
**California Underground Facilities Safe Excavation Board
("Dig Safe Board")**

September 14, 2020

Agenda Item No. 16 (Action Item) – Staff Report

Dig Safe Board Fee Regulation

PRESENTER

Tony Marino, Executive Officer

SUMMARY

Following three months of discussion of the current fee regulation and improvements that can be made to it, the attached regulatory language provides flexibility to the regional notification (one-call) centers to assess the Board's fee either as a line item on the invoices they send to collect member dues or as separate invoices. Staff recommends that the Board authorize the commencement of rulemaking proceedings.

STRATEGIC PLAN

2020 Strategic Plan Objective: Continue Building a Foundation for Board Operations
Strategic Activity: Review of the Board's Fee Regulation

BACKGROUND

The Dig Safe Act of 2016 (SB 661, Chapter 809, Statutes of 2016)¹ created the Board and authorized it to obtain funding for its operational expenses from fees charged to members of California's two one-call centers (Gov't Code § 4216.16(b)).² To implement this statute, the Board on August 20, 2018 approved a regulation to require the one-call centers to assess the fee through their standard invoicing processes and collect it on the Board's behalf (Title 19, § 4010, California Code of Regulations).³

During the Board's June, July, and August 2020 meetings, the Board discussed issues that arose and information gleaned during staff's attempts to collect the regulatory fee from members who had not paid it, as well as possible solutions. Much of the discussion centered on whether the fee should be a line item on the one-call center member's invoices for membership dues, or if they should remain separate, as is the custom of both of the state's one-

¹ https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB661

² https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=4216.16.&lawCode=GOV

³ 19 CCR § 4010(b)(2), [https://govt.westlaw.com/calregs/Document/IC79205F948E049F395A4C532744BC5EA?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/calregs/Document/IC79205F948E049F395A4C532744BC5EA?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default))

call centers, DigAlert and USA North 811. The representative from USA North 811 suggested that the regulation be flexible, as while it is currently more convenient for the one-call centers to use two separate invoices, that may not always be the case.

DISCUSSION

Following the discussion at the August 2020 Board meeting, staff made several changes to the proposed regulatory language.

1. **Rearranged the requirements into two code sections.** To increase clarity, the language is now split into two code sections to make a distinction between information that one-call center members needed to know (related to how their fee was calculated and how to pay it) and what the one-call centers needed to know (in order to collect it).
2. **Adding definitions for “calculation year” and “billing year”.** To increase clarity, several definitions were moved out of Section 4010 (a) to separate the definition of the fee equation from the definition of its constituents. New definitions include that of “calculation year” and “billing year”. The dollar amount of “Board operational expenses” was removed from subdivision (a) to a new subdivision (e) for both clarity (as described above) and to allow the display of fee amounts for the time periods so that a reader could better see that the revenue requirement has changed.
3. **Clarifies to a member that their fee is remitted to the one-call center.** While this is implicit in the existing regulation, it has been made explicit here.
4. **Clearly defines the six-month transition period.** The transition from billing on a calendar to billing on a fiscal year requires a six-month transition period (January 1, 2022 to June 30, 2022). This period has its own “calculation year” (January 1, 2021 to June 30, 2021) and affordance to the one-call center for how to bill during that period if the call center wouldn’t normally send an invoice (4011(e)).
5. **Provides the one-call centers the option of using either a line item or a separate invoice for the fee.** This provides flexibility to the one-call centers. Should a one-call center elect to provide separate invoices for their dues and for the regulatory fee, those invoices would need to be sent at substantially the same time to reduce confusion for members at getting the second invoice.
6. **Requires the one-call centers to make reasonable efforts to make their members aware of balances and credits to their fee accounts.** This is in response to hearing from some members that they were not aware that they hadn’t paid all of their fees.
7. **Requires the one-call centers to invoice for a late fee and provide prior notice.** Following the offer from the one-call centers in the August meeting and followed up in their August 20 letter (**Attachment A**), the language would require the one-call centers to invoice for a late fee for an invoice unpaid after 90 days and requires a notification of the impending late fee no later than 30 days from that time.
8. **Allows the one-call centers to use the Board’s seal.** To add legitimacy to invoices provided by the one-call centers to their members, the regulation allows them to use

the Board's seal with language "*Use of the Dig Safe Board seal is authorized pursuant to Section 4011 of Title 19 of the California Code of Regulations.*"

The following provisions are preserved from the August draft language:

- Delay the billing year for an extra six months
- Require the Board to post member fee amounts on March 1 in advance of the July 1 billing year
- Bill only for new tickets instead of new, renewal, and remark tickets
- Reduce the drop in revenue requirement starting 2022 from \$3.2 million (\$7.0M→\$3.8M) to \$2.0 million (\$7.0M→\$5.0M)
- Require the one-call centers to provide fee and member data to the Board monthly and quarterly
- Require the one-call centers to remit fee revenue quarterly instead of semi-annually

RECOMMENDATION

Approve Resolution No. 20-09-02 authorizing the adoption of regulations to update fee regulations pursuant to the Dig Safe Act of 2016 and authorizing rulemaking proceedings.

