

**The Tennessee Advisory Commission
on Intergovernmental Relations**



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MEMORANDUM

TO: TACIR Commission Members

FROM: Harry A. Green
Executive Director

DATE: December 10, 2009

SUBJECT: Proposed Legislative Changes in Tennessee's Underground Utility
Damage Prevention Program

At our September meeting, you heard presentations from Director Eddie Roberson of the Tennessee Regulatory Authority (TRA) and Bill Turner, executive director of the Tennessee One-Call System (TNOCS), about proposed changes in Tennessee's Underground Utility Damage Prevention Act (TCA § 65-31-101 et seq.) TNOCS is a non-profit Tennessee corporation established in 1983 whose mission is "to act as an advance notification service to operators of underground facilities anywhere within the state." Its formation predated the state law authorizing underground utility operators to form a one-call service to handle notification of excavation and demolition to prevent damage to underground utilities. TNOCS is the only such service in the state.

The TRA is responsible for Tennessee's gas pipeline safety program, which is partially funded by the U.S. Department of Transportation's Pipeline and Hazardous Material Safety Administration (PHMSA) through the Office of Pipeline Safety (OPS). The OPS administers the national regulatory program to ensure safe transportation of natural gas, petroleum, and other hazardous materials by pipeline. According to Director Roberson, the changes proposed in the original version of the bill that became Public Chapter 470 (Acts of 2009) were prompted by increasing pressure from the federal government to improve states' underground utility damage prevention programs. The OPS is authorized to fund up to 80% of states' actual cost for its pipeline safety program, but the actual amounts have not been nearly that much. State programs are scored each year to determine their eligibility for reimbursement. According to the latest information available from the OPS web site (2008), Tennessee's program was rated 98.5 on a 100-

point scale, and it was scheduled to receive \$291,261 or 39.174% of its estimated budget (see Attachment A).

TACIR's directive from the General Assembly is to study the effectiveness of Tennessee's current program and report on the following:

- Review federal standards and other state initiatives to improve their programs and whether a reduction in underground damage has resulted.
- Determine whether any legislative action is needed to improve the effectiveness of the program, including but not limited to, provisions related to program enforcement.
- If a need for improvement is found, recommend to the legislature what entity or entities would be best suited to undertake further responsibilities.

The original bill that became Public Chapter 470 (Acts of 2009), the bill directing this study, would have made broad changes in Tennessee's Underground Utility Damage Prevention Act, including some controversial ones affecting utility operators other than the natural gas pipeline operators regulated by TRA. The stated purpose of those changes was to enhance the damage prevention program and bring it into compliance with federal law. Along with the issues included in the study directive, we will include a review of the changes required by federal law.

Overview of Federal Programs

The federal government establishes minimum pipeline safety standards under the U.S. Code of Federal Regulations (CFR), Title 49 "Transportation," Parts 190 - 199. The OPS has overall regulatory responsibility for hazardous liquid and gas pipelines under its jurisdiction in the United States. The majority of pipeline inspections in the United States are carried out by state inspectors who work for state regulatory agencies. If a state has a *certified* pipeline safety program, then a state agency is responsible for inspecting *intrastate* pipelines. Oversight and inspections of *interstate* pipelines are carried out either by OPS or—in states where OPS and the state have a special agreement in place—by the state agency.*

Certification. While the Federal government is primarily responsible for developing, issuing, and enforcing pipeline safety regulations, the pipeline safety statutes provide for state assumption of the *intrastate* regulatory, inspection, and enforcement responsibilities under an annual certification. To qualify for certification, a state must adopt the minimum federal regulations and may adopt additional or more stringent regulations as long as they are not incompatible with the federal regulations. A state must also provide for injunctive and monetary sanctions substantially the same as those authorized by the federal pipeline safety statutes.

* Information from PHMSA's web site: <http://primis.phmsa.dot.gov/comm/Partnership.htm>.

