

WHITE PAPER

**DESIGN PROFESSIONALS
AND
UNDERGROUND UTILITIES**

Avoiding Unnecessary Liability Risks

by

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INTRODUCTION

Few construction activities are as fraught with uncertainty and peril as excavation in the vicinity of buried utilities. At a minimum, inadvertent construction damage to underground utilities can result in very expensive repair costs, as well as construction delays. Damage to utilities can also result in serious injury and/or loss of life, as well as catastrophic property damage.

Frequently, the information available to engineers concerning the precise location of buried utilities is less than ideal. The duties of design professionals in dealing with underground utilities arise from a variety of sources. These duties include:

- Duties imposed by local and federal law;
- Duties assumed by contract;
- Duties sought to be imposed by utilities;
- Duties assumed by conduct during design, construction administration, and observation.

It is imperative that design professionals understand the various sources of duty, including the requirements of local jurisdictions. Legal duties vary widely from jurisdiction to jurisdiction. For example, in some states, it is legally sufficient for the owner, acting through its design professional, to simply **note the existence** of underground utilities in the area of the proposed excavation on plans and specifications. However, in a minority of jurisdictions, the engineer may be obligated to seek out highly specific utility location information and to include this information on project plans and specifications.

The law also imposes a host of obligations on utility owners and contractors to prevent damage to underground utilities. Design professionals working in this area need to understand the full constellation of duties that apply to all participants in the construction process: the owner, the design professional/engineer, the contractor and the utility owner.

This paper will examine some of the issues that confront engineers when a project involves construction activity near underground utilities. This discussion will include a review of the regulatory framework surrounding work in proximity to utilities, as well as contractual considerations on the allocation of duties and responsibilities within the regulatory framework.

We urge every design professional to consult with counsel in the jurisdiction where the project will be located to fully understand the legal duties that may be involved in the specific scope of work. We also caution that since this area is in constant flux, design professional firms frequently review their practices and their contract forms.

SUMMARY OF RECOMMENDATIONS

The engineer will most typically encounter underground utility problems in one of two settings: during the design stage, and when providing on-site services during construction. Each of these roles carries unique risks and a concomitant need for the engineer to be aware of obligations

required under the law or by contract. The following is a list of recommendations that summarize the points addressed below:

- Know the law in the jurisdiction where the project will be constructed. Typically most state statutes impose duties only on excavators and utility owners, but not always – some jurisdictions place a duty on the design professional or on the owner, which, in turn, may result in a pass-through duty on the engineer.
- The owner’s duty to indicate the existence of underground utilities on plans and specifications will typically fall to the engineer. Be familiar with the specific notation requirements mandated in the jurisdiction where the project is located.
- Limit liability exposure in coordinating design work with utility owners.
- Disclaim responsibility to utility owners to protect underground utilities during construction.
- Provide clear notice to contractors in bidding and construction documents of the existence of underground utilities, and the contractor’s need to coordinate with the utility owners and to take all steps required by law to protect underground utilities from excavation damage.
- Do not inadvertently assume duties in the professional services contract.
- Do not inadvertently assume duties when providing construction observation services.

A. REGULATORY SCHEME

1. State regulation.

The vast majority of excavation projects in the vicinity of underground utilities are controlled by the laws of the state where the project is located. Most states have adopted a general legislative scheme to protect underground utilities from excavation damage. There may also be local ordinances involved, especially in larger jurisdictions.

A bibliography of state statutes is attached.¹ These statutes are typically enacted under the general police power held by the states. They frequently begin with a stated legislative goal of

¹ The bibliography of citations to underground utilities statutes for the 50 states is attached as an appendix to this paper. This bibliography is offered to indicate the breadth of the issues and the diversity of regulation. We cannot assure that this bibliography is exhaustive of all state or local law that may apply to a particular project. We again urge consultation with local counsel concerning the controlling law for any particular jurisdiction.

protecting the integrity of buried utilities and safeguarding the public welfare. Washington's preamble is representative:

It is the intent of the legislature in enacting this chapter to assign responsibilities for locating and keeping accurate records of utility locations, protecting and repairing damage to existing underground facilities, and protecting the public health and safety from interruption in utility services caused by damage to existing underground utility facilities.

