

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMMISSION'S
REVIEW OF THE RULES IN OHIO
ADM.CODE CHAPTER 4901:1-2
REGARDING THE PROTECTION OF
UNDERGROUND UTILITY FACILITIES.

CASE NO. 21-896-AU-ORD

ENTRY

Entered in the Journal on November 3, 2021

I. SUMMARY

{¶ 1} The Commission directs that all interested persons or entities wishing to file comments or reply comments on Ohio Adm.Code Chapter 4901:1-2, rules regarding the protection of underground utility facilities, do so no later than November 24, 2021, and December 3, 2021, respectively.

II. DISCUSSION

{¶ 2} R.C. 111.15(B) and R.C. 106.03(A) require all state agencies to conduct a review, every five years, of their rules and to determine whether to continue their rules without change, amend their rules, or rescind their rules. The Commission opened this docket to review the rules pertaining to the protection of underground utility facilities in Ohio Adm.Code Chapter 4901:1-2.

{¶ 3} R.C. 106.03(A) requires that the Commission determine whether the rules:

- (a) Should be continued without amendment, be amended, or be rescinded, taking into consideration the purpose, scope, and intent of the statute under which the rules were adopted;
- (b) Need amendment or rescission to give more flexibility at the local level;

- (c) Need amendment or rescission to eliminate unnecessary paperwork;
- (d) Incorporate a text or other material by reference and, if so, whether the citation accompanying the incorporation by reference would reasonably enable the Joint Committee on Agency Rule Review or a reasonable person to whom the rules apply to find and inspect the incorporated text or material readily and without charge and, if the rule has been exempted in whole or in part from R.C. 121.71 to 121.74 because the incorporated text or material has one or more characteristics described in R.C. 121.75(B), whether the incorporated text or material actually has any of those characteristics;
- (e) Duplicate, overlap with, or conflict with other rules;
- (f) Have an adverse impact on businesses, as determined under R.C. 107.52;
- (g) Contain words or phrases having meanings that in contemporary usage are understood as being derogatory or offensive; and
- (h) Require liability insurance, a bond, or any other financial responsibility instrument as a condition of licensure.

{¶ 4} Additionally, in accordance with R.C. 121.82, in the course of developing draft rules, the Commission must evaluate the rules against the business impact analysis (BIA). If there will be an adverse impact on businesses, as defined in R.C. 107.52, the agency is to incorporate features into the draft rules to eliminate or adequately reduce any adverse

impact. Furthermore, the Commission is required, pursuant to R.C. 121.82, to provide the Common Sense Initiative (CSI) office the draft rules and the BIA.

{¶ 5} On September 21, 2021, the Commission held a virtual workshop in this proceeding to enable interested stakeholders to propose revisions to Ohio Adm.Code Chapter 4901:1-2. No stakeholders offered comments on this rule chapter at the workshop.

{¶ 6} The Staff evaluated the rules contained in Ohio Adm.Code Chapter 4901:1-2 and has recommended that no changes be made to this rule chapter. The Commission now seeks comment on Staff's recommendation.

{¶ 7} Attached to this Entry are the rules in Ohio Adm.Code Chapter 4901:1-2 (Attachment A) and the BIA (Attachment B), which are also posted on the Commission's Docketing Information System website at <http://dis.puc.state.oh.us/>. To minimize the expense of this proceeding, the Commission will serve a paper copy of this Entry only. All interested persons are directed to input case number 21-896-AU-ORD into the Case Lookup box to view this Entry, as well as the proposed changes, or to contact the Commission's Docketing Division to request a paper copy.

{¶ 8} The Commission requests comments on the proposed rules from interested persons to assist in the review required by R.C. 111.15 and R.C. 106.03. Comments should be filed, via electronic filing or in hard copy, by November 24, 2021. Reply comments should be filed by December 3, 2021.

