

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Mark Sievers, Chairman
Thomas E. Wright
Shari Feist Albrecht

In the Matter of the General Investigation Into the)
Escape of Natural Gas from a Pipeline Operated by)
Kansas Gas Service, a Division of ONEOK, Inc., on) Docket No. 12-GIMG-584-GIP
January 30, 2012, Resulting in an Explosion and)
Injury to Person and Property in Topeka, Kansas)

ORDER

The above-captioned matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having reviewed the files and records, and being duly advised in the premises, the Commission makes the following findings and conclusions:

I. AUTHORITY

1. Pursuant to K.S.A. 66-104, K.S.A. 1,200 and K.S.A. 66-1,201, the Commission is vested with full power, authority and jurisdiction to supervise and control natural gas public utilities doing business in Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.

2. Pursuant to the Kansas underground utility damage prevention act (KUUDPA), K.S.A. 66-1801, et seq., the Commission has jurisdiction over excavators operating within the state. KUUDPA "create[s] a mandatory program designed to protect the State's underground utility infrastructure from excavation damage and to protect the public from harm."¹ The

¹ *Kansas One-Call System, Inc. v. State of Kan.*, 294 Kan. 220, 223, 274 P.3d 625 (2012).

Commission is further authorized to administer and enforce the provisions of KUUDPA pursuant to K.S.A. 66-1813.

3. The Commission is authorized by K.S.A. 66-1,150 to adopt gas pipeline safety rules and regulations necessary to conform with the Natural Gas Pipeline Safety Act of 1968, as amended (49 U.S.C. § 60101, *et seq.*). These rules and regulations are applicable to all public utilities and all municipal corporations or quasi-municipal corporations rendering gas utility service in Kansas.

4. K.S.A. 66-1,157b authorizes the Commission to conduct an investigation as to the cause or origin of any accident or fire suspected to have been caused by natural gas. If the investigation establishes violation of the gas pipeline safety rules and regulations, penalties may be assessed pursuant to K.S.A. 66-1,151 which provides for a civil penalty up to \$25,000 for each violation for each day that violation persists.²

5. Civil penalties may be compromised by the Commission and certain factors, including the appropriateness of the penalty to the size of the business, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance shall be considered when determining the amount of a penalty.³

6. K.S.A. 66-1812 provides that any person who violates any provisions of KUUDPA shall be subject to civil penalties and injunctive relief as set out in K.S.A. 66-1,151.

7. K.S.A. 2012 Supp. 66-1810 states as follows:

When any contact with or damage to any underground facility occurs, the operator shall be informed immediately by the excavator. Upon receiving such notice, the operator immediately shall dispatch personnel to the location to provide necessary temporary or permanent repair of the damage. If the protective covering of an electrical line is penetrated or dangerous gases or

² K.S.A. 66-1,151.

³ K.S.A. 66-1,152.

fluids are escaping from a broken line, the excavator immediately shall inform emergency personnel of the municipality in which such electrical short or broken line is located and take any other action as may be reasonably necessary to protect persons and property and to minimize hazards until arrival of the operator's personnel, emergency medical responders or first responders.

II. BACKGROUND

a. Incident

8. On January 30, 2012, an explosion occurred at 1905 Navajo in Topeka, Kansas, destroying a single family residence and fatally injuring one occupant of the residence.⁴

9. On January 31, 2012, Staff of the Commission (Staff) submitted a Report and Recommendation informing the Commission of the January 30, 2012 explosion. Staff stated that the explosion may be related to natural gas escaping from a pipeline operated by Kansas Gas Service, a Division of ONEOK, Inc. (KGS). Staff further noted that it had observed excavation activity at 1912 Arrowhead Road which appeared to be associated with the leaking gas main.⁵ Staff recommended the Commission open a general investigation docket.⁶

10. On February 1, 2012, the Commission issued an Order Opening General Investigation directing Staff to investigate the circumstances involving the explosion and to formally file its findings in a Supplemental Report and Recommendation in this docket.⁷

11. On February 20, 2012, N-Line Lawn Service (N-Line) filed a petition to intervene stating that it was conducting excavation activities in the vicinity of the house explosion at the time of the explosion.⁸

⁴ Commission Staff Report and Recommendation, p. 1 (Aug. 22, 2012).

