FINAL REPORT OF
THE JOINT SUBCOMMITTEE STUDYING

The Status and Implementation of the Virginia Underground Utility Damage Prevention Act

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

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To: The Honorable James S. Gilmore, III, Governor of Virginia
and
The General Assembly of Virginia

Richmond, Virginia
January 2001

I. INTRODUCTION

The 2000 Session of the General Assembly adopted Senate Joint Resolution 75 (Appendix A), which established a joint subcommittee to study the Status And Implementation of the Virginia Underground Utility Damage Prevention Act (the "Act"). The joint subcommittee was directed to consider the certification and governance of the notification centers by the State Corporation Commission. SJR 75 recites that the implementation of various provisions of the Act by the State Corporation Commission ("SCC"), including the Act's incident reporting requirements, has recently been the subject of criticism. It further recites that the effectiveness of the Act, relative to the burdens it imposes on utility operators and excavators, has not been comprehensively studied since the State Corporation Commission became responsible for enforcing the Act. The joint subcommittee is to complete its work in time to submit its findings and recommendations to the Governor and the 2001 Session of the General Assembly. The joint subcommittee was chaired by Senator William T. Bolling of Hanover County, who patroned SJR 75. Delegate Riley E. Ingram of Hopewell was elected vice chairman. Other legislative members of the joint subcommittee were Senator J. Randy Forbes of Chesapeake, Senator William C. Mims of Loudoun County, Delegate Harvey B. Morgan of Gloucester, Delegate Frank D. Hargrove of Hanover County, and Delegate Viola O. Baskerville of Richmond. Delegate C. Richard Cranwell of Vinton was appointed to the joint subcommittee but resigned from the body following its second meeting.

The Act has successfully reduced damage from accidental cut-ins to buried utility facilities. The successes of Virginia's "Miss Utility" program can be attributed to the Act, its implementation by the staff at the SCC's Division of Energy Regulation, and the hard work and cooperative spirit of the excavators and operators who work with the program on a daily basis. Despite these successes, the State Corporation Commission has recognized that interests of public safety are properly served by ensuring that Virginia's program is periodically reviewed for appropriate modifications. An example of the SCC's aggressive approach to keeping the program as good as it can be is the new "Always CARE" campaign.

The SCC also initiated an investigation and invited public comment on December 13, 1999, in case PUE 990786 to determine whether amendments to the SCC's enforcement regulations were appropriate. In a report filed on May 26, 2000, changes in the rules to address

specific issues were proposed. On June 14, 2000, the Commission issued an order inviting comments on proposed changes to the SCC's rules for enforcement of the Act.

In reviewing the Act and its implementation, the SCC's staff identified a number of areas where, though they may be appropriate, changes in the program would require amendments to the Act and therefore could not be implemented through the rulemaking process. The SCC has convened a task force to consider possible amendments to the Act for introduction in the 2002 Session of the General Assembly.

The SCC's staff also identified a number of areas where, in their opinion, improvements in the Commission's enforcement of the Act could be accomplished through regulations. The SCC has been charged with enforcing the Act as the result of amendments adopted in the 1994 Session. The most controversial of the proposed enforcement regulations would require utilities and other operators to report incidents involving damage above certain thresholds to the SCC. Under the current voluntary reporting system, the reporting of incidents by operators is optional. Though concerns about these proposed regulatory changes prompted the General Assembly to create this joint subcommittee, the joint subcommittee realized that the Act was in need of a comprehensive legislative examination. The effectiveness of the Act and its implementation had not been studied subsequent to the adoption of changes in the 1994 Session.

The joint subcommittee recommends the enactment of legislation that would prevent the SCC from requiring, by regulation, that non-gas operators be required to report cut-ins and related incidents involving buried facilities to the Commission. (Appendix B). The other joint subcommittee recommendations for legislative action in the 2001 Session of the General Assembly seek to accomplish the following:

- Eliminate the statutory distinctions between the measure of damages that operators and excavators are authorized to recover following incidents resulting from violations of the Act. (Appendix C)

- Exempt excavations performed in installing signage upon property from the provisions of the Act, if the excavations are not more than 12 inches deep. (Appendix D)

- Authorize revenues collected through enforcement of the Act, to the extent they exceed the costs of administering the program, to be used for training and education programs and for programs providing incentives for excavators, operators, line locators, and other persons. (Appendix E)

- Clarify the standards to be applied by the SCC in actions involving the certification of notification centers established under the Act. SCC actions shall be made in furtherance of the purpose of preventing or mitigating loss of, or damage to, life, health, property or essential public services resulting from damage to underground utility lines. Decisions to approve or revoke notification center certifications shall ensure protection for the public from the hazards that the Act is intended to prevent or mitigate; ensure that persons receive an acceptable level of performance; and require the notification center and its agents to demonstrate financial responsibility. (Appendix F)

II. BACKGROUND

A. STATUTORY PROVISIONS

1. Development of the Act

The Underground Utility Damage Prevention Act (Chapter 10.3 [§§ 56-265.14 through 56-265.32] of Title 56 of the Code of Virginia) requires excavation or demolition work to be preceded by at least 48 hours' advance notification to all operators, defined as entities furnishing or transporting materials or services by means of underground utility lines. In practice, contractors call a regional notification center, which acts as a clearinghouse, that notifies all utilities by computer communication of the proposed excavation or demolition. The utility is then required to determine and mark the location of its facilities at the site of the proposed work.

The Underground Utility Damage Prevention Act was enacted in 1979 in an attempt to minimize the probability of damage to underground facilities from excavation or demolition activities. As originally enacted, the Act required operators to file in circuit court clerk's offices the names of the persons to whom all calls regarding proposed excavations should be directed. Participation in notification centers was optional; for those localities where a notification center existed, the center's telephone number was filed in the clerk's office on behalf of participating operators.

In 1989, the Act was amended to require every operator having the right to bury underground utility lines, except VDOT, to join a notification center. The 1989 amendments gave the Commission the authority to certify notification centers.

The Act was materially revised in 1994 as the result of a study that was prompted in part by a 1992 review of the Commission's pipeline safety program by the Federal Office of Pipeline Safety (OPS). The OPS stated that "in the absence of meaningful enforcement authority, the law is easily ignored," and urged the Commission to establish enforcement provisions within the Act. House Joint Resolution 430 (1993) directed the Commission, with the assistance of other state agencies and interested parties, to study the Act. The Commission's report was published as House Document 43 (1994). In conducting the study, the Commission surveyed 22 utilities. The 1993 survey revealed an average of 26 incidents of third party damage to underground facilities per working day, with each incident affecting the service of an average 59 customers per incident. The survey indicated that 91.5 percent of the incidents were the result of persons not complying with the Act.

House Bill 409, introduced in the 1994 Session, amended the Act to:

- Provide for the operator-excavator information exchange system.

- Establish an advisory committee to assist notification centers in the development and implementation of newly created public awareness programs.

- Make clarifying changes to reduce misinterpretations of the Act, including new or revised definitions of "emergency," "hand digging," "willful," and "utility line."

- Making excavators who willfully fail to notify a notification center of proposed excavation or demolition liable to an operator whose facilities are damaged for three times the cost to repair the damaged property and up to $10,000 in punitive damages in any single cause of action, and authorizing the Commission to impose civil penalties up to $2,500 for violations occurring as a result of failure to exercise reasonable care.

Additional changes to the Act were adopted in 1996 by House Bill 182, which amended various provisions of the Act to: (i) Bring certain gravity sewer systems under the Act's provisions; (ii) add a definition for "contract locator"; (iii) extend the exemption of routine roadway maintenance to include all paved portions of a street; (iv) prohibit persons from requesting repeated or unnecessary site markings, and subject violators to damages of treble the cost of marking the site; (v) make contract locators subject to the same liabilities and penalties as operators when the locators, acting on behalf of operators, fail to perform the duties imposed by the Act; and (vi) provide immunity to the members of the advisory committee.

2. Overview of Act

The Underground Utility Damage Prevention Act establishes the framework for Virginia's "Miss Utility" program. Its paramount goal is the prevention of injury and damage resulting from cut-ins of buried utility facilities. The Act is structured in a manner that imposes duties, and potential liability for violations, on operators, excavators, and notification centers.

The Act requires any person, including counties, cities and towns, who owns, furnishes, or transports materials or services by means of a buried utility line (including water, electricity, telecommunications, gas, and cable television) to join a notification center. Notification centers are certified by the Commission. The centers must maintain a database, provided by its member operators, and have the capability to transmit, within one hour of receipt, notices of proposed excavation to member operators by teletype, telecopy, personal computer, or telephone. Each notification center maintains an excavator-operator information exchange system, which has a separate toll-free telephone number to be called when checking on the status of a request. The notification centers are listed in telephone directories under their popular name of "Miss Utility." Members of a center are required to develop and implement a public awareness program.

Virginia is served by two notification centers: (i) Northern Virginia Utility Protection Service, Inc., which covers areas north of the southernmost boundaries of the Counties of Shenandoah, Warren, Fauquier, and Stafford, and includes the Eastern Shore Counties of Northampton and Accomack; and (ii) Virginia Underground Utility Protection Service, Inc., which covers the rest of the Commonwealth.

Section 56-265.17 prohibits any person from making or beginning any excavation or demolition without first notifying the notification center for that area. Notice to the notification center is deemed to be notice to each operator who is a member of that notification center. Each

notice must contain, among other information, the location of the proposed work and the name, address, telephone number, and telefacsimile number, if available, of the excavator or demolisher to whom notification can be given. A notification center is required, upon notification by the person intending to excavate, to notify all member operators whose underground lines are located in the area of the proposed excavation or demolition and tell the excavator who is being notified. Notification centers are required to keep records of these telephone calls.

Except in the case of an emergency, or if informed by the notification center that no operators are to be notified, the excavator must wait at least 48 hours following the notification before commencing work. Upon expiration of this 48-hour period, the excavator is prohibited from commencing work until he calls the notification center's excavator-operator information exchange system (known as the ticket information system, or TIE) and confirms that all applicable utilities have either (i) marked their underground line locations or (ii) reported that no lines are present in the vicinity of the excavation or demolition.

If any utility fails to respond to the excavator-operator information exchange system by the end of the 48-hour period following the excavator's notification, the excavator must wait another 24 hours before commencing work. The notification center must then renotify any operator who failed to respond within the 48 hours that followed the original notification. Operators are required to mark all applicable utility lines, or report that no lines are present, and confirm the marking or the absence of lines to the excavator-operator information exchange system within 24 hours of this renotification. If an excavator observes clear evidence of the presence of an unmarked utility line in the area of the proposed excavation, he is prohibited from excavating until calling the notification center again and waiting three hours.

If the proposed excavation is planned in such proximity to a line that the line may be damaged or disturbed, the operator must mark the approximate horizontal location of the underground utility line on the ground to within two feet of either side of the underground utility line by means of stakes, paint, or flags. This must be done no later than 48 hours after receiving notice from the notification center. Within this 48-hour period, the operator is required to report to the information exchange system that each line's location has been marked. Operators must mark the approximate location of buried lines using specified colors coded to the type of utility line. Alternatively, if the proposed excavation or demolition is not in proximity to the operator's underground utility lines, the operator shall report that information to the notification center's excavator-operator information exchange system within the 48-hour period.

The Act also imposes duties on the excavator. Under § 56-265.24, any person excavating or demolishing within two feet of either side of the staked or marked location of an operator's underground utility line shall take all reasonable steps necessary to properly protect, support, and backfill underground utility lines. This protection shall include, but is not limited to, hand digging within the limits of the planned excavation or demolition, starting two feet of either side of the extremities of the underground utility line.

If any damage occurs to any underground utility line in connection with any excavation or demolition, the person responsible for the work is required to immediately notify the operator of the underground utility line, and is not to backfill around the line until the operator has

repaired the damage or has given clearance to backfill. The operator must within 24 hours either commence repair of the damage or give clearance to backfill. If the damage, dislocation, or disturbance of the underground utility line creates an emergency, the person responsible for the excavation or demolition shall take immediate steps reasonably calculated to safeguard life, health and property.

The Act does not require persons to give the Commission notice of incidents or probable violations of the Act. The Commission's rules for enforcement of the Act provide that any person may report probable violations of the Act to the Division of Energy Regulation within 30 days of a person becoming aware of circumstances constituting the probable violation. However, incidents involving gas pipelines are required to be reported under the Commission's authority to enforce pipeline safety regulations for jurisdictional gas companies.

Persons are prohibited from requesting that a site be marked through a notification center unless excavation is scheduled to commence. The Act also prohibits persons from making repeated requests for remarking, unless due to circumstances not reasonably within their control. Any person (other than a local government) who willfully fails to comply with this subsection is liable to the operator for three times the cost of marking its utility line, not to exceed $1,000.

Activities exempt from the Act include hand digging performed by a property owner or occupant and tilling of soil for agricultural purposes. Excavations performed entirely within the right-of-way of a public road, street or highway in connection with road maintenance operations by the Department of Transportation and certain localities are exempt from the Act if reasonable care is taken to protect utility lines placed in the right-of-way by permit.

If any underground utility line is damaged as a proximate result of a person's failure to comply with any provision of this chapter, that person is liable to the operator of the underground utility line (if it is a member of a notification center) for the total cost to repair the damaged facilities as that cost is normally computed by the operator. A person who willfully fails to notify the notification center of proposed excavation or demolition shall be liable to the operator whose facilities are damaged for three times the cost to repair the damaged property, if the operator is a member of the notification center. The total amount of punitive damages, as distinguished from actual damages, shall not exceed $10,000 in any single cause of action. However, if an operator, after receiving proper notice, fails to discharge a duty imposed by any provision of this chapter and its underground utility line is damaged by any person who has complied with all of the provisions of this chapter, such person is not liable for the damage. Moreover, if the excavator's equipment is damaged by the operator's underground utility line, the operator shall be liable to the excavator for the total cost to repair any damage to the equipment.

The Act authorizes the SCC to impose civil penalties for certain violations of the Act by persons other than local governments. The SCC may impose a civil penalty not exceeding $2,500 for each violation if it is proved that the person violated the Act as a result of a failure to exercise reasonable care. Civil penalties are paid into the Underground Utility Damage Prevention Special Fund for administering the regulatory program authorized by the Act. Excess funds are used to support public awareness programs established by notification centers. Since 1994, the SCC has had the authority to enforce the provisions of the Act and to promulgate rules

or regulations necessary to implement the Commission's authority to enforce the Act. The Commission is directed to establish an advisory committee to review reports of violations of the Act and to make recommendations to the Commission regarding penalties.

