



TENNESSEE UNDERGROUND UTILITY DAMAGE ENFORCEMENT BOARD
Meeting on September 26, 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
Wayne Hastings	Bobby Pitts
Bill Hollin	Kevin Raley
Charles Eddie Hood	Steven Raper
Craig Jensen	Thomas Suggs – by telephone
Kenneth King – by telephone	Rick Tunnell
Kevin Kruchinski	Bill Turner
Bob Lambert	

Board Member(s) absent:

Jonathan Campbell

TPUC Staff Present:

Stacy Balthrop	Chris Eaton
Kelly Cashman-Grams	Ryan McGehee
Aaron Conklin	Tim Schwartz
Sharla Dillon	

Also Present:

Bobby Garner, Chairman, Tennessee 811	Todd Kelley, Heath Consultants
Tim Vaughn, Kentucky 811	Matt Mingus, Team Construction
Dan Meiners, Kentucky 811	Paul Leath, AGL Resources
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Chairman Kevin Tubberville opened the meeting at 10:00 a.m., and rollcall was taken of the Board members. The Board considered the Minutes of the last meeting of May 24, 2017. There were no corrections, and the Minutes were approved on a voice vote.

Program and Financial Update by TPUC Staff

Ryan McGehee gave a brief update on the contracting process. He stated that the special contract that was approved by the Comptroller's Office and the State CPO Office last year was not official and effective until April and that the Board had agreed to competitively bid the contract out after a year. Although there is still time left on the contract, he said that discussions will be started between staff and the CPO Office about the next step for the competitive bid process because that process can take up to six months.

Mr. McGehee then stated that Chris Eaton was present and prepared to answer any questions about the current invoice. Bill Turner asked if the allocated rate for the State cost went from 1.75 to 3.5, and Mr. Eaton responded that the percentage increased because a second person came on board as a dedicated staff member. Craig Jensen commented that at the last meeting Tennessee 811 expressed certain audit concerns, but he didn't see any substantial change on the current invoice. He inquired about conversations and/or agreements with the auditor since then. Mr. Eaton stated that he had a conversation with the auditor in which they had come to an agreement on two adjustments going forward. The first one involves a breakdown of individual salary costs as opposed to that cost being given as a lump sum. The second concerns the way percentages of time are allocated for non-dedicated staff. Mr. Eaton stated that currently the time spent by certain individuals fluctuates, but once the program is matured there will likely be no fluctuating IT or legal staff costs. A time study analysis will then be done, possibly next year.

Mr. Eaton stated that there is a dedicated fund into which penalty revenue goes that the Board can access for such things as outreach. He reported that the fiscal year closed at the end of June, and the balance for the first year is \$625. He said that he will give an updated balance at the end of each fiscal year.

Mr. Turner inquired about something new on the invoice regarding wellness, and Mr. Eaton responded that it is an annual charge from F&A related to insurance for individuals. The charge is dependent upon the individual's benefits election coverage.

Mr. Tubberville stated that this invoice is closer to what was originally projected and asked if it is more accurate. Mr. Eaton stated the original projections were around \$80,000 a quarter, and that amount is a reasonable guess going forward. He said there will be some fluctuations, but it is not going to escalate a great deal.

Mr. Turner stated that it is the time of year again when Tennessee 811 collects fees from its members, and he asked if a budget was being put together for this fiscal year so that they will know how much the fees should be. Mr. Eaton responded that there have been some internal discussions, but nothing has been put on paper yet. He inquired about a timeline for 811's billing so that he could help with their billing schedule. Mr. Turner responded that their budget approval will be the first week of November and prior to that would be helpful.

The invoice was then unanimously approved on a voice vote.

