March 21, 2006

Honorable Philip Bartlett, Senate Chair
Honorable Lawrence Bliss, House Chair
Joint Standing Committee on Utilities and Energy
100 State House Station
Augusta, ME 04333

Re: LD 2060, Resolve, Regarding Legislative Review of Portions of Chapter 895: Underground Facility Damage Prevention Requirements, a Major Substantive Rule of the Public Utilities Commission

Dear Senator Bartlett and Representative Bliss:

The Commission will testify in favor of LD 2060. The Resolve would adopt Chapter 895 of the Commission's rules, which the Commission provisionally adopted on February 22, 2006.

***Background – the Dig Safe Law***

23 M.R.S.A. §3360-A establishes procedures that act to avoid harm to excavators, the public, and underground facilities that can occur if an excavator damages an underground facility such as an electrical conduit, a natural gas pipeline, a telephone cable, or a water main. The law establishes procedures that must be followed by excavators and facility operators, and it establishes a one-call center that facilitates information flow between excavators and operators. Generally, these procedures require that an excavator mark the location of an excavation and call the one-call center, that the one-call center notify operators of underground facilities located near the excavation, and that the operators mark the location of their facilities within the excavation area. Before beginning excavation, an excavator must wait three days after notifying the one-call center to allow time for operators to mark their facilities.

Under the Dig Safe Law, some underground facility operators, such as water and sewer utilities, are exempt from membership in Dig Safe, although they may voluntarily join. Thus, the law also requires excavators to individually notify all non-member underground facility operators.

The Dig Safe System, Inc., a utility-owned corporation that operates the New England regional underground damage prevention system, currently operates the one-call center directed by the Dig Safe Law.

Chapter 895 of the Commission's Rules establishes procedures by which excavators, underground facility operators, and the one-call center carry out the requirements of the Dig Safe Law.

During the first session of the 122st Legislature, the Legislature enacted P.L. 2005, ch. 334 (the 2005 Act), which directed the Commission to address four issues through rulemaking:

- alternative notice requirement procedures for excavation;
- newly installed underground facilities in active excavation areas;
- penalties; and
- discovered facilities.

***Revisions Provisionally Adopted in this Rulemaking***

1. Alternative notice requirement procedures for excavators. The 2005 Act allows the Commission to "extend alternative notice requirements established for excavation associated with drinking water well construction… to other types of excavation." The alternative notice requirement, which is associated with drinking water well construction, states that an excavator need not notify the Dig Safe System (System) if the excavator discovers from a Commission reference database that there are no member operator facilities in the excavation area. The excavator must notify all non-member operators that are listed on the reference database as having underground facilities in the excavation area. This procedure allows excavators to avoid a delay of 3 days allotted to allow operators to mark facilities in the excavation area in instances when no underground facilities are present.

All excavators would benefit from this procedure. Accordingly, we extended this alternative notification option to all excavators without opposition. This was done by revising Sections 2(H-1) and 4(B)(1)(a)(ii) in the provisionally adopted rule.

2. Newly installed underground facilities in active excavation areas. The 2005 Act requires the Commission to "establish procedures to reduce the incidence of damage to newly installed underground facilities in active excavation areas as defined by the commission by rule." An excavator pre-marks an excavation site and operators mark existing underground facilities once, before excavation begins; however, operators are not required to mark new facilities installed during the construction process, thereby creating the risk of damage by

subsequent excavators who may not know the new facilities have been installed. The provision addresses this risk.

To most efficiently accomplish this provision, the Commission weighed the goal of ensuring that all excavators are aware of all installed underground facilities with the effort and cost required to attain this goal. A variety of possible approaches were explored. We adopted six revisions to the rule that, taken in their entirety, will lessen the existing vulnerability in many circumstances.

a. Excavators must obtain a new Dig Safe ticket every 30 days. This requirement results in newly installed facilities being located and marked by the operator, if the Dig Safe System's records have been updated to reflect the existence of these facilities or if the operator has other existing facilities in the excavation area. This requirement is consistent with practices in many other states, including neighboring New Hampshire.

b. Operators must send updated records of newly installed facilities to the System within 21 business days of obscuring the facility with soil. This requirement increases the likelihood that the operator will be notified that it must locate and mark the newly installed facility when an excavator obtains (or re-obtains every 30 days) a ticket from the Dig Safe System. A delay of 21 days results in an exposure period during which an excavator notifies the System but the System has no record of the facility and thus does not notify the operator to locate the facility. However, the 21-day time frame was the shortest that could be attained by most of those who commented in the rulemaking.[1]

c. The Dig Safe System must update its records within 21 business days of receiving updated records from an operator. This requirement complements the comparable requirement that operators update records of newly installed procedures (part (b) above).

