June 20, 2022

Indiana Utility Regulatory Commission
Attn: Jeremy Comeau
101 W. Washington Street
Suite 1500 East
Indianapolis, IN 46204

Re: 811 Law Strawman Draft Proposed Rule Comments

Dear Mr. Comeau:

I am writing on behalf of USIC Locating Services, LLC ("USIC") in response to the request of the Indiana Regulatory Commission ("IURC") for comments on potential revisions to 170 IAC 5-5. As you may know, USIC performs locating services for all types of utilities including gas, electric, telecommunications, sewer, and water. USIC has decades of experience with this work and, therefore, is well-suited to comment on the realities of performing utility locating services in the very dynamic construction industry. To ensure USIC's customers are satisfied with USIC's work, USIC is continually-focused on protection of underground facilities and the corresponding safety of the public and persons working around those facilities—the very purpose of Indiana's 811 law (the "Act").

USIC has no concerns regarding most of the proposed changes, which appear focused on clarifying certain aspects of the Act. However, one proposed change causes concern because it appears inconsistent with the Act, and is unworkable in the field, being: "*Adds a new section to define compliant methods for notifying excavators of a reschedule under IC 8-1-26-18(k), requiring an oral communication or a signed agreement for the reschedule*."

The Act itself has few provisions addressing the timing of tickets:

- Excavators must call in their tickets at least two days, but not more than twenty days, before they intend to commence excavation. IC 8-1-26-16(a)
- An excavator's notice is required to provide "the starting date, anticipated duration, and type of excavation or demolition operation to be conducted." IC 8-1-26-16(d)
- Tickets expire 20 days after they are called. IC 8-1-26-16(f)
- Generally, utilities must mark tickets within 2 full working days of receipt of a ticket. IC 8-1-26-18

The Act addresses situations where the facility operator (and in turn locating services like USIC) are unable to meet the 2-day marking deadline. And the Act does not require an affirmative agreement from the excavator but, rather, requires only that the operator "***notify*** the person responsible for the excavation or demolition of the operator's determination." IC 8-1-26-18(i). There is a difference between "notifying" an excavator versus requiring an affirmative agreement from the excavator. Thus, initially, the proposed

rule appears to constitute an expansion and amendment to the Act, as opposed to a clarification or implementation of it.

Beyond that, it is important that the IURC understand ***why*** a rule mandating how utilities or locating services must interact with excavators is highly problematic in the field. Communications in the field occur in numerous manners—jobsite conversations between locators and excavators (USIC's tenured technicians often have relationships with many of the well-established excavators), phone calls, voicemails, e-mail exchanges, confirming e-mails, notes in the tickets themselves, text messages, etc. Ticket extensions are routine, and often support the safety-focused purposes of the Act. But a documented "oral communication"—and even more so a "signed agreement"—are among the least common methods of documenting extensions.

There are countless innocuous reasons a ticket may need to be extended—to clarify the ticket scope, weather delays, other construction start time delays, and lack of labor availability. When excavators agree to those extensions (whether at their own request or at the request of the locating company), it would be irrelevant how that agreement is reached. More problematic, however, is that many excavators abuse the 811 system which, from their perspective, is a "free" service. By way of some examples USIC encounters on a regular basis:

- Rather than systematically submitting tickets in a manner that aligns with the excavator's actual anticipated construction schedule, excavators will use downtime, such as slow periods or rain days, to simultaneously call-in tickets for ALL their upcoming work then they simply get to that work whenever they can (and call in remark tickets if they cannot complete the work within 20 days);

- Excavators do not utilize the actual anticipated start date for the ticket response (IC 8-1-26-16(d)) but, instead, request 2-day responses for ALL of their tickets, which often results in USIC placing marks that are never used. This, in turn, requires remarks because the work is never started within the 20 day expiration period.