Stacy Balthrop reported that 25 complaints were received in July, 30 in August, and 15 so far in September. Six complaints have entered into the contested case phase, three of which are for noncompliance, and three have opted to contest. She stated that the next Board meeting will be November 29th, and the next Executive Committee meeting will be October 25th. Mr. Tubberville reminded everyone that they can attend the Executive Committee meetings and that the Committee would be meeting immediately following today's Board meeting. Mr. Turner asked if there is a running total reported year-to-date, and Ms. Balthrop responded that for the fiscal year which ended in June there were just over 200. Bob Lambert stated that the Executive Committee is hearing approximately 25 complaints a month.

Mr. Jensen asked if all the 2016 cases have been cleared, and Ms. Balthrop responded that if there are any 2016 cases still open, it would only be one or two. Mr. Jensen asked if there are timelines that need a closer look for getting the complaints heard since the purpose is to put urgency on safety and public awareness of adhering to the dig law. Mr. Tubberville replied that the investigative staff is doing a tremendous job trying to get some of the cases caught up but that some alleged violators are almost being defiant in their noncompliance. Several attempts are being made to communicate with them, but they don't respond to phone calls, mail or emails. Mr. Jensen asked what plan is in place for handling those cases going forward, and Mr. Tubberville stated that the Committee is working with legal on insuring the process is in compliance with the statute. Mr. Jensen then inquired if this is something that needs to be addressed in proposed legislation. Mr. Lambert stated that because of budget constraints, you can't put more people onto it. He said that the investigators are putting 100 percent of their time on doing the investigations and the paperwork involved in preparation of the cases and that although they hoped things would start to taper off in order for the Committee to start meeting every two months, that hasn't happened yet.

Mr. McGehee stated that one option that is being discussed is taking people to chancery court to compel compliance. Bob Pitts asked at what point a decision is made to do something about those who are being non-responsive. Mr. McGehee responded that there has been a lot of discussion about the size of legal costs, and a measured approach must be taken as an agency as to where to spend the Board's money. He said that getting violators into the court system can be effective, but it can also be a lengthy process. He stated that they still have the opportunity to contest the citation, and we have to let that process play out. Mr. Tubberville pointed out that the six contested cases are currently at that point.

Mr. Pitts asked if there is a timeline in place for those who don't cooperate to contest. Aaron Conklin responded that he is the attorney who would act as the prosecutor for these cases. He stated that someone who wants to actively contest a citation has 30 days to do that, but if someone is simply not responding or cooperating, some factors make it really difficult to put a timeline on it. First, it must be proved that there was a violation, and sometimes there isn't enough information to do that. Investigative staff then has to go back to get adequate information to bring to the Executive Committee, and after a finding of violation, then the violators are given every opportunity to come into compliance. When no response is received, the statute says we have to convene a contested case. They probably won't show up for the hearing, so the hearing officer can enter a default judgment, and they are given another opportunity to come into compliance. At this point a decision must be made about going to court. Mr. Tubberville stated that he does think some legislative action could help improve the situation.

Presentation by Tennessee 811 of Suggested Conceptual Legislative Changes to the Underground Utility Damage Enforcement Board and the Underground Utility Damage Prevention Act

Mr. Turner recognized several additional people in attendance at the meeting and expressed appreciation for their interest in coming. He then asked if he could give a quick update on training and suggested that it is something that should be added to future agendas.

Mr. Turner reported that they have trained 60 individuals year-to-date, which represents 39 organizations. Ten of those training sessions have been done on-site at the Tennessee 811 location, and five have been done off-site, all five having been done in East Tennessee. Training is done at the Tennessee 811 office on the last Wednesday of every month, and seven individuals, representing six organizations, are scheduled to train tomorrow. On October 25th, three individuals, representing two organizations, are scheduled to train. He stated that there are still 36 individuals, representing 30 organizations, who haven't contacted them for training. He reported that training is going very well, that everyone has been very open and willing to attend, and that attendees are really excited to learn some of the things being taught.