III. ORDER

{¶ 9} It is, therefore,

{¶ 10} ORDERED, That all interested persons or entities wishing to file comments or reply comments with the Commission regarding the proposed rules do so no later than November 24, 2021, and December 3, 2021, respectively. It is, further,

{¶ 11} ORDERED, That a copy of this Entry, with the rules and the BIA, be submitted to CSI, in accordance with R.C. 121.82. It is, further,

{¶ 12} ORDERED, That a copy of this Entry be sent to the Electric-Energy, Gas-Pipeline, Telephone, and Water industry service lists. It is, further,

{¶ 13} ORDERED, That a copy of this Entry be served upon all regulated electric distribution companies, regulated gas and natural gas companies, all incumbent local exchange companies, the Ohio Gas Association, the Ohio Oil and Gas Association, the Ohio Petroleum Council, the Ohio Telecom Association, the Ohio Cable Telecommunications Association, the Ohio Utilities Protection Service, and all other interested persons of record.

COMMISSIONERS:

Approving:

Jenifer French, Chair
Lawrence K. Friedeman
Daniel R. Conway
Dennis P. Deters

JRJ/mef

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NO CHANGE

4901:1-2-01 Definitions.

As used within this chapter, these terms denote the following:

- (A) “Aggrieved person,” for purposes of this chapter, shall have the same meaning as defined in division (A) of section 4913.01 of the Revised Code.
- (B) “Commission” means the public utilities commission of Ohio.
- (C) “Committee” means the underground technical committee created pursuant to section 3781.34 of the Revised Code that shall carry out the duties outlined by section 3781.36 of the Revised Code.
- (D) “Compliance failure,” for purposes of this chapter, shall have the same meaning as defined in division (B) of section 4913.01 of the Revised Code.
- (E) “Coordinator” shall be a full-time employee of the commission designated by the director of the service monitoring and enforcement department to assist the committee in the performance of its duties.
- (F) “Days,” when used to compute any period of time prescribed or allowed by these rules, shall not include the date of the act or event from which the designated period of time begins to run. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.
- (G) “Designer,” “developer,” “excavation,” “excavator,” “one-call notification system,” “person,” “protection service,” “underground utility facility,” and “utility” shall have the same meanings as in section 3781.25 of the Revised Code.
- (H) “Director” means the director of the commission’s service monitoring and enforcement department or the director’s designee.
- (I) “Filing” means delivery, through paper filing, facsimile transmission (fax) filing, or electronic filing (e-file), to the commission’s docketing division in accordance with rule 4901-1-02 of the Administrative Code.
- (J) “Hearing” means all proceedings before the commission conducted in a manner consistent with

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Chapter 4903. of the Revised Code.

- (K) “Participants” means the aggrieved person and the person responsible for the alleged compliance failure and any persons permitted to intervene after commencement of a proceeding.
- (L) “Report of inquiry” is a document summarizing the investigation of a compliance failure and reporting on a fine, penalty, or no-penalty determination made by either the committee or the staff, when applicable.
- (M) “Respondent” means the person, as defined in section 3781.25 of the Revised Code, responsible for the alleged compliance failure.
- (N) Staff” means those employees of the commission to whom responsibility has been delegated for administering the provisions of Chapter 4913. of the Revised Code, as applicable.
- (O) “Violation” means any conduct, act, or failure to act, prohibited by Chapter 4913. of the Revised Code.

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4901:1-2-02 Purpose and scope.

- (A) This chapter is adopted in compliance with, and under the authority of, division (B) of section 4913.45 and division (F) of section 121.22 of the Revised Code.
- (B) This chapter establishes rules for the committee and for the protection of underground utility facilities pursuant to Chapter 4913. of the Revised Code.
- (C) This chapter shall apply to all persons with duties and obligations under sections 153.64, 3781.27, and 3781.28 to 3781.32 of the Revised Code and divisions (A) and (B) of section 3781.26 of the Revised Code.
- (D) The commission may, upon application or motion, waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown.

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NO CHANGE

4901:1-2-03 Duties of the committee.

The committee shall do the following:

- (A) Coordinate with the commission in carrying out its duties under Chapter 4913. of the Revised Code.
- (B) Provide subject matter expertise when requested during inquiries conducted under section 4913.09 of the Revised Code.
- (C) Review reports in accordance with section 4913.15 of the Revised Code.
- (D) Make recommendations under sections 4913.15 and 4913.16 of the Revised Code.
- (E) Perform any additional duties as may be required under Chapter 4913. of the Revised Code.

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NO CHANGE

4901:1-2-04 Selection and duties of chairperson, vice chairperson, secretary, and coordinator.

