

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 99-M-1624 - In the Matter of the Rules and Regulations of the Public Service Commission contained in 16 NYCRR Part 753 - Protection of Underground Facilities, filed in C 95-M-1007.

NOTICE OF PROPOSED RULEMAKING
(Issued April 4, 2000)

NOTICE is hereby given that the Commission is proposing revisions to the rules relating to the protection of underground facilities contained in 16 NYCRR Chapter VII, "Provisions Affecting Two or More Kinds of Public Service", Subchapter F, "Miscellaneous", Part 753, "Protection of Underground Facilities". The revisions make changes to Subparts 1, 3, 4, 5 and adopt a new Subpart 6.

Comments are specifically sought on the appropriateness of the Commission delegating authority to issue penalty determinations and whether standards need to be developed for such determinations.

Any person making comments should file five copies with Debra Renner, Acting Secretary, Public Service Commission, Three Empire State Plaza, Albany, New York, 12223-1350, to be received by June 5, 2000, or 45 days after publication in the State Register, whichever is later.

DEBRA RENNER
Acting Secretary

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

December 6, 1999

TO: THE COMMISSION

FROM: OFFICE OF GAS & WATER, OFFICE OF GENERAL COUNSEL

SUBJECT: CASE 99-M-1624 - In the Matter of the Rules and Regulations of the Public Service Commission, Contained in 16 NYCRR Part 753 - Protection of Underground Facilities, filed in C 95-M-1007.

RECOMMENDATION: The Commission should issue a Notice of Proposed Rulemaking to solicit comments on proposed revisions and additions to 16 NYCRR Part 753 - Protection of Underground Facilities.

Introduction

On October 27, 1998 the Commission issued a Notice of Proposed Rulemaking (NPRM) to adopt amendments to Part 753 - Protection of Underground Facilities. The most significant amendment is the addition of a new Subpart 6 entitled Enforcement Procedures, which describes the process used to determine penalties for violations of Part 753. Several revisions were also proposed to Subparts 1 through 5, which were originally adopted in early 1997.

Nine organizations, listed in Appendix A, commented on the proposed rules. Due to the extensive commentary received, Staff recommends the proposal be modified and that interested parties be provided another opportunity to comment.

Below is an analysis of the major, substantive comments received on the October 27, 1999 NPRM. The regulations which Staff now proposes are shown in the proposed Resolution attached hereto.

Analysis of Comments

This Section will discuss and analyze the comments received on the October 27, 1998 NPRM. The proposed code revision (underlining indicates new material, brackets indicate deletions) is shown, followed by a summary and analysis of the

relevant comments. The Enforcement Procedures (Subpart 6) are covered first, followed by Subparts 1 through 5.

To help put the comments and analysis regarding Subpart 6 in context, a summary of the proposed enforcement process is provided below. Prior to developing the proposed regulations, Staff had discussions with the Department of Law (Attorney General's Office) regarding how the two agencies could interact to effectively enforce the regulations, consistent with existing provisions of Public Service Law (PSL) and General Business Law (GBL).^{1/} The enforcement procedure presented in the Notice of Proposed Rulemaking reflected those discussions.

Enforcement Process

1. Staff issues Field Citations to persons (Respondents) it believes have committed a violation.

2. Warning letters may be sent when circumstances are not severe enough to warrant a penalty, but Staff wants to put a party on notice that it has violated the code, and advise them to comply in the future or be subject to penalties.

3. In cases where a penalty is sought, a Notice of Probable Violation (NOPV) is issued to the Respondent. This alerts the Respondent that the Department is considering a penalty and provides an opportunity to dispute the alleged violation. If the Respondent wants to contest the NOPV, the options are to respond in writing or request an informal conference with Staff.

4. NOPV's will include a proposed (unsigned) Consent Order, which is an agreement between Department Staff and the Respondent, whereby the Respondent agrees to pay the penalty and waive the right for further appeal. The Respondent may sign the Consent Order and pay the penalty if the NOPV is not contested. Consent Orders can be negotiated and signed at any time prior to

^{1/} The applicable provisions of these statutes are shown in Appendix B.

issuance of a Final Order. Alternatively, Respondents always have the right to decline to sign a Consent Order and to follow the appeals process.

5. If the NOPV is disputed, any information or material provided by the Respondent is evaluated. A recommendation, in the form of a draft Final Order with a stated penalty amount and instructions for payment, is prepared by Staff in consultation with the Office of General Counsel^{1/}

6. The Respondent may seek a review of a Final Order. Appeals beyond that could be made pursuant to Article 78 of the Civil Practice Law and Rules (CPLR).

7. If the Respondent does not pay by the required date, the matter is referred to the Attorney General's Office.

8. The progression in severity of the enforcement actions is (1) Field Citation, (2) Warning Letter, (3) NOPV. However, each action is independent and this exact progression may not be followed in every case. For example, a warning letter to an excavator may be sent based on information provided by an operator or a one-call system, even though a Field Citation was not issued. A NOPV may be issued even though the Respondent has no history of warning letters and/or prior violations. The rules provide flexibility so that appropriate enforcement action can be taken based on the circumstances and severity of the offense.

^{1/} The October 27, 1999 proposal would have permitted an Office Director to make penalty determinations pursuant to a delegation of authority by the Commission. Due to comments received, this proposal does not provide for this delegation of authority. However, comments are specifically solicited on this issue.

General Comments

General comments on enforcement policies and the Commission authority^{1/} are addressed first, followed by analysis of commentary on specific code wording.

All the commentors supported enforcement of the regulations by the Commission and the addition of enforcement procedures to Part 753.

The Department of Law commented:

Since the focus of the Article is to protect the lives of the workers and citizens of the state, the procedure of issuing a warning and suggesting corrective actions, as long as the violation is not an immediate threat to health or safety, is preferable to immediate punitive action. Should the excavator or operator refuse to correct the defect, the NOPV provides the respondent with ample due process protection and a clear understanding of his rights regarding a formal challenge to the allegations.

The New York State Telephone Association (NYSTA) commented that it supports strong enforcement in this area, but is concerned that these regulations may not survive legal challenge because they allow the Commission and Staff to undertake actions not allowed by statute.

NYSTA points out that under GBL Article 36, §765 and PSL §119-b, the Commission is authorized to adopt regulations implementing the substantive statutory requirements, to examine and inspect excavation methods and to determine an appropriate penalty when a violation has occurred. The role of enforcing and collecting a penalty is assigned to the Attorney General, who has authority over both regulated and non-regulated entities. Upon

^{1/} In particular, the New York State Telephone Association (NYSTA) filed extensive comments on these issues. Staff shared NYSTA's comments with the Department of Law, which agreed with NYSTA on a few points but generally supported Staff's recommended approach. We generally agree with the Department of Law's analysis and will conform to most of its specific recommendations.

referral from the Commission, the Attorney General may commence an action to recover the penalty.

NYSTA questions the Commission's authority to "order" an operator to pay a determined fine because the statute clearly states the Commission is to determine the fine and the Attorney General is to decide whether to collect the fine. It claims the distinction is important because the Commission only has jurisdiction over utilities. It contends that the Commission's role is to investigate violations, seek to settle matters voluntarily through consent agreements, and determine penalties for referral to the Attorney General. The Commission cannot order Respondents to remit a penalty to itself, NYSTA contends.

The Department of Law reviewed NYSTA's comments and provided the following analysis:

While it may be true that the PSC has no regulatory authority over a "non-regulated utility" or, for that matter, a non-regulated excavator, Article 36 of the General Business Law and Section 119-b of the Public Service Law (PSL), when viewed in conjunction with Sections 8 and 11 of the PSL, clearly vests the PSC with the authority to determine a civil penalty against any excavator (GBL §760(5) and PSL §119-b(1)(e)) or operator (GBL §760(6) and PSL §119-b(1)(f)). Furthermore, while the relevant statutes vest only the Attorney General with authority to commence an action to recover the penalty, there is no language that prohibits the PSC from attempting to collect the civil penalty via an order of the Commission pursuant to PSL §11.

Staff agrees with the Department of Law's analysis. NYSTA's proposed regulatory scheme is not the only one possible under the statute. PSL §119-b(8) can also be read as only allowing the Attorney General to commence an action to recover the penalty. It does not by its terms preclude the Commission from doing so.

