

HOUSE BILL 2346

By McCormick

AN ACT to amend Tennessee Code Annotated, Title 4,
Chapter 29 and Title 65, relative to underground
utility damage prevention.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 65-31-102, is amended by deleting the existing subdivisions (4) and (12), adding the following as new, appropriately designated subdivisions and renumbering the remaining subdivisions accordingly:

() "Board" means the underground utility damage enforcement board, created by § 65-31-114;

() "Design locate request" means a communication to the one-call service in which a request for locating existing utility facilities for predesign or advance planning purposes is made. A design locate request shall not be used for excavation purposes;

()

(A) "Excavate" or "excavation" means an operation for the purpose of the movement, placement, or removal of earth, rock, or other materials in or on the ground by use of mechanized equipment or by discharge of explosives, and including augering, backfilling, digging, ditching, drilling, grading, plowing-in, pulling-in, ripping, scraping, trenching and tunneling. "Excavation" does not include the tilling of soil for agricultural purposes; or the digging of holes for fence posts on private property in any area that is not located within a recorded easement of an operator or that is not located within one hundred feet (100') of the edge of the pavement of a street or highway. "Agricultural purposes" for the sole purpose of this chapter includes surface activities, such as plowing, planting

and combining, but does not include blasting, setting drainage tiles, subsoiling or other sub-surface activities;

(B) "Excavate" or "excavation" shall not include:

(i) Pavement milling or pavement repair that does not exceed the depth of the existing base stone and pavement;

(ii) Routine railroad maintenance activities, including removal and replacement of base material up to twenty-four inches (24") below the flow line of ditch or ground surface of the railroad right of way adjacent to the existing track structure, provided, such work is conducted by railroad employees or railroad contractors and is carried out with reasonable care so as to protect any installed underground facilities placed in the railroad right-of-way by agreement with the railroad. Nothing in this chapter shall modify or abrogate any contract term between any railroad and any other party owning or operating an underground facility or underground utility lines within the railroad's right-of-way;

(iii) Any other routine roadway maintenance activities carried out by road maintenance employees or contractors; provided, that such activities:

(a) Occur entirely within the right of way of a public road, street, or highway of the state;

(b) Are carried out with reasonable care so as to protect any utility owned facilities and laterals placed in the right of way;

(c) Are carried out within the limits of any original excavation on the traveled way, shoulders, or drainage ditches of a public road, street, or highway, and do not exceed eighteen inches (18") in depth below the grade existing prior to such activities; and

(d) If involving the replacement of existing structures at a depth greater than eighteen inches (18”), replace such structures in their previous locations and at their previous depths.

(C) Nothing in subdivision (B) shall remove the liability for damage to underground facilities caused by a person engaged in the activities set forth in subdivision (A).

(D) Nothing in the definition of “excavate” or “excavation” shall remove the obligation of any excavator, whether engaged in excavation or activities described in subdivision (B), from the reporting requirements of § 65-31-111;

() “Excavator” means any person who engages in excavation as described in subdivisions (A) and (B) in the definition of “excavate” contained in this section;

() “Utility” means any line, system or facility used for producing, storing, conveying, transmitting, or distributing communications, electricity, gas, petroleum, petroleum products, hazardous liquids, water, steam, sewerage and other underground facilities. “Utility” does not include any railroad or the Tennessee department of transportation, created by title 4, chapter 3, part 23;

SECTION 2. Tennessee Code Annotated, Section 65-31-105, is amended by adding the following as a new subsection:

(f) All underground utilities owned by an operator that are installed on or after January 1, 2017, shall be installed in a manner that will make such underground utilities locatable using a generally accepted electronic locating method.

