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Rulemaking Hearing Rule(s) Filing Form

Rulemaking Hearing Rules are rules filed after and as a result of a rulemaking hearing (Tenn. Code Ann. § 4-5-205).

Pursuant to Tenn. Code Ann. § 4-5-229, any new fee or fee increase promulgated by state agency rule shall take effect on July 1, following the expiration of the ninety (90) day period as provided in § 4-5-207. This section shall not apply to rules that implement new fees or fee increases that are promulgated as emergency rules pursuant to § 4-5-208(a) and to subsequent rules that make permanent such emergency rules, as amended during the rulemaking process. In addition, this section shall not apply to state agencies that did not, during the preceding two (2) fiscal years, collect fees in an amount sufficient to pay the cost of operating the board, commission or entity in accordance with § 4-29-121(b).

Agency/Board/Commission:	Underground Utility Damage Enforcement Board
Division:	Investigations
Contact Person:	Aaron J. Conklin, Senior Counsel
Address:	502 Deaderick Street, 4 th Floor, Nashville, TN
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Revision Type (check all that apply):

- Amendment
 New
 Repeal

Rule(s) (ALL chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please make sure that ALL new rule and repealed rule numbers are listed in the chart below. Please enter only ONE Rule Number/Rule Title per row.)

Chapter Number	Chapter Title
1230-01-01	Definitions
Rule Number	Rule Title
1230-01-01-.01	Definitions

Chapter Number	Chapter Title
1230-01-02	Rules and Regulations of Practice and Procedure
Rule Number	Rule Title
1230-01-02-.01	Complaint of Alleged Violations of the Act
1230-01-02-.02	Investigations
1230-01-02-.03	Executive Committee Proceedings
1230-01-02-.04	Authorized Actions by Investigative Staff
1230-01-02-.05	Guidelines for Application of Penalties
1230-01-02-.06	Representation by Counsel
1230-01-02-.07	Proceedings Before a Hearing Officer
1230-01-02-.08	Notice of Hearing
1230-01-02-.09	Ex Parte Communications

1230-01-02-.10	Conflicts of Interest
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Chapter Number	Chapter Title
1230-01-03	Regulations for Utility Location and Excavation
Rule Number	Rule Title
1230-01-03-.01	White Lining Standards
1230-01-03-.02	Marking Standards
1230-01-03-.03	Exercise of Reasonable Care in Excavation Practices

Chapter Number	Chapter Title
1230-01-04	Rules and Regulations on Public Access to Meetings and Records
Rule Number	Rule Title
1230-01-04-.01	Public Records Requests
1230-01-04-.02	Public Access to Meetings
1230-01-04-.03	Public Comments

Place substance of rules and other info here. Please be sure to include a detailed explanation of the changes being made to the listed rule(s). Statutory authority must be given for each rule change. For information on formatting rules go to <https://sos.tn.gov/products/division-publications/rulemaking-guidelines>.

RULES
OF
UNDERGROUND UTILITY DAMAGE ENFORCEMENT BOARD

CHAPTER 1230-01-01
DEFINITIONS

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1230-01-01-.01 Definitions

- (1) Any term used in these rules that has been defined in T.C.A. § 65-31-102 shall have the meaning given to the term therein.
- (2) In addition, for the purpose of these rules, the following terms shall have the following meanings:
 - (a) "Act" means the Underground Utility Damage Prevention Act, T.C.A. §§ 65-31-101 *et seq.*
 - (b) "Board" means the underground utility damage enforcement board created by T.C.A. § 65-31-114.
 - (c) "Bore" or "Boring" means the creation of a horizontal hole beneath the surface of earth, pavement, or other materials without disturbing said surface, using directional drills, horizontal augers, or other equipment designed for such purpose.
 - (d) "Commission" means the Tennessee Public Utility Commission created by T.C.A. § 65-1-101.
 - (e) "Complainant" means the person initiating a complaint against another party for investigation and consideration by the Executive Committee.
 - (f) "Cross bore" or "Cross boring" means an intersection of one underground utility by another underground utility resulting in a direct connection between the services of each utility that disrupts the integrity of at least one of the intersecting underground utilities.
 - (g) "Executive Committee" means the executive committee of the underground utility damage enforcement board created by T.C.A. § 65-31-114(f).
 - (h) "Hand dig" or "hand digging" means any movement, placement, or removal of earth, rock, or other materials in or on the ground by use of non-mechanized tools or equipment, including, but not limited to, shovels, picks, post hole diggers, vacuum excavation or soft digging.
 - (i) "Hearing Officer" means the same as "Administrative Judge," as defined in T.C.A. § 4-5-102(1), and "Hearing Officer," as defined in T.C.A. § 4-5-102(4).
 - (j) "Investigative Staff" means the employee(s) of the Commission designated to investigate complaints pursuant to T.C.A. § 65-31-116(a).
 - (k) "Marking Standards" means the method by which an operator indicates the location of a facility in accordance with the guidelines adopted by the Board.

