500, except when the same person damaged the facility owner's lines two or more times within a six-month period. House Bill 2189 proposes to remove the exemption, which would hold facility owners to the same reporting requirements as all other stakeholders. Ensuring that all damage is reported, regardless of the repair cost, is a step in the right direction towards preventing line hits.

Lastly, House Bill 2189 would grant authority to the Commission to impose additional administrative penalties if a party fails to timely pay an administrative penalty set forth in an informal determination of the DPC that has not been rejected by the alleged violator. House Bill 2189 would further authorize the Commission to impose administrative penalties if a party fails to timely attend and successfully complete a damage prevention educational program. The ability to impose additional administrative penalties as a consequence for non-compliance with previously issued penalties and educational requirements is essential to deter future violations of the PA One Call Law. This is especially true with repeat offenders.

Commission Priorities when Reauthorizing the PA One Call Law

Next, I would like to take this opportunity to highlight three recommendations that the Commission views as priorities when considering amendments to the PA One Call Law that are not included in House Bill 2189.

Amending the definition of “excavation work”

First, the current definition of “excavation work” set forth in the law excludes certain earth moving operations that may nevertheless lead to facility damage. Specifically, the definition exempts activities that are conducted without the use of powered equipment or explosives, such as hand tools. It also exempts digging methods using soft excavation technology, such as vacuum and high pressure air or water.

Not only could these exempted activities lead to line hits, but they may also conflict with federal regulations. As a condition of receiving federal funding to support the Commonwealth’s One Call damage prevention program, the Commission must demonstrate compliance with the Pipeline and Hazardous Materials Safety Administration’s (PHMSA) regulations. Among the criteria used to evaluate the effectiveness of the Commission’s damage prevention program is whether an excavator who causes damage to a pipeline facility: (1) reports the damage to the operator of the facility at the earliest practical moment; and (2) reports damage resulting in the escape of PHMSA regulated natural gas or hazardous liquid to emergency officials. 49 CFR § 198.55(a)(6)(iii).

Currently, the exempted activities are not subject to reporting requirements even if they cause damage or result in the release of product. Section 180(7) of the PA One Call Law directs excavators performing “excavation work” to report immediately to the facility owner any break or leak on its lines, or any dent, gouge, groove, or other damage to such lines or to their coating or cathodic protection, made or discovered in the course of the excavation or demolition work. 73 P.S. § 180(7). Additionally, Section 180(8) directs excavators performing “excavation work” to call 911 and the facility owner if the damage results in the escape of any flammable, toxic or corrosive gas or liquid that endangers life, health or property. 73 P.S. § 180(8). Given the definition of “excavation work,” there are certain earth moving activities that are not required to comply with the reporting requirements in Sections 180(7) and 180(8) of the PA One Call Law, even if they result in damage

or a release of product. The exemptions prevent the Commission from fully enforcing the federal reporting requirements, which may jeopardize the ability to receive federal funding to support the Commonwealth's damage prevention program.

House Bill 2189 seeks to amend the definition of "excavation work" by including the performance of routine maintenance of a depth less than eighteen inches. It further proposes to include incidental, or *de minimis*, excavation associated with routine maintenance and the removal of sediment buildup, within the right-of-way of public roads or work up to a depth of twenty-four inches beneath the existing surface within the right-of-way of a state highway. The Commission is concerned that the inclusion of these activities in the definition of "excavation work" will lead to increased One Call tickets and locate requests without a commensurate increase in the potential for damage. The rationale for these exemptions is that utility facilities are buried at a sufficient depth to permit shallow excavations to go forward without locating and marking facilities. For this reason, the Commission recommends retaining this portion of the definition of "excavation work" and retaining the definition of "minor routine maintenance," as currently enacted.

Removing the limitation to report a release only if it endangers life, health or property

Second, Section 180(8) of the PA One Call Law requires excavators to immediately notify 911 and the facility owner if damage results in the escape of any flammable, toxic or corrosive gas or liquid *which endangers life, health or property*. 73 P.S. § 180(8) (emphasis added). The language awards discretion to excavators for determining what might, or might not, endanger life, health or property. Excavators may not possess the expertise needed to know or understand the dangers of a release of a flammable, toxic or corrosive product.

Additionally, the PHMSA regulation for reporting excavation damage, 49 CFR § 198.55(a)(6)(iii)(b), which I testified about previously, does not recognize a qualification that the damage must endanger life, health or property. Rather, a state's damage prevention requirements must show that excavators notify 911 or other emergency authorities if damage results in the escape of PHMSA regulated natural gas and other gas or hazardous liquid. To align with the federal regulation and in the interest of public safety, the Commission recommends that the qualifying language of endangering life, health or property be eliminated from the notification requirement when there is a release of gas or liquid.

Adding a statute of limitations

Presently, the PA One Call Law lacks a statute of limitations establishing the time limit in which an action can be brought. The Commission recommends that the PA One Call Law define the maximum amount of time in which a formal complaint may be filed, as this will provide certainty to all stakeholders.

The Public Utility Code utilizes a three-year statute of limitations at Section 3314(a). A three-year statute of limitations is likely sufficient to timely address alleged violations of the PA One Call Law and preserve the integrity of evidence.

Conclusion

I thank the Committee for holding this hearing and engaging in a thorough review of the PA One Call Law as it considers its reauthorization. The Commission fully supports reauthorization of the Law, because it has proven to reduce damage to underground facilities. Enabling safe construction around utility infrastructure, particularly natural gas given its combustible nature, is vital to the Commonwealth. Reauthorization of the PA One Call Law will mitigate the number of underground line hits, which are a threat to the safety of workers and the public, and can impact the cost and reliability of utility service.

Reauthorizing the PA One Call Law is especially important at this time when federal funding has been awarded to plan and construct utility infrastructure projects. From broadband deployment to replacing aging pipelines and building out electric transmission lines, One Call tickets are likely to increase.

The Commission encourages consideration of its proposals when reauthorizing the law – including the elimination of certain exemptions in the definition of “excavation work,” and requiring excavators to notify of all instances of damage resulting in the escape of gas or liquids. These proposals are consistent with PHMSA’s regulations, which the Commission is obligated to enforce. The Commission further recommends adding a statute of limitations so that a clear time limit is established for bringing forth an action under the Law.

The Commission stands ready to continue to assist you in any way on the reauthorization of this important law. I’ll be glad to answer any questions you may have. Thank you.



Pennsylvania One Call System, Inc.

925 Irwin Run Road
West Mifflin, PA 15122-1078
(412) 464-7100
www.paonecall.org

Testimony of

William G. Kiger, President & CEO

Gerald McInaw, Board Chair

Pennsylvania One Call System, Inc.

Before the House Consumer Protection, Technology & Utilities Committee

On House Bill 2189

Harrisburg, Pennsylvania

September 17, 2024

Good morning, Chairman Matzie, Chairman Marshall, and members of the House Consumer Protection, Technology & Utilities Committee. We welcome the opportunity to speak with you this morning and to answer any questions you may have.

By way of background, the first pa one call statute passed the general assembly in 1974 – 50 years ago. I, personally, have appeared before the committee to testify regarding every revision beginning in 1986, 38 years ago.

We have moved from a small handful of volunteers in Allegheny County using an answering service and wall maps to generally locate where someone said they wanted to excavate to a statewide organization with over 90 employees taking more than 1 million calls annually.

Instead of wall maps we have a multi-million-dollar computer system that automatically locates excavation sites within polygons, compares the sites to the facility locations of our 4,000 + members, which we update on an ongoing basis, and notifies each one of them of any excavation requests we receive that may impact their facilities at the excavation site.

Our purpose is to prevent damage to underground facilities. To promote safety, we provide an efficient and effective communications network among project owners, designers, excavators, and facility owners.

Pennsylvania One Call System, Inc.

We have the largest, most stakeholder-diverse board of directors in the United States, representing all gas, electric, water, sewer, telecommunications, pipeline, and cable company in the commonwealth, both private and public.

In addition, over 20% of our board is composed of municipalities and authorities, and we are the only one call board in the United States with government agency members: PEMA, Penn DOT, and the PUC - 35 members in all, and all of them serve without compensation from PA 811.

Our sole job is to make excavation as safe as possible for the residents of this commonwealth, and we are recognized as one of the premier one call systems in the world. We want that record to continue.

