ENGROSSED HOUSE
BILL NO. 1644 By: Rousselot of the House

and

Garrison of the Senate

An Act relating to public health and safety; amending 63 O.S. 2001, Sections 142.2, as last amended by Section 1, Chapter 427, O.S.L. 2004, 142.3, as amended by Section 2, Chapter 362, O.S.L. 2003, 142.9, 142.9a, as last amended by Section 6, Chapter 362, O.S.L. 2003 and 142.11, as amended by Section 8, Chapter 362, O.S.L. 2003 (63 O.S. Supp. 2008, Sections 142.2, 142.3, 142.9a and 142.11), which relate to the Oklahoma Underground Facilities Damage Prevention Act; adding a definition; deleting certain exemption for municipalities; deleting certain option for municipalities; requiring an excavator to report damages within certain time period; requiring act to apply to all excavators operating in the state; providing penalties for violation of the act; providing penalties for intentional violation of the act; making each violation a separate offense; setting time limitation for imposing penalties; authorizing the Corporation Commission to reduce any penalties upon certain actions by the excavator; setting conditions; allowing the Attorney General to bring an action to collect penalties; providing for deposit of penalties; limiting authority of the Commission to seek penalties; authorizing the Commission to investigate complaints of violations; directing the Commission to establish an enforcement committee; providing for membership, meetings, and duties of the committee; providing for formal hearing proceeding; deleting certain exemption for public agencies; requiring public agencies to make certain notification for certain projects; creating the Oklahoma Underground Facilities Damage Prevention Training Revolving Fund; making fund continuing; stating source of funding; providing for budgeting and expenditure; stating purpose; requiring claims to

be filed in certain manner; amending 17 O.S. 2001, Section 180.11, which relates to the assessment upon public utilities; expanding the use of the assessment on public utilities; requiring credit of certain portion of monies to the Pipeline Safety Department for certain purposes; directing the Legislature to establish certain budgetary limits; repealing Section 9, Chapter 362, O.S.L. 2003 (63 O.S. Supp. 2008, Section 142.12), which relates to authorization to elect to participate in the one-call notification center; providing for codification; providing an effective date; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 63 O.S. 2001, Section 142.2, as last amended by Section 1, Chapter 427, O.S.L. 2004 (63 O.S. Supp. 2008, Section 142.2), is amended to read as follows:

Section 142.2 As used in the Oklahoma Underground Facilities Damage Prevention Act:

1. "Certified project" means a project where the public agency responsible for the public project, as part of its procedure, certifies that the project right-of-way is free and clear of underground facilities or wherein the public agency responsible for such project, as part of its procedure, notifies all persons determined by the public agency to have underground facilities located within the construction right-of-way and certifies that all known underground facilities are duly located or noted on the engineering drawings for the project;

2. <u>"Commission" means the Corporation Commission;</u>

3. "Damage" means any impact upon or removal of support from an underground facility as a result of explosion, excavation or demolition which according to the operating practices of the operator of the underground facilities would necessitate the repair thereof;

~~3.~~ 4. "Demolish" means to wreck, raze, render, move or remove a structure by means of any equipment or explosive;

~~4.~~ 5. "Demolition" means the act or operation of demolishing a structure;

~~5.~~ 6. "Excavate" means to dig, compress or remove earth, rock or other materials in or on the ground by use of mechanized equipment or blasting, including, but not necessarily limited to, augering, boring, backfilling, drilling, grading, pile driving, plowing in, pulling in, trenching, tunneling and plowing; provided, however, that neither:

a. the moving of earth by tools manipulated only by human or animal power, nor

b. any form of cultivation for agricultural purposes, nor any augering, dozing by noncommercial dozer operators or digging for postholes, farm ponds, land clearing or other normal agricultural purposes, nor

c. routine maintenance, nor

d. work by a public agency or its contractors on a preengineered project, nor

e. work on a certified project, nor

f. work on a permitted project, nor

g. the opening of a grave in a cemetery, nor

h. a solid waste disposal site which is a preengineered project, nor

i. any individual excavating on his own property and who is not in the excavating business for hire,

shall be deemed excavation;