ATTACHMENTS:

- A. Letter to Carl Voss from Ann Diamond and James Wingate, August 20, 2020*
- B. Draft Fee Regulations*
- C. Resolution No. 20-09-02*

Attachment A

August 20, 2020

California Underground Facilities Safe Excavation Board
Office of the State Fire Marshall
2251 Harvard Street, Suite 400
Sacramento, CA 95815

Re: Discussion of Dig Safe Board Regulatory Fee
Item 5 on Board's August 10, 2020 Agenda

Chairperson Voss and Members of the California Underground Facilities Safe Excavation Board:

During the August 10, 2020 Dig Safe Board (DSB) meeting, after much discussion about changing the DSB regulatory fee process, the regional notification centers said while this isn't what they want to do, as from the very beginning the centers wanted to provide the billing information of its members to the DSB, if they could continue to send separate invoices they would be in charge of sending the late notices and adding the 5% fee. There was an accusation that why did the centers say they could do it now but not before. Because we didn't want to do the billing in the first place.

Please be aware that the process was working for the most part after the initial shock of what is this bill and some logistic questions until April of 2020 when the DSB sent out an invoice with the 5% penalty to members who were past due. DigAlert only became aware of these letter as we got phone calls about it because the phone numbers on the letters voice mail was full or there was no answer. When discussions of transparency and sharing of information are brought up, it would have been nice for the DSB to give a heads up that these invoices were being sent. Before the centers sent the first DSB invoice, we provided a copy of the invoice to the DSB for approval. That's when we were told that we couldn't use their logo. DigAlert did not have all the information (total operational DSB expenses, total statewide billable tickets and the members billable tickets) on the first 2 invoices sent even though nothing was said about that information being omitted when the sample invoice was presented.

Once the centers knew that the DSB had sent out late fee invoices we asked which members received them and what the additional late fees were and who had paid them directly. We have not received this information even though we've asked for it since April. The reason the centers need this information is to update our invoices to include the late fee and to reconcile those that have paid directly to the DSB otherwise those members will still show on our end as being past due.

It is for these reasons the centers said they would take over all accounting for the DSB fees. Not that we want to, but we have to, to streamline the process and not confuse our members any further.

However, in taking over the sending of invoices and the follow up collections it must be pointed out that unlike regulated companies, the centers will not be taking the amount due to the DSB as a debt on our books. If there are bankruptcies or the member refuses to pay the DSB fee, we cannot remove them as members, and it will be up to the DSB to take actions to get the money due them.

One comment that has been repeatedly made in staff reports and during Board meetings is, in essence, that it is common practice for service providers to collect regulatory fees from members

on behalf of state regulators. That is certainly true. On the other hand, it is not uncommon for state agencies to collect regulatory fees directly from those who are responsible for those fees (e.g. California Vehicle License Fee). And in the case of the specific regulatory agencies cited in staff reports and by the Board which rely on utility companies as “middle-men” to collect regulatory fees, it is very important to note that the underlying statutory/regulatory structure is quite different from the Dig Safe laws, and that the history of fee collection in those arenas is quite different.

One regulatory agency mentioned by the Board and Board staff is the Federal Communications Commission (“FCC”). In one staff report it is suggested that the “Federal Communications Commission recover[s] . . . operational expenses through the use of surcharges on the bills service providers issue their customers.” (See June 8-9, 2020 staff report at p. 2) This is not entirely accurate. It is true that “Annual regulatory fees are mandated by Congress pursuant to Section 9 of the Communications Act of 1934, as amended” and that “Section 9 requires the Commission to collect regulatory fees to recover the regulatory costs associated with [] its enforcement, policy and rulemaking, user information, and international activities.” (<https://www.fcc.gov/licensing-databases/fees/regulatory-fees>) However, in its various “regulatory fee fact sheets” for industry specific guidance, the FCC provides more detailed information about who is responsible for those fees. As can be seen in those fact sheets, the FCC imposes those fees upon the service providers themselves, not the end-users of the utility services. (See, e.g., Regulatory Fees Fact Sheet re Commercial Wireless Services; Regulatory Fact Sheet re Cable Television Systems)

