



Ohio Legislative Service Commission

Final Analysis

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Sens. Coley, Peterson, Hite, Eklund, Hughes, Kearney, LaRose, Patton, Sawyer, Schiavoni, Seitz, Uecker

Reps. Stautberg, Burkley, Conditt, Dovilla, Grossman, Hackett, Perales, Sheehy, Strahorn

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ACT SUMMARY

- Gives the Public Utilities Commission of Ohio (PUCO) jurisdiction to enforce Ohio's underground-utility-damage-prevention law, in conjunction with a 17-member Underground Technical Committee (UTC).
- Permits a person with certain duties and obligations, who is directly involved with or impacted by a failure to comply with certain requirements of the underground-utility-damage-prevention law, to request an inquiry with the PUCO.
- Requires the PUCO to make reports of those inquiries available to the UTC.
- Requires the UTC to review each report and (1) recommend a fine or penalty, consistent with certain guidelines, (2) request an administrative hearing with the PUCO if the UTC believes that heightened fines or penalties are warranted, or (3) determine that no enforcement action should be taken.
- Requires the PUCO to impose the UTC's recommended fines and penalties, with some exceptions.
- Permits the UTC to find that a person is a persistent noncomplier, in which case the PUCO may impose a fine of up to \$10,000.
- Permits a person requesting an inquiry or a person responsible for a compliance failure to seek reconsideration with the PUCO if either person disagrees with a finding of or no-enforcement determination made by the UTC.

- Requires utilities, excavators, developers, and designers who participate in the one-call notification system to register with the PUCO and pay a safety registration of up to \$50 annually.
- Requires the safety registration and fines for failure to pay the safety registration to be deposited in the Underground Facilities Protection Administrative Fund created by the act to be used to fund the new enforcement process.
- Requires the PUCO to adopt rules in consultation with the UTC.
- Specifies that members of the UTC, by virtue of their UTC membership, are not subject to the financial disclosure requirements of Ohio ethics law.
- Specifies that members of the UTC are immune, individually and jointly, from civil liability for any act or omission done or made in performance of UTC duties provided that the act or omission was not willful misconduct.
- Creates an Underground Utility Damage Prevention Grant Program, funded by compliance-failure fines collected under the act's provisions and creates the Underground Facilities Protection Fund.

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CONTENT AND OPERATION

Underground utility protection

Overview

The act creates an enforcement process for Ohio's underground-utility-damage-prevention law. Enforcement authority is given to the Public Utilities Commission of Ohio (PUCO). The act also creates a committee called the Underground Technical Committee (UTC) to review reports of the PUCO and recommend fines and penalties. The PUCO is required to impose the UTC's recommended fines and penalties, with some exceptions. The PUCO staff conducts inquiries upon request of an aggrieved person directly involved with or impacted by a compliance failure (see "**Definition of "aggrieved person"**"). A "compliance failure" is defined as a failure to comply with certain requirements of Ohio's underground-utility-damage-prevention law. Below is a brief summary of the general requirements of that law, which encompass both private excavations and public improvements. The list below does not address requirements for special circumstances or emergencies.

- Utilities that own or operate underground utility facilities must participate in and register the location of their underground utility facilities with a protection service.
- Protection services, utilities, commercial excavators, excavation equipment dealers, the PUCO, the Board of Building Standards, local law enforcement agencies, and fire departments should publicize the importance of locating underground utility facilities before excavating and the use of protection services to obtain that information.¹
- Developers and designers must notify a protection service of the location of a proposed excavation. Likewise, public authorities must contact a protection service and owners of underground utility facilities that are not protection service members for the existence and location of facilities in a construction area.

¹ R.C. 3781.26(A) and (B), not in the act.