- (l) "Person" means any individual; any corporation, partnership, association, or any other entity organized under the laws of any state; any state; any subdivision or instrumentality of a state; and any employee, agent or legal representative thereof.
- (m) "Private Service Line" means an underground utility line or facility which is not owned by an operator and is not used by an operator to provide its utility services.
- (n) "Proceeding" means any complaint submitted for adjudication by the Executive Committee, including any contested cases resulting from a respondent's request for a hearing or the filing of a petition for enforcement by investigative staff, and any appeal of an order of a Hearing Officer.
- (o) "Respondent" means a person against whom a complaint is filed or against whom any relief is sought.
- (p) "Root Cause" means the primary reason for the occurrence of an event that constitutes an alleged violation of the Act.
- (q) "Safety Zone" means a strip of land at least four feet (4') wide, but not wider than the width of the utility plus two feet (2') on either side of an underground utility line or facility.

Authority: T.C.A. § 65-31-115(a)(1).

CHAPTER 1230-01-02
RULES AND REGULATIONS OF PRACTICE AND PROCEDURE

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1230-01-02-.01 Complaint of Alleged Violations of the Act

- (1) Any person may report an alleged violation of the Act by completing and submitting an electronic complaint, which can be found on the Commission's website.
- (2) Alleged violations must be reported to the Executive Committee within ninety (90) days of the person or entity becoming aware of the circumstances constituting the alleged violation.
- (3) Reports of alleged violations should include as much relevant information concerning the circumstances as possible, including, but not limited to, damage and/or incident reports, photographs, statements and other informational documents.

Authority: T.C.A. §§ 65-31-114(f)(1), 65-31-115 and 65-31-116.

1230-01-02-.02 Investigations

- (1) Upon receipt of a complaint alleging violation of the Act, Investigative Staff shall send notice of the complaint to the alleged violator requesting a written response within thirty (30) days. Written responses to complaints may be provided to Investigative Staff by U.S. Mail or other commercial shipping/delivery service, facsimile, or electronic mail ("email").
- (2) Investigative Staff shall conduct an investigation to gather and examine all relevant facts with regard to the reported alleged violation. The investigation may include, but is not limited to, records verification, teleconferences, photo documentation, informal meetings and other appropriate investigative methods.

- (3) Upon completion of the investigation, Investigative Staff shall provide its findings and recommendations to the Executive Committee or issue a notice of violation or citation as permitted by T.C.A. §§ 65-31-112, 65-31-116(b) and these rules.
- (4) Where a complaint was not timely submitted, or as otherwise authorized by the Executive Committee, Investigative Staff may administratively close the investigation without presentation to the Executive Committee for determination of whether a violation occurred.
- (5) Investigative Staff shall notify the Complainant of administrative closure, dismissal, or issuance of a citation in matters filed by the Complainant.
- (6) Investigative Staff shall notify the Respondent of administrative closure or dismissal of matters filed against such Respondent or shall send to the Respondent a citation in matters where the Respondent is found to have violated the Act.

Authority: T.C.A. §§ 65-31-114(f)(1), 65-31-115 and 65-31-116.

1230-01-02-.03 Executive Committee Proceedings

- (1) The Executive Committee shall meet periodically to review complaints of alleged violations of the Act and the Investigative Staff's findings and recommendations relative to such complaints.
- (2) At any time prior to the consideration of a complaint by the Executive Committee, the person or entity that submitted the complaint may notify Investigative Staff of withdrawal of the complaint. Upon withdrawal of the complaint, Investigative Staff shall administratively close the matter.

Authority: T.C.A. §§ 65-31-114(f)(1), 65-31-115 and 65-31-116.

1230-01-02-.04 Authorized Actions by Investigative Staff

- (1) If, during the course of an investigation, Investigative Staff identifies a person, in addition to, or in the alternative to the Respondent of a filed Complaint who may be responsible for the violation alleged in the Complaint. In such instance, Investigative Staff shall issue a Notice of Alleged Violation ("NAV") to such person.
- (2) The Investigative Staff may issue a citation, as directed by the Executive Committee.
- (3) In matters where the root cause alleged is failure to give notice to the one-call service prior to excavation as required by T.C.A. § 65-31-106, the Executive Committee may authorize the Investigative Staff to issue a citation to the Respondent if the investigation finds uncontroverted evidence of such root cause, and further finds that the violation would be a first violation for the Respondent. In the alternative, Investigative Staff may present such matters to the Executive Committee for collective consideration. The Executive Committee may remove any individual matter presented for collective consideration to be considered on an individual basis.