- (A) Members of the committee shall annually select a chairperson, vice chairperson, and secretary from among its members. The selection shall be made at the first meeting of each calendar year. The selection of the chairperson, vice chairperson, and secretary shall be those members receiving the most votes for those three positions by an absolute majority of the committee.
- (B) Unless removed from office or replaced as a member of the committee, the term of office for the chairperson, vice chairperson, and secretary shall be until the first meeting of the committee held the following calendar year. The chairperson, vice chairperson, or secretary may be removed from office by an absolute majority vote of the committee at any regularly scheduled or special meeting.
- (C) The chairperson of the committee shall preside over the meetings of the committee, schedule meetings of the committee, cause notice of the meetings to be emailed or, if individually requested, mailed to members of the committee, and perform such other duties as required to enable the members of the committee to perform their duties.
- (D) The secretary of the committee shall record the minutes or designate another person to record the minutes subject to the secretary's review and approval of the meetings. A complete transcript of a meeting, except an executive session, may be substituted for the minutes. If the committee holds an executive session, the minutes or transcript shall state the matter to be considered in the session. A copy of the minutes or the transcript of each meeting shall be available for public inspection at the offices of the commission.
- (E) If the chairperson has been removed from office or replaced as a member of the committee or has otherwise relinquished the position or is not present at a meeting, the vice chairperson shall assume the duties of the chairperson until such time as a chairperson is seated.
- (F) If the committee is without a chairperson, vice chairperson, and secretary, the coordinator of the committee shall schedule a meeting of the committee and cause notice of the meeting to be sent to members of the committee upon receipt of a written request signed by at least two members of the committee.
- (G) The coordinator shall work with the chairperson, vice chairperson, and secretary of the

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committee to ensure that notice of meetings occur, to gather and distribute to members of the committee copies of the report of each inquiry conducted pursuant to section 4913.09 of the Revised Code, and such other duties as requested by the chairperson, vice chairperson, or secretary of the committee.

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NO CHANGE

4901:1-2-05 Meetings of the committee.

- (A) All meetings of the committee shall be open and accessible to the public. For the purpose of this rule, the term “meeting” shall mean any prearranged discussion of the public business of the committee by a majority of its members. Consistent with division (B) of section 3781.36 of the Revised Code, a majority of committee members constitutes a quorum.
- (B) The committee may conduct meetings in person, by teleconference, or by video conference.
- (C) The committee shall meet as necessary to carry out its duties and meet the time-period requirements of division (B) of section 4913.15 of the Revised Code, but not less than once every three months.
- (D) The committee may hold an executive session for the sole purpose of the consideration of a matter contained in division (G) of section 121.22 of the Revised Code. Such executive session may be held only at a regular or special meeting for which notice has been given in accordance with rule 4901:1-2-08 of the Administrative Code, and only after a majority of a quorum of the committee determines, by a roll call vote, to hold such a session.
- (E) Meetings of the committee may be recessed for up to three business days.

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NO CHANGE

4901:1-2-06 Voting procedures.

- (A) Each member of the committee shall have one vote.
- (B) There shall be majority vote of the full committee, with at least one of the commercial-excavator members voting with the majority, for the committee to do any of the following:
 - (1) Recommend a fine, penalty, or a combination of fines and penalties under section 4913.15 or section 4913.16 of the Revised Code.
 - (2) Determine, under section 4913.15 or section 4913.16 of the Revised Code, that no enforcement action should be taken.
 - (3) Request a hearing under section 4913.19 of the Revised Code.
- (C) If the committee fails to achieve the required majority for any action described in division (B) of section 4913.15 of the Revised Code, it shall notify the commission.

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NO CHANGE

4901:1-2-07 Types of meetings.

- (A) A regularly scheduled meeting is one in which members of the committee are informed of the meeting at least five days prior to the start of the meeting.
- (B) A special meeting is one in which members are informed less than five days but more than twenty-four hours prior to the start of the meeting.
- (C) An emergency meeting is one in which members are informed less than twenty-four hours prior to the start of the meeting.

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NO CHANGE

4901:1-2-08 Notice of meetings to the public.