Agreement. A state agency that does not satisfy the criteria for certification may enter into an agreement to undertake certain aspects of the pipeline safety program for *intrastate* facilities on behalf of OPS. While the state agency under an agreement will inspect pipeline operators to ascertain compliance with federal safety regulations, any probable violations are reported to OPS for enforcement action. Every state is currently participating by agreement in the natural gas pipeline safety program except for Alaska, Hawaii, and Idaho. Fifteen states participate by agreement in the hazardous liquid pipeline safety program. Fewer states participate in the liquid program because of the significantly lower number of miles of liquid pipelines.

Interstate Agent. Federal pipeline statutes provide for exclusive federal authority to regulate interstate pipelines. OPS may authorize a state to act as its agent to inspect interstate pipelines, but retains responsibility for enforcement of the regulations.

Responsibility for inspection, regulation, and enforcement in Tennessee is divided between the state and federal governments:

- *interstate* natural gas and hazardous liquid pipeline safety requirements—OPS
- *intrastate* hazardous liquid pipeline safety requirements—OPS
- *intrastate* natural gas pipeline safety requirements—Gas Pipeline Safety Division of the Tennessee Regulatory Authority through *certification* by OPS

The OPS is authorized to reimburse a state agency up to 80% of the cost to carry out its pipeline safety program, including the cost of personnel and equipment. The actual amount of federal reimbursement depends upon the availability of appropriated funds and state program performance. The formula used to allocate funds includes performance factors such as the extent to which the state asserts safety jurisdiction over pipeline operators, whether the state has adopted all federal requirements, and number and qualifications of state pipeline safety inspectors. The OPS monitors the performance of the state agencies participating in the pipeline safety program through its regional offices

In addition to the allocations for the states' pipeline safety programs, PHMSA makes a number of smaller grants to state agencies to improve pipeline safety:

- **State Damage Prevention Grants.** The federal Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006 (PIPES Act) authorizes PHMSA to award grants to fund improvements in state damage prevention programs. According to

* Information from PHMSA's web site:

<http://primis.phmsa.dot.gov/comm/DamagePreventionGrantsToStates.htm>.

PHMSA's web site, it is in the process of awarding these grants for 2010. States are encouraged to implement the 9 elements of an effective damage prevention program listed in Attachment B. The TRA was awarded grants in 2008 (\$64,500) and 2009 (\$87,870) to address element 7:

Enforcement of State damage prevention laws and regulations for all aspects of the damage prevention process, including public education, and the use of civil penalties for violations assessable by the appropriate State authority.

The 2008 grant also proposed to layout a 4-year plan to address 8 of the 9 elements (1, 2, 3, 4, 6, 7, 8, and 9).

- **One-call Grants.** PHMSA's One-call Grants are designed to provide funding to state agencies in promoting damage prevention, including changes with their state underground damage prevention laws, related compliance activities, training and public education. The grants were first authorized under the Accountable Pipeline Safety and Partnership Act of 1996, Public Law 104-304. This optional grant program has a maximum amount request of \$50,000 per state, and supports initiatives to further promote efforts specifically for damage prevention, including one-call legislation, related compliance activities, training and public education. This optional grant is only open for states that have a certification or agreement with PHMSA to do pipeline safety inspections. State agencies that participate in the pipeline safety program are eligible to apply for one-call grant funding each year.
- **Transportation Equity Act for the 21st Century (TEA-21) Grants.** Under TEA-21, Congress authorized PHMSA to award pipeline safety damage prevention grants to help states implement best practices in preventing damage to underground utilities and improve the overall quality and effectiveness of one-call notification systems. PHMSA awarded \$6 million in 2001 and 2003 to State agencies to fund a wide range of education efforts, communications system improvements, and enforcement of State requirements for damage prevention. The TEA-21 grant program has expired.

Concerns about Continued Federal Funding

A report issued by Tennessee's Comptroller of the Treasury issued in August 2007 raised concerns about the possibility that at some point PHMSA may reduce funding for Tennessee's pipeline safety program because it did not fully comply with federal law. That report covered a period before the federal PIPES Act was passed, but the issue it raised was not altered by that legislation or any other state or federal action:

Tennessee's Underground Utility Damage Prevention legislation need(s) to be further improved by the adoption of injunctive relief and civil penalties substantially the same as provided for in the federal requirements.