⁵ Commission Staff Report and Recommendation, p. 2 (Jan. 31, 2012).

⁶ Id.

⁷ Order Opening General Investigation (Feb. 1, 2012) ¶ 7.

⁸ N-Line Lawn Service Petition to Intervene and Entry of Appearance, ¶ 3 (Feb. 20, 2012).

12. KGS is a public natural gas utility subject to the jurisdiction of the Commission, pursuant to K.S.A. 66-104.

13. N-Line Lawn Service is engaged in the business of installing sprinkler systems in the State of Kansas.⁹ Pursuant to K.S.A. 2012 Supp. 66-1802(d), N-Line is an excavator engaged directly in excavation activities.

b. Staff Report and Recommendation

14. On August 31, 2012, Staff filed a Report and Recommendation (Report) which detailed its investigation. Staff reported that its investigation determined the explosion was a natural gas incident which was a result of N-Line damaging a KGS service line with excavation equipment.¹⁰ The line served a residence at 1912 SW Arrowhead.¹¹ Unknown to N-Line, the gas service line was pulled out of a compression fitting service tap on the main resulting in a large underground gas leak.¹² Staff's investigation reviewed N-Line's excavation activities as well as KGS' emergency response.

i. N-Line Lawn Service

15. Staff concluded that N-Line violated two Kansas Underground Utility Damage Prevention Act (KUUDPA) provisions.

16. First, N-Line did not call emergency responders when a gas leak from a damaged line became evident as required by K.S.A. 2012 Supp. 66-1810.¹³ More specifically, Staff concluded that N-Line violated K.S.A. 2012 Supp. 66-1810 when N-Line failed to call City of Topeka emergency responders after causing damage to the KGS service line.¹⁴ Staff further

⁹ Id. at ¶ 1.

¹⁰ Staff Report and Recommendation, p. 1 (Aug. 31, 2012).

¹¹ Id.

¹² Id.

¹³ Id. at p. 12.

¹⁴ Id. at p. 11.

noted that it has been Staff's experience that a call placed to 9-1-1 serves the purpose of notifying fire departments of a gas leak, and in turn, serves the purpose of notifying the gas operator through a subsequent call from the fire department dispatch to the gas operator.¹⁵ However, Staff noted that N-Line attempted to alert KGS immediately after the damage occurred and that N-Line is a small company with limited means to pay a large fine.¹⁶ Therefore, while Staff noted a \$25,000 baseline civil assessment is an appropriate penalty based on N-Line's KUUDPA violation, Staff recommended the Commission assess a \$5,000 civil penalty after accounting for the mitigating actions N-Line took.¹⁷

17. Second, Staff's investigation revealed that N-Line did not have a valid notice of intent to excavate as required by K.S.A. 2012 Supp. 66-1804.¹⁸ However, Staff noted that a locate had been requested and the markings were visible at the time of Staff's investigation of the scene.¹⁹ Additionally, Staff determined that N-Line had pot-holed (exposed the service line) prior to excavating in the area of the service line, which serves the purposes of the markings.²⁰ Therefore, Staff did not recommend a civil penalty for this violation.²¹

ii. Kansas Gas Service

18. Staff concluded that KGS violated three natural gas pipeline safety regulations related to responding to a natural gas emergency. Specifically, Staff determined that KGS' emergency plan did not provide adequate training to guide emergency first responders on which steps to use when investigating a gas leak to assure the safety of all structures adjacent to the potential leak; this is a violation of 49 C.F.R. 192.615(a)(3), 49 C.F.R. 192.615(a)(5), and 49

¹⁵ Id. at p. 11.

¹⁶ Id. at p. 12.

¹⁷ Id.

