



TENNESSEE UNDERGROUND UTILITY DAMAGE ENFORCEMENT BOARD
Meeting on May 24, 2017

MINUTES

The Board meeting of the Tennessee Underground Utility Damage Enforcement Board was called to order at 10:00 a.m. in the Ground Floor Hearing Room of 500 Deaderick Street, Nashville, Tennessee 37243 by Chairman Kevin Tubberville.

Board Members Present:

Kevin Tubberville, Chairman	Scott Niehaus
Jonathan Campbell	Bobby Pitts
Wayne Hastings – by telephone	Kevin Raley – by telephone
Bill Hollin	Steven Raper – by telephone
Craig Jensen	Rick Tunnell
Kenneth King	Bill Turner
Bob Lambert	

Board Member(s) absent:

Charles Hood
Kevin Kruchinski
Thomas Suggs

TPUC Staff Present:

Lisa Cooper	Ryan McGehee
Stacy Balthrop	Sharla Dillon

Also Present:

Craig Ingram - Tennessee 811
Michael Varnell – Dempsey, Vantrease & Follis

Chairman Kevin Tubberville opened the meeting at 10:00 a.m., and rollcall was taken of the Board members. Mr. Tubberville introduced Jonathan Campbell, with the cable industry, as a new member of the Board. Bill Turner recognized a visitor to the meeting, Annette Reburn, Executive Director of Alabama 811, and stated that Alabama 811 is looking to do similar things as Tennessee and she had come to observe the process. The Board considered the Minutes of the last meeting of February 27, 2017. There were no corrections, and the Minutes were approved on a voice vote.

Election of Executive Committee

Mr. Tubberville stated that the terms of the Executive Committee will expire before the next regularly scheduled meeting of the Board on September 26, and he asked for input about having an election today rather than change the date of the next Board meeting. Mr. Turner suggested that because the Executive Committee is still in learning mode it might be a good idea to extend their current terms if they are willing to serve again. After confirming that all three members were willing to serve another term, the Committee elected, individually on voice vote, Mr. Tubberville, Steve Raper and Bob Lambert for another term. The new terms will begin on August 25. Kenneth King suggested that the Board might consider staggering the terms of the Executive Committee so that they don't all expire at the same time, but Ryan McGehee stated that the statute doesn't give the Board the flexibility to stagger the terms.

Program and Financial Update

The Board moved out of session to hear updates from TPUC staff. Mr. McGehee stated that the Legislature has given the Board an attendance policy – if you miss more than 50 percent of the scheduled meetings, you're automatically off the Board. There is no discretion, and there are no excused absences. This policy became effective when it was signed into law on April 19. He reminded the Board that if they cannot physically be present, they can call in to participate.

Mr. McGehee stated that the Executive Committee meeting minutes are the best source of information about the Committee's actions, and those minutes are posted on the website once they are approved. He said there are two contested citations at present, and they will have to be heard by a hearing officer in a formal hearing setting. If the violator does not like the decision there, an appeal can be made to the Executive Committee.

Stacy Balthrop reported that 24 complaints were received in April, 11 complaints had been received so far in May, and 32 citations had been issued by the Executive Committee. She stated that future Executive Committee meetings have been scheduled for: June 28, July 26, August 30, September 26 (also the full Board meeting), October 25, November 29 (also the full Board meeting), and December 13. Ms. Balthrop stated that there are currently about 93 open investigations, and a total of 190 complaints have been received since the complaint process began in October.

Rick Tunnell asked if there is something additional that can be provided to the Executive Committee for incidents where no locates have been called in but the customer gets a no-fault ruling. He stated that it is difficult to then try to recover for the damage done to equipment. Mr. McGehee responded that anyone from Mr. Tunnell's company could contact the staff about those issues, but as a Board member, he could not.

