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May 11, 2018

The Honorable Joe Negron  
409 Capitol  
Tallahassee, FL 32399

The Honorable Richard Corcoran  
420 Capitol  
Tallahassee, FL 32399

Dear President Negron and Speaker Corcoran:

Sunshine State One Call of Florida and stakeholders in the industry, including the Florida Natural Gas Association, TECO Peoples Gas, AT&T, Florida Internet and Television, the National Utility Contractors Association of Florida and the Florida Energy Pipeline Association, respectfully request the Legislature to undertake a study of the current mechanisms for enforcing the Underground Facility Damage and Prevention Act and make appropriate recommendations, where necessary. Further information related to this request can be found below.

### Background

In 1993, the legislature adopted and the Governor signed the Underground Facility Damage Prevention and Safety Act (Act<sup>1</sup>), which is codified in Chapter 556, Fla. Stat. The Act authorizes creation of Sunshine State One Call of Florida, Inc., a non-profit corporation, to administer the Act. Sunshine State One Call of Florida, Inc. does business as "Sunshine 811," a name which includes the 811 phone number that can be dialed throughout Florida to initiate the pre-excavation notification process which is a hallmark of the Act. The members of the non-profit corporation consist of all operators of underground facilities<sup>1</sup> in Florida and is governed by a board of directors elected by the membership. The purpose of the Act is to prevent injuries and damage that can occur from unintended contact with underground facilities when excavation activities are conducted anywhere in the state.

The process established in Chapter 556, Fla. Stat., requires any person or entity planning any excavation or demolition to provide certain information to Sunshine 811, including but not

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<sup>1</sup> "Underground facility" is defined at sec. 556.102(13), Fla. Stat., to mean any public or private personal property which is buried, placed below ground, or submerged on any member operator's right-of-way, easement or permitted use which is being used in connection with the storage or conveyance of water; sewage; electronic, telephonic, or telegraphic communication; electric energy; oil; petroleum products; natural gas; optical signals; or other substances, and includes but is not limited to pipelines, pipes, sewers, conduits, cables, valves and lines.

limited to the location where the excavation/demolition will occur, when it will commence and the anticipated duration of the excavation/demolition activities, and information on the identity of the excavator and the person or entity on whose behalf the work is being done (see sec. 556.105(1) for the complete list of information items required to be provided). The required information must be provided to Sunshine 811 by the excavator (referred to in the Act as “the system”) no less than 2 full business days before beginning the excavation/demolition (or not less than 10 full business days before beginning any excavation/demolition beneath the waters of the state). Sunshine 811, thereafter, notifies all members with facilities at the location of the proposed work as specified by the excavator. Those members who, in fact, have underground facilities within or in proximity to the area of the proposed excavation/demolition must then, within 2 (or 10) full business days following receipt by Sunshine 811 of the notification, identify the horizontal route of the member’s facilities by marking same to within 24 inches from the outer edge of either side of the underground facility. This must be done by use of “stakes, paint, flags or other suitable means” (generally referred to as “marks” or “marking”)<sup>2</sup>. By insuring that underground facilities are marked prior to the time any excavation/demolition commences, the processes described in the Act protect the public, excavators, and facility owners from potential injuries, facility damage and possible loss of services provided to the public by affected underground facilities.

The success of the processes described in and required by Chapter 556, Fla. Stat., naturally depends on compliance by all parties involved, e.g., underground contractors providing timely notice to Sunshine 811 before excavation; underground contractors waiting until the 2 (or 10) day period provided for marking by members to pass before commencing excavation/demolition; and members locating and marking their underground facilities within the 2 (or 10) day period following receipt of the notice from Sunshine 811.