- The protection service must notify its members and participants that have underground utility facilities of the location of the proposed excavation.
- Utilities that have underground utility facilities on a proposed excavation site must notify the developer, designer, or public authority.
- The developer, designer, or public authority must indicate locations of underground utility facilities for the project plans.²
- The public authority must notify owners of underground utility facilities of the contractor to whom the contract for the public improvement was awarded.³
- The contractor or subcontractor for a public improvement must notify a protection service and the owners of underground utility facilities who are not protection service members.⁴
- Excavators must notify a protection service of the location of an excavation site and the date that excavation will begin, and pre-mark the location.
- The protection service must notify utilities with underground utility facilities of the proposed excavation.⁵
- Utilities must locate and mark their underground utility facilities at an excavation site or public improvement.⁶
- Excavators must comply with certain requirements, such as maintaining clearance between cutting equipment and utility facilities, acting in a careful, prudent, and nondestructive manner, reporting damage to the utility, and notifying a utility if markings are removed.⁷
- Contractors and subcontractors for a public improvement must report damage to underground utility facilities to the facilities' owners or operators.⁸

² R.C. 153.64(B) and 3781.27, not in the act.

³ R.C. 153.64(B)(5), not in the act.

⁴ R.C. 153.64(C), not in the act.

⁵ R.C. 3781.28 and 3781.29, not in the act.

⁶ R.C. 153.64(C), 3781.28, and 3781.29, not in the act.

⁷ R.C. 3781.30 and 3781.31, not in the act.

⁸ R.C. 153.64(D), not in the act.



- Connections or tie-ins to utility services within a public right-of-way must comply with permit requirements.⁹

A "protection service" is defined under continuing law as a notification center, but not an owner of an individual utility, that exists for the purpose of receiving notice from persons that prepare plans and specifications for or that engage in excavation work, that distributes this information to its members and participants, and that has registered by March 14, 1989, with the Secretary of State and the PUCO.¹⁰

Inquiry process

Inquiry requests

The act permits, beginning in 2016, an "aggrieved person" (see "**Definition of "aggrieved person"**") to request an inquiry with the PUCO staff seeking the imposition of a fine or penalty on a person responsible for an alleged compliance failure. The request must be made not later than 90 days after the aggrieved person discovers the alleged compliance failure. The request must state with particularity the name of the person responsible, the date, nature, and location of the compliance failure, and any other information that the requestor considers relevant. The act prohibits the request from causing, by itself, the creation of a formal PUCO proceeding.

Definition of "aggrieved person"

The act defines an "aggrieved person" as a person with duties and obligations under the provisions of the underground-utility-damage-prevention law that are summarized above, and who is directly involved with or impacted by the alleged compliance failure, as identified in the request for the inquiry, of another person with duties and obligations under those same provisions.¹¹ Persons that have duties and obligations under those provisions are, in no special order:

- Utilities;
- Protection services;
- Commercial excavators and excavators;
- Excavation equipment dealers;

⁹ R.C. 3781.32, not in the act.

¹⁰ R.C. 3781.25(A), not in the act (a similar definition applies to public improvements – R.C. 153.64(A)(4)).

¹¹ R.C. 4913.01(A).



- The PUCO;
- The Board of Building Standards;
- Local law enforcement agencies;
- Fire departments;
- Developers;
- Designers;
- Contractors and subcontractors;
- Owners of underground utility facilities;
- Governmental entities;
- Other public authorities;
- Industry representatives serving on Ohio damage prevention councils.

This is an exhaustive list of the persons who have duties or obligations under the provisions. So a home owner does not appear eligible to request an inquiry under the act.¹²

The PUCO staff must notify the person allegedly responsible for the compliance failure of the request within ten business days. The person may respond to the request, providing any information that the person considers relevant, not later than 30 days after being notified. The response may include an admission of the compliance failure.¹³

PUCO inquiry and report

The PUCO staff must conduct an inquiry of the request. The inquiry must be limited to whether there was a compliance failure. The staff must examine relevant facts regarding the alleged compliance failure. The staff may request records verification, informal meetings, teleconferences, photo documentation, and any other documentation or information relevant to the inquiry. Then the staff must make a report of the inquiry available to the UTC. The report must contain any admission made by the responsible person. The act explicitly prohibits the report from containing a

¹² R.C. 3781.25 and 4913.01; R.C. 1.59, 153.64, 3781.26(A) and (B), 3781.27, and 3781.28 to 3781.32, not in the act.