~~6.~~ 7. "Excavation" means the act or operation of excavating;

~~7.~~ 8. "Excavator" means a person or public agency that intends to excavate or demolish within the State of Oklahoma;

~~8.~~ 9. "Notification center" means the statewide center currently known as the Oklahoma One-Call System, Inc., which has as one of its purposes to receive notification of planned excavation and demolition in a specified area from excavators, and to disseminate such notification of planned excavation or demolition to operators who are members and participants;

~~9.~~ 10. "Operator" shall mean and include any person or public agency owning or operating underground facilities;

~~10.~~ 11. "Permitted project" means a project where a permit for the work to be performed must be issued by a state or federal agency and, as a prerequisite to receiving such permit, the applicant must locate all underground facilities in the area of the work and in the

vicinity of any blasting and notify each owner of such underground facilities;

~~11.~~ 12. "Person" includes any individual, partnership, corporation, association, cooperative, trust or other entity, including a person engaged as a contractor by a public agency, but not including a public agency;

~~12.~~ 13. "Preengineered project" means a public project wherein the public agency responsible for such project, as part of its engineering and contract procedures, holds a meeting prior to the commencement of any construction work on such project in which all persons, determined by the public agency to have underground facilities located within the construction area of the project, are invited to attend and given an opportunity to verify or inform the public agency of the location of their underground facilities, if any, within the construction area and where the location of all known underground facilities are duly located or noted on the engineering drawing and specifications for the project;

~~13.~~ 14. "Public agency" means the state or any board, commission or agency of the state, and any city, town, county, subdivision thereof or other governmental entity;

~~14.~~ 15. "Routine maintenance" means the grading of roads and barrow or drainage ditches, the removal and replacement of pavement, including excavation relating thereto and the installation and maintenance of drainage and bridge facilities, signs, guardrails,

and electrical and communications facilities in or on the public rights-of-way by a public agency; and

~~15.~~ 16. "Underground facility" means any underground line, cable, facility, system and appurtenances thereto, for producing, storing, conveying, transmitting or distributing communication (including voice, video, or data information), electricity, power, light, heat, refined petroleum products, water (including storm water), steam, sewage and other commodities. Underground facilities shall also mean oil and natural gas pipelines that are subject to the Hazardous Liquid Transportation System Safety Act and natural gas pipelines subject to the jurisdiction of the ~~Oklahoma~~ Corporation Commission Pipeline Safety Department, and any oil and gas pipeline located in a public right-of-way.

SECTION 2. AMENDATORY 63 O.S. 2001, Section 142.3, as amended by Section 2, Chapter 362, O.S.L. 2003 (63 O.S. Supp. 2008, Section 142.3), is amended to read as follows:

Section 142.3 ~~Except for a municipality, all~~ All operators of underground facilities shall participate in the statewide one-call notification center and shall have on file with the notification center a notice that such operator has underground facilities, the county or counties where such facilities are located, and the address and telephone number of the person or persons from whom information about such underground facilities may be obtained. ~~A municipality may, at its discretion, participate in the statewide~~

~~one-call notification center as provided for in this section or may provide information concerning the underground facilities of the municipality as provided for in Section 9 of this act.~~

SECTION 3. AMENDATORY 63 O.S. 2001, Section 142.9, is amended to read as follows:

Section 142.9 A. When any damage occurs to an underground facility or its protective covering, the operator ~~thereof~~ of the facility shall be notified immediately by the excavator who caused the damage. In addition, within forty-eight (48) hours after the damage occurred, the excavator shall report the incident to the one-call notification center. The notification center shall keep a record of all reported incidents.