¹⁸ Staff did not recommend a penalty for N-Line's failure to have a valid notice of intent to excavate because Staff believed that violation did not contribute to the cause or consequences of the incident. *Id.* at pp. 10, 12.

¹⁹ Id. at p. 12.

²⁰ Id.

²¹ Id.

C.F.R. 192.615(b)(2); as adopted by K.A.R. 82-11-4.²² Staff further asserted that because of the ineffective emergency plan, the KGS training program does not provide guidance to the KGS emergency first responders on which steps to use when investigating a gas leak to assure the safety of all structures adjacent to the suspected leak.²³

19. Staff stated a \$25,000 baseline civil assessment would be an appropriate civil penalty. However, Staff considered actions taken by KGS' emergency responder in assuring the safety of the residence at 1912 SW Arrowhead and the unknown location of the leaking pipeline to be mitigating factors in calculating a civil assessment.²⁴ After consideration of these mitigating factors, Staff recommended a civil penalty of \$15,000.²⁵

20. In addition to a civil penalty, Staff recommended the Commission order KGS to amend its Emergency Plan to address the steps necessary to protect life and property when investigating a potential gas leak caused by excavator damage.²⁶ Staff further recommended the Commission order KGS to provide training to emergency responders on the specific steps to be taken to prioritize protection of public safety, including investigating for gas concentrations near houses adjacent to excavation damage.²⁷

21. Staff also recommended the Commission order KGS to analyze its distribution system and map areas where steel mains are installed in the rear easement above the sewer main.²⁸ Staff further recommended the Commission urge KGS to analyze its distribution

²² Id. at p. 16-17.

²³ Id. at p. 16.

²⁴ Id.

²⁵ Id.

²⁶ Id. at p. 16-17.

²⁷ Id. at p. 17.

²⁸ Id. at 17-18.

systems for valve placement and consider installing additional valves to which would allow KGS to quickly isolate sections of the system in an emergency.²⁹

c. Consent Decree between Staff and KGS

22. On October 29, 2012, Staff and KGS filed a Joint Motion to Approve Consent Decree with a proposed Consent Decree attached. Among other things, the Consent Decree provides that remedial actions by KGS in lieu of a penalty or fine are reasonable. The remedial actions imposed upon KGS per the proposed Consent Decree are as follows:

- (a) Within 60 days, KGS shall amend its Emergency Plan to clarify language on how a first responder will assess and react to an emergency situation that gives rise to the migratory aspects of natural gas;
- (b) Within 90 days, KGS shall revise its lesson plans and operator qualification examinations to formalize emergency scenario assessments that are made at the time of an event that constitutes an emergency involving damage by a third party excavator;
- (c) KGS will instruct customer service representatives or dispatchers taking emergency calls from third party excavators to direct the third parties to call 911 to respond to an incident involving excavators;
- (d) Within one year, KGS will conduct three training sessions with public emergency responders to emphasize officer safety when responding to natural gas damages, and will file statements of compliance with the Commission;
- (e) KGS will initiate a project to identify the areas of its distribution system in which steel gas mains are parallel to and occupy the same utility easement

²⁹ *Id.* at 18.

as sanitary sewer mains, where sewer information is available, and KGS will file semi-annual progress reports with the KCC Staff; and

- (f) Staff shall report acts or omissions constituting noncompliance to the Commission, which may impose administrative penalties, fines, or sanctions.

23. Staff and KGS stated that the Consent Decree allows KGS to remedy the alleged deficiencies and to take steps to avoid similar deficiencies without the imposition of further sanctions or penalties.³⁰

d. N-Line's Response to Consent Decree

24. On December 21, 2012, N-Line filed a Response to Staff's Report and Recommendation and Staff and KGS' Joint Motion to Approve Consent Decree.

i. Notice of Intent to Excavate

25. N-Line stated that it did not call for a relocate because (1) the lines and flags from the initial locate were still clearly visible, and (2) N-Line believed it was within the timeframe for excavation, because it mistakenly believed the locate ticket was valid for 15 working days instead of 15 calendar days.³¹ Ultimately, however, N-Line stated that it takes no issue with regard to Staff's recommendation.³²

ii. Failure to Call Emergency Responders

26. N-Line stated that it disagrees with Staff's recommended \$5,000 penalty.³³ As support for its position, N-Line posits three arguments: (1) the requirement to notify emergency personnel as required under K.S.A. 2012 Supp. 66-1810 was not triggered in this instance; (2)

³⁰ Joint Motion to Approve Consent Decree, ¶ 3 (Oct. 29, 2012).