3. Related Statutes

Among the sections of the Code of Virginia dealing with related issues, § 56-555 authorizes the Commission to implement the federal Hazardous Liquid Pipeline Safety Act (49 U.S.C. § 60101 et seq.) with respect to intrastate and interstate pipelines located within the Commonwealth to the extent authorized by certification or agreement under Section 205 of the Pipeline Safety Act. For the purposes of intrastate pipelines, any person failing or refusing to obey Commission orders relating to the adoption or enforcement of regulations for the design, construction, operation, and maintenance of pipeline facilities and temporary or permanent injunctions issued by the Commission shall be fined such sums not exceeding the fines and penalties specified by § 208 (a) (1) of the Pipeline Safety Act. The Commission shall charge an inspection fee to every hazardous liquid pipeline operator, to be used for administering the regulatory program. The number of planned inspections conducted on each interstate pipeline operator shall be reasonable under the circumstances and prioritized by risk to the public or to the environment.

The Pipeline Safety Act requires the federal Secretary of Transportation to prescribe regulations providing minimum requirements for establishing and operating a one-call notification system for a state to adopt. Under the Pipeline Act, gas utilities are required to have a damage prevention program. In its implementation of the Pipeline Safety Act with respect to non-municipal gas utilities, the Commission is determining the effectiveness of companies' mandatory damage prevention programs. In order to determine their effectiveness, the SCC issued a letter to gas utilities in March 1996 requiring them to report incidents involving gas lines.

Section 56-257.2 also deals with natural gas pipeline safety. The SCC has been given authority to regulate the safety of natural gas facilities comprising a master-metered gas system as defined by federal regulations promulgated under the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. § 1671 et seq.), as amended, and not served by any natural gas distribution system owned and operated by any county, city, or town. The Commission may enforce the authority conferred herein pursuant to § 56-5.1 and shall have authority to adopt such rules and regulations as are necessary to promote pipeline safety in the Commonwealth consistent with the Natural Gas Pipeline Safety Act of 1968.

Section 56-257.1 requires that any plastic or other nonmetallic pressurized conduit installed underground on and after July 1, 1976, shall have affixed thereto a wire conductive of electricity or some other means of locating the conduit while it is underground. This section is being construed as applicable only to utilities over which the State Corporation Commission has jurisdiction.

Prior to the enactment of Senate Bill 445 of the 2000 Session, § 56-257 authorized the Commission to establish minimum separation clearances for the installation of pipes and

conduits in public streets, roads, parks, and other facilities. Amendments to this section, which take effect July 1, 2001, require operators (other than interstate gas pipelines) to install underground utility lines in accordance with accepted industry standards. These standards include standards established by the National Electric Safety Code, the Commission's pipeline safety regulations, the Department of Health's waterworks regulations, and standards established by the Utility Industry Coalition of Virginia. The Commission is directed to promulgate rules or regulations necessary to enforce these requirements as to those operators who do not comply with such accepted industry standards.

B. IMPLEMENTATION OF THE ACT

The SCC's role in enforcing the Act commenced with the enactment of the 1994 amendments that authorized the SCC to promulgate rules to enforce the provisions of the Act and to issue civil penalties.

In 1995, the SCC conducted a survey of 22 operators, of which eight were natural gas companies. Survey data revealed there were 3,287 incidents, of which 1,138 involved gas facilities. Only nine of the 1,138 gas facility incidents had been reported to the SCC under its voluntary reporting rule. In March 1996, the SCC, pursuant to pipeline safety regulations, began requiring all jurisdictional gas utilities to report excavation damages. The number of gas facility damages per 1,000 tickets issued has declined steadily from 4.49 in 1996 to 2.31 through the first five months of 2000.

Another measure of the program's success is the increase in the number of ticket requests. From 1995 through 1999, the number of requests has increased from 675,923 to more than one million. Since January 1995, the SCC has received 11,772 reports of probable violations of the Act. Of the 10,546 closed reports, 41.5 percent were found to be probable violations by excavators, 30.9 by operators, and 0.1 percent by notification centers. Another 27.5 percent of the reported probable violations were dismissed. In this period, $2.9 million in civil penalties have been assessed. More than 52 percent were assessed against utility locators only, and 33.4 percent were assessed against excavators only.

Virginia's enforcement procedures have been recognized as "Best Practices" in the federally-sponsored 1999 Common Ground study of one-call systems and damage prevention best practices. An important element of an effective program is acknowledged to be public education. While the "Miss Utility" and "Call Before You Dig" initiatives have been successful, the SCC is embarking on a new program to educate and remind excavators of their major responsibilities under the Act. The new campaign's message is "Always CARE! -- Keep Virginia Safe," with CARE being an acronym for Call before you dig; Allow the required time for marking; Respect the marks/flags; and Excavate with care. The SCC has planned short-term and long-term education efforts to create statewide recognition of digging with CARE, increase frequency of the message to problem groups, foster partnerships, and monitor campaign performance.

III. WORK OF THE JOINT SUBCOMMITTEE

A. FIRST MEETING

At the joint subcommittee's initial meeting on July 10, 2000, the chairman observed that as there has been no legislative review of the program since its inception, the study provides an opportunity to determine if its efficiency and effectiveness can be improved.

Following an overview of the Act and the State Corporation Commission's implementation of its duties, Rick Pevarski, chairman of the notification center serving southern Virginia, noted that the notification centers are considering two major changes in their structure and operations. First, the two centers are moving to consolidate into one entity, Virginia Utility Protection Services. Consolidation is viewed as a means to reduce confusion and achieve economies of scale. SCC certification of the new, single notification center will be required. The second change under consideration will bring the centers' operations in-house, as has been done in North Carolina and several other states. This change is expected to reduce the costs per call to members of the centers from a range of between 96 cents and $1.09 to between 30 and 40 cents. Other expected benefits include greater control of operations, improving relationships with excavators, and easier institution of new technologies. Under the plan outlined to the joint subcommittee, the work will be brought in-house as existing contracts expire in 2002 and 2003.

SCC staff provided an update on the status of the Commission's rulemaking procedure. In December 1999, the SCC initiated a rulemaking process and invited public comment on approximately 65 damage prevention issues. Proposed specific rules and regulations were identified in a report filed by SCC staff on May 26, 2000. The revisions seek to expand and clarify damage prevention rules adopted by the SCC in 1994.

The proposed revised rules require reporting of probable violations of the Act by non-gas utility operators. Currently, such operators may, but are not required to, report such violations. Other proposed rules address emergency excavation and demolition procedures, marking of underground utility lines, notification center data update requirements, excavator responsibilities regarding underground lines, recordkeeping by operators, and site inspections by excavators. Following a hearing on the proposed revisions to the existing rules governing enforcement of the Act, the Commission issued an order promulgating final rules on December 19, 2000. The rules are effective July 1, 2001.

The SCC established a task force of stakeholders to study issues not addressed by the proposed rules. Several of these issues have been deemed to require statutory changes. The Commission's goal is to reach consensus for possible legislative action in 2002-2003.

Members of the joint subcommittee identified several concerns with the Act and its implementation during the course of the meeting (Part IV A).

B. SECOND MEETING

The second meeting of the joint subcommittee on September 19, 2000, featured a discussion of the SCC's proposed regulations that would require mandatory reporting of incidents by non-gas utilities. The balance of the meeting consisted of a forum for interested persons to address both the proposed reporting rules and other aspects of the Act and its implementation.

Speakers disagreed as to the need for the proposed rules. David Ward, a contractor and member of the Act's advisory board, endorsed the proposed rules. Rodney Blevins of Dominion Virginia Power criticized many aspects of the proposed rules as intrusive, impractical, and unenforceable. Fredericksburg City Attorney James Pates urged the joint subcommittee to support the SCC in its damage prevention efforts. Mark Singer, representing contractors' associations in Northern Virginia and the Richmond area, remarked that the consensus approach utilized by the SCC has worked so well that there are very few points of major contention requiring legislative solutions. He voiced support for the mandatory incident reporting proposal on the basis that generating timely and accurate data highlight existing problems and produce a safer work environment. Areas of concern for contractors include the scope and definition of hand digging; lack of making of abandoned lines; requiring utilities to keep accurate records as to where they install underground facilities and sharing this data with locators in the field; the lag time between laying new lines and their showing up in the database for marking; the ability of engineers to use the system in planning projects with a minimum of disruption to underground facilities; and the performance of some locators. However, specific recommendations to deal with these issues should be developed by the SCC and various stakeholders working through the issues and developing a comprehensive bill, which could be presented to this joint subcommittee in advance of the 2002 Session.

Former Delegate Dick Fisher, appearing on behalf of Washington Gas, raised issues regarding the SCC's authority to regulate, and require reporting of incidents by, municipal gas facilities and the Virginia Department of Transportation. He also suggested a clarification of what constitutes a violation. For example, a single act of failing to mark four lines could produce four separate violations, with separate penalties. With regard to the proposed mandatory reporting rule, he noted that it will be needed at some time. He favors listening to what the SCC's advisory group on legislative changes comes up with. Finally, he opposed any exception to the Act for hand-digging to install campaign or other signs.

Jack Watts of Contracting Enterprises in Lynchburg criticized practices relating to the imposition of fines and the presentation of cases before the advisory committee. The expansion of mandatory reporting requirements to non-gas utilities is beyond the scope of the Act's terms. Moreover, he criticized the fact that the Commission determines who sits on the advisory committee that recommends civil penalties; makes the rules; enforces the rules; and collects the penalties. He urged a greater emphasis on incentives and training, and less legislation, regulation and fines. His concerns were echoed by Tom Hall, also of Lynchburg, who is concerned by the expansion of mandatory incident reporting requirements. After the rules are initially adopted, he warned, the thresholds may be lowered.

Tom Hoff of One Call Concepts and Phil Thompson of One Call Center objected to the proposal to merge the existing notification centers and to hire in-house employees rather than use third party contractors. Mr. Hoff suggested that using a third party vendor brings accountability to the system, and observed that contractors operating in Northern Virginia would need to call separate call centers if they had projects in the Commonwealth as well as in the District of Columbia or Maryland. Mr. Thompson urged the subcommittee to amend the law to keep call centers competitive rather than being brought in-house by utilities.

At the close of the second meeting, staff was directed to prepare a list of concerns with the Act raised either by joint subcommittee members at their first meeting or by speakers at the second meeting. Based on these concerns, staff prepared amendments to the Act that may address these concerns. The chairman characterized the proposals as "straw man" ideas that are intended to serve as the starting point for discussion of issues. The list of concerns and proposals for amending the Act was posted to the joint subcommittee's Internet web site (http://dls.state.va.us/sjr75.htm). Written comments regarding the discussion draft amendments were then submitted to staff by interested persons.

C. THIRD MEETING

Issues addressed at the joint subcommittee's third meeting on November 13, 2000, include mandatory incident reporting requirements in other states and whether the General Assembly has the constitutional authority to require local governments and state agencies to report incidents to the State Corporation Commission.

In response to an inquiry regarding the extent to which other states imposed mandatory reporting requirements, a SCC polling of state public utility commissions indicated that 15 states require incidents to be reported. Three additional states (including Virginia) require reporting for incidents involving gas only. Twenty-seven states and the District of Columbia do not have mandatory reporting requirements. It could not be determined whether five states require incident reporting.

The statutes of most of the states examined are similar to the Virginia Act's requirement that the person responsible for the excavation or demolition operations must notify the operator of the underground utility line if there is any damage, dislocation or disturbance to the line. Some states, including Georgia, Idaho and Mississippi, provide for notification of the one-call center operator by the excavator.

Virginia's Act currently applies to political subdivisions and state agencies. However, the SCC is not authorized to assess civil penalties against counties, cities and towns. The SCC's proposed mandatory incident reporting regulations do not exempt political subdivisions and state agencies from its requirements, though localities would apparently remain exempt from civil penalties if they failed to comply with its provisions. Staff presented material regarding the scope of the General Assembly's authority to require local governments and state institutions to report incidents involving underground utility facilities to the SCC.

The Virginia Municipal League and Municipal Electric Providers Association of Virginia (MEPAV) contended that, notwithstanding arguments regarding the constitutional limits on the General Assembly's power to bestow jurisdiction on the SCC, the legislature should uphold its policy of abstaining from bringing government-owned utilities under SCC authority. The wisdom of imposing incident reporting requirements on localities operating utilities was challenged on public policy grounds. They alleged that local governments have a greater incentive to ensure public safety than do for-profit utilities and that the requirement would impose additional costs while not serving any beneficial purpose.

Currently, private gas utility compliance with the federal gas pipeline safety act is administered by the SCC, while municipal gas utility compliance with the act is administered by the federal Department of Transportation. Members questioned why municipalities would prefer to be subject to federal government enforcement than to state enforcement. Concern was also expressed that while private gas operators must report incidents to the SCC, municipal gas operators do not. SCC staff was asked to provide the joint subcommittee with federal information on municipal gas pipeline safety.

Under the Act's definition, a "person" who is subject to its requirements includes any governmental unit, department or agency. The Virginia Department of Transportation (VDOT) is exempt from the Act when performing excavations for routine pavement maintenance upon the paved portion of a roadway if the depth of the digging does not exceed 12 inches, and repairs needed to address unforeseen occurrences that impair a roadway. In addition, VDOT employees are not required to comply with the Act when excavating entirely within the right-of-way of public roadway if reasonable care is taken to protect the utility lines placed in the right-of-way by permit if the excavation does not exceed 18 inches in depth or replaces previous structures in their previous location.

VDOT advised the joint subcommittee that the agency complies with the Act pursuant to instructions issued by the Chief Engineer requiring the proposed excavation to be called in to the notification center. However, VDOT is concerned with any requirement that it be required to join a notification center as an operator. VDOT spent more than $4.7 million in the past year locating utility lines and designing new construction around these facilities.

Most of the damage to VDOT facilities is damage to traffic signals caused by permitted work. The agency has not had problems recouping its expenses. Consequently, VDOT does not support mandatory reporting of incidents to a third party.

