



Ohio Legislative Service Commission

Bill Analysis

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(As Introduced)

Sens. Buehrer, Wagoner, Seitz, Sawyer

BILL SUMMARY

- Applies certain provisions of the underground utility facility Protection Service Law, known as the Call-Before-You-Dig Law, to public improvements conducted by a public authority that are currently addressed in a separate law, makes definitions between the two laws more uniform and makes various other changes to the Protection Service Law.
- Requires any utility that elects to participate in a protection service on a limited basis to fully participate in and register the location of its underground utility facilities with the appropriate protection service within four years of the bill's effective date.
- Makes utilities liable for damages or injuries that are a result of excavation accidents due to the utilities' failure to adequately provide notification for or mark underground utility facilities.
- Requires each utility that is fully participating in a protection service to also participate in its affiliated positive response system.
- Requires every commercial excavator to be a member of a protection service within four years of the bill's effective date and requires that protection service to impose a reasonable membership fee.
- Requires excavators to define and pre-mark the immediate area and perimeter of a proposed excavation site before notifying a protection service about the proposed excavation and makes modifications to notification requirements.

* Deletes **COMMENT** 1 and adds a footnote describing the Ohio Utilities Protection Service.

- Establishes requirements for excavators utilizing trenchless excavation methods and modifies requirements for excavators utilizing traditional excavation technologies.
- Creates the State Underground Protection Advisory Committee to investigate and conduct review hearings regarding the complaints forwarded by protection services and to recommend to the Underground Protection Commission enforcement recommendations for the Protection Service Law and resolutions of complaints regarding discriminatory or unfair rates or fees charged by a protection service.
- Creates the Underground Protection Commission of Ohio within the Department of Commerce to review enforcement recommendations submitted by the State Underground Protection Advisory Committee, impose corrective action and appropriate penalties against habitual or willful non-compliers, and resolve complaints regarding discriminatory or unfair rates or fees charged by a protection service.
- Creates the Underground Utility Protection Fund into which an allocation of membership fee revenues paid to protection services and penalties for willful non-compliance are deposited.
- Requires the Fund to be used to pay administrative and enforcement costs under the Protection Service Law, to improve underground utility facilities protection, to make grants to fund public awareness and education to advance the mission and operation of protection services.

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CONTENT AND OPERATION

Protection service background

The General Assembly's first efforts to address underground utility protection applied to public authorities entering into public improvement contracts. The 114th General Assembly enacted a law, effective in July 1982, requiring public authorities working on public improvement contracts to include in their plans and specifications the location of underground utility facilities in the construction area, requiring contractors to notify a registered underground utility protection service of the planned construction, and requiring utilities to mark or otherwise designate the location of those facilities.¹ The 117th General Assembly enacted a separate, broader "Call-Before-You-Dig Law" as a temporary measure requiring (1) a public utility with underground utility facilities to participate in an excavation protection service, (2) developers of real property to indicate on construction or excavation plans the location of underground utility facilities, (3) excavators to contact utilities with such facilities before excavation begins, and (4) utilities to mark their facilities' locations at construction sites.² Subsequent legislation enacted by the 118th General Assembly modified this law (referred to in this analysis as the Protection Service Law) and made it permanent (effective July 2, 1990).³

Protection Service Law overview

(R.C. 3781.25 to 3781.32)

The Protection Service Law generally requires utilities that own or operate underground facilities to participate in and register the location of their underground facilities with a protection service that serves the area in which the facilities are located. A "protection service" means a notification center, but not an owner or an individual utility, that exists for the purpose of receiving notice from persons that prepare plans and specifications for or that engage in excavation work, that distributes this

¹ Am. Sub. H.B. 538, 114th General Assembly.

² Am. Sub. S.B. 174, 117th General Assembly.

³ Sub. S.B. 264, 118th General Assembly.

information to its members and participants, and has registered by March 14, 1989 with the Secretary of State and the Public Utilities Commission (PUCO).⁴

Utilities may participate in the protection service on a full or limited basis. Full participation requires the utility to identify and register the location of its underground facilities. Limited participation requires the utility to identify only the municipal corporation and townships in which it has underground facilities.