RCW 19.122.010.

In the vast majority of jurisdictions, underground utility statutes focus on the contractor or excavator and the utility owner/operator. Typically, the thrust of the statutory scheme is to impose a duty on contractors to notify the utility owner prior to excavation (usually through some form of "one-call system"), and a parallel duty on the utility to provide location data and/or to respond to the excavation notice.

This shared responsibility makes sense. It recognizes that the contractor or excavator and the utility owner are the parties directly concerned with, and involved in, the work, and are in the best position to protect the buried utility from damage. Conversely, parties who are one step or more removed from the work, such as project owners and design professionals, have largely been omitted from most of the statutory schemes that address protecting buried utilities. Most states have elected to impose only limited duties on design professionals. For example, under the Washington statutory scheme, the owner is obligated to indicate the **existence** of underground utilities in the vicinity of the proposed excavation on the plans or specifications. This obligation is frequently assigned to the owner's design professional.

2. Specific statutory duties for engineers.

Some states have elected to impose more specific duties on engineers for construction projects planned near underground utilities. In these instances, it is critical for the engineer to be thoroughly educated as to the specific statutory requirements concerning engineers.² The discussion below is not intended to be an exhaustive survey of the law in all of the states that specifically impose duties on engineers, but is, instead, a representative sample of the types of duties imposed on, and the context in which such duties are assigned to, design professionals.

The states that impose statutory duties on engineers have generally done so in the context of project design. For example, Delaware has established the following requirements for engineers ("designer" per statutory definition):

It shall be the duty of each designer:

- (1) To contact the approved notification center and *obtain the identity* of operators whose facilities are listed, as required by § 803 of this title, in the area of the proposed excavation or demolition;

² Those states are identified in the attached bibliography.

- (2) To obtain the information prescribed [elsewhere in the statute] from each operator identified as required by § 803(2) of this title;
- (3) To *show upon the drawing* the type of each line, derived pursuant to the request made as required in subsection (2) of this section, the name of the operator and telephone number of the approved notification center, and instructions to "notify the approved notification center not less than 2 working days, but no more than 10 working days, prior to the excavation or demolition activities."³

(Emphasis added).

The obligation to show utilities on the drawings is a far more significant requirement than the typical requirement of merely noting the **existence** of underground utilities in the area of the proposed excavation. If the underground utilities turn out to be in a place other than where they were **shown** by the engineer, the contractor, at a minimum, can be expected to bring a differing site condition claim. If the utilities were found other than where shown and damage were to occur, the engineer's liability exposure will be substantially increased. In jurisdictions with a legislative requirement to "**show**" underground utilities on plans and specifications, a specific disclaimer in the general conditions of the construction contract may be called for.

Among the most onerous set of duties imposed on engineers are those found in the New Mexico statute. This extensive statutory scheme place duties on the engineer similar to the duties typically placed on contractors. The range of duties extends from the design phase, through one-call notification, to excavation/construction work, and includes a duty to notify an owner of damage caused during excavation:

Every person *who prepares engineering plans for excavation* or who engages in excavation *shall*:

determine the location of any underground facility in or near the area where the excavation is to be conducted, including a request to the owner or operator of the underground facility to locate the underground facility; ... *plan the excavation to avoid or minimize interference or damage* to underground facilities in or near the excavation area; ... *provide telephonic advance notice* of the commencement, extent and duration of the excavation work to the one-call notification system operating in the intended excavation area, or the owners or operators of any existing underground facility; ... *immediately notify by telephone the owner of any underground facilities which may have been damaged or dislocated* during the excavation work⁴

(Emphasis added).