- (A) Any person may determine the time, place, and purpose of all upcoming regular, special, and emergency meetings of the committee by:
- (1) Writing to the following address: "Underground Technical Committee Coordinator, Service Monitoring and Enforcement Department, Public Utilities Commission of Ohio, 180 East Broad Street, Columbus, Ohio 43215."
 - (2) Contacting the commission via telephone, 800-686-7826, during normal business hours.
 - (3) Consulting the commission's web site at www.puco.ohio.gov.
- (B) Any person may request to receive notice of the time, place, and purpose of all regularly scheduled, special, and emergency meetings of the committee by submitting a written request to: "Underground Technical Committee Coordinator, Service Monitoring and Enforcement Department, Public Utilities Commission of Ohio, 180 East Broad Street, Columbus, Ohio 43215." Requests shall include the name, address, telephone number, and email address of the person making the request.
- (C) Notice of regularly scheduled meetings shall be emailed to those persons who have requested to receive notice not less than five days prior to the date of the meeting.
- (D) If a special meeting of the committee is scheduled, notice of the meeting will be made by email no later than twenty-four hours prior to the special meeting. Such notice shall be complete once an email has been sent. Notice of special meetings shall be given to representatives of the news media who made request to receive notice.
- (E) Members of the news media who wish to be notified of a special meeting or emergency meeting of the committee should indicate on their request that they are a member of the news media, the news agency that they represent, and a request to be notified when a special meeting or emergency meeting is scheduled. Notice of a special meeting or emergency meeting will only be given to one representative of any particular news agency.
- (F) If an emergency meeting of the committee is scheduled, immediate notice of the meeting will be made by email or telephone to members of the news media who have requested notification. Calls will be made during the normal business hours of the commission. Such notice shall be

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complete if an email has been sent or if a telephone message has been left for the representative.

- (G) The coordinator of the committee may request that persons verify in writing that they wish to remain on the list of persons to be notified of meetings of the committee.

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NO CHANGE

4901:1-2-09 Registration requirements.

- (A) Each utility, excavator, developer, and designer who participates in the one-call notification system in the current or previous calendar year shall receive notice from the commission to pay a safety registration fee not to exceed fifty dollars annually, which the commission may lower if the commission determines lowering the registration to be necessary.
- (B) To recognize compliance, the commission may charge a discounted safety registration fee to those registrants that have no fines or penalties assessed against them in the previous calendar year.
- (C) The registration year shall be the calendar year and registration will be accomplished through payment by the due date of the invoice issued by the commission.
- (D) Subject to section 119.14 of the Revised Code, failure to pay the registration fee shall result in a fine of not more than two thousand five hundred dollars.
- (E) The commission shall deposit all safety registrations and fines collected under this section in the underground facilities protection administrative fund created under section 4913.30 of the Revised Code.

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NO CHANGE

4901:1-2-10 Service during the investigation of an alleged compliance failure.

During the investigation of an alleged compliance failure:

- (A) Unless provided otherwise by this chapter, service upon the staff may be made by ordinary or certified United States mail, by courier service, by facsimile transmission, or by personal service upon the coordinator.

Service is effective upon receipt except that service by United States mail is complete upon mailing and service by facsimile transmission is complete upon transmission.

- (B) Service upon the participants shall be made by ordinary or certified United States mail, by courier service, by facsimile transmission, by electronic mail, or by personal service. Service is effective upon receipt by any person, except that service by ordinary or certified United States mail is effective upon mailing and service by facsimile transmission or email is complete upon transmission. Service by email may be made only if the person to be served has consented to receive service by email. Service upon the participants by ordinary or certified United States mail shall be made at any of the following:

(1) If the participant is a natural person at the address listed on the inquiry report.

(2) If the participant is other than a natural person:

(a) If the participant has provided any information to the staff or to the committee, at the address indicated in this communication.

(b) If the participant wants to have notices or requests for inquiries served at a particular address, the participant may contact the commission and request service at such a specific address.

(c) If the participant is a business entity, and whose address is not otherwise disclosed, at any business address of the participant.

- (C) Once a participant has filed a written application for reconsideration with the commission in accordance with section 4913.25 of the Revised Code, any further service shall be made in accordance with Chapter 4901-1 of the Administrative Code.

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NO CHANGE

4901:1-2-11 Inquiry procedures.