When a developer plans an excavation and when an excavation is imminent, the developer and excavator are required to notify the protection service of the planned or imminent excavation, as applicable. The protection service notifies each utility that is a full participant of the service and that has underground facilities in the area of the planned or imminent excavation. It also notifies the developer and excavator of each utility that participates in the service on a limited basis and that has underground facilities in the municipal corporation or township where the excavation is to take place. The developer and excavator contacts each utility that is a limited basis participant in the service to find out the location of its underground utility facilities. The law requires utilities to cooperate with developers regarding location information of their underground utility facilities when the development plans are made and to mark the location of their underground utility facilities at excavation sites when excavation is imminent.

Public improvements protection service law

(R.C. 153.64)

The law governing public improvements protection service retained by the bill requires public authorities,⁵ prior to preparing plans and specifications, to contact the registered protection service and the owners of underground utility facilities that are not members of a protection service for the existence and location of all underground utility facilities within the construction area. Public authorities must include, in the plans and specifications for such improvement, the identity and location of the existing

⁴ Pursuant to the registration requirement, the protection service must identify its name, address, telephone number, membership, and other pertinent information and the Secretary of State and the PUCO must establish procedures for accepting registrations and providing information about registrants to public authorities upon request. Since the date for registration to be a protection service has passed, the bill deletes this division. The bill's references to the division as it existed on that date provide historical context for this registration requirement. (R.C. 153.64(F).)

⁵ Pursuant to R.C. 153.64, "public authority" includes the state, or a county, township, municipal corporation, school district, or other political subdivision, or any public agency, authority, board, commission, instrumentality, or special district of or in the state or a county, township, municipal corporation, school district, or other political subdivision.

underground utility facilities located in the construction area as provided by the owner of the underground utility facility and the name, address, and telephone number of each owner of any underground utility facilities in the construction area that does not subscribe to a protection service. Within ten calendar days after award of a contract for a public improvement, public authorities must notify in writing all owners of underground utility facilities known to be located in the construction area of the public improvement of the name and address of the contractor to whom the contract for the public improvement was awarded.

Currently, at least two working days (excluding Saturdays, Sundays, and legal holidays) prior to commencing construction operations in the construction area, the contractor for a public improvement or its subcontractor must cause notice of the project to be given to the registered underground utility protection services and the owners of underground utility facilities shown on the plans and specifications that are not members of a registered service. After receiving this notice, the owner of the facility within 48 hours (excluding Saturdays, Sundays, and legal holidays) must stake, mark, or otherwise designate the location of the facilities in such a manner as to indicate their course together with the approximate location at which they were installed. The marking or locating must be coordinated to stay approximately two days ahead of the planned construction. The bill removes this notification and marking requirement when excavation is imminent and in its place requires the Protection Service Law, as amended by the bill, to govern public improvements to the extent that the Protection Service Law is applicable. In an apparent attempt to ensure that public improvements provisions do not conflict, the bill deletes the provision in the Protection Service Law exempting its application to public improvements. (See **COMMENT.**)

Definition changes

(R.C. 153.64(A) and 3781.25)

The bill changes the definitions of "protection services," and "underground utility facility" in the Protection Service Law and the law governing public improvements protection service to make them more similar, but not exactly the same. The bill shortens the term "underground utility protection service" in the law governing public improvements protection service to "protection service" and changes it to match the definition in the Protection Service Law in Chapter 3781. of the Revised Code. In addition, the definition of an "underground utility facility" in both the law governing public improvements protection service and the Protection Service Law⁶ is altered by

⁶ Currently pursuant to R.C. 3781.25, an "underground utility facility" means "any item buried or placed below the surface of the earth or submerged under water for use in connection with the storage or conveyance of water or sewage; electronic, telephonic, or telegraphic communications; television signals;

the bill. The Protection Service Law definition of those facilities is expanded to include: electric energy; manufactured and mixed natural gas; synthetic or liquefied natural gas; and propane gas. In addition, the bill specifies that a facility under the Protection Service Law includes all operational underground pipes, sewers, tubing, conduits, cables, valves, lines, wires, worker access holes, and attachments, owned by any person, firm, or company. For the Protection Service Law, the bill specifically excludes the following from the definition of an underground utility facility: (1) a private septic system in a one-family or multi-family dwelling utilized only for that dwelling and not connected to any other system, and (2) an oil or gas producing facility that is not regulated by the federal "Natural Gas Pipeline Safety Act"⁷ if the facility is not located in an "urbanized area" as defined in Ohio oil and gas law.⁸ The second exclusion does not appear in the bill's definition of underground utility facilities in the law governing public improvements protection service. The only change in that definition is to replace "double-family" dwelling with "multi-family" dwelling.