d. Each excavation company must obtain a ticket from the Dig Safe System. This requirement avoids the risk that a general contractor obtains the damage prevention ticket but fails to notify all sub-contracted excavators of the existence of underground facilities.

e. Operators must mark newly installed facilities within one day of installation. This requirement ensures that newly installed underground facilities will be marked in the same manner that occurs when the System notifies operators of impending excavation. This will increase the likelihood that excavators are made aware that the facilities exist. As noted earlier, the operator

[1] We note that a utility frequently does not assume ownership or operation of a facility until the facility is completely installed. Thus, during the installation period, when the installer is not a member of the Dig Safe System, no information will be provided to the System.

may initially be the developer or site owner, who must arrange to have the excavator or some other entity comply with this provision.

f. Operators may, at their own option, submit pre-construction plans to the Dig Safe System. When an operator uses this option, it would result in the System notifying the operator to perform a location when excavation is imminent. The operator would locate and mark the facility if notified after it had been installed. The operator would mark the actual location of the newly-installed facility even if the installed location differed somewhat from the plans submitted to the System.

In the provisionally adopted rule, these changes are in the form of amendments to Sections 4(B)(1)(a), 5(B)(10), 6(A)(1)(d)(iii), 6(B)(5), and 6(D)(3).

3. Penalties. The 2005 Act requires that the Commission establish "standards for when and at what level penalties must be assessed." This provision expands upon the law's provision that the Commission may impose an administrative penalty for certain violations of the damage prevention law and that the penalty shall be no greater than $500 or, for subsequent violations within a 12-month period, no greater than $5,000.

The provisionally adopted rule includes seven criteria that the Commission would take into account when determining the level of an administrative penalty. Taken together, the criteria allow the flexibility necessary to respond to the wide variety of situations the Commission encounters when considering violations. The seven criteria are:

a. Record of the violator, including, to the extent applicable, the number of successful excavations undertaken by the violator or the number of locations successfully marked by the violator during the prior 12 months;

b. Whether the violation resulted in death or personal injury, the degree to which it posed a risk of death or personal injury, and the degree to which it caused or posed a risk of public inconvenience;

c. Amount of property damage caused by the violation;

d. Degree of compliance with other provisions of this rule;

e. Good faith attempts to comply with the violated provision of this rule;

f. Steps to ensure future compliance; and

g. Amount necessary to deter future violation.

The 2005 Act also requires the Commission to consider how to implement the requirement in the law that the Commission consider "evidence of

the record of the violator, including, to the extent applicable, the number of successful excavations undertaken by the violator or the number of locations successfully marked by the violator during the prior 12 months."

To comply with this requirement, we include this provision as one of the seven criteria we will consider when imposing a penalty. However, we continue to be skeptical that we will be able to make a reasonable judgment using this criterion. We have no reasonable way to ascertain the number of successful locates that an operator has performed. Some participants in the rulemaking process assert that the number of notifications an operator receives from the System is a reasonable proxy for the number of successful locates. We disagree. A significant number of notifications occur in instances when no facilities exist in the excavation site; counting these notifications as a "successful locate" is misleading and inaccurate. In addition, an inaccurate locate does not necessarily result in an excavator damaging the facility, so the number of locates is not equivalent to the number of successful locates. Determining the number of successful excavations performed by a private excavating company is equally problematic, in that the Commission must simply ask the excavator, creating a potentially onerous situation for the excavator and resulting in data that is impossible to verify.

Aside from our concerns regarding our inability to obtain accurate data, it is not clear to us how best to use the information we obtain. In particular, it is unclear how an entity that regularly and successfully engages in underground facility activity (and thus might be expected to be well-practiced as well as knowledgeable about the damage prevention requirements) should be compared with one that infrequently engages in underground facility activity.

When we carry out our enforcement procedures, we will invite participants to present evidence of successful excavations or locates. However, we want the Committee to know that we are skeptical that any entity will be able to do so with enough factual certainty to convince us to use the information. We do not intend to rely upon the number of notifications as an indicator of successful locates. We call this to the Committee's attention so that if it does not agree with our assessment and wishes us to use particular pieces of information (such as the number of notifications) as proxies for success, it may do so through explicit legislation.

In the provisionally adopted rule, these changes are in the form of amendments to Sections 8(D) and 8(E).

Alternatively, the Committee might consider replacing the first criterion (and the associated statutory language) with the requirement to consider the history of previous violations, as a reasonable way to evaluate and reward operators and excavators that follow the law.

4. Discovered facilities. The 2005 Act requires that, "when an underground facility is discovered during an excavation and the location of that facility was, prior to the discovery, unknown or unclear to the operator, the Public Utilities Commission may direct that operator to determine and map the location of the facility for a reasonable distance, as determined by the (C)ommission, from the point of discovery."