Authority: T.C.A. §§ 65-31-112, 65-31-114(f)(1), 65-31-115 and 65-31-116.

1230-01-02-.05 Guidelines for Application of Penalties

- (1) The Executive Committee shall determine and assess penalties consistent with the provisions of T.C.A. § 65-31-112. When considering and determining the penalty for a violation, the Executive Committee may consider the nature, circumstances and gravity of the violation, the degree of the respondent's culpability, the respondent's history of prior violations, and such other factors as may be appropriate.
- (2) When considering the history of prior violations, the Executive Committee shall consider only the number of violations occurring in the eighteen (18) months immediately preceding the date of the alleged violation when considering the respondent's history of violations, provided, however, that the Executive Committee may consider a violation occurring more than eighteen (18) months immediately preceding the date of the alleged violation if the citation for such violation has not been satisfied.

Authority: T.C.A. §§ 65-31-112, 65-31-114(f)(1) and 65-31-115(a)(1).

1230-01-02-.06 Representation by Counsel

- (1) Any party to a contested case may be advised and represented, at the party's own expense, by a licensed attorney or attorneys.
- (2) Any party to a contested case may represent himself or herself, provided, however, that in the case of a corporation, limited liability company, or other entity recognized by law, the party may give testimony as an authorized representative of the entity, but shall have an attorney to provide legal representation for the filing of pleadings, examination and cross-examination of witnesses, and other actions that require a licensed attorney, as required by the statutes, rules, regulations and orders concerning the practice of law within the state.
- (3) Any out-of-state counsel shall comply with T.C.A. § 23-3-103(a) and Tenn. S. Ct. R. 19. The affidavit referred to in the Supreme Court Rule shall be filed with the Chair of the Board.

Authority: T.C.A. §§ 23-3-103(a), 65-31-112, 65-31-115(a)(1), 65-31-116; and Tenn. S. Ct. R. 19.

1230-01-02-.07 Proceedings Before a Hearing Officer

- (1) In any contested case brought under the Act and these rules, the Hearing Officer or Executive Committee may, on his or her own motion or on motion of any party, enter an order, pursuant to T.C.A. § 4-5-306, directing counsel for the parties and any unrepresented parties to appear for a conference or conferences prior to the hearing on the merits to consider:
 - (a) The simplification of issues for the hearing on the merits;
 - (b) The necessity or desirability of any amendments to filings;
 - (c) The possibility of obtaining stipulations, admissions of fact, and admissions of documents which may avoid unnecessary duplication of proof;
 - (d) The disposition of any pending motions;
 - (e) The steps which may be taken to expedite the disposition of the case or to facilitate settlement of the case, or any part of the case; and,
 - (f) Such other matters as may facilitate the just, efficient and economical disposition of the case including alternative resolution.
- (2) At least one of the counsel or other representative for each party participating in the pre-hearing conference shall have authority to enter stipulations, make admissions, or enter agreements with respect to any matters which the parties may reasonably anticipate may be considered.
- (3) The Hearing Officer shall enter an order which states the actions taken and all decisions made at the pre-hearing conference, and such order shall control the subsequent course of the case, unless modified by subsequent order.
- (4) In the discretion of the Hearing Officer, all or part of the pre-hearing conference may be conducted by electronic means, provided that each participant in the conference shall have an opportunity to hear and to participate in the proceeding while it is taking place.
- (5) In the absence of a pre-hearing conference, the Hearing Officer may issue a pre-hearing order based upon the filings to regulate the conduct of the proceedings.

Authority: T.C.A. §§ 4-5-306, 65-31-115, and 65-31-116.

1230-01-02-.08 Notice of Hearing

- (1) Except as may be otherwise provided by statute or by these rules, the Executive Committee and Hearing Officer shall give all parties reasonable notice of any hearing on the merits.

- (2) Except as may be otherwise provided by statute, by these rules, or by agreement of the parties, reasonable notice shall be given for any pre-hearing conference that may be held.

Authority: T.C.A. §§ 4-5-307, 65-31-115, and 65-31-116.