The definition of a "utility" is "any owner of an underground utility facility, including any public authority that owns an underground utility facility." "Utility" does not include the owners of the following types of real property with respect to any underground utility facility on that property: (1) the owner of a single-family or two-, three-, or four-unit residential building, (2) the owner of an apartment complex, (3) the owner of a commercial or industrial building or complex of buildings, including

electricity; crude oil; petroleum products; artificial or liquefied petroleum; natural gas; coal; steam; hot water; or other substances; except that it does not include private septic systems in a one- or two-family dwelling not connected to any other system."

Defined similarly under current R.C. 153.64, "underground utility facility" means "any item buried or placed below ground or submerged under water for use in connection with the storage or conveyance of water or sewage; or electronic, telephonic, or telegraphic communications; electricity; electric energy; petroleum products; manufactured, mixed, or natural gas; synthetic or liquefied natural gas; propane gas; or other substances." It also includes "all operational underground pipes, sewers, tubing, conduits, cables, valves, lines, wires, manholes, and attachments, whether owned by any public or private or profit or nonprofit person, firm, partnership, company, corporation, joint stock association, joint venture, or voluntary association, wherever organized or incorporated, except for a private septic system in a single- or double-family dwelling utilized only for that dwelling and not connected to any other system."

⁷ The references in the bill and existing law to the "Natural Gas Pipeline Safety Act of 1968" with regard to the definitions of "underground utility facility" and "interstate gas pipeline" are obsolete because that act has been repealed. The new reference should be to the "Pipeline Safety Improvement Act of 2002, 116 Stat. 2985, 49 U.S.C. 60101, as amended." The incorporation by reference regarding the definition of "interstate hazardous liquids pipeline" should be similarly updated.

⁸ Under R.C. 1509.03 (not in the bill) "urbanized area" means "an area where a well or production facilities of a well are located within a municipal corporation or within a township that has an unincorporated population of more than five thousand in the most recent federal decennial census prior to the issuance of the permit for the well or production facilities."

factories and shopping centers, and (4) the owner of a farm. The bill expands the definition to include any "operator, or an agent of an owner or operator, of an underground utility facility, including any public authority that owns or operates an underground utility."

The bill, with respect to the Protection Service Law, changes "approximate location" to "tolerance zone" regarding the term that means "the site of the underground facility including the width of the underground utility facility plus eighteen inches on all sides of the facility (the bill substitutes "all sides" for "each side")."

The term "days" in current law is changed to "working days." The definition of "hours" that excludes hours on Saturdays, Sundays, and legal holidays is deleted and "[a] single working day begins at midnight and has a duration of twenty-four hours" is added to the definition of "working days."

The bill removes from the definition of "excavation" the provision that excludes "any activity by a governmental entity which does not penetrate the earth to a depth of more than twelve inches." In addition, the term "excavation," as changed by the bill, specifies that it means the use of "hand" tools rather than merely "tools."

The term "excavator" is changed to mean "person or persons responsible for making actual excavation" instead of "contractor or other person who is responsible for making the excavation." (See also the definition of "commercial excavator" below.)

The bill deletes the definition of "owner of underground utility facility" from the law governing public improvements protection service that effectively exempted certain telephone companies, owners of pipelines that conduct petroleum products, or cable television companies from the requirement to register with an underground utility protection service.

New definitions

The bill adds the following new definitions to the Protection Service Law:

(1) "Commercial excavator" means any excavator excluding a utility that "for compensation, performs, directs, supervises, or is responsible for the excavation, construction, improvement, renovation, repair, or maintenance on a construction project and holds out or represents oneself as qualified or permitted to act as such and employs tradespersons who actually perform excavation construction, improvement, renovation, repair, or maintenance on a construction project.

(2) "Person" includes an individual, corporation, business trust, estate, trust, partnership, association, and public authority (see **COMMENT**).

(3) "Positive response system" means "an automated system facilitated by a protection service allowing a utility to communicate to an excavator the presence or absence of any conflict between the existing underground facilities and the proposed excavation site.

(4) "Project" means any undertaking by a private party of an improvement requiring excavation.

(5) "Public authority" has the same meaning as in the law governing public improvements protection service (see discussion under "**Public improvements protection service law**," above).

(6) "Improvement" means any construction, reconstruction, improvement, enlargement, alteration, or repair of a building, highway, drainage system, water system, road, street, alley, sewer, ditch, sewage disposal plant, water works, and all other structures or works of any nature.