The provisionally adopted rule requires that an operator locate the discovered facility to the point it connects to a known facility or to the point that it ends (or other length if approved by the Commission), that a member operator notify the System of a discovered facility within 21 business days of discovering it, and that the System update its records within 21 business days of receiving this information.

In the provisionally adopted rule, these changes are in the form of amendments to Sections 6(B)(6), 6(A)(1)(d)(iii), and 5(B)(10).

***Additional Issues***

***1. Implement Certain Provisions on April 1, 2007***

We suggest that the Committee establish an implementation date of April 1, 2007 for three revisions described on page 3 of this testimony: excavators to obtain a new Dig Safe ticket every 30 days, operators to send updated records to the System within 21 business days, and the System to update its records within 21 days of receiving updated records. In our March 8th waiver of the mapping requirements of the Rule due to the faulty System base maps, we allow operators to request notification of all excavations within a municipality in which they have underground facilities, rather than of just those excavations near their facilities. This temporary waiver will end on April 1, 2007 when the System will have installed a new computer system and base maps will likely be more accurate than those currently being used, enabling the System to provide more accurate notifications. Until the waiver expires, 30-day ticket renewals will result in an inordinate number of notifications, unnecessarily taxing operators as well as excavators. Accordingly, we suggest that implementation of this provision of the Rule be deferred until April 1, 2007. We also suggest that the Committee defer implementation of the two mapping update provisions until April 1, 2007 for operators that employ a municipality-wide notification default for System excavation notifications because in this circumstance the additional accuracy of the operators' facility locations would not result in more accurate notification.

### *2. Facility "Buffers"*

During the rulemaking, some operators suggested the Commission allow operators to expand the "footprint" of their facilities by adding a "buffer" to the facility locations on the maps supplied to and used by the System. The premise of this approach is that, the larger the facility area is, the greater the chances are that operators with newly installed, but unrecorded, facilities will be notified of excavations. These operators noted that this mechanism would lead to notification to operators of excavations near newly-installed facilities only in some circumstances.

While we did not revise the rule to reflect this suggestion, we have engaged in discussions with these operators outside the rulemaking process, with the goal of collaboratively identifying workable resolutions of each operator's concerns and particular circumstances. Through this process, we have granted waivers of the mapping requirements of the Rule when warranted and have established ongoing steps to continue the collaborative process through early 2007.[2] This issue is most effectively dealt with by allowing this collaborative process to unfold in response to improvements being made in the Dig Safe System's base maps and computer capabilities.

### *Compliance with the Administrative Procedures Act*

The revisions to Chapter 895 provisionally adopted by the Commission comply with the considerations that the Committee must review, as set forth in subsection 8072 (4) of Title 5. Each requirement of subsection 8072 is addressed below:

1. § 8072(4)(A). In provisionally adopting Chapter 895, the Commission has not exceeded the scope of its statutory authority. The revisions are made pursuant to P.L. 2005, ch. 334 and pursuant to the Commission's rulemaking authority established in 23 M.R.S.A. § 3360-A (13).

2. § 8072(4)(B). As explained in this testimony, the provisional rule is in conformity with the statutory directive enacted as P.L. 2005, ch 334.

3. § 8072(4)(C). The revised terms of the provisional rule do not conflict with any other provisions of the law or Commission rule.

4. § 8072(4)(D). The provisional rule is necessary to fully accomplish the statutory objectives for reasons discussed in this testimony.

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[2] See Docket No. 2003-672, Order Granting Waiver to All Operators (May 18, 2005), Docket No. 2003-672, Order Modifying Waiver (March 8, 2006), and Docket No. 2006-140, Order Granting Waivers of Chapters 140 and 895 to Maine Public Service Company (March 2006).

5. § 8072(4)(E). The provisional rule is reasonable as it affects the convenience of persons affected by it. Some participants in the rulemaking commented that the Commission's proposed rule contained unreasonably short time frames for notifying the Dig Safe System of new facilities or for updating the System's records. The provisionally adopted rule revised those time frames to better conform to companies' and the System's practices.

6. § 8072(4)(F). The amendments to the provisional rule are understandable to members of the general public who use the rule because they are consistent with the language and complexity of the remainder of the current rule.

7. § 8072(4)(G). The provisional rule was proposed and adopted in compliance with the provisions of 5 M.R.S.A. Chapter 375. The Committee has been provided with the Commission's Order Provisionally Adopting Amendments. The Order describes the Commission's procedures, the parties that participated in the rulemaking, the comments of all parties, and the Commission's reasons for reaching the decisions it made.

8. § 8072(4)(H). Finally, no reduction in property values will occur as a result of the changes enacted through the provisional rule.

The Commission will be represented at the work session to assist the Committee as it considers LD 2060.

Sincerely,

Marjorie R. McLaughlin

cc: Utilities & Energy Committee members
Jon Clark, legislative analyst