1230-01-02-.09 Ex Parte Communications

- (1) Unless otherwise authorized by statute, rule, regulation or order of the Board or Executive Committee, all members of the Executive Committee and any Hearing Officer assigned to adjudicate any matters concerning complaints submitted to the Executive Committee may not communicate, directly or indirectly, regarding any issue in the proceeding, while such proceeding is pending, with any person, including, but not limited to:
- (a) a party;
 - (b) a party's employee, attorney, or representative;
 - (c) a person known to act on behalf of a party;
 - (d) a person who has direct interest in the outcome of the proceeding;
 - (e) a person representing a third party advocating a certain outcome of the proceeding; or,
 - (f) a member of the Board who is not a member of the Executive Committee;

without notice and opportunity for all parties to the proceeding to participate in the communication.

- (2) Notwithstanding subsection (1) above, only to the extent not otherwise inconsistent with this rule, any person may make educational or informational communications that are not intended to persuade or advocate a position on an issue in a particular proceeding while the proceeding is pending, provided, however, that the Executive Committee members and Hearing Officer do not receive ex parte communications of a type that such person would be prohibited from receiving and do not furnish, augment, diminish, or modify the evidence in the record.
- (3) A member of the Executive Committee or a Hearing Officer assigned to adjudicate any matters concerning complaints submitted to the Executive Committee, who receives an ex parte communication in violation of this rule shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom such person received an ex parte communication. Any party desiring to rebut the ex parte communication shall be allowed to do so, upon requesting the opportunity for rebuttal within ten (10) days after notice of the communication.

Authority: T.C.A. §§ 4-5-304, 65-31-114(f)(1), 65-31-115, and 65-31-116.

1230-01-02-.10 Conflicts of Interest

The Board shall create a policy governing conflicts of interests that identifies procedures for identifying and disclosing conflicts of interest and establishes guidelines for participation in Board discussion and voting where conflicts of interest are identified and disclosed.

Authority: T.C.A. §§ 4-5-303, 65-31-115, and 65-31-116.

CHAPTER 1230-01-03
REGULATIONS FOR UTILITY LOCATION AND EXCAVATION

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SS-7039 (March 2020)

1230-01-03-.03 Exercise of Reasonable Care in Excavation
Practices

1230-01-03-.01 White Lining Standards

- (1) As required by T.C.A. § 65-31-106(b), the location of a proposed excavation or demolition shall be designated by marking such area with "safety white" color-coded stakes or paint, unless:
 - (a) The precise location of the proposed area can be ascertained by the operator or its agent based solely upon the street address from a one-call service locate ticket;
 - (b) The precise location of the proposed area can be ascertained by the operator or its agent from a one-call service location ticket that references a driveway or other easily identifiable point on the identified property;
 - (c) The precise location of the proposed area can be ascertained by the operator or its agent from a one-call service location ticket that identifies the property as being located on a street or road between two designed intersections of the street or road and two cross streets or roads; or
 - (d) The person responsible for excavation or demolition and all operators with underground facilities in the proposed area of excavation have had a meeting prior to the commencement of excavation or demolition for the exchange of information on the location of the proposed area.
- (2) Where the proposed area described in the one-call service location ticket is not consistent with, or is in contradiction to, the area designated by white line markings, the operator shall mark the area described in the one-call service location ticket, or if deemed necessary, contact the person responsible for the excavation or demolition to resolve such conflict or contradiction.

Authority: T.C.A. §§ 65-31-106(b) and 65-31-115(a)(1).

1230-01-03-.02 Marking Standards

- (1) The Board hereby adopts the Uniform Color Code and Marking Guidelines as found in Common Ground Alliance, *Best Practices: The Definitive Guide for Underground Safety and Damage Prevention*, Ch. 4, Locating and Marking, and Appx. B (Ver. 17.0, March 2020), as may be amended from time to time, and incorporates such standards as if stated herein verbatim.
- (2) No local, county, or municipal governing body shall adopt, by resolution or ordinance, any color code and/or marking guidelines that are contrary to T.C.A. § 65-31-108 or this rule.
- (3) An operator is not required to mark a Private Service Line. The marking of a Private Service Line is the responsibility of the person who owns the Private Service Line, who shall bear any expense for marking the Private Service Line.

Authority: T.C.A. §§ 65-31-108(a) and 65-31-115(a)(1).