Currently, section 556.107(1) designates the following “violations” of relevant requirements in the chapter as noncriminal infractions:

- Failure to provide notice to Sunshine 811 two full business days prior to beginning excavation/demolition or 10 full business days before beginning any excavation/demolition beneath the waters of the state.
- Failure of an excavator to avoid excavation in the area described in the notice until: a) each member operator with underground facilities in the area of the proposed excavation has marked and located their facilities; b) the excavator has received notice that no members have facilities in the area; or c) the two (or ten) full business days allowed for marking have passed, whichever occurs first.
- Failure of an excavator to stop excavation/demolition activities, re-notify Sunshine 811 and wait for remarking of facilities should markings previously made by a member owner be removed or no longer be visible.
- Failure of a member operator to mark an underground facility within 2 (or 10) full business days after notification.

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<sup>2</sup> Sunshine 811 has no involvement in and is actually prohibited in sec. 556.106(6), Fla. Stat., from locating and marking underground facilities.

- Failure of an excavator to cease excavation/demolition activities, and immediately notify the affected facility owner/operator should any contact with a pipe, cable, or its protective covering occur.
- An excavator falsely notifying Sunshine 811 that an “emergency” exists (as defined in sec. 556.109(1), Fla. Stat.), which if same existed would suspend operation of the Act as it relates to the notification process.
- Failure, when marking facilities to utilize the “low impact marking practices” described in sec. 556.114, Fla. Stat.

An offending party who commits any of the above listed infractions may be issued a citation therefore by a local or state law enforcement officer; or a local government code inspector or code enforcement officer. An offender must pay a civil penalty for each infraction in the amount of \$500.00, plus court costs. If a party given a citation denies commission of the infraction, that party may elect to appear in county court for a hearing. Following such a hearing, if the judge determines an infraction has been proven, the judge may impose a civil penalty of up to \$5,000.00, plus court costs. Sunshine 811 provides training to more than 100 law enforcement agencies and code enforcement officer groups regarding these violations and provides citation books for these offenses. Nevertheless, historically, only a very limited number of such citations are written statewide each year.

The 2018 report (covering the 2017 calendar year) from the Florida Court Clerks & Comptrollers states that a total of 25 tickets were written for Chapter 556, Fla. Stat., violations in all 67 counties of the state in 2017. Compared with the total of 3,346 reported excavation damages in the same year to underground facilities of Sunshine 811 member operators, less than 1% of the damages result in enforcement action. This is generally consistent with the number of such tickets written in prior years.

One infraction included in Chapter 556 is deemed a second degree misdemeanor, hence, a criminal infraction. Sec. 556.107(3), makes the knowing and willful removal or destruction of physical marking used to mark the horizontal route of an underground facility a second degree misdemeanor. For purposes of this section, markings are valid for a period of 30 days following the initial notification to Sunshine 811 of intended excavation/demolition activities.

A separate, special enforcement provision is set out in sec. 556.116, Fla. Stat., that applies only to “high priority subsurface installations” (“HPSI”). HPSIs consist of:

an underground gas transmission or gas distribution pipeline, an underground pipeline used to transport gasoline, jet fuel, or any other refined petroleum product or hazardous or highly volatile liquid, such as anhydrous ammonia or carbon dioxide, if the pipeline is deemed to be critical by the operator of the pipeline and is identified as a high-priority subsurface installation....

When an incident occurs that involves damage to an identified HPSI that results in death or serious injury requiring inpatient hospitalization; or results in property damage, including service restoration costs in excess of \$50,000.00, or interruption of service to 2,500 or more customers, and where the excavator causing the event did not follow the appropriate notification processes

prior to commencing the excavation, then the incident and related infraction must be reported by the member operator to Sunshine 811 within 24 hours. Thereafter, Sunshine 811 must transmit an incident report regarding the incident to the Florida Division of Administrative Hearings (“DOAH”). DOAH must then conduct a hearing to determine whether an infraction has occurred which was the proximate cause of the incident. If the DOAH judge so determines, the judge may impose a fine against the violator in an amount not to exceed \$50,000.00 (\$10,000 if the offending party is a state agency or political subdivision thereof) together with the cost of the proceeding. One shortcoming of this process is that DOAH has no investigation function or authority with regard to any incident—its only function is the hear facts and render a judgement regarding a fine amount. In the eight years this section has been a part of the chapter, only one such hearing, which was conducted on March 14, 2018, has ever occurred. No order has yet been entered in that matter.

