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May 12, 2010

The Honorable Martin O'Malley  
Governor of Maryland  
State House  
Annapolis, Maryland 21401

**Re: Senate Bill 911**

Dear Governor O'Malley:

We have reviewed and hereby approve Senate Bill 911 for constitutionality and legal sufficiency. We write to address the legal nature of the Maryland Underground Facilities Damage Prevention Authority and its source of funding as well as to suggest that a minor title problem be fixed in next year's curative bill.

Senate Bill 911 is intended to modernize Maryland's underground facility damage prevention system and to maximize our opportunity to receive federal incentive grants under the federal Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006 (the "PIPES Act") for doing so. The PIPES Act grants the U.S. Secretary of Transportation the authority to make grants to a "State authority" "to assist in improving the overall quality and effectiveness of a damage prevention program ... if the State authority has ... in effect an effective damage prevention program ... or demonstrates that it has made substantial progress toward establishing ... a program" that contains the following elements:

- (1) Participation by operators, excavators, and other stakeholders in the development and implementation of methods for establishing and maintaining effective communications between stakeholders from receipt of an excavation notification until successful completion of the excavation, as appropriate.

- (2) A process for fostering and ensuring the support and partnership of stakeholders, including excavators, operators, locators, designers, and local government in all phases of the program.
- (3) A process for reviewing the adequacy of a pipeline operator's internal performance measures regarding persons performing locating services and quality assurance programs.
- (4) Participation by operators, excavators, and other stakeholders in the development and implementation of effective employee training programs to ensure that operators, the onecall center, the enforcing agency, and the excavators have partnered to design and implement training for the employees of operators, excavators, and locators.
- (5) A process for fostering and ensuring active participation by all stakeholders in public education for damage prevention activities.
- (6) A process for resolving disputes that defines the State authority's role as a partner and facilitator to resolve issues.
- (7) Enforcement of State damage prevention laws and regulations for all aspects of the damage prevention process, including public education, and the use of civil penalties for violations assessable by the appropriate State authority.
- (8) A process for fostering and promoting the use, by all appropriate stakeholders, of improving technologies that may enhance communications, underground pipeline locating capability, and gathering and analyzing information about the accuracy and effectiveness of locating programs.
- (9) A process for review and analysis of the effectiveness of each program element, including a means for implementing improvements identified by such program reviews.

From our review of the existing Maryland Miss Utility law, §12-101 *et seq.* of the Public Utility Companies ("PUC") Article, we believe that Maryland is currently in compliance with seven of these nine elements.<sup>1</sup> Because Maryland's existing program is run on a voluntary, cooperative basis by the effected industries, however, we currently lack a "State authority" that can be described as a "partner" or "facilitator" in the dispute resolution process, 49 U.S.C. §60134(b)(6), or that is currently "enforc[ing]" the damage prevention program through public education and civil penalties, 49 U.S.C. §60134(b)(7). Moreover, there is no state authority to apply for or receive the federal grants.

Senate Bill 911 rectifies this situation by creating a new Maryland Underground Facilities Damage Prevention Authority (also known by the euphonious acronym "MUFDDPA"). It is our view that under Maryland law the MUFDDPA is a state authority, *see Commission on Medical Discipline v. Stillman*, 291 Md. 390, 408-13 (1981) and, therefore, satisfies the requirements of the federal PIPES Act and improves the possibility that we will receive the incentive grants from the federal government.

It is not entirely clear, however, how the MUFDDPA's budget is to be operated. Proposed PUC §12-106(b) provides that "[i]t is the intent of the General Assembly that the [MUFDDPA] not be funded by appropriation from the State budget." Nevertheless, despite that unenforceable statement of legislative intent, the legislature did not make the MUFDDPA a non-budgeted agency (as it has with, for example, the Maryland Transportation Authority, the Injured Workers Insurance Fund, the Maryland Automobile Insurance Fund, and the Maryland Environmental Service) nor has it given MUFDDPA the authority to make expenditures without appropriations as is otherwise required by the Maryland Constitution. Md. Const., art. III, §§32, 52.

Instead of exempting MUFDDPA from the State's budget process (which the words of proposed PUC §12-106(b) would literally suggest), we recommend that you interpret this legislature's statement of intent to mean that it desires that MUFDDPA be operated in a manner that is "revenue neutral" to the State: that the revenue it receives from federal and state grants, filing and administrative fees, and other sources, proposed PUC §12-111(a), cover its operating costs. If the legislature intended something more or different, corrective legislation will be required next year to make MUFDDPA a non-budgeted agency.

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<sup>1</sup> We have reviewed the final report of a stakeholders group convened by the Maryland Public Service Commission and they appear to concur that Maryland's current system lacks only elements 6 and 7. *See Report of the Maryland State Underground Facilities "Miss Utility Law" Stakeholders Work Group*, available at <http://www.missutility.net/pdfs/MD%20Law%20Rewrite%20Minutes%20and%20Report%20-%20November%202009.pdf> (last visited March 16, 2010).

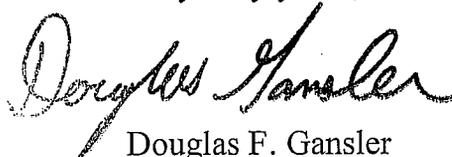
The Honorable Martin O'Malley

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Finally, we note that the function paragraph of the title of Senate Bill 911 (page 4, lines 21-26) states that §12-208 of the Public Utility Companies Article is being repealed and reenacted "without amendments." However, that section, which appears on page 23, is amended by the bill. This should be addressed in next year's curative bill.

Very truly yours,

A handwritten signature in cursive script that reads "Douglas F. Gansler".

Douglas F. Gansler  
Attorney General

DFG/DF/kk

cc: The Honorable John C. Astle  
The Honorable John P. McDonough  
Joseph Bryce  
Karl Aro