¹³ R.C. 4913.05(C) and 4913.07.



recommendation as to the imposition of a fine or penalty or as to whether no enforcement action should be taken.¹⁴

Review and recommendation by UTC

The UTC must review every report made available by the PUCO staff. Not later than 90 days after obtaining the report, the UTC must:

(1) Make a written recommendation to the PUCO as to the imposition of a fine, penalty, or both;

(2) Request an administrative hearing with the PUCO if the UTC believes that the person responsible for the compliance failure should be subject to fines or penalties exceeding the guidelines specified below; or

(3) Determine that no enforcement action should be taken.

The act clarifies that a request for an administrative hearing for heightened fines and penalties is *in lieu* of a fine or penalty recommendation.

For any of these three actions, there must be a majority vote of the full committee, with at least one of the commercial-excavator members voting with the majority.

The UTC may recommend a penalty of training, education, or another nonmonetary penalty, or a fine of up to \$2,500 (up to \$5,000 for subsequent compliance failures), or a combination of the fine and penalties. Penalties must be appropriately related to the underground-utility-damage-prevention law. The UTC may communicate with persons who have knowledge or information concerning the alleged compliance failure as part of its review and to assist in making recommendations.¹⁵

If the UTC fails to act or fails to achieve the required majority

If the UTC votes on one of the three actions described above during the 90-day period but fails to achieve the required majority, the act requires the UTC to notify the PUCO of the failure and prohibits the PUCO from taking any enforcement action. If, on the other hand, the UTC does not vote at all during the 90 days, the PUCO staff must amend its initial report and resubmit it to the UTC with a recommendation of a fine, penalty, or no enforcement. Not later than 30 days after receiving the resubmitted report, the UTC has another opportunity to vote on one of the three actions. Again,

¹⁴ R.C. 4913.09 and 4913.13.

¹⁵ R.C. 4913.15, 4913.151, 4913.152, and 4913.19.



there must be a majority vote of the full committee, with at least one of the commercial-excavator members voting with the majority. If the UTC votes on one of the three actions during the 30-day period but fails to achieve the required majority, the act requires that no enforcement action be taken. But if the UTC again fails to vote at all, the act directs the PUCO to impose a fine or penalty described above, or to take no enforcement action. The PUCO must inform the UTC of its decision.¹⁶

If the UTC acts and achieves the required majority

If the UTC recommends a fine or penalty, the PUCO must impose it.

If the UTC requests an administrative PUCO hearing because the UTC believes that a person should be subject to heightened fines or penalties, the PUCO must, as a result of the hearing, impose a fine or penalty or take no enforcement action.

If the UTC determines that no enforcement action should be taken, it must notify the PUCO in writing.¹⁷

Persistent noncompliers

The UTC may find, as part of its review of a PUCO report, that a person is a persistent noncomplier. This finding is to be made based on the number and type of compliance failures committed by a person. Again, there must be a majority vote of the full committee, with at least one of the commercial-excavator members voting with the majority, for the UTC to make this finding. The UTC must report the finding to the PUCO staff. The PUCO may impose a fine on the person of up to \$10,000. The PUCO may also, but is not required to, impose a penalty that was recommended by the UTC.¹⁸

Factors that must be considered in making enforcement determinations

The act requires the UTC, the PUCO, and the PUCO staff to consider certain factors when determining fine or penalty recommendations or impositions or whether no enforcement action should be taken. Specifically, the requirement applies to:

- UTC recommendations or no-enforcement determinations, made during the initial 90-day period or the additional 30-day period;
- PUCO staff recommendations as to a fine or penalty or no enforcement, made after the UTC fails to act during the initial 90-day period;

¹⁶ R.C. 4913.15(C) and 4913.16.

¹⁷ R.C. 4913.15(B)(2), 4913.16(B)(2), 4913.19, and 4913.21.

¹⁸ R.C. 4913.17 and 4913.171.