Mr. Tubberville pointed out that the Executive Committee has asked Mr. Turner every month about how the presentations are going, and feedback has always been positive. Mr. Tubberville stated that he thinks the program is working and that we're getting the information out there. He said that Mr. Turner and his organization are doing an excellent job in passing along the information in a positive manner. Mr. Turner responded that Tennessee 811 is there to educate and promote safe digging and damage prevention, so this all fits perfectly into their model of what they do.

Mr. Pitts asked if it would be helpful to exchange information with investigative staff to see how many of the 30 from whom they have heard nothing might be in the contested group. Mr. Turner responded that they do provide information back to the staff in a monthly report, but due to conflict of interest concerns don't know who has contested their case. He stated that it's up to the violator to contact Tennessee 811, that they make no outreach to those violators. Mr. Pitts said that he was just concerned that, theoretically, someone could fall through the cracks. Mr. Tubberville responded that investigative staff presents tracking updates at each Executive Committee meeting.

Mr. Turner stated that by statute the enforcement board has some influence over proposing new legislation based on the experiences and cases that are heard, so discussions were begun in September to talk about some potential changes. Because Tennessee 811 is interacting with all the stakeholders, they receive a lot of feedback. They take some of that information and fine tune it into proposed legislative changes, corrections or improvements to make the Tennessee statute better.

Mr. Turner stated that after six years of working to improve legislation, a bill went into effect in May 2015. Since that time over 200 potential violations have been heard, which is a fantastic accomplishment. He then explained that his slide presentation contained some of the changes that he would like to address but that it was just suggestions for discussion and not what he was saying should be presented to the Legislature. He said that Mr. McGehee had presented some questions regarding his slides, and he had added those questions to the presentation.

Topic 1: The first recommendation is to define acceptable markings for underground utilities. As an example, Mr. Turner pointed out that because of fiber projects in Tennessee, Tennessee 811 had a 52 percent increase in ticket volume in Davidson County during the first quarter of 2016. This involved a lot of paint markings, and those marks were staying there for months, if not years. The current bill contains no standards as it relates to locating. The recommendation is to adopt the most current marking standards published by the Common Ground Alliance, which publishes a best practice manual that is updated yearly. Mr. Turner stated that the Best Practice Committee of the Common Ground Alliance operates by consensus - if one person disagrees with a practice that is being proposed, it is not accepted. He stated that all stakeholders are represented in these best practice committees. Mr. McGehee had questioned whether the intent here is to make a violation, and Mr. Turner stated that the intent right now is just to come up with a marking standard.

Topic 2: The next recommendation is to address the failure of utility companies to participate in Tennessee 811 as required by law. Mr. Turner stated that there are some utility operators who are required to join Tennessee 811 but haven't done so, and there is no penalty unless someone files a violation against them. Mr. McGehee had questioned how this membership would be enforced or compelled, and Mr. Turner stated that it would require a reported violation. Mr. Turner said that no cases have been presented regarding this violation, and he went on to mention several cities that either joined late or haven't joined yet. The final deadline as stated on the bill is January 1, 2018, and 96 utilities will fall under that deadline. Not all have been in contact with Tennessee 811.

Mr. McGehee had asked about the scope of the problem and the potential cost to enforce. Mr. Turner stated that the bill requires the operators to pay a fee to help cover the cost of the administrative responsibilities of the enforcement board, and they are not doing that. What that means is that the utility operators that are paying are picking up the load for those that are not current members, and there is no recourse for going back and collecting those fees. Mr. Turner stated that he did not think there would be a huge cost involved with the enforcement board sending out letters to operators identified by Tennessee 811 as not being members, telling them they are in violation and could be subject to some type of penalty.

Topic 3: The next recommendation is to establish a trainer by statute. Mr. Turner mentioned the lengthy process of recognizing Tennessee 811 as a trainer and stated that going through the procurement department took longer than anticipated. Mr. McGehee had asked if the Board would have the ability to opt out and obtain a new trainer in the future if a change in trainer, or more competition, is needed. Mr. Turner commented that the current statute says that the operators will form and operate a one-call service, which is Tennessee 811, and that there will be only one one-call service for the State. He stated that the organization is a nonprofit which is governed by a board of directors made up of the operators and an excavator representative. Mr. Turner stated that their mission clearly states that they are in the education business. He said that they promote damage prevention and educate and that based on their short history, he thinks it has worked really well.