(7) "Emergency" means an unexpected occurrence causing a disruption or damage to an underground utility facility that requires immediate repair or a situation that creates a clear and imminent danger that demands immediate action to prevent or mitigate loss of or damage to life, health, property, or essential public services.

(8) "Nondestructive manner" means using low-impact, low-risk technologies such as hand tools, or hydro or air vacuum excavation equipment.

(9) "Habitual or willful non-complier" means a person, utility, or commercial excavator that has consistently or continually failed to comply with or purposefully or knowingly disregarded the provisions of the Protection Service Law.

Tolerance zones, working days, and multiple protection services

(R.C. 3781.26, 3781.27, 3781.28, 3781.281, 3781.29, 3781.30, 3781.31, and 3781.34)

Several changes in, and additions to, the Protection Service Law terminology are repeated throughout the bill. Where the term "approximate location" appears, it is replaced with "tolerance zones," and the terms "day" and 24 hours are replaced with "working day" and "one full working day" respectively. Since the bill defines "working day" as beginning at midnight and lasting for a 24-hour period, the bill's references to 48 hours are replaced with "two working days."

In addition, references to the protection service are amended or enacted to allow for more than one protection service. The bill refers to "each" protection service or to "any appropriate" protection service.

Phase-out of limited basis participation

(R.C. 3781.26(A))

The bill amends the provision in current law allowing utilities that own or operate underground utility facilities to participate in and register the location of its facilities with a protection service on a full or limited basis. Any utility that elects to participate on a limited basis must change its status and fully participate in and register the location of its underground utility facilities with the appropriate protection service within four years of the effective date of the bill. For those participating on a limited basis before this period elapses, the bill specifies that they must identify not only the municipal corporation and townships by county in which it has facilities as in current law but also, where applicable, the immediate geographic area in which it has facilities.

Commercial excavators

(R.C. 3781.26(B) and 3781.261)

In a new requirement under the bill, every commercial excavator must be a member of a protection service not later than four years after the bill's effective date. Each commercial excavator is subject to a reasonable membership fee that shall be imposed by that protection service. In addition, the bill adds commercial excavators to those who, under existing law, should publicize the importance of ascertaining the location of underground utility facilities before excavating and the use of protection services to ascertain that information.

Required clearance

(R.C. 3781.27(E)(4))

Under continuing law, if a project includes the installation of new underground utility facilities, the developer must attempt to design their installation so that there is at least a 12-inch clearance between the new and existing facilities. Also, no facility may be installed with clearance of less than 12 inches unless the owners of the existing facility are notified prior to the installation of new facilities. The bill requires that this notification be in writing.

Positive response system

(R.C. 3781.26(D))

Under the bill, each utility that is fully participating in a protection service must also participate in its affiliated positive response system. Each utility participating on a limited basis must directly communicate to the excavator the presence or absence of any

conflict between the existing underground utility facilities and the proposed excavation site.

Notification requirements

(R.C. 3781.27(E)(2) and 3781.28)

For developers, other than a utility, current law requires the developer of proposed excavation projects, to provide project plans to the excavator before excavation begins. The bill changes this provision to require the developer to provide the plans to the commercial excavator prior to entering into a contract that involves such excavation. If the developer does not prepare written plans or does not have any written plans prepared, the developer must otherwise provide the tolerance zones, identifying information on the utilities, information on required adjustments, and any special notification requirements to the excavator before excavation begins. The bill specifies that this information be provided to the commercial excavator.

Current law requires excavators to notify the protection service of the location of an excavation site at least 48 hours, but not more than ten days before commencing excavation. Under the bill, the notice period is clarified to be two working days excluding the day the notice is given, but not more than ten working days. The bill also requires the excavator to give the same notice (two working days, excluding the day the notice is given, but not more than ten working days) to a limited basis participant in the protection service.

Different notice requirements apply to excavations that cover a large area and progress from one area to the next over a period of time. In this case, the bill adds a new requirement that the notice of excavation that the excavator provides to each protection service or limited basis participant be written. This written notice must include projected timelines for segments of the excavation as it progresses thus allowing the coordination of the marking of tolerance zones with actual excavation schedules. The bill further provides that under such circumstances, the utility and excavator must determine a mutually agreed upon marking schedule based on the project schedule. Once the schedule is established, the regular marking and notification requirements do not apply (see "**Excavation site marking**" below).