NYSTA also commented that the proposed rules delegate too much power and discretion to Commission Staff to make penalty determinations. NYSTA referred to the Memorandum accompanying

the NPRM which indicated that the enforcement procedure envisioned a delegation of authority from the Commission to the Office Director level. The Memorandum indicated that this streamlined procedure would obviate formal session items and shorten the timeline. NYSTA expressed concern over the apparent minimal involvement of the Commission and asserted that Respondents should be provided full opportunity for hearing. It recommends that the regulations be amended to require that final penalty determinations be made by at least one Commissioner, subject to approval by the full Commission.

NYSTA also commented that the rules need to set out clear standards for when a violation should be pursued and how severely a violation should be penalized. The considerations listed in PSL §119-b.8 (gravity of offense, history of previous violations, etc.) are not clarified in the proposed rules and no guidance is provided as to when Staff should issue a field citation, warning letter, or NOPV, or as to what level of penalty should be associated with different violations. NYSTA says the rules must be articulated sufficiently to guide the Staff's discretion - the statutory standards for penalty determinations should be explained in the rules and the types of violations that will result in different levels of penalty should be delineated. For example, NYSTA comments, the Commission should treat mismarks that do not result in damage less severely than facility damages caused by a contractor's failure to notify the one-call center.

National Fuel Gas (National Fuel or NFG) requested that the Commission consider adopting a progressive discipline structure that would be fully integrated with the "warning", "field citation" and "Notice of Probable Violation" structure. Discipline would be imposed at a variety of levels based on the severity of the violation. Penalties could include requiring violators to attend educational seminars conducted by the One Call systems and financial penalties.

Finally, the Department of Law pointed out that the regulations lack a notice to the Respondent that they may appeal

pursuant to Article 78 of the CPLR if they disagree with a Final Order.

The proposed rule provided that Final Orders could be issued by the Commission or a "designee". Staff recommends deleting the "or designee" language from the proposed rule. However, comments are specifically sought on the appropriateness of the Commission delegating authority to issue penalty determinations and whether standards need to be developed for such determinations.

Staff does not believe there is a need to add a reference to Article 78 as recommended by the Department of Law, since pursuit of legal remedies against the Commission is a matter for the Respondent to decide and such notice is not given in any other Commission decisions. However, a provision that Respondents may petition the Commission for review of a Final Order is added (see 753-6.8(d)).

Staff agrees with NFG and NYSTA that the rules should be applied as fairly and consistently as possible and the level of discipline should be commensurate with the severity of the violation. However, Staff does not agree that these items should be delineated in Subpart 6. The Department of Law's analysis of NYSTA's comment follows:

if the regulations establish statutory standards and delineated examples of civil penalties as proposed by NYSTA, the PSC may be stuck with a rigid formula that takes away the PSC's ability to assess each and every potential violation on a case-by-case basis.

Staff anticipates that enforcement policies may need to emphasize different problems over time. For example, there are violations that may be characterized as abuses of the One-Call process but do not directly cause damages, such as making emergency locate requests in the absence of an emergency^{1/},

^{1/} To avoid having to wait two days to excavate.

giving commencement dates less than 2 days in advance, making multiple and/or false locate requests with no intention of excavating on the given commencement date^{1/}, failure of operators to notify excavators that work sites are either marked out or all clear, or failure of operators to participate in one-call systems. These might initially be addressed with warning letters or less than maximum fines, reserving the option to "escalate" if compliance does not improve.

Staff has also been working with the gas utilities and One-Call Systems to develop performance measures and programs to track root causes of damages. This information may be useful in identifying problem areas to which the enforcement program may need to adapt.

For these reasons, Staff agrees with the Department of Law's analysis that the regulations should not lock in rigid penalty formulas.

Sharing Evidence

Orange & Rockland Utilities (Orange & Rockland or O&R) commented that the PSC should be required to provide affected or potentially affected operators copies of all field citations, warning letters, and NOPV's issued to Respondents, as well as all evidence it gathers during its investigation of a violation. It states that since violations often result in damage, it believes it should receive a copy of all such evidence. Furthermore, sometimes third parties allege that the operator is responsible for an incident or committed violations and it would be important for the operator to have access to the evidence so it can conduct its own review and rebut allegations made against it. O&R states that only by receiving a copy of the evidence can the operator

^{1/} The real purpose might be design work, or an excavator may be excavating at multiple locations (ex: planting trees), hasn't adequately planned a work schedule but wants to call them in all at once.

determine its position with regard to an alleged violation, and provide the PSC with accurate and complete information.

It is true that most of the violations staff issues to excavators are associated with damages. However, the affected operators are usually the ones who report these damages to Staff and are obviously already aware of them. Furthermore, §753-3.10 requires excavators to report damages to the affected operators. If Staff has reason to believe that a damage occurred of which the operator is unaware, it would inform the operator. It can do this without supplying all the enforcement paperwork and evidence.

When investigating an excavator damage, Staff usually interviews all the involved parties - operator and excavator - and thereby obtains the operators position. Staff can also follow up with the operator if new allegations arise against it or there are facts in dispute. Furthermore, when DPS Field Staff issue a Field Citation, it provides affected operators copies of citations issued to an excavator (and vice versa).

Staff believes that a code mandate to provide copies of all material and evidence to affected operators would impose an unnecessary paperwork burden on Staff and potentially draw Staff into disputes over repair costs. It appears that O&R's recommendation is geared towards protecting its own interests rather than advancing the enforcement process.

Comments on Specific Provisions of Subpart 6

753-6.1 Scope: This Subpart describes the enforcement authority and sanctions of the Public Service Commission for achieving and maintaining compliance with 16 NYCRR Part 753. It also describes the procedures governing the exercise of that authority and the imposition of those sanctions.

National Fuel recommended that this subdivision be modified to include a statement that "Enforcement of Part 753 shall be of a comprehensive nature and shall include the activities of both operators and excavators." NFG states it is concerned that certain other operators, both municipal and

private, are not actively participating in one-call notification systems, as required, and that failure should subject them to applicable sanctions. NFG submits that such an affirmative statement would serve the public interest.

Staff does not propose adoption of NFG's recommendation. Staff will continue to work with the One-Call systems and the Department of Law to achieve participation by those facility operators who are not yet in compliance.

753-6.7 Consent Orders

(a) Notwithstanding any other provision to the contrary, the Department may at any time resolve an outstanding NOPV with a consent order. A consent order must be signed by the person to whom it is issued, or a duly authorized representative, and must indicate agreement with the terms thereof. A consent order need not constitute an admission by any person that a violation has occurred.

(b) A consent order is a final order of the Commission having the same force and effect as a final order issued pursuant to Section 753-6.8 of this Subpart.

(c) A consent order shall not be appealable and shall include an express waiver of appeal or judicial review rights that might otherwise attach to a final order of the Commission.

The Energy Association commented that it supports the Consent Order concept because it will streamline the regulatory process, enabling parties to focus on safety rather than litigation, while not foreclosing opportunities for parties to further address liability issues in other forums. It requested clarification, however, as to whether Respondents will or will not admit that a violation occurred. Paragraph (a) says a Consent Order "need not constitute an admission..." The Staff Memorandum indicated that a Respondent "acknowledges that a violation occurred but does not admit that he or she committed the violation".

The Energy Association asks for clarification as to whether a Respondent may be required to admit it committed the violation. It claims this is necessary to establish clear parameters within which a consent order may be negotiated. It

suggests that to clarify these two matters, the rule be modified as follows:

A consent order need not constitute an admission by any person that [a] the person committed the violation [has occurred].

Staff agrees that Energy Association's proposed wording clarifies the intent and proposes that it be adopted. To further clarify this issue, it is important to note that Consent Orders are "negotiated" and entered into voluntarily. Neither the Commission nor Staff can "require" a Respondent to sign a Consent Order. The intent of the "need not constitute an admission" phrase is to avoid situations where Respondents feel they must contest a NOPV when their real concern is liability in other forums, such as a civil court or in a dispute with an operator over damage costs. As reworded, this enforcement option provides flexibility. Staff anticipates that in the majority of cases the "no admission of guilt" clause would be included. If Staff or the Commission felt it inappropriate, it need not include it in a proposed Consent Order. In any case, the Respondent has the right, as always, to decline to sign a Consent Order and to contest a NOPV.