The next question from Mr. McGehee had been whether the Board or Executive Committee would have the ability to approve or reject what is a reasonable cost. Mr. Turner responded that he currently comes before the Executive Committee to get approval for off-site trainings, and that is perfectly reasonable. He mentioned that it took several months to get to this

point with the special contract, that a complete RFP will be involved with renewal, and that he is confident Tennessee 811 will be awarded the contract.

Topic 4: The next recommendation is to define contract locator. Mr. Turner stated that the statute does not define what a contract locator is, but it is the primary method for locating and marking underground utilities. The question had been asked about what specific definition of contract locator is proposed. He said he does not have one yet, but other states have definitions of a contract locator that could be used for examples. He said that currently an operator could be found liable for a violation of its agent, such as contract locator. He stated that many contract locators feel like they are exempt from this law. Because they are not named, they feel like they cannot be touched if something is not done correctly. Thus, operators could be mandated to go through training at Tennessee 811 for a violation of a mislocate or a no locate.

Topic 5: The next recommendation is to stagger the terms of the Executive Committee members. Mr. Turner stated that this topic was discussed at the May meeting because the terms of the three Executive Committee members were about to expire, and it was agreed to extend their terms. However, the statute states that they can serve a one-year term for two consecutive years, thus meaning that the terms of all three current members will expire at the same time and cause the loss of all the experience they have gained at once.

The question had been asked how staggering the terms would impact the terms for Seat A, which represents the excavating community, and Seat B, which represents local government. Mr. Turner responded that Seats A and B expire in 2019, and Seat C expires in 2020. Seat A is pulled from three categories - the road builders, the excavators and the property owners. Seat B is pulled from the local government - the county roads and TML. Seats A and B are somewhat limited, but there are duplication representatives that could be selected. Seat C represents the utilities, and there are approximately eleven representatives that could fulfill that. Mr. Turner stressed that some method of staggering the current Executive Committee is needed in order to successfully maintain the continuity and consistency of what the organization has done.

Topic 6: The next recommendation is to improve procedures for hearing complaints. Mr. Turner stated that Tennessee One-Call often has information that would assist the Executive Committee in assessing responsibility related to complaints for underground damages. Tennessee 811 does attempt to attend all the Committee meetings, and during the cases being presented there are policy and procedure issues related to Tennessee 811, not legislative issues, about which Tennessee 811 could add information or be helpful, such as the definition of a short notice. They do not want or need to have a vote but could be of assistance from an informational standpoint.

The question had been asked about how the Executive Committee would address the conflict of interest Tennessee 811 would present on the Committee, and Mr. Turner responded that it would be no different from the way current members of the Committee have recused themselves from certain cases. Another question asked was if Tennessee 811 would be considered another investigative arm of the Board in a contested case, and Mr. Turner stated that they could have offered insight and positive responses to questions that have come up in previous situations. He stated that they were not trying to determine who is in violation but just bring guidance and expertise to the process, as a non-voting member of the Executive Committee.

Mr. Turner said that it is important that everyone get together on this because the purpose is to protect underground utilities in Tennessee. He stated that these are some of the things they feel they could contribute to that process, thus improving the law and how the Enforcement Board operates. He further stated that they would like to have the endorsement from the Board before going forward with the legislative process. Bill Hollin stated that if each of the Board members had a list of the 97 people who have not joined, they could contact them. He also said that a rotating board is pretty easy to set up.