³¹ Response of N-Line Lawn Service, p. 3 (Dec. 21, 2012).

³² Id. at p. 4.

³³ Id.

even if K.S.A. 2012 Supp. 66-1810 was triggered, N-Line did not violate this statute; (3) even if N-Line violated K.S.A. 2012 Supp. 66-1810, the amount of Staff's recommended penalty is excessive in light of the facts of this case and the Commission's precedent in other similar cases.

27. N-Line stated that immediately upon making contact with the gas line (at approximately 10:10 a.m.) it shut down the operating machine to help seal the break while calling for assistance.³⁴ The excavator attempted to call KGS (the operator) and then called a firefighter with the Topeka Fire Department at 10:13 a.m.³⁵ The excavator was unable to reach the Topeka firefighter and the firefighter returned the excavator's call at 10:42 a.m.³⁶ In the interim, the excavator had been on the phone constantly making numerous attempts to contact KGS so that KGS could make any necessary contacts and dispatch personnel to the site who could take appropriate action regarding the incident.³⁷

28. N-Line posits that the requirement to notify emergency personnel as required under K.S.A. 2012 Supp. 1810 was not triggered in this case.³⁸ N-Line stated that although the excavator noticed the scent of gas, it did not rise to the level of "dangerous gases escaping from a broken line."³⁹ In a footnote supporting this statement, N-Line noted that the excavator responded negatively to the KGS operator when she asked him if gas was blowing and that the excavator explained that the gas was just perhaps "seeping", and that the excavator had left his machine in place to plug the point of contact.⁴⁰ N-Line stated it was focused on the point of contact with the line at the Arrowhead property, which was not a major break and that the major gas leak that caused the ultimate damage was at a different location of which the excavator was

³⁴ Id.

³⁵ Id.

³⁶ Id.

³⁷ Id.

³⁸ Id. at p. 5.

³⁹ Id.

⁴⁰ Id. at footnote 9.

totally unaware.⁴¹ N-Line also posited that a certain degree of personal judgment is inherent in the requirement of K.S.A. 2012 Supp. 66-1810 regarding whether there is a need to inform emergency personnel and that judgment is exercised in real-time, without the benefit of hindsight and that based on the information available to the excavator at the time, the situation did not seem unusually “dangerous.”⁴²

29. While N-Line posited arguments that K.S.A. 66-1810 was not triggered in this instance, it also noted that there could be no finding that N-Line violated this part of the statute because N-Line did place a call to emergency personnel, a firefighter with the Topeka Fire Department.⁴³ N-Line explained that while Staff’s assertion is that N-Line violated K.S.A. 2012 Supp. 66-1810 because N-Line failed to call 9-1-1, the statute does not state that compliance with the statute can only be attained by calling 9-1-1. N-Line asserted that “if punitive measures are being contemplated by a government agency against an individual, requirements cannot be imputed into a statute when the language of the statute itself does not include those requirements.”⁴⁴ N-Line stated it complied with the plain language of the statute and that the Commission cannot rewrite the statute so as to allow the agency to then find that N-Line violated the parts of the statute that the agency rewrote.⁴⁵ As support for its legal conclusions, N-Line cited the following Kansas Supreme Court holding: “[a]s a general rule, a punitive statute should be strictly construed in favor of the accused, which simply means that words are given their ordinary meaning. Any reasonable doubt about their meaning is decided in favor of the accused.”⁴⁶

⁴¹ Id. at p. 5.

⁴² Id.