As to HB2189 we are focused on three things: first, fixing technical things that didn't come out in the right place in the current law. Second, clarifying language that needs clarification. And third, making some modest substantive changes that will permit us to be more effective. That includes making the committee aware of the negative effects of certain other proposed changes.

As to the first, we believe that the bill addresses the technical fixes.

As to the second, we believe that the bill addresses the needed clarifications.

As to the third, we believe that additional work needs to be done to avoid turning the current good Samaritan provision into a mandate for facility owners to locate lines that they do not own, which has always been the responsibility of the excavator, who is the one onsite with excavation equipment, and who has been hired to do that. We have provided our specific comments to staff.

My last point is that the term the statute uses is and has always been "facility owner," not utility. Facility owners include utilities, but also includes municipalities, water and sewer authorities, interstate pipelines, for example. In other words, virtually anyone who has a line that serves customers.

Any change to the existing language regarding "lines" and "facilities," agreed to and understood by all parties over the past 40 years, without a clear and compelling reason to make such a change, coupled with a consensus from the stakeholders as a whole, not just the one who would benefit from the change, is a bad idea.

The second significant issue we have has to do with making facility owners responsible for continuously monitoring depth. Depth changes over time as a

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result of things over which the facility owner has no control, especially as it does not own the property in question.

How can anyone continuously monitor the depth of everyone else's property throughout the entire commonwealth? If someone regrades their property, they're not obliged to notify anyone unless there is some zoning ordinance at play. In the absence of a zoning requirement no one needs to tell anything to anyone about what they choose to do on their own land. This is simply unworkable.

With respect to these two substantive issues, I would like to point out that the party advocating them is both a member of pa 811, was a member of our legislative task force that developed the changes we proposed and voted in favor of those changes. At no time during this process did they ever discuss with or propose to their fellow stakeholders at pa 811 the changes that they now advocate.

Thank you for your time. As I said at the beginning, we are available to answer any questions the committee members or staff may have.

Pennsylvania One Call System, Inc.

About Pennsylvania One Call System:

Pennsylvania One Call System, Inc. incorporated 4/6/1978, under the laws of the Commonwealth of Pennsylvania and registered as a non-profit corporation under Section 501(c)(6) of the Internal Revenue Code. A 35-member Board of Directors governs the organization. The composition of the Board includes representation from the following industries: Electric, Gas (including an owner or operator associated with Conventional oil and gas wells and a facility owner representative of a pipeline associated with Unconventional oil and gas wells), Municipal, Pipe Line, Telecommunications, Telephone, Water, Cable Television, Associate, Contractor, Designer, the Pennsylvania Public Utility Commission, Pennsylvania Emergency Management Agency, and the Department of Transportation.

William G. Kiger, is the President and Chief Executive Officer of the corporation. The principal place of business is located at 925 Irwin Run Rd., West Mifflin, PA 15122. The backup site for business continuity is the Ohio Utilities Protection Service in North Jackson, OH.

Funding of the company has come from notification service fees to members. Increased revenues from growth are used to offset operating expenses. A lesser amount of revenue comes from collection of the annual service fee from business entities, and others not classified as homeowners, who call PA One Call to provide notice of proposed excavation (formerly known as the excavator fee). The annual service fee is used to offset the cost of membership for municipalities and municipal authorities, to offset certain company operational costs, and to partially fund the PUC enforcement effort.

The Company's Mission

Our purpose is to prevent damage to underground facilities. To promote safety, we provide an efficient and effective communications network among project owners, designers, excavators, and facility owners.

The Company's Vision

Pennsylvania One Call: The Keystone of Damage Prevention

Services

We are a service company dedicated to minimizing utility service interruptions, reducing on-the-job injuries and deaths, promoting a higher level of public safety and protecting the environment.

Pennsylvania One Call System, Inc.

Since its inception in 1972, Pennsylvania One Call System has increased its membership from 6 utilities in one county to 3,770 underground facility owner/operators in all 67 counties from the following industries: cable television, electric, gas, propane, Marcellus shale, pipeline, sewer, telecommunications, telephone, water and government, including state, county, city, borough, townships of the 1st class, townships of the 2nd class, and municipal authorities, of which 1,577 are exempt from paying for the one call services and 2,193 receive an annual refund to help offset their operating costs associated with membership. Members also include private master meter companies, manufactured housing communities, and private entities, such as schools, hospitals, manufacturing sites, and others owning underground facilities which cross public roads.

Use of the service increased from 389 work location requests the first year, reaching 1,020,498 notifications in 2023.

The company can be reached using the national call before you dig number of **8-1-1** or through its toll-free telephone number **800-242-1776** by anyone requesting location of underground lines prior to digging. The service is available **24 hours per day, every day of the year**. Information is obtained from the person planning or scheduling excavation or demolition. In addition to phoning the call center, users, with credentials that have passed the **Web Ticket Entry** training, may enter their dig notices via our website www.paonecall.org. The collected data is referred to as a Work Location Request, 'Dig Notice' or 'Ticket'. After creation of a dig notice, a **ticket confirmation**, which is a copy of the ticket, is sent to users and to callers who provide their email address or fax number. The emailed ticket confirmation includes a hyperlink to the map graphic of the work site.

Whether the notice information is gathered **by phone or entered via the web**, it is disseminated to underground facility owner/operators via **email, fax, XML, or WebView**. Facility owners have the option to request voice relay to their emergency personnel outside normal business hours when requested.

Additionally, for emergency tickets, facility owners may request to receive a **text notification** when an emergency ticket is sent to their designated receiving email address. The system accepts **automated responses** from facility operators and relays them to the excavator or designer through our **KARL** system.

Members are required to "register" their underground facility locations by providing us with a list of municipalities in which their lines are located. Electronic "**member mapping**" service became a requirement for all members beginning in 2018. It allows members to define polygonal notification areas with

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adjustable buffers, to reduce the number of non-involved dig notices they receive. Members with internal GIS or CAD systems can upload their shapefiles into the system. This saves members time and money, as they do not need to research or respond to dig notices outside their mapped service territory. Persons reporting planned excavation also benefit from our **electronic mapping** as they can draw a polygon to delineate the proposed excavation area, notifying only the members within the drawn polygon.

Coordinate PA is the project and coordination tool for utility and public works project planning and coordination within the Commonwealth of Pennsylvania. Coordinate PA was developed by Pennsylvania 811, is web based, and easy to use. It provides a spatial, map-based look at underground utility and public works projects to help identify opportunities for coordination and collaboration when projects overlap in space and overlap in time. *Planning is the first step in effective damage prevention efforts.* From within the Coordinate PA portal, the next two steps in damage prevention can be initiated:

Design notifications. Design tickets must be created from within the Coordinate PA portal and allows for the electronic exchange of drawing data.

Complex Projects. Coordinate PA is the mechanism to use for defining a project, requesting a complex project pre-construction meeting, creating phases, adding meeting participant contact information, uploading meeting notes and other documents, and creating routine excavation tickets. Routine tickets created from the project are associated with the project by reference, tying all related documentation together. We strongly believe that early utility coordination is an important component of damage prevention, and devote resources to starting, building, contributing and maintaining thirty-four (34) active Utility Coordination Committees (UCC) throughout the Commonwealth. These committees also provide the **Damage Prevention Liaison (DPL)** an opportunity to educate the committee members on POCS's products and services, and new developments with POCS's ticket management applications. In 2023, there were **1,431** attendees at **46** UCC meetings.

Education and Public Awareness are a critical part of the service we provide. **Educational programs, Act 287 compliance training, and Safety presentations** are offered targeting facility owners, designers, excavators, and locators.

In 2023, there were 323 combined virtual and live sessions for 10,343 attendees. The DPLs participated in 690 meetings with 6,700 attendees. Five

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Safety Day events were held across the Commonwealth with a total attendance of 2,075.

We conduct public awareness programs to promote safe digging practices through billboards and poster boards, email marketing ads (direct and retargeting); on air sponsorships; streaming online commercials; YouTube channel; social media; and a Digital Marketing Plan with behavioral target banners based on specific consumers lifestyle, demographics, and interests. Additional homeowner outreach is done via postcards. Outreach to rental companies and nurseries is done to educate those renting powered equipment and homeowners doing weekend projects, on the importance of contacting 811 before starting their projects. We leverage joint awareness efforts through partnerships with our members at minor league baseball games and 811 Popper Ads. as well as outreach to our state officials, i.e., Senate, House, Governor, County Commissioners, and local government entities, who in turn give us proclamations to support our efforts and the communication service. To promote the safe digging and the 811 brand, POCS uses Common Ground Alliance toolkits and infographics. These materials are published to our social media channels. POCS promoted the national outreach campaigns for: safety is in your hands every dig, every time; how excavators can help; a single dig can be a matter of life or death; who is responsible to notify 811; use white lining when outlining your proposed worksite; complex projects; protect underground lines; and safe digging steps.