1230-01-03-.03 Exercise of Reasonable Care in Excavation Practices

- (1) An excavator shall exercise reasonable care to avoid damage caused by an excavation or demolition within the safety zone.
- (2) In the exercise of reasonable care, an excavator shall take actions, which shall include, but are not limited to:
 - (a) Planning excavation or demolition to avoid damage to and minimize interference with underground utilities in and near the excavation area;
 - (b) Maintaining a clearance between the underground utility and the cutting edge or point of any mechanized equipment, taking into account the known limit of control of such cutting edge or point, as may be reasonably necessary to avoid damage to such utility;

- (c) Providing such support and protection for underground utilities in and near the construction area, including during backfill operations, as may be reasonably necessary for the protection of such utilities; and
 - (d) Installing each utility, regardless of the use or material, with sufficient clearance to permit the maintenance of existing utilities and to protect against damage to existing utilities.
- (3) In performing trenchless excavation or boring, reasonable care shall include, but is not limited to:
- (a) Visually inspecting the planned excavation path for structures indicating the presence of underground utilities;
 - (b) When possible, contacting utility company directly and review maps or drawings to verify underground utility locations;
 - (c) Reviewing surface markings and compare to other information to identify any unmarked or mis-marked utility;
 - (d) Hand digging test holes or "pothole" and use other safety precautions to identify the location and depth of utilities in the drill path; and
 - (e) Drilling at a pace that is slow enough to permit tracking device(s) to detect drill line deflections or large obstructions.
- (4) The Board further adopts the best practices for excavation as stated in Common Ground Alliance, *Best Practices: The Definitive Guide for Underground Safety and Damage Prevention*, Ch. 5, Excavation, and Appx. D (Ver. 17.0, March 2020), as may be amended from time to time, and incorporates such standards as if stated herein verbatim; provided, however, that the Common Ground Alliance Best Practices shall be read in conjunction with Tennessee law and United States law. Where the Common Ground Alliance Best Practices conflicts with state or federal law, the state or federal law shall serve as the controlling authority.

Authority: T.C.A. §§ 65-31-108, 65-31-110, and 65-31-115(a)(1).

CHAPTER 1230-01-04
RULES AND REGULATIONS ON PUBLIC ACCESS TO MEETINGS AND RECORDS

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1230-01-04-.01 Public Records Requests

- (1) Pursuant to T.C.A. § 10-7-503(g), the purpose of the following public records rule is to provide timely and efficient access to public records of the Board while at the same time preserving the confidentiality and protection of records or information as provided under state and federal law.
- (2) The Tennessee Public Records Act provides that all state public records shall, at all times during regular business hours, be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.
- (3) Through the Public Records Request Coordinator identified in this Rule, the Board shall timely and efficiently provide access and assistance to persons requesting to view or receive copies of public records. No provisions of this Rule shall be used to hinder access to open public records. However, the integrity and organization of public records, as well as the efficient and safe operation of the Board, shall be protected as provided by current law. Questions about these Rules should be addressed to the Board's Public Records Request Coordinator or to the Tennessee Office of Open Records Counsel ("OORC").

- (4) The Board, having been established within the Commission by T.C.A. § 65-31-114(a), hereby adopts the Commission's Rules on Access to Public Records Held By the Commission, Tenn. R. & Regs. 1220-01-04-.01 *et seq.* and incorporates said rules as if restated verbatim herein.

Authority: T.C.A. §§ 10-7-503, 65-31-114 and 65-31-115(a)(1).

1230-01-04-.02 Public Access to Meetings

- (1) The Board shall comply with the Tennessee Public Meetings law, T.C.A. Title 8, Chapter 44.
- (2) The Board shall have a minimum of two (2) regular meetings each year as required by T.C.A. § 65-31-115(b)(2).
- (3) Special meetings may be called by the Board Chair or by a quorum of the Board.
- (4) Reasonable advance notice of a meeting shall be given to all Board members, unless all Board members agree to waive notice, or unless exigent circumstances require meeting with less notice.
- (5) Members of the Board may request items to be addressed on the Meeting Agenda of the Board. Such requests to present information to the Board during a regularly scheduled Board meeting shall be submitted in writing to the Board Chair and the Board's staff, at least fourteen (14) days prior to the meeting. Exceptions may be made in extraordinary circumstances at the direction of the Chair. All requests are subject to review and approval by the Chair.
- (6) Board staff shall keep a record of all regular meetings. The minutes shall be transcribed and presented for approval or amendment at the next regular meeting. The minutes or a true copy thereof, approved by the Board, shall be open to public inspection and maintained on the website for the Commission.
- (7) All regular meetings of the Board shall be open and public except for executive sessions as provided by the Tennessee Public Meetings law, T.C.A Title 8, Chapter 44.

Authority: T.C.A. §§ 8-44-102, 65-31-114 and 65-31-115(a)(1).