753-6.10 Injunctive Relief
Notwithstanding any of the enforcement procedures listed in this Subpart, if the Commission is aware that any excavator is engaging in or proposing to engage in excavation or demolition in a negligent or unsafe manner, which has resulted in or is likely to result in damage to underground facilities in such a manner that life, property or the continuation of operator service is endangered, the Commission or designee may enjoin such excavator from further excavation or demolition work or any aspect thereof. Nothing herein shall impair the rights of any operator or the Attorney General, pursuant to General Business Law Section 765, from seeking an injunction against any excavator engaging in or proposing to engage in excavation or demolition in a negligent or unsafe manner.

NYSTA commented that the authority to enjoin excavators is expressly given to the Attorney General under the statutes. NYSTA recommends the rules be amended to clarify that any injunctive relief must be sought by the Attorney General before

the Supreme Court of the jurisdiction where the violation is occurring.

UFPO and National Fuel recommended that the first sentence be revised to allow seeking an injunction "if the Commission is aware or has reason to believe that an excavator..." to allow the Commission to act if there is a reasonable belief than an unsafe or negligent excavation has occurred or is about to occur.

The Department of Law agreed with NYSTA that only its office (and an affected operator) may apply to the Supreme Court for injunctive relief. Section 753-6.10 has been revised to allow the Commission or designee to give notice to immediately cease and desist performing the excavation or demolition and to recommend that the Attorney General commence an action to enjoin an excavator.

UFPO and NFG's suggested "reason to believe" language is also included in the revised proposal.

SUBPART 753-1 GENERAL REQUIREMENTS

An analysis of comments received on Subparts 1 through 5 follows:

753-1.2 Definitions.

([e]h) Excavation: Any operation for the purpose of movement or removal of earth, rock or other materials in or on the ground by use of mechanized equipment or by blasting, and includes but is not limited to, digging, auguring, backfilling, drilling, grading, plowing in, pulling in, fence post or pile driving, tree root removal, sawcutting, jackhammering, trenching and tunneling; provided, however, that the movement of earth by tools manipulated only by human or animal power and the tilling of soil for agricultural purposes shall not be deemed excavation.

UFPO recommended adding "pavement" after "removal of earth, rock...". UFPO argues that since §753-3.6(a) allows use of mechanical equipment to break pavement when verifying the location of a facility, some people think one-call notification is not required if the job is limited to removing pavement. Some

facilities can be shallow or even within the pavement, and notification should still be made^{1/}.

The New York Gas Group (NYGAS) and the Energy Association commented that the addition of sawcutting and jackhammering to the definition would increase the number of calls to the One-Call centers and costs to the operators. It states that permanent restoration of roadway and sidewalk excavations routinely involve use of sawcutters and jackhammers. In addition, operators often need to repair pavement and sidewalks around their facilities. It recommended adding the following to the definition:

provided, however, that the permanent restoration of roadway or sidewalk excavations does not constitute a separate excavation requiring an additional notification, and that powered or mechanized equipment may be used for removal of pavement or masonry, up to the depth of such pavement or masonry and that such removal does not constitute an excavation.

It might appear that UFPO's comments are in direct opposition to those of the Energy Association and NYGAS. The latter's comments on "permanent" pavement restoration concern situations where an excavation project has already been performed where notifications to the One-Call Center were made, and markouts have been provided, and a temporary restoration of pavement and sidewalks has been made. At a later date, the excavator (which could be an operator or its contractor) returns to permanently restore the pavement, which involves removing the temporary pavement but not excavating deeper. NYGAS and Energy Association would like to clarify that a second markout request for such pavement restoration work is not intended by the regulations. They claim this practice is the norm, has been followed for many years and rarely, if ever, results in damages.

Staff believes that the Energy Association's proposed language might be interpreted as no notification is required at

^{1/} See also the analysis of NYSTA's comments regarding shallow cover facilities under §753-3.6.

all if the work involves regrading roads or replacing sidewalks. For those situations, Staff believes that operators must receive these notices since they are particularly important for operators with shallow facilities. However, Staff does not agree additional clarifying regulation is needed to highlight acceptable pavement restoration practices. Staff has revised to proposal to adopt UFPO's suggestion.

(r) Respondent: A person on whom the Department has served a field citation, warning letter or Notice of Probable Violation.

UFPO commented that, by definition, a person can be a company or private individual, but it is concerned with the personal liability issue and requests it be further clarified in this definition.

UFPO, NYGAS and the Energy Assoc. recommended that in addition to defining Notice of Probable Violation, definitions of "field citation" and "warning letter" should be added. UFPO commented that the progressive nature and related severity of the three notifications should be made clearer. The Energy Association suggested clarifying the consequences of a violation, and thus enhancing compliance, if these terms were defined.

Regarding the private individual vs. company - personal liability issue, Staff believes the proposed wording of "Respondent" is correct. "Person" is defined in GBL §760.1, PSL §119-b.1.a and §753-1.2(1) as an "individual, firm corporation, association or partnership, cooperative association, ... etc." A review of the definition of "excavator", as found in GBL, PSL and Part 753, is also informative. Each states that "an individual employed by an excavator and having no supervisory authority other than the routine direction of employees over an excavation or demolition, shall not be deemed an excavator...". Therefore, any enforcement action taken by the Department, whether against an excavator or operator, would be against the business entity.

Staff's proposed definitions of Field Citation and Warning Letter are shown in the Resolution.

SUBPART 753-3 DUTIES OF EXCAVATORS

753-3.1 Timing of notice and excavation and demolition.

(a) Before commencing or engaging in any non-emergency excavation or demolition, each excavator shall provide notice of the location and date of the proposed excavation or demolition to the one-call notification system serving the vicinity in which the excavation or demolition is to take place. Such notice shall be served at least two but not more than ten working days, not including the date of the call, before the proposed commencement date of the excavation or demolition.

The New York Gas Group and National Fuel suggested adding a requirement that excavators have a "good faith intention" to actually begin excavation on the proposed commencement date. They state that some excavators abuse the one-call system by placing a large number of notifications, even though they have no intention of actually commencing on the proposed excavation date. The UFPO suggested changing "proposed excavation" to "excavation date", here and wherever it appears elsewhere, in order to clarify that the commencement date given in the notification should be adhered to.

Although Staff agrees with NYGAS and NFG's intention, a "good faith intention" standard would be difficult to enforce. Staff proposes to adopt UFPO's recommendation and delete "proposed" wherever it appears (it modifies "work area" several times as well), replacing it with "planned" or "stated" where applicable. This will indicate that excavators are expected to provide truthful and accurate information to the one-call notification systems regarding intended start dates and work sites. Excavators are advised that they should not be making notifications unless they actually intend to excavate on the stated commencement date. Staff understands that projects may be delayed for weather or other unforeseen reasons, but excavators acting as described by NFG may be in violation of other existing subdivisions (ex: postponements and cancellations §753-3.1(c) & (d)).

753-3.1([c]d) Whenever an excavator cancels the proposed commencement date he or she shall promptly inform the one-call

notification system. A postponement of more than 10 days shall be considered a cancellation.

753-3.1([d]e) Whenever an excavator postpones the commencement date for five or less working days, no call to the one-call notification system or operators is required. Whenever an excavator postpones the commencement date by more than five but less than ten working days, the same requirements for notice shall pertain to the revised commencement date as listed in subdivisions 753-3.1(a) and (b).

Orange & Rockland recommended that these subdivisions be revised so as to provide that any postponement of a commencement date of more than five days be considered a cancellation.

UFPO recommended that the first sentence of subdivision (d) be revised to read: "Whenever an excavator cancels the proposed commencement date he or she shall promptly communicate the cancellation to facility operators utilizing the one-call notification system as appropriate", stating that clarification is required to define the meaning of "inform".

Staff observes that, based on the questions it receives, these two paragraphs cause confusion about what is required for a 5 to 10 day postponement versus a greater than 10 day postponement. Staff proposes to revise the rule as recommended by O&R. For postponements of more than 5 days beyond the stated commencement date, the excavator is required to cancel the original notification. This cancellation should be made prior to the fifth day beyond the stated commencement date. A new notification is then required 2 to 10 working days prior to the new commencement date. The proposed wording is shown in the Resolution.

753-3.2 Detailed notice requirements.

(b) When necessary for adequate identification, the excavator shall delineate the work area with white paint, white stakes or other suitable white markings.