SECTION 3. Tennessee Code Annotated, Section 65-31-107, is amended by deleting the word “Operators” at the beginning of the first sentence in subsection (a) and substituting the

language "Subject to the requirements of subsection (b), operators", and by deleting subsection (b) and substituting the following:

(b) All operators are required to join the one-call service and utilize the services of the notification center as follows:

(1) Operators that are members of the existing one-call service on the effective date of this act must remain members;

(2) Operators with more than fifty thousand (50,000) customers or one thousand (1,000) miles of facilities who are not members must join the one-call service no later than January 1, 2015;

(3) Operators with more than twenty five thousand (25,000) customers or five hundred (500) miles of facilities, who are not members, must join the one-call service no later than January 1, 2016; and

(4) All operators that do not meet the thresholds described in subdivisions (1), (2), or (3) must join the one-call service no later than January 1, 2017.

(c) There shall be only one one-call service for this state.

(d) The one-call service shall provide for a reasonable way of apportioning the cost of operating the notification center among its members.

SECTION 4. Tennessee Code Annotated, Section 65-31-111, is amended by adding the following as a new subsection:

(e) Each operator whose utility facilities have been damaged shall report the incident using the Damage Information Reporting Tool (DIRT) utilized by the Common Ground Alliance.

SECTION 5. Tennessee Code Annotated, Section 65-31-112, is amended by deleting the section and substituting the following:

(a) Any person who violates this chapter, or the rules and regulations promulgated under this chapter, shall be subject to a penalty as follows:

(1) For a first violation, the board shall require the violator to complete a course of training concerning compliance with this chapter as determined by the board;

(2) For a second or subsequent violation, the board shall require the violator to complete a course of training concerning compliance with this chapter as determined by the board or pay a civil penalty in an amount set by the board, not to exceed two thousand five hundred dollars (\$2,500) per incident, or both; and

(3) Notwithstanding subdivisions (1) and (2), if any violation was the result of gross negligence or willful or wanton misconduct as determined by the board, the board shall require the violator to complete a course of training concerning compliance with this chapter as determined by the board and pay a civil penalty in an amount set by the board, not to exceed five thousand dollars (\$5,000) per incident.

(4) For the purposes of this chapter, any monetary civil penalties shall not apply to any department of the state. In the event that a state department is found by the board to be noncompliant, the board may submit a notice of noncompliance to the department head along with a request for an action plan for future compliance.

(b) This section shall not be construed to limit any person's right to pursue any additional civil remedy otherwise allowed by law.

(c) Any person who is required to complete a course of training under subsection (a) shall be responsible for paying for the cost of any such training.

(d)

(1) Any excavator who violates this chapter may be issued a notice of violation by the board inspector, and the inspector may require any excavator to cease work on any excavation, or not start a proposed excavation, until the excavator complies with this chapter.

(2) An excavator who complies with this chapter shall not be liable for damage that the excavator causes to an operator's underground facility, if:

(A) The operator received the notification required by § 65-31-106;

(B) The operator fails to locate its facilities as required by § 65-31-108; and

(C) The damage is a proximate result of the operator's failure to locate its facilities as required by § 65-31-108.

(3)

(A) Any person who violates § 65-31-106 and whose subsequent excavating or blasting damages utility facilities or sewer laterals shall also indemnify the affected facility owner or operator and the one-call service against all claims or costs incurred, if any, for personal injury, property damage, or service interruptions resulting from damaging the utility facilities and sewer laterals.

(B) The requirements of subdivision (3)(A) shall not apply to any state agency, county, city, town, utility district or other political subdivision of this state.

(e) Any person who knowingly and willfully removes or otherwise destroys the stakes or other physical markings used to mark the horizontal route of an underground facility commits the offense of vandalism under § 39-14-408, and shall be subject to the punishment for vandalism under § 39-14-105.

SECTION 6. Tennessee Code Annotated, Section 65-31-114, is amended by deleting the section and substituting the following:

(a) There is hereby created within the Tennessee regulatory authority, created by § 65-1-101, an underground utility damage enforcement board for the purpose of enforcing this chapter.

(b) The Tennessee regulatory authority will provide administrative and investigative support for the board subject to concurrence by the board. Pursuant to § 65-2-122, the Tennessee regulatory authority shall charge the expenses associated with the administration and investigative duties of the board back to the board, subject to concurrence by the board.