1230-01-04-.03 Public Comments

- (1) Members of the public may submit written comment on any matter before the Board or its Executive Committee by sending such comments to: Underground Utility Damage Enforcement Board, ATTN: Board Counsel, 502 Deaderick Street, 4th Floor, Nashville, Tennessee 37243, or via email to Damage.Prevention@tn.gov.
- (2) All meetings of the Board and its Executive Committee shall include a designated time for members of the public to comment. Public comment must relate to an item on the Board's meeting agenda or the general business of the Board. The Board Chair may establish a time limit for comment.

Authority: T.C.A. §§ 8-44-102, 65-31-114 and 65-31-115(a)(1).

* If a roll-call vote was necessary, the vote by the Agency on these rulemaking hearing rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)
Kevin Tubberville, Chairman	X				
Wayne Hastings, Vice Chairman	X				
Rob Arnold	X				
Earl Bolin	X				
Doug Burgess	X				
Bill Hollin	X				
Eddie Hood	X				
Kevin Kruchinski	X				
Scott Niehaus	X				
Bob Pitts	X				
Kevin Raley	X				
Steve Raper	X				
Bill Turner	X				
Vacant					
Vacant					
Vacant					
Vacant					

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Underground Utility Damage Enforcement Board on 03/10/2021 and is in compliance with the provisions of T.C.A. § 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on: 11/04/2020

Rulemaking Hearing(s) Conducted on: (add more dates). 12/22/2020

Date: 03/11/2021

Signature: 

Name of Officer: Aaron J. Conklin

Title of Officer: Senior Counsel, Tennessee Public Utility Commission

Agency/Board/Commission: Underground Utility Damage Enforcement Board

Rule Chapter Number(s): 1230-01-01, 1230-01-02, 1230-01-03, 1230-01-04

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.


Herbert H. Slatery III
Attorney General and Reporter

5/25/2021
Date

Department of State Use Only

Filed with the Department of State on: 6/8/2021

Effective on: 9/6/2021



Tre Hargett
Secretary of State

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JUN 08 2021

Secretary of State
Division of Publications

Public Hearing Comments

One copy of a document that satisfies T.C.A. § 4-5-222 must accompany the filing.

See attached.

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rule making process, all agencies shall conduct a review of whether a proposed rule or rule affects small business.

The proposed rules will impact small utilities with underground utility facilities and that engage in excavation practices. In addition, small contractors and excavators that engage in excavation activities and entities that engage in utility location practices. The rules provide clarity to the processes and procedures of the Underground Utility Damage Enforcement Board. The rules do not conflict with any federal, state, or local government rules and it is not anticipated that these rules would increase reporting, recordkeeping, or other administrative costs relative to existing statutory requirements.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (<http://publications.tnsosfiles.com/acts/106/pub/pc1070.pdf>) of the 2010 Session of the General Assembly.)

The proposed rules are not anticipated to have an impact on local governments.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

- (A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

The proposed rules are new rules which constitute the initial set of rules promulgated by the Underground Utility Damage Enforcement Board (Board). These rules seek to provide clarity to operations and procedures before and within the Board. The Board enforces the Underground Utility Damage Prevention Act, T.C.A. § 65-31-101 *et seq.* (the Act), primarily through the issuance of citations for violations of the requirements of the Act. These rules provide definition and clarity regarding certain excavation types, guidelines for marking of underground utilities and the exercise of reasonable care in excavation practices, the investigations process from receipt of complaint to consideration by the Board's Executive Committee, considerations for the application of penalties, and contested case procedures. These rules also address procedures for submitting public records requests, attending open meetings, and submitting public comment via writing or during a Board meeting. These rules are necessary to facilitate the orderly operation of the Board in protecting the safety of the public, excavators, utilities and their underground facilities, and the services provided to utility customers.

- (B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

T.C.A. 65-31-115(a)(1) gives the Board the power and authority to promulgate rules "for the conduct of the affairs of the board." In addition T.C.A § 65-31-108(a)(2) authorizes the Board to adopt rules, consistent with the guidelines established in the statute, concerning "best practices for uniform color code and marking" of underground utilities.

- (C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

These proposed rules impact utilities, excavators, building and demolition contractors, private utility locator entities, the one-call notification service, state and local governmental entities that have underground utility facilities or engage in excavation activities, and individuals who may engage in excavation activity. Each of these stakeholder groups are represented in the membership of the Board and has been involved in the Board's process for adoption of these rules. None of these groups have urged rejection of these rules. Certain persons and groups have provided comments supporting and offering recommendations to improve the procedures and guidelines set forth in the rules.