Orange & Rockland recommended adding "or at the request of the operator" before the first comma. O&R states that the current regulation is unclear as to who determines the necessity for a more clearly marked excavation or demolition area.

In order to provide facility operators the ability to refine markout requests for work areas that are difficult to describe verbally, Staff proposes adoption of O&R's recommendation. However, operators are advised to be judicious in their use of this provision. It is not intended that operators can demand that all work areas be premarked.

753-3.6 Verification of underground facilities.

(a) Where an underground facility has been staked, marked or otherwise designated by the operator [within a proposed work area] and [if] the tolerance zone [of an underground facility] overlaps with any part of the work area, or the projected line of a bore/directional drill intersects the [path of an underground facility] tolerance zone, the excavator shall verify the precise location, type, size, direction of run and depth of such underground facility or its encasement. Verification may be completed before the excavation or demolition is commenced or may be performed as the work progresses. Powered equipment may not be used in a tolerance zone prior to the verification of the location of facilities within the tolerance zone, except that powered or mechanized equipment may be used for removal of pavement or masonry but only to the depth of such pavement or masonry.

(b) The verification of underground facilities furnishing gas or liquid petroleum products shall be accomplished by the excavator by exposing the underground facility or its encasement to view by means of hand dug test holes at one or more points where the work area and tolerance zone overlap, or more points as designated by the operators of such facilities. [Powered or mechanized equipment may be used for removal of pavement or masonry but only to the depth of such pavement or masonry.]

Orange & Rockland recommended deleting the last sentence of (a), and not deleting the last sentence of (b). It says this would permit the operator and the excavator to mutually agree on the most appropriate means of verifying the location of facilities, rather than applying a "one size fits all" approach.

For example, water or sewer laterals may not require the same level of precaution.

National Fuel Gas recommended replacing the proposed new material in the last sentence of subdivision (a) with:

unless such powered or mechanized equipment is used by the operator of such facilities within the tolerance zone, or its agents or contractors, or unless such powered or mechanized equipment is used for removal of pavement or masonry but only to the depth of such pavement or masonry.

and adding the following to §(b):

unless such verification is being performed by the operator of such facilities.

NFG states that an operator is in the best position to know the location of its facilities, and should not be required to hand dig each verification hole. It suggests that operators should be permitted to initially use powered or mechanized equipment to a safe depth, with final verification accomplished by hand digging. NFG submits that this is a safe and efficient practice when the only facility involved is owned by the operator.

NYSTA commented that use of mechanized equipment should be prohibited, except where acceptable by the operator, in areas with shallow cover, such as areas above the New York City subway system, where telephone lines are placed within 18 inches of the surface.

Finally, UFPO recommended changing the "may"'s in the second sentence of 3.6(a) to "shall"'s. It also recommended that subdivisions (b) and (c) be relettered as (a)(1) and (a)(2) to clarify that they are subsets of the general requirement stated in (a).

It appears that O&R's goal is to be permitted to use powered equipment, beyond removal of pavement, to expose underground facilities other than gas and liquid petroleum lines. Staff agrees that this is an acceptable practice, if agreed to in writing by the affected operator(s). Staff also agrees that it is an acceptable practice when operators, or their own

contractors working on their facilities, are exposing their own facilities. If the tolerance zone(s) of other facilities overlap, the consent of those affected operators would be required. Furthermore, violations could be identified if damage occurs (ex: §753-3-8, §753-3.10).

Staff observes that NYSTA does not indicate how excavators are to know, in advance of attempting to verify the location of an underground facility, whether it is a "shallow-cover" area. Staff believes the burden should be on operators of shallow-cover facilities to alert the excavator and give guidance on how to excavate near their facilities. Section 753-3.10 requires excavators to "take all reasonable precautions to prevent contact and damage ... including ... compliance with any reasonable directions or accepted engineering practices given by affected ... operators." Operators may rely on this section to require special precautions in shallow-cover areas. However, operators are cautioned that this does not give them the right to prevent excavators from using powered equipment anywhere in their service territory because they might have shallow facilities in some places, i.e the burden is on shallow-facility operators to inform excavators where the breaking pavement with powered equipment is not allowed, not on the excavator to determine where it is allowed.

As suggested by UFPO, Staff proposes making the may/shall substitutions. Staff has also reformatted the subsection to improve readability and to have the material presently contained in (b) and (c) fall under the umbrella of the existing (a). The final wording is shown in the Resolution.

SUBPART 753-4 DUTIES OF OPERATORS

753-4.6 Locating underground facilities.

(a) Whenever an operator's underground facilities are in or within 15 feet of a proposed work area, such facility shall be located, accurately and with due care, by means of staking, marking or other designation in accordance with the provisions of this Subpart. An operator may identify the location of a known facility connected to its facility beyond the point of the interconnection or tee, but not owned by the operator, as a

helpful guide to the excavator. Such staking or marking shall be in accordance with paragraph (b) of this Section, except that surface markings shall be dotted or broken lines rather than solid lines. The identification shall not be deemed to impose any liability upon the facility owner for the accuracy of the private facility identification.

This proposed "good samaritan" regulation was intended to address situations where the underground facility operators do not own all underground facilities up to the building wall. For example, some electric operators consider their responsibility to only extend to the property line, or possibly the dropbox. They do not mark out beyond that point because they do not want to be liable for a mismark. Therefore, excavators could make notification as required, commence digging believing facilities have been marked, yet risk causing property damage, injury or death by hitting a facility they were unaware of. Even if they are aware that there are unmarked facilities in the area, the lack of even a rough approximation of their location severely hampers the ability to work productively.

This subdivision generated several recommended revisions to add clarity. However, NYSTA commented that the Commission lacks the authority to immunize operators from civil liability, and therefore, can only waive penalties created by the regulation. NYSTA is essentially correct. Thus, the options are to revise the rule to exempt operators only from penalties the Commission might impose, or to eliminate it entirely. Since operators would have some civil liability exposure by providing marks, it is unlikely that any would perform such markouts, defeating the purpose of the rule. Therefore, the "good samaritan" clause is not included in this proposal.

753-4.14 Information for design purposes. Each operator shall provide a means by which information regarding the location of underground facilities can be obtained for design purposes. If marking in accordance with Section 753-4.6 is the means selected by the operator, the operator may take up to 10 working days to complete the marking.

SUBPART 753-5 One-Call Notification Systems
753-5.3 System duties.

(c) Provide a means by which contact information provided by the member operators can be obtained for the purpose of learning the location of underground facilities for design purposes.

These two provisions are addressed together since they are closely related.

UFPO and Orange & Rockland recommended that the last sentence of §753-4.14 be modified to allow the markings to be completed within a mutually agreed upon time period rather than setting a fixed period. UFPO commented that the proposed wording promotes a fixed completion period when all other identified means have no established completion obligation.^{1/}

NYGAS commented that since its members have individually developed effective means for imparting such information to design firms, municipalities, etc., and have honed these techniques over time in the interest of avoiding damages, it wants to ensure that the "means" can be left to the discretion of operators as an operational requirement, including whether to charge fees, whether to issue maps in lieu of requiring personal meetings, etc. The Energy Association also requested that operators be allowed to charge fees to ensure that costs are paid by those receiving the benefits, rather than shifting the costs to the operator or its customers.

NYSTA commented that the proposal could create significant burdens on operators. For example, if several designers or contractors are bidding on a project, operators may have to respond to more than one request for the same project. It also comments that the options, while flexible, are expensive. For example, an operator may need to "scrub" maps to ensure they do not disclose information that is proprietary to itself or

^{1/} The proposed rule does not mention any other methods. However, the memorandum accompanying the NPRM mentioned supplying maps or utility/contractor meetings as other possible means.

another operator using its facilities. Therefore, the rules should require designers to compensate operators for providing maps, markouts or meetings. NYSTA also comments that the rules should provide a penalty for developers that call in illegitimate marking requests in order to avoid paying for design assistance.

NYSTA also commented that the Commission should support the one-call centers by providing them with frequently updated points of contact at each company operating underground facilities. When seeking information for design purposes, contractors should be able to retrieve the names of operator contacts from the one-call centers and then be responsible to contact each operator directly. The one-call centers currently lack the capacity to provide direct design assistance.