But then why do consumers see those fees on their cable or wireless bills? As explained with respect to the Universal Service Charges seen on bills (which are meant to assist the government in ensuring reasonable access rates for telephone services) “the FCC does not require this charge to be passed on to you, but service providers are allowed to do so.” (<https://www.fcc.gov/consumers/guides/understanding-your-telephone-bill>)

The California Public Utilities Commission (“CPUC”) has also been mentioned as using a model wherein service providers collect regulatory fees from end-users on behalf of regulatory agencies. Unlike the FCC fees discussed in the previous paragraphs, fees collected by telephone companies on behalf of the CPUC are charges to the end-user of the services. Further, the Revenue and Taxation Code specifically requires utility companies to bill end-users for regulatory fees on the same invoice as the costs for the utility service itself. (See, e.g. Cal. Rev. & Tax Code sections 40019 & 40020 [collection of energy resources surcharge fee by suppliers from customers]; 41021 & 41022 [collection of emergency telephone users surcharges by suppliers from customers]).

While it might appear that the model used by the utilities subject to the CPUC should be feasible for one-call notification centers, there are significant differences in the statutory schemes that make this very difficult. Although the fee is imposed upon the end-user in the examples described above, the code says that the “surcharge required to be collected . . . constitutes [a] debt[] owed” by the provider to the state of California (See Cal. Rev. and Tax Code sections 40021 and 41023). Note that the law does not say that the amount of the surcharge actually collected by the utility constitutes a debt to the state, but the amount required to be collected. Thus, it is the utility’s responsibility to either: (1) simply pay the amount that should have been paid by the end user regardless of whether the payment was actually received, or (2) withhold that amount from payment to the state by claiming that amount as a form of “credit” on returns that must be submitted to the state. (See, e.g. Cal. Rev. & Tax Code 40061 et seq.)

The centers have always tried to work with the DSB as our missions are the same – preventing damage to underground lines as the communications link between excavators and owners of underground lines. We want to continue as safe digging partners but with the understanding that we are nonprofit mutual benefit corporations that are not regulated in the same manner as large for profit companies.

We hope that the information provided above explains again why the centers are suggesting that we take over the invoicing, collection, past due notifications and late fee charges but as separate invoices. We will meet with staff, as discussed at the meeting on August 10, 2020, but wanted to make our position clear as to why we have come to this conclusion.

Should the DSB wish to discuss further or have any questions, feel free to reach out to us.

Sincerely,



Ann Diamond
President – DigAlert



James Wingate
Executive Director – USA North 811



Attachment B

4010. Fees

- (a) (1) Each member of a regional notification center as defined in Government Code, section 4216, subdivision (q) who receives ~~more than 200~~ or more locate request transmissions in the ~~previous calendar~~calculation year shall pay a fee to support the operational expenses of the California Underground Facilities Safe Excavation Board as provided in the following formula:

Fee = (member locate request transmissions / statewide locate request transmissions) X Board operational expenses

- (2) In the formula above:

(A) “member locate request transmissions” represents the number of locate request transmissions the member of the regional notification center received in the ~~previous calendar~~calculation year;

(B) “statewide locate request transmissions” is the total number of locate request transmissions issued by the regional notification centers in the ~~previous calendar~~calculation year, not including those locate request transmissions issued to members who received less than 200 locate request transmissions in the ~~previous calendar~~calculation year; and

(C) “Board operational expenses” is the sum of the estimated operational ~~expenses,~~expenses reflected in subdivision (b). including any loan repayment, of the California Underground Facilities Safe Excavation Board in the ~~current calendar~~billing year, subject to the State Budget Act. ~~The “Board operational expenses” is \$7 million for each calendar year 2019, 2020, and 2021, subject to the State Budget Act. The “Board operational expenses” is \$3.8 million for calendar year 2022 and each calendar year thereafter, subject to the State Budget Act.~~

~~(3) The “member locate request transmissions,” “statewide total locate request transmissions,” and the “Board operational expenses” shall be reflected on the invoice to each member of a regional notification center.~~

- ~~(b) (1) Each member of a regional notification center shall remit the fee under subdivision (a) to the regional notification center by the due date in the billing statement issued by the regional notification center.~~

~~(2) At least semi-annually on April 1 and October 1, the regional notification centers shall submit to the California Underground Facilities Safe Excavation Board the fees received by the regional notification centers as of the date of submittal to the California Underground Facilities Safe Excavation Board.~~

~~(e) If a member fails to pay the fee by the due date in the billing statement as provided in subdivision (b), the Board shall issue an invoice to seek and obtain the fee directly from the member and charge the member a late fee of 5% of the amount of the fee, in addition to the fee due in the billing statement. The regional notification centers shall inform the Board of any failure to pay the fee and shall provide a copy of the member's billing statement.~~

(b) The value of the estimated operational expenses in subdivision (a)(2)(C), subject to the State Budget Act, is the following for the following time periods:

(1) \$7 million for each calendar year 2019, 2020, and 2021.