If the excavator is the owner of a single-family or two-, three-, or four-unit residential dwelling; the owner of an apartment complex; the owner of a commercial or industrial building or complex of buildings, including factories and shopping centers; or the owner of a farm, the notice requirements of the Protection Service Law described above do not apply unless the excavation is planned for an area where a utility easement is located or a public right-of-way. Under the bill, the notice provisions also

apply to these owners when excavation is planned where utility facilities are known to serve the property.

Excavation site marking

(R.C. 3781.29(A) and (B))

Current law requires utilities to locate and mark the approximate location of its underground utility facilities at the excavation site within 48 hours of receiving notice from a protection service or developer of a proposed excavation. The bill requires the utility to review the status of its facilities within the excavation site in addition to locating and marking the facilities' tolerance zones within two working days, excluding the day of receiving notice. In addition, the bill requires that the facilities be marked in such a manner as to indicate their course and that the utility report the appropriate information to the protection service for its positive response system.

Current law provides that if a utility does not mark its underground utility facilities or contact the excavator within 48 hours of receiving notice, the utility is deemed to have given notice that it does not have any facilities at the excavation site. Under the bill, the time period after which the utility is deemed to have given notice that it does not have any facilities at the excavation site is changed to if a utility does not mark its underground utility facilities or contact the excavator "within that time," meaning two working days, excluding the day of receiving notice.

If the utility is unable to accurately mark the tolerance zones of its facilities, it is required to mark them to the best of its ability. The bill adds the requirement that the utility notify the excavator using the positive response system that the markings may not be accurate.

Current law specifies that unless a facility actually is uncovered or probed by the utility, any indications of the depth of the facility must be treated as estimates. The bill adds to this provision a facility uncovered or probed by an excavator and specifies that any indications of the depth of the facility must be treated as estimates only.

Utility liability

(R.C. 3781.29(A)(1))

The bill adds a provision governing when utilities are liable for damages or injuries resulting from excavation of their underground utility facilities. If the utility cannot locate its underground utility facilities or cannot estimate them with reasonable accuracy and provide notice of their locations to the excavator and any damage occurs to the underground utility facility through the excavation, the utility operating the

facility is responsible for repairing the damage and is liable for any resulting injury to persons or property.

Pre-marking the excavation site

(R.C. 3781.29(D) and (F))

The bill adds the requirement that excavators define and pre-mark the immediate area and perimeter of the proposed excavation site before notifying a protection service about the proposed excavation. The markings must be made in white as required in current law for proposed construction or excavation markings. The bill adds that the white marking may be through the use of an industry-recognized method such as chalk-based paint, flags, stakes, or other method applicable to the specific site. When possible the markings must indicate the excavator's identity by name, abbreviation, or initial.

Pre-marking requirements are not required under the following circumstances specified in the bill:

(1) The utility can determine the precise location, direction, size, and length of the proposed excavation site by referring to the notification provided by the protection service.

(2) The excavator and the affected utility have had an on-site, pre-construction meeting for the purpose of pre-marking the excavation site.

(3) The excavation involves replacing a pole that is within five feet of an existing pole.

(4) Pre-marking by the excavator would clearly interfere with pedestrian or vehicular traffic control.

Emergencies

(R.C. 3781.29(E))

The bill requires an excavator to make every effort to notify each protection service of an emergency excavation before beginning the excavation, or as soon as possible thereafter. In providing this notification under the bill, the excavator must provide at a minimum: (1) the name of the individual notifying the protection service, (2) the name, address, any electronic mail address, and any telephone and facsimile numbers of the excavator, (3) the specific location of the excavation site, and (4) a description of the excavation.

When the protection service receives the notification of an emergency excavation, the protection service must provide the excavator with a reference number and a list of utilities that the protection service intends to notify. The protection service must immediately notify each utility that has facilities located within the designated area of the emergency excavation according to the registration information for the facilities received by the protection service. The bill permits any utility notified of an emergency excavation to inspect all of its underground utility facilities located at the emergency excavation site and to take any otherwise lawful action it considers necessary to prevent disturbance to or interference with its facilities during excavation.

Excavation requirements

(R.C. 3781.30)

Current law lists requirements for excavators when excavating. Included among them are the requirements to maintain reasonable clearance between an underground utility facility and the cutting edge point of powered equipment, to protect and preserve markings of underground utility facilities until they are no longer required, and to report to the utility any damage to its facilities as soon as it is discovered and allow the utility time to make necessary repairs. The bill maintains these requirements but specifies that these and other requirements changed by the bill (described below) apply to both traditional and trenchless technologies.