Finally, regarding the obligations of the One-Call Centers, UFPO recommended that §753-5.3(c) be revised to read: "The one-call notification system shall provide a means by which member operator contact information can be obtained for the purpose of learning the location of underground facilities for design purposes." It states that it believes this statement is clear in the service the One-Call Center provides to the excavator.

Currently, there is no provision in Part 753 for providing facility location information for design purposes. Experience shows that some designers and contractors call in false excavation notices in order to obtain this information.

The intent of these rules is to legitimize requests for design assistance, utilize the one-call centers as a resource designers can turn to, while allowing flexibility in the methods available to operators to respond. The cover memorandum of the October 27, 1998 NPRM stated:

The benefit would be reduced damages and interference costs because planners could factor in the existence of underground facilities early in the design stage. Utilities would also receive an early "heads-up" that a project might impact their facilities and take steps to avoid damages such as relocating facilities, replacing deteriorating facilities in conjunction with the project, provid-

ing specifications or guidance on how to support and protect facilities, etc.

Regarding the duties of One-Call Centers, the NPRM memorandum also pointed out that the rule does not require them to issue a notice to members as if it were a markout request. The One-Call centers could provide the phone numbers of operator contacts orally to the caller, or mail or fax a list back to the excavator^{1/}.

Although these provisions may result in additional calls to the One-Call Centers, Staff believes any increased costs would be offset by the benefits mentioned above. Furthermore, to the extent designers have been placing inappropriate locate requests, they will now have a legitimate option and those types of calls should decrease.

Regarding NYSTA's suggestion that the rule provide a penalty for such abuse of the system, such individuals may already be subject to penalties^{2/}. Staff sees no need to single this one out, from all the other potential abuses, for special mention.

Staff's current proposal omits the second sentence of subdivision 753-4.14 so as to not single out marking as having a specified completion time. All methods of providing design information shall be within mutually agreeable time periods. Operators are advised to respond to such requests within a reasonable time period and that ignoring such requests is not an acceptable "means." Staff believes that operators should not charge fees for provision of maps since the benefits to operators in terms of reduced interference and coordination of replacement programs seems to outweigh any costs.

^{1/} UFPO provides names and phone numbers of member design contacts on its web site, which allows designers to obtain this information without tying up a UFPO telephone operator.

^{2/} Potential violations include not providing notices of postponements and cancellations or not providing notice within the 2 to 10 day advance timeframe.

Staff disagrees with NYSTA's suggestion that the Department provide updated contact lists to the One-Call Centers. The One-Call Centers already have relationships with their member operators. NYSTA's suggestion would only interject the Department as a middleman.

Finally, Staff recommends that UFPO's suggested revision to §753-5.3(c) not be adopted. The New York City One-Call Center has expressed concern that it could only pass on information provided by members and it didn't want to be held responsible for their omissions. For that reason, the phrase "provided by member operators" was added. That concept would be lost with UFPO's proposed wording.

Funding of One-Call Centers

NYSTA commented that the proposed rules increase the work of the One-Call Centers but do not provide a funding mechanism to support them in implementing the additional responsibilities. It recommends that Commission seek authority from the Legislature to provide additional funding for the one-call centers from increased penalties collected pursuant to these regulations.

The One-Call Centers are not-for-profit organizations governed by Boards of Directors composed primarily of the member utilities. Paying members are charged on a per ticket received basis, which is how the centers are funded. The only new obligation imposed on the One-Call Centers is the "design locate" requirement. As discussed above, there are benefits associated with the rule and Staff anticipates any additional costs will be offset by reduction of locate requests that are actually for design work, fewer interference problems and reduced interruptions of service.

To the extent the enforcement program leads to increased call volume at the one-call centers, Staff believes that would be a desirable outcome for the One-Call Centers and their membership. The benefit would be a reduction in damages and the associated costs to property and human health.

SEQRA REVIEW

Staff has reviewed the proposed regulations pursuant to the State Environmental Quality Review Act and its implementing regulations and finds that they are Type II actions (those previously determined not to have a significant adverse effect on the environment) within the meaning of 16 NYCRR Section 7.2(b)(5).

RECOMMENDATION

Staff recommends that the Commission issue a Notice of Proposed Rulemaking to solicit comments from interested parties on the attached proposed revisions to Part 753.

Prepared by:

Reviewed by:

Steven D. Blaney
Assistant Gas & Petroleum Engineer

Peter Catalano
Office of General Counsel

Reviewed by:

Approved by:

John E. Gawronski
Chief, Gas & Petroleum Safety

Phillip S. Teumim
Director,
Office of Gas & Water

Appendix A - Commenting Parties

Central Hudson Gas & Electric Corporation (CHG&E)

National Fuel Gas Distribution Corporation (NFG)

Orange & Rockland Utilities (O&R)

New York Gas Group (NYGAS)

Elmira Water Board

Energy Association of New York State (Energy Assoc.)

New York State Telephone Association (NYSTA)

Underground Facilities Protective Organization (UFPO)

Office of the Attorney General (Attorney General or AG)

Appendix B - Applicable Statutes

Public Service Law (PSL) §119-b

2. The commission shall adopt rules and regulations to implement and carry out the requirements of article thirty-six of the general business law established for the protection of underground facilities. Such rules and regulations shall include, but not be limited to, requirements for notice, one-call notification systems, participation of operators in such systems, designation and marking of the location of underground facilities and the verification of the designated or marked location of underground facilities, support for underground facilities and obligations of excavators to protect underground facilities under such article, including the use of hand-dug test holes at underground facilities furnishing gas or liquid petroleum products and such other matters as may be appropriate for the protection and security of property, life or public health, safety or welfare.
6. The commission shall have power, through the inspectors or duly authorized employees of the department, to examine and inspect excavation and demolition methods used by any person within fifteen feet in any direction of any underground pipeline used for conveying natural gas or of any telephone, electric, steam or water facility used for providing service and to order compliance with the standards for excavation and demolition near underground facilities contained in regulations adopted by the commission to implement and carry out the requirements of article thirty-six of the general business law established for the protection of underground facilities.
7. Notwithstanding any inconsistent provisions of this chapter, the enforcement procedure for rules and regulations adopted by the commission shall be as follows:
 - a. any violation of any provision of such rules and regulations is a violation of the provisions of article thirty-six of the general business law and the attorney general may bring and prosecute an action to recover penalties for such violations as provided in paragraph c of subdivision one of section seven hundred sixty-five of such law;
 - b. any penalties, fines and financial liability resulting from violations of such rules and regulations shall be those specified in section seven hundred sixty-five of the general business law.

8. In the event a violation of such rules and regulations occurs and such violation is subject to a civil penalty pursuant to article thirty-six of the general business law, the commission shall determine the amount of the penalty after consideration of the nature, circumstances and gravity of the violation, history of prior violations, effect on public health, safety or welfare, and such other matters as may be required and shall send a copy of its determination to the excavator, operator, commissioner of labor and attorney general. Upon receipt of such determination the attorney general may commence an action to recover such penalty.

General Business Law (GBL), Article 36

§765 Penalties and liabilities

(1) Civil penalties

- a. Failure to comply with any provision of this article shall subject an excavator or an operator to a civil penalty of up to one thousand dollars for the first violation and up to an additional seven thousand five hundred dollars for each succeeding violation which occurs in connection with the entire self-same excavation or demolition activity within a two month period.
 - c. An action to recover a penalty under this article may be brought in the supreme court in the judicial district in which the violation was alleged to have occurred which shall be commenced and prosecuted by the attorney general. The public service commission shall, pursuant to section one hundred nineteen-b of the public service law, forward to the attorney general its determination of the amount of the penalty for violations of rules and regulations adopted to implement the requirements of this article. Upon receipt of such determination, the attorney general may commence an action to recover such penalty. All moneys recovered in any such action, together with the costs thereof, shall be paid into the state treasury to the credit of the general fund.
3. Any excavator engaging in or proposing to engage in excavation or demolition in a negligent or unsafe manner, which has resulted in or is likely to result in damage to underground facilities in such a manner that life, property or the continuation of operator service is endangered, may be enjoined from such excavation or demolition or any aspect thereof upon application of the operator owning the facilities or the attorney general made in supreme court having jurisdiction in the county wherein the excavation or

demolition or proposed excavation or demolition is to take place. Three or more instances of damage by an excavator to underground facilities in the course of the entire self-same excavation or demolition activity shall be prima facie ground for enjoining the excavator from further performance of the excavation or demolition activity.