(c) The board shall be composed of thirteen (13) members. Except for initial appointments, members who are not ex officio members shall be appointed to four-year terms. Appointments to the board shall be made as follows:

(1) The president of Tennessee One-Call, Inc., or the president's designee, who shall be a voting, ex-officio member;

(2) One (1) member shall be a person representing the interests of Tennessee natural gas distribution systems to be appointed by the governor whose initial term shall be four (4) years. In considering appointees, the governor shall review a list of qualified persons submitted by the Tennessee Gas Association;

(3) One (1) member shall be a person representing the interests of Tennessee utility districts to be appointed by the speaker of the senate whose initial term shall be four (4) years. In considering appointees, the speaker shall review a list of qualified persons submitted by the Tennessee Association of Utility Districts;

(4) One (1) member shall be a person representing interests of the Tennessee cable industry to be appointed by the speaker of the house whose initial term shall be four (4) years. In considering appointees, the speaker shall review a list of qualified persons submitted by the Tennessee Cable and Telecommunications Association;

(5) One (1) member shall be a person representing the interests of large Tennessee incumbent local exchange carriers with more than one hundred thousand (100,000) customers to be appointed by the speaker of the house whose initial term shall be four (4) years;

(6) One (1) member shall be a person representing the interests of Tennessee towns and cities to be appointed by the governor whose initial term shall be three (3) years. In considering appointees, the governor shall review a list of qualified persons submitted by the Tennessee Municipal League;

(7) One (1) member shall be a person representing the interests of small Tennessee incumbent local exchange carriers to be appointed by the speaker of the senate whose initial term shall be three (3) years. In considering appointees, the speaker shall review a list of qualified persons submitted by the Tennessee Telecommunications Association;

(8) One (1) member shall be a person representing the interests of Tennessee counties to be appointed by the speaker of the house whose initial term shall be three (3) years. In considering appointees, the speaker shall review a list of qualified persons submitted by the Tennessee County Services Association;

(9) One (1) member shall be a person representing the interests of Tennessee road builders to be appointed by the governor whose initial term shall

be three (3) years. In considering appointees, the governor shall review a list of qualified persons submitted by the Tennessee Road Builders Association;

(10) One (1) member shall be a person representing the interests of the excavation industry to be appointed by the speaker of the senate whose initial term shall two (2) years. In considering appointees, the speaker shall review a list of qualified persons submitted by the Associated Builders and Contractors of Tennessee;

(11) One (1) member shall be a person representing the interests of interstate pipelines to be appointed by the speaker of the house whose initial term shall be two (2) years;

(12) One member (1) shall be a private property owner representing agricultural or homeowners' interests to be appointed by the governor whose initial term shall be two (2) years; and

(13) One member (1) shall be a person representing the interests of electric utilities with underground facilities to be appointed by the speaker of the senate whose initial term shall be two (2) years.

(d) Every two (2) years the board shall elect a chair from among its members and such other officers as the board deems necessary.

(f) The members of the board shall serve without compensation.

SECTION 7. Tennessee Code Annotated, Title 65, Chapter 31, Part 1, is amended by adding the following as new sections:

65-31-115.

(a) The board has the power and authority to:

(1) Promulgate rules and regulations, in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5 for the conduct of the affairs of the board;

(2) Adopt a seal for the board, prescribe the style of the seal and alter the seal at the board's pleasure; and

(3) Make and enter into contracts.

(b) The board shall:

(1) Initiate investigations and conduct hearings as required by § 65-31-116;

(2) Meet a minimum of two (2) times per calendar year;

(3) Examine data regarding underground utility damage and make recommendations to the general assembly for further updates to this chapter;

(4) Manage the underground damage prevention fund created by § 65-31-117;

(5) Assess its annual operating cost to operators in an amount equal to the amount necessary to offset the cost of investigative and administrative services performed by the Tennessee regulatory authority at the direction of the board. Such annual operating costs shall be apportioned and collected by the one-call service from the operators;

(6) Subject to the availability of funding in the underground damage prevention fund created by § 65-31-117, contract with appropriate entities or agencies to conduct training and public awareness for damage prevention.