- Excavators routinely submit tickets that, on their face, would require 2-day responses on massive project tickets, such as miles-long fiber installs—where a 2-day turnaround is impossible;

- Excavators call in unnecessary remark tickets where the original ticket is not expired and the marks are still visible (this happens frequently on large projects and developments);

- Excavators submit tickets with unreasonably broad marking scopes, leaving USIC to attempt to either decipher the intent or try to mark the entire scope (we have seen excavators call in tickets for over a mile radius from an intersection, when the actual work will take place within a matter of a few feet);

- Excavators fail to white line ambiguous ticket scopes, even though it is required by IC 8-1-26-16(a); and

These abusive processes certainly do not apply to all excavators—many excavation companies are reputable long-standing businesses that work hand-in-hand with the utilities and locating services. But that does not alleviate the issues posed by the non-compliant excavators. Further, the excavators that most frequently abuse the system tend to be "fly by night" companies that are also the most difficult (often impossible) to contact regarding clarifications and reschedules. The excavators are rarely onsite at the time of the excavation start date as stated in the ticket, they do not answer or return phone calls or e-mails, and they certainly will not make themselves available to enter a "signed agreement" regarding the timing or scope of their tickets.

As such, requiring an "oral communication" or "signed agreement" leaves utilities and locating companies scrambling mark tickets within 2 days even though those tickets may not be excavated on for weeks (which increases the chances of a damage) and scrambling to timely mark tickets that may not be excavated on at all within the 20-day expiration period. It also leaves utilities and locating companies trying to self-ascertain the scope of unreasonably broad or vague tickets, with no recourse if the excavator is non-responsive. In the end, this does nothing to protect the facilities or the public, and it drives up the cost of utility services as the utility companies are forced to pay for unnecessary or inefficient marking services. It also does nothing to encourage excavators to stop these practices, most of which are avoidable if they would simply comply with the intent of the Act by accurately ascertaining their start dates and schedules, timely submitting tickets in advance, accurately describing the scope of the ticket, white-lining, and being cooperative on large scope project tickets.

For these reasons, USIC believes the IURC should not move forward with this aspect of the proposed rule and should not require utilities and locating companies to do anything more than what is required by the Act, which is to "***notify*** the person responsible for the excavation or demolition of the operator's determination" when tickets cannot be timely marked. USIC always has and will continue its best efforts to communicate with excavators proactively and meaningfully to fulfill the Act's safety-oriented goals. But additional communication mandates are unnecessary for reputable excavators and will only complicate the problems associated with excavators who abuse the 811 system.

If the IURC nonetheless elects to move forward with this aspect of rule, any rules should state that all modes of communication, including confirming e-mails, voicemails and text messages, and ticket notes (irrespective of whether the excavator acknowledges them, as only "notification" is required under the Act), will be considered adequate under the Act. If the IURC moves forward with this portion of the rule, it should also strongly consider corresponding regulations and/or enforcement actions against excavators that refuse to respond to communications, that request overly broad ticket scopes, that fail to white line, that call in tickets with inaccurate start dates, and/or that call in tickets but fail to begin excavation within the 20-day expiration period. Those activities overwhelm the 811 system and undermine its purposes, and abusive excavators should be held accountable.

USIC also has concerns about several of the issues that are being considered that are not part of the current draft. Since these are not part of the current draft, we have provided much more limited comments but can elaborate if the IURC elects to consider these further:

- *Should the rule address spacing of paint and flags*? USIC believes this should not be part of any rule. The goal of the Act is to mark facilities, so excavators are aware of their existence prior to excavation. If that requirement is met, minor spacing deviations should not potentially shift

damage liability (for example, whether a facility is marked at a 10 foot versus 8 foot internal should be irrelevant if the facility and path are identifiable). It is not feasible to expect technicians to take measurements between marks while working in the field, and site conditions can also impact this (standing water, piles of building materials, etc.). Locating technicians need the ability to exercise their best judgment in the field when encountering such conditions and place their markings in a manner that best serve the purposes of the Act. Further, many of USIC's customers have their own expectations, many of which are quite demanding, but could be undermined by such requirements.

- *Should the rule address the frequency of ongoing maintenance of the markings by the operator?* USIC believes this should not be part of any rule. Under the Act, facility operators (and accordingly locate companies) have no ongoing role—and no ongoing obligations—after responding to a ticket and marking the facility(ies). After marking, it is incumbent upon the excavator to ensure the marks remain visible until the expiration date or, alternatively, to call in another ticket if "the markings indicating the location of an underground facility have become illegible" IC 8-1-26-20(a). Again, this would not be a clarification of the Act but, rather, an addition to it—and would shift the excavator's responsibilities to the utilities.

Thank you for your consideration of these comments.

Respectfully,

David T. Parker

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