B. Upon receiving notice of ~~such~~ damage, the operator shall promptly dispatch personnel to the location to effect temporary or permanent repairs.

C. Should damage occur that endangers life, health or property, the excavator responsible for the work shall keep all sources of ignition away from the damaged area and shall take immediate action to protect the public and property and to minimize the hazard until arrival of the operator's personnel or until the appropriate police or fire officials shall have arrived and taken charge of the damaged area.

D. An excavator shall delay any backfilling in the immediate area of the damaged underground facilities until the damage has been

repaired, unless the operator authorizes otherwise. The repair of ~~such~~ damage must be performed by the operator or by qualified personnel authorized by the operator.

SECTION 4. AMENDATORY 63 O.S. 2001, Section 142.9a, as last amended by Section 6, Chapter 362, O.S.L. 2003 (63 O.S. Supp. 2008, Section 142.9a), is amended to read as follows:

Section 142.9a A. All excavators operating in the state shall be subject to all of the provisions of the Oklahoma Underground Facilities Damage Prevention Act.

B. Any excavator~~, except for a public agency~~ who fails to comply with the Oklahoma Underground Facilities Damage Prevention Act and who damages an underground facility owned or operated by a nonprofit rural water corporation organized pursuant to Section 863 of Title 18 of the Oklahoma Statutes or a rural water district organized pursuant to the Rural Water, Sewer, Gas, and Solid Waste Management Districts Act, shall be liable for the underground damage to and responsible for the repair of such facilities. Any new underground facilities installed on and after September 1, 1992, shall contain materials capable of being detected so that the facilities can be accurately located.

~~B.~~ C. Any excavator who damages or cuts an underground facility, as a result of negligently failing to comply with the provisions of the Oklahoma Underground Facilities Damage Prevention Act or as a result of failing to take measures for the protection of

an underground facility shall be liable to the operator of the underground facility for the repair of the damaged underground facility.

~~C. Except for public agencies, any~~ D. Any excavator who by willful act or by reckless disregard of the rights of others, repeatedly violates the provisions of the Oklahoma Underground Facilities Damage Prevention Act and repeatedly damages underground facilities, thereby threatening the public health, safety, and welfare, may be enjoined by a court of competent jurisdiction from further excavation.

E. 1. Except as otherwise provided for in paragraph 2 of this subsection, and in addition to all other penalties provided by law, any excavator found to have violated any provision of the Oklahoma Underground Facilities Damage Prevention Act which results in damage to underground facilities shall be subject to a penalty of not more than One Thousand Dollars ($1,000.000) for the first violation and not more than Five Thousand Dollars ($5,000.00) for each subsequent violation.

2. In addition to all other penalties provided by law, any excavator who intentionally violates or who intentionally procures, aids or abets in the violation of any provision of the Oklahoma Underground Facilities Damage Prevention Act shall be subject to a penalty of not more than Five Thousand Dollars ($5,000.00) for the

first violation and not more than Ten Thousand Dollars ($10,000.00) for each subsequent violation.

3. Each violation of any provision of the Oklahoma Underground Facilities Damage Prevention Act shall be a separate offense. In the case of a continuing violation, each day that the violation continues shall constitute a separate violation.

4. Penalties provided for pursuant to this subsection shall not be imposed except by order of the Corporation Commission. A complaint must be filed within two (2) years following the date of the violation.

5. The Commission may reduce any penalty provided in this section on any terms the Commission considers proper if the excavator:

a. admits to the violation or violations alleged in the complaint and makes a timely request for reduction of the penalty or the defendant submits to the Commission a written request for reduction of the penalty within fifteen (15) days from the date of the penalty order, and

b. participates in training on the excavation laws offered or approved by the Commission.

The Commission may hold the reduced portion of the penalty in abeyance and if the excavator complies with the provisions of this paragraph and can demonstrate that for a period of at least twelve

(12) months from the date of the last violation that the excavator has not been in violation of the act, the Commission may waive that portion of the penalty.