We support the CGA national 811 awareness efforts in conjunction with other one call centers and stakeholders, by participating when Pennsylvania professional teams play on August 11th. In 2023, the campaign used 811 assets across 15 games played on August 11th which included the Minnesota Twins vs. Philadelphia Phillies and the Cincinnati Reds vs. Pittsburgh Pirates.

Educational videos are published and available on our website at www.pa1call.org/videos.

Development to Date

One Call was created as a sub-committee of the Pittsburgh Public Service Coordinating Committee in 1968. Operations were established in September 1972 and the service covered 6 utilities serving Allegheny County in Southwestern Pennsylvania.

- The organization incorporated 4/6/1978.
- In April 1975, Act 287 (1974) went into effect requiring excavators to call before digging, and expanded the service area to 11 counties. At that time, in honor of the 1776 United States Bicentennial, the toll-free

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number 800-242-1776 was added as an additional way to reach the call center, and coverage included the 33 counties of Western Pennsylvania. Expansion continued across the Commonwealth in 1977, adding Central Pennsylvania in a merger with JUNE (Joint Utility Notification for Excavators) and the Southeastern counties were added in September 1977.

- Having established the ‘Call Before You Dig’ concept in the state, the Pennsylvania One Call System and the contractor associations sought passage of legislation mandating participation by all underground facility owner/operators.
- Enactment of Act 172 (1986) mandated participation by facility owners and created the contractor fee to offset the operational cost of municipal participation. Mandatory participation brought about major growth, and clearly established the need for a full-time staff to coordinate member services and perform the duties of the corporation.
- Enactment of Act 38 (1991) placed new responsibilities on engineers, architects, contractors, facility owners and municipalities.
- Enactment of Act 187 (1996) brought about change in the composition and structure of the Board of Directors and provided for greater enforcement abilities through the PA Department of Labor & Industry (Department).
- At the Department’s request, Act 199 (2004) provided the Department greater enforcement authority and redefined the administrative fines and penalties.
- Enactment of Act 181 (2006) incorporated Subsurface Utility Engineering requirements, began requiring adherence to CGA Best Practices and HDD Good Practices by reference, defined responsibilities of a project owner and a complex project, gave the Board of Directors the ability to define the maximum area of a notification, included other factors concerning the operation of the System, and required regulated utilities to maintain records of abandoned facilities.
- Act 121 (2008) re-inserted the “good Samaritan” clause which allows facility owners to identify the location of underground lines not owned by the facility owner, normally on private property, as a helpful guide to excavators, without assuming liability for their efforts.
- Act 50 (2017) transferred enforcement authority from the Department of Labor & Industry to the PA Public Utility Commission (Commission); established a Damage Prevention Committee; added reporting obligations and deadlines, through the one call system, for project owners, facility owners, designers and excavators; mandated all facility owners participate in the member mapping service; modified the structure of the Board of Directors; added the ability for facility owners to declare tickets as complex projects; defined timeframes for

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excavators to re-notify facility owners regarding unmarked or mismarked lines, and timeframes for facility owners to respond to those re-notifies; clarified responsibilities for Subsurface Utility Engineering; extended the requirement of maintaining records of abandoned lines to all facility owners; modified some factors concerning the operation of the System, including requiring an annual financial audit; requires the one call system to fund part of the enforcement effort; requires excavators and designers to pay the annual fee; continued exemptions for mining, construction of well pads and operations incidental to the extraction of oil or natural gas, added exemptions for stripper well lines; continued the exemption for minor routine road maintenance; and removed the requirement to provide lists to the recorder of deeds.

Our development goals are for increased participation by all underground facility owner/operators, project owners, designers and excavators, and elimination of all legislative exemptions.

Respectfully Submitted,

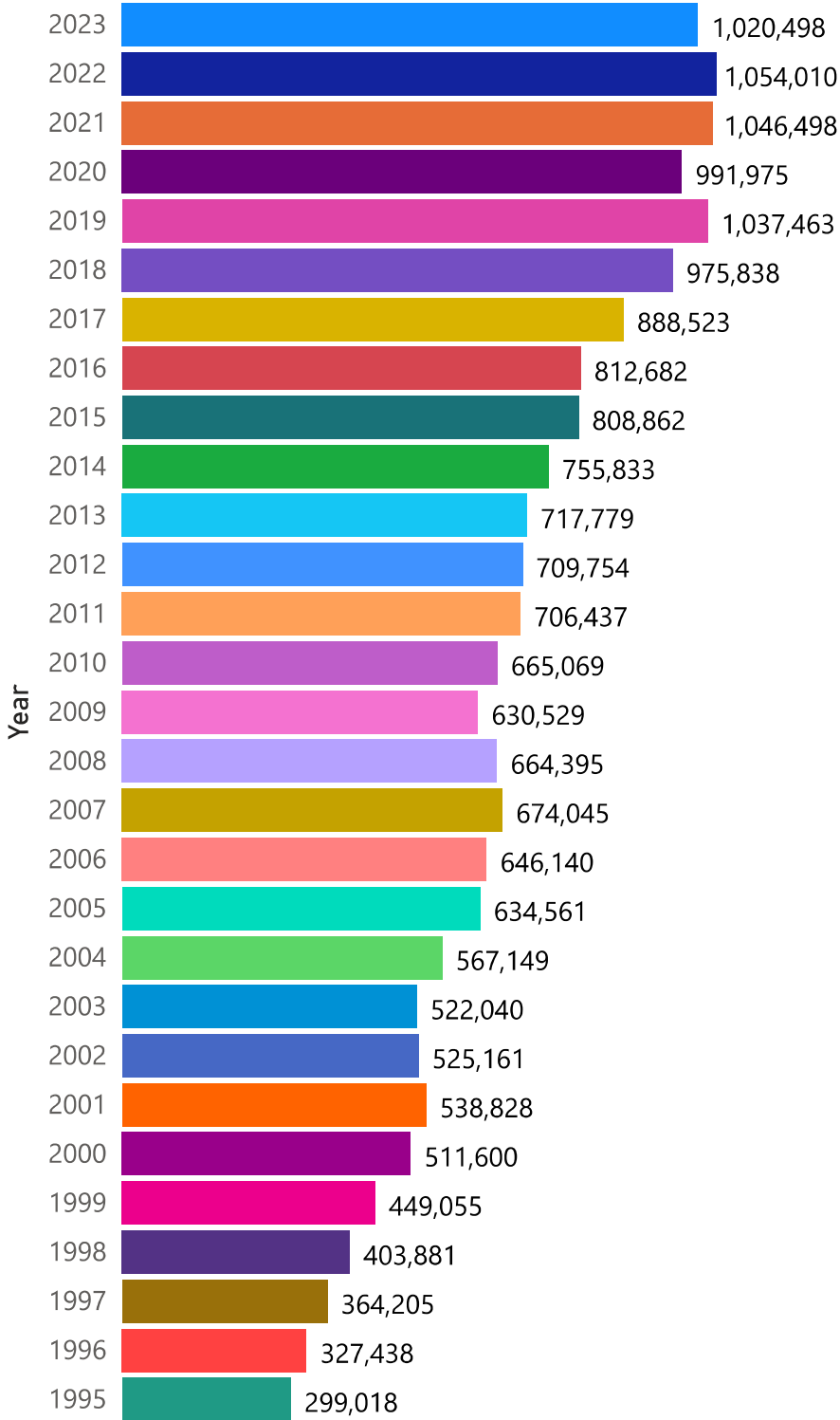
William G. Kiger, President & CEO
Gerald McInaw, Chair
Pennsylvania One Call System, Inc

Contacts: email –	wgkiger@pa1call.org	Phone – 412-464-7111
	William Boswell wpboswell@verizon.net	412-999-8008
	Gerald McInaw Gerald.j.mcinaw@williams.com	610-248-2835
	John Taylor John.Taylor@archerpublicaffairs.com	717-686-4105
	Eric Bugaile Eric.Bugaile@archerpublicawareness.com	717-686-4106



Damages Reported to PA One Call as a Percentage of Total Tickets 1995 through December 2023