Mr. King thanked the Executive Committee for their hard work and encouraged the Board members to attend the meetings, or call in, because it provides a good understanding of the decisions made and will provide a learning experience for possible future service on the Committee. Mr. Tubberville also encouraged Board members to attend or call in, and he thanked TPUC staff for their hard work in processing the complaints and presenting reports to the Board. Mr. Turner said that the next quarterly Tennessee 811 magazine will be issued soon, and it will contain an article submitted by TPUC staff which discusses some specifics about helpful hints on reporting damage and how to go about it. He said it will also contain a follow-up article from David Roberts of Atmos, who has been very successful at presenting his violations. Mr. Turner encouraged the Board to share the magazine throughout their businesses.

Lisa Cooper stated she would be providing a financial update and would also show some trends as far as the costs of the services provided to the Board. She gave a slide presentation to show quarterly and annual trends. Ms. Cooper explained that the slides were broken down into three categories: (1) division costs, which is the investigative enforcement division; (2) administrative costs, which would be IT and financial, as well as Ms. Cooper and Ms. Balthrop; and (3) legal costs, which includes support to the Board and the Committee.

Ms. Cooper stated that the trends are going down on a quarterly basis, with the exception of division costs, which have been increasing. There was a gain in costs of \$5,183, and the projection for the next quarter for division costs is another increase, from \$21,702.81 to approximately \$30,000 with additional staff for the investigative and compliance workload. She explained that there are still unknown variables for the database development, affecting administrative costs, and that automating everything is still about a year away. Once automation is complete, division costs will probably flatline and be more consistent.

Mr. Turner asked about allocations for the legal division that had not been on the quarterly billing before, and Mr. McGehee explained that the charges were for support staff and would be on the billing sometimes dependent upon whether their services were utilized. Mr. Turner then inquired about the future increase in division costs and additional staff. Ms. Cooper responded that they began with one investigator and Ms. Balthrop, then they added a second investigator who devoted 50 percent of her time to the investigation of complaints. She explained that starting in April the second investigator would be spending 100 percent of her time on investigations, and that would account for the increase. Mr. Turner inquired if the percentage of impact that the Board is charged based on the number of TPUC employees would also increase, and Ms. Cooper responded that it would remain the same but would be tied into the projected increase.

Ms. Cooper pointed out that there were some set-up costs that will level off, but the use of a hearing officer could increase costs, especially if the hearing officer has to travel to the county where the incident occurred, as required by statute. She went over the projections and stated that the four quarters would end up around \$273,000, which is under the \$320,000 that was discussed at the last meeting. Ms. Cooper asked the Board to consider handling biannual invoices, to tie in with biannual meetings required by the statute, in order to reduce staff time in preparation of quarterly reports and quarterly Board meetings, thus reducing costs.

Mr. Lambert asked if the division costs would be reduced as the number of complaints levels off, and Ms. Cooper stated that Ms. Balthrop's time might be reduced, but the two investigators' time will continue at the same level due to the short amount of time they have for preparation between the monthly Executive Committee meetings. Mr. Lambert said that having less frequent meetings has been discussed, but due to the current volume of complaints it is necessary to continue to meet monthly.

Ms. Cooper told the Board that if they have any questions concerning the invoice, they can contact Chris Eaton, and Mr. McGehee stated that they can always e-mail Mr. Eaton too. Mr. Tubberville asked Ms. Cooper for clarification as to whether she was asking the full Board to meet biannually or just requesting a change to biannual reports and invoicing, and Ms. Cooper responded that the request was for the full Board, as well as invoicing, in order to reduce preparation time, and thus costs as well. Mr. Tubberville expressed his concerns about biannual meetings and the requirement of 50 percent attendance for Board members. Craig Jensen asked if adding additional staff meant hiring new people or using existing staff, and Ms. Cooper responded that existing staff would be used.

Tennessee 811 Update Concerning Training and Its Annual Audit

Mr. Turner stated that Tennessee 811 is funded by fees collected from their membership during annual billing, and as a nonprofit 501(c)(4) organization, they undergo an annual audit. The audit for 2016 showed a significant deficiency for the first time in their history, and their board has concerns about that deficiency. As a result, Mr. Turner brought their auditor, Michael Varnell, of Dempsey, Vantrease & Follis, to the meeting to give a report.