Current law requires an that individual other than the equipment operator look for any sign of the underground utility facility while excavating with powered equipment. The bill changes the requirement to read as follows: "When approaching and excavating within the tolerance zone of underground utility facilities with powered equipment, require an individual other than the equipment operator, to visually monitor the excavation activity for any indication of the underground utility facility."

Current law also requires excavators to conduct the excavation in the vicinity of the underground utility facility in a careful and prudent manner, excavating by-hand, if necessary, to determine the precise location of the facility and to prevent damage. The bill changes this provision to require excavators to conduct the excavation within the tolerance zone in a careful, prudent, and nondestructive manner, when necessary, to determine and expose the precise location of the facility and to prevent damage.

The excavator must also immediately report to the utility and, if necessary, to the appropriate law enforcement agencies and fire departments, any damage to an underground facility that results in escaping flammable, corrosive, explosive, or toxic liquids or gas, and take reasonable appropriate actions needed to protect persons and property and to minimize safety hazards until those agencies and departments and the

utility arrive at the scene. Under the bill, the excavator must also report such damage to the protection service and if necessary, report to the appropriate law enforcement agencies or fire departments by calling 9-1-1.

The bill includes additional requirements for an excavator utilizing trenchless excavation methods that must be met in a manner consistent with the requirements listed above for both traditional and trenchless technologies. Those requirements require the excavator to do the following:

(1) Expose and confirm all underground utility facilities at each crossing point by the proposed excavation in a nondestructive manner;

(2) Expose all parallel underground utility facilities in a nondestructive manner at the beginning and end of each trenchless excavation. Any parallel underground utility facility that is within 5 feet of the proposed alignment shall also be exposed every 100 feet. Any parallel underground utility facility that is within 3 feet of the proposed alignment shall be exposed every 50 feet.

(3) Ensure that the final product installation maintains the proper 12-inch or other agreed upon clearance of existing underground utility facilities (see "**Required clearance**," above).

State Underground Protection Advisory Committee

(R.C. 3781.33 and 3781.34)

The bill creates the State Underground Protection Advisory Committee consisting of nine members appointed by the Governor. The Governor must appoint Committee members representing the interests of several different organizations. The bill lists the membership qualifications as follows:

(1) One member representing the interests of commercial excavators selected from a list of at least three individuals provided to the Governor by the Ohio Contractors Association or a successor organization representing the interests of commercial excavators in Ohio;

(2) One member representing the PUCO selected from a list of three individuals provided by the PUCO chairperson;

(3) One member representing the interests of utilities not subject to regulation by the PUCO selected from a list of at least three provided by the Ohio Oil and Gas Association or a successor organization;

(4) One member representing contract facility locators selected from a list of at least three provided to the Governor by the organization representing their interests in Ohio;

(5) One member selected from a list of at least three such individuals provided by the Department of Transportation in conjunction with the County Engineers Association of Ohio or a successor organization;

(6) One member selected from a list of at least three individuals provided by the organization representing the interests of municipal governments in Ohio;

(7) One member representing a gas company, natural gas company, or company not subject to regulation by the PUCO that is engaged in the transportation of natural gas by pipeline;

(8) One member representing an electric light company;

(9) One member representing a telephone or telegraph company.

The last three members listed above must be selected from a list provided to the Governor by the Board of Trustees of the Ohio Utilities Protection Service.⁹ The list must include at least nine representatives of utilities subject to PUCO regulation and companies not subject to PUCO regulation that are engaged in the transportation of natural gas by pipeline. At least three individuals listed must represent the interests of a gas company, natural gas company, or company not subject to PUCO regulation that is engaged in the transportation of natural gas by pipeline. At least three individuals listed must represent the interests of an electric light company, and at least three individuals listed must represent the interests of a telephone or telegraph company.¹⁰ In any event, no member of the Board of Trustees of the Ohio Underground Protection Service can be appointed to the Committee.

Initial appointments must be made within 30 days after the effective date of the bill and are for staggered terms with three terms ending on January 31 of each of the years 2011, 2012, and 2013. Subsequent terms for Committee members are for three years ending on the same day of the same month as the term that it succeeds. Members may be reappointed but may not serve more than two consecutive terms. After serving

⁹ The Ohio Utilities Protection Service (OUPS) is a nonprofit organization that assists utilities and others to meet the notification and utility protection measures required by the Protection Services Law. More information is available about OUPS at: <http://www.oups.org>.