Moreover, the PIPES Act added language authorizing PHMSA to take enforcement action against excavators for violations even when a state has been certified to

implement the pipeline safety program if the Secretary of Transportation determines that the state's own enforcement is inadequate. The Secretary is required to issue rules to implement this provision. PHMSA issued a notice of proposed rulemaking on October 29, 2009, describing how it proposes to determine when a state program is inadequate. Proponents of the bill that became Public Chapter 470 did not have the benefit of the guidance this rulemaking notice provides. It is not plainly stated either in the federal law or in this notice that such action by the Secretary would affect federal funding of the state's program, but that is the logical inference. The state's eligibility for funding depends on certification that, in turn, depends on the adequacy of state practices.

Proposed Federal Rules

According to the rulemaking notice, "a threshold criterion for determining the adequacy of a state's damage prevention enforcement program will be whether the state has established and exercised its authority to assess civil penalties for violation of its one-call law." This is a key issue, but the notice goes on to list a number of others that PHMSA proposed to consider when evaluating the enforcement component of state damage prevention programs:

- Does state law require gas and hazardous liquid pipeline operators to be members of and participate in the state's one-call system?
- Does state law require all excavators to use the state's one-call system and request that underground utilities be located and marked before digging?
- Has the state avoided giving exemptions to its one-call damage prevention laws to state agencies, municipalities, agricultural entities, railroads, and other groups of excavators?
- Are the state's requirements detailed and specific enough to allow excavators to understand their responsibilities before and while digging in the vicinity of a pipeline?
- Are excavators required to report all pipeline damage incidents to the affected pipeline operators?
- Does state law require that 911 be called if a pipeline damage incident causes a release of hazardous products?
- Has the responsible state agency established a reliable mechanism to ensure that pipeline damage incidents are reported to it timely?
- Does the responsible state agency investigate all excavation damage to pipeline incidents to determine
 - ▶ whether the excavator appropriately used the one-call system to request a facility locate,
 - ▶ whether a dig ticket was generated,

- ▶ how quickly the pipeline operator responded,
 - ▶ whether the pipeline operator followed all of its applicable written procedures,
 - ▶ whether the excavator waited the appropriate time for the facilities to be located and marked,
 - ▶ whether the pipeline operator's markings were accurate, and
 - ▶ whether the digging was conducted responsibly?
- Does the state's damage prevention law authorize civil penalties, and are the maximum penalties similar to the federal maximums?*
 - Has the state designated a state agency with responsibility for administering the damage prevention laws?
 - Does the state official responsible for determining whether or not to proceed with an enforcement action document the reasons for the decision in a transparent and accountable manner, and are the records of these investigations and enforcement decisions made available to PHMSA?
 - Is the state actually exercising its civil penalty authority when enforcement action is taken, does the amount of the civil penalties reflect the seriousness of the incident, and are remedial orders given to the violator legally enforceable?
 - Are annual statistics on the number of excavation damage incidents, investigations, enforcement actions, penalties proposed, and penalties collected made available to PHMSA and to the public?

Further, the rulemaking notice seeks comment on standards for excavators and poses the following questions:

* The federal maximums are found at 49 U.S.C. 60122(a). They are (1) up to \$100,000 for violations of 60114(b) related to marking violations, 60114(d) related to violations by excavators, and 60118(a) related to violations by pipeline facility operators with a maximum of \$1 million for a related series of violations; (2) not more than \$50,000 for violations of 60103 related to standards for liquefied natural gas pipeline facilities and 60111 related to financial responsibility for liquefied natural gas facilities; and (3) not more than \$1,000 for violations of 60129 related to protection of employees providing pipeline safety information.

Penalties under Tennessee's Underground Utility Damage Prevention Act are criminal, not civil; the maximum punishment is a fine of up to \$2,500 and 48 hours in jail. The Act does not designate a state agency to enforce it.