- (A) An aggrieved person may request an inquiry with the staff. The request for inquiry must be made no later than ninety days after discovering the alleged compliance failure. A request for inquiry shall not, by itself, cause the creation of a formal proceeding at the commission. A request for inquiry shall state, at a minimum and with particularity:
- (1) Name of the respondent.
 - (2) Date of the compliance failure.
 - (3) Nature of the compliance failure.
 - (4) Location of the compliance failure.
 - (5) Any other information that the requestor considers relevant.
- (B) Not later than ten business days after receiving a request for inquiry, the staff shall notify the respondent that the request for inquiry was made.
- (C) The respondent may respond to the request for inquiry by providing any information that the person considers relevant to the inquiry, including an admission of the compliance failure, not later than thirty days after being notified by the staff.
- (D) The staff shall conduct an inquiry. The staff's investigation shall be limited to whether there was a compliance failure.
- (E) A report of each inquiry will be made by the staff to the committee and to the participants. The report of inquiry should include all relevant material collected in the course of the proceeding including any documentary and photographic evidence which has been collected regarding the alleged violation. The report of inquiry should also include any information concerning past violations under sections 4913.151 and 4913.17 of the Revised Code and the various factors for consideration under section 4913.20 of the Revised Code. This report shall not contain a recommendation as to the imposition of a fine or penalty or as to whether any enforcement action should be taken except as provided in section 4913.16 of the Revised Code.
- (F) The committee shall review every report of inquiry submitted to it by the staff and consider

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making a recommendation that a fine, a penalty, or a combination of fine and penalty be imposed or that no enforcement action be taken pursuant to section 4913.15, 4913.16, 4913.17, or 4913.19 of the Revised Code.

- (G) The commission, the legal director, the deputy legal director, or an attorney examiner may issue subpoenas, upon the request of the staff or upon the request of the committee, to support the investigation of an inquiry. A subpoena shall command the person to whom it is directed to attend and give testimony at the time and place specified therein. A subpoena may also command such person to produce the papers, documents, or other tangible things described therein. A subpoena issued under this rule shall be served by personal service or by certified United States mail and is effective upon receipt.
- (H) The commission, the legal director, the deputy legal director, or an attorney examiner may, upon their own motion or upon motion of the person to whom the subpoena is directed, quash a subpoena if it is unlawful, unreasonable, or oppressive.

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NO CHANGE

4901:1-2-12 Guidelines for consistent application of fines and penalties.

In determining a fine or penalty recommendation or whether no enforcement action should be taken under section 4913.15, 4913.16, 4913.171, 4913.19, or 4913.25 of the Revised Code, the committee, the commission, and the staff, as applicable, shall consider the following factors, as they apply:

- (A) The person's demonstrated history of one-call, design, and excavation practices, including the following:
 - (1) The number of locate requests received and responded to.
 - (2) The number of locates completed.
 - (3) The number of one calls placed.
 - (4) The number of excavations completed.
 - (5) The number of design or development projects.
- (B) The nature, circumstances, and gravity of the compliance failure, including the amount of damage involved in relation to the compliance failure, and whether it resulted in death, serious injury, dismemberment, or a significant threat to public safety.
- (C) The organizational size of the responsible person.
- (D) The prospective effect of a fine on the person's ability to pay business obligations and otherwise conduct business.
- (E) The history or number of compliance failures by the person based on information maintained by the coordinator.
- (F) The good faith effort on the person's part in attempting to achieve compliance after the compliance failure was identified.

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NO CHANGE

4901:1-2-13 Notice of a completed report of inquiry.

- (A) Within ten business days of receiving from the committee either a recommendation to impose a fine or penalty or a determination that no enforcement action should be taken, the staff will serve upon the participants a letter notifying the participants of any fine or penalty or of a no-enforcement determination. Service of the letter is effective upon mailing by ordinary or certified United States mail. The letter shall include all of the following, as applicable:
- (1) The date of the compliance failure.
 - (2) The citation to the statute that was not complied with.
 - (3) A brief description of the compliance failure.
 - (4) The fine or penalty to be imposed, if any.
 - (5) Instructions on how the person may file for reconsideration under section 4913.25 of the Revised Code and how to make a timely filing.
 - (6) A statement that failure to file for reconsideration under section 4913.25 of the Revised Code will make any findings final and enforceable.
- (B) The director of the service monitoring and enforcement department or the director's designee has the authority to enforce any fine or penalty set forth in section 4913.151 of the Revised Code.

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NO CHANGE

4901:1-2-14 Default.