65-31-116.

(a) Upon receipt of a complaint of a violation of this chapter, the board shall initiate an investigation of the complaint by requesting that the Tennessee regulatory authority designate an employee of the authority who will investigate the complaint at the board's direction.

(b) Any investigator acting at the direction of the board may issue citations for violations of this chapter. Any issuing investigator shall indicate on the citation the time and location for a hearing concerning the alleged violations contained in such citation. Any such citation may include a recommendation for the penalty to be assessed under § 65-31-112.

(c) If the person to whom the citation is issued under subsection (b) does not pay the citation, or submit to ordered training, or both, within thirty (30) days then the board shall conduct a hearing pursuant to the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, at the time and place set forth in the citation.

(d) Following a hearing under subdivision (c)(1)(B), the board shall either:

- (1) Dismiss the complaint;
- (2) Reduce the penalty recommended by the investigator; or
- (3) Affirm the citation and assess an appropriate penalty.

65-31-117.

(a) There is created an underground damage prevention fund within the Tennessee Regulatory Authority. All civil penalties collected pursuant to this chapter shall be deposited into the underground damage prevention fund. Any moneys remaining in the underground damage prevention fund at the end of the fiscal year shall not revert to the general fund, but shall remain in the underground damage prevention fund for the exclusive use of the board.

(b) The expenditure of monies in the underground damage prevention fund shall be at the discretion of the board for the following purposes:

- (A) Grants to operators to assist the recipient in complying with this chapter. Grants may not be used for operating expenses; and

(B) Contracting with providers of public awareness, educational and compliance training.

65-31-118.

(a) Any person may submit a design locate request to the one-call service. Such design locate request shall:

(1) Describe the tract or parcel of land for which the design locate request has been submitted with sufficient particularity, as defined by policies developed by the one-call service, to enable the facility owner or operator to ascertain the precise tract or parcel of land involved; and

(2) State the name, address, and telephone number of the person who has submitted the design locate request, as well as the name, address, and telephone number of any other person authorized to review any records subject to inspection under subdivision (b)(3).

(b)

(1) Within fifteen (15) working days after a design locate request has been submitted to the one-call service for a proposed project, the facility owner or operator shall respond by one of the following methods:

(A) Designate or cause to be designated by a locator under § 65-31-108 the location of all utility facilities and laterals within the area of the proposed excavation;

(B) Provide to the person submitting the design locate request the best available description of all utility facilities and sewer laterals in the area of proposed excavation, which might include drawings of utility facilities and sewer laterals already built in the area, or other facility records that are maintained by the facility owner or operator; or

(C) Allow the person submitting the design locate request or any other authorized person to inspect or copy the drawings or other records for all utility facilities and sewer laterals within the proposed area of excavation.

(2) In the event that the one-call service charges a fee to a member operator for design location notification, the utility operator may recover that fee from the requestor.

(c) Upon responding using any of the methods authorized by subsection (b), the facility owner or operator shall provide the response to the one-call service in accordance with one-call service procedures.

(d) An operator may reject a design notice based upon homeland security considerations pending the operator obtaining additional information confirming the legitimacy of the notice. The operator shall notify the person making the request through a design notice of the denial and may request additional information through the positive response system.

(e) Nothing in this section shall supersede any federal, state, or local laws governing the confidentiality of the location of utility facilities.

(f) Any utility operator responding to a request for a design location under this section shall not be liable for any damages associated with the response to the request for a design location under this section.

(g) Nothing in this chapter shall be construed as amending, altering or affecting title 54, chapter 5, part 8.

65-31-119. Nothing in this chapter shall be construed as extending to the Tennessee regulatory authority any authorization to regulate any entity that the Tennessee regulatory authority was not authorized to regulate prior to the effective date of this act.

SECTION 8. Tennessee Code Annotated, Section 4-29-237(a), is amended by adding the following as a new subdivision:

() Underground utility damage enforcement board, created by § 65-31-114.

SECTION 9. This act shall take effect upon becoming a law, the public welfare requiring it.