South Carolina assigns utility protection duties in the design phase to either the project owner or the design professional:

³ 26 Del.C. § 805

⁴ NMSA 1978 § 62-14-3

Prior to any excavation or demolition, the person financially responsible *or the architect, engineer or designer responsible for such activities* should consult with all the public utilities operating in the area and *cause a detailed plan to be drawn and furnished to the entity physically doing the excavation or demolition* that will show the location of all utilities in accordance with the provisions of § 58-35-80.⁵

(Emphasis added).

In certain jurisdictions, such as Virginia, the statutory scheme creates an ambiguous and, consequently, risky set of duties, by allowing, but not requiring, the engineer to perform certain tasks, if the engineer elects to engage in the notification process:

Each designer, who prepares drawings and plans for projects requiring excavation or demolition work, *may* notify the notification center and provide the center with the information required by § 56-265.18 and the designer's professional license number.

...

If a designer notifies the notification center to receive underground utility line information in accordance with § 56-265.17:3, *the designer shall*:

1. Indicate on the construction drawings, the type of underground utility lines, the horizontal location of these lines as provided by the operators, and the names of the operators of these lines;
2. Consider, when designing a project and preparing drawings therefor, the location of existing underground lines so as to minimize damage or interference with the existing facilities;
3. Indicate, on the construction plans or drawings, the designer ticket number and the notification center's toll-free number ...⁶

(Emphasis added).

This unusual scheme theoretically allows an engineer to avoid bearing the burden of the enumerated duties listed above (as well as others not cited here) merely by making an election not to interact with the utility notification centers in that state.

These are some examples of the types of duties and ways in which a few states have added obligations for design professionals. It is imperative that engineering firms be aware of what requirements are imposed in the jurisdictions where work is being performed. Depending on the duties that may be imposed by law, unique contractual protections may be necessary in both the

⁵ Code of Laws of South Carolina 1976 Annotated Title 58; § 58-35-40.

⁶ Va. Code Ann. § 56-265.17:1.

owner/design professional contract and in the general conditions of the construction contract. In those jurisdictions where there is ambiguity as to who bears the burden of locating and protecting underground utilities, to the extent permitted by the statutory scheme, these burdens should be allocated by contract.

3. Project owner duties that may transfer to the engineer.

Some states have adopted a scheme where a statutory or regulatory burden is placed on the project owner, but such duties become, in practical terms, a *de facto* duty on the engineer, even absent a contractual undertaking. For example, Ohio's underground utility statute imposes a number of duties on the project owner, which the typical owner will be unqualified and/or incapable of performing. One would expect such duties to normally fall to the design professional:

... [A]ny developer who is planning a project that will require excavation shall notify the protection service of the location of the proposed excavation site.

... Each utility that has any underground utility facilities in the area of the proposed excavation site shall notify the developer of the approximate locations and description of the utility's underground utility facilities located at the proposed excavation site ...

The utility shall determine if any relocation, support, or removal, or protective steps ... are required in order to prevent disturbance or interference with the underground utility facilities during excavation. The utility shall determine *whether it will permit the developer to make those adjustments* ...

... [T]he developer shall indicate the approximate locations of underground utility facilities either on or with the plans prepared for the project. *The developer shall include with the plans the names, addresses, and telephone numbers of utilities* ... In the case of an interstate hazardous liquid pipeline or an interstate gas pipeline, *the developer also shall include any special notification requirements.*

... [T]he developer shall provide the plans to the excavator before excavation begins. If the developer does not prepare written plans or have any written plans prepared, he shall otherwise provide the approximate locations, identifying information on the utilities, information on required adjustments, and any special notification requirements to the excavator before excavation begins.

... *The developer shall design the project taking into account the approximate location of existing underground utility facilities in order to prevent, as far as is practicable, disturbance or interference with those facilities.*⁷

⁷ R.C. § 3781.27 Baldwin's Ohio Revised Code Annotated.

Further muddling the issue, Ohio's statutory scheme goes on to allow for circumstances where some of these duties *may* be assigned to the designer, if one is retained, or may fall to the excavator.