- PUCO impositions of a fine or penalty, or no-enforcement determinations, made after the UTC fails to act during the additional 30-day period;
- PUCO impositions of a fine or penalty on a persistent noncomplier;
- PUCO impositions of a fine or penalty, or no-enforcement determinations, made as a result of an administrative hearing requested by the UTC when the UTC believed that a person should be subject to heightened fines and penalties; and
- PUCO impositions of a fine or penalty, or no-enforcement determinations, made based on the PUCO's formal review of an application for reconsideration, which the act permits for UTC findings and no-enforcement determinations.

The requirement does *not* apply to the following:

- The UTC's decision to request an administrative hearing when it believes that a person should be subject to heightened fines and penalties;
- The UTC's decision to find that a person is a persistent noncomplier;
- The PUCO's obligatory imposition of UTC-recommended fines and penalties; and
- Any fine or penalty impositions, or no-enforcement determinations, that might be made following a rehearing and appeal on a reconsideration order.¹⁹

The following is a list of the factors that must be considered, "as they apply":

- The person's demonstrated history of one-call, design, and excavation practices, including the number of locate requests received and responded to, the number of locates completed, the number of one-calls placed, the number of excavations completed, and the number of design or development projects;
- The nature, circumstances, and gravity of the compliance failure, including the amount of damage involved, and whether it resulted in death, serious injury, dismemberment, or a significant threat to public safety;

¹⁹ R.C. 4913.15, 4913.16, 4913.17, 4913.171, 4913.19, 4913.20, 4913.21, 4913.25, and 4913.251.

- The organizational size of the responsible person;
- The prospective effect of a fine on the person's ability to pay business obligations and otherwise conduct business;
- The history or number of the person's compliance failures;
- The good faith effort on the person's part in attempting to achieve compliance after the compliance failure was identified.²⁰

Notice of the case outcome

The act requires the PUCO to promptly notify by letter the person that requested the inquiry and the person responsible for the compliance failure of any fine or penalty imposed or of a no-enforcement determination. The notice must include all of the following, "as applicable":

- The date of the compliance failure;
- The citation to the statute that was not complied with;
- A brief description of the compliance failure;
- The fine or penalty to be imposed, if any;
- Instructions on how to remit payment of a fine or to comply with a penalty;
- Instructions on how the person may file for reconsideration and how to make a timely filing;
- A statement that failure to file for reconsideration will make any findings final and enforceable.²¹

Reconsideration with the PUCO

Not later than 30 days after receiving notice of the outcome of a request for inquiry, if the person that made the request or the person responsible for the compliance failure disagrees with a finding or no-enforcement determination made by the UTC, either person may apply to the PUCO for reconsideration of the "finding"

²⁰ R.C. 4913.20.

²¹ R.C. 4913.23.



made by the UTC under certain provisions of the act. The application for reconsideration must state with particularity the grounds for reconsideration.

Upon the filing of an application for reconsideration, the act requires the PUCO to formally review the UTC's "finding." The PUCO may hold a hearing on the application.

The PUCO must affirm, reject, or modify the UTC's "finding." The PUCO must also impose any fine or penalty authorized under the act or take no enforcement action.²²

Paying fines and complying with penalties

A person subject to a fine imposed under any of the act's provisions must pay the fine not later than 60 days after the fine is imposed by the PUCO. A person subject to a penalty imposed under any of the act's provisions must begin compliance not later than 30 days after the penalty is imposed.²³

Hearing procedure and appeal process

All hearings conducted by the PUCO under the act must be conducted in a manner consistent with continuing law governing PUCO hearings. A reconsideration order issued under the act is subject to the rehearing and appeal process under that law.²⁴

Documentation to be treated as confidential

The act states that any documentation obtained pursuant to (1) a PUCO-staff inquiry, conducted upon request by an aggrieved person, (2) communications between the UTC and persons who have knowledge or information about an alleged compliance failure, or (3) an administrative hearing requested by the UTC for heightened fines or penalties must be treated as confidential until a formal reconsideration proceeding is commenced with the PUCO. The act further specifies that at this time, the parties to the proceeding must be bound by the PUCO's rules governing discovery in matters pending before it.²⁵

²² R.C. 4913.25.