Mr. Varnell stated that they looked at TPUC invoices provided to Tennessee 811 by the Board and various minutes that were available, that it rose to the level of a significant deficiency, and that they had concerns related to the way this is being enacted from an accounting perspective. He stated that there are several problems they could see, but he would start with the cost basis. The first issue is that it didn't appear that the first two invoices affecting the 2016 audit had proper review prior to the approval and the alternate payment. Next is a question related to the actual details behind the costs – having an allocation without proper supporting evidence on the details of that allocations basis, whether that is salary, time incurred, etc. Mr. Varnell stated that there were different percentages for different allocations, and that with a lot of the allocations there is a lack of competent evidential matters.

Mr. Varnell stated that this causes a trickle-down effect because Tennessee 811 must pass the charges along to their members. He said that, based on the law, violators were supposed to sign up and be responsible for their share of these costs, and not everyone did that, so there was a disproportion of allocation. Management decided not to seek any collection of those funds from members that did sign up, which creates a collection and enforcement issue. He stated that the Board would be the arm having the ability to take action on that, but any collections made by the Board are to go into a specific reserve for the Board. Therefore, there is no mechanism to remit funds to Tennessee 811 for enforcement, causing members to shoulder even more of the costs.

Mr. Varnell stated that another issue is the manner in which billing for these costs was set up. There was no specific allocation of Board costs in the first year billing, and it was rolled into the membership billing. Tennessee 811 typically asks for a certain budget amount and does a

form of allocation to its members, so the costs of the Board and their regular organizational budget were rolled into one and billed to the members. This gives the “potential” for some members to be overcharged and others to be undercharged.

Mr. Tubberville stated that his understanding of Mr. Varnell’s report is that the way the law was written, coupled with the way the Board has been conducting business, as far as finances are concerned, has placed a hardship on Tennessee 811 because of the way the minutes read and the way the invoices were approved. Mr. Varnell responded that it is not a hardship, per se, but a control deficiency – a void in a clear audit trail between the approved cost and the cost incurred. Mr. Tubberville pointed out that the follow-up to that is the fact that some members have not signed up and thus contributed to the cost.

Mr. King stated that the Board didn’t formalize its budget until October 2016, where \$80,000 per quarter was projected, and he wondered if the 811 board had a projection before that was done. He said that going forward they would have numbers on which to base their projections. Mr. Varnell responded that they did have conversations before the legislation was passed and also talked with other states that have similar processes, so they did have a general idea. He agreed that the process has been improved with the actual invoicing and information, but he pointed out that having audit evidence and projections is just not the same.

Mr. Tubberville asked if there is a list of specific information needed that can be provided by the TPUC, but he also pointed out that the Board can’t do anything about the people who didn’t sign up. He stated that they don’t want to cause any hardship on the 811 program. Mr. Varnell responded that he believes the fact that this was the first year of implementation accounts for the significant deficiency because there are so many unknowns, but he stated that it would be helpful to support the percentages, either through some sort of internal time study or the use of time cards, and then include that detail. A second option would be to get detailed information about payroll schedules and to know the basis to which that ratio is being applied – i.e. salary and benefits. Mr. Varnell also stated that the approval chain should be documented showing that things like staff being added was approved prior to being incurred.

Mr. Tubberville stated that he thought some of the percentages are based on employee count versus how much space is being occupied in this building as part of the rent. He pointed out that Mr. Eaton can provide Mr. Varnell with information as to how they arrived at that percentage. Mr. Varnell responded that he had had some conversations but felt the basis for the ratios was lacking in sufficiency. Mr. McGehee inquired if Mr. Varnell had met with Mr. Eaton, and Mr. Varnell stated that he had not, that he had met with Tennessee 811, the board president and legal counsel, and Bill Turner. Mr. McGehee then stated that this was the first time the agency had heard about the audit, and he requested a copy of the audit and the findings. He also pointed out that when the invoices are presented, the agency is an open book for the Board.

