

Before the House Committee on Judiciary

February 12, 2019

Neutral Testimony  
On House Bill 2178

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On Behalf of  
The Staff of the Kansas Corporation Commission

Chair Patton, Vice Chair Ralph, Ranking Minority Member Carmichael, and members of the committee, thank you for the opportunity to provide testimony to your committee today on behalf of the staff of the Kansas Corporation Commission (Commission).

The Commission Staff is taking a neutral position on HB 2178. But I would like to use this opportunity to explain and highlight some of the provisions of the bill from our perspective.

The goal of the Kansas Underground Utility Damage Prevention Act (KUUDPA) is to minimize damage to buried utilities caused by excavators digging over the lines. In my opinion, however, the primary goal of KUUDPA is to promote public safety by minimizing damage to buried electric and natural gas lines.

To reach these goals, KUUDPA essentially requires excavators and utility operators to communicate. The excavators are required to provide notice of any planned digging activities, and the utility operators are required to provide temporary marks or locates on top of the ground that indicate the location of their buried facilities. Under KUUDPA, excavators loosely include any person digging outside of their own property, and operators generally include gas, electric, telecommunication, water, and sanitary sewer utilities.

Although the requirements to communicate are the framework for KUUDPA, there are many more scenarios that are contemplated throughout the law. Recently one of these scenarios resulted in a Commission general investigation in Docket 17-GIME-565-GIE<sup>1</sup>, which interpreted the KUUDPA definition of "operator". The current definition of Operator is found in K.S.A. 66-1802(j) as follows:

"Operator" means any person who owns or operates an underground tier 1 or tier 2 facility, except for any person who is the owner of real property wherein is located underground facilities for the purpose of furnishing services or materials only to such

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<sup>1</sup> See final order, [http://estar.kcc.ks.gov/estar/ViewFile.aspx/Final\\_Order.pdf?id=408750ff-9b37-4238-821d-7dc813247823](http://estar.kcc.ks.gov/estar/ViewFile.aspx/Final_Order.pdf?id=408750ff-9b37-4238-821d-7dc813247823)

person or occupants of such property

In its final Order in the 17-565 Docket, the Commission found that the term “operator” means, “a person who either owns an underground tier 1 or tier 2 facility, *or* performs a function with respect to; exerts power or influence over; or controls the functioning of; that is, operates, an underground tier 1 or tier 2 facility.”<sup>2</sup>

In general, the utilities that were involved in the investigation, argued the legislative intent of the definition of “operator” was meant to apply only to those facilities owned by the utility. In response to this argument, the Commission’s Order stated the Commission’s interpretation of the legislative intent was based on the plain meaning of the phrase “or operates” as found in the definition.<sup>3</sup> The Commission ordered all operators to provide locates of underground electric lines up to the point that the customer had functional control of the line. It should be noted the Commission’s Order in this docket only applied to underground electric serving commercial customers; however, the interpretation of the phrase “or operates” could be applied to all underground electric service lines.

HB 2178 proposes to remove any question of intent regarding the phrase “or operates” by striking this phrase from the definition of operator. This modification would make operators responsible under KUUDPA only for the underground facilities they own. To further emphasize this point, the bill adds an exemption to the definition of operator for those utilities that provide electric service by noting the demarcation point between facilities owned by an electric utility and its customers can be determined from an operator’s published rules and regulations or service agreements.

Section 2 of the bill modifies 66-1806, which lists the duties of the operator with respect to providing locates. The addition of subsection (e) to this section would limit the responsibility of electric utilities to only mark facilities they own as long as they publish the utility/customer interface in their service agreements. The limitation in marking responsibility also will minimize the liability the electric utility may incur by providing locates of buried facilities for which they have limited or no construction records to assist them in providing accurate locates.

In my opinion, the proposed changes cause some confusion. By striking the phrase “or operates” from the definition of operator, the only operators subject to KUUDPA will be those that actually own or lease underground facilities. While the exemption for electric service providers proposed as subsection 2 of the definition is helpful in explaining how to determine the change in ownership, it would provide an exemption for an entity that is already excluded from the term operator by striking the phrase “or operates”.

If the committee agrees with the proposal to limit locating responsibility for electric providers to only those facilities they own, we suggest not striking the phrase “or operates” and leaving in the exemption for electric service providers as proposed. The addition of subsection (e) to 66-1806 would then serve as a reinforcement for electric service providers to notify their customers of the utility/customer interface or provide locates for the customer owned service line as interpreted by

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<sup>2</sup> Para. 33, final order, 17-GIME-565-GIE.

<sup>3</sup> Para. 62, Final Order, 17-GIME-565-GIV

the Commission's Order in the 17-565 Docket. In other words, the electric service suppliers could take advantage of the exemption to mark customer's underground service lines *provided* they publish the utility/customer demarcation point in their service agreements.

The proposed changes would relieve electric utilities of the potential liability of locating electric service lines they do not own. For example, if a utility provided inaccurate locates to an excavator that resulted in property damage or injury, the utility possibly could be held liable under the provisions of 66-1811. Although locating underground electric service lines can be readily accomplished by experienced locators, there is always a risk of inaccurate locates.

The changes as contemplated would also impact the excavator community. Under the current law and the Commission's interpretation of the phrase "or operates", excavators call 8-1-1, describe where they will be digging, and wait two days for the utility to locate their lines. Once the electric provider receives this notice from the call center, it is required to provide marks of buried electric lines up to the point where the customer can effectively de-energize the line. Under the proposed bill, the excavator will no longer receive an indication from the utility operator of where the last segment of electric service line is buried. Instead, the excavator will need to rely on the owner of the electric service line to provide that information.

If an excavator is digging on private property, the owner of the service line likely will be their customer or at least aware of the excavation activity. In this case, the excavator could work with the property owner to determine the location of the customer owned facilities.

However, if the utility/customer demarcation point is located in a common utility easement or a road right-of-way, there is a high probability the excavator would be passing through the neighborhood and have no contact whatsoever with the property owners. In that case, the excavator would have no indication of the existence of buried customer lines nor would the affected customer be made aware that excavation was taking place over its buried facilities. Under this scenario, the excavator could not rely on simply calling 8-1-1 to get an indication of possible obstacles in the path of the planned excavation. Rather, the excavator would need to work closely with the utility and adjacent landowners to determine the probable location of electric service lines.

Thank you for the opportunity to offer our perspective on the proposed bill and the opportunity to appear before your committee.