Following testimony on these issues, members began reviewing the 16 issues that they and other had previously identified. The list of 16 concerns enumerated in Part IV of this report was narrowed to 10, which were the subject of subcommittee action at its final meeting. The 10 remaining concerns included:

- The SCC's proposed rule requiring mandatory reporting of incidents involving non-gas utility facilities. The proposed SCC rule generating the most interest would require that incidents meeting certain thresholds be reported to its Division of Energy. For incidents involving electric facilities, the level is 1,000 or more customer meters affected or injury or death. For

telecommunications facilities, it is 1,000 or more access lines affected. For cable television or combined cable television and telecommunication, it is 1,000 or more customers affected. For water and sewer facilities, incidents must be reported if they result in injury, death or serious impact on public health.

- The Act's discrepancy in the measure of damages available to an operator and to an excavator, who is allowed to recover from an operator that has violated the Act only the cost of repairing damaged equipment.

- The absence in the Act of a de minimis exemption for shallow diggings, such as yard signs used by political campaigns and real estate agents.

- The absence in the Act of requirements as to how deep non-gas utility lines must be buried.

- The potential liability for treble damages resulting from a "willful" violation of the Act may encourage persons to avoid becoming educated about the Act.

- The Act should focus on training and education, with incentives or rewards for avoiding injuries.

- Mandatory reporting to the SCC by local governments and VDOT of damage to underground facilities.

- The current broad scope of what constitutes a "violation" under the Act.

- The notification center staffing should be contracted for by competitive bidding and not be brought in-house.

- The SCC should consider additional criteria in designating notification center service areas.

D. FOURTH MEETING

At its last meeting on December 28, 2000, it was reported that the SCC had promulgated regulations amending its rules for the enforcement of the Act. The rules can be viewed at the Commission's web site at http://www.state.va.us/scc/caseinfo/orders/case/e990786e.pdf.

The joint subcommittee also received a report regarding federal data indicating the comparative safety record of municipal gas utilities. (Appendix G) The data indicates that important differences exist between gas systems subject to the SCC's jurisdiction and the municipal systems, which are regulated as to safety matters by the federal Department of transportation's Office of Pipeline Safety (OPS).

The OPS issued a notice in 1991 informing gas pipeline operators to develop programs to identify and replace their cast iron piping systems that may threaten public safety. It was reported that the jurisdictional gas systems have a much smaller percentage of cast or wrought iron pipe (2.12 percent) than do municipal systems (36.8 percent).

Data on gas facility damages indicate that damage incidents for the three municipal gas systems (Richmond, Charlottesville, and Danville) from the period 1996 through 1999 has ranged between five and 7.37 damages per 1,000 tickets issued, while the corresponding figures for the jurisdictional gas companies during the same period ranged between 2.72 and 4.49.

The data on leaks per mile of gas main and service pipes from 1996 through 1999 show comparatively little differences between the two categories of systems. However, the greatest difference between the jurisdictional and municipal systems is evident in the inspections performed. While jurisdictional systems had 236.8 inspection person-days in 1999 (or 0.285 inspection person-days per 1,000 customers), municipal systems had three inspection person-days in 1999 (or 0.026 inspection person-days per 1,000 customers) that year.

The major difference with regard to safety programs between municipal and jurisdictional gas systems is the identity of the entity responsible for conducting the inspections. The SCC has the responsibility of conducting safety inspections for all intrastate gas systems other than the municipally-owned systems. Because the SCC has no authority to oversee the safety of the municipal systems, the municipals are subject to inspections by federal OPS personnel. The OPS has requested the SCC to assume responsibility for safety inspections of the municipal gas systems in order to allow the federal regulators to focus on interstate pipeline safety issues. In response, the General Assembly considered, but did not enact, legislation that would have given the SCC jurisdiction for safety of municipal gas systems.

The joint subcommittee questioned representatives of the municipal gas utilities as to why they preferred to be regulated on safety matters by the OPS rather than by the SCC. The reaction of the Richmond gas utility (Appendix H) illustrates the concerns of the municipal gas utilities with the proposed imposition of a new level of state regulation.

After the conclusion of the presentation on the safety statistics regarding municipal gas systems, the members then proceeded to discuss the propriety of legislative action on each of the 10 remaining issues before joint subcommittee. The joint subcommittee's recommendations with respect to these 10 issues are discussed in Part V infra.

IV. ISSUES EXAMINED BY THE JOINT SUBCOMMITTEE

Following the joint subcommittee's first two meetings, staff compiled 16 concerns with the terms and implementation of the Act. Possible legislative solutions were presented as examples of how the Act could be amended to address these concerns, and were intended to serve as a starting point for discussion rather than recommendations for legislation.

A. CONCERNS RAISED BY MEMBERS

Members identified 10 concerns with the Act and its implementation in the course of the first meeting of the joint subcommittee.

1. Mandatory Incident Reporting

The principle issue faced by the joint subcommittee was the suggestion that the SCC's proposed rule requiring mandatory reporting of incidents involving non-gas utility lines may be overly broad.

a. Proposed Enforcement Regulations

Massoud Tahamtani of the SCC provided joint subcommittee members with an overview of proposed changes in program enforcement regulations. In December 1999, the SCC initiated a rulemaking process and invited public comment on approximately 65 damage prevention issues. On May 26, 2000, SCC staff filed a report with the Commission proposing regulations that seek to expand and clarify damage prevention rules adopted in 1994. On June 14, 2000, the Commission issued an order inviting comments on the proposed rules.

Though the proposed rules address a wide range of issues, four generated significantly greater interest. These rules call for (i) reporting of probable violations of the Act by non-gas utility operators; (ii) responses to requests for data in investigations of probable violations; (iii) marking multiple utility lines located in the same trench; and (iv) maintaining accurate installation records for new lines.

Of these, the rule generating the most interest is the proposal requiring that incidents meeting certain thresholds be reported to the SCC's Division of Energy. For incidents involving electric facilities, the level is 1,000 or more customer meters affected or injury or death. For telecommunications facilities, it is 1,000 or more access lines affected. For cable television or combined cable television and telecommunication, it is 1,000 or more customers affected. For water and sewer facilities, incidents must be reported if they result in injury, death or serious impact on public health.

Information regarding interruptions in electric service and telecommunications service is currently filed with the Commission pursuant to separate voluntary agreements with the industries, pursuant to the SCC's performance monitoring role. Cable operators are not now required to make such reports. In response to concerns regarding potential dual reporting

requirements, SCC staff stated that procedures could be implemented administratively to avoid duplication.

Staff reported that the proposed thresholds are not likely to impose significant duties on operators. In 1999, for example, no incidents involving electricity facilities surpassed the 1,000 customer threshold.

The Commission held a hearing on the proposed regulations on October 23, 2000. The Commission promulgated final regulations on December 19, 2000. The regulations promulgated by the Commission had an effective date of July 1, 2001, in order to provide the General Assembly with an opportunity to respond legislatively.

b. Reporting Requirements of Other States

Staff of the State Corporation Commission identified those states with a damage prevention law or Commission rule that contains mandatory reporting requirements for utilities to report "probable violations" of their law, rule or regulation. (Appendix I) Fifteen states were identified as having a damage prevention law or public utility commission rule that contains mandatory reporting requirements. Three additional states (including Virginia) require reporting for incidents involving gas only. Twenty-seven states and the District of Columbia do not have mandatory reporting requirements. The SCC staff was unable to determine whether five states require incident reporting.

A review of the buried utility facility damage prevention statutes of the 15 states identified by the SCC staff as requiring mandatory reporting by operators revealed that most of the 18 states examined contain provisions very similar to § 56-265.24 of the Virginia Act. These sections which requires the person responsible for the excavation or demolition operations to notify the operator of the underground utility line if there is any damage, dislocation or disturbance to the line. Some states, including Georgia, Idaho and Mississippi, provide for notification of the one-call center operator by the excavator.

A few states specifically address incident reporting to regulators. New Jersey has a statutory requirement for operator incident reporting. Section 48:2-80 of the New Jersey Code provides that "An operator shall maintain a record of all damage to its underground facilities, including all damage reported by an excavator pursuant to [the act]. An operator shall provide an updated copy of this record to the board on a quarterly basis." New Hampshire directs its public utility commission to adopt rules relative to minimum requirements for the operation of the system, including notification procedures. Connecticut Code § 16-358 requires gas utilities to file biennial reports regarding the status of underground gas facilities. Connecticut also provides for a biennial report by the Department of Public Utility Control to a legislative committee, to include data on accident, damage, and injury reports.

The review of state statutory provisions indicates that those states with a reporting requirement are more likely to have implemented it through order of their public utility commission or through a statutory provision not included in the state's damage prevention law. For example, Virginia's mandatory incident reporting requirement for natural gas facilities is

implemented through its enforcement authority under gas pipeline safety laws, and not through the Underground Utility Damage Prevention Act.

c. Alternative approaches

To address this concern, the approach taken by Senate Bill 339 from the 2000 Session was revisited. This bill would have removed the SCC's authority to implement mandatory reporting by non-gas utilities pursuant to language in the Act. Discussion draft legislative language provided: Nothing in this chapter shall be construed to authorize the Commission to promulgate any rules or regulations that require any person to report to the Commission any probable violation of this chapter or any incident involving damage, dislocation, or disturbance of any utility line.

This language is intended to apply only to rules or regulations implementing the Act. Gas utilities are required to report incidents pursuant to authority under natural gas pipeline safety laws, not the Act. As a result, it is not intended to affect the SCC's ability to require reporting of gas line incidents.

Alternative approaches were also identified. To the extent that the concern was aimed at the scope of who would be required to report incidents involving certain amounts of damage, a narrower statute could amend the Act to authorize the SCC to require operators to report probable violations of the Act only if the damage affects more than a minimum number of customers, meters or access lines, or in the case of damage to water or sewer lines, result in an injury or a fatality or have a serious impact on public health. The SCC's proposed regulations suggest that the minimum number of customer meters, access lines, etc., be 1,000. Legislation may substitute a larger number of customers, meters, or lines.

Another approach could provide that reporting requirements would not apply to incidents involving cuts of specific types of utility lines, such as cable television or telecommunications lines.

2. "Firewall" in Litigation

The concern was raised that the absence of a "firewall" provision may allow litigants in utility line damage civil court cases to use the outcome of SCC civil penalty proceedings, including negotiated settlements.

Virginia's seat belt law (§ 46.2-1094) provides one approach to address this concern. However, the seat belt law goes further, and states that a violation of that law shall not constitute negligence or be considered in mitigation of damages. Another model is § 46.2-378, which provides that no accident report "shall be used as evidence in any trial, civil or criminal, arising out of an accident."

3. Excavators as Members of Notification Centers

The question arose as to whether excavators who become associate members of a notification center are provided any of the immunities provided to members who comply with the provisions of the Act.

The Act generally uses a phrase such as "member operator" or "operator who is a member of a notification center." Therefore, an excavator who joins a notification center as an associate member would probably not be entitled to the same benefits under the Act that are provided to an operator who is a member.

While adding language to the definitions in the Act may add an extra degree of clarity, it was suggested that the need for the additional language was not evident.

4. Measure of Damages for Operators and Excavators

Member expressed reservations about provisions of the Act that require excavators to pay as damages to an operator whatever sum the operator claims as the total cost to repair the damaged facilities, including lost profits, while an excavator is allowed to recover from an operator that has violated the Act only the cost of repairing any damaged equipment. Moreover, an operator is entitled to recover as damages the cost to repair the damaged facilities "as that cost is normally computed by the operator."

In Washington Gas Light Co. v. Leo Const. Co., 48 Va. Cir. 237 (Cir. Ct. Loudoun Co., 1999), the court observed that the operator assessed damages on a "flat rate bill" of $506.59 per incident. The court held that the evidence was sufficient that the operator assessed the total cost to repair as it is normally computed.

5. Use of Threats to Report Incidents

Because operators have the option of reporting line damage involving non-gas facilities to the SCC, the Act may allow operators whose lines are damaged to pressure the excavator to pay unreasonable sums as compensation in order to induce the operator to refrain from notifying the SCC, thereby avoiding the expenses of defending its actions in a civil penalty inquiry before the SCC and its Advisory Committee.

This issue could be addressed by amending § 56-265.25 to provide that excavators shall only be liable to operators for the actual costs incurred in repairing the damaged facilities. Such an amendment may remove a basis under which "unreasonable" sums are demanded as a condition to abstaining from reporting an incident to the Commission. By eliminating the potential for liability for other monetary damages, the leverage that the operator may have over an excavator to require payment of unreasonable sums may be reduced. Another option would be to require the reporting of all incidents involving damage to underground facilities.

As long as such settlements are allowed, however, some firms, such as those with lengthy records of prior violations of the Act, have a greater incentive than other firms to make payments

that would ensure that proceedings are not brought up with the Commission. In other words, the reaction of two firms to an offer that it pay a sum to avoid a proceeding may vary widely, and therefore some firms may not want to be forced to give up the option of paying off certain claims.

6. Exemption for Yard Signs

The erection of yard signs, such as used by political campaigns and real estate agents, may constitute a violation of the Act. The Act does not have a de minimis exemption for most shallow diggings.

A possible legislative solution would be to create a new exemption in § 56-265.15:1 to allow any hand digging performed in installing signage upon property, provided that such hand digging does not exceed a depth of 12 inches.

The twelve-inch limit follows the current limits in VDOT's exemption under subdivision 5 of § 56-265.15:1. Alternatives could include shallower or deeper limits; however, the absence of any limit may allow large signs to be erected.

7. Mandatory Depths for Line Installations

Though federal regulations govern the depth of gas lines, the Act does not establish requirements as to how deep other types of utility lines must be buried. A possible legislative solution to this concern would be to amend § 56-257, which section was amended in 2000 to require that every operator shall install non-gas underground utility lines in accordance with accepted industry standards. While the 2000 amendments were directed at line separation standards, the section could be further amended to require that standards governing line installation address the minimum depth to which underground utility lines must be buried.

8. Contributory Negligence

A concern was raised that a technical violation of the Act arguably may make an excavator contributorily negligent in a suit for damages if he strikes a line that an operator negligently buried too close to the surface.