A separate part of the Tennessee Code governs pipeline systems and operator safety; it authorizes injunctions and civil penalties of up to \$10,000 for each individual violation and up to \$500,000 for a continuing series of violations. The TRA is responsible for enforcement of that law.

- Should the federal standards for excavators be limited to the minimum requirements in federal law, or should they be more detailed and extensive?
- Will implementing the 911 requirement cause any unintended consequences in practice?
- Are there suggested alternatives to these standards?

The standards listed are to

- ▶ use a one-call system before digging,
- ▶ wait the required time,
- ▶ excavate with proper regard for location information or markings established by the pipeline operator,
- ▶ promptly report any damage to the pipeline operator, and
- ▶ report any release of hazardous products to appropriate authorities by calling 911.

We think the information provided by PHMSA in this notice of proposed rulemaking is key to determining whether Tennessee's damage prevention program will comply with federal requirements or whether changes should be made in state law so that it can comply. But there are broader issues related to prevention of damage to underground utilities other than the pipelines for which TRA is responsible. Tennessee's current damage prevention law applies to all underground utilities and all excavation in areas where they are known or likely to be located. The issue of whether or how state law should be changed as it affects those other utilities is a separate, but related issue. An undated letter from PHMSA to the TRA announcing new grants promoting adoption of the 9 elements (Attachment B) under the PIPES Act speaks of an initiative to improve all underground utilities (see Attachment C).

2008 NATURAL GAS PIPELINE SAFETY GRANT ALLOCATION				
STATE	REQUEST	STATE POINTS	ALLOCATION	PERCENT OF FUNDING
ALABAMA	\$ 1,162,427	100.0	\$ 577,885	39.771%
ARIZONA	\$ 1,115,705	100.0	\$ 554,657	39.771%
ARKANSAS	\$ 505,855	100.0	\$ 251,479	39.771%
CALIFORNIA_PUC	\$ 1,946,414	92.0	\$ 890,223	36.589%
COLORADO	\$ 417,008	95.0	\$ 196,944	37.782%
CONNECTICUT	\$ 744,000	100.0	\$ 369,869	39.771%
DELAWARE	\$ 101,158	94.0	\$ 47,272	37.385%
GEORGIA	\$ 1,015,251	100.0	\$ 504,718	39.771%
IDAHO	\$ 148,480	97.0	\$ 71,600	38.578%
ILLINOIS	\$ 1,051,040	100.0	\$ 522,510	39.771%
INDIANA	\$ 869,810	98.5	\$ 425,928	39.174%
IOWA	\$ 591,813	100.0	\$ 294,212	39.771%
KANSAS	\$ 571,102	100.0	\$ 283,915	39.771%
KENTUCKY	\$ 450,865	95.0	\$ 212,934	37.782%
LOUISIANA	\$ 1,192,878	100.0	\$ 593,023	39.771%
MAINE	\$ 225,873	100.0	\$ 112,290	39.771%
MARYLAND	\$ 408,016	99.5	\$ 201,825	39.572%
MASSACHUSETTS	\$ 1,159,170	99.5	\$ 573,384	39.572%
MICHIGAN	\$ 655,002	100.0	\$ 325,626	39.771%
MINNESOTA	\$ 1,344,613	100.0	\$ 668,456	39.771%
MISSISSIPPI	\$ 405,600	93.5	\$ 188,532	37.186%
MISSOURI	\$ 650,752	97.0	\$ 313,807	38.578%
MONTANA	\$ 47,869	93.5	\$ 22,250	37.186%
NEBRASKA	\$ 256,877	100.0	\$ 127,703	39.771%
NEVADA	\$ 680,542	100.0	\$ 338,322	39.771%
NEW HAMPSHIRE	\$ 445,950	100.0	\$ 221,698	39.771%
NEW JERSEY	\$ 1,014,202	99.0	\$ 499,155	39.373%
NEW MEXICO	\$ 777,139	99.0	\$ 382,481	39.373%
NEW YORK	\$ 2,662,725	100.0	\$ 1,323,737	39.771%
NORTH CAROLINA	\$ 421,718	98.5	\$ 206,507	39.174%
NORTH DAKOTA	\$ 68,848	99.5	\$ 34,056	39.572%
OHIO	\$ 1,227,643	98.5	\$ 601,152	39.174%
OKLAHOMA	\$ 949,724	98.0	\$ 462,700	38.975%
OREGON	\$ 491,716	100.0	\$ 244,450	39.771%
PENNSYLVANIA	\$ 1,094,348	98.0	\$ 533,159	38.975%
PUERTO RICO	\$ 187,221	85.0	\$ 79,113	33.805%
RHODE ISLAND	\$ 151,498	100.0	\$ 75,315	39.771%
SOUTH DAKOTA	\$ 72,000	98.5	\$ 35,257	39.174%
TENNESSEE	\$ 594,800	98.5	\$ 291,261	39.174%
TEXAS	\$ 2,977,151	96.0	\$ 1,420,848	38.180%
UTAH	\$ 397,384	96.0	\$ 189,652	38.180%
VERMONT	\$ 143,192	99.5	\$ 70,830	39.572%
VIRGINIA ¹	\$ 951,580	95.0	\$ 449,412	37.782%