... This section does not apply in the case of the owner of the types of real property ... *unless the owner employs a designer to make written plans for work that will involve excavation.* If the owner employs a designer, the designer shall contact the utility protection service and utilities that are limited basis participants ..., and shall include in or with the plans the information required The owner shall provide that information to the excavator.⁸

It is good contracting practice to recognize these ambiguities in the statutory scheme and to clearly allocate responsibilities between the participants in a unified and consistent manner. Cases arising out of damage to underground utilities can result in extensive finger pointing between the players after the damage has occurred. Good contracts can at the very least anticipate the risks and allocate these risks in a manner consistent with the statutory scheme.

However, there are statutory limitations on permissible risk allocation. For example, the Washington scheme provides:

Any clause in an excavation contract which attempts to allocate liability, or requires indemnification to shift the economic consequences of liability, different from the provisions of this chapter is against public policy and unenforceable. Nothing in this chapter prevents the parties to an excavation contract from contracting with respect to the allocation of risk for changed or differing site conditions.

RCW 19.122.040(3).

All contracts should be carefully reviewed for conformance with the applicable statutory scheme. We have included suggestions for good contracting practices below.

4. Federal mandates.

There is also a substantial body of federal law on protecting underground utilities. The federal scheme applies largely to the transportation of natural gas and petroleum products via underground pipelines. There is an important interplay between these federal laws and regulations and the various state schemes discussed above.

A series of recent catastrophic accidents arising out of excavation damage to oil and gas pipelines has led to Congress enacting recent amendments to the Pipeline Safety Act⁹. These federal legislative changes are having a direct impact on state regulatory schemes. For example, a new federal statute links federal grants to adoption by the states of pipeline/utility safety and notification programs and systems, such as some form of "one-call" system.

⁸ R.C. § 3781.28 Baldwin's Ohio Revised Code Annotated.

⁹ 49 U.S.C. § 60101 *et. seq.*

In allocating grants to State agencies under the pipeline safety laws ... the Secretary considers whether a State has adopted or is seeking to adopt a one-call damage prevention program in accordance with § 198.37. If a State has not adopted or is not seeking to adopt such program, the State agency may not receive the full reimbursement to which it would otherwise be entitled.

49 CFR § 198.35.

Notably, federal regulations focus exclusively on (1) excavators, (2) pipeline owners/operators and (3) one-call system operators. Federal regulations are silent as to the role of property owners and design professionals.

Federal regulations place the exclusive burden for notification of excavation activities near utilities on the contractor/excavator:

Excavators must be required to notify the operational center of the one-call notification system that covers the area of each intended excavation activity ...¹⁰

Likewise, federal regulations require states to impose duties on owners/operators of underground pipelines:

Operators of underground pipeline facilities participating in the one-call notification systems must be required to respond in the manner prescribed ...¹¹

Finally, federal regulations mandate that states adopt a punishment scheme for only three parties identified under the Pipeline Safety Act – excavators, pipeline owners and one-call operators:

Operators of underground pipeline facilities ... excavators and persons who operate one-call notification systems who violate the applicable requirements of this subpart must be subject to civil penalties and injunctive relief that are substantially the same as are provided under the pipeline safety laws

49 CFR § 198.37(h).

Thus, the federal framework focuses exclusively on utility owners and excavators -- and omits any burden placed on design professionals -- leaving it to the individual states to adopt additional duties for engineers, if so desired.

¹⁰ 49 CFR § 198.37(c).

¹¹ 49 CFR § 198.37(f).

B. CONTRACTING ISSUES

1. Guard against an assumption of a duty unless explicitly negotiated for and defined within the contract.

The majority of jurisdictions omit any mention of engineers/design professionals within the statutory schemes concerning underground utilities. In these jurisdictions, a key concern for the engineer is to avoid inadvertently assuming a duty not otherwise imposed by law, either through a contractual obligation or by taking some action that creates a duty.