### Pipeline Hazardous Material Safety Administration

The Pipeline and Hazardous Materials Safety Administration (“PHMSA”) housed within the U.S. Department of Transportation, regulates transportation of hazardous liquid and natural gas pipelines at the federal level and also operates grant programs for the states for related programs and facilities. PHMSA, through its regulatory and grant programs, seeks to prevent property damage and personal injury related to excavation activities in and around pipelines that transport hazardous liquids or natural gas (“Regulated Pipelines”). As authorized by Congress (49 USC § 60114), PHMSA began a rule development process to establish criteria by which to assess the effectiveness of state enforcement of safety and damage prevention programs related to Regulated Pipelines. The ultimate purpose of this effort was to enable PHMSA, in those states determined to have inadequate enforcement programs, to exercise backstop enforcement authority to insure that “adequate” enforcement occurs. PHMSA’s fine authority is much greater than included in Chapter 556, Fla. Stat., in that it can impose fines of up to \$205,000.00, daily, up to a maximum of \$2 million, for violations concerning failure to notify one-call centers prior to excavation, failure to mark or failure to wait until marking can occur in accordance with state law. PHMSA does not exercise its enforcement authority in states determined to have adequate enforcement programs.

PHMSA’s rule (49 CFR 196), effective January 1, 2016, provides criteria for assessing the effectiveness of enforcement of state safety and damage prevention laws for Regulated Pipelines. In 2016, PHMSA engaged in an examination process for the relevant programs for all 50 states, including Florida. The examination of Florida’s programs occurred in December 2016<sup>3</sup>. In March, 2017, PHMSA notified Florida, through a letter addressed to the Chair of the Florida Public Service Commission, of its determination that Florida’s enforcement program is inadequate (a copy of the letter is attached). No appeal was made of this determination, and as a consequence, PHMSA now has the ability to engage in enforcement for violations related to Regulated Pipelines. To date, PHMSA has not undertaken any enforcement actions in Florida using this authority. In addition to the ability to engage in backstop enforcement in Florida, the

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<sup>3</sup> The examination occurs annually, so a subsequent PHMSA examination of Florida’s adequacy occurred in December 2017, but no results have yet been published of the results of that examination. Because there has been no amendment of Florida’s laws concerning enforcement, it is likely Florida’s program will again be determined to be inadequate.

March 17 letter also states that if Florida fails to establish an adequate enforcement program within five years, of the initial determination, PHMSA, the state may be subject to a four percent reduction in PHMSA State Base Grant Funding, which PHMSA says currently funds up to 80 percent of the cost of the Florida PSC's pipeline safety program.

There is no definitive reason why more enforcement of the requirements of Chapter 556, Fla. Stat. does not occur. Law enforcement and code enforcement officers have many other priorities and responsibilities beyond than those addressed in this chapter and there are exemptions in the law that make enforcement problematic for local enforcement officers. For many years, Sunshine 811 has provided enforcement education, materials and support with marginal results. There is no statewide entity with authority to enforce these particular requirements or to direct their enforcement as an alternative to local enforcement.

An appropriate question is why should the state be concerned with PHMSA's determination regarding inadequate enforcement? First, the potential fines that could be imposed on Florida businesses for these types of violations are substantially higher than those provided for under Florida law, enough that a Florida business could be bankrupted by a PHMSA fine. A federal agency does not have the local knowledge and presence that would hopefully enable a more just enforcement process to be implemented by in-state authorities rather than a Washington authority. More importantly, if a federal agency were required to come into the state to undertake enforcement in a circumstance where someone was killed or severely injured as a consequence contact with a Regulated Pipeline (which has occurred in many other states) that could be the source of embarrassment for the state—embarrassment that Florida failed to implement its one call law in the manner needed to protect its citizens.