Ms. Cooper stated that the statute says a concurrence, that the agency does have costs that are going to be carried over, and that that is the reason the TPUC is trying to reduce those as much as possible. She stated that she didn’t believe that the statute allows for approval of staff – that would be up to the TPUC’s Executive Director. Mr. McGehee said that it would be impractical to wait for quarterly Board meetings to approve, plus legal would have to burn more time trying to get a special contract approved. He stated that the law wasn’t designed in that

fashion and that the TPUC deals with a lot of accounting principles in the ratemaking area and thus understands accounting principles.

Mr. Varnell pointed out that the law specifically gave the Board the power to dispute the charges, but he just wasn't sure there is the clarification within the statute when they are disputing and approving. He stated that the law mandates the Board to be responsible for approval, and Tennessee 811 has the fiduciary responsibility with their members to make sure it is as accurate as possible. Mr. McGehee responded that understanding that, they are also responsible for assessing annual operating costs to operators in an amount equal to the amount necessary to offset the costs of investigation and administration services performed by the agency, and a cost is a cost. He re-stated that the agency has been an open book for the Board. Mr. Tuberville stated that if they could get a list to Mr. Eaton of specific information needed, it would improve invoicing as we go forward.

Craig Jensen asked if the TPUC does an internal audit on the invoices that can be provided when they are presented to the Board for approval. He said he thinks the question is about how the numbers are obtained – do the employees self-report and is that time validated? Mr. McGehee responded that he tracks his time by days and then discusses it with General Counsel, presenting lowball numbers because of the complaints received about legal costs. He pointed out that there have been a lot of costs to deal with because everybody on the Board has a conflict of interest, and the special contract took a lot of time. He stated that there may be more costs in the future when hearings are held, especially if held out of county as the statute designates.

Mr. Jensen stated that it is more of a validation issue and that he doesn't know that any government agency or individual company will take a guesstimate about time on a RFP and approve it. He said it would settle a lot of issues to look at something internally for validation in the future. Ms. Cooper responded that her division does staff time allocation with other funding and, as a self-funded agency, does not have time cards. She said they can take a look at the validation issue, but she thinks since everyone has been lowballing it the trends she showed earlier will increase. She also stated that the agency is allowed to recoup its costs, and it can do specific time billing.

Mr. Jensen stated that he understands that the costs are the costs, but every time the Board asks for something it gets some pushback. He said to present whatever the expenses are to the Board, and they will approve it or not; and if things don't work out between the Board and the TPUC, then they will explore other avenues at that time. He further stated that an issue has been brought up regarding transparency, and the Board is expected to do its due diligence to resolve it. Mr. Jensen stated that when they bring it to the agency, they're not asking for excuses to do it or not do it but are asking can it be done and what can be done to satisfy that. He stated that he personally wouldn't hire a contractor on a percentage basis and allow them to self-report – there needs to be some checks and balances.

Ms. Cooper responded that agency auditors have the needed checks and balances, and if that is what the Board would like to be done, then they can start doing that. Mr. Jensen said that the question is whether the agency has any internal audits that justify the time, and Ms. Cooper responded in the affirmative. Mr. Jensen stated that getting together to obtain that information should satisfy the issue. Mr. McGehee stated that he understands the concerns but that the

agency has been transparent the entire time. He stated that invoices have been presented and very few questions have been asked, so the agency is caught a little off guard with all the concerns. He further stated that it is an important issue, and the agency will deal with it to everyone's satisfaction.

Mr. Lambert asked if it is proper for the audit firm to discuss this with Mr. Eaton, and Mr. McGehee responded that it would be. Mr. Lambert suggested that such a meeting might clear up some of the questions. Mr. Varnell pointed out that they are not disputing that there are costs but that it was purely a control-related comment regarding the method in which it is being borne. It is because of the significant amount involved that the question was raised to that level, and it is not raised to the level of a material weakness but is something that has the potential to be misstated based on the way it is being done. Mr. Varnell stated that the concern is because Tennessee 811 is passing the charges through to their customers. He stated that the other items for discussion with Mr. Eaton would be the reserve fund and the collection mechanism.