One approach to addressing this concern would be to enact legislation addressing whether a violation constitutes negligence. Using the approach in the seat belt law (§ 46.1-1094), legislation could provide that a violation of the Act shall not constitute negligence, be considered in mitigation of damages of whatever nature, be admissible in evidence or be the subject of comment by counsel in any action for the recovery of damages arising out of any incident involving damage to, or dislocation or disturbance of, any utility line, nor shall anything in this section change any existing law, rule, or procedure pertaining to any such civil action.

9. Willfulness from Lack of Knowledge

One member raised a concern that the potential liability for treble damages resulting from a "willful" violation of the Act may encourage persons to avoid becoming educated about the Act. It was suggested that the concern could be addressed by amending the definition in the Act of "willful" to add that the lack of knowledge of the requirements imposed pursuant to this chapter shall not bear upon any determination of whether an act is done willfully.

Subsection A of § 56-265.17 provides for punitive damages of treble the cost of repairing damaged property if an excavator willfully fails to notify an excavation center. Section 56-265.24 F provides for damages of treble the cost of marking a utility line if a person willfully requests a line be marked when excavation is not scheduled to commence or makes repeated requests for remarking. In this context, "knowingly" currently appears to refer to intentionally taking an action, rather than taking an action with knowledge of whether an action is or is not subject to the requirements of the Act.

10. Exemption for Excavating on Own Property

The observation was offered that the Act's exclusion for hand digging by an owner on his own property may be overbroad. As now written, the exemption allows a person to dig to an unlimited depth.

The concern could be addressed by amending § 56-265.15:1 to limit the current exemption for hand digging performed by an owner or occupant of property to situations where the digging does not exceed a depth of 12 inches or another depth deemed appropriate. Alternatively, the joint subcommittee may consider whether any limit on the exemption for hand digging should be integrated with any guidelines that may be established for the depth to which facilities are required to be buried.

B. CONCERNS IDENTIFIED BY STAKEHOLDERS

1. Focus on Training and Education

Several speakers at the joint subcommittee's second meeting urged that the focus of the Act should be redirected from levying fines against violators to reducing the number of violations through training and education, with incentives or rewards for avoiding injuries. The advocates of this new approach did not identify the source of funding for any training or incentive programs.

Excess civil penalties that are currently placed in the Underground Utility Damage Prevention Special Fund were identified as a possible source of funding for training and incentives. While using excess penalties as a funding source avoids the need for the appropriation of new funds, the collection of penalties tends to be unpredictable, which would limit the scope and duration of any training or incentive programs.

Currently, civil penalties in excess of the costs of operating the Damage Act program are used to support public awareness programs established by notification centers. It was proposed that § 56-265.32 could be revised to allow excess moneys in the Special Fund to be used to fund training and education programs for excavators, operators, line locators, and other persons, and programs providing incentives for excavators, operators, line locators, and other persons to reduce the number and severity of violations of the Act. The Commission would be charged with determining the appropriate allocation of any excess funds among such programs, with establishing required elements for training and education programs and incentive programs.

2. Continuation of Study

One group contended that the Act should not be amended at this time. A task force has been established to bring interested groups together to build a consensus on possible changes. The task force is expected to have draft legislation ready prior to the 2002 Session. The task force's suggestions should then be presented to this joint subcommittee. Under this approach, the joint subcommittee could recommend a resolution for introduction in the 2001 Session that would continue the study for another year, for the purpose of receiving recommendations from the task force.

It was noted that if the study was continued for a second year without making recommendations in this its first year, the joint subcommittee would have missed the opportunity to make recommendations regarding the Commission's pending amendments to its enforcement regulations. The regulations are scheduled to be acted on by the Commission prior to the next General Assembly Session, with an effective date of July 1, 2001.

3. Reporting of Incidents by Localities and Department of Transportation

a. Concerns with local and state agency compliance with the Act.

The most hotly-debated issue addressed by the joint subcommittee was the proposal aired by former Delegate Fisher of Washington Gas that local governments and the Department of Transportation should be required to report damage to underground facilities to the SCC. The debate on the propriety of imposing reporting requirements on governmental entities expanded into a discussion of whether municipal gas utilities should continue to be subject to safety regulation by the federal Office of Pipeline Safety rather than by the State Corporation Commission.

With respect to the issue of state and local government reporting of incidents to the SCC, it was noted that both types of entities are subject to many of the requirements of the Act in accordance with the definition of "person" in § 56-265.15. The Act currently defines "person" as including any municipality, or other political subdivision, governmental unit, department or agency. Such persons are subject to the requirements of the Act unless covered by specific exemptions in § 56-265.15:1 or § 56-265.23.

The primary distinction in the Act for localities is in § 56-265.32, which immunizes them from the imposition of civil penalties. In lieu of liability for civil penalties, the Commission is

required to inform local governments of alleged violations and, at the request of the locality, to suggest corrective action.

A proposal offered for consideration would have required that any rules or regulations promulgated by the SCC requiring the reporting of any probable violation of this chapter or any incident involving damage, dislocation, or disturbance of any utility line shall impose the same reporting requirements on municipalities and other political subdivisions, governmental units, departments and agencies, as are imposed by such rules or regulations on other persons. Rather than imposing a requirement to report incidents to the Commission, the proposal would require that if such a reporting requirement is imposed by regulation, it shall apply to the "persons" who are governmental entities.

b. Constitutionality of Local Government Reporting Requirements

At the joint subcommittee's September 19 meeting, Senator Mims asked whether the General Assembly had the authority to require local governments and state institutions to report incidents involving underground utility facilities to the State Corporation Commission. The question involves Article IX, Section 7 of the Virginia Constitution, which states:

> The term "corporation" or "company" as used in this article shall exclude all municipal corporations, other political subdivisions, and public institutions owned or controlled by the Commonwealth.
>
> Section 2 of Article IX provides in part that:
>
> Except as may be otherwise prescribed by this Constitution or by law, the Commission shall be charged with the duty of administering the laws made in pursuance of this Constitution for the regulation and control of corporations doing business in this Commonwealth. Subject to such criteria and other requirements as may be prescribed by law, the Commission shall have the power and be charged with the duty of regulating the rates, charges, and services and, except as may be otherwise authorized by this Constitution or by general law, the facilities of railroad, gas, and electric companies.

Several localities have suggested that the State Corporation Commission lacks the authority to require local governments or state institutions to comply with provisions of the Act because (i) the Commission's powers under Section 2 apply to companies and corporations, and (ii) Section 7 excludes political subdivisions and state-controlled institutions from the terms "corporation" and "company."

Professor A.E. Dick Howard's Commentaries on the Constitution of Virginia (University Press of Virginia, 1974) addresses the origin and purpose of Article IX, Section 7. He contends that when the article dealing with Corporations was added to the Constitution in 1902, the primary concern was the regulation of transportation and transmission companies. Municipal corporations were largely the subject of another article of the Constitution. However, unless the term "corporation" was defined, an ambiguity would be created because the term could be taken to include municipal corporations. (Howard, Vol. II, p. 1002)

Section 153 of the 1902 Constitution defined "corporation" to exclude "all municipal corporations and public institutions owned or controlled by the State." Section 156(a) of the Constitution of 1902 required that all laws for the regulation of corporations be administered by the SCC. Howard observes that "[t]his did not preclude the General Assembly from placing aspects of municipal corporations, such as their operation of gas or water utilities, under SCC regulation; it simply meant that, unless the Assembly acted, such corporations would not, by virtue of the Constitution itself, fall under SCC dominion." Id.

The Commission on Constitutional Revision that proposed what became the 1971 Virginia Constitution suggested re-writing the 1902 language to state that "Municipal Corporations or other political subdivisions of the Commonwealth shall not be subject to the jurisdiction of the State Corporation Commission except as may be prescribed by law." This language was proposed as the fourth paragraph in Section 2; there was no separate Section 7 in the Commission's proposal. The official comment to this proposed language states: "The fourth paragraph of the proposal preserves the independence of municipal corporations from SCC jurisdiction. However, the General Assembly may provide for SCC regulation of municipally owned utilities if it so desires." Report of the Commission on Constitutional Revision (1969), p. 286.

In the 1969 Special Session, this provision provoked much debate. Both the House and Senate recommended exclusions that would have explicitly curtailed the SCC's power to regulate the rates, charges, services, and facilities provided by municipal corporations and other political subdivisions. Howard notes that:

> [B]oth versions would have created, from the State's standpoint, a no-man's land in which even the General Assembly would have been powerless to act to protect consumers or to correct abuses. The creation of such a constitutional exemption was defended on such grounds as the . . . protection afforded by the fact that consumers would also be voters. But the difficulty of fashioning the limits of the exclusion began to suggest that the legislators were attempting to do in the Constitution the kind of line-drawing best left to statute. Moreover, the perils of tying the Assembly's hands by a constitutional exemption became more apparent when it was realized that the reference to "political subdivisions" would include authorities, special districts, and other entities operating, for example, such important facilities as tunnels and turnpikes. The no-man's land about to be created was potentially a vast one.

Id., p. 1003 (citations omitted)

Ultimately, the General Assembly returned to the approach suggested by the Commission on Constitutional Revision. The definition in Article IX, Section 7 "precludes the excluded classes from automatically falling within SCC jurisdiction by operation of the Constitution itself." Id., p. 1003. Professor Howard concludes:

> As with the 1902 Constitution, it lies with the Assembly to determine by statute whether any of the aspects of the operations of municipal corporations, political subdivisions, or

public institutions shall be regulated by the SCC or by any other body. As Delegate Mann pointed out, Section 7 does not operate to limit the language of Section 2, which makes clear the authority of the Assembly to confer upon the SCC additional powers and duties not inconsistent with the Constitution.

Id., pp. 1003-1004, citing House Debates at pp. 709-710.

In an opinion issued to the Commissioner of Revenue for Rockingham County, the Attorney General stated that "Section 7 does not prohibit the General Assembly from vesting the State Corporation Commission with jurisdiction over municipally owned corporations . . .." 1984-85 Op. Atty Gen. 355 (July 9, 1984). The issue at stake was whether Rockingham County could impose a gross receipts tax on a municipally-owned electric utility of the Town of Elkton. The opinion notes that while the General Assembly could provide for the local taxation of municipally owned corporations, it has not yet done so.

c. VDOT Compliance with Act

The Act's definition of a "person" subject to its requirements includes any governmental unit, department or agency. The Virginia Department of Transportation (VDOT) is exempt from the Act when performing excavations for routine pavement maintenance upon the paved portion of a roadway if the depth of the digging does not exceed 12e inches, and repairs needed to address unforeseen occurrences that impair a roadway. In addition, VDOT employees are not required to comply with the Act when excavating entirely within the right-of-way of public roadway if reasonable care is taken to protect the utility lines placed in the right-of-way by permit if the excavation does not exceed 18 inches in depth or replaces previous structures in their previous location.

VDOT advised the joint subcommittee that the agency complies with the Act pursuant to instructions issued by the Chief Engineer requiring the proposed excavation to be called in to the notification center. However, VDOT is concerned with any requirement that it be required to join a notification center as an operator. VDOT spent more than $4.7 million in the past year locating utility lines and designing new construction around these facilities. Most of the damage to VDOT facilities is damage to traffic signals caused by permitted work. The agency has not had problems recouping its expenses. Consequently, VDOT does not support mandatory reporting of incidents to a third party.

4. Definition of Violation

The concern was raised that one set of actions, such as failing to mark four lines for an operator, can result in four findings of a violation of the Act (and the imposition of four civil penalties), though the failure to mark the four lines arose from a single failure to perform the required action. Consequently, it was suggested that the Act should clarify what constitutes a "violation."

For discussion purposes, it was offered that, for purposes of § 56-265.32, the breach of a duty to comply with a requirement imposed pursuant to the Act would constitute a single

violation if such breach arises from or involves one discrete series of actions or inactions, without regard to whether the series of actions or inactions results in the failure to locate, or damage to, more than one utility line.

5. Use of Contractors by Notification Centers

At the joint subcommittee's September 19 meeting, it was suggested that the Act should be amended to require that notification centers stay "competitive" and that the work of manning the centers not brought "in-house." The issue was alleged to involve vendor accountability and, ultimately, public safety concerns.

To address this concern, it was suggested that § 56-265.16:1 be amended to provide that the Commission shall not certify any notification center that does not use a third party contractor, selected through competitive bidding processes, to operate the notification center.

6. Consolidation of Notification Centers

Notification centers are required to be certified by the SCC. The Act requires that there be one notification center certified for each geographic area. Currently, Virginia is served by two notification centers, each of which maintains a toll-free telephone number for inquiries: the Northern Virginia Utility Protection Service, Inc., and the Virginia Underground Utility Protection Service, Inc. Both of the centers, which are non-profit, tax exempt corporations, currently contract with third parties to conduct their operations.

It was suggested that in designating areas for notification centers, the Commission should be required to consider that contractors working in Northern Virginia, Maryland, and the District of Columbia would be required to call separate "Miss Utility" centers depending on the location of a particular project.

The concern could be addressed by a requirement that in defining geographic areas of the Commonwealth, the Commission shall consider the potential advantages and disadvantages of changing the existing boundaries of areas served by the notification center in geographic areas that are currently served by a single notification center that serves areas both within and outside the Commonwealth.

The proposal requires a consideration of the potential advantages and disadvantages of changing boundary areas because a speaker who raised this issue also said he wanted "due diligence" before a third center is certified. Alternatively, legislation could remove the SCC's power to designate areas for notification centers and specify that there shall be one, two, or any other number of such centers, and what areas of the Commonwealth each shall serve.

V. RECOMMENDATIONS

At the joint subcommittee's December 28, 2000, meeting, the members acted on the issues identified at the previous meeting as possibly being appropriate for action in the 2001 Session.

- Mandatory Reporting of Incidents

On December 19, 2000, the Commission entered its final order adopting revised enforcement rules for the Underground Utility Damage Prevention Act, effective July 1, 2001. The delayed effective date provided the General Assembly with the opportunity to take action in the 2001 Session to make legislative changes in the Act to countermand regulatory action via the enactment of legislation.