#### Request for Study and Recommendations

Sunshine 811's Board of Directors, with the encouragement of stakeholders holding interest in the Florida's damage prevention and safety programs related to Regulated Pipelines, have determined that amendment of the enforcement provisions in Chapter 556 is desirable, not just to achieve a determination of adequacy from PHMSA, but to insure that Florida is the safest state in the nation to dig. PHMSA's finding of inadequacy for Florida's enforcement provisions focused on the fact that there is no single state entity responsible for or authorized to enforce the provisions of Chapter 556. The current enforcement provisions, described above, give a variety of primarily local government officials the ability to write citations for violation of several provisions of Chapter 556, however, because those entities have many other law enforcement priorities, very few citations are actually written for Chapter 556 offenses, and when they are, the associated fine can be minimal in relation to the potential harm from noncompliant behavior. As noted, there is an enforcement process for HPSIs, however, perhaps because of the thresholds that are a prerequisite to application of that process, or for other reasons, the process has only been invoked once in the eight years since it has been in existence. At its 2017 strategic planning meeting, Sunshine 811's Board of Directors discussed and deliberated on enforcement and which statewide agency and voted its preference that a statewide entity should be responsible for Chapter 556 enforcement and that DOAH should be the entity to do that, in a fashion similar to the process spelled out for HPSIs. However, as noted below, the Board in 2018 determined to request a study of the issue by the Legislature.

The stakeholders in this industry would urge the Legislature to undertake a study of this issue and consider the desirability of developing legislation to address this enforcement issue. There are many models across the nation for state enforcement programs for Regulated Pipelines. Part of any study should include a review of what state entity should have primary responsibility for leading and coordinating any enforcement program.

Sincerely,



Mark Sweet, Executive Director

Cc: Chris Lyon, Sunshine State One Call of Florida  
Dale Calhoun, Florida Natural Gas Association  
Donna Simmons, TECO  
Casey Reed, AT&T  
Charlie Dudley, Florida Internet and Television  
Kari Hebrank, National Utility Contractors Association of Florida  
Rob Wilson, Florida Energy Pipeline Association



U.S. Department  
of Transportation

Pipeline and Hazardous  
Materials Safety  
Administration

1200 New Jersey Avenue, SE  
Washington, D.C. 20590

MAR 13 2017

**OVERNIGHT EXPRESS MAIL**

Ms. Julie Imanuel Brown  
Chairman  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399

Dear Ms. Brown:

On December 5, 2016, the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) conducted an adequacy evaluation of Florida's enforcement of its excavation damage prevention law, the Underground Facility Damage Prevention and Safety Act. This letter serves as your official notice of our findings and determination. Based on the evaluation, PHMSA has determined that enforcement of Florida's excavation damage prevention law is **INADEQUATE** due to the State responding no to the following evaluation criterion:

In the previous calendar year, did the State assess civil penalties and/or other sanctions for violations?

PHMSA conducted the evaluation pursuant to 49 United States Code (USC) § 60114 and 49 Code of Federal Regulations (CFR) Part 198, Subpart D—State Damage Prevention Enforcement Programs. Our representatives met with Rick Moses of the Florida Public Service Commission, Bob Cohen of the Florida Division of Administrative Hearings, Mark Sweet and other Sunshine 811 staff, David Parham of Florida Gas Transmission Company, Dale Calhoun of Florida Natural Gas Association, and Kari Hebrank of the National Utility Contractors Association of Florida. During the evaluation, PHMSA asked a series of standard questions regarding actions that the State executed in calendar year 2015 to enforce the Florida excavation damage prevention law.

In accordance with 49 CFR Part 198.55, States must be able to demonstrate that they adequately meet the seven Federal criteria that PHMSA uses to assess the effectiveness of the State's damage prevention enforcement programs. These criteria evaluate if the State has the authority to enforce its excavation damage prevention law, whether the State utilizes its authority to issue civil penalties and other appropriate sanctions for violations of the law, and if the State is able to provide documented procedures, processes, and data to demonstrate an effective overall damage prevention enforcement program. The evaluation criteria are attached.