Mr. Tubberville stated that the best method right now would be for Mr. Varnell to obtain the specific items on which Mr. Eaton can provide additional information and make Mr. Eaton aware so that he can include that further documentation along with future invoices. Mr. Lambert pointed out that the Board is basically less than a year old, and when they started they had absolutely no idea how to base any costs because of the unknowns on how many complaints might be filed and how much staff time would be involved in investigating the complaints. He stated that the audit was based on a year when the Board was taking baby steps, and he asked that they work with the Board and Mr. Eaton to see if they can come up with some good information.

Bill Hollin asked if the Board was set up without funding by the House and Senate. Mr. McGehee responded that there is no State funding. Mr. Hollin then asked if Tennessee 811 is required to pay for everything, and Mr. McGehee stated that it falls to the members. Mr. Hollin inquired if Tennessee 811 approved that arrangement, and Mr. Turner responded that it was done through the legislative process. Mr. Hollin expressed his surprise that this was set up, a bill was passed, and a law went into effect with no funding whatsoever from the State.

Mr. Turner then turned things over to Craig Ingram for a report on Tennessee 811 training. Mr. Ingram reported training has been fulfilled on six violations through four different training sessions, two of which were off-site. That represents 5 organizations and 13 individuals who have submitted to mandated training. The upcoming schedule includes 8 organizations and 11 individuals at the next on-site training to be held on May 31. There is one outstanding party from the first round of violators and six from the second round who have not yet been scheduled for training, but they may be among those who have appealed the violation. Mr. Ingram reported that he starts by explaining the process and why they are in the training, and because of the newness of the whole operation there are a lot of questions.

Mr. Tubberville asked Mr. Ingram if they are provided some information about the violation along with the list of people from whom to expect phone calls, and Mr. Ingram responded that the TPUC is now providing copies of the citation, with contact information redacted. He stated that the Board considered at one point whether to target training specifically to the offense for which the party was cited, but the decision was made to not go that route. However they will take time during the training to answer any specific questions regarding a

specific violation. Mr. Tubberville said that he hopes this information will be helpful to those who don't know the law or have chosen to ignore the process and that they are passing that information along to their organization and others they interact with on a regular basis. Mr. Ingram stated that they are trying to make people aware that they also offer free, voluntary training, as they want to be proactive in preventing these violations. He said that they are always advertising those services. Mr. Ingram also reported that the attendees have openly shared information regarding their violations and haven't necessarily disputed the fact that they were in violation of the law. He stated that so far it has been a very positive experience. He said he will be providing a more thorough and detailed report to the TPUC on June 1, immediately following the next training session.

Mr. King asked how they determined where to have the off-site training sessions, and Mr. Ingram responded that in both instances the party ordered to training was able to provide suitable space at their office. Mr. Turner had gotten pricing approval from the Executive Committee - for a fee of \$500, plus federal mileage for the travel, they could send up to five people through the training. Because of their other activities, Tennessee 811 was able to reduce the price in one situation, as they want to be as flexible and cooperative with the violators as possible. Mr. Tubberville stated that it was a pretty significant travel distance for both parties, and Mr. Ingram said that because of the number of people they would have to accommodate travelwise and the distance involved, they did the training in Piney Flats and Maryville.