The joint subcommittee observed that when the Act was amended in 1994 to authorize the SCC to enforce its provisions, the affected population understood that reporting of incidents was to be voluntary. In order to move from voluntary reporting to mandatory reporting of incidents, the joint subcommittee expressed that a showing of a compelling public purpose would need to be established. While the thresholds for reporting incidents that were included in the final regulations should allay any fears of parties concerned with earlier proposals, the members were not persuaded that a compelling public purpose existed that justified changing the existing voluntary reporting system. A motion to adopt legislation (Appendix B) that would block the Commission's mandatory reporting regulations for non-gas utilities from taking effect was unanimously adopted, with the understanding that this action would not impair the SCC's ability to continue requesting jurisdictional gas utilities to report incidents, as such actions are not within the scope of the Act.

- Appropriate measure of damages for operators and excavators.

The joint subcommittee unanimously endorsed a legislative proposal to eliminate the statutory distinctions between the measure of damages that operators and excavators are authorized to recover following incidents resulting from violations of the Act. (Appendix C) Members specifically expressed concerns with the phrase in § 56-265.25 that currently allows operators to recover the total cost to repair the damaged facilities "as that cost is normally computed by the operator."

- Exemption for hand digging to install signs.

A proposal to create an exemption from the provisions of the Act for hand digging to install signs, provided that the depth of the digging does not exceed 12 inches, was unanimously endorsed by the joint subcommittee. (Appendix D) The amendment was prompted by concerns that the installation of yard signs for such purposes as real estate advertising and political campaigning could technically violate the Act.

- Depth to which underground facilities must be buried.

The joint subcommittee considered, and rejected, a proposal (Appendix J) that would have addressed the concern that state law does not currently require that buried utility facilities be installed to specified depths. It was suggested that an appropriate solution may to be require their installation to depths consistent with accepted industry standards. However, several speakers noted that requiring facilities to be buried to specific depths could be misleading because erosion, surface landscaping work, and other factors beyond the control of the installer may change the actual depth of lines over time.

Concerns were raised that existing language in § 56-527, which was amended in the 2000 Session to address concerns with utility line separation standards, refers to standards of organizations that may not specifically address depth-of-installation issues. In light of the fact that the SCC's task force on legislative matters relating to the Act has included this issue in its agenda, the joint subcommittee recommended that the SCC's task force address this issue in the course of its deliberations next year. Members concurred that the joint subcommittee should send a letter to the task force expressing the need for an evaluation of minimum depth-of-installation requirements.

- Lack of knowledge of the Act as an element of the willfulness of a violation.

The joint subcommittee debated the issue of whether the definition of "willful" in § 56-265.15 should be amended to provide that the lack of knowledge of the requirements imposed by the provisions of the Act should be a defense to a determination of whether an action is done willfully. A motion to adopt such a change to the terms of the Act failed, and the issue was tabled.

- Incentives for training and incident avoidance.

The joint subcommittee unanimously endorsed a proposal (Appendix E) that would direct the SCC to determine an appropriate allocation of excess civil penalties collected from violators of the Act, to be used to fund programs providing (i) training and education and (ii) incentives for excavators, operators, contract locators, and other persons to reduce the incidence and severity of violations of the Act. Under this proposal, the Commission is also required to establish elements for such programs.

- State Corporation Commission jurisdiction over municipal gas utilities.

A proposal had been prepared for discussion by the joint subcommittee to address the concern that municipalities and state agencies should be subject to the same incident reporting requirements that are imposed on jurisdictional gas system operators under the SCC's implementation of federal pipeline safety laws, and would be imposed on non-gas utilities under the proposed SCC regulations. (Appendix K) Following the joint subcommittee's decision that the Act should be amended to abrogate the Commission's ability to promulgate regulations that might require reporting of incidents by non-gas utility operators, the issue as presented was mooted.

However, the discussion of this issue by the joint subcommittee veered from the issue of whether city utility systems should be subject to the same reporting requirements as private utility operators to the question of whether the SCC should be given jurisdiction over safety regulation of municipal gas utilities. Several members reasoned that, under the concept of subsidiarity, state oversight of municipal gas utility systems would be preferable to federal regulation. Other members countered that local government administration of safety programs, which currently is in place with these municipal utilities, is preferable to transferring this responsibility to the state level. Ultimately, the lack of a demonstrated compelling public purpose for changing the existing regulatory structure was persuasive. A motion to place the three municipal gas systems under SCC jurisdiction for safety purposes only failed on a tie vote.

- Definition of a violation.

Washington Gas had urged the joint subcommittee to redefine "violation" in a manner that would not subject a person to liability for multiple violations of the Act that resulted from a single action or omission. However, prior to the joint subcommittee's December 28, 2000, meeting, Washington Gas communicated to the chairman that it wished to withdraw their interest in proceeding with the proposal at this time. The joint subcommittee agreed that the optimal course of action would be to request the task force assembled by the SCC to address this issue. The joint subcommittee expressed its request in a letter to the task force.

- Use of contract workers by notification centers.
- Consolidation of notification centers.

At the joint subcommittee's November 13, 2000, meeting, Senator Mims suggested that these two issues should not be subjected to micro-management by the joint subcommittee. Rather, it was suggested that these issues be examined in light of an alternative approach focusing on the standards to be applied by the SCC in ensuring that public safety remained the paramount concern in decisions regarding the certification of notification centers.

An alternative proposal was presented at the joint subcommittee's last meeting. The proposal clarifies the standards to be applied by the SCC in actions involving the certification of notification centers. Commission actions shall be made in furtherance of the purpose of preventing or mitigating loss of, or damage to, life, health, property or essential public services resulting from damage to underground utility lines. Decisions to approve or revoke notification center certifications shall ensure protection for the public from the hazards that this chapter is intended to prevent or mitigate; ensure that persons receive an acceptable level of performance; and require the notification center and its agents to demonstrate financial responsibility, which may be by obtaining liability insurance. (Appendix F) The joint subcommittee endorsed this alternative recommendation, though it was acknowledged that interested parties did not have the opportunity to review the proposal prior to the meeting and may identify concerns after it is scrutinized more closely.

VI. CONCLUSION

The joint subcommittee's review of the Underground Utility Damage Prevention Act has brought this vitally important - but low-profile - program under careful scrutiny. The program implemented pursuant to the Act can be cited as a successful example of how cooperation between a regulated community and responsible regulators can help ensure that Virginia will continue to reduce the number and severity of damaging and dangerous line cut-ins. Moreover, the joint subcommittee recognizes that increases in the number and variety of utility facilities can only complicate task of ensuring that incidents of damage are kept to a minimum.

While the joint subcommittee has concluded that attempting to improve safety through mandatory incident reporting requirements is not appropriate, it observes that the underlying focus of the program and of those persons charged with enforcing the program is appropriately aimed at enhancing public safety.

The joint subcommittee wishes to express its appreciation to all persons who participated in its study.

Respectfully submitted,

Senator William T. Bolling, Chairman
Delegate Riley E. Ingram, Vice Chairman
Senator J. Randy Forbes
Senator William C. Mims
Senator John Watkins
Delegate Harvey B. Morgan
Delegate Frank D. Hargrove
Viola O. Baskerville

2000 SESSION

ENROLLED

SENATE JOINT RESOLUTION NO. 75

Establishing a joint subcommittee to study the status and implementation of the Virginia Underground Utility Damage Prevention Act.

Agreed to by the Senate, March 9, 2000
Agreed to by the House of Delegates, March 8, 2000

WHEREAS, the Virginia Underground Utility Damage Prevention Act was enacted by the General Assembly in 1979 for the purpose of avoiding direct and consequential damage resulting from digging that interferes with buried utility lines; and

WHEREAS, the Act requires persons who transport materials or services by means of buried utility lines to join area notification centers that maintain excavator-operator information exchange systems; and

WHEREAS, subject to exceptions enumerated in the Act, the Act prohibits any person from trenching, tunneling or conducting other digging activities without first notifying the area notification center; and

WHEREAS, excavators are required to wait at least 48 hours following notice to the center before commencing work, during which time the operator of an existing line within the area in which the excavator plans to dig is required to mark the location of his facilities; and

WHEREAS, the Act was amended in 1994 to charge the Virginia State Corporation Commission with enforcing the provisions of the Act effective January 1, 1995; and

WHEREAS, the implementation of various provisions of the Act by the State Corporation Commission, including the Act's incident reporting requirements, has recently been the subject of criticism; and

WHEREAS, the effectiveness of the Act, relative to the burdens it imposes on operators and excavators, has not been comprehensively studied since the State Corporation Commission became responsible for enforcing the Act; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That a joint subcommittee be established to study the status and implementation of the Virginia Underground Utility Damage Prevention Act. The joint subcommittee shall also consider the certification and governance of the notification centers by the State Corporation Commission. The joint subcommittee shall be composed of eight legislative members, as follows: three members of the Senate, to be appointed by the Senate Committee on Privileges and Elections; and five members of the House of Delegates, to be appointed by the Speaker of the House in accordance with the principles of Rule 16 of the Rules of the House of Delegates.

The direct costs of this study shall not exceed $8,000.

The Division of Legislative Services shall provide staff support for the study. Technical assistance shall be provided by the State Corporation Commission. All agencies of the Commonwealth shall provide assistance to the joint subcommittee, upon request.

The joint subcommittee shall complete its work in time to submit its findings and recommendations to the Governor and the 2001 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

Implementation of this resolution is subject to subsequent approval and certification by the Joint Rules Committee. The Committee may withhold expenditures or delay the period for the conduct of the study.

2001 SESSION

010200404

SENATE BILL NO. 1089

Offered January 10, 2001

Prefiled January 10, 2001

A BILL to amend and reenact § 56-265.30 of the Code of Virginia, relating to the Underground Utility Damage Prevention Act; enforcement regulations.

Patron—Bolling

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That § 56-265.30 of the Code of Virginia is amended and reenacted as follows:

§ 56-265.30. Authority of the State Corporation Commission.

A. The Commission shall enforce the provisions of the Underground Utility Damage Prevention Act as set out in this chapter. The Commission may promulgate any rules or regulations necessary to implement the Commission's authority to enforce this chapter.

B. Nothing in this chapter shall be construed to authorize the Commission to promulgate any rules or regulations pursuant to its authority to enforce this chapter that require any person to report to the Commission any probable violation of this chapter or any incident involving damage, dislocation, or disturbance of any utility line.

Official Use By Clerks

Passed By The Senate		Passed By The House of Delegates	
with amendment	☐	with amendment	☐
substitute	☐	substitute	☐
substitute w/amdt	☐	substitute w/amdt	☐

Date: _____ Date: _____

Clerk of the Senate

Clerk of the House of Delegates

2001 SESSION

010201404

SENATE BILL NO. 1405

Offered January 19, 2001

A BILL to amend and reenact § 56-265.25 of the Code of Virginia, relating to the Underground Utility Damage Prevention Act; liability for damage.

Patrons—Forbes and Bolling

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That § 56-265.25 of the Code of Virginia is amended and reenacted as follows:

§ 56-265.25. Liability of operator and excavator; penalties.

A. 1. If any underground utility line is damaged as a proximate result of a person's failure to comply with any provision of this chapter, that person shall be liable to the operator of the underground utility line for the ~~total~~ *actual* cost ~~to repair~~ *incurred in repairing* the damaged facilities ~~as that cost is normally computed by the operator~~, provided the operator is a member of the notification center covering the area in which the damage to the utility line takes place. The liability of such a person for such damage shall not be limited by reason of this chapter.

2. Any person who willfully fails to notify the notification center of proposed excavation or demolition shall be liable to the operator as provided in subsection A of § 56-265.17.

3. If, after receiving proper notice, an operator fails to discharge a duty imposed by any provision of this chapter and an underground utility line of such operator is damaged, as a proximate result of the operator's failure to discharge such duty, by any person who has complied with all of the provisions of this chapter, such person shall not be so liable.

B. If an underground utility line of an operator is damaged, as the proximate result of the operator's failure to comply with any provision of this chapter, by any person who has complied with the provisions of this chapter, the operator shall be liable to such person for the ~~total~~ *actual* cost ~~to repair~~ *incurred in repairing* any damage to the equipment or facilities of such person resulting from such damage to the operator's underground utility line.

C. Except as specifically set forth herein, the provisions of this chapter shall not be construed to either abrogate any rights, duties, or remedies existing under law or create any rights, duties, defenses, or remedies in addition to any rights, duties, or remedies existing under law.

2001 SESSION

010202404

HOUSE BILL NO. 2660

Offered January 15, 2001

A BILL to amend and reenact § 56-265.15:1 of the Code of Virginia, relating to the Underground Utility Damage Prevention Act; exemptions.

Patron—Ingram

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That § 56-265.15:1 of the Code of Virginia is amended and reenacted as follows:

§ 56-265.15:1. Exemptions; routine maintenance.

Nothing in this chapter shall apply to:

1. Any hand digging performed by an owner or occupant of a property.

2. The tilling of soil for agricultural purposes.

3. Any excavation done by a railroad when the excavation is made entirely on the land which the railroad owns and on which the railroad operates, provided there is no encroachment on any operator's rights-of-way or easements.

4. An excavation or demolition during an emergency, as defined in § 56-265.15, provided all reasonable precaution has been taken to protect the underground utility lines.

In the case of the state highway systems or streets and roads maintained by political subdivisions, officials of the Department of Transportation or the political subdivision where the use of such highways, roads, streets or other public way is impaired by an unforeseen occurrence shall determine the necessity of repair beginning immediately after the occurrence.

5. Any excavation for routine pavement maintenance, including patch type paving or the milling of pavement surfaces, upon the paved portion of any street, road, or highway of the Commonwealth provided that any such excavation does not exceed a depth of twelve inches (0.3 meter).

6. Any excavation for the purpose of mining pursuant to and in accordance with the requirements of a permit issued by the Department of Mines, Minerals and Energy.

7. Any excavation performed in installing signage upon property, provided that such excavation does not exceed a depth of twelve inches (0.3 meter).

Official Use By Clerks			
Passed By The House of Delegates		**Passed By The Senate**	
with amendment	☐	with amendment	☐
substitute	☐	substitute	☐
substitute w/amdt	☐	substitute w/amdt	☐
Date: _____		Date: _____	
Clerk of the House of Delegates		Clerk of the Senate	

2001 SESSION

010203404

SENATE BILL NO. 1090

Offered January 10, 2001

Prefiled January 10, 2001

A BILL to amend and reenact § 56-265.32 of the Code of Virginia, relating to the Underground Utility Damage Prevention Special Fund.

Patron—Bolling

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That § 56-265.32 of the Code of Virginia is amended and reenacted as follows:

§ 56-265.32. Commission to impose civil penalties for certain violations; establishment of Underground Utility Damage Prevention Special Fund.