Ticket Volume by Year



Damage Count	In-Out Ratio	% of Damages Per Total Tickets
7,944	6.43	0.78%
7,765	6.52	0.74%
7,771	6.47	0.74%
7,823	6.54	0.79%
8,398	6.75	0.81%
7,111	7.16	0.73%
6,439	7.24	0.72%
6,471	7.27	0.80%
6,355	7.44	0.79%
5,864	7.62	0.78%
5,673	7.72	0.79%
6,114	7.70	0.86%
6,254	7.72	0.89%
6,235	7.62	0.94%
6,369	7.71	1.01%
8,039	7.91	1.21%
7,685	7.97	1.14%
7,784	8.41	1.20%
8,188	9.17	1.29%
6,413	9.56	1.13%
5,956	10.14	1.14%
6,632	9.60	1.26%
7,402	8.82	1.37%
7,267	8.77	1.42%
5,250	9.71	1.17%
4,517	9.37	1.12%
3,926	9.13	1.08%
3,125	9.50	0.95%
2,468	8.87	0.83%

Averages: **687,906** **6,456** **8.10** **0.98%**

Member Count as of December 2023: **3,749**

PA 2020 Census Population: 13,002,700

Source: <https://www.census.gov/quickfacts/fact/table/PA/POP010220>

**Before the
House Consumer Protection, Technology & Utilities Committee
Public Hearing re:
House Bill 2189
September 17, 2024**

**Testimony of
Donna M.J. Clark, Vice President & General Counsel
Energy Association of Pennsylvania**

Good Morning Chairman Matzie, Chairman Marshall, and members of the House Consumer Protection, Technology & Utilities Committee. I am Donna Clark, VP and General Counsel of the Energy Association of Pennsylvania (“EAP” or “Association”), a trade association comprised of electric and natural gas utilities—also known as electric and natural gas distribution companies (EDCs and NGDCs)—operating in Pennsylvania. Collectively, EAP’s members deliver energy to more than 8.7 million residential, commercial, and industrial customers. EAP advocates for its members before the General Assembly, the Pennsylvania Public Utility Commission and other state agencies, assists its members by facilitating sharing of information and best practices, and provides educational opportunities for employees of its members and others through its operations and consumer services conferences. Safety is of paramount importance to EAP and its member distribution companies; members are committed to improving safety for their customers and in the workplace. Safety issues are regularly included on the agendas of EAP Board of Directors meetings and at our electric and gas operations conferences. EAP has an Accident Prevention Committee that recognizes superior performance by members with annual safety awards. EAP’s members support the goals of Pennsylvania’s Underground Utility Line Protection Law and are active participants in the PA One Call System, serving on its Board of Directors and actively contributing within its committee structure. EAP also attends meetings of the Board and is a regular exhibitor in the System’s “Safety Days” programs which take place each year throughout

the Commonwealth. Thank you for this opportunity to testify regarding reauthorization of Pennsylvania's Underground Utility Line Protection Law, commonly referred to as the "One Call Law."

Established more than 40 years ago as a "call before you dig" communications service in Southwestern Pennsylvania, "PA One Call" was designed to protect underground utility facilities from damage resulting from excavation projects. After becoming law in 1974, the "One Call" concept continued to expand throughout the Commonwealth (and beyond) to provide for a single nationwide toll-free telephone number (811) whereby excavators, designers, or other persons could notify facility owners thorough a central third-party entity of their intent to "dig" in an area which may (or may not) include underground facilities, i.e. pipes and wires. In turn, the facility owners would then be afforded the opportunity to mark the underground facility to avoid damage during the planned excavation or demolition process.

In Pennsylvania, a series of legislative amendments made participation in the One Call system mandatory for most underground facility owners and operators. This legislation also defined and identified the duties, requirements and notification responsibilities of the various parties involved in the One Call system; determined the composition, staffing and leadership of the third-party entity that operates the system; and delegated enforcement authority and established penalties and fines to be levied in the event of a violation and/or damage resulting from a violation. Today, the Pennsylvania Public Utility Commission ("Commission" or "PUC") enforces the requirements of the One Call Law, which ideally protects both the excavator and the underground facility from harm which can occur when an underground pipeline, conduit or wire is hit and damaged. Agency oversight was moved from the Department of Labor & Industry in 2017; at that time, the General assembly established a Damage Prevention Committee ("DPC") comprised of representatives of various stakeholder groups identified in the One Call Law (the Chairman of the

PUC; the Pennsylvania Secretary of Transportation; the President of the One Call System; one representative of certain non-municipally owned utilities, including electric, natural gas or petroleum pipelines, telephone, water or wastewater utilities and cable television; three excavator representatives; one representative of municipal governments; one representative of municipal authorities). The primary function of the DPC is to review a report of an alleged violation of the One Call Law along with the findings and recommendations of a damage prevention investigator; to issue a warning letter to an alleged violator as deemed appropriate by the DPC or as recommended by the investigator; to issue an informal determination that imposes an administrative penalty; to require an alleged violator to attend a damage prevention educational program; and/or to issue an informal determination that modifies or dismisses a recommendation of the committee staff, i.e., damage prevention investigator. Thus the 2017 amendments to the One Call Law created via legislation a volunteer committee within the Public Utility Commission to review alleged violations and make recommendations following an initial internal PUC staff conducted investigation of an alleged violation of the statute. The 2017 amendments further direct the DPC, with input from the One Call System, to develop bylaws, which are then approved by the Commission, establishing a schedule for regular meetings and detailing the Committee's practice and procedure pursuant to the One Call Law as well as duties established via PUC orders and regulations.

EAP and its member utilities support the timely reauthorization of the One Call Law. One Call remains essential to ensure that underground utility facilities are marked before any excavation begins to avoid damage, and to investigate and timely address violations in order to prevent future line hits and damages. The One Call Law aims to prevent injuries, property damage, and unnecessary utility outages.

We appreciate the efforts to date to address various stakeholder positions, however EAP remains concerned that some of the proposals contained in HB 2189 add statutory language that

will be costly to implement and does not improve safety, or add language that creates prescriptive statutory requirements that may be better resolved via a rulemaking process.

For example, the current One Call Law requires project owners to use sufficient quality levels (A, B, C, D) of subsurface utility engineering (“SUE”) or other similar technique whenever practicable to properly determine the existence and positions of underground facility when designing known complex projects having an estimated cost of \$400,000 or more. Current law is written so that the project owner/utility working with its engineers and subject matter experts has the discretion to determine the level of SUE sufficient for a particular complex project. This may mean that the design/construction drawings used in the bid process include one level of SUE information that can be adjusted during the post-bid/construction phase based on subsequent site visits by the utility and contractor.

HB 2189 proposes amendments to the One Call Law that require the highest quality level of SUE information during the design phase of the project which may prove unnecessary, adding substantial and unnecessary cost to the overall project. Rather than attempting to prescribe a certain quality level of SUE at the design phase in all complex projects, EAP suggests that the statutory language remain as is and that the PUC consider a regulatory process to promulgate guidelines or rules specifying the use of a certain quality level of SUE during the design phase of a complex project. This would ensure that the impact of proposed changes, their costs and benefits, had been fully vetted and considered by the Commission via diverse stakeholder input prior to the establishment of rules.¹

EAP supports proposals contained in HB 2189 which clarify and improve the procedure and processes followed by the PUC and the DPC to resolve alleged violations of the One Call Law. EAP suggests the establishment of a statute of limitations for the filing of a formal complaint by the

¹ See, HB 2189 at p. 8, lines 24 - 30

Commission's prosecutorial staff following the report of an alleged violation. Currently, no timeframe exists and an alleged violation report can be pending before the DPC for a period of twelve to eighteen months after the damage or violation occurred, lessening the impact of any remedy recommended by the Committee. Adding a statute of limitations will focus the investigation on the basis or root cause of the damage to the facility AND reduce the backlog of reported violation.

EAP supports amendments in HB 2189 which require DPC members to maintain employment within the represented industry and to have expertise in the operation of the One Call Law.² EAP further supports changes to the current One Call Law which would require:

- Additional representation of the natural gas utilities and pipeline operators on the DPC (from one to two members) to assure industry expertise and representation during Committee discussions determining whether a natural gas utility or pipeline operator violated the One Call Law based on the report of an alleged violation;
- A time limit (180 days from the occurrence of the alleged violation) for the DPC to act on a report of an alleged violation to assure that any remedy or penalty recommended by the Committee is timely and impactful;
- New statutory language that clarifies that the role of the DPC is akin to an advisory board and that its recommendation, once timely rejected by the alleged violator, has no binding effect and is not to be considered an adjudication; and
- The PUC to promulgate regulations establishing the process and procedure of the DPC and the rules governing the actions and timeframes for alleged violators appearing before the DPC.