- (A) The respondent upon whom a letter has been served in accordance with paragraph (A) of rule 4901:1-2-13 of the Administrative Code who fails within sixty days to pay the fine or who fails to begin compliance with the penalty within thirty days after the letter shall be in default unless reconsideration in accordance with section 4913.25 of the Revised Code is requested. A person responsible for a compliance failure in default shall be deemed to have admitted the occurrence of the violation and waived all further right to contest liability under Chapter 4913. of the Revised Code for the fine or penalty set forth in the letter or to further contest the fine or penalty through a request for reconsideration.
- (B) The attorney general, upon the written request of the commission, shall bring a civil action in the court of common pleas of Franklin county to collect a fine or enforce a penalty assessed under this section.

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NO CHANGE

4901:1-2-15 Requests for reconsideration.

- (A) Not later than thirty days after receiving notice under rule 4901:1-2-13 of the Administrative Code, either the person that requested the inquiry or the respondent may file a written application for reconsideration with the commission. The application for reconsideration must state with particularity the grounds for reconsideration.
- (B) Any person opposing an application for reconsideration shall have fifteen days to file a memorandum contra with the commission.
- (C) The staff shall have thirty days after the filing of the application for reconsideration to file a responsive pleading.
- (D) In all other respects, the procedural requirements set forth in Chapter 4901-1 of the Administrative Code shall apply to the reconsideration proceeding before the commission.
- (E) On reconsideration, the commission shall affirm, reject, or modify the finding of the committee and shall impose any fine or penalty authorized or take no enforcement action in accordance with section 4913.25 of the Revised Code.

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NO CHANGE

4901:1-2-16 Rehearing.

Pursuant to section 4913.251 of the Revised Code, a reconsideration order issued under section 4913.25 of the Revised Code is subject to the rehearing and appeal process under Chapter 4903. of the Revised Code.

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NO CHANGE

4901:1-2-17 Hearings.

All hearings conducted by the commission under Chapter 4913. of the Revised Code and the process described in section 4913.251 of the Revised Code shall be conducted in a manner consistent with Chapter 4903. of the Revised Code.

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NO CHANGE

4901:1-2-18 Payment of fines.

Any fine shall be paid in a manner determined by the commission. Payment shall contain the identifying case number of the violation for which payment is tendered. Payment is complete upon receipt by the staff.

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NO CHANGE

4901:1-2-19 Damage prevention grant program procedures.

(A) The commission may administer an underground utility damage prevention grant program, subject to availability of funds, to provide grants for qualified purposes.

(1) Qualified purposes include:

- (a) Public awareness programs established by a protection service.
- (b) Training and education programs for excavators, operators, designers, persons who locate underground utility facilities, or other persons.
- (c) Programs providing incentives for excavators, operators, persons who locate underground utility facilities, or other persons to reduce the number and severity of compliance failures.

(2) Grant funds will be awarded:

- (a) At the discretion of the commission.
- (b) After a review of all grant applications for the grant review period.
- (c) As reimbursement for qualified expenses incurred after grant application approval.

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NO CHANGE

4901:1-2-20 Annual report to the general assembly.

In accordance with section 4913.43 of Revised Code, the commission shall submit to the general assembly an annual report regarding the activities of the commission and committee for the previous calendar year. The report shall include, but shall not be limited to:

- (A) The number of registrations pursuant to division (A) of section 4913.03 of the Revised Code.
- (B) The number of investigations conducted by the commission pursuant to section 4913.09 of the Revised Code.
- (C) The number of inquiries submitted to the committee pursuant to section 4913.13 of the Revised Code.
- (D) The number of the committee's recommendations pursuant to section 4913.15 of the Revised Code for the inquiries submitted to them over the previous calendar year.
- (E) Accounting of funds received through enrollments, penalties, fines, and forfeitures.
- (F) Accounting of funds distributed through the utility damage prevention grant program.
- (G) The membership activities of the committee for the previous year.
- (H) Any other pertinent information, excluding confidential information, the commission believes will be helpful to the general assembly in the review of this report.