Except in those jurisdictions which explicitly impose duties on design professionals concerning utilities, the engineer can avoid unnecessary liability risks by providing only those services required under the professional services contract with the owner. Careful consideration should be given to the scope of services negotiated for both the design and construction phases of the project. When a project includes work that may involve buried utilities, the engineer should be aware of this potential issue and mindful of precisely what services the owner expects in this regard when the scope of services is negotiated.

If an owner has a statutory duty to indicate the location of utilities on plans, to coordinate design with utility operators, or to deliver notice of a planned excavation to either the utility owner or a one-call service, and intends instead that the engineer perform these duties, the scope of these duties should be explicitly negotiated. The engineer should be aware of the statutory scheme in a given jurisdiction and if services beyond those required by law are requested by the owner, the engineer should know it and make a conscious choice as to what additional legal responsibilities will be assumed. The engineer should also make an informed choice as to what the assumption of the duty means in terms of actual performance requirements, as well as the potential liability the engineer may be assuming.

Washington's buried utility statute is typical of many jurisdictions in that it imposes statutory duties on the project owner. In practical terms, however, these duties may fall to the engineer, either through contractual assumption of the duty or by the constructive assumption of duties by performing tasks that effectively transfer the burden of complying with the statute from the owner to the engineer:

Project owners shall indicate in bid or contract documents the existence of underground facilities known by the project owner to be located in the proposed area of excavation.¹²

As a practical matter, the function of indicating utility locations is often assigned to the engineer by the owner in the professional services contract.

In practice, a great deal more is often required of the design professional. For very good reasons, determining the precise location of utilities by the engineer may be required to discharge the design function. For many projects, gathering and depicting buried utility data will be a necessity. The engineering profession has been struggling for a number of years to recommend

¹² R.C.W. 19.122.040(1).

standards of practice for these activities. See for example, ASCE's "Standard Guideline for the Collection and Depiction of Existing Subsurface Utility Data." This Standard includes a ranking system for the quality and anticipated accuracy of data that may be obtained regarding underground utilities, along with appropriate disclaimers to be affixed to project documents.

A design may not be able to be developed without locating the utilities and designing the new work around them. The failure to account for existing utilities as they relate to the new work may be an invitation for a differing site condition claim. Existing utilities can affect the design requirements for structures. In such circumstances, it is critical that the owner and the engineer clearly allocate responsibility for locating and protecting utilities during construction. If these issues are not expressly addressed in both the owner/engineer contract and in the construction contract, this intense level of involvement on the part of the engineer in locating utilities and showing them on plans and specifications can easily give rise to a claim that the engineer assumed the duties to protect the utilities.

Even if the engineer is required to locate utilities and to show them on plans and specifications, in most jurisdictions, the primary duty for protecting underground utilities from construction damage remains assigned by statute to the excavator and to the utility owner. The professional services contract between the owner and the engineer bears careful scrutiny in this context. Even though underground utilities in a given project area have been identified through survey or from data provided by the utility and the information has been added to the plans, the engineer can still limit its responsibility for protecting utilities in its contract with the owner and in the contract between the owner and the contractor.

The problem of assumed duties also arises during the construction phase of the project. Broadly worded contractual undertakings for inspection and construction observation services can lead to problems.

The same overly broad and vague clauses regarding inspection responsibilities that have given rise to so many claims against design professionals can be equally troublesome in the event a contractor damages underground utilities. This is especially the case if the contractor or excavator has not followed the carefully crafted requirements in the general conditions of the construction contract.

Clauses like the following should be avoided:

- Engineer shall... determine if such work is proceeding in accordance with the contract documents.
- Engineer shall exercise the utmost care and diligence in discovering and promptly reporting to the client any defects or deficiencies in the work.

Likewise, beware of overly broad and vague assumptions of duty:

- Provide coordination with the contractor. Communicate with the contractor to assure continuous exchange of information and to expedite solution of problems encountered in the work.

In this context, it is also advisable to avoid “stop work” authority if at all possible. It is not difficult to imagine the liability peril when a contractor is working near known utilities, and there is some question as to whether the means and methods employed by the contractor have placed the utility in jeopardy – especially when damage does in fact result.