PHMSA representatives stressed during the evaluation the importance of consistent, fair, and balanced enforcement for violations of the excavation damage prevention law, as well as data collection and analysis to evaluate the impact of the enforcement program. PHMSA encourages Florida stakeholders to address these issues in any future legislation or rulemakings.

During the evaluation, PHMSA representatives also noted areas of concern that impacted the adequacy of damage prevention enforcement. The Florida excavation damage prevention law does not specifically require a notification to 911 or similar emergency response number if a pipeline facility is damaged and a release occurs. This is a requirement of 49 USC § 60114, and is found in PHMSA's Final Rule. According to 49 CFR Part 198.55 (a)(6)(iii), an excavator who causes damage to a pipeline facility:

- A. Must report the damage to the operator of the facility at the earliest practical moment following discovery of the damage; and
- B. If the damage results in the escape of any PHMSA-regulated natural or other gas or hazardous liquid, must promptly report to other appropriate authorities by calling the 911 emergency telephone number or another emergency telephone number.

PHMSA urges all States to review the definitions for excavator and excavation in their excavation damage prevention law to ensure the law does not exempt anyone from the reporting requirements of 49 USC § 60114 and 49 CFR Part 198.55. An excavator is defined in 49 CFR Part 196.3 as "any person or legal entity, public or private, proposing to or engaging in excavation."

Effective 30 days from receipt of this letter the determination will go into effect and PHMSA may enforce the Federal excavation standards defined in 49 CFR Part 196 against an excavator who damages a hazardous liquid or natural gas pipeline in Florida. It is important to note this does not mean that Florida is unable to continue its enforcement efforts, only that PHMSA now has the authority to enforce its own Federal minimum excavation damage standards alongside your current efforts. PHMSA recognizes the critical role Florida officials play in the safety of their pipeline network, and will continue to work together with them going forward.

Federal civil penalty levels are as high as \$205,638 per violation per day the violation continues, with a maximum civil penalty of \$2,056,380 for any related series of violations. Additionally, States that fail to establish an adequate excavation damage prevention law enforcement program within five years from the date of the final PHMSA determination notice may be subject to a four (4) percent reduction in PHMSA State Base Grant funding. This grant currently funds up to 80 percent of the cost of the pipeline safety program in the Florida Public Service Commission.

Florida has the right under 49 CFR Part 198.59 to submit to PHMSA a written response contesting the inadequacy determination and requesting that the determination be withdrawn within 30 days of receiving this letter. Upon receipt of such notification, PHMSA will review all relevant information and issue a final determination. Please send letters to my attention at:



Mr. Alan K. Mayberry  
Associate Administrator for Pipeline Safety  
Pipeline and Hazardous Materials Safety Administration  
U.S. Department of Transportation  
1200 New Jersey Avenue SE, Suite E22-326  
Washington, DC 20590

PHMSA evaluation of State damage prevention law enforcement will occur annually; however, if Florida takes action to establish an adequate enforcement program prior to the annual evaluation, Florida may request that PHMSA review and reconsider the State's designation of inadequacy.

PHMSA strongly believes that effective damage prevention programs—including enforcement—are best addressed at the State level. Excavation damage continues to be a leading cause of hazardous liquid and natural gas pipeline incidents resulting in fatalities, serious injury, and environmental damage. Damaging a pipeline during excavation poses a serious safety risk to excavators, the public living and working in proximity to the excavation site, and the environment. Nationwide statistics show that effective enforcement of State excavation damage prevention laws reduces excavation damage and pipeline incidents, resulting in increased safety.

PHMSA encourages Florida damage prevention stakeholders to work with policymakers to pass legislation addressing the inadequacies in the State's excavation damage prevention program. We stand ready to assist Florida stakeholders in improving enforcement of your excavation damage prevention law. PHMSA offers its assistance to work with your State to address this deficiency. If you have any questions or need additional information, please contact our Damage Prevention Team by email at [excavation.enforcement@dot.gov](mailto:excavation.enforcement@dot.gov) or phone at (804) 556-4678.