2008 NATURAL GAS PIPELINE SAFETY GRANT ALLOCATION				
STATE	REQUEST	STATE POINTS	ALLOCATION	PERCENT OF FUNDING
WASHINGTON	\$ 1,520,429	99.0	\$ 748,302	39.373%
WASHINGTON DC	\$ 240,731	99.0	\$ 118,479	39.373%
WEST VIRGINIA	\$ 522,400	96.0	\$ 249,316	38.180%
WISCONSIN	\$ 600,282	97.0	\$ 289,470	38.578%
WYOMING	\$ 210,568	100.0	\$ 104,681	39.771%
Totals	\$ 35,441,370		\$ 17,300,398	

Note:

The 'Request' represents 80% of the State's estimated budget.

The 'Percent of Funding' is the percentage of the budget represented by allocation.

¹State Programs that have both a 60105 and 60106 program. These states have had their 60105 and 60106 funding combined and shown as the figure represented in the table, therefore budget, request and allocation figures represent funding for both programs.

²Within the first 3 years of a new program a minimum score of 90% shall be automatically given.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 8, 2008 (see <http://www.law.cornell.edu/uscode/uscprint.html>).

**TITLE 49 - TRANSPORTATION
SUBTITLE VIII - PIPELINES
CHAPTER 601 - SAFETY**

§ 60134. State damage prevention programs

(a) **In General.**— The Secretary may make a grant to a State authority (including a municipality with respect to intrastate gas pipeline transportation) to assist in improving the overall quality and effectiveness of a damage prevention program of the State authority under subsection (e) if the State authority—

- (1) has in effect an annual certification under section 60105 or an agreement under section 60106; and
- (2) (A) has in effect an effective damage prevention program that meets the requirements of subsection (b); or
(B) demonstrates that it has made substantial progress toward establishing such a program, and that such program will meet the requirements of subsection (b).

(b) **Damage Prevention Program Elements.**— An effective damage prevention program includes the following elements:

- (1) Participation by operators, excavators, and other stakeholders in the development and implementation of methods for establishing and maintaining effective communications between stakeholders from receipt of an excavation notification until successful completion of the excavation, as appropriate.
- (2) A process for fostering and ensuring the support and partnership of stakeholders, including excavators, operators, locators, designers, and local government in all phases of the program.
- (3) A process for reviewing the adequacy of a pipeline operator's internal performance measures regarding persons performing locating services and quality assurance programs.
- (4) Participation by operators, excavators, and other stakeholders in the development and implementation of effective employee training programs to ensure that operators, the one-call center, the enforcing agency, and the excavators have partnered to design and implement training for the employees of operators, excavators, and locators.
- (5) A process for fostering and ensuring active participation by all stakeholders in public education for damage prevention activities.
- (6) A process for resolving disputes that defines the State authority's role as a partner and facilitator to resolve issues.
- (7) Enforcement of State damage prevention laws and regulations for all aspects of the damage prevention process, including public education, and the use of civil penalties for violations assessable by the appropriate State authority.
- (8) A process for fostering and promoting the use, by all appropriate stakeholders, of improving technologies that may enhance communications, underground pipeline locating capability, and gathering and analyzing information about the accuracy and effectiveness of locating programs.
- (9) A process for review and analysis of the effectiveness of each program element, including a means for implementing improvements identified by such program reviews.