¹⁰ "Gas company," "natural gas company," "electric light company," "telephone company," and "telegraph company" have the same meaning as defined in R.C. 4905.03 (not in the bill).

two consecutive terms, a member may be reappointed to the Committee if a period equal to a single three-year term has elapsed. Vacancies on the Committee are filled in the same manner as original appointments, and members appointed to fill a vacancy hold office for the remainder of that term. The bill requires a member to continue in office after the expiration of the member's term until a successor takes office or until 60 days has elapsed, whichever occurs first.

Committee administration and duties

The member appointed to represent the PUCO serves as the Committee chairperson during the initial year of the Committee, and in subsequent years, the chairperson is elected by the Committee. Five members constitute a quorum to do business. The Committee must meet at least four times per year and at any additional times as it judges necessary. Meetings may be held at the location and time the Committee selects.

The bill specifies that, as appropriate, each protection service and the Department of Commerce must provide the Committee with meeting space, staff services, and other technical and administrative assistance within their respective areas of expertise. Assistance may include providing the Committee with data, research, statistics, and analysis and providing investigators and hearing examiners to the Committee.

Members are to receive reimbursement for their actual and necessary expenses incurred and for each mile necessarily traveled in the performance of official business and official duties. Committee members are not subject to the financial disclosure reporting requirements of the Ohio Ethics Law. In addition, they are immune from civil liability for any act or omission in the performance of their duties while serving on the Committee, except in the case of willful misconduct.

Under the bill, the protection services must maintain any and all records on behalf of the Committee in conjunction with the Underground Protection Commission. The records must be made available to the public upon proper request. In addition, the Committee may adopt rules to govern its procedures and must adopt rules to govern the procedure by which each protection service forwards to the Committee the complaints it receives (see "**Investigation of complaints**," below). The committee may adopt an identifying mark such as a seal, logo, or brand.

The bill requires the Committee to provide enforcement recommendations for the Protection Service Law. In addition, the Committee must recommend resolutions of complaints (see "**Investigation of complaints**," below) regarding discriminatory or

unfair rates or fees charged by protection services to the Underground Protection Commission.

Underground Protection Commission of Ohio

(R.C. 121.04, 3781.35, and 3781.36)

The bill creates the three-member Underground Protection Commission of Ohio within the Department of Commerce. Commission members are to be appointed by the Governor with the advice and consent of the Senate so that one member represents the Office of the Attorney General, one member represents the Department, and one member represents the interests of the public. The members must be appointed within 30 days after the bill's effective date. Initial appointments are for staggered terms ending on January 31 of the years 2011, 2012, and 2013. Subsequent terms for Commission members are to be for three years ending on the same day of the same month as the term that it succeeds. Members may be reappointed to no more than two successive terms, and after serving two consecutive terms, a member may be reappointed to the Commission if a period equal to a single three-year term has elapsed.

The bill provides for the transition of Commission membership due to vacancies or the expiration of terms. It provides for vacancies to be filled in the same manner as provided for original appointments, and members appointed to fill a vacancy hold office for the remainder of that term. The bill requires a member to continue in office after the expiration of the member's term until a successor takes office or until 60 days have elapsed, whichever occurs first.

Under the bill, Commission members are immune from civil liability for an act or omission in performing their duties while serving on the Commission, except in the case of willful misconduct. Commission members are not subject to the financial disclosure requirements of the Ohio Ethics Law.¹¹ They are to receive reimbursement for actual and necessary expenses they incur and for each mile necessarily traveled in the performance of their official work for the Commission.

The Commission must elect its chairperson to a one-year term at its first meeting and must elect a new chairperson annually. Two members constitute a quorum to do business, and the Commission is authorized to meet at any time that, in its judgment, is necessary at the location and time it selects.

¹¹ R.C. 102.02 (not in the bill).

Commission duties

The bill mandates that the Commission do the following: (1) review and assess, and if necessary investigate, all enforcement recommendations submitted by the State Underground Protection Advisory Committee, (2) upon a majority vote of its members finding reasonable grounds indicating that a party against whom a complaint has been filed (see "**Investigation of complaints**," below) is a habitual or willful non-complier, the Commission has the authority under the bill to impose corrective action and appropriate penalties, (3) review and assess, and mediate resolution of, all complaints made to the Committee regarding discriminatory or unfair rates or fees charged by a protection service, and (4) maintain any and all Commission records and make them available to the public upon proper request.

