

SENATE BILL REPORT

E2SHB 1634

As of March 23, 2011

Title: An act relating to underground utilities.

Brief Description: Concerning underground utilities.

Sponsors: House Committee on General Government Appropriations & Oversight (originally sponsored by Representatives Takko, Angel, Morris and Armstrong).

Brief History: Passed House: 3/04/11, 93-4.

Committee Activity: Environment, Water & Energy: 3/15/11.

SENATE COMMITTEE ON ENVIRONMENT, WATER & ENERGY

Staff: Sam Thompson (786-7413)

Background: Dig Law. Legislation enacted in 1984, sometimes colloquially referred to as Washington's dig law, generally requires excavators digging more than 12 inches deep to notify underground utility owners (owners) at least two business days before excavating. Excavators may provide notice to owners by contacting an owner-maintained one-number locator service called Washington 811 (locator service). The locator service provides an excavator with a confirmation code and the owner with notice of the impending excavation. Upon receipt of notice, an owner must generally respond within two business days. With respect to locatable utility lines, owners must provide excavators with reasonably accurate information by surface marking the location of lines. With respect to identifiable but unlocatable utility lines, owners must provide excavators with best available information. An owner is not required to indicate the presence of service laterals or appurtenances if their presence can be determined from other visible facilities, such as buildings, manholes, or meter and junction boxes.

Owners use color-coded surface markings to indicate different types of locatable utility lines, e.g. yellow to indicate gas, oil, and petroleum lines; orange to indicate telephone and cable TV lines.

Liability. Excavators may receive compensation from owners for costs incurred if owners do not locate utility lines in accordance with requirements. Owners may receive compensation for costs incurred in responding to excavation notices given less than two business days prior to excavation from the excavator. If an excavator discovers utility lines that were not

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identified, the excavator must cease excavating in the vicinity of the lines and immediately notify the owner or operator of the lines, or the locator service.

Penalties. A person who violates requirements, resulting in damage to a utility line, is subject to a civil penalty of \$1,000 for each violation. An excavator may be subject to treble damages for an owner's repair or relocation costs if the excavator failed to notify owners or the locator service prior to excavating, or if the excavator willfully or maliciously damaged a field-marked underground utility. An excavator who failed to notify the locator service and caused damage to a hazardous liquid or gas pipeline is subject to a civil penalty of \$10,000 for each violation. An excavator who excavates within 35 feet of a transmission pipeline without a valid confirmation code from the locator service is guilty of a misdemeanor, and may also be subject to a civil penalty of \$10,000 for each violation. Civil penalties imposed for damage to hazardous liquid or gas pipelines are deposited in a pipeline safety account. Other penalties are deposited in the general fund.

The Utilities and Transportation Commission (UTC) and federal Pipeline and Hazardous Materials Safety Administration (PHMSA). UTC regulates intrastate pipelines and the PHMSA regulates interstate pipelines. The UTC is the lead inspector of interstate pipelines in the state, certified by the PHMSA to make inspections based on federal regulations.

Pursuant to the Federal Pipeline Inspection, Protection, Enforcement, and Safety (PIPES) Act of 2006, PHMSA awards grants to state damage prevention programs. Grants are intended to promote effective state damage prevention programs, which include the following elements: (1) participation by stakeholders in establishing effective communications; (2) fostering of support and partnership of all stakeholders; (3) reviewing of operator's use of performance measures for locator services; (4) encouraging of effective employee training programs; (5) fostering of public education for damage prevention; (6) a dispute resolution process defining the state authority's role; (7) enforcement of state damage prevention laws; (8) promotion of use of technology to improve the locating process; and (9) a process for reviewing and analyzing elements and implementing improvements.

In 2009 a stakeholder group began to meet to consider changes to the Washington's dig law, partly in response to the PIPES Act. The group eventually developed recommended legislation.

Summary of Bill: Generally. Many dig law duties regarding owners are recast to apply to underground facility operators (operators), defined as any person with control over underground facilities, including any person having the legal right to place underground facilities in a public right-of-way or in any utility easement. A person or entity is not considered a facility operator of an independently owned underground facility operated within the person's or entity's right-of-way or utility easement.

Road Maintenance. Road maintenance is excepted from the definition of excavation if maintenance does not involve excavation below original road grade and ditch maintenance, does not involve excavation below original ditch flow line, or alter original ditch horizontal alignment. Road maintenance activities nonetheless require notice to an operator.

Locator Service. All operators within a locator service area must subscribe to the locator service.

Marking Excavation Areas. Before providing notice to a locator service, an excavator must mark the boundary of an excavation area in white paint unless doing so is unfeasible, in which case the excavator must communicate with the operator to ensure that the excavation area is accurately identified.

Maintaining Markings. An excavator is responsible for maintaining the accuracy of original underground utility markings for 45 calendar days from the date notice was provided to a locator service. Markings expire at that time. For excavation occurring thereafter, excavators must provide a second notice to a locator service. Excavators that make repeated calls to locate underground utilities because of their failure to maintain markings may be charged for services provided.

Marking of Laterals. In proposed excavation areas, an owner or operator must mark the location of service, water, or sewer laterals or, if laterals are unlocatable, mark within the area that laterals are unlocatable. Owners or operators must indicate laterals only to the extent that they exist within a right-of-way or easement. Laterals on private property are the responsibility of the property owner.

If an excavator uncovers identified but unlocatable utility lines, the excavator must notify the operator, who must act to allow for accurate future location of the uncovered portion of utility lines identified by the excavator. An operator may accept location information from the excavator for future marking of utility lines.