Mr. Tubberville thanked Mr. Turner for providing all the information and asked what he needs from the Board at this point. Mr. Turner responded that he would like to know if everyone agrees that in concept these are good changes so that things can move forward with drafting some legal language. He stated that because the legislative session begins in January, it would be good to get started on this so that something can be presented to the Board at the November meeting. Mr. Tubberville stated that he definitely agrees with a lot of the suggestions and thinks that the intent is to clean up some of the things that were missed in the original legislation. Mr. Turner also pointed out that the Board is missing a vital stakeholder - someone representing the locating community.

Steve Raper stated that he agrees this is a good concept and that he would make a motion to pursue this and to take Mr. Turner's suggestions positively and go work on them. Mr. Jensen asked if this is something that requires a subcommittee, and Mr. Turner responded that he would love to have a committee to work on this together.

Mr. McGehee pointed out that for the complaints and the Executive Committee, they are enforcing what's in the act, not necessarily what's in somebody's policy or procedure, such as the example of short notices. He stated that regarding a conflict of interest, if you have any interest in the outcome of a decision, you have to recuse yourself. He further stated that if you are the trainer, especially if you are a mandatory trainer who collects a fee, you have an interest in that outcome. This presents a conflict of interest, and you would have pretty much an interest in every outcome of every case. Mr. Jensen asked if that means any representative of 811, including board members, and Mr. McGehee responded that it would apply to board members as well. He further stated that any member of the Executive Committee can call on 811 for information, but they should not ask for 811's interpretation of the act.

Mr. Turner stated that he envisions this as 811 being available to answer questions, an ex-officio and non-voting member. He said that 811 has built knowledge and understanding of things that others haven't, and there is value they can bring. Mr. Turner stated that he understands the conflict of interest but that their goal is zero damages - no violators - to get to a point where they don't have to train anyone. Mr. McGehee responded that he does understand the mission but he just wanted everyone to be aware of the conflict of interest issue that presents itself.

Mr. Pitts stated that he also had some concern about the conflict of interest issue and wondered if it is absolutely essential that 811 be an ex-officio member of the Board. He suggested that the Executive Committee might, by its own volition, choose to allow 811 to attend the Executive Committee meetings and, if the Committee has questions, to then call on 811. He stated that such an arrangement wouldn't formalize it as much but would guarantee 811 an opportunity to talk. Mr. McGehee responded that he would reaffirm that if the Executive Committee wants to hear from Tennessee 811, and as long as they stick with information and

steer clear of interpretation, then the process comes through cleanly. Mr. Pitts said that he was simply suggesting that Mr. Turner could be in close proximity to a meeting and thus available in case there were any questions.

Tim Schwartz pointed out that there is a review process going on right now, so it is a good time to determine what tweaks may be needed to improve the act. He stated that one of the improvements that has been discussed internally is on the venue for appeals. The statute states that the hearing will be held in the county where the incident occurred, and the Board might desire to have it based in Nashville to help control costs moving forward. He said that TPUC Commissioners will ultimately decide on the agency's position on legislation.

Mr. Tubberville stated that his understanding of Mr. Schwartz's presentation is that the agency review will look at the growth of the process, put recommendations together to present to the Commissioners, and come up with something to present to the Legislature. Mr. Schwartz stated that was correct and that they hope to have enough time to have something to present by November. Mr. Tubberville said that it appears that the agency review is more procedural, such as location and noncompliance, and Mr. Turner's presentation was more to fill in some of the gaps, such as contract locator definition - which is slightly different from the agency review. Mr. Schwartz stated that he would agree with that characterization and that the agency could agree on all or some of it or have reservations about some. He said that what is discussed conceptually could be different from what is actually introduced as legislation, so it would be good to reserve judgment until the actual language is introduced.

Mr. McGehee clarified that the memo the Board received was not an official position of the Commission. He pointed out that Mr. Schwartz was speaking for the Commission, and he was speaking as an advisor to the Board. He stated that he, not the Commission, had looked at the concepts and come up with the questions for the Board to think about.