In addition, the Commission may adopt rules to govern its procedures, adopt and utilize an identifying mark (such as a seal or logo) for the authentication of its documents, and request and receive meeting space, staff services, and other technical assistance from the Department of Commerce. The assistance may include providing the Commission with data, research, statistics and analysis and providing the Commission with investigators and hearing examiners.

Investigation of complaints

(R.C. 3781.37)

Under the bill, a protection service must forward all complaints it receives to the Committee in accordance with Committee rules. The Committee must investigate and conduct review hearings regarding the complaints. If, after an investigation and review hearing, and with a majority vote of its members, the Committee finds reasonable grounds indicating that a party against whom a complaint has been filed is a habitual or willful non-complier, the Committee must provide its findings and recommendations for corrective action and civil penalties to the Underground Protection Commission. Recommended civil penalties must not exceed \$10,000 per violation that is identified by the Committee in its findings and recommendations. The Commission must then review any recommendations submitted by the Committee, conduct its own hearing, and issue a ruling regarding each case.

The Committee also must investigate, review, and arbitrate resolutions of any complaints about discriminatory or unfair rates or fees charged by a protection service. Any party subject to such arbitration under this provision may appeal the Committee's resolution to the Commission.

In the course of investigating complaints, both the Committee and Commission may accept information from any person appearing to show a violation of the

Protection Service Law. Provided the person is not acting in bad faith, any person reporting information or testifying before the Committee or the Commission during any hearing under the bill is not liable for any claims of civil damages that may arise from providing such report or testimony.

The Committee or Commission may administer oaths; order the taking of depositions, and issue subpoenas to compel the attendance and testimony of persons and the production of books, accounts, papers, documents, or other tangibles. If a person fails to comply with a subpoena issued under the bill, the Committee or Commission may apply to the Court of Common Pleas in the county in which the person to be subpoenaed resides for an order compelling compliance in the same manner as compliance with a subpoena issued by the court is compelled.

The Commission may impose and collect penalties for violations of the Protection Service Law. Any penalty collected pursuant to the bill is to be deposited in the State Underground Protection Fund created by the bill. Penalties must not exceed \$10,000 per violation.

Only with a majority vote of its respective members may the Committee and Commission dismiss a complaint. Under the bill, Commission decisions may be appealed to the Franklin County Court of Common Pleas.

State Underground Protection Fund

(R.C. 3781.281 and 3781.38)

The bill creates the State Underground Protection Fund in the state treasury consisting of any money appropriated to the fund and the moneys deposited into the Fund from penalties imposed for violations of the Protection Service Law. In addition, each protection service must annually allocate a portion of its membership fee revenues and deposit it into the Fund. The aggregate revenue from these allocations must not exceed \$50,000.

The moneys in the Fund are to be used at the discretion of the Underground Protection Commission to pay the administration and enforcement costs of the Commission and the complaint process under the bill. Any moneys remaining in the Fund must be used at the discretion of the Commission for activities to improve the state's underground utility facilities protection and to provide grants to organizations to fund public education and awareness programs that promote and advance the mission and operations of protection services.

COMMENT

By incorporating "to the extent they are applicable" the provisions of the Protection Service Law regarding notification and marking of underground utility facilities into the law governing public improvements protection service, the bill may raise questions because both laws contain provisions that address temporary relocation of underground utility facilities (R.C. 153.64(B), 3781.28(D), and 3781.27(E)), liability for damage to unmarked facilities (R.C. 153.64(D) and 3781.29(A)(1)), contractor/excavator duties when an emergency is caused by excavation of the facilities (R.C. 153.64(D) and 3781.30(A)(6)), and reporting damage to the facilities (R.C. 153.64(D) and 3781.30(A)(5)). Although the provisions may not be in conflict, they contain differences that may make the incorporation to the extent of applicability uncertain. The bill also defines "person" for purposes of the Protection Service Law to include a "public authority" as defined in the law governing public improvements protection service and then utilizes the term "person" in defining "excavator" and "developer" under the Protection Service Law. That change, viewed in conjunction with the change removing the exemption from the Protection Service Law for public improvements, could add uncertainty regarding the relationship between the Protection Service Law and the law governing public improvements protection service.

HISTORY

ACTION	DATE
Introduced	07-02-09

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