- (D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule or the necessity to promulgate the rule;

N/A

- (E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars (\$500,000), whichever is less;

No changes to state or local government revenues or expenditures are expected as a result of promulgation of these rules.

- (F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Aaron J. Conklin, Senior Counsel

- (G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Aaron J. Conklin, Senior Counsel

(H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

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(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

N/A

TENNESSEE UNDERGROUND UTILITY DAMAGE ENFORCEMENT BOARD



Tennessee Public Utility Commission
502 Deaderick Street, 4th Floor
Nashville, TN 37243-0001

MEMORANDUM

From: Aaron J. Conklin, TPUC Senior Counsel

RE: Tenn. Code Ann. § 4-5-222
Public Hearing Comments
Rule Chapter Numbers 1230—01-01, 1230-01-02, 1230-01-03, 1230-01-04
UUDEB Docket No. 20-0001

Date: March 10, 2021

The Tennessee Underground Utility Damage Enforcement Board (Board) filed its Notice of Rulemaking Hearing with the Secretary of State on November 4, 2020 and held a rulemaking hearing on the proposed rules on December 22, 2020. Before the hearing, the Board issued a Notice requesting written comments on the proposed rules and received comments from three parties. One of the parties participated in the public hearing and provided information concerning submitted written comments. No other person or party provided comment at the public hearing. In satisfaction of T.C. § 4-5-222, the substance of the comments and response of the Board thereto are provided as follows:

1. A commenter suggested that the terms “operator” and “utility” be defined in the Rule 1230-01-01-.01, the definition section of the rules and that the definition should either incorporate or quote the definitions of these terms as found in T.C.A § 65-31-102. The Board noted that this rule already contains language in paragraph (1) that incorporates the terms and definitions found in T.C.A. 65-31-102. The terms defined in this rule generally are not duplicative of terms defined in that statute. Therefore, the Board declined to amend the rule as suggested, finding that the suggested incorporation was already present in the rule.

2. A commenter suggested that the definition of “Private Service Line” in Rule 1230-01-01-.01(j) be amended to have the ownership of the facility be determinative rather than the location of the facility. The commenter provided the following suggested definition: “‘Private Service Line’ means an underground utility line or facility which is not owned by an operator and

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www.tn.gov/tpuc/divisions/uudp-underground-utility-damage-prevention

is not used by an operator to provide its utility services.” The Board found that this suggestion was well taken and adopted the proposed definition.

3. A commenter sought clarification on whether Rule 1230-01-02-.04 concerning authorized actions by investigative staff would allow an investigator to initiate a complaint against an additional or alternate party if the investigation revealed violations by such additional or alternate parties. Legal staff provided an explanation of the Board’s current practice and procedure embodied in the proposed rule. Following the explanation, no changes to the rule were sought or requested. Therefore, the Board took no further action on the comment.

4. A commenter questioned whether limiting the consideration of the history of prior violations to eighteen (18) months when assessing a penalty, as described in Rule 1230-01-02-.05(2), is consistent with the Executive Committee’s authority under the enabling legislation. The Board rejected amendment of this rule. The Executive Committee has developed the eighteen (18) month “look back” as a matter of policy in its consideration on penalty assessments. This policy was developed after a study of similar look back procedures for Boards with similar enforcement authority in other states. Further, the adoption of the look back provision by rule provides notice to potential violators of a potential enhancement factor when considering penalties. Finally, the Board determined that the look back provision is not inconsistent with the penalty assessment authority granted to the Executive Committee by the enabling statutes.

5 A commenter sought clarification on whether Rule 1230-01-02-.09(1) concerning ex parte communications would impact incoming contacts Tennessee 811 receives seeking advice concerning a situation where the caller does not disclose the matter concerns a complaint filed against the caller. Legal staff provided suggestions on responding to inquiries and under what circumstances disclosure may be required. Following the explanation, no changes to the rule were sought or requested. Therefore, the Board took no further action on the comment.

6. A commenter suggested that Rule 1230-01-02-.09 concerning ex parte communications should not be adopted. The commenter urged that the work of the Executive Committee is mostly investigative and does not involve contested cases. As such, the rule as proposed would broaden the application of the prohibitions in the Uniform Administrative Procedures Act, which limits the prohibition to contested case matters. The Board rejected the suggestion that the rule not be adopted and that the rule would expand application beyond the statute. T.C.A § 65-31-116(a) directs the Executive Committee to request that complaints be

investigated by a designated employee of the Tennessee Public Utility Commission (TPUC). These complaints involve parties whose interests are opposed, a complainant and a respondent. The Executive Committee does not itself conduct the investigation and have conversations with the parties, but rather, determines whether a violation occurred and what penalty to assess to violations based upon the investigation conducted by designated TPUC staff. The Executive Committee also serves as the adjudicative panel in matters appealed from a Hearing Officer's initial order according to T.C.A. § 65-31-116(d). Therefore, upon the filing of a complaint, the rule is necessary to protect the exercise of adjudicatory authority by the members of the Executive Committee.

