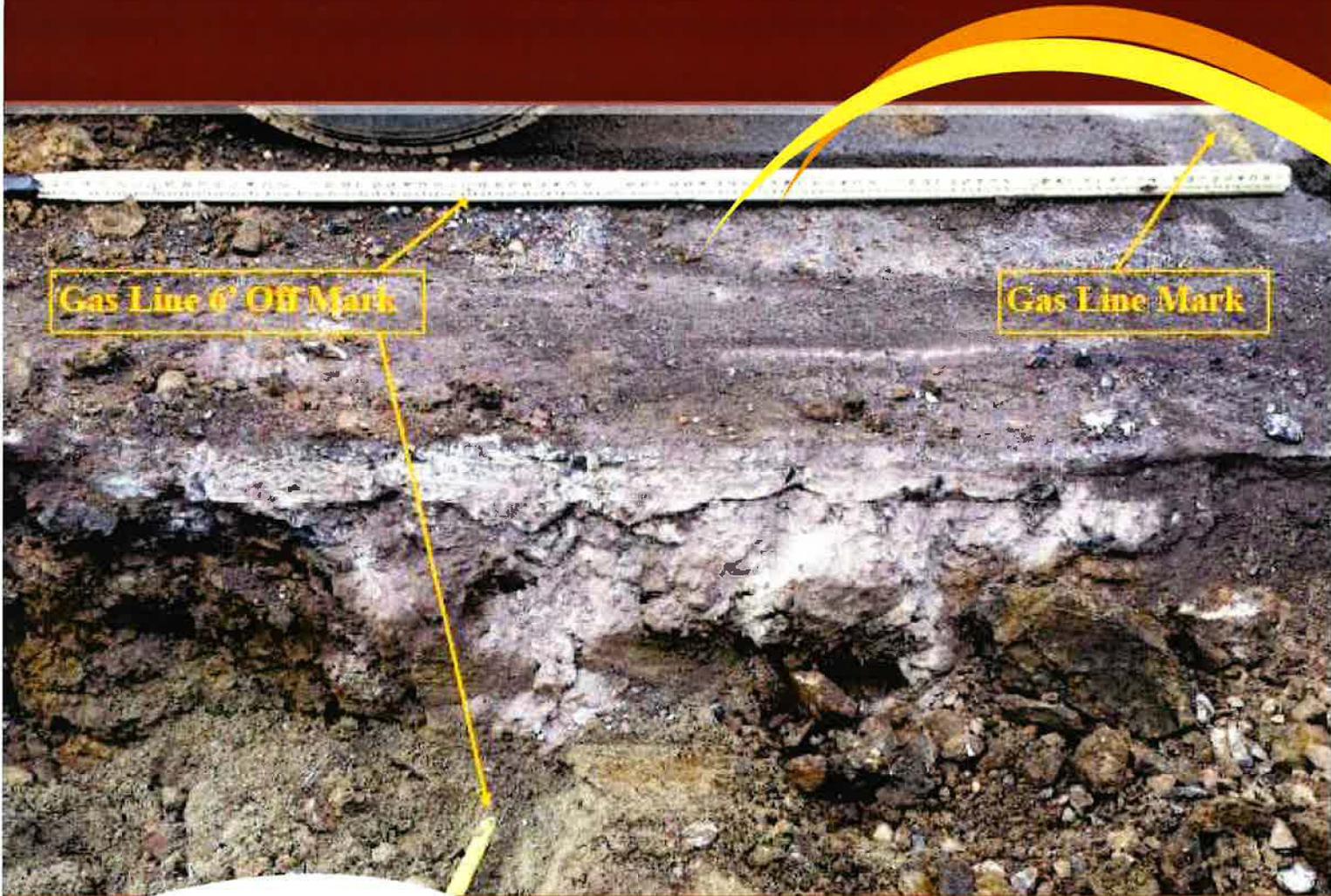


NUCA of Pennsylvania



June 5, 2017

Testimony

House Consumer Affairs Committee

Public Hearing

Underground Utility Line Protection Act—HB 284

NUCA OF PENNSYLVANIA TESTIMONY

Standby Time and Prevailing Party Attorney Fees

Good Morning. My name is Kevin McKeon, and I am a Pennsylvania construction lawyer with the law firm of Watt, Tieder, Hoffar & Fitzgerald, and I am here today with executives from two prominent Pennsylvania construction companies: Mark Reisinger of PKF-Mark III, Inc. and Jim Dacey of DOLI Construction Corporation. We want to thank the Committee for allowing us to offer testimony today on the most important safety legislation for our industry.

We represent the National Utility Contractors Association of Pennsylvania. “NUCA” is a group of contractors, suppliers, and engineers dedicated to promoting the utility construction and excavation industry through safety, education, advocacy and industry relationships. Our members work on water, sewer, gas, electric, and telecommunications projects, as well as treatment plants and site development.

Importantly, the majority of these projects involve significant underground excavation and underground infrastructure work, using heavy equipment – giant size Tonka Toys – capable of digging and moving a massive amount of earthen material relatively quickly.

As you know, this is dangerous work, not just because of the use of heavy equipment, but even more so because of what is concealed beneath the surface of the work site. And it’s not just dangerous to the equipment operators and laborers performing the work, but also to the consumers whose homes and businesses are tied into those power and gas lines in particular.