² See, HB 2189 at p. 12, lines 20 – 21

Thank you for the opportunity to testify on behalf of our members and I would be happy to address any questions.



**PENNSYLVANIA
UTILITY
CONTRACTORS
ASSOCIATION**

HB 2189

TESTIMONY

September 17, 2024



Billy Kukurin, VP, Kukurin Contracting, Inc
Steve Johnston, VP, DOLI Corporation
Brenda Reigle, DIG Prevention Consulting as PUCA Lobbyist

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Thank you for the opportunity to speak on House Bill 2189. The Pennsylvania Utility Contractors Association (PUCA) is a coalition of contractors, suppliers, and engineers committed to advancing the utility construction and excavation industry through safety, education, advocacy, and fostering industry relationships. Our members are involved in projects across water, sewer, gas, electric, and telecommunications sectors, including treatment plants and site development.

A significant portion of these projects requires extensive underground excavation and infrastructure work, often utilizing heavy equipment—massive machines capable of quickly digging and moving large amounts of earth.

As you are aware, **this work is inherently dangerous**, not only **due to the use of such powerful equipment** but **even more so because of the hidden hazards beneath the surface**. The risks extend beyond the workers operating the machinery to the consumers whose homes and businesses rely on the power and gas lines buried underground.

Let me emphasize PUCA's primary concern, along with that of all stakeholders—and indeed the General Assembly—regarding the One Call Act

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is, and should always be, safety. Every comment we make must be considered through this lens, as our operators and laborers work in the closest proximity to the danger zone.

House Bill 2189 amends the Underground Utility Line Protection Act, commonly known as the PA One Call law to provide for damage prevention in the excavation industry.

The Pennsylvania Utility Contractors Association (**PUCA**) **supports the majority of the new provisions within HB 2189; however, we believe the bill can do more to provide improved safety measures for the public and the excavation industry.**

PUCA's Key concerns revolve around the following issues:

PUC Enforcement Issues
Service Lines
Shallow Depth Lines
Designer Drawing Details
Project Owner SUE Clarification
Enforcement – DPC Board Composition
Downtime - Self Enforcement
Jurisdiction of Judicial Proceedings
Nuisance lawsuits

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THE ELEPHANT IN THE ROOM - PUC ENFORCEMENT ISSUES

Please do not mistake our honesty below for complete disenchantment with PUC Enforcement. On the contrary, PUCA was the organization that initially advocated for PUC Enforcement over the Department of Labor and Industry. We firmly believe that PUC Enforcement represents a significant step in the right direction, particularly with the inclusion of AVRs being filed by all stakeholders. Our goal is simply to ensure that enforcement remains fair and balanced for everyone involved. With that in mind, we present the following three concerns:

FACILITY OWNER BOUNTY PROGRAMS

- A. Over recent years, several facility owners have instituted a Bounty program incentivizing utility employees to report Alleged Violation Reports (AVRs) even when no damage occurs. These employees actively patrol communities, particularly targeting homeowners conducting yard work. In this program, facility owners compensate these employees

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with monetary rewards (bounties) for filing AVRs. Once filed, these AVRs are reviewed by the PUC Damage Prevention Committee for adjudication.

Since the introduction of PUC's Enforcement, there has been a notable increase in AVRs filed against homeowners for non-damage incidents. Conversely, AVRs filed by excavators against facility owners for other non-damage issues do not receive the same level of scrutiny from PUC Enforcement. Members of PUCA have filed numerous AVRs in such cases, often resulting in no action taken against facility owners. This disparity raises concerns about perceived favoritism within the enforcement process, which should be avoided to maintain fairness for all stakeholders.

PUC 2017 DOWNTIME PROMISE TO EXCAVATORS

- B. In 2017, PUC Commissioner Coleman requested that PUCA allow the PUC Enforcement a few years to improve the issues of mis-marks and

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late locates (no marks). If enforcement failed to substantially improve in this area, the PUC would consider Downtime language.

While PUCA acknowledges that overall compliance with the One Call law has improved, our primary concern remains unaddressed, even six years after the implementation of Act 50 of 2017. PUC Enforcement was expected to address the excavation industry's issues with late locates and mis-marked facility lines, which would lead to reduced downtime for excavators. However, the expected improvements in facility owner damage prevention measures have not materialized to the extent necessary to enhance the safety of our crews.

STATISTICAL COMPARISON ANALYSIS OF ANNUAL REPORT

C. The PUC is required to "submit an annual report containing relevant damage prevention data to the commission, the Senate Committee on Consumer Protection and Professional Licensure, and the House Committee on Consumer Affairs." While the PUC has complied with this

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legal requirement, they have not conducted statistical analyses comparing violations between excavators and facility owners. Based on data available from the PUC website or obtained through Right-to-Know requests, PUCA has determined that facility owners violate the law almost twice as often as excavators. PUCA has made this claim for many years, and the evidence now supports it. A different pattern is seen in the Common Ground Alliance (CGA) DIRT reports, where the statistics are skewed in favor of facility owners, as reporting to the DIRT database is not mandatory for all stakeholders. The majority of CGA reports are submitted by locators and facility owners, often placing blame on excavators, even in cases where the excavator was not at fault. The PUC's mandatory reporting for all stakeholders has been crucial in highlighting the primary violators of Pennsylvania's One Call law. PUCA recommends adding language that requires the PUC to annually prepare a statistical analysis comparing violations between excavators and facility owners. The analysis should be published on the

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PUC website for public review and serve as a tool to help the PUC adjust its enforcement efforts to target the biggest offenders.

1. SERVICE LINES – need clarification

Section 1 Definitions, and Section 2 Facility Owner

Service Lines should be added to the definitions and be a requirement for facility owners to mark private service lines running directly from the main to the building connection.

Reasoning for service lines to be marked: PUCA firmly believes the relevant definitions within existing law require these lines to be marked, but because of the current language within the law it is not clearly stated for facility owners to understand their responsibilities.

Several states have taken the issue before their courts and won their cases for service lines to be marked because facility owners have an operational responsibility to mark lines they utilize to provide their product to the end user, regardless of its ownership of public or private. (**See References in the**

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CGA Best Practices v 20.0, Section 4-21 Service Lines

<https://bestpractices.commongroundalliance.com/New-in-Version-200>).

You may find it noteworthy that Pennsylvania is specifically mentioned in this Reference Section as one of the states that mark service lines. Yet, many stakeholders ignore Pennsylvania’s technically written law thereby rejecting the requirement to mark all service lines, public or private.

Quote from the CGA Best Practices 4-21

Practice Statement: *A service line is marked in response to a locate request to the operator (facility owner) who uses the service line to pursue a business that derives revenue by providing a product or service to an end-use customer via the service line. A service line is marked in response to a locate request to a governmental entity that provides a product or service to an end-use customer via the service line.*

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References Section:

- South Dakota Attorney General's official opinion (8/11/08)
 - *Minnesota DPS Rule Ch 7560 (5/31/05)*
 - *Colorado appellate court case: Wycon Construction Co. v. Wheat Ridge Sanitation District, 870 P.2d 496 (Ct. App. Col. 1994)- Leon County, FL, County Court Case No. 03-SC-6827, Mitchell Properties, Ltd. v. Cornerstone of North Florida, Inc. v. City of Tallahassee- Oregon PUC Ruling (5/1/98)*
 - **State One Call laws: AZ, GA, MN, OH, PA**
-

Given these precedents and the CGA language, it's difficult to understand why the marking of service lines shouldn't be clarified. The idea that homeowners and business owners should be responsible for marking their private lines is problematic for several reasons:

- 1. Inability to Meet Timeframes:** Home and business owners typically cannot meet the required 3-day mark-out timeframe for each locate request (ticket) under current law. Facility owners, on the other hand, can contract third-party locators at reduced rates compared to what an individual homeowner or business owner would have to pay.

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2. Lack of Expertise and Equipment: Most home and business owners lack the necessary knowledge, experience, or proper equipment to accurately locate their lines, which is critical for ensuring the safety of both the excavator and the surrounding community.