⁴³ Id. at p. 6.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id.; citing *Double M Construction, Inc. v. State Corp. Comm’n*, 288 Kan. 268, 272 (2009).

30. Finally, N-Line argues that even if there had been a violation of K.S.A. 2012 Supp. 66-1810, the amount of the penalty recommended by Staff is excessive in light of the facts of this case and the Commission's precedent in other similar cases.⁴⁷ As support for this assertion, N-Line states that N-Line did not intentionally violate any KUUDPA provisions and that N-Line consciously attempted to comply with all such provisions.⁴⁸ N-Line further stated that N-Line's actions compare equally and favorably with other cases in which the Commission did not issue a penalty for failure to notify emergency personnel.⁴⁹ In support of this assertion, N-Line cited to four separate Commission dockets involving penalty orders related to failure to inform emergency personnel, one of which resulted in no penalty and three of which resulted in a \$500 penalty for failure to serve notice of intent to excavate and failure to inform emergency personnel.⁵⁰ N-Line further stated that N-Line has been in operation for approximately 20 years and has not previously been cited by Staff for notices of probable non-compliance and that a penalty of \$5,000 is an extremely large sum to a small operation like N-Line.⁵¹

e. KGS & Staff's Replies to N-Line's Response

31. KGS and Staff each filed replies to the Response of N-Line on January 14, 2013.

32. KGS stated that although Staff and N-Line could not reach an agreement, the Commission should not delay addressing Staff and KGS' Consent Decree because the regulatory actions in this docket were separate matters for KGS and N-Line.⁵²

33. Staff stated that the recommendations made in its August 31, 2012 Report and Recommendation are reasonable and supported by the evidence collected during its

⁴⁷ Id. at p. 7.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Id. at footnote 11.

⁵¹ Id. at p. 8.

⁵² Reply of KGS to Response of N-Line Lawn Service, p. 2-3 (Jan. 14, 2013).

investigation.⁵³ As a result of its investigation, Staff noted that the phone records evidence the fact that at no time did the excavator place a call to emergency personnel of the City of Topeka.⁵⁴ Staff further posited that N-Line's argument that the excavator's attempt to contact a personal friend (who is employed by the fire department) on the friend's personal cell phone was insufficient to satisfy the requirement of K.S.A. 2012 Supp. 66-1810 and that this fact only serves to demonstrate that the excavator was aware that the situation was serious and does not relieve N-Line of its legal duty under K.S.A. 2012 Supp. 66-1810 to contact emergency personnel.⁵⁵

34. Staff further noted that K.S.A. 2012 Supp. 66-1810 does not address the potential danger of the situation created by escaping gas, despite N-Line's argument that the requirement to contact emergency personnel is subjective based on the excavator's determination of whether or not the escaping gas is a dangerous situation.⁵⁶ Rather, Staff posited that the language of K.S.A. 2012 Supp. 66-1810 is unambiguous and requires that an excavator shall call emergency personnel upon hitting a natural gas pipeline and causing the release of natural gas (a dangerous gas).⁵⁷

35. With regard to the amount of the civil penalty, Staff noted that in its review of its enforcement actions, it considers the totality of the evidence and the consequences of the violations when recommending a penalty.⁵⁸ Staff further noted that in Docket No. 07-MMCP-469-SHO (469 Docket), Staff recommended a \$25,000 civil penalty based on its findings that the excavator did not have a valid Notice of Intent of Excavation prior to excavating and that a death

⁵³ Staff's Reply to Response of N-Line Lawn Service, ¶ 13 (Jan. 14, 2013).

⁵⁴ Id. at ¶ 10.

⁵⁵ Id. at ¶ 10.

⁵⁶ Id. at ¶ 11.

⁵⁷ Id. at ¶ 11.