Sincerely,



Alan K. Mayberry  
Associate Administrator for Pipeline Safety

Enclosure

cc: The Honorable Rick Scott, Office of the Governor, State of Florida  
Rick Moses, Bureau Chief Safety, Florida Public Service Commission  
Mark Sweet, Executive Director, Sunshine 811

**United States Department of Transportation (USDOT)**  
**Pipeline and Hazardous Materials Safety Administration (PHMSA)**  
**Pipeline Safety: Pipeline Damage Prevention Programs**  
**49 CFR 196 – Protection of Underground Pipelines from Excavation Activity**  
**49 CFR 198 – Regulations for Grants to Aid State Pipeline Safety Programs**  
**Effective January 1, 2016**

**Background**

49 USC § 60114 provides the United States Department of Transportation with back stop authority to conduct administrative civil enforcement proceedings against excavators who damage hazardous liquid and natural gas pipelines in a state that has failed to adequately enforce its excavation damage prevention or one-call laws.

PHMSA published a Final Rule on July 23, 2015 that establishes

1. Criteria and procedures for determining the adequacy of state pipeline excavation damage prevention law enforcement programs
2. An administrative process for making adequacy determinations
3. Federal requirements PHMSA will enforce in states with inadequate excavation damage prevention law enforcement programs
4. The adjudication process for administrative enforcement proceedings against excavators where Federal authority is exercised

**Criteria to be used to Evaluate State Damage Prevention Programs**

1. Does the state have enforcement authority including civil penalties?
2. Is there a designated enforcement body?
3. Is the state using its authority and making enforcement records available to the public?
4. Does the state have a reliable means of learning about damages?
5. Does the state have damage investigation practices that are adequate to determine the at-fault party when damage occurs?
6. At a minimum, does state law require:
  - a. Excavators must call 811 before digging
  - b. Excavators must “respect the marks”
  - c. If damage to a pipeline occurs...
    - i. Excavator must report damage to operator at earliest practical moment
    - ii. If release occurs, excavator must call 911
7. Are exemptions from the DP law limited? Written justification of exemptions is required.

## **Administrative Process for States to Contest Notices of Inadequacy**

1. PHMSA issues a notice of inadequacy to the state in accordance with 49 CFR 190.5
2. State will have 30 days to submit written response

Mail responses to:

Alan Mayberry  
Acting Associate Administrator for Pipeline Safety  
Pipeline and Hazardous Materials Safety Administration  
U.S. Department of Transportation  
1200 New Jersey Avenue, SE, Suite E22-207  
Washington, DC 20590

3. PHMSA issues a final decision to states that contested a notice of inadequacy
4. State may petition PHMSA to reconsider at any time following a finding of inadequacy; PHMSA will respond not later than the date of the next annual review
5. States that fail to establish an adequate enforcement program within five years of effective date of final rule may be subject to 4% reduction in base grant funding

## **Federal Standard for Excavators**

1. Call 811 before excavating
2. Wait for pipeline operators to establish and mark the location of underground pipelines before excavating
3. Excavate with proper regard for the marks, take all practicable steps to prevent excavation damage
4. Make additional use of one-call as necessary
5. Any contact with pipelines must be reported to operator at earliest practical moment
6. If there is a release, excavator must call 911

There are no exemptions in the new regulation for calling 811 prior to excavation. PHMSA understands many states have one-call law exemptions and will be considerate of those exemptions when undertaking Federal enforcement action.

## **For More Information**

<http://phmsa.dot.gov/pipeline/safety-awareness-and-outreach/excavator-enforcement/>

## **Contact Our Damage Prevention Team**

Our team of damage prevention professionals, Sam Hall, Annmarie Robertson, and Steve Fischer are available to answer questions pertaining to this final rule, state one call laws, and damage prevention. They may be reached at [excavation.enforcement@dot.gov](mailto:excavation.enforcement@dot.gov).