3. Facility Owners' Responsibility: Many Facility Owners have long utilized private service lines without taking responsibility for the private lines they rely on, despite the fact that current law requires them to mark service lines. These lines are essential for delivering their services or products to home and business owners, and these owners often spend thousands of dollars on their service line's installation and maintenance. If service lines are damaged due to a Facility Owner's negligent marking, the resulting damages should be covered by the Facility Owner's liability as an operational responsibility for the use of the private line in delivering their product/services through the private home or business line. Conversely, if an excavator damages a service line within the tolerance zone, the excavator should be held responsible for the damages.

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Suggested language from 4-21 of the CGA Best Practices v 20.0

Section 1. Definition

A service line is a type of underground facility that is connected to a main facility. The service line is used by the following entities:

- An operator who provides a product or service within a right-of-way, an easement, or an allowed access to or through private property while pursuing a business that generates revenue by providing a product or service to an end-use customer (other than another operator of like kind or themselves).

- A governmental entity that provides a product or service via that service line.

Section 2. (i.2) Facility Owners – PUC language

(i.2) To identify the location of a known service line connected to its facilities through which the facility owner uses the service line to pursue a business that derives revenue by providing a product or service to an end-use customer via the service line, regardless of whether the service line is owned or operated by the facility owner.

²**APPENDIX B** – PUCA (NUCA OF PENNSYLVANIA) collective reply to Answers and Protests filed by Interveners on PUC DOCKET NO P-2019-3009889

³**APPENDIX C** – Other state cases

2. LINE DEPTH – SECTIONS 1, 2 and 5

PUCA is requesting the inclusion of language that mandates facility owners to indicate in inches the depth of the underground facility. Over time, an increasing number of lines are not being maintained at the proper depths as

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required by **49 CFR 192.36 (see below)**, which exposes excavation crews and the public to potential property damage and injuries. The occurrence of shallow-depth lines has been on the rise in recent years, with our crews encountering them in sidewalks, pavement, yards, roadways, and other areas. As excavators, we are required to use careful techniques within the tolerance zone. However, shovels are ineffective for removing hard materials like concrete and asphalt. Instead, we use diamond blade saws set to an appropriate depth to cut sections that can then be lifted away with heavy equipment. In doing so, we frequently find electric, gas, and fiber lines buried within or just under these hard materials that are damaged as the material is lifted for removal. While we make every effort to avoid any facilities within the tolerance zone, no one anticipates encountering a dangerous line within the first 1-10 inches. Excavators should be informed of known line depth. The Federal Code of Regulations specifies installation depths on private property and in streets and roads under **Federal Regulation 49 CFR 192.351 et seq.**

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49 CFR 192.36

§ 192.361 Service lines: Installation.

*(a) **Depth.** Each buried service line must be installed with at least 12 inches (305 millimeters) of cover in private property and at least 18 inches (457 millimeters) of cover in streets and roads. However, where an underground structure prevents installation at those depths, the service line must be able to withstand any anticipated external load.*

We also reference the following United States District Court, Middle District of Pennsylvania court decision on facility owner lines being maintained at the depths required by Federal Regulation in 49 CFR 192.361. *Here the court disagreed with “UGI’s argument that the duty established by 49 CFR Section 192.36 regarding the depth of service lines extends only to the installation of service lines, and does not create a continuing obligation on the part of the facility owner to maintain the service line at a particular depth as the surface grade changes over time. UGI’s internal operating procedures in effect when the service line was installed states that buried lines must have a minimum of 24 inches or as much as 36 inches of cover, depending on the composition of*

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the surrounding ground.” The court held UGI to the standard depths in this case.

⁴2012 WL 5949213

United States District Court, M.D. Pennsylvania.

***FEDERAL INSURANCE COMPANY as subrogee
of Fulton Financial Corporation, Plaintiff
v. HANDWERK SITE CONTRACTORS, UGI
Corporation, and UGI Utilities, Inc., Defendants.***

Civil Action No. 1:10-cv-617.

Nov. 28, 2012.

At a recent PA One Call System Legislative Task Force meeting, PUCA’s initial proposal on shallow depth utility lines was voted down by the facility owners. In response, PUCA requested the group to find a solution for shallow lines. A representative from PECO suggested that New York's law could provide a model. This led PUCA to discover that New York’s 811 Law specifically addresses the issue of shallow depth utility lines. Our research also revealed that NY 811 not only addresses shallow lines, but they also require facility

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owners to indicate the depth of their lines in inches at the stake or marking point.

For many years, Pennsylvania facility owners have not been required to indicate line depths, but this practice is no longer justifiable with the advanced locating technologies available today that can measure depth. To support the transition to digital mapping of underground facilities for security reasons, providing line depth in inches would not only improve the accuracy of GIS mapping but also enhance safety for excavators and the community.

SUGGESTED LANGUAGE UNDER SECTION 1, 2 AND 5:

Section 1. Definitions

"**Excavation work**" means the use of powered equipment or explosives in the movement of earth, rock or other material, and includes, but is not limited to, anchoring, augering, backfilling, blasting, boring, digging, ditching, dredging, drilling, driving-in, grading, plowing-in, pulling-in, ripping, scraping, trenching and tunneling. The term does not include soft excavation technology such as vacuum, high pressure air or water, tilling of soil for agricultural purposes to a depth of less than eighteen inches, saw cutting and jack hammering six inches below the bottom of the pavement or masonry in connection with pavement removal or restoration of an initial or previous excavation where only the pavement or masonry is involved. [performing minor routine maintenance up to a depth of less than eighteen inches measured from the top of the edge of the cartway or the top of the outer edge of an improved shoulder, in addition to the performance of incidental de minimis excavation associated with the routine maintenance and the removal of sediment buildup, within the right-of-way of public roads or work up to a depth of twenty-four inches beneath the existing surface within the right-of-way of a State highway,] work performed by persons whose activities must comply with the requirements of and regulations promulgated under the act of May 31, 1945 (P.L.1198, No.418), known as the Surface Mining Conservation and Reclamation Act, the act of April 27, 1966 (1st Sp.Sess., P.L.31, No.1), known as The Bituminous Mine Subsidence and Land Conservation Act, or the act of September 24, 1968 (P.L.1040, No.318),

Continued. . .

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known as the Coal Refuse Disposal Control Act, that relate to the protection of utility facilities or the direct operations on a well pad following construction of the well pad and that are necessary or operations incidental to the extraction of oil or natural gas.

Section 2 (5)(i)

(i) To mark, stake, locate or otherwise provide the position of the facility owner's underground lines at the work site within eighteen inches horizontally from the outside wall of such line in a manner so as to enable the excavator, where appropriate, to employ prudent techniques, which may include hand-dug test holes, to determine the precise position of the underground facility owner's lines. This shall be done to the extent such information is available in the facility owner's records_or by use of standard locating techniques [other than excavation]. Standard locating techniques shall include, at the utility owner's discretion, the option to choose available technologies suitable to each type of line or facility being located at the work site, topography or soil conditions or to assist the facility owner in locating its lines or facilities, based on accepted engineering and operational practices. Facility owners shall make reasonable efforts during the excavation phase to locate or notify excavators of the existence and type of abandoned lines. Each stake and surface marking shall indicate in inches the depth of the underground facility at that point, if known. If staking or marking are not completed to indicate the location of an underground facility, the operator shall designate such location in accordance with the following:

- (1) By exposing the underground facility or its encasement to view within the work area in a manner sufficient to allow the excavator to verify the type, size, direction of run and depth of the facility; or
- (2) By providing field representation and instruction to the excavator in the work area.

Section 5.

5. (4)(i) Powered or mechanized equipment may be used in the tolerance zone after verification of the location of the marked facilities.

5. (4) (ii) Prior to the verification of the location of facilities within the tolerance zone, powered or mechanized equipment may be used for the removal of pavement or masonry to whichever is greater:

- (a) to the depth of 18 inches; or
- (b) six inches below the bottom of the pavement or masonry

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In our neighboring state of New York, depth must be indicated in inches. This requirement also enhances safety for excavation crews and the public. If a facility owner is unable to accurately indicate the line's location, they are required to follow one of two specific safety measures.

3. DESIGNER CLARIFYING LANGUAGE - Section 4

To ensure consistency in Bid Drawings and enhance the bid process for underground infrastructure projects, it is crucial to gather the necessary information for future digital mapping of our underground assets. The following language provides clear guidance to Designers preparing bid drawings, establishing required standards for as-built digital information to facilitate ongoing updates of our infrastructure digital maps.