(2) \$2.5 million for the period of January 1, 2022 to June 30, 2022.

(3) \$5.0 million for the billing year that begins on July 1, 2022 and for each billing year thereafter.

(c) The Board shall post to its website by March 1 of each year, the statewide locate request transmissions from the recently ended calculation year, the member locate request transmissions for each member of a regional notification center from the calculation year, and the amount of regulatory fees to be paid by each member of a regional notification center in the upcoming billing year.

(d) (1) A member shall remit payment to the regional notification center who issued the invoice to the member.

(2) A member who fails to pay the fee within 90 days of the date the invoice was issued pursuant to Section 4011 is subject to a late fee of 5% the amount of the fee, in addition to the fee due on the invoice.

~~(d)~~(e) For purposes of this section, “locate request transmission” the following terms have the following meanings:

(1) “Billing year” means the July 1 to June 30 period in which the Legislature authorizes expenditures in the State Budget Act.

(2) “Calculation year” means the January 1 to December 31 period before the beginning of the billing year.

(3) “Locate request transmission” means the notification provided by a regional notification center to an operator to locate and field mark in response to a new ~~or renewed~~ ticket, as identified in Government Code section 4216.2, subdivision ~~(e)~~, (e) or to a new ticket created to replace an expired ticket, as identified in Government Code section 4216.2, subdivision ~~(i)~~, ~~or to a ticket requesting a remark, as identified in Government Code section 4216.3, subdivision (b).~~ (i).

(f) For the period of January 1, 2022 to June 30, 2022, the fee shall be calculated

pursuant to subdivision (a) with the following modifications:

(1) The calculation year shall be January 1, 2021 to June 30, 2021.

(2) The billing year shall be January 1, 2022 to June 30, 2022.

(3) The Board operational expenses shall be as identified in subdivision (b) paragraph (2).

4011. Fee Collection

(a) A regional notification center shall collect the fee described in Section 4010 from its members on the Board's behalf. A regional notification center shall send an invoice to a member on the same billing cycle it uses to send the invoice to the member for dues to pay the operating costs of the regional notification center pursuant to Government Code 4216.1.

(1) A regional notification center shall use one of the following two methods when invoicing to their members for the fee:

(A) A line item on the invoice that the regional notification center sends to a member to collect member dues.

(B) An invoice dedicated to the fee.

(i) A regional notification center shall send an invoice to a member for the fee at substantially the same time as the regional notification center sends an invoice to the member for dues to pay the operating costs of the regional notification center.

(2) A regional notification center shall make reasonable efforts to inform members of past due balances and account credits.

(3) An invoice sent pursuant to this subdivision shall include the "member locate request transmissions," "statewide total locate request transmissions," and "Board operational expenses," as defined in Section 4010 subdivision (a).

(4) A regional notification center may use the Board seal on an invoice requesting a member pay of the Board's fee, a statement informing a member of balance due for the Board's fee, or communication informing a member of the consequences of late payment or nonpayment of the Board's fee, if the document contains the following language:

"Use of the Dig Safe Board seal is authorized pursuant to Section 4011 of Title 19 of the California Code of Regulations."

- (5) If, using the member contact information available to it, a regional notification center is unable to provide an invoice for the fee to a member, the regional notification center shall inform the Board.
- (b) (1) A regional notification center shall reissue an invoice to a member who has not paid an invoice within 90 days of receipt. The regional notification center shall include the 5% late fee described in Section 4010 subdivision (d)(2).
- (2) Prior to reissuing the invoice pursuant to paragraph (1), the regional notification center shall send a reminder to the member of the unpaid invoice no later than 30 days before reissuing the invoice that includes the 5% late fee. The reminder will notify the member of the date at which the 5% late fee applies.
- (c) A regional notification center shall the remit fee revenues that it collected prior to January 1, April 1, July 1, and October 1 each year. The regional notification center shall remit the fee revenues within 15 days of the dates above.
- (d) A regional notification center shall provide the following information to the Board electronically:
- (1) Within 15 days after the end of each month, information about invoices for the fee issued and payments received in the previous month, including the following:
- (A) For each member, the invoice number, invoice due date, amount of the regulatory fee, and the applicable email or physical address the invoice was sent to.
- (B) For each member, the invoice number, payment received date, amount of payment received, identifying information about the payment such as check, ACH, or other payment identification number.
- (C) A copy of any invoice to collect the fee sent.
- (2) Within 15 days after the end of each calendar quarter described in subdivision (c), regional notification center membership information about the following:
- (A) The number of locate request transmissions, as defined in Section 4010 subdivision (e)(3), each member received in the recently-ended quarter.
- (B) The membership of the regional notification center, including the member identification code, any member identification sub-code.