A. The Commission may, by judgment entered after a hearing on notice duly served on any person not less than thirty days before the date of the hearing, impose a civil penalty not exceeding $2,500 for each violation, if it is proved that the person violated any of the provisions of this chapter, except § 56-265.16:1, as a result of a failure to exercise reasonable care. Any proceeding or civil penalty undertaken pursuant to this section shall not prevent nor preempt the right of any party to obtain civil damages for personal injury or property damage in private causes of action. This subsection shall not authorize the Commission to impose civil penalties on any county, city or town. However, the Commission shall inform the counties, cities and towns of reports of alleged violations involving the locality and, at the request of the locality, suggest corrective action.

B. The Underground Utility Damage Prevention Special Fund (hereinafter referred to as "Special Fund") is hereby established as a revolving fund to be used by the Commission for administering the regulatory program authorized by this chapter. The Special Fund shall be composed entirely of funds generated by the enforcement of this chapter. Excess funds shall be used to support any *one or more of the following: (i)* public awareness programs established by a notification center pursuant to subsection B of § 56-265.16:1*; (ii) training and education programs for excavators, operators, line locators, and other persons; and (iii) programs providing incentives for excavators, operators, line locators, and other persons to reduce the number and severity of violations of the Act. The Commission shall determine the appropriate allocation of any excess funds among such programs, and shall establish required elements for any program established under clause (ii) or (iii).*

C. All civil penalties collected pursuant to this section shall be deposited into the Underground Utility Damage Prevention Special Fund. Interest earned on the fund shall be credited to the Special Fund. The Special Fund shall be established on the books of the Commission comptroller and any funds remaining in the Underground Utility Damage Prevention Special Fund at the end of the fiscal year shall not revert to the general fund, but shall remain in the Special Fund.

Official Use By Clerks			
Passed By The Senate		**Passed By The House of Delegates**	
with amendment	☐	with amendment	☐
substitute	☐	substitute	☐
substitute w/amdt	☐	substitute w/amdt	☐
Date: _____		Date: _____	
_____		_____	
Clerk of the Senate		Clerk of the House of Delegates	

2001 SESSION

REPRINT

010204500

SENATE BILL NO. 1328

Offered January 12, 2001

A BILL to amend and reenact § 56-265.16:1 of the Code of Virginia, relating to the Underground Utility Damage Prevention Act; notification centers.

Patrons—Mims, Bolling and Forbes; Delegates: Baskerville and Ingram

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That § 56-265.16:1 of the Code of Virginia is amended and reenacted as follows:

§ 56-265.16:1. Operators to join notification centers; certification.

A. Every operator, including counties, cities and towns, but excluding the Department of Transportation, having the right to bury underground utility lines shall join the notification center for the area.

B. Every notification center shall be certified by the ~~State Corporation~~ Commission. *The Commission shall determine the optimum number of notification centers in the Commonwealth. If the Commission determines that there shall be more than one notification center in the Commonwealth, it shall define the geographic area to be served by each notification center.*

C. Any corporation desiring to serve as the notification center for an area of the Commonwealth may apply to the ~~State Corporation~~ Commission to be certified as the notification center for that area. The ~~State Corporation~~ Commission shall have authority to grant, amend, or revoke certificates under regulations ~~which it may adopt~~ *promulgated* relating to certification. *An application for certification shall include such information as the Commission may reasonably require addressing the applicant's operational plan for the notification center.*

D. Every Commission action regarding the optimum number of notification centers, the geographic area to be served by each notification center, the promulgation of notification center certification regulations, and the grant, amendment, or revocation of notification center certifications shall be made in furtherance of the purpose of preventing or mitigating loss of, or damage to, life, health, property or essential public services resulting from damage to underground utility lines. Any action by the Commission to approve or revoke any notification center certification shall:

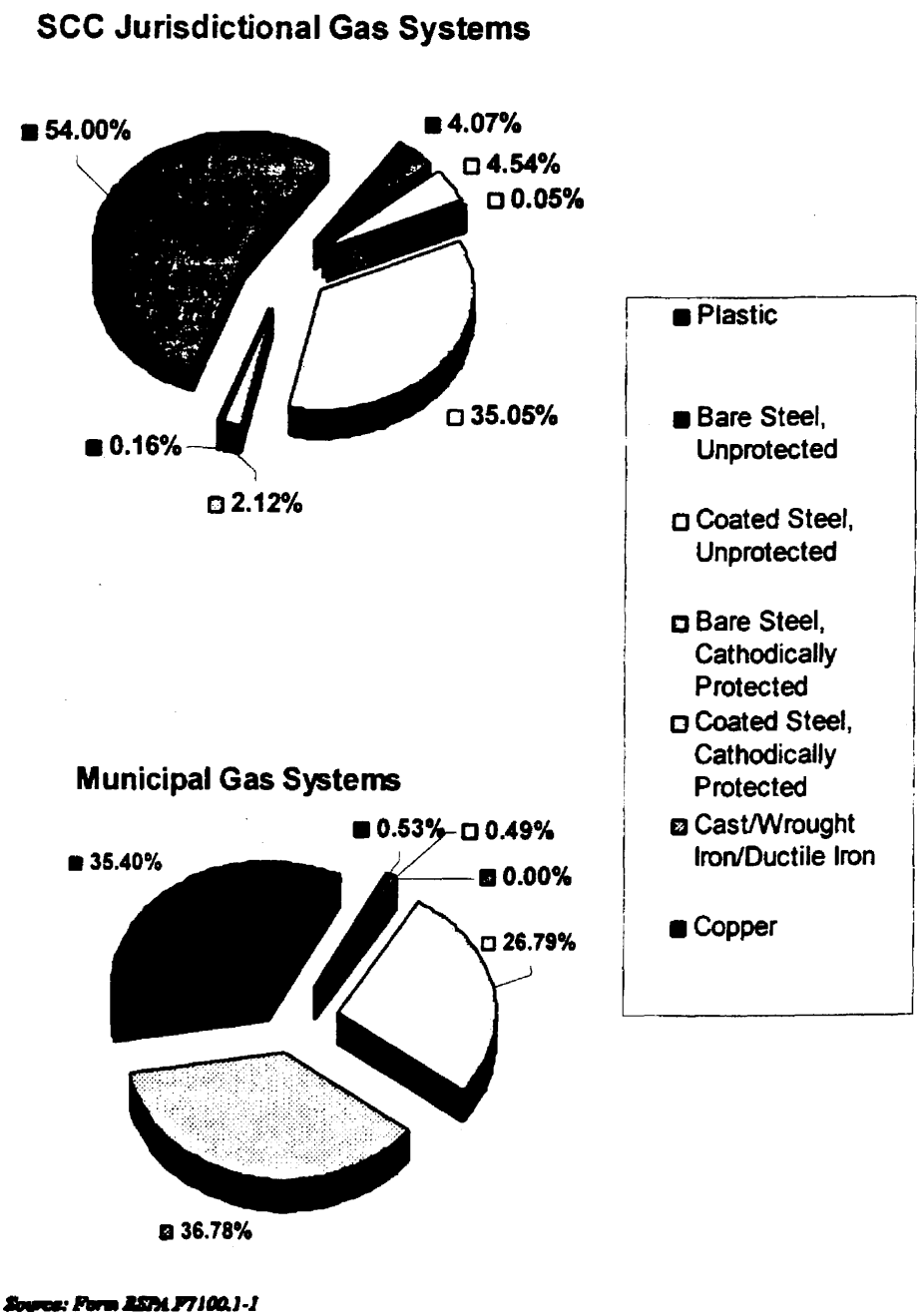
1. Ensure protection for the public from the hazards that this chapter is intended to prevent or mitigate;

2. Ensure that all persons served by the notification center receive an acceptable level of performance, which level shall be maintained throughout the period of the notification center's certification; and

3. Require the notification center and its agents to demonstrate financial responsibility for any damages that may result from a violation of any provision of this chapter. Such requirement may be met by purchasing and maintaining liability insurance on such terms and in such amount as the Commission deems appropriate.

E. A notification center shall maintain an excavator-operator information exchange system in accordance with notification center certification regulations promulgated by the ~~State Corporation~~ Commission. The members of a notification center shall be responsible for developing and implementing a public awareness program to ensure that all parties affected by this chapter shall be aware of their responsibilities. There shall be only one notification center certified for each geographic area defined by the ~~State Corporation~~ Commission.

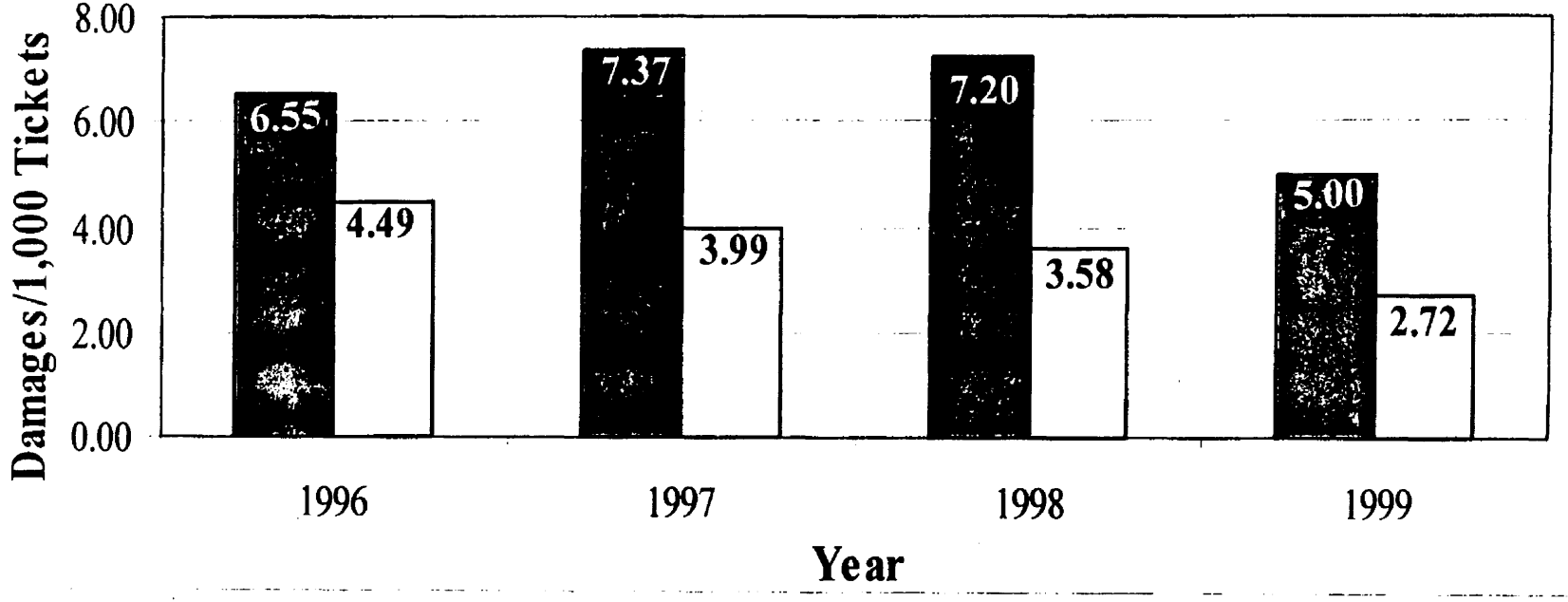
Appendix G: Municipal gas utility safety data



Source: Form RSPA F7100.1-1

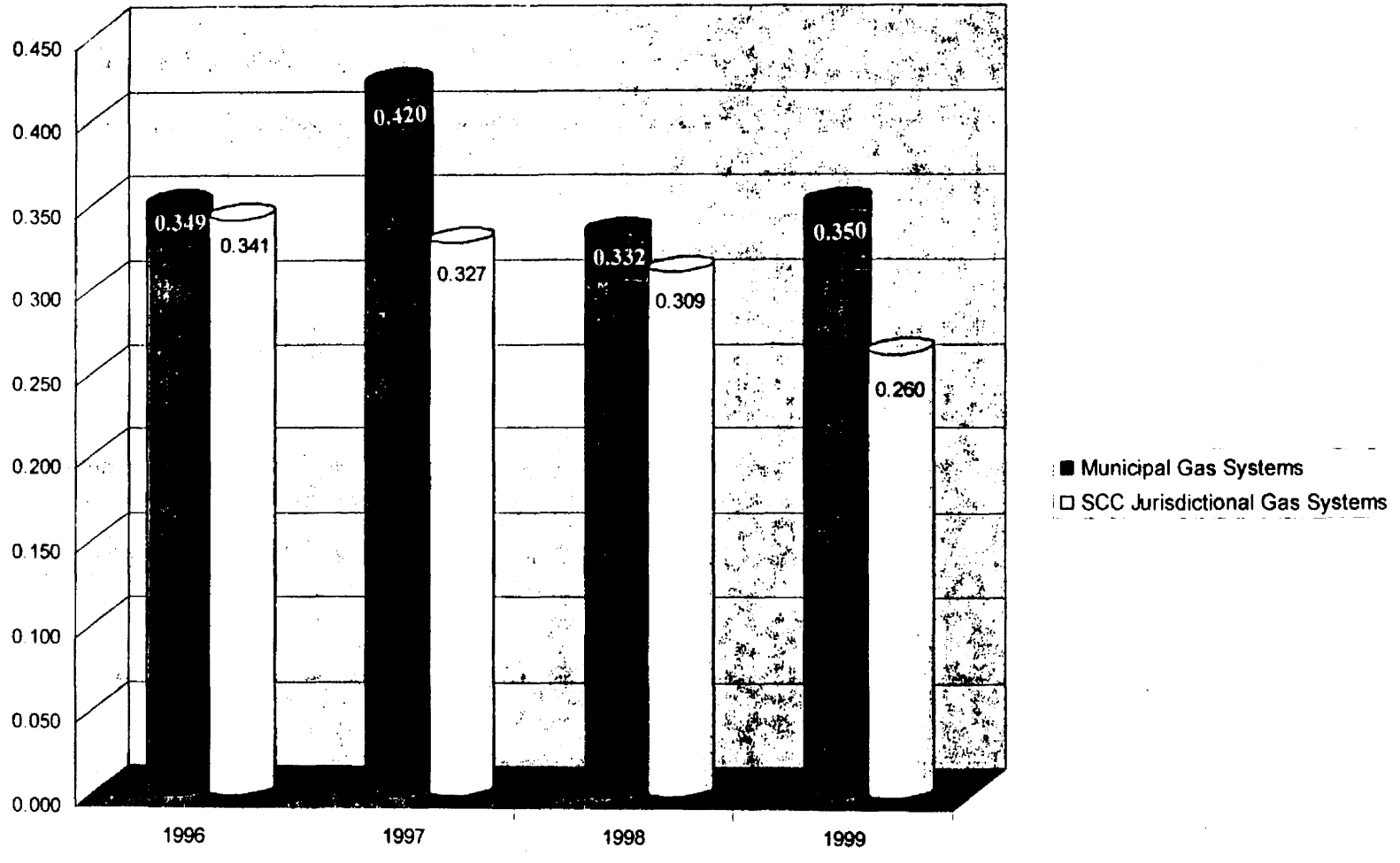
Note: Research and Special Program Administration's Pipeline Safety Alert Notice ALN91-02, issued October 11, 1991, informed the gas pipeline operators to develop a program to identify and replace their cast iron piping system that may threaten public safety.