Suggested language:

(4.1) To depict lines or facilities with the appropriate quality levels based on the complexity of the design and construction activities obtained through the SUE process in the planning and design phases, including test hole data sheet details for lines, service lines, or facilities crossing existing lines, service lines or facilities per the American Society of Civil Engineers (ASCE) most recently published standard CI/ASCE 38.

4.2) In the event that as-builts are required during the construction phase, to prepare the as-builts in accordance with the most recently published standard of CI/ASCE 75.

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4. DOWNTIME – Section 2 Facility Owner, and Section 5. Excavator

Under current Pennsylvania law the Economic Loss Doctrine prevents a contractor from holding the facility owner liable for financial damages (“economic” damages), unless someone is personally injured, or property is damaged. Mis-marked lines and late marks are increasing over the years costing project owners considerable dollars for excavators to dig prudently to locate unmarked lines or costing the consumer in repair costs for mis-marked lines.

Let me re-state and re-phrase that, because it may be hard to believe, and it’s certainly counter-intuitive: Unless someone is killed or physically injured, or there is a vehicle, a piece of equipment or a building damaged or destroyed, the facility owners cannot be held accountable for mis-marked or late markings on the required three-day locate request.

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A few years ago, the Pennsylvania Supreme Court addressed this very issue in the case *Excavation Technologies, Inc. v. Columbia Gas Co. of Pennsylvania*, 985 A.2d 840 (Pa. 2009). The court ruled that facility owners could not be held liable, effectively shielding negligent facility owners from liability unless there was a significant disaster involving physical injuries or property damage.

Instead of creating an exception to the Economic Loss Doctrine, the Court suggested that this was a public policy matter best addressed by the legislature. This is why we are proposing the inclusion of downtime language currently adopted by several other state 811 laws. This clause directly addresses the 2009 Supreme Court decision in *Excavation Technologies vs. Columbia Gas*.

In a more recent case from 2018, the Supreme Court of Pennsylvania, Western District, in *DITTMAN vs. UPMC*, held that negligence claims for economic losses are not barred. Had *Excavation Technologies* pursued a negligence claim instead of a negligent misrepresentation claim, the outcome might have favored the excavator. As a result, PUCA is advocating for a private

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cause of action for economic losses due to negligence, as recognized by the Supreme Court in the DITTMAN vs. UPMC case.

PUCA also believes that holding facility owners accountable for downtime costs would enhance public safety more effectively than relying solely on PUC enforcement. By allowing for self-enforcement, mis-marked and late locate enforcement cases would likely decrease, as facility owners prioritize avoiding the loss of profit, thereby reducing the burden on the PUC's Damage Prevention Committee Agenda.

For too many years, excavators have suffered economic losses without any recourse to recover damages caused by facility owners' failure to properly or timely locate their lines. The proposed waiver clause would prevent facility owners from contracting with their prequalified excavators in a way that includes an economic loss clause to circumvent negligence provisions under the law.

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RECENT DOWNTIME CASE ON POINT:



Orange marks placed after renotifying facility owner several times

These two pictures show a recent excavation by an Excavator in the Northeast region. The Excavator's crew uncovered AT&T marker tape. There were no communication mark outs on the roadway, and AT&T was not listed on the original One Call ticket for having facilities in the area. After discovering the safety tape, the Excavator had to stop and submit a renotify. Even though AT&T

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was included on the updated ticket, they failed to respond. The Excavator eventually had to go directly to AT&T's local office to request their involvement. They finally came out, marked the line, and mentioned that it was a critical line requiring their presence during the hydro excavation. This delay caused hours of downtime for the Excavator. **As of the date of this testimony, AT&T has yet to officially respond to the One Call.**

Suggested language Section 2 and 5 :

2(17) (c) If a facility owner of a subsurface installation has failed to comply with the provisions of Section 2(5)(i), the facility owner shall be liable to the excavator, who has complied with the terms of this act and was not otherwise negligent, for damages, costs, and expenses resulting from the facility owner's failure to comply with these specified requirements to the extent the damages, costs, and expenses were proximately caused by the facility owner's failure to comply. The Loss of Profit doctrine goes against public safety and therefore is null and void under this Act. A provision in a contract, public or private, which attempts to limit the rights of excavators under this subclause shall not be valid for any reason. An attempted waiver of this subclause shall be void and unenforceable as against public policy, and the attempted waiver shall be reported to the commission.

5 (15)(i) If a facility owner of a subsurface installation has failed to comply with the provisions of Section 2(5)(i), the facility owner shall be liable to the excavator, who has complied with the terms of this act and was not otherwise negligent, for damages, costs, and expenses resulting from the facility owner's failure to comply with these specified requirements to the extent the damages, costs, and expenses were proximately caused by the facility owner's failure to comply. The Loss of Profit doctrine goes against public safety and therefore is null and void under this Act. A provision in a contract, public any reason. An attempted waiver of this subclause and shall be void unenforceable as against public policy, and the attempted waiver shall be reported to the commission.

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5. SECTION 6.1. Project Owner - SUE

The existing language in Section 6.1 (1) requires clarification, as many Project Owners have circumvented the intent of the 2006 amendment by selectively opting for the lowest two levels of subsurface utility engineering. This approach only provides the same information already available through the Pennsylvania One Call System's 811 Call, hindering progress towards the goal of digital mapping. As a result, Pennsylvania has been set back 18 years in achieving our statewide underground infrastructure mapping objective. To address this issue, PUCA proposes the following revised language.

SUGGESTED LANGUAGE FOR SECTION 6.1 (1) PROJECT OWNER

The language under 6.1 (1) should remove the ambiguity on the levels of SUE needed.

To utilize a sufficient [quality levels of] subsurface utility engineering process or other similar techniques, [whenever practicable] based on the complexity of the design and construction to properly determine the existence and positions of underground facilities when designing known complex projects having an estimated cost of four hundred thousand dollars (\$400,000) or more. (See Definitions Section for Subsurface Utility Engineering)

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6. ENFORCEMENT - DPC Board- Section 7.8

In the discussions preceding the passage of SB 242 in 2017, Commissioner Coleman and PUC staff assured PUCA that five (5) seats would be designated for excavators on the Damage Prevention Committee (DPC), aiming to create a more balanced representation compared to the One Call Board. However, this number was unexpectedly reduced to THREE (3) as part of a deal with facility owners. Now, as the rewrite process begins again, facility owners are seeking additional seats, but the excavators deserve to receive the TWO (2) extra seats that were originally promised. In our view, a promise is a promise.

PUCA believes that the president or their designee from the One Call System should serve as a neutral advisory entity to the PUC DPC rather than as a voting member. Given that the majority of the One Call System designee's salary is funded primarily by facility owners, who are the largest stakeholders in the system, this position should be filled by a Subsurface Utility Engineering (SUE) practitioner. The new appointee should bring fresh energy and a commitment to utilizing ASCE-38-22 and ASCE-75 standards. Currently, the DPC lacks an expert in the SUE field.

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7. Jurisdiction of judicial proceedings - Section 8 (1) & 8 (2)

The PUC should hold original jurisdiction over cases that fall within its legislated authority. PUCA believes that the PUC is better equipped to handle violation and claim cases, as opposed to leaving these matters to 60 Common Pleas Courts and numerous Minor Courts. These courts generally lack the specialized expertise that the PUC possesses.

SUGGESTED NEW LANGUAGE:

8 (1) The Public Utility Commission (Commonwealth Court) shall have original jurisdiction involving all actions and claims under the Pennsylvania Underground Utility Line Protection Law.

8 (2) Damage Complaints

a) For an investigation that the board undertakes as a result of a complaint of a violation of Section 5, the complainant shall not file an action in court for damages based on those violations until the investigation or appeals process is exhausted, during which time, applicable statutes of limitation shall be tolled only for two years.

(b) If a complainant files an action in court against a person for damages based upon violations of Section 5, after the completion of a board investigation and the appeals process is exhausted and the person was found not to have violated the article, the complainant shall be barred from filing an action in court for damages. Any complaints filed with a court of jurisdiction that has not been heard before the PUC Damage Prevention Committee shall be rejected by the court of jurisdiction and sent to the PUC Enforcement for further action.

(c) This section only applies to a claim for damages to a subsurface installation.

(d) This section shall become operative on January 1, 2025.