Wayne Hastings asked if 811's involvement in previous Executive Committee meetings had been simply being asked for clarification or definitions. Mr. Turner responded that he did not believe that they have actually been recognized to answer a question, and Mr. Tubberville pointed out that 811 has primarily presented training updates. Mr. Turner stated that as far as dealing with individual violations, they haven't been called on for any clarification. Mr. McGehee said that there have been some occasions when Mr. Turner has pointed out something in the act to him, and he has then passed it on to the Committee.

After clarifying with Mr. Turner that it had not been an opinion or judgment that was passed on, Mr. Hastings seconded Mr. Raper's motion. Mr. Pitts asked if the motion includes the appointment of a subcommittee, and Mr. Tubberville asked if there were any volunteers for a subcommittee to work on the project. Mr. Hastings, Mr. Jensen, Mr. Pitts and Mr. Hollin volunteered. Mr. Tubberville re-stated that the motion was to go forward with the concept Mr. Turner had presented and to amend that motion to include the formation of a subcommittee to assist with developing the concept further and working on potential legislative drafts.

Kelly Cashman-Grams stated that she had one point of clarification regarding the failure of certain utility companies to become members as required under the act and the belief that there are no other remedies available. She stated that under Tenn. Code Ann. § 65-31-112(a)(2)(c) there is nothing in the act that precludes anyone who has a claim or a right the remedy to pursue any civil remedy in court. Therefore, Tennessee 811 has a right to pursue any

of those utilities in court to require them to join. Ms. Cashman-Grams stated that having the Board determine a remedy or determine that a violation has occurred is another venue, but nothing currently precludes 811 from pursuing those members to require them to join. She reminded the Board that this could affect the legal costs to the Board.

Mr. Hollin stated that what Mr. Turner presented gives the legal department some ideas of what he sees is not working, along with some ideas for study for possible changes. He said he believes it might help in making decisions that would be good for the Board. Mr. Tubberville stated that he hopes there will be a combined effort with the review, the Commission's input and the subcommittee's input. Mr. Turner asked if Mr. Schwartz or someone from the legal department would be willing to serve on the subcommittee also, and there was agreement.

The Board then unanimously approved the motion on a voice vote, and Mr. Tubberville thanked everyone for their input.

Topics for the Next Board Meeting

Mr. Tubberville stated that they had already discussed adding the training update to the agenda as an ongoing item and that the legislative subcommittee can be added for the next meeting. He reminded everyone that the next meeting is at 10:00 on November 29th.

Mr. Turner asked if the budget is something the Executive Committee can act on because the November 29th meeting will be past their budget approval date. Mr. McGehee asked if he would be using the budget to assess the costs, and Mr. Turner responded that they do their billing the beginning of November to collect their fees for the next year, so they need to have a proposed budget of how much it might be. Mr. McGehee stated that the code is pretty explicit that the Board assesses the annual costs, so he would get back to Mr. Turner to see what can be worked out.

Mr. Hastings asked when the Board should start looking at the contract for training. Mr. McGehee responded that the current contract is good until next April and that it's a 12-month contract. He stated that the staff envisions a process where it would not handle the actual competitive bid, that the CP office would, thus cutting down on hours for staff. He reported that staff has been told that it is a three- to six-month process, most likely six, so there will be some preliminary meetings about that - which might provide something to present to the Board at the next meeting. Mr. McGehee stated that he knows there is a legislative concept out there about making this process null and void, but he said that we still need to proceed until that changes. Mr. Hastings asked if the Board has the authority to extend the special contract for another year, and Mr. McGehee responded that the CP office has been creative to work with and does a great job. Mr. Hastings replied that because it is a unique training he would not think there will be a lot of competition. Mr. McGehee responded that the State operates on the general proposition that contracts need to be subject to a competitive bid in order to keep everything out in the open.

A motion was made to adjourn the meeting, and it unanimously passed on a voice vote. The meeting was adjourned at 11:30 a.m.