6. If the amount of the penalty is not paid to the Commission, the Attorney General, at the request of the Commission, shall bring an action in the name of the state in district court to recover the penalty. The action shall not be commenced until after the time has expired for an appeal from the findings, conclusions and order of the Commission.

7. Notwithstanding any other provision of law, all penalties recovered pursuant to this subsection shall be deposited in the Oklahoma Underground Facilities Damage Prevention Training Revolving Fund established pursuant to Section 6 of this act.

8. The Commission shall not seek penalties under this subsection except in response to a complaint alleging a violation of an Oklahoma Underground Facilities Damages Prevention Act filed with the one-call notification center. The Commission may investigate any complaint, and the Commission shall have sole discretion to seek penalties under this subsection.

9. The Commission shall establish an enforcement committee that shall provide an informal process for all parties involved in the complaint to discuss the issues. The enforcement committee shall be composed of one representative from each of the following:

a. the one-call notification center board of directors,

b. the pipeline industry,

c. the utility industry,

d. the telecommunications industry,

e. a municipality with underground facilities, and

f. a county commissioner.

The enforcement committee shall meet as needed to address complaints. After reviewing a complaint, the enforcement committee shall report their findings and recommendations to the Commission. The recommendations of the enforcement committee shall be advisory only and not binding on the Commission.

10. If resolution of a complaint cannot be reached through the procedures set forth in paragraphs 8 and 9 of this subsection, the complaint shall proceed to formal hearing before the Commission.

SECTION 5. AMENDATORY 63 O.S. 2001, Section 142.11, as amended by Section 8, Chapter 362, O.S.L. 2003 (63 O.S. Supp. 2008, Section 142.11), is amended to read as follows:

Section 142.11 Notwithstanding anything which may be contained in this act to the contrary, public agencies and their contractors engaged in work within the public right-of-way which work is a preengineered project, certified project or routine maintenance shall ~~be exempt from the provisions of this act. Provided, a public agency contractor~~, prior to engaging in work on such a project or routine maintenance, ~~shall~~ take reasonable steps to determine the location of underground facilities in or near the proposed area of

work. Reasonable steps ~~may~~ shall include utilization of the statewide one-call notification center procedures as provided for in Section 142.6 of this title at least forty-eight (48) hours prior to engaging in the work.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 180.12 of Title 17, unless there is created a duplication in numbering, reads as follows:

There is hereby created in the State Treasury a revolving fund for the Corporation Commission to be designated the "Oklahoma Underground Facilities Damage Prevention Training Revolving Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received by the Commission from penalties collected as provided for in Section 142.9a of Title 63 of the Oklahoma Statutes. All monies accruing to the credit of said fund are hereby appropriated and may be budgeted and expended by the Commission for the purpose of providing training to excavators found in violation of the Oklahoma Underground Facilities Damage Prevention Act. Expenditures from said fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.

SECTION 7. AMENDATORY 17 O.S. 2001, Section 180.11, is amended to read as follows:

Section 180.11 A. The Corporation Commission is hereby authorized to assess a fee upon each public utility to provide adequate funding to the Public Utility Division of the ~~Oklahoma~~ Corporation Commission for the regulation of public utilities in this state and for providing for timely and expeditious reviews and completion of rate cases, ~~and~~ providing increased responsiveness to the needs of consumers and the regulated community, and to provide adequate funding to the Pipeline Safety Department of the Corporation Commission to investigate complaints of violations of the Oklahoma Underground Facilities Damage Prevention Act.

B. 1. The assessment authorized by this section may, after excluding the amount allocated to interexchange telecommunications companies, resellers, pay phone service providers and operator service providers in paragraph 2 of this subsection, be borne by the affected public utilities as follows:

a. one-half (1/2) shall be allocated based on that proportion which the total regulated Oklahoma jurisdictional gross operating revenues of each public utility bear to the total regulated Oklahoma jurisdictional gross operating revenues of all public utilities, and

b. one-half (1/2) shall be allocated based on that proportion which the total number of regulated Oklahoma jurisdictional customers of each public

utility bears to the total number of regulated Oklahoma jurisdictional customers of all public utilities.