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

PROPOSED RESOLUTION BY THE COMMISSION

Statutory Authority
Public Service Law §119-b and General Business Law Article 36

CASE 98-M-1624 - In the Matter of the Rules and Regulations of
the Public Service Commission contained in 16
NYCRR Part 753 - Protection of Underground
Facilities, filed in C 95-M-1007.

At a session of the Public Service Commission held in
the City of Albany on , the Commission, by
vote of its members present

RESOLVED:

1. That the provisions of Section 202(1) of the State
Administrative Procedure Act and Section 101-a(2) of the Execu-
tive Law having been complied with, Part 753 of Chapter VII of
Title 16 of the Official Compilation of Codes, Rules and Regula-
tions of the State of New York is amended, effective upon publi-
cation of a Notice of Adoption in the State Register, as shown in
the following 19 pages (Deletions are bracketed; new material is
underlined):

2. That the Secretary to the Commission is directed
to file a copy of this Resolution with the Secretary of State.

SUBCHAPTER F - Miscellaneous.

PART 753

PROTECTION OF UNDERGROUND FACILITIES

(Statutory Authority: (Public Service Law §119-b and
General Business Law Article 36)

Subparts

753-6 Enforcement Procedures

SUBPART 753-1 GENERAL REQUIREMENTS

753-1.2 Definitions. When used in this Part, unless the context otherwise requires, the following terms shall have the following meanings.

(a) Commission: The Public Service Commission.

([a]b) Contact: Any defacing, scraping, impact upon an underground facility or its protective coating, housing or other protective device.

([b]c) Damage: Any displacement of or removal of support from any underground facility which would necessitate repair of such facility or any destruction or severance of any underground facility or its protective coating, housing or other protective device.

(d) Department: The Department of Public Service.

([c]e) Demolition: The total or partial wrecking, razing, rending, moving or removal of any structure.

(f) Enforcement action: An action by the Commission or a designee to determine a penalty, for violations of this part, under the authority of §119-(b)(8) of the Public Service Law.

([d]g) Emergency: Any abnormal condition which presents an immediate danger to life or property including the discontinuance of a vital utility service necessary for the maintenance of public health, safety and welfare.

([e]h) Excavation: Any operation for the purpose of movement or removal of earth, rock, pavement or other materials in or on the ground by use of mechanized equipment or by blasting, [and includes] including, but [is] not limited to, digging, auguring,

backfilling, drilling, grading, plowing in, pulling in, fence post or pile driving, tree root removal, sawcutting, jackhammering, trenching and tunneling; provided, however, that the movement of earth by tools manipulated only by human or animal power and the tilling of soil for agricultural purposes shall not be deemed excavation.

([f]i) Excavator: Any person who is engaged in a trade or business which includes the carrying out of excavation or demolition; provided, however, that an individual employed by an excavator and having no supervisory authority other than the routine direction of employees over an excavation or demolition, shall not be deemed an excavator for the purpose of this Part. The act of any employee or agent of any excavator acting within the scope of his or her official duties or employment shall be deemed to be the act of such excavator.

(j) Field Citation: A written statement issued by an employee of the Department, pursuant to subdivision 753-6.2 of this Part, informing a Respondent that, in the judgement of that employee, a violation has occurred, and setting forth the specific provisions that were allegedly violated.

([g]k) Hand dug test holes: Excavations performed for designating, testing or verification purposes which are dug by the use of hand-held tools utilizing only human power. The use of vacuum excavation techniques is an acceptable means of exposing underground facilities.

([h]l) Local governing body: A town, village or city outside the city of New York or a county within the city of New York.

([i]m) Near: An area within 15 feet of the outside perimeter or diameter of an underground facility or its encasement.

(n) Notice of probable violation (NOPV): A written statement or letter from the Department to a Respondent informing him or her that an enforcement action is being initiated and containing the items specified by §6.4(b) of this Part.

([j]o) One-call notification system: Any organization among whose purposes is establishing and carrying out procedures to protect underground facilities from damage due to excavation and demolition, including but not limited to, receiving notices of intent to perform excavation and demolition and transmitting the notices to one or more member operators of underground facilities in the specified area.

([k]p) Operator: Any person who operates an underground facility to furnish any of the following services or materials: electricity, gases, steam, liquid petroleum products, telephone or telegraph communications, cable television, sewage removal, traffic control systems, or water.

([l]q) Person: Any individual, firm, corporation, association or partnership, cooperative association, joint venture, joint stock association, business trust, their lessees, trustees or receivers, municipality, governmental unit or public authority whether or not incorporated.

(r) Powered equipment: Any equipment energized by an engine or motor and used in excavation or demolition work.

(s) Respondent: A person on whom the Department has served a field citation, warning letter or Notice of Probable Violation.

([m]t) Tolerance zone: If the diameter of the underground facility is known, the distance of one-half of the known diameter plus two feet, on either side of the designated center line or, if the diameter of the underground facility is not known, two feet on either side of the designated center line.

([n]u) Underground facility: A facility and its attachments located underground and owned or leased [installed] by an operator to furnish its services or materials, including but not limited to, pipelines, conduits, ducts, cables, wires, manholes, vaults, tanks, tunnels and any encasement containing such facilities. Such term shall not include oil and gas production and gathering pipeline systems used primarily to collect oil or gas production from wells.

(v) Warning Letter: A written letter from the Department to a Respondent, pursuant to subdivision 753-6.3 of this Part, informing a Respondent that an alleged violation of a specific provision(s) of Part 753 has occurred or is continuing, advising the Respondent to correct it, if it is correctable, and to comply henceforth or be subject to enforcement actions under this Part.

([o]w) Work area: The area of the ground or equivalent surface which will be disturbed or removed by excavation work or affected by demolition work.

([p]x) Working days: Mondays through Fridays, exclusive of the following public holidays: New Year's Day, Martin Luther King Day, Washington's Birthday/President's Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day and Christmas Day. If the holiday occurs on a Saturday, it will be observed the Friday before, If the holiday occurs on a Sunday, it will be observed the Monday after.

SUBPART 753-3 DUTIES OF EXCAVATORS

§753-3.1 Timing of notice and excavation and demolition

§753-3.15 [Emergency excavation or demolition

§753-3.16 Pre-Demolition conferences

§753-3.17] Responsibility to employees

753-3.1 Timing of notice for [and] excavation and demolition.

(a)(1) Before commencing or engaging in any non-emergency excavation or demolition, each excavator shall provide notice of the location and date of the [proposed] planned excavation or demolition to the one-call notification system serving the vicinity in which the excavation or demolition is to take place.

(2) Such notice shall be served at least two but not more than ten working days, not including the date of the call, before the commencement date of the excavation or demolition.

(b) [Such notice shall be served at least two but not more than ten working days, not including the date of the call, before the proposed commencement date of the excavation or demolition.] Excavation or demolition which is required to be performed promptly as a result of an emergency, disaster or to correct an immediate hazard may proceed immediately without prior notification to operators, if the situation is so serious that the excavation or demolition cannot reasonably be delayed. However, excavators shall notify the one-call notification system as soon as possible that such excavation or demolition is commencing or is underway. Extreme caution shall be employed by the excavator to prevent damage to existing underground facilities and to avoid endangering persons and property.

(c) At least seven working days in advance of the commencement date of a demolition, the excavator shall request a pre-demolition conference, through the one-call notification system, with all member operators who have underground facilities at or near the demolition area. A pre-demolition conference may encompass one or more demolition(s) in the project area. A request for a pre-demolition conference is not a substitute for the notice of intent to perform demolition work required by Section 753-3.1 of this Part.

([c]d) Whenever an excavator cancels [the proposed commencement date] an excavation or demolition, he or she shall promptly [inform] communicate the cancellation to facility operators utilizing the one-call notification system. A postponement of more than [10] 5 days shall be considered a cancellation.

([d]e(1)) Whenever an excavator postpones the commencement date for five or less working days, no call to the one-call notification system or operators is required.

(2) Whenever an excavator postpones [the commencement date by more] an excavation or demolition more than five [but less than ten] working days, the same requirements for

notice shall pertain to the revised commencement date as listed in subdivisions 753-3.1(a) [and (b)].

[(e) An excavator may request a written admission of receipt of the notice of the location and date of a proposed excavation or demolition and of a new commencement date or cancellation.]