GAS FACILITY DAMAGES* PER 1,000 TICKETS

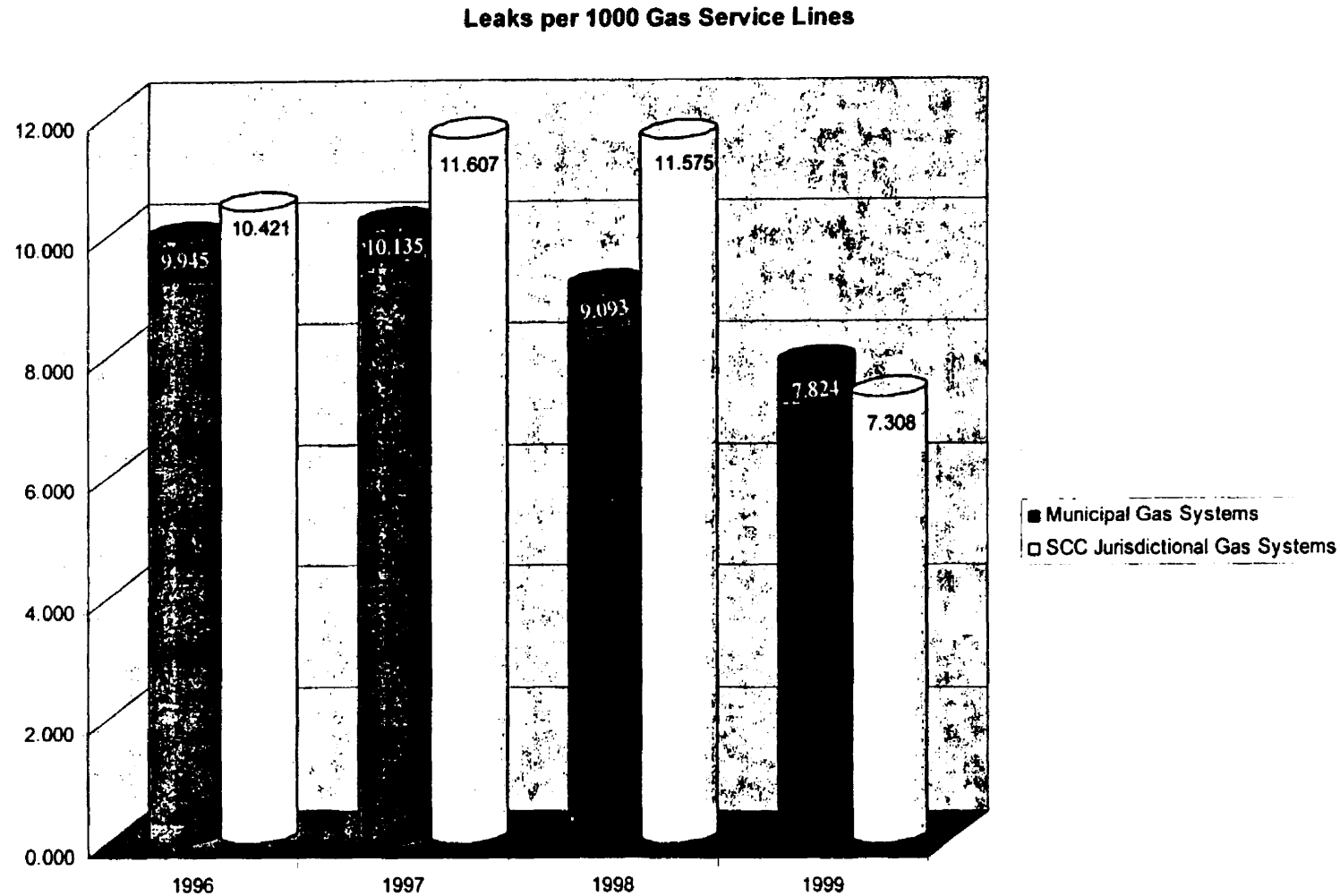


*Source: OPS Annual Report Form RSPAF7100.1-1

Leaks per Mile of Gas Main Pipe

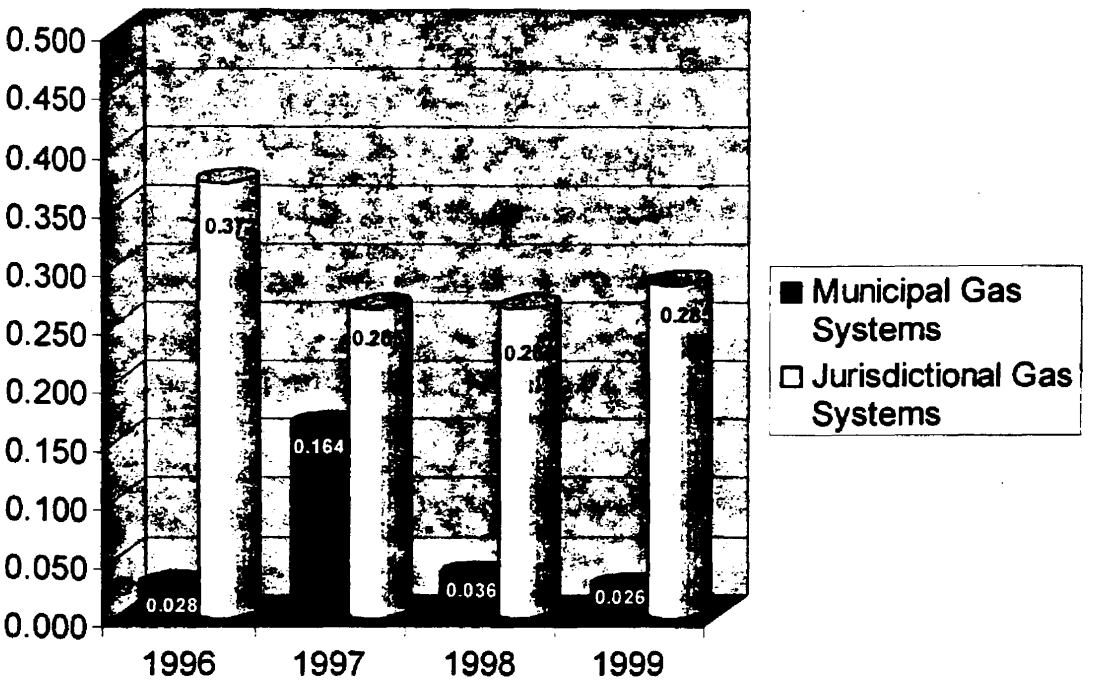


Source: Form RSPA F 7100.1-1



Source: Form RSPA F 7100.1-1

Inspection Person-Days per 1000 Customers



The national average inspection person-days for state pipeline safety programs per 1000 customers is 0.54 based upon 1998 data.

Inspection Activities

	Total Inspection Person-Days			
	1996	1997	1998	1999
Jurisdictional Gas Systems	274.8	203.8	211.8	236.8
Municipal Gas Systems	3	18	4	3

Average Emergency Response Time for 1999

	Minutes
Jurisdictional Gas Systems	22
Municipal Gas Systems	18

Data Sources: OPS Eastern Region;
Cities of Charlottesville, Danville, Richmond; and,
National Association of Pipeline Safety Representatives

CITY OF RICHMOND
DEPARTMENT OF PUBLIC UTILITIES
OFFICE OF THE DIRECTOR

December 21, 2000

Honorable Senator William T. Bolling
Chairman, SJR 75 Subcommittee
c/o Frank Munyan, Division of Legislative Services
910 Capitol Street, 2nd Floor
Richmond, Virginia 23219

Dear Senator Bolling:

The purpose of our letter is to offer further comments to the subcommittee concerning the Underground Damage Prevention Act (UDPA) and the report submitted by the State Corporation Commission (SCC). As a group, we represent the three municipally owned gas utilities (municipals) of the cities of Richmond, Charlottesville and Danville.

We are on record as being in opposition to the amendment of this bill pertaining to municipal reporting and the possible assessment of penalties against municipals for violations of the Act. We want to provide the subcommittee information about our collective concerns. We also want to provide information about our damage prevention actions and practices.

Setting aside the issue of constitutionality, which we feel very strongly about, we cannot understand the necessity for these proposed changes and the concern expressed by some members of the subcommittee that we "report" to the State Corporation Commission (SCC). Our records and information are open to the public and readily available to anyone wishing to review them. We would gladly share information with the SCC on a timely and voluntary basis, but not under threat or penalty.

A municipality has greater control and authority over contractors working in our respective jurisdictions and their construction practices. After all, they are working on local government property. Even though the SCC has authority over some contractor actions, it pales to those granted to municipalities within their right of ways. Through the permitting process, a municipality can, if necessary, stop a contractor from working in public right of ways for poor construction practices, (no utility markings, missed markings, traffic safety violations etc.) or in the spirit of the UDPA, for damaging

underground or even damage above ground (poles, lights) to utilities or any other public use structure. If a municipality damages another's facility the municipality is liable for damages. The three municipalities own other utilities such as gas, water, sewer and electric. If one municipal utility damages another municipal facility (city sewer crew is working and hits a city gas service), it makes little sense to report the incident to a third party (the SCC, for example) when the ultimate authority rests with the municipality. That municipality, through its inherent authority, can "penalize" its own utilities. The UPDA recognizes municipal authority by not imposing regulation directly on them.

The SCC has presented a report requested by the subcommittee. This report compares jurisdictional, investor owned gas companies (IOU) with the three municipals in several areas. We do not take issue with the SCC report. To the contrary, we believe its findings to be accurate. We offer only clarification and additional statistics to bring the proper perspective to the issues before the subcommittee.

As stated, we concur with the information provided by the SCC. It is our opinion that the information is only a snapshot of the combined jurisdictional IOUs and combined municipal systems during a four-year period and does not necessarily reflect the current conditions of these systems or their planned improvements. Generally speaking, the comparison of several reported items are consistent. The SCC report indicates no major differences between the IOUs and the municipals. There is, however, additional data that does note distinctions between the two groups.

We call your attention to the System Leakage Chart within the SCC report. Please note the pie-chart on the System Composition page of the report. Two percent (2%) of the piping material in investor owned systems is cast iron pipe. The municipals' gas systems consist of 37% cast iron piping. It is a fact that the greatest number of leaks per mile on any system material within either group will be on a cast iron pipe (jointed) system. The municipals gas systems are probably the three oldest gas systems in Virginia. They have, or had, more old cast iron pipe installed when it was the accepted 'state of the art' for manufactured gas systems.

Charlottesville has all but completed its cast iron renewal program with 1 mile remaining to be completed. Danville has a good cast iron main replacement program that is well underway. Richmond has an excellent cast iron replacement program that is funded to replace 20 miles of cast iron pipe every year until completed. All three programs have been presented to the U.S. Office of Pipeline Safety (OPS) and officially approved for correction and implementation. Please note that the SCC report indicates that the overall leakage rate is decreasing which shows the municipals progress as well as sound public safety practices and responsible system management.

We have included an attachment from the city of Danville for your review. As an indication of the municipal's public safety practices consider that the SCC report does not include an incident chart that denotes actual gas related emergencies. Page four of the attachment does compare municipals and IOUs (jurisdictional) actual incidents. Our research shows actual gas "incidents" reported by municipals are more favorable than

those reported by the IOUs. This clearly demonstrates the value municipals place on safety.

There are many public safety practices and damage prevention measures that municipals undertake routinely. Some of those measures are listed below for your information:

1. The municipality of each public utility owns the streets and the right of ways in their respective jurisdictions. They exert more authority over construction activities i.e., permitting prior to street excavation, and protection of their facilities than can the SCC.
2. Municipal utilities are strong proponents of Miss Utility and were among the original utilities to support and lead the effort. As a local government agency, we have instituted strong measures to enforce compliance.
3. Distribution of Miss Utility literature (city wide) throughout all departments and the public strongly supports the "education" phase of the UDPA.
4. Municipals have strong and immediate responses to reported gas leaks. Emergency response time appears to be 20% faster than with inversor owned gas companies. (Source: SCC report to subcommittee, dated November, 2000)
5. Each municipal utility conducts a strong annual valve survey program.
6. Each municipal conducts year round leak detection surveys. Businesses are surveyed once a year. The entire system every three years.
7. Each municipal conducts year round cathodic protection checks, monitored monthly. This exceeds minimum requirements.
8. In-house training on excavation and emergency response are conducted by the municipals. Each municipal retains two full time safety employees.
9. Municipals train with local emergency units, including fire departments and rescue units along with the city, county and state police departments and other state emergency agencies. There are also annual regional emergency operations training and exercises.
10. Training is conducted under the new federal requirement for the gas operator's qualification program. This program is being conducted through a collaborative effort for all VA natural gas LDC's in conjunction with the SCC.

There are other concerns about the proposed amendment. The respective municipalities own their water systems, sewer systems and a large part, if not all, of the electric system. With ownership of four utility systems, would municipals report on themselves for damage to their own facilities by their own labor forces? We ask, for what purpose? What would be the public benefit of a fine levied against a municipality for digging in to its own utilities, street, etc.? It appears to the municipals that we defeat the intent of the Act by penalizing those entities the act is attempting to protect. This renders the amendment useless.