(c) **Factors to Consider.**— In making grants under this section, the Secretary shall take into consideration the commitment of each State to ensuring the effectiveness of its damage prevention program, including legislative and regulatory actions taken by the State.

(d) **Application.**— If a State authority files an application for a grant under this section not later than September 30 of a calendar year and demonstrates that the Governor (or chief executive) of the State has designated it as the appropriate State authority to receive the grant, the Secretary shall review the State's damage prevention program to determine its effectiveness.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 8, 2008 (see <http://www.law.cornell.edu/uscode/uscprint.html>).

(e) Use of Funds.— A grant under this section to a State authority may only be used to pay the cost of the personnel, equipment, and activities that the State authority reasonably requires for the calendar year covered by the grant to develop or carry out its damage prevention program in accordance with subsection (b).

(f) Nonapplicability of Limitation.— A grant made under this section is not subject to the section 60107 (a) limitation on the maximum percentage of funds to be paid by the Secretary.

(g) Limitation on Use of Funds.— Funds provided to carry out this section may not be used for lobbying or in direct support of litigation.

(h) Damage Prevention Process Defined.— In this section, the term “damage prevention process” means a process that incorporates the principles described in sections 60114 (b), 60114 (d), and 60114 (e).

(Added Pub. L. 109–468, § 2(b)(2), Dec. 29, 2006, 120 Stat. 3487.)



U.S. Department
of Transportation
**Pipeline and Hazardous
Materials Safety
Administration**

Administrator

ATTACHMENT C

1200 New Jersey Ave., S.E.
Washington, DC 20590

Commissioner Eddie Roberson
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

Dear Commissioner Roberson,

I am writing to enlist your support for a vital initiative to improve all underground utilities within your state. We are advocating an excavation damage prevention program to protect all pipelines as well as telecommunications, water and sewer and other vital lifelines on which your citizens depend. Construction related damage is an all too frequent threat to our safety and the continuity of services we need to live and work.

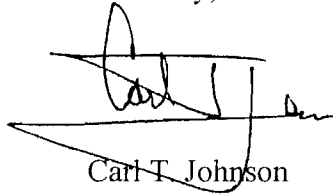
When the Congress passed the Pipeline Inspection, Protection, Enforcement and Safety Act of 2006 (PIPES Act), it focused on the need to improve state-wide damage prevention programs. The bill prescribed nine program elements that a few states have used successfully to drive down this type of risk. The bill received wide bipartisan support from the pipeline industry, the excavator community, and public interest groups. The National Association of Regulatory Utility Commissioners passed a resolution last month supporting the nine elements. I have attached a copy of the elements.

The Act also gave the Pipeline and Hazardous Materials Safety Administration (PHMSA) the authority to award additional funding to state partner agencies that seek to incorporate all the elements in their respective damage prevention programs. Several state agencies have applied to PHMSA for this new grant and funding remains available.

I am seeking your support and assistance in achieving success in these elements within your state which may include changes to your state's authorization laws. I have designated a key member of my senior staff, James Wiggins, to lead this initiative that has been named the Excavation Damage Prevention Initiative.

Your support is critical to our success in reducing construction related damage. If you or your staff are interested in working with us on this important program or seek additional information, please call me or Jim at 202-366-4831. I appreciate your consideration of support for this vital initiative.

Sincerely,

A handwritten signature in black ink, appearing to read "Carl T. Johnson", is written over a horizontal line. The signature is stylized and somewhat cursive.

Carl T. Johnson

Enclosures