7. A commenter sought clarification on an early draft of Rule 1230-01-02-.03 concerning conflicts of interest that predated the rule presented for the rulemaking hearing. The previous draft would have had a negative impact on Board discussions and deliberations since the Board is comprised of members of stakeholder groups and organizations. As a result of the comment, the rule as presented to the Board for approval to submit to rulemaking hearing directs the Board to adopt a policy concerning identifying and disclosing conflicts of interest and guidelines of participation in discussion and voting where such conflicts are identified and disclosed.

8. A commenter suggested that Rule 1230-01-03-.01 were issues of concern within the Contract Locator (*see* T.C.A. § 65-31-102(5)) industry. A commenter from the Contract Locator industry similarly commented on this rule, suggesting that a draft of the rule containing a requirement that a utility mark underground facilities within fifty feet (50') of white line markings be reduced to ten feet (10') or fifteen feet (15'). The Board found that the language contained in paragraph 1 was derived from the statute and required no amendment. The Board deleted the paragraph concerning the marking of underground facilities in relation to white line marks, as this subject is best addressed in the Common Ground Alliance, *Best Practices: The Definitive Guide for Underground Safety and Damage Prevention*, Ch. 4, Locating and Marking, and Appx. B, (Ver. 17.0, March 2020) adopted and incorporated in Rule 1230-01-03-.02. Subsequent paragraphs were renumbered accordingly.

9. A commenter suggested an amendment to Rule 1230-01-03-.02(3) concerning marking standards to clarify the reference to Private Service Line. The commenter proposed the second sentence read, "The marking of a Private Service Line is the responsibility of the person

who owns the Private Service Line who shall bear any expense for marking the Private Service Line.” The Board accepted the recommendation and amended the language as suggested.

10. A commenter suggested that the term “hand digging,” which is included in the definitions rule proposed, be included in the reasonable care procedures delineated in Rule 1230-01-03-.03(2). Legal staff provided an explanation concerning the inclusion of the term in the definitions due to its use in the Common Ground Alliance, *Best Practices: The Definitive Guide for Underground Safety and Damage Prevention*, (Ver. 17.0, March 2020), which the Board adopted and incorporated in Paragraph 4 within the rule. The commenter also suggested referring to safe excavation techniques when excavating concrete and asphalt. Paragraph 2 is a restatement of requirements set forth in T.C.A. § 65-31-110; however, this statute does not reference hand digging. The Board did add a reference to hand digging in Paragraph 3. In addition, digging techniques for concrete and asphalt are covered in the best practices adopted in Paragraph 4.

11. A commenter suggested the addition of the phrase “as may be amended from time to time” to Rule 1230-01-03-.03(4) following the adoption of the Common Ground Alliance, *Best Practices: The Definitive Guide for Underground Safety and Damage Prevention*, (Ver. 17.0, March 2020) so as to allow for automatic incorporation of updates and changes to best practices. The Board accepted this suggestion and added this language to the rule.

12. A commenter provided a suggestion to include the penalty scale generally utilized by the Executive Committee in the rules. The Board determined that this subject is better left as a policy of the Executive Committee, allowing for flexibility as Executive Committee membership changes and individual case considerations demand.

13. A commenter suggested that the Board consider a rule to address procedural guidelines for circumstances where a subsequent complaint(s) is submitted against a respondent during the pendency of an initial complaint. The Board determined that this subject is better left as a policy of the Executive Committee, allowing for flexibility as Executive Committee membership changes and individual case considerations demand.

14. A commenter suggested inclusion of a rule that the Executive Committee will provide a record of the violation to other boards, or regulatory/enforcement entities (e.g., contractor licensing board or TPUC Gas Pipeline Safety Division) where a person or entity is found in violation of the Underground Utility Damage Prevention Act. The Board determined that

this subject is better left as a policy of the Executive Committee, allowing for flexibility as individual case considerations and citation compliance matters may demand.

Respectfully submitted,



Aaron J. Conklin, Senior Counsel
On Behalf of the Tennessee Underground Utility Damage Enforcement Board

Sworn to and subscribed before me this 11th day of March, 2021.



Notary Public

My Commission Expires: 3/8/2022

