

ONE-CALL EXCAVATION NOTICE SYSTEM - BACKGROUND MEMORANDUM

Senate Bill No. 2167 (2015) directs the Legislative Management to study the one-call excavation notice system. The study must include:

1. The financial and operational impact on underground facilities operators from the tremendous increase in the number of times underground facilities must be located;
2. A review of who should be responsible for the expenses associated with locating underground facilities in certain situations;
3. The appropriateness of penalties for one-call excavation notice system violators; and
4. The enforcement of penalties by the appropriate state agency.

The Legislative Management assigned this study to the Economic Impact Committee.

The bill began as a \$2 million appropriation to the Public Service Commission (PSC) to reimburse the cost of one-call locates as a result of oil and gas development, but was changed to this study in the Senate. The legislative history reveals the reason for the appropriation was the increased numbers of underground facility location requests due to the increased construction in this state, especially in the western portion of this state. In particular, one rural telephone cooperative experienced a 16-fold increase in recent years. This is a burden both financially and operationally on rural telephone cooperatives. The location of underground facilities by the operator is done at the operator's expense. The increased construction increased the number of initial locate requests and also increased the number of relocate requests. Relocate requests occur when an excavator will ask for a large locate, for example, over 40 miles, and will ask for the same locate after the excavation is not completed in 21 days, the time limit for excavation at a particular location.

When the bill became a study, the subject matter contemplated by the introduced bill was widened. However, most of the issues were a result of excavation in the Bakken Formation and there was concern that any remedy for issues in the Bakken Formation may not apply to the rest of the state. An area that is contemplated by the study is a study of penalties and enforcement. The main issues as to penalties and enforcement were that enforcement actions take a long time and there is not enforcement of civil penalties, if the excavator goes bankrupt or leaves the state.

STATUTORY PROVISIONS

The North Dakota one-call excavation notice system is governed by North Dakota Century Code Chapter 49-23. The one-call excavation notice system was established in 1995. The notification center is governed by a nonprofit corporation and that corporation is operated by the North Dakota One Call Board. The corporation and board are not part of any state agency. However, the PSC is given authority over civil penalties for violations of one-call laws. The board has members that represent:

- Cable television providers;
- Cities with a population of at least 5,000;
- Cities with a population of fewer than 5,000;
- Electric utilities;
- Excavators;
- Gas pipeline operators;
- Rural water systems; and
- Telecommunications providers.

Section 49-23-04 provides:

1. Except in an emergency, an excavator must contact the notification center and provide an excavation or location notice at least 48 hours before beginning any excavation, excluding Saturdays, Sundays, and holidays, unless otherwise agreed to between the excavator and operator. The excavator must limit the locate request to the area to be excavated during the 21 days following the request.

2. The notification center is required to provide a toll-free telephone number and assign an inquiry identification number to each excavation notice and retain a record of all excavation notices received for at least six years. The notification center is required to immediately transmit the information contained in an excavation notice to every operator that has an underground facility in the area of the proposed excavation. The notification center is required to inform persons giving notice of intent to engage in an excavation activity the names of participating operators of underground facilities to whom the notice will be given and to establish procedures for assuring positive response from the affected operator and all emergency excavation notices.
3. An operator, within 48 hours, or any extension of that period, after receiving an excavation notice from the center, excluding Saturdays, Sundays, and holidays, unless otherwise agreed to between the excavator and operator, is required to locate and mark or otherwise provide the approximate horizontal location of the underground facilities of the operator.
4. If the operator does not locate facilities within the allotted time, the excavator may excavate. However, under any circumstance, if an underground facility is located during an excavation, the excavator must stop and contact the operator or the one-call notification center. The excavator may not excavate in a location for more than 21 days. After 21 days, the excavator must request another locate. After two locates in the same location, the excavator is responsible for the cost of the third and subsequent locates.

In short, the notification center does not know the location of underground facilities, but knows the underground facility operators in the area and notifies these operators of a locate request by an excavator. All the information provided by the excavator is sent to each of the operators that have facilities in the dig area as a "ticket." It is then the operator's responsibility to locate the lines through staff or through contract locators. The notification center is funded by a \$1.10 fee charged to the excavator, unless the excavator is a homeowner or a farmer, and then there is no fee. For the first two locates in a location, the location cost is the responsibility of the operator.

As used in Chapter 49-23 "excavator" means a person who conducts excavation and "operator" means a person who owns or operates an underground facility, including a master meter operator with underground facilities, or a state or local governmental entity. An underground facility is defined to mean an underground line, facility, system, and its appurtenances used to produce, store, convey, transmit, or distribute communications, data, electricity, power, television signals, heat, gas, oil, petroleum products, water, steam, sewage, hazardous liquids, and other similar substances. Privately owned and operated underground facilities that do not extend beyond the boundary of the private property are excluded from the definition of underground facility.

Section 49-23-06 contains provisions that apply upon the damage to facilities. This section provides that if any damage occurs to an underground facility or its protective covering, the excavator shall notify the operator as soon as reasonably possible. When the operator receives a damage notice, the operator is required to dispatch, as soon as reasonably possible, personnel to the damage area to investigate. If the damage endangers life, health, or property, the excavator responsible for the work must take immediate action to protect the public and property and to minimize the hazard until arrival of the operator's personnel or until emergency responders have arrived and taken charge of the damaged area. This section requires the excavator to delay backfilling in the immediate area of the damaged underground facilities until the damage has been investigated by the operator, unless the operator authorizes otherwise. Repair of damage must be performed by the operator or by qualified personnel authorized by the operator.