Damage Reporting. Operators and excavators who observe or cause damage to a utility line must report the event to the UTC. A non-pipeline operator acting as their own excavator or the operator's subcontractor who hits its own facilities is not required to report that damage event. Reports must be made to the UTC's Office of Pipeline Safety within 45 days of the event, or sooner if required by law, using the UTC's virtual private Damage Information Reporting Tool (DIRT) report form or other similar form. If a form other than the DIRT report form is used, it must report specified information.

Penalties. A person who violates provisions not relating to hazardous liquid or gas pipelines is subject to a civil penalty of \$5,000 for subsequent violations, after an initial violation, within a three-year period. Penalties must be deposited into the Damage Prevention Account and used for education and training of excavators and facility operators regarding best practices and compliance.

Damage Prevention Account. The Damage Prevention Account is created in the custody of the State Treasurer. Expenditures may be used only for educational programming to improve worker and public safety relating to excavation and underground utilities and for grants to persons who have developed educational programming that the UTC and the Safety Committee deem appropriate. Only the UTC may authorize expenditures.

Dispute Resolution. The UTC must contract with a statewide nonprofit entity whose purpose is to reduce damages to utility lines. That entity must create a Safety Committee

(Committee) to (1) advise the UTC and other state agencies, the Legislature, and local governments on best practices and training to prevent damage to underground utilities, worker and public safety and protection of underground utility lines; and (2) resolve disputes involving practices related to underground utility lines and possible violations. Any party may bring a complaint to the Committee regarding a violation of underground utility line damage prevention laws.

The Committee, made up of 13 members appointed in consultation with the UTC to staggered three-year terms, consists of representatives of local governments, owners and operators of hazardous liquid and gas pipelines, contractors, excavators, a UTC-regulated electric utility, a consumer-owned utility, a pipeline transportation company, the UTC, and a telecommunications company.

The Committee may mediate disputes related to possible violations. For mediation, the Committee must appoint three to five members representing excavators, operators, and the insurance industry, and at least one representative of a pipeline company or natural gas distribution company.

Enforcement. The UTC may enforce civil penalties when a document is filed with the UTC by the Committee indicating that a violation has likely occurred. After notice and an opportunity for a hearing, the UTC may impose penalties on violators with respect to underground utilities within its jurisdiction. Before imposing a penalty, the UTC must consider the Committee's recommendation. Any person aggrieved by a penalty may seek judicial review. If a penalty imposed by the UTC is not paid, the Attorney General must, on behalf of the UTC, file a civil action to collect the penalty.

Construction or Excavation Near Transmission Pipeline. State or local government agencies undertaking or permitting construction or excavation activity under state building code standards within 100 feet, or greater distance if defined by local ordinance, of a right-of-way or easement containing a transmission pipeline must (1) notify the transmission pipeline company of the proposed activity before a permit is approved; or (2) require consultation between the person proposing the activity and the transmission pipeline company as a condition of receiving the permit.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: The bill takes effect on January 1, 2013.

Staff Summary of Public Testimony: PRO: This bill is really about safety. Stakeholders did not agree on terms when they began meeting to discuss proposed legislation in 2009, but most stakeholders now support this measure. The UTC's Pipeline Safety Program is recognized as one of the nation's best, but the UTC's Damage Prevention Program needs better enforcement provisions and reporting requirements, which the bill is intended to provide. The bill is important to the UTC to enhance safety and to maintain federal funding,

which provides much of the program's operating budget. The bill will align Washington law with new requirements under federal law. Stakeholders have made great progress in negotiating terms. The bill establishes stricter marking requirements, a stakeholder-driven complaint review process, better enforcement provisions, and enhanced data collection. A provision requiring notice to pipeline companies for work within 100 feet of a pipeline is also important. Requirements for identification of laterals simply require that utility operators provide information; if necessary, they may indicate that laterals are unlocatable.

CON: Seattle Public Utilities strongly oppose this bill's imposition of a duty to locate sewer laterals owned by property owners, not the utility. This duty will impose higher costs to cities with no real benefits. While Tacoma public utilities support some provisions of the bill, the bill's definition of facility operator is too inclusive, and requirements to provide information regarding unlocatable lines not owned by the city will have a huge fiscal impact. While the Association of Washington Cities supports many provisions of the bill, it remains opposed to new duties imposed on facility operators. The bill should be amended to clarify that consumer-owned utilities are not subject to UTC regulation.

OTHER: The bill creates difficult duties for consumer-owned utilities regarding location of laterals that are not owned by the utilities. The duty to locate laterals will be expensive for sewer and water districts, particularly smaller districts. The bill should be amended to exempt certain excavation in federal reclamation projects from excavator duties. New excavator notice duties for placement of signs along roadways relating to roadwork will cause delays; in addition, an exemption from notice duties should be provided for excavation involving routine roadwork up to 12 inches below the original road grade. The bill should be amended to clarify that consumer-owned utilities are not subject to UTC regulation. Public utility districts share concerns with other utility operators regarding marking duties.

Persons Testifying: PRO: Representative Takko, prime sponsor; Jeffrey Goltz, UTC; Ron Schmitt, Citizens Committee on Pipeline Safety; Don Evans, Washington 811; Dan Kirschner, NW Gas Association; Brad Tower, Olympic Pipeline Company; Nancy Atwood, Puget Sound Energy; Van Collins, Associated General Contractors.

CON: Bob Hennessey, Seattle Public Utilities; Bob Mack, City of Tacoma; Ashley Probart, Association of Washington Cities; Kent Lopez, Washington Rural Electric Cooperative Association.

OTHER: Jeff Johnson, Water Cooperative of Pierce County; Joe Daniels, Washington Association of Water & Sewer Districts; Mike Schwisow, Washington State Water Resources Association; Gary Rowe, Washington State Association of County Engineers; Bill Clarke, Washington Public Utility District Association.