In summary, the three publicly owned gas organizations respectfully request that the members of this subcommittee recognize the inherent difference in structure between the municipals and IOU gas companies. The amendments to the Act

pertaining to reporting, penalizing and overseeing municipals, specifically issues list #7 (previously item # 13) should not go forward for legislation. We believe it is not necessary and serves no public safety purpose or benefit to require municipal reporting to the SCC. We urge the subcommittee to reject these amendments as being cost burdensome, unnecessary and intrusive on the authority of municipalities to regulate and protect public safety and creation of bad public policy.

I hope that with the above we have shed some light on the operating activity of the three (3) municipals. We would welcome the opportunity to address the subcommittee concerning this proposed legislation. If desired, we are prepared to provide a presentation or tour of municipal facilities to further inform the subcommittee of our actions and practices that significantly contribute to the public's safety through responsible management of our gas systems. Please do not hesitate to contact William Galli, Richmond or any of the municipals through him at (804) 646-5290.

Respectfully Submitted on behalf of the
Cities of Charlottesville, Danville and Richmond by,

William J. Galli, Deputy director
City of Richmond
Department of Public Utilities

On behalf of:

James Harr
City of Danville
Department of Public Utilities

James Palmborg
City of Charlottesville
Department of Public Utilities

Cc: SJR 75 Subcommittee Members
City Managers Richmond, Charlottesville and Danville
George Kolb, Richmond
Kelley Harris, Richmond

Danville Attachment

The municipal natural gas systems feel the need to comment on the letter and attached information submitted to the Subcommittee by the State Corporation Commission (SCC) comparing the municipals with SCC jurisdictional gas systems. The SCC, in response to a request from the Subcommittee to provide information relevant to leak reporting and general systems' conditions, submitted the information basing their response on six items: 1) system composition, 2) gas facilities damages per 1,000 Miss Utility tickets, 3) leaks per mile of gas main, 4) leaks per 1000 gas service lines, 5) inspection person-days per 1000 customers, and 6) average emergency response times for 1999. While, in review of the information, we concur with the information as provided, however it is our opinion that the information is only a snapshot of the combined jurisdictional and the combined municipal systems during a four-year time period and does not necessarily reflect the current condition of these systems or the planned improvements for the near future. Due to the diversity of the systems comprising both the municipal and jurisdictional systems, further review should include individual reviews of each system. In reviewing the information provided by the SCC, the municipals believe that the information could be construed by the Subcommittee to show the municipal systems are not as safety conscious or oriented as the jurisdictional systems. The municipal systems want to ensure that there is no misinterpretation of the information provided in the submittal by the SCC. The municipals, as a group, are as concerned, if not more, with the condition of its systems and the public's safety.

The first chart presented by the SCC compares the combined composition of the pipe materials in the two groups. The SCC currently has nine natural gas distribution systems in its jurisdiction, which are combined have 14,679 miles of distribution mains. The municipal natural gas distribution systems include three systems, when combined have a total of 2,243 miles of distribution mains. A breakdown of the two system's main compositions is shown in the following tables.

SYSTEM COMPOSITION (1999)

JURISDICTIONAL

Material	Miles of Main	Percentage of Systems
Bare Steel Unprotected	597	4.07%
Coated Steel Unprotected	667	4.54%
Bare Steel Protected	8	0.05%
Coated Steel Protected	5,145	35.05%
Polyethylene	7,927	54.00%
Cast Iron	311	2.12%
Ductile Iron	0	0.00%
Copper	24	0.16%
Total	14,679	

MUNICIPAL

Material	Miles of Main	Percentage of Systems
Bare Steel Unprotected	12	0.54%
Coated Steel Unprotected	11	0.49%
Bare Steel Protected	0	0.00%
Coated Steel Protected	601	26.79%
Polyethylene	794	35.40%
Cast Iron	651	29.02%
Ductile Iron	174	7.76%
Copper	0	0.00%
Total	2,243	

Both groups have replaced existing mains and installed new mains during the four-year period used for the SCC report. The replacements and installations have been performed almost exclusively with polyethylene pipe. The charts include a note referencing the RSPA Safety Alert Notice, which requires natural gas system operators to prepare a plan to identify cast iron piping which may affect public safety and commence a program for the replacement of such piping. Each of the municipal systems has

complied with the requirements of the notice. The City of Charlottesville has replaced all cast iron in its system, and the Cities of Richmond and Danville are currently involved in ambitious programs for the replacement of the cast iron piping in their systems.

The second chart relates the higher incidents of third party damage among the municipal systems. The municipal group prior to the compilation of this letter could not verify the information in this chart, but the accuracy is not in question. It is assumed that the evident conclusion may be that the lower incidence of 3rd party damage in the jurisdictional systems is a result of the investigations and potential resulting fines imposed by the SCC, which provides motivation to 3rd parties to avoid further damages. Each of the municipal systems routinely investigates damage resulting from 3rd parties in-house. The investigations involve the determination of fault in the incidents and if the 3rd party is found to be at fault or negligent directly resulting in the damage, compensatory fines are levied. The Cities of Richmond and Danville typically require compensation for direct cost, but the City of Charlottesville does levy charges equal to three times the cost incurred to the system when negligence is determine in the investigation, similar to that of the SCC. One potential explanation for the higher number of 3rd party damages among the municipal systems may be that these three systems are typically located in urban areas with congested infrastructures.

The third and fourth charts compare the incidents of leaks on mains and services in the two groups sections. These charts include all leaks resulting from: 1) corrosion, 2) 3rd party damage, 3) outside forces, 4) material defects, 5) construction defects, and 6) other, as reported on the annual report (Federal Form RSPA 7100.1-1). In both groups the highest number of leaks on mains are a result of corrosion and other (typically leaks on mechanical joints). These numbers could reflect the amounts of steel in the jurisdictional systems and the amount of cast iron and ductile iron in the municipal systems. As these systems are replaced through cast iron replacement programs and general system replacements a lower number of leaks in these categories should be reflected. Third party damage and other result in the highest number of leaks on service lines in the jurisdictional systems, while corrosion and 3rd party damages are the highest causes of the leaks on service lines in the municipal systems. A table is included below showing total number of leaks in each group for the time period included in the SCC report. Leaks resulting from corrosion, material defects, and construction defects have been grouped together; leaks resulting from 3rd party damages and outside force damages have been grouped together; and other leaks are in a separate group.

SYSTEM LEAKS

JURISDICTIONAL MAINS*

	Corrosion/ Defects	3rd Party/ Outside Force	Other	Total
1999	1,961	492	1,369	3,822
1998	2,330	525	1,515	4,370
1997	2,118	525	1,827	4,470
1996	2,398	589	1,467	4,454
TOTALS	8,807	2,131	6,178	17,116

* Does not include Virginia Gas Distribution Co. totals for 1999

MUNICIPAL MAINS

	Corrosion/ Defects	3rd Party/ Outside Force	Other	Total
1999	100	128	556	784
1998	113	180	437	730
1997	78	219	614	911
1996	92	158	480	730
TOTALS	383	685	2,087	3,155

JURISDICTIONAL SERVICES*

	Corrosion/ Defects	3rd Party/ Outside Force	Other	Total
1999	1,999	1,659	2,415	6,073
1998	3,636	1,749	3,739	9,124
1997	3,593	1,973	3,362	8,928
1996	2,964	2,173	2,561	7,698
TOTALS	12,192	7,554	12,077	31,823

* Does not include Virginia Gas Distribution Co. totals for 1999

MUNICIPAL SERVICES

	Corrosion/ Defects	3rd Party/ Outside Force	Other	Total
1999	457	330	113	900
1998	439	385	198	1,022
1997	607	282	222	1,111
1996	607	270	187	1,064
TOTALS	2,110	1,267	720	4,097

Total leaks on a system do not appear to be an accurate indicator of system conditions. Third party damage and damage caused by outside forces, although often avoidable, do not differentiate between "good" piping and "bad" piping.

The next chart compares the amount of outside inspection for the two groups of systems. Again, the municipal group was not able to obtain the information to verify the information in the graph prior to preparation of this letter. Typically the Office of Pipeline Safety performs an annual inspection of each system, which includes visual inspection, operational inspection, record keeping, etc. of the facilities. In the event of reportable (under CFR 40 Part 191 guidelines) incident additional time onsite is required for incident investigations. Inspection guidelines are not known for the SCC jurisdictional systems, but it is assumed that these are performed similar to the OPS inspections. The municipal systems have several questions concerning this chart, which include:

1. Do the SCC numbers for the jurisdictional systems include inspection time for the investigation of leaks and incidents, or system review time only? The municipal systems feel that the two types of inspection cannot be combined for the purpose of ascertaining the safe operation of a gas system since system review inspections are considered a preventive inspection and leak and incident inspections or investigations are a response inspection. The municipals believe that two charts would be a better indicator for inspection effectiveness, one for preventive inspection and one for response inspection.
2. If the chart includes leak and incident investigation time, does this time include only onsite investigations or does it also include time spent on the investigations offsite?
3. If the chart does include inspections for the investigation of leaks and incidents, shouldn't there be an allowance for in-house investigations for 3rd party and outside forces damage in the municipal's numbers? As municipalities charged with public safety, there is much more effort expended by the operators in the insurance of safe operations and public safety than time spent onsite by Federal inspectors. It is estimated that on average a 3rd party/outside force leak investigation requires approximately one hour of investigation time by municipal employees.

In addition to leak investigations by the SCC for jurisdictional systems, it was noted in the review of the SCC information that the jurisdictional systems incurred a much higher number of reportable incidents to the federal government, which would account for an increased need for onsite inspection of the jurisdictional systems. The following information was obtained from OPS reports.

- There have been 8 reportable incidents (Part 191.9) in the time period used for the SCC report. Distribution companies that are inspected by the SCC reported 7 of these incidents.
- Costs of incidents:
    - o Jurisdictional - $2,300,000
    - o Municipal - $ 48,000
- Fatalities as result of incidents:
    - o Jurisdictional - 1
    - o Municipal - 0
- Injuries as result of incidents:
    - o Jurisdictional - 2
    - o Municipal - 0
- Cause of Accidents
    - o Outside Forces - 3
    - o Corrosion - 2
    - o Operator Accident - 1
    - o Other 2

The last comparative chart shows average emergency response times for each group of systems. The times shown are quite relevant to the concern by both the municipal and jurisdictional systems for public safety.

Appendix I: Mandatory reporting requirements of other states

Is your damage prevention law or Commission rule contain any mandatory reporting requirements for utilities to report "probable violations" of your law, rules or regulations?

	YES	NO
Alabama		X
Alaska	(note 1)	
Arizona	X	
Arkansas		X
California		X
Colorado		X
Connecticut	X	
Delaware	X	
District of Columbia		X
Florida		X
Georgia	X	
Hawaii	(note 1)	
Idaho	X	
Illinois	X	
Indiana	X	
Iowa		X
Louisiana		X
Kansas	(note 3)	X
Kentucky		X
Louisiana		X
Maine	X	
[illegible]ryland		X
[illegible]sachusetts	X	
[illegible]chigan	X	
Mississippi	X	
Missouri		X
Montana		X
Nebraska	(note 2)	
Nevada	(note 1)	
New Hampshire	X	
New Jersey	X	
New Mexico	gas only	
New York	gas only	
North Carolina		X
North Dakota		X
Ohio		X
Oklahoma		X
Oregon		X
Pennsylvania	(note 1)	
Rhode Island	X	
South Carolina		X
South Dakota		X
Tennessee		X
Texas		X
Utah		X
Vermont	X	
Virginia	gas only	
[illegible]hington		X
[illegible] Virginia		X
Wisconsin		X
Wyoming		X

1. Alaska, Hawaii, Navada and Pennsylavania could not be contacted despite several attempts.
2. Nebraska did not respond to Commission Staff Inquiry.
3. Kansas Law will change in 2001 and require reporting.

Appendix J: Proposal addressing minimum installation depth for utility facilities

Proposed amendment to subsection A of § 56-257:

§ 56-257. (Effective July 1, 2001) Manner of installing underground utility lines.

A. Every operator, as defined in § 56-265.15, having the right to install underground utility lines, as defined in § 56-265.15, except interstate gas pipelines subject to regulation by the U.S. Department of Transportation, shall install such underground utility lines in accordance with accepted industry standards. Such standards shall include, as applicable, standards established by the National Electric Safety Code, the Commission's pipeline safety regulations, the Department of Health's waterworks regulations (12 VAC 5-590-10 et seq.), and standards established by the Utility Industry Coalition of Virginia. *Such standards shall address, among other items, the minimum depth to which underground utility lines are required to be buried.*

B. . . .

C. . . .

Appendix K: Proposal addressing municipal utility and VDOT incident reporting

Proposed legislative solution:

§ 56-265.23. Exemption for roadway maintenance operations by the Virginia Department of Transportation and certain counties, cities, and towns.

Employees of the Virginia Department of Transportation acting within the scope of their employment, and certain employees of those counties, cities, and towns which maintain their streets or roads in accordance with § 33.1-23.5:1 or § 33.1-41.1 performing street or roadway maintenance operations and acting within the scope of their employment, excavating entirely within the right-of-way of a public road, street or highway of the Commonwealth shall not be required to comply with the provisions of this chapter, *except as provided in rules or regulations promulgated as provided in subsection B of § 56-265.30,* if reasonable care is taken to protect the utility lines placed in the right-of-way by permit and if they:

1. Excavate within the limits of the original excavation; on the traveled way, shoulders or drainage features of a public road, street, or highway and any excavation does not exceed eighteen inches (0.45 meter) in depth below the grade existing prior to such excavation; or

2. Are replacing previously existing structures in their previous locations.

§ 56-265.30. Authority of the State Corporation Commission.

A. The Commission shall enforce the provisions of the Underground Utility Damage Prevention Act as set out in this chapter. The Commission may promulgate any rules or regulations necessary to implement the Commission's authority to enforce this chapter.

B. Any rules or regulations promulgated by the Commission requiring the reporting to the Commission of any probable violation of this chapter or any incident involving damage, dislocation, or disturbance of any utility line shall impose the same reporting requirements on municipalities and other political subdivisions, governmental units, departments and agencies, as are imposed by such rules or regulations on other persons.