⁵⁸ Id. at ¶ 12.

occurred as a result of the excavator's inaction.⁵⁹ Staff compared the facts of the 469 Docket to N-Line's actions and found that while N-Line did not have a valid Notice of Intent of Excavation, the consequence of that violation did not directly lead to any injury or loss of property resulting in Staff not recommending a penalty for that violation.⁶⁰ However, Staff stated that N-Line's excavator's failure to call emergency personnel in the City of Topeka arguably contributed to property damage and a fatality and, for that reason, Staff stated that a \$25,000 civil assessment was an appropriate penalty based on the single violation of K.S.A. 2012 Supp. 66-1810.⁶¹ Staff noted, however, that it accounted for the excavator's mitigating actions and recommended a reduced penalty of \$5,000.⁶²

III. FINDINGS

a. Kansas Gas Service

36. Consistent with its authority to compromise a penalty⁶³, the Commission finds the violations discovered in the course of this investigation are adequately addressed in the terms of the proposed Consent Decree filed by KGS and Staff. The Consent Decree imposes upon KGS several requirements to improve its Emergency Plan, communications with both internal and external emergency responders, and pipeline system mapping. The Consent Decree obligates KGS to provide compliance and progress reports to the Commission. The Consent Decree is fully enforceable by the Commission, promotes public safety, and thus furthers the objective of KUUDPA.

37. The Commission approves the Consent Decree in its entirety.

b. N-Line Lawn Service

⁵⁹ Id. at ¶ 12.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

⁶³ K.S.A. 66-1,152.

38. With regards to N-Line, the only matter before the Commission is the alleged violation of K.S.A. 2012 Supp. 66-1810, more specifically, N-Line's failure to inform emergency personnel.

39. N-Line's December 21, 2012 Response raises the following three issues for Commission determination: (1) whether the requirement to inform emergency personnel as required under K.S.A. 2012 Supp. 66-1810 was triggered in this case; (2) if that requirement was triggered, whether N-Line violated K.S.A. 2012 Supp. 66-1810; and (3) if N-Line violated K.S.A. 2012 Supp. 66-1810, whether Staff's recommended civil penalty of \$5,000 is appropriate.

i. Applicability of K.S.A. 2012 Supp. 66-1810

40. As noted above, N-Line posits several reasons why N-Line's excavator was not required to inform emergency personnel of the City of Topeka. N-Line's primary contention is that although the excavator smelled gas after hitting the gas line, "it did not rise to the level of 'dangerous gases escaping from a broken line.'"⁶⁴ N-Line also distinguishes "blowing gas" from "seeping gas" as it relates to this argument.⁶⁵ Ultimately, N-Line contends that based on the information available to the excavator at the time the natural gas line was struck, the situation did not seem unusually "dangerous" and that the excavator's "judgment is exercised [in] real-time, without the benefit of hindsight."⁶⁶

41. Staff posits that K.S.A. 2012 Supp. 66-1810 does not address the potential danger of the situation created by escaping gas but rather requires the excavator to take action upon causing the release of the "dangerous gas."

42. The Commission does not agree with N-Line's assertion that a "certain degree of personal judgment is inherent in the requirement of K.S.A. 66-1810 regarding whether there is a

⁶⁴ N-Line Response, p. 5.

⁶⁵ Id.

⁶⁶ Id.

need to inform emergency personnel.” The statute is quite clear: if dangerous gases are escaping from a broken line, the excavator immediately shall inform emergency personnel. Therefore, it does not matter whether N-Line’s excavator, in his judgment, believed that the situation did not seem unusually dangerous.

43. The evidence in the record is clear that N-Line’s excavator made contact with a KGS service line and knew that damage had been caused and that natural gas was leaking.⁶⁷ As such, N-Line’s excavator was required to follow the requirements of K.S.A. 2012 Supp. 66-1810. Therefore, the requirement that an excavator inform emergency personnel of the municipality in which the broken gas line is located, pursuant to K.S.A. 2012 Supp. 66-1810, was applicable in this case.

ii. N-Line’s Violation of K.S.A. 2012 Supp. 66-1810

44. N-Line contends that it did not violate K.S.A. 2012 Supp. 66-1810 because N-Line did place a call to emergency personnel, more specifically, a call to Mr. Blake Redd of the Topeka Fire Department.