Common Sense Initiative

Mike DeWine, Governor
Jon Husted, Lt. Governor

Carrie Kuruc, Director

Business Impact Analysis

Agency, Board, or Commission Name: Public Utilities Commission of Ohio (PUCO)

Rule Contact Name and Contact Information:

Attention: Angela Hawkins, Legal Director

Phone: 614-466-0122, Fax: 614-728-8378, Email: Angela.Hawkins@puco.ohio.gov

Regulation/Package Title (a general description of the rules' substantive content):

Case No. 21-896-AU-ORD

Protection of Underground Utility Facilities

Rule Number(s): Ohio Adm.Code Chapter 4901:1-2

Date of Submission for CSI Review: November 3, 2021

Public Comment Period End Date: December 3, 2021

Rule Type/Number of Rules:

New/___ rules

No Change/20 rules (FYR? Yes)

Amended/rules (FYR? Yes)

Rescinded/___ rules (FYR? ___)

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIPublicComments@governor.ohio.gov

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of regulations that have an adverse impact on business with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Reason for Submission

- 1. R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rule for CSI review.**

Which adverse impact(s) to businesses has the agency determined the rule(s) create?

The rule(s):

- Requires a license, permit, or any other prior authorization to engage in or operate a line of business.**
- Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.**
- Requires specific expenditures or the report of information as a condition of compliance.**
- Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.**

Regulatory Intent

- 2. Please briefly describe the draft regulation in plain language.**

Please include the key provisions of the regulation as well as any proposed amendments.

Ohio Adm.Code Chapter 4901:1-2 is being submitted in accordance with the state of Ohio's five-year rule review procedures. R.C. 111.15(B) and 106.03(A) require all state agencies to conduct a review, every five years, of their rules and to determine whether to continue those rules without change, amend the rules, or rescind them.

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The rules in Chapter 4901:1-2 provide for the protection of underground utility facilities, including rules governing the Underground Technical Committee process created pursuant to R.C. 3781.34 and in conjunction with the Public Utilities Commission of Ohio (PUCO or Commission) under R.C. Chapter 4913. No changes are being proposed to these rules.

3. Please list the Ohio statute(s) that authorize the agency, board or commission to adopt the rule(s) and the statute(s) that amplify that authority.

These rules are being submitted in response to R.C. 111.15(B) and 106.03(A), which require all state agencies to conduct a review, every five years, of their rules and to determine whether to continue those rules without change, amend the rules, or rescind them.

The statutory authority for the Commission to adopt the rules in Ohio Adm.Code Chapter 4901:1-2 is found in R.C. 4913.45.

4. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?

If yes, please briefly explain the source and substance of the federal requirement.

The rules in Ohio Adm.Code Chapter 4901:1-2 qualify as a state damage prevention program pursuant to federal law, 49 U.S. Code Sec. 60134. As such, Ohio is eligible for federal grant monies that are used to assist with offsetting the costs of operating the gas pipeline safety program in Ohio. If Ohio does not have an eligible state damage prevention program, the state would be ineligible for such federal funding.

5. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

These rules do not exceed any federal requirement.

6. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

The purpose of this chapter is to establish protection for underground utility facilities and the processes and procedures for the operations of the Underground Technical Committee in accordance with R.C. Chapter 4913.

7. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

The Commission will measure success of these regulations by the lack of damage to underground utility facilities as well as the degree, or the lack thereof, by which the Underground Technical Committee and the PUCO undertake enforcement actions against designers, developers, and excavators with the goal of reducing the incidents involving underground utility facilities.

8. Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931?

If yes, please specify the rule number(s), the specific R.C. section requiring this submission, and a detailed explanation.

No, not applicable.

Development of the Regulation

9. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

If applicable, please include the date and medium by which the stakeholders were initially contacted.

The Commission conducted a workshop via Webex on September 21, 2021, to receive feedback from interested stakeholders and the general public. The case number for the Commission's review of Ohio Adm.Code Chapter 4901:1-2 is 21-896-AU-ORD. The entry providing notice of the workshop was served upon the Electric-Energy, Gas-Pipeline, Telephone, and Water industry service lists as well as on all regulated electric distribution companies, regulated gas and natural gas companies, all incumbent local exchange companies, the Ohio Gas Association, the Ohio Oil and Gas Association, the Ohio Petroleum Council, the Ohio Telecom Association, the Ohio Cable Telecommunications Association, the Ohio Utilities Protection Service, and other interested stakeholders.

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10. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

No stakeholders provided comments at the workshop.

11. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

No scientific data was provided or considered. Rather, the rules in this chapter were adopted to fulfill the requirements of the General Assembly as adopted in the Ohio Revised Code. In reviewing this chapter for any required amendments, the Commission took into account feedback from stakeholders and the general public.

12. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

No alternative regulations were considered. The PUCO is directed by statute to establish rules concerning the protection of underground utility facilities.

13. Did the Agency specifically consider a performance-based regulation? Please explain.

Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.

No performance-based regulations were considered. The rules contained in Ohio Adm.Code Chapter 4901:2-22 are primarily regulatory in nature and are required by the Ohio Revised Code.

14. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

The PUCO has widely publicized notice of the consideration of these rules to those individuals involved with underground utility facilities, as well as other organizations and interest groups. The PUCO has reviewed other Ohio regulations and found no duplicate, nor has a duplicate regulation been identified by any stakeholder.

15. Please describe the Agency’s plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

The PUCO conducted a remote workshop on September 21, 2021, to receive feedback from interested stakeholders and the general public. Next, the Commission has issued an entry that sets forth the PUCO staff’s recommendation of no changes to these rules, and stakeholders then can file written comments and reply comments. Finally, following the comment period specified in the entry, the PUCO will issue a Finding and Order adopting the rules. All potential stakeholders will be notified that this chapter is under review by the PUCO and they will be provided an opportunity for feedback concerning the rules in this chapter. Thus, stakeholders will have the opportunity to express whether the proposed rules will be applied consistently and predictably.

Adverse Impact to Business

16. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

a. Identify the scope of the impacted business community; and

The scope of the business community impacted by Ohio Adm.Code Chapter 4901:1-2 includes designers, developers, excavators, electric, gas pipeline, and telecommunication utilities employing underground utility facilities.

b. Identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance,); and

The proposed rules impact the identified business community in terms of employer time for compliance and the safe operation of excavation activities to ensure no damage to underground utility facilities.

c. Quantify the expected adverse impact from the regulation.

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a

“representative business.” Please include the source for your information/estimated impact.

The anticipated adverse impact should be minimal because the underground utility community should already be operating in accordance with the standards. Moreover, the impact to the underground utility community by these rules is no greater than required by authorizing state law. To the extent that the PUCO receives comments that the adverse impact of these regulations is beyond the statutory authority and likely to be significant, the PUCO will consider revisions to address such concerns.

17. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

The PUCO does not make such a determination because the purpose of this chapter is to implement R.C. Chapter 4913 as required by the General Assembly. It is notable that the underground facility community had no comments at the public workshop, nor has there been any indication from stakeholders that the rules in this chapter are particularly onerous.

Regulatory Flexibility

18. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

No. However, PUCO staff will work with regulated entities to assist them with the applicable requirements and provides guidance on how to achieve compliance.

19. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

The Underground Technical Committee and the PUCO do not assert fines and penalties for paperwork violations. R.C. 4913.20 provides a list of factors that the Underground Technical Committee and the PUCO must consider before asserting any statutorily authorized fines and penalties pursuant to R.C. 4913.15 and R.C. 4913.16. In most instances, the initial remedy for damaging an underground utility facility is a penalty consisting of additional training for involved staff. Monetary fines are rarely the initial recourse and are only implemented should a party fail to comply with the supplemental training requirement. Monetary fines are only imposed when an entity demonstrates a history of failing to comply with the underground

utility protection laws or when the damage to underground utility facilities result in death, serious injury, dismemberment, or a significant threat to public safety.

Additionally, parties that have had a penalty or fine imposed upon them have the due process right to seek reconsideration with the PUCO pursuant to R.C. 4913.25 and then an appeal as of right to the Ohio Supreme Court pursuant to R.C. 4913.251.

20. What resources are available to assist small businesses with compliance of the regulation?

PUCO staff works with all entities to answer questions and provide guidance on how to achieve compliance with the underground protection laws and rules.

**This foregoing document was electronically filed with the Public Utilities
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in

Case No(s). 21-0896-AU-ORD

Summary: Entry directing that all interested persons or entities wishing to file comments or reply comments on Ohio Adm.Code Chapter 4901:1-2, rules regarding the protection of underground utility facilities, do so no later than November 24, 2021, and December 3, 2021, respectively electronically filed by Heather A. Chilcote on behalf of Public Utilities Commission of Ohio