753-3.2 Detailed notice requirements.

(a) Every notice provided by an excavator to the one-call notification system concerning [proposed] planned excavation or demolition shall contain at least the following information:

(5) Address and exact location as well as the extent and dimensions of the [proposed] planned work area;

(7) Brief description of the [proposed] planned excavation or demolition;

(8) Date and time the excavation or demolition is [proposed] planned to commence.

(b) When necessary for adequate identification or at the request of the operator, the excavator shall delineate the work area with white paint, white stakes or other suitable white markings.

753-3.3 Commencement of excavation or demolition.

(a) The excavator may proceed with excavation or demolition on the stated date of commencement if, prior thereto, he or she has received notification from each and every operator notified by the one-call notification system that:

(1) Such operator has no underground facility located in or within 15 feet of the [proposed] work area; or

(2) That any underground facility located in or within 15 feet of the [proposed] work area has been staked, marked or otherwise designated in accordance with the provisions of Subpart 753-4 of this Part.

(b) The excavator shall not commence the [proposed] excavation or demolition on the stated commencement date if he or she has been notified by an operator that the staking, marking, or

other designations of an underground facility located in or within 15 feet of the [proposed] work area will not be completed on the stated commencement date. In such case, the operator is required promptly to report such fact to the excavator and to inform the excavator of a prompt and practicable completion date, which in no case shall be more than two working days after the excavator's stated commencement date, unless a longer period is agreed to by both parties.

753-3.4 Staking, marking or other designation.

(b) [An operator performing excavation or demolition work at or near his or her own underground facility shall not be required to stake, mark or otherwise designate such underground facility.

(c)] Whenever the excavator determines that a review of the staking, marking or other designation is necessary or that additional information is required, he or she shall so notify the operator or the one-call notification system.

753-3.5 Preservation of stakes, markings or other designations. Starting on the [proposed] stated commencement date given in the excavator's notice to the one-call notification system, the excavator shall be responsible for protecting and preserving the staking, marking or other designation until no longer required for proper and safe excavation or demolition work at or near the underground facility.

753-3.6 Verification of underground facilities.

[(a)] Where an underground facility has been staked, marked or otherwise designated by the operator [within a proposed work area] and [if] the tolerance zone [of an underground facility] overlaps with any part of the work area, or the projected line of a bore/directional drill intersects the [path of an underground facility] tolerance zone, the excavator shall verify the precise location, type, size, direction of run and depth of such underground facility or its encasement. Verification [may] shall be

completed before the excavation or demolition is commenced or [may] shall be performed as the work progresses.

(a) Powered or mechanized equipment [may not be used in a tolerance zone prior to the verification of the location of facilities within the tolerance zone, except that powered or mechanized equipment] may be used within the tolerance zone for removal of pavement or masonry but only to the depth of such pavement or masonry.

(1) Below the depth of pavement or masonry, powered equipment may be used in the tolerance zone prior to the verification of the location of facilities when agreed to in writing by the affected operator(s).

(2) Operators, or their agents and contractors working under their direction, may use powered equipment to locate their own facilities within the tolerance zone.

(b) The verification of underground facilities furnishing gas or liquid petroleum products shall be accomplished by the excavator by exposing the underground facility or its encasement to view by means of hand dug test holes at one or more points where the work area and tolerance zone overlap, or more points as designated by the operators of such facilities. [Powered or mechanized equipment may be used for removal of pavement or masonry but only to the depth of such pavement or masonry.]

[(d) Where center line stakes or marks indicate the size of the underground facility, such facility shall be assumed to lie within a strip of land equal to the width of the facility plus four feet with the center line of such strip of land at the stakes or marks.

(e) Where center line stakes or marks do not indicate the size of the underground facility, such facility shall be assumed to lie within a strip of land four feet in width with the center line of such strip of land at the stakes or marks.

(f) Where offset stakes or remote tie-in markings indicate the size of the facility, the underground facility shall be assumed to lie in a strip of land equal to the width of the

facility plus four feet with the center line of such strip of land at the center line of the facility as indicated by the stakes or markings.

(g) Where offset stakes or remote tie-in markings do not indicate the size of the underground facility, the facility shall be assumed to lie in a strip of land four feet in width with the center line of such strip of land at the center line of the underground facility as indicated by the stakes or markings.]

753-3.7 Unverifiable underground facilities. If the precise location of an underground facility cannot be verified by the excavator after diligent search at a reasonable depth within the [strip of land] tolerance zone as staked, marked or otherwise designated by the operator, the excavator shall so notify such operator as soon as possible. [The operator shall verify the location of the underground facility with his or her own personnel as soon as possible or shall provide the excavator with prompt field assistance or use other means mutually agreed to by the excavator and operator. Such agreement shall be provided in writing to the excavator upon his or her request.] The operator shall respond in accordance with subdivision 753-4.10 of this Part.

753-3.9 Discovery of unknown underground facilities. Where an undesignated or otherwise unknown underground facility is discovered within a work area, the excavator shall report such discovery as follows:

(b)(1) If the identity of the operator of the discovered underground facility is not known or obvious, the excavator shall report the discovery to the one-call notification system and each operator notified by the one-call notification system shall respond immediately and, in accordance with subdivision 753-4.9[(c) or](d) of this Part, determine whether or not such discovered facility is his or hers.

753-3.15 [Emergency excavation or demolition. Excavation or demolition which is required to be performed promptly as a result of an emergency, disaster or to correct an immediate hazard may proceed immediately without prior notification to operators, if the situation is so serious that the excavation or demolition cannot reasonably be delayed. However, excavators shall notify the one-call notification system as soon as possible that such excavation or demolition is commencing or is underway. Extreme caution shall be employed by the excavator to prevent damage to existing underground facilities and to avoid endangering persons and property.

753-3.16 Pre-demolition conferences. At least seven working days in advance of the commencement date of the demolition, the excavator shall request a pre-demolition conference, through the one-call notification system, with all operators who have underground facilities at or near the proposed demolition area. A request for a pre-demolition conference is not a substitute for the notice of intent to perform demolition work required by Section 753-3.1 of this Part.

753-3.17] Responsibility to employees. Every excavator subject to the provisions of this Part shall make certain that all of his or her employees directly [concerned with] involved in excavation or demolition are thoroughly familiar with the applicable provisions of this Part and especially the provisions of this Subpart relating to their safety.

SUBPART 753-4 DUTIES OF OPERATORS

§753-4.14 [Consumer education programs]
Information for design purposes
§753-4.15 Consumer education programs

753-4.4 Receiving notices. Each operator shall establish a means of receiving notices of [proposed] planned excavation or

demolition from the one-call notification system in accordance with the procedures of the system.

753-4.5 Operator's response to notice.

(a) Prior to the stated commencement date of the [proposed] excavation or demolition work as stated in the recorded notice, the operator shall make a reasonable attempt to inform the excavator directly that either:

(1) The operator has no underground facility in or within 15 feet of the [proposed] work area; or

(2) Every underground facility belonging to him or her which is located in or within 15 feet of the [proposed] work area has been staked, marked or otherwise designated in accordance with the provisions of this Subpart.

(b) Where an operator cannot complete the staking, marking or other designation of an underground facility prior to the stated commencement date and time of the [proposed] excavation or demolition, the operator shall promptly report such fact to the excavator and shall inform the excavator of a prompt and practicable completion date which in no case shall be more than two working days after the excavator's stated commencement date, unless a longer period is agreed to by both parties.

753-4.6 Locating underground facilities.

(a) Whenever an operator's underground facilities are in or within 15 feet of a [proposed] work area, such facility shall be located, accurately and with due care, by means of staking, marking or other designation in accordance with the provisions of this Subpart.

(c) If staking or marking are not used to indicate the location of an underground facility, the operator shall designate such location in accordance with the following:

(1) By exposing the underground facility or its encasement to view within the [proposed] work area in a manner suffi-

cient to allow the excavator to verify the type, size, direction of run and depth of the facility;

(2) By providing field representation and instruction to the excavator in the [proposed] work area; or

(d) An operator, or its agents or contractors, performing excavation or demolition work at or near his or her own underground facility shall not be required to stake, mark or otherwise designate such underground facility.

753-4.7 Uniform color code. The following uniform color codes shall be utilized for staking and marking used to designate the location of underground facilities and [proposed] excavation sites:

(g) White - [Proposed e] Excavation site.