In addition, an excavator who knowingly damages an underground facility and who does not notify the operator as soon as reasonably possible or who backfills in violation of this section is guilty of a Class A misdemeanor. If an excavator fails to comply with Chapter 49-23 or damages an underground facility, the excavator is liable for all damages caused by the failure to comply with the chapter and for all damages to the facilities and must reimburse the operator for the cost of repair and restoration, loss of product, and interruption of service occurring because of the damage or injury to the facilities, together with reasonable costs and expenses of suit, including reasonable attorney's fees. Reimbursement to the operator is not required if the damage to the underground facility was caused by the sole negligence of the operator or the operator failed to comply with the relevant provisions of Chapter 49-23.

Section 49-07-01.1 provides for the PSC to impose a civil penalty for a violation of Chapter 49-23 not to exceed \$25,000. The commission is required to develop policies for the assessment of this penalty which take into consideration the severity of the damage and the conduct of the offender. The penalty may be compromised by the commission. If the penalty is not paid, it is recoverable in a civil action.

Under Section 49-23-03(4)(d), the North Dakota One Call Board shall aid state's attorneys in enforcement and prosecutions of violations of Chapter 49-23. In addition, the board may institute a civil action for an injunction to enjoin violations of Chapter 49-23 without proof that anyone suffered actual damages.

In short, if an excavator knowingly damages an underground facility and does not immediately notify the operator or backfills without authorization, the excavator is guilty of a Class A misdemeanor. The board may work with the state's attorney to prosecute these violations. The excavator is liable for all of the damages to the operator, if the excavator did not properly use the one-call system. The operator may bring a civil action to recover these damages. The Public Service Commission can impose a civil penalty of up to \$25,000. The board may bring a civil action to enjoin violations.

PAST STUDIES

In the 2007-08 interim, the Legislative Management's Natural Resources Committee studied the feasibility and desirability of establishing legislation for the enforcement and assessment of civil penalties for violation of the one-call excavation notice system. The committee considered, but did not recommend a bill draft. As to penalties, the bill draft would have allowed the PSC to create rules and created civil penalties for violations of Chapter 49-23 or the rules. The bill draft allowed for a person to file a complaint to the PSC. The Public Service Commission would have notified the respondent and requested an answer. Upon receiving the answer, the PSC would have sent all information to the North Dakota One Call Board for peer review and testimony. After this, the PSC would have sent the information to an administrative law judge for a determination of probable cause. If there is probable cause, the administrative law judge would have determined the amount of the civil penalty. If a party requested a hearing, the PSC would have conducted the hearing. If the penalties were not paid, the PSC would have been required to bring a civil action in the name of the state to recover the civil penalty. An aggrieved person could have appealed to the district court, but the order of the PSC would have been assumed valid. The penalties would have been:

- Up to \$500 for a first violation;
- Up to \$1,000 for a second violation; and
- Up to \$5,000 for a third or subsequent violation.

If intentional, the penalties would have been:

- Up to \$1,000 for a first violation;
- Up to \$5,000 for a second violation; and
- Up to \$10,000 for a third violation.

RECENT STATUTORY CHANGES

Senate Bill No. 2347 (2015) required tangible marking materials to be removed by an excavator after completion of an excavation and defined tangible marking materials to include any material perceptible by touch used to mark the location of an underground facility. The term does not include paint, chalk, or liquid ink.

House Bill No. 1359 (2013):

- Increased the civil penalty imposed by the PSC from up to \$5,000 to up to \$25,000 for a violation of the one-call notice system.
- Allowed an excavator to notify the notification center of the location by an identifiable roadway or roadway intersection and, if the location is large or complex, the excavator was required provide information by white marking, project staking, geographic information system shape file, detailed drawing, map, or other appropriate means.
- Changed the limitation to 21 days for the area to be excavated in the location request and the time after which facilities are required be relocated, unless other arrangements have been made with the underground facility owner. Previously the time had been 10 days, changed from the original 72 hours.
- Provided the excavator is responsible for locate costs after two locates in the same area.
- Required an underground facility owner to make all new facilities locatable.
- Required the excavator to use reasonable efforts to maintain markings during excavation.

House Bill No. 1382 (2011) changed the definition of "locate" as used when an operator must locate markings of an underground facility to include showing the approximate horizontal location, including all lines, line direction, intersections, tees, and lateral facilities.

STUDY APPROACH

The committee may desire to receive testimony from interested parties, including:

- North Dakota One Call;
- The North Dakota One Call Board;
- The Public Service Commission;
- State's attorneys;
- Excavators;
- The Common Ground Alliance; and
- Operators, including:
 - Cable television providers;
 - Electric utilities;
 - Pipeline operators;
 - Rural water systems; and
 - Telecommunications providers.

The committee may desire to define any issues that need addressing after listening to interested parties and if appropriate, receive testimony of best practices or practices in other states.