Topics for the Next Board Meeting

The Board went back into session, and Mr. Tubberville stated that the next meeting is scheduled for 10:00 on September 26. He asked if there were any items for the next agenda other than the minutes from this meeting and updates from the staff. Mr. King said he had attended a couple of the Executive Committee meetings and had a few questions. He wondered if the Board should set some kind of guidelines or standards for some of the violations. During the Committee meetings there were similar complaints with different training requirements, and he wondered if there should be some standard set. Mr. McGehee responded that the Committee bases their decision on the facts, and he thinks they have been consistent. He said it depends a lot on whether 811 was called and whether there was a dig ticket. Mr. Lambert stated that each situation is different, and sometimes you don't know who was operating the equipment, or they are no longer employed with the company and the foreman on the job site was responsible for instructing the operators. He said that the Committee looks at each complaint on its own merit. Mr. King replied that he was just concerned that there could be issues down the road without consistencies or guidelines.

Mr. Tubberville stated that he has thought all along that training is best served to the people doing the work rather than relying on somebody in the office to pass the information along. Mr. King replied that, understanding that people are not always forthcoming with information on who was operating the equipment, he believes it might be better to have the company determine who would benefit from training rather than having the Executive Committee designate someone. Mr. McGehee stated that the question of allowing the company to decide that has come up before, but it was decided that it wasn't a good idea. Mr. Tubberville pointed out that a company can send whomever they want and as many people as they want. If they think someone else would benefit more from training, a company can send them too.

Mr. Lambert stated that the TPUC team does a tremendous job in the investigative process of gathering just about every bit of information they can, and the Committee uses their information and recommendations a lot. Mr. King said that he was just trying to help streamline or speed up the process. He asked if the Board gets outside the law when it asks someone that is not the excavating party, or the entity that did the damage, to attend training. Mr. Tubberville responded that in some instances it depends on who called in the locate. The builder may have called in a locate and told the excavator he had gotten it, but that's not how the law is written. Thus, they are learning about the law just as much as they are learning about the hazards the law is trying to prevent.

Mr. Tubberville reminded everyone that the Executive Committee would meet immediately following the Board meeting, and he then inquired if anyone had anything to add to the agenda for the next Board meeting. Mr. Turner stated that he would like a standard item on the agenda going forward to have a review of any possible legislative changes or housekeeping changes that should be considered. Wayne Hastings stated that he would like to receive a follow-up on the concerns regarding the audit findings and whether it has been resolved so that there isn't an issue going forward on the next audit for 811. Mr. McGehee said the Board should be receiving a copy of the audit.

Mr. Hastings expressed his appreciation for the efforts of the TPUC and stated that he is sure Mr. Eaton can address the audit concerns with supplemental information on the invoicing. He then asked if the Board needs to formally approve the current invoice, and Mr. Turner responded that previous minutes didn't clearly document that the finances had been approved by the Board. He stated that future Board minutes need to clearly document approval of the invoices, and Mr. Hastings asked if there needed to be a motion on the current invoice. Mr. McGehee stated that the statute sets the Board's annual operating costs, but it can be looked at on a quarterly basis if that's what the Board wants. Mr. Turner stated that the Board meetings were set around the dates when Mr. Eaton could complete his quarterly billing so that there would be enough time to get the billing out to all the Board members for review, discussion and approval. That then authorizes him to pay the invoice on behalf of Tennessee 811 and its members. Mr. Turner said that he has to have some authorization that they are valid expenses that Tennessee 811 is obligated to pay, plus it would provide validation if Tennessee 811 tries to legislatively or legally recoup unpaid fees.

Mr. Hastings stated that he just wanted to make sure the Board is addressing the concerns of Tennessee 811's audit so that the Board doesn't repeat the same practice and possibly have a finding next year. Mr. King stated that the Board had voted and approved an \$80,000 per quarter budget, that Mr. Eaton is providing information showing that the Board is staying below that amount, and that he didn't see a problem with voting on it each quarter. Mr. McGehee stated that the Board had given Tennessee 811 an estimate based on a lack of any history, but the invoices have allowed the Board to see the costs and have kept the Board informed. He said that there is no legal problem with the Board voting on them again, but he reminded the Board that the statute states they are to assess an annual operating cost to the operators. Mr. Lambert made a motion to approve Mr. Eaton's report, and it was unanimously passed on voice vote.

The meeting was adjourned at 11:36 a.m.