Special care must be given to training the engineer’s inspectors as to the limits on the scope of inspection services. The line between “inspecting” and “directing” is easily crossed and, consequently, may result in a legal duty created by action where none was intended by contract or required by statute.

It is useful to bear in mind the duties which will always fall to either the excavator and/or the utility owner, as a checklist of duties the engineer should avoid assuming, either by contract or by performance:

- The duty on excavators to provide timely notice of the scheduled commencement of excavation to utility owners through a given region’s one-call system.
- The duty on the utility company to provide accurate information as to the location and orientation of its underground facilities by surface marking, including the use of mandated colored markings to depict the type of buried utility.
- The duty of the excavator to delay excavation until known utilities have been marked.
- The duty of the excavator to maintain markings once placed by the utility operator.
- The duty of the excavator to cease excavating if unidentified underground utilities are encountered.
- The duty of the excavator to use reasonable care to avoid damaging underground utilities, including the obligation to cease using mechanical excavation equipment when in close proximity to known utilities.
- The duty to determine the precise location of underground facilities which have been marked.
- The duty to plan the excavation in such a manner as to avoid damage to, or minimize interference with, underground utilities.
- The duty to provide adequate shoring, backfill and other physical support to protect underground utilities.

- The duty to immediately notify the utility owner of excavation damage and, where required, to take steps to mitigate damage and/or assist in repair.
- The duty to delay burying a damaged utility until it has been repaired to the satisfaction of the utility owner.

If the engineer participates in preparing the construction contract, it is imperative that the engineer and owner disclaim all duties imposed on, or assigned to the contractor/excavator in the general conditions of the construction contract. Further, the general conditions should include the obligations of the contractor/excavator to follow the law regarding protecting underground utilities. The following is offered as a sample clause intended to achieve this result:

The Owner has indicated the presence of underground utilities (underground facilities) known to be within the proposed areas of excavation on the Construction Plans that have been issued to all bidders. These known underground facilities have been identified by using available information provided by known utility owners. Providing this information to bidders fulfills all obligations imposed on the Owner and its Engineer by [*insert relevant state statutory provision*].

All further responsibilities to protect underground facilities, including those imposed by [*insert relevant state statutory provision*], are to be carried out by the Contractor in coordination with Utility owner(s). *By entering into this General Contract, Contractor warrants that he has reviewed and is familiar with the obligations on excavators imposed by [*insert relevant state statutory provision*].* Services provided by the Engineer during construction, including but not limited to engineering management and site inspection services, shall not impose any obligations on Owner or Engineer to:

- Locate utilities within the proposed areas of excavation.
- Notify utilities directly or through one-call locator services of excavations within the area of underground utilities.
- Inspect contractor excavations regarding protection of underground facilities from damage.
- Assure or assist contractors in complying with any additional requirements that may be imposed by utility owners.

Contractor shall be solely and fully responsible for compliance with all requirements imposed on excavators by [*insert relevant state statutory provision*]. Contractor shall be fully responsible to notify all utility owners of any changes or modifications to the Contract Plans that may affect excavations in the area of underground facilities. (Include general indemnity clause for any claims against Owner or Engineer from damage to underground facilities.)

In a circumstance where the project area is known to include an underground utility posing unique and high risks (such as natural gas and petroleum pipelines or high voltage cables) and/or with known special requirements sought by the utility owner, the special conditions to the owner/contractor contract could contain the following:

The Project Plans indicate the presence of a [*insert name/description of special utility*] within the proposed area of excavation. This pipeline is owned by _____. The owner can be contacted at: _____.

In addition to any requirements imposed by the General Conditions and by law, Contractor shall be fully and solely responsible for the following:

- Compliance with all requirements imposed by [*insert relevant state statutory provision*].
- Contacting and coordinating with the utility owner for any additional requirements imposed by the pipeline owner for excavations in the area of the pipeline.
- Compliance with all requirements imposed by the pipeline owner for protecting its pipeline.
- Notifying the pipeline owner of any changes in the Construction Plans, the Contractor's schedule for its work, or the Contractor's proposed or actual means and methods of construction that could have any impact on excavations in the vicinity of the pipeline.
- Site inspections and other Construction Management Services, provided by the Engineer to the Owner, shall not create any obligations on the Owner or the Engineer with regard to protecting the pipeline.