²³ R.C. 4913.22 and 4913.25(D).

²⁴ R.C. 4913.251 and 4913.252.

²⁵ R.C. 4913.26.

Underground Technical Committee

Members

The UTC is composed of the following 17 members:

- Four members from the stakeholder group of the commercial excavator industry, with the President of the Senate, the Speaker of the House of Representatives, and the minority leaders of the Senate and the House each appointing one of the four;
- One member from each of the following stakeholder groups, to be appointed as indicated:
 - The natural gas transmission pipeline industry, by the Senate President;
 - The natural gas distribution industry, by the Speaker;
 - Electric utilities, by the Governor;
 - Electric cooperatives, by the Speaker;
 - A statewide organization representing independent oil and gas producers, by the Senate President;
 - The telephone industry, by the Governor;
 - Cable service providers, by the Senate President;
 - Locators of underground utility facilities, by the Speaker;
 - Municipal corporations, by the Governor;
 - The Department of Transportation, by the Governor;
 - The general public, by the Governor;
 - The hazardous liquids pipeline industry, by the Governor;
 - Designers, developers, or surveyors, by the Governor.

If a vacancy occurs during a member's term, a new member must be appointed in the same manner as the original appointment.



Terms of office are initially staggered at two, three, and four years and generally determined by lot. After the staggering, terms are four years. Members may be reappointed an unlimited number of times.²⁶

Financial disclosure not required

Under the act, UTC members are not, by virtue of their UTC membership, subject to the financial disclosure requirements of Ohio ethics law.²⁷

Conflicts of interest

A member of the UTC who has a conflict of interest in a particular review must declare the conflict to the UTC and recuse himself or herself from committee discussions and voting regarding that review.²⁸

Immunity

Under the act, every UTC member is immune, individually and jointly, from civil liability for any act or omission done or made in performance of the member's duties while serving on the UTC. This immunity only applies in the absence of willful misconduct.²⁹

Meetings

The UTC may conduct meetings in person, by teleconference, or by video conference. Before convening a meeting by teleconference or video conference, the UTC must send (via email, fax, or U.S. mail) a copy of meeting-related documents to each committee member.

The act requires that minutes of each meeting specify whether the UTC members attended in person, by teleconference, or by video conference. Under the act, if any vote taken in a meeting held by teleconference is not unanimous, it must be recorded as a roll call vote.³⁰

The committee must meet as necessary to carry out its duties and meet the time-period requirements of the act, but not less than once every three months. A majority of

²⁶ R.C. 3781.34.

²⁷ R.C. 3871.343; R.C. 102.02 and 102.021, not in the act.

²⁸ R.C. 3781.341.

²⁹ R.C. 3781.38.

³⁰ R.C. 3781.342.



committee members constitutes a quorum.³¹ The act requires the UTC to establish a primary meeting location that is open and accessible to the public.³²

Specified duties

In addition to what the UTC is required to do under the act described above, the act creates a list of duties of the UTC:

- Coordinate with the PUCO in carrying out its duties under the act;
- Provide subject matter expertise when requested during inquiries;
- Review reports of the PUCO staff in accordance with the act;
- Make recommendations under the act;
- Perform any additional duties as may be required under the act.³³

PUCO rulemaking and reporting

The act requires the PUCO to, in consultation with the UTC, adopt rules under Revised Code section 111.15 to carry out the provisions of the act. The rules must include all of the following:

- Guidelines for consistent application of fines and penalties;
- Tracking compliance of persons on whom fines or penalties have been imposed;
- The required contents of the Underground Utility Damage Prevention Grant Program, created by the act;
- The gathering, review, and acceptance of applications for grants;
- The dispensation and tracking of money from the Underground Facilities Protection Fund;
- The UTC's duties, including rules that establish the UTC's operation, meeting schedule, and voting procedures;

³¹ R.C. 3781.36(B).