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8. NUISANCE LAWSUITS – New Section 8 (3)

Facility Owners have deep pockets and often file frivolous lawsuits even when the excavator is not at fault. The excavator is often pressed to make a business decision to pay the claim just to avoid the hassle and extra cost to defend against the lawsuit. Insurance companies then pay these claims into the billions of dollars. These payouts result in higher premiums for businesses and homeowners.

PUCA had a member who successfully defended their case before the PUC Damage Prevention Committee, winning his case based on the evidence presented. The facility owner, however, chose not to attend the DPC hearing or file an appeal with the PUC. Instead, the facility owner, who employed a third-party damage claims vendor, solicited local attorneys to file a lawsuit against the contractor for alleged damages to their facility, valued at \$486,000. Over the next three years, the case proceeded to the Court of Common Pleas,

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where depositions were taken, and a judge eventually ruled in favor of the contractor in September 2022.

Despite this decision, the facility owner filed a Post-Trial Motion for Judgment Notwithstanding the Verdict, which was denied. The case was then appealed to the Superior Court of Pennsylvania, which issued a decision in favor of the contractor on March 28, 2024. No further appeal to the Supreme Court was filed, and the contractor's legal battle finally came to an end.

Here's the kicker: defending the lawsuit cost the contractor and their insurance provider around \$286,000, despite the outcome being the same as the PUC Damage Prevention Committee's ruling. This kind of abuse of the judicial system happens all too often. Contractors are frequently forced to make tough business decisions—either pay nuisance repair invoices for damages they didn't cause or face the threat of a costly lawsuit. This kind of manipulation of the legal system is not only unjust but also deeply concerning, as consumers ultimately bear the cost of these legal battles.

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As a result, PUCA is advocating for legislative relief from nuisance lawsuits by incorporating language from other state One Call laws who have resolved their nuisance lawsuits using the following language.

SUGGESTED NEW LANGUAGE:

8 (2) (a) For an investigation that the board undertakes as a result of a complaint of a violation of Section 5, the complainant shall not file an action in court for damages based on those violations until the investigation or appeals process is exhausted, during which time, applicable statutes of limitation shall be tolled only for two years.

(b) If a complainant files an action in court against a person for damages based upon violations of Section 5, after the completion of a board investigation and the appeals process is exhausted and the person was found not to have violated the article, the complainant shall be barred from filing an action in court for damages. Any complaints filed with a court of jurisdiction that has not been heard before the PUC Damage Prevention Committee shall be rejected by the court of jurisdiction and sent to the PUC Enforcement for further action.

(c) This section only applies to a claim for damages to a subsurface installation.

(d) This section shall become operative on January 1, 2025.

8 (3)) A court or arbitrator shall award reasonable attorney's costs and fees, including expert witness fees, to an excavator if either of the following apply:

(1) The court or arbitrator determines that an excavator is not liable for damages to a subsurface installation in accordance with section 5(12)(i).

(2) The excavator makes an offer to settle the matter that is not accepted and the plaintiff fails to obtain a more favorable judgment or award.

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CONCLUSION

In conclusion, PUCA has proposed several additional amendments to the Underground Utility Line Protection Law, known as the Pennsylvania One Call law. These suggested changes have been submitted to the Chairs of the Senate and House committees. The proposed language is drawn from similar laws in other states. PUCA respectfully requests that our compilation of proposed changes be included by reference in our written testimony.

Thank you once again for your attention to our testimony. We urge you to consider our positions as vital safety measures that can be implemented through your actions in this legislative session.

¹**APPENDIX A** – PUCA’s Proposed 811 Law Changes – [Link to Document](#)

²**APPENDIX B** – PUCA Advisory Opinion and Reply to Answers and Protests on Service Lines

³**APPENDIX C** – South Dakota & Colorado Court Case on Service Lines

⁴**APPENDIX D** – **2012 WL 5949213**, U.S. District Court, M.D. Pennsylvania on Shallow Lines

House Consumer Protection, Technology and Utilities Committee

Public Hearing on HB 2189 P.N. 2859

September 17, 2024

Testimony of:

Mike Kyle, Lancaster Area Sewer Authority, Executive Director, Retired

Good morning, Chairman Matzie, Chairman Marshall, and members of the House Consumer Protection, Technology and Utilities Committee. Thank you for your invitation to provide testimony on HB 2189 P.N. 2859 by Chairman Matzie.

My name is Mike Kyle, and I am testifying on behalf of the Pennsylvania Municipal Authorities Association (PMAA). I am recently retired as Executive Director of the Lancaster Area Sewer Authority (LASA) and currently an officer on the LASA Board. LASA is a public wastewater utility committed to providing unparalleled service to residents and businesses in all our service areas. Founded in 1965 by six incorporating municipalities, LASA is governed by a 7-member Board of Directors and presently serves nine municipalities. LASA is a non-profit, public agency and our activities and services are funded via revenue from our wastewater customers. Our dedicated employees work 24/7 to provide wastewater services to over 40,000 customers, including about 1,400 businesses. LASA is among the ten largest sewer authorities in the Commonwealth.

PMAA represents more than 700 municipal authorities across the Commonwealth, the vast majority of which provide drinking water and wastewater treatment services to more than six million citizens. If you live in Pennsylvania, you are likely within the service area of at least one authority. In addition, PMAA has more than 500 associate members, such as certified public accountants, engineers, and solicitors, who provide services to authorities.

HB 2189 amends the Underground Utility Line Protection Law (PA One Call) to extend the expiring sunset date another seven years as well as make various other changes. Key changes are as follows:

1000 North Front Street, Suite 401, Wormleysburg, PA 17043
717-737-7655 . 717-737-8431 (f) . info@municipalauthorities.org

- Adds, expands and updates definitions
- Further clarifies the duties of designers, excavators, facility owners, and project owners
- Requires designers to submit design ticket notifications to the PA One Call System before preparing construction drawings
- Bolsters the damage prevention committee by increasing its membership and expanding its duties
- Increases compliance orders and administrative penalties for violations

To provide some background, the PA One Call Law includes specific provisions for municipal authorities requiring them to be members of the PA One Call System. As facility owners, they must identify the names of counties and municipalities where their lines are located, provide information about the location of their utility lines, and respond to locate requests through the PA One Call System. Municipal authorities, like other facility owners, can face penalties for non-compliance.

The PA One Call System is governed by a Board of Directors that includes representation from various industries and entities, including municipal authorities. By having strong representation on the PA One Call System Board, municipal authorities can help shape policies and perspectives that protect vital underground infrastructure while serving the needs of their communities. It also ensures that as facility owners, stakeholders in public safety, and partners in education the interests of municipal authorities are considered in the organization's decision-making process and the unique needs and challenges of municipal underground utilities are addressed. Currently, I represent LASA on the PA One Call Board of Directors and also serve as Treasurer.

As noted above, municipal authorities play a crucial role in preventing damage to underground utilities and ensuring public safety during excavation and construction projects. PMAA generally **supports** reauthorization of the PA One Call Law. To underscore our support, PMAA adopted the following resolution as part of our advocacy platform:

Resolution 7-24

RESOLVED. That PMAA work with other stakeholders in the underground utility industry and with the PA General Assembly to negotiate language acceptable to PMAA members and to ensure that the Underground Utility Line Protection Law (PA One Call) is reauthorized before the current law sunsets on December 31, 2024.

Good Samaritan Clause

PMAA supports keeping Section 2(5)(i.1) as it currently exists under Act 50 of 2017. The current printer's number of HB 2189 does just that. However, as negotiations on the bill continue PMAA members would like to emphasize the importance of keeping the Good Samaritan clause intact. The Good Samaritan clause **allows but does not require** facility owners to identify utility lines they do not own without assuming liability. By providing certain protections, facility owners are encouraged to provide more comprehensive information as a courtesy and helpful guide to excavators and property owners as well as contribute to safe excavation practices without exposing themselves to undue legal risk. Please note that **PMAA strongly opposes any attempt to require facility owners to identify lines they do not own or operate.**

For fifty years, the Underground Utility Line Protection Law has saved countless lives and prevented untold damages. PMAA thanks Chairman Matzie, Chairman Marshall, and members of the House Consumer Protection, Technology and Utilities Committee for their continued diligence and dialogue on HB 2189, which would allow this critically important law to continue saving lives and preventing damages to underground utilities.

Again, thank you for the opportunity to testify before you today. I am happy to answer any questions.