The “Underground Utility Line Protection Law” that is before you for renewal should truly be referred to as the “Utility Consumer and Utility Worker Protection Law,” because for

NUCA OF PENNSYLVANIA TESTIMONY

our members, it is truly about the protection of people – our own utility workers and the utility consumers – that is of the utmost importance as we review this Law.

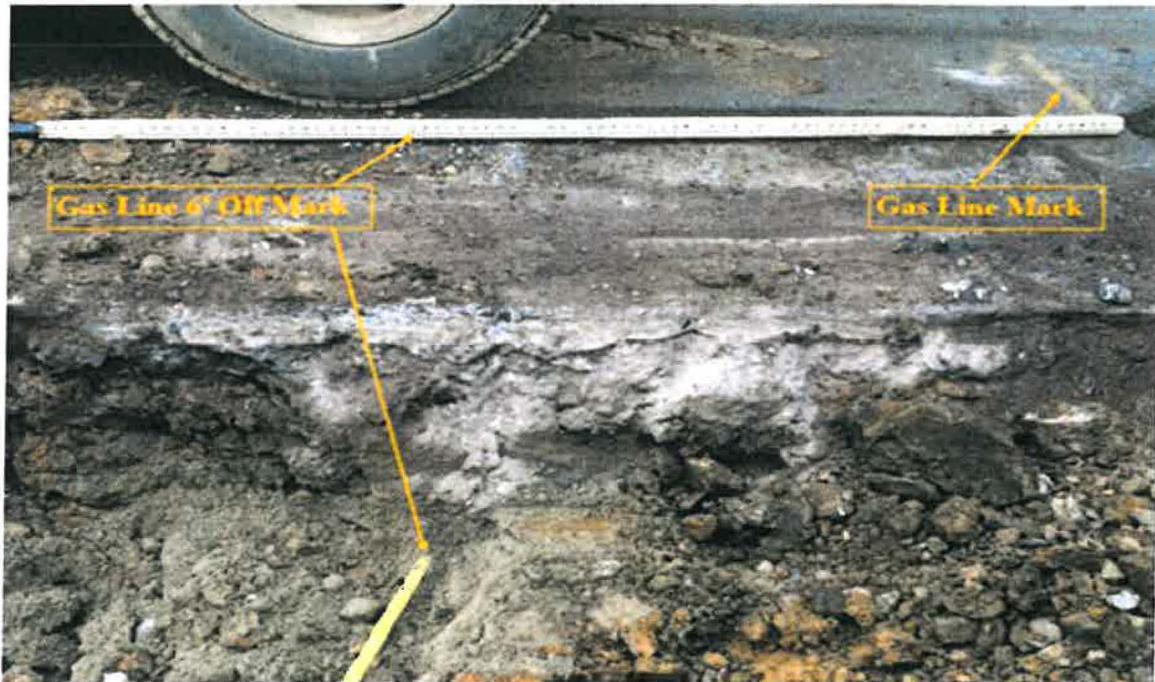
Most people, however, refer to it simply as the One Call Act. On a daily basis, our members make calls to the One Call System to request the locations of underground facilities on their work sites, and they rely on the facility owners to comply with the One Call Act and to accurately mark their underground lines. Our members will tell you that the marks placed by the facility owners are as important to maintaining their life-safety as are the red, yellow and green lights of a traffic signal to all of us in safely commuting to and from work every day. Imagine the danger created by a malfunctioning traffic signal at a 4-way intersection. But also imagine if you had no ability to see traffic coming from any direction. That scenario may give you some insight into why it is so important to us that facility owners accurately mark the locations of their facilities, particularly gas and power lines, that are hidden underground and have the potential to cause disasters.