³² R.C. 3781.342(B).

³³ R.C. 3781.36(A).



- The contents of the annual report required under the act;
- The process related to collecting the safety registration paid by utilities, excavators, developers, and designers who participate in the one-call notification system.

The act *permits* the PUCO to adopt rules establishing (1) procedures for conducting inquiries of requests or (2) any other duties for the UTC.

The act requires the PUCO to submit an annual report of the previous year's activities under the act to the General Assembly by April 1. Each report must be made publicly available on the PUCO's website.³⁴

Registration amount required – used for enforcement funding

The act requires each utility, excavator, developer, and designer who participates in the one-call notification system to register with the PUCO and pay a safety registration of up to \$50 annually, which the PUCO may lower. The PUCO must administer and oversee the registration process. The act states that failure to register results in a fine of up to \$2,500.

Funds collected from the safety registrations and fines for failing to pay the safety registration must be deposited into the Underground Facilities Protection Administrative Fund, which the act creates. The fund retains its interest and is to be used to fund the operation of the UTC and the PUCO in the performance of duties under the act.³⁵

Underground Utility Damage Prevention Grant Program

Except for the fines for failure to pay the safety registration, the PUCO must deposit all fines collected under the act into the Underground Facilities Protection Fund, which the act creates. The fund retains its interest and is to be used solely to fund Underground Utility Damage Prevention grants, which are for any of the following purposes:

- Public awareness programs established by a protection service;
- Training and education programs for excavators, operators, designers, persons who locate underground utility facilities, or other persons;

³⁴ R.C. 4913.43 and 4913.45.

³⁵ R.C. 4913.03 and 4913.30.



- Programs providing incentives for excavators, operators, persons who locate underground utility facilities, or other persons to reduce the number and severity of compliance failures.

The act permits the PUCO to administer the grant program and to provide the grants. The PUCO is to determine the appropriate amounts of grants.³⁶

The act does not affect civil liability

The act states that it does not give the PUCO or the UTC the authority to determine the civil liability of any person for any compliance failure.³⁷ In a separate provision, it similarly states that no finding, determination, or recommendation of the UTC, no decision of the PUCO under the act, and no no-enforcement determination under the act is determinative of civil liability in a private cause of action for personal injury or property damage. The act also states that no proceeding under the act, no-enforcement determination under the act, or fine or penalty imposed under the act prevents or preempts any party from obtaining civil damages for personal injury or property damage in a private cause of action.³⁸

No fine in the case of a federal fine

The act prohibits a person from being subject to a fine under the act and a fine under federal law for the same compliance failure. In this situation, the federal fine – and not the fine under the act – would apply.³⁹

Public Utilities Commission's jurisdiction

The act states that the PUCO has exclusive jurisdiction to enforce, in accordance with the act, the act's enforcement process and the requirements of the underground-utility-damage-prevention law described in the "**Overview**," regarding a compliance failure.

The act states that the PUCO's enforcement authority is limited to actions specifically authorized by the act. The act expressly states that the law governing PUCO

³⁶ R.C. 4913.27, 4913.29, and 4913.31.

³⁷ R.C. 4905.041(C).

³⁸ R.C. 4913.50.

³⁹ R.C. 4913.47.

procedures for handling complaints against any public utility does not apply to the enforcement process under the act.⁴⁰

Applicability to permits

The act states that a person with a permit for excavation from the state or a local governmental unit is subject to the act.

It also states that its provisions do not affect or impair local ordinances, charters, or other provisions of law requiring permits to be obtained before excavating.⁴¹

Exemption for domestic wells

The act exempts owners of certain domestic wells from any requirements of "utilities" under the underground-utility-damage-prevention law. For instance, the act exempts an owner of a domestic well from the requirement to register the well's location with a protection service.⁴²

HISTORY

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⁴⁰ R.C. 4905.041(A) and (B) and 4905.26.

⁴¹ R.C. 4913.52.

⁴² R.C. 3781.25(C)(5); R.C. 3781.26(A), not in the act.