(Include express indemnity clause running from Contractor to Owner and Engineer for any claims arising out of damage to the pipeline.)

2. Obligations utility owners may seek to impose.

Frequently utility owners will have a list of concerns which they seek to have addressed by entities performing excavation work within their right-of-way. These concerns may be framed as "duties" or "requirements." In some instances, these concerns may mirror the statutory obligations on excavators already in place and, therefore, serve only as an additional reminder of the duties already imposed by law. In other instances, these concerns may impose new and additional obligations above and beyond those required under the law.

Examples of such duties may include:

- A demand that the Owner be required to coordinate project design with the utility owner.

- Technical specifications particular to the utility integrity concerns of the utility owner, such as minimum clearances for water, sewer and gas service line crossings.
- Specific requirements for cathodic protection.
- A demand that the Engineer submit final plans for “review,” “comment” and/or “approval,” of that portion of the project that will involve work in the utility right-of-way, or as concerns excavation in proximity to the utility.

Although coordinating project design with utility owners is inevitable and may also be good engineering practice, extreme care must be taken in “coordinating design” with utilities. Coordination of design can inadvertently result in assuming duties the utility owner may seek to impose on the engineer. The utility may have “design” and utility protection requirements that are far broader and more onerous than anything contained in the state statutory scheme.

Once these duties have been assumed by the engineer, they can extend into the construction period when coordination responsibility clearly should rest with the excavator, and not the engineer. For example, the utility owner may take the view that any change to design during construction that may affect the utility requires the utility owner’s approval. The contractor/excavator is in a far better position to deal with the utility owner during construction than is the engineer.

Effective communication with the utility owner can result in a better design and allay the utility’s concerns without creating unintended risks of liability. At a minimum, all communication with the utility owner should be in writing and state clearly the nature of the interaction and what is, or is not, agreed to. In particular, it may be wise to disclaim those duties and responsibilities that belong to the contractor, or to the utility itself. The engineer may want to include a disclaimer in any written communications with the utility owner relating to design documents review. The following clause is offered as an example of such a disclaimer:

This [design drawing] is being submitted to you for your consideration because the proposed work is proximate to underground utilities you own and maintain in the intended project area where excavation will be required. As project Engineer, we will endeavor to accommodate specific concerns you may have to ensure the integrity of your [*insert utility name*]. However, the Engineer assumes no liability or responsibility whatsoever for the duties imposed on the Utility owner or the excavator by law or regulation for the protection of underground utilities.

After the construction contract for this work has been let, all further communications regarding your underground utilities should be with the General Contractor. You should inform the General Contractor of any unique requirements to protect your utilities and any additional communications you may require regarding design or field changes for this project that may affect your

utilities. The Owner has notified the General Contractor of the existence of your underground facilities in the vicinity of this project.

Any additional notifications should be communicated directly from you to the General Contractor.

C. CONCLUSION

Damage to underground facilities is all too common – most engineers can readily call to mind a story involving some inadvertent damage to a buried utility. The results of these accidents can, in some instances, be catastrophic and, in almost every instance, very expensive to repair. To avoid, or at least minimize, the risks inherent in construction activity in proximity to underground utilities, an engineer must be aware of the legal obligations imposed on design professionals in the project jurisdiction. The engineer should then ensure that contractual duties include no more than is required by law, unless knowingly agreed to with the owner with full regard for the risks that are being assumed.

With good contract terms and adherence to sound practices, the risks of liability when damage to a buried utility does occur can be greatly reduced.¹³

¹³ This paper is not intended to constitute legal advice to any specific reader. Skellenger Bender strongly recommends that the design professional firm seek legal advice from its own attorney regarding the issues presented.