(C) Contact information for each member, including the names, phone numbers, and email addresses for the general contact and billing contact.

(3) Information provided pursuant to paragraphs (1) and (2), except for subparagraph (C) in paragraph (1), shall be provided in tabular form, each of entry of which shall include the member name, member identification code, and any member identification sub-code.

(e) Notwithstanding the requirement in subdivision (a) for a regional notification center to send an invoice to a member on the same billing cycle it uses to send the member an invoice to collect dues to pay the operating costs, if a regional notification center does not send an invoice to a member for dues during the period of January 1, 2022 to June 30, 2022, the regional notification center shall send an invoice to the member prior to March 1, 2022 to collect the fee for the six-month billing period described in Section 4010, subdivision (f).

Attachment C

**CALIFORNIA UNDERGROUND FACILITIES SAFE
EXCAVATION BOARD**

RESOLUTION NO. 20-09-02

**APPROVING THE ADOPTION OF THE REGULATION TO AMEND
REGULATORY FEES PURSUANT TO THE DIG SAFE ACT OF 2016 AND
AUTHORIZING RULEMAKING PROCEEDINGS**

WHEREAS, pursuant to the Dig Safe Act of 2016 (SB 661, Chapter 809, Statutes of 2016) (the “Act”), codified under Government Code section 4216 et seq. (the “statute”), the California Underground Facilities Safe Excavation Board (the “Board”) is mandated to coordinate education and outreach activities that encourage safe excavation practices, develop certain standards for safe excavation practices, investigate possible violations of the statute, and enforce the statute on specified persons;

WHEREAS, the Board is authorized under the Act to obtain funding for its operational expenses from a fee charged to members of the regional notification centers not to exceed the reasonable regulatory cost incident to enforcement of the statute, and the Board must apportion the fee in a manner consistent with formulas used by the regional notification centers;

WHEREAS, the Board adopted in Resolution 18-08-01 Section 4010 of Title 19 of the California Code of Regulations to establish fees pursuant to Government Code section 4216.16;

WHEREAS, the modification of the fee regulation is necessary to improve clarity to fee payers, streamline collections, and ensure the Board has sufficient funds to carry out its mission;

WHEREAS, Government Code section 4216.22 provides that the Board may prescribe rules and regulations as may be necessary or proper to carry out the purposes and intent of the Act and to exercise the powers and duties conferred upon it by the Act;

THEREFORE, BE IT RESOLVED by the California Underground Facilities Safe Excavation Board as follows:

Section 1. The proposed regulation to modify provisions related to the fee charged to members of the regional notification centers as authorized under the Act is hereby approved in substantially the form submitted to the Board by staff. The

Executive Officer is hereby authorized, for and on behalf of the Board, to proceed as required by the Administrative Procedure Act to adopt the proposed regulation and submit the proposed regulation with the supporting documentation required by law to the Office of Administrative Law.

Section 2. The Executive Officer is hereby authorized, for and on behalf of the Board, to take such actions, including making or causing to be made such changes to the proposed regulation as may be required for approval thereof by the Office of Administrative Law, and to execute and deliver any and all documents, including STD. 399 and STD. 400, that the Executive Officer may deem necessary or advisable in order to effectuate the purposes of this resolution.

Section 3. This resolution shall take effect immediately upon approval.

Date of Adoption: September 14, 2020

I hereby certify that the attached resolution is a true and exact copy of Resolution No. 20-09-02 adopted by the California Underground Facilities Safe Excavation Board on September 14, 2020: RESOLUTION OF THE CALIFORNIA UNDERGROUND FACILITIES SAFE EXCAVATION BOARD APPROVING THE ADOPTION OF THE REGULATION TO AMEND REGULATORY FEES PURSUANT TO THE DIG SAFE ACT OF 2016 AND AUTHORIZING RULEMAKING PROCEEDINGS.

Tony Marino
Executive Officer

Carl Voss
Chair

Date: September 14, 2020