I personally have been involved with NUCA-Pennsylvania for twenty years, while almost exclusively representing contractors in helping to manage and sort out the various disputes that arise in the construction industry. As a result, I often say that I feel that I am more a part of the construction industry than a part of the bar—although I'm a proud member of both – and those two worlds frequently intersect in the One Call Act. That is why Brenda Reigle, the Executive Director of NUCA-PA, asked me to summarize the testimony on behalf of the Association.

Let me emphasize again, NUCA's primary concern, and all stakeholder's concern, and indeed the General Assembly's primary concern regarding the One Call Act is, and should always be: safety. All of our comments must be viewed through that perspective, because our operators and our laborers are in the closest proximity to the danger zone.

NUCA OF PENNSYLVANIA TESTIMONY

That being emphasized, our members would testify that One Call “locates” have gotten progressively worse – meaning they have become less accurate. The picture included below and on the cover of our written submission is just one example in which the actual location of a pressurized gas line is six (6) feet from where the facility owner marked it:



In that regard, our members would also testify that most underground facility owners are now subcontracting their locating services to third parties. These locators are not regulated, nor are they licensed.

Most surprisingly, however, due to a legal loophole, the underground facility owners enjoy almost complete immunity even when obviously negligent, and creating a safety hazard, as reflected in the picture.

Brenda has included a wealth of materials with our written submission, and we respectfully ask you to review those materials in detail, if you have not already. But we wanted

NUCA OF PENNSYLVANIA TESTIMONY

to focus our testimony today on closing the loophole and holding all parties accountable, because no one should enjoy immunity when it comes to a safety issue.

Let me take a moment to give you some context and background. In the situation shown in the picture, if the heavy equipment operator had hooked that gas line while excavating from the left to the right, and caused an explosion that injured him or her, and destroyed the equipment, there is no question that the facility owner who is responsible for negligently marking that line could be held liable for any and all damages. That is not the problem.

The problem actually occurs when we have the same situation, but the operator gets “lucky.” No explosion occurs. No catastrophic injuries. No damage to the piece of equipment. Instead, imagine that the operator merely breaks the line and safely evacuates the area. What happens next?

Our members would testify that in that scenario, they must stand by and wait for the facility owner to come out and fix the break. Well, you might ask “what’s so bad about that? No one got hurt.” But in fact, the contractor is still hurt – financially. Even on a small crew, we have several workers – equipment operator, laborers, a truck driver, a flagger, a foreman or superintendent. All of these employees stand by and wait, and they’re entitled to be paid on an hourly basis plus fringe benefits. At the same time, we also have equipment; typically, an Excavator machine, a Loader, and a dump truck – all of which are also standing by. But again, the contractor has to pay for this equipment on an hourly basis. In this situation, the contractor is paying between \$600 and \$2000 per hour, depending on the size of the crew and the location of the site... for nothing. For no work. For no productivity. While waiting for the facility owner to fix the facility owner’s mistake.