2. For interexchange telecommunications companies, resellers, pay phone service providers and operator service providers, the allocation may be based on the total regulated Oklahoma jurisdictional gross operating revenues that each interexchange telecommunications company, reseller or operator service provider bears in proportion to the total regulated Oklahoma jurisdictional gross operating revenue of all public utilities as applied to the total amount of the assessment to be collected from all public utilities for each year.

C. Any assessment levied pursuant to this section shall be recoverable as an operating expense to the public utility and shall be included in a utility's base rates or basic monthly service charge. The Corporation Commission shall take such action necessary to ensure recovery of the assessment by a public utility during the period for which it is levied.

D. The Corporation Commission may provide that each public utility shall pay any assessment levied pursuant to this section on a quarterly basis. Notice of the annual assessment shall be sent by certified mail, return receipt requested, to each public utility. Each public utility shall pay the amount assessed to the Commission for deposit to the Public Utility Regulation Revolving Fund created

in subsection E of this section. A public utility may, at its discretion, pay its annual assessment prior to the due date of the quarterly payments.

E. Any assessment collected by the Commission pursuant to this section shall be deposited in the Public Utility Regulation Revolving Fund hereby created. The fund shall be a continuing fund not subject to fiscal year limitations and shall consist of the monies received by the Commission from any assessment levied pursuant to the provisions of this section. All monies accruing to the credit of the fund are hereby appropriated and may be budgeted and expended by the Commission to pay the costs, both direct and indirect, of the Public Utilities Division incurred to regulate public utilities. A portion of monies accruing to the credit of the fund shall be transferred to the Pipeline Safety Department and used to investigate violations of the Oklahoma Underground Facilitates Damage Prevention Act. Expenditures from said fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.

F. The Legislature shall establish budgetary limits for the Public Utility Division of the Corporation Commission and the Pipeline Safety Department of the Corporation Commission for purposes of investigating violations of the Oklahoma Underground Facilities Damage Prevention Act. Any assessment levied pursuant to

this section shall not exceed the amount of the budgetary limits and indirect costs for related support functions established by the Legislature for any fiscal year.

G. For purposes of this section, "public utility" means:

1. A public utility as defined by Section 151 of ~~Title 17 of the Oklahoma Statutes~~ this title, excluding those companies encompassed by paragraph (d) of Section 151 of ~~Title 17 of the Oklahoma Statutes~~ this title;

2. Any telephone or telecommunications company subject to Section 131 et seq. of ~~Title 17 of the Oklahoma Statutes~~ this title, including interexchange telecommunications companies or such other telecommunications companies as defined by OCC Rule OAC 165:55-1-4, resellers as defined by OCC Rule OAC 165:56-1-4 and operator service providers as defined by OCC Rule OAC 165:57-1-4; and

3. Any association or cooperative corporation doing business under the Rural Electric Cooperative Act except for generation and transmission associations or cooperative corporations, or transmission associations or cooperative corporations.

H. It is the intention of the Legislature that this entire section is an amendment to and alteration of Sections 18 through 34, inclusive, of Article IX of the Constitution of the State of Oklahoma, as authorized by Section 35 of Article IX of said Constitution.

SECTION 8. REPEALER Section 9, Chapter 362, O.S.L. 2003 (63 O.S. Supp. 2008, Section 142.12), is hereby repealed.

SECTION 9. This act shall become effective July 1, 2009.

SECTION 10. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

Passed the House of Representatives the 24th day of February, 2009.

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Presiding Officer of the House of Representatives

Passed the Senate the ____ day of _____, 2009.

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Presiding Officer of the Senate