753-4.9 Operator's response to notices of contact or damage, facilities in danger [or] of failing and discovery of unknown underground facilities.

753-4.10 Unverifiable underground facilities. If an excavator notifies an operator that, after diligent search at a reasonable depth within the [strip of land] tolerance zone as staked, marked or otherwise designated by the operator, that he or she cannot verify the location of an underground facility, the operator shall verify such location [with his or her own personnel] as soon as possible or shall provide the excavator with prompt field assistance or use other means mutually agreed to by the excavator and operator. Such agreement shall be provided to the excavator upon his or her request.

753-4.13 Support and backfilling requirements. Where an underground facility will be disturbed or uncovered by excavation or demolition, the operator of such facility shall indicate to the excavator any preferred means of support or protection required for such facility and any special backfilling require-

ments or provide any other guidance for protection of an underground facility. Such information shall be furnished to the excavator before the stated date of commencement of the [proposed] work, if practical.

753-4.14 Information for design purposes. Each operator shall provide a means by which information regarding the location of underground facilities can be obtained for design purposes. Such means may include, but are not limited to; provision of maps, meetings, or marking in accordance with Section 753-4.6 and shall be performed within mutually agreed to timeframes.

753-4.15 Each operator of an underground gas pipeline or hazardous liquid petroleum facility shall on its own initiative or through a one-call notification system conduct a program to educate the public on the possible hazards associated with damage to facilities and on the importance of reporting gas odors and leaks. The one-call notification system may develop materials suitable for use in such programs.

SUBPART 753-5 One-Call Notification Systems

753-5.2 Notice procedures.

Every one-call notification system shall:

(a) Establish an effective notification service for receipt of notices from excavators, including a toll-free telephone number, and for transmission of such notices to every member operator who has underground facilities in or within 15 feet of the [proposed] work area. Such notices may include:

(1) notice of a [proposed] planned excavation or demolition;

(c) Use a standardized format to record all incoming notices or requests from excavators, including at least the following information:

(6) Address and exact location as well as the approximate extent and dimensions of the [proposed] work area;

(8) Brief description of the [proposed] planned excavation or demolition;

(9) Date and time the [proposed] work is to commence;

753-5.3 System duties. Each one-call notification system shall perform the following duties:

(b) Conduct a continuing program to:

(1) Inform excavators of the one call notification system's existence and purpose and their responsibility to notify the one-call notification system of [proposed] planned excavation and demolition and to protect underground facilities;

(2) Inform operators of the responsibility to participate in the one-call notification system, to respond to a notice relating to a [proposed] planned excavation and demolition and to designate and mark facilities according to the provisions of this Part.

(c) Provide a means by which contact information provided by the member operators can be obtained for the purpose of learning the location of underground facilities for design purposes.

SUBPART 753-6 - Enforcement Procedures

§753-6.1 Scope

§753-6.2 Field citations

§753-6.3 Warning letters

§753-6.4 Notice of probable violation

§753-6.5 Respondent's options

§753-6.6 Department action

§753-6.7 Consent orders

§753-6.8 Final order

§753-6.9 Payment of penalties

§753-6.10 Injunctive relief

753-6.1 Scope: This Subpart describes the enforcement authority and sanctions of the Public Service Commission for achieving and maintaining compliance with 16 NYCRR Part 753. It also describes the procedures governing the exercise of that authority and the imposition of those sanctions.

753-6.2 Field citations: Upon determining that a probable violation of a provision of Part 753 has occurred, the Department may issue a field citation to a Respondent, identifying specific provisions alleged to have been violated.

753-6.3 Warning letters: Upon determining that a probable violation(s) of a provision of Part 753 has occurred or is continuing, the Department may issue a warning letter notifying the Respondent of the probable violation and advising him or her to correct it, if it is correctable, and to comply henceforth, or be subject to enforcement actions under this Part.

763-6.4 Notice of probable violation:

(a) If the Department has reason to believe that a violation of Part 753 has occurred or is continuing, the Department may commence an enforcement action by issuing a Notice of Probable Violation (NOPV).

(b) The NOPV shall include:

(1) A listing of the regulations which the Respondent is alleged to have violated, a description of the evidence on which the allegations are based and a copy of the field citation(s), if applicable;

(2) Notice of the response options available to the Respondent under Section 753-6.5 of this Subpart;

(3) If an administrative penalty is proposed, the amount of the proposed penalty and the maximum penalty for which the Respondent may be liable; and

(4) A proposed Consent Order pursuant to Section 753-6.7 of this Subpart.

(c) A NOPV may be amended at any time prior to issuance of a final order. If an amendment includes any new material allegations of fact or proposes an increased administrative penalty, the Respondent shall have another opportunity to respond under Section 753-6.5 of this Subpart.

753-6.5 Respondent's options: Within 30 days after issuance of a NOPV the Respondent shall respond in one of the following ways:

(a) Sign the Consent Order and return it with payment of any proposed administrative penalty;

(b) Submit a written explanation, information or other material in answer to the allegations; or

(c) Request an informal conference with Department Staff.

(d) Failure of the Respondent to respond in accordance with subdivision (a), (b) or (c) shall constitute a waiver of its right to contest the allegations in the NOPV and authorizes the Commission, without further notice to the Respondent, to find facts to be as alleged in the NOPV and to issue a final order under Section 753-6.8 of this Subpart.

753-6.6 Department Action (a) If the Respondent requests an informal conference, such conference will be conducted by Department Staff. The Respondent shall have the right to be represented by an attorney or other person, and shall have the right to present relevant evidence. Any evidence which indicates that the Respondent may have violated Part 753 shall be made available to the Respondent, who shall have the opportunity to rebut this evidence.

(b) Following its review of any material submitted in writing or at an informal conference, the Department will compile a case file, which will be the basis for a final order. The case file of an enforcement proceeding shall include:

(1) The field citations, inspection reports and any other evidence of alleged violations;

(2) A copy of the NOPV issued under Section 753-6.4 of this Subpart;

(3) Any material submitted by the Respondent in response to the NOPV or at an informal conference; and

(4) A written evaluation and recommendation for a final order.

753-6.7 Consent Orders

(a) Notwithstanding any other provision to the contrary, the Department may at any time resolve an outstanding NOPV with a consent order. A consent order must be signed by the person to whom it is issued, or a duly authorized representative, and must indicate agreement with the terms thereof. A consent order need not constitute an admission that the person committed the violation.

(b) A consent order is a final order of the Commission having the same force and effect as a final order issued pursuant to Section 753-6.8 of this Subpart.

(c) A consent order shall not be appealable and shall include an express waiver of appeal or judicial review rights that might otherwise attach to a final order of the Commission.

753-6.8 Final Order Based on the review of a case file and upon considering the nature, circumstances and gravity of the violation, history of prior violations, effect on public health, safety or welfare and such other matters as may be required, the Commission will issue a final order that includes:

(a) A statement of findings and determinations on all material issues;

(b) If an administrative penalty is assessed, the amount of the penalty and the procedures for payment of the penalty;

(c) Respondents may petition the Commission for review of a Final Order.

753-6.9 Payment of penalties:

(a) Payment of an administrative penalty under this subpart must be made by certified check or money order payable to the "Department of Public Service" and sent to the Secretary to the Commission, Three Empire State Plaza, Albany, N.Y. 12223-1350.

(b) If a Respondent fails to pay the full amount of a penalty assessed in a final order within thirty days after receipt of the final order, the Department may refer the case to

the Attorney General with a request that an action to collect the assessed penalty be brought in any court of competent jurisdiction.

753-6.10 Injunctive Relief. Notwithstanding any of the enforcement procedures listed in this Subpart, if the Commission is aware or has reason to believe that any excavator is engaging in or proposing to engage in excavation or demolition in a negligent or unsafe manner, which has resulted in or is likely to result in damage to underground facilities in such a manner that life, property or the continuation of operator service is endangered, the Commission or designee may give notice to any excavator to immediately cease and desist the excavation or demolition and may recommend to the Attorney General that they commence an action to enjoin such excavator from further excavation or demolition work or any aspect thereof. Nothing herein shall impair the rights of any operator or the Attorney General, pursuant to General Business Law Section 765, from seeking an injunction against any excavator engaging in or proposing to engage in excavation or demolition in a negligent or unsafe manner.