NUCA OF PENNSYLVANIA TESTIMONY

Yes, luckily no one is personally injured, but the contractor is *financially* injured. Now you would think that logically, if the contractor and its employees can recover against the negligent gas company when there's a massive explosion and a disaster, certainly they can recover for these financial damages when – luckily for all involved – no explosion occurred. Unfortunately, this is wrong, and this is the problem.

Under current Pennsylvania law the Economic Loss Doctrine prevents a contractor from holding the facility owner liable for financial damages (“economic” damages), unless someone is personally injured or property is damaged.

Let me re-state and re-phrase that, because it may be hard to believe, and it's certainly counter-intuitive: Unless someone is killed or physically injured, or there is a vehicle, a piece of equipment or a building damaged or destroyed, the facility owners cannot be held accountable.

We know this because a few years ago, the Pennsylvania Supreme Court took a look at this precise issue in case called Excavation Technologies, Inc. v. Columbia Gas Co. of Pennsylvania, 985 A.2d 840 (Pa. 2009), and decided that the facility owner could not be held liable. This decision almost completely immunized negligent facility owners from liability absent a real catastrophe involving pain and suffering for physical injuries, or property damage. Instead of recognizing an exception to the Economic Loss Doctrine like courts in several other states, the Court indicated that this was a matter of public policy best left to the Pennsylvania legislature. That is why we are here.

In our written submission, we have included a one paragraph amendment to HB 284 that would simply hold negligent facility owners liable for financial damages for stand-by time when there is no catastrophe. The amendment is also reciprocal, in that it recognizes the facility

NUCA OF PENNSYLVANIA TESTIMONY

owner's right to hold negligent contractors liable for the costs to repair broken lines as well. The amendment is patterned from a similar provision that is already on the books in New Jersey.

I must point out that facility owners can already sue contractors for negligence, regardless of whether our amendment is adopted or not. The Economic Loss Doctrine does not apply to bar their claim because the broken lines constitute property damage. Our members would testify that as a matter of practice, the facility owners will universally send the contractor a bill for the repairs, and will sue the contractor because there is really no downside.

This is where closing the loophole also levels the playing field. As the law currently stands, contractors cannot assert a counter-claim, again due to the Economic Loss Doctrine. Isn't it only fair that in a case when both parties allege negligence against each other, that either party can recover damages if they prove negligence? Of course, it is. But in this situation, the best the contractor can hope for is to successfully defend itself, but the contractor will still incur thousands of dollars in attorney fees to do so. As set forth in our written submission, we have also proposed a prevailing party attorney fee amendment to remedy this problem, and again, it is reciprocal.

In conclusion, all stakeholders and this legislature must encourage a culture of safety in construction, and further incentivize facility owners to accurately maintain and mark their underground lines. We are not generalizing, nor are we suggesting that all facility owners are marking poorly. Instead, we are simply asking that if we can prove that a facility owner has acted negligently, they should be held accountable, regardless of whether there is a catastrophe or not. The way to make that happen – the way to encourage fairness and safety – is to adopt our proposed amendments to allow for recovery of stand-by time and prevailing party attorney's fees. Our proposed amendments are attached under exhibits to our written submission.

NUCA OF PENNSYLVANIA TESTIMONY

Given the time limitations on our oral testimony, our written submission follows with a powerful memo from Mark Reisinger that expresses our opposition to any exemption for oil and gas gathering lines, and he recounts one example of a terrible accident that could have been prevented if the current version of the law did not allow for such an exemption. Also, as an industry frustrated with inequitable enforcement, no stakeholder advisory panel, and an unreasonable appeal process, our written submission also offers support for moving One Call Act enforcement to the Public Utility Commission.

We appreciate your time and attention today, and Jim, Mark and I remain available for any questions you may have.