45. Commission Staff argues that at no time did N-Line’s excavator place a call to the emergency personnel of the City of Topeka.⁶⁸ Rather, N-Line’s excavator attempted to contact a personal friend (who is employed by the fire department) on the friend’s personal cell phone and that this action was not sufficient to satisfy the requirement of K.S.A. 2012 Supp. 66-1810.⁶⁹

46. N-Line disagrees with Staff’s assertion that N-Line violated K.S.A. 2012 Supp. 66-1810 when “N-Line failed to contact 9-1-1 after causing damage to the KGS service line”⁷⁰

⁶⁷ Staff Reply, ¶ 5; N-Line Response, ¶¶ 2, 11.

⁶⁸ Staff Reply, ¶ 10.

⁶⁹ Id.

⁷⁰ Staff Report, p. 12.

and notes that the statute does not state that compliance with the statute can only be attained by calling 9-1-1.⁷¹

47. As applied to the facts of this case, K.S.A. 2012 Supp. 66-1810 required N-Line to perform the following tasks:

- Immediately inform KGS;
- Immediately inform emergency personnel of the City of Topeka; and,
- Take any other action as may be reasonably necessary to protect persons and property and to minimize hazards until arrival of the operator's personnel, emergency medical responders or first responders.

48. According to Staff's Report and Recommendation, the timeline of the actions that N-Line took after damaging the service line is as follows:

- 10:10 AM – N-Line damages and breaks natural gas service line;⁷²
- 10:10 AM – N-Line called a non-emergency phone number listed on the KGS locate flag and was placed on hold;⁷³
- 10:13 AM – N-Line attempted to call a personal friend who works for the Topeka Fire Department on that friend's personal cell phone to ask if he had a direct contact who could get N-Line a quicker response; this friend was unavailable and the call went to voicemail;⁷⁴
- 10:13 AM – N-Line places second call to a non-emergency phone number and again is placed on hold;⁷⁵
- 10:30 AM – N-Line calls Kansas One Call and receives instructions to contact the utility operator directly;⁷⁶
- 10:34 AM – N-Line notifies KGS Call Center of a hit service line;⁷⁷
- 11:03 AM – KGS Service man arrives at 1912 SW Arrowhead.⁷⁸

49. A review of the timeline above shows that N-Line informed KGS of the damaged service line approximately 24 minutes after N-Line caused the damage.⁷⁹

⁷¹ N-Line Response, ¶ 13.

⁷² Staff Report, p. 6.

⁷³ Staff Report, p. 6.

⁷⁴ Staff Report, p. 6; Appendix 1 (Notice of Probably Non-Compliance; KCC Investigation # 6374; Response of Glen Niehues as Owner of N-Line Lawn Service); Staff Reply, ¶ 10.

⁷⁵ Staff Report, p. 6.

⁷⁶ Id.

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Staff Reply, ¶ 6.

50. A review of the timeline above shows that N-Line did not inform emergency personnel of the City of Topeka nor does it appear N-Line made any further attempt to inform emergency personnel as required under K.S.A. 2012 Supp. 66-1810 which requires “any other action as may be reasonably necessary to protect persons and property and to minimize hazards until arrival of the operator’s personnel, emergency medical responders or first responders.” Unlike N-Line’s attempt to inform KGS of the damaged service line, N-Line merely placed a call to a personal friend (who works for the Topeka Fire Department) on that friend’s personal cell phone. After failing to reach that person, N-Line failed to take any other action to “inform emergency personnel of the municipality in which such electrical short or broken line is located.”

51. K.S.A. 2012 Supp. 66-1810 requires the excavator to immediately inform emergency personnel of the municipality of the broken line.

52. K.S.A. 66-1802(g), defines “Municipality” as follows:

“Municipality” means any city, county, municipal corporation, public district or public authority located in whole or in part within this state which provides firefighting, law enforcement, ambulance, emergency medical or other emergency services.

53. There is no definition of “emergency personnel” in KUUDPA.

54. Although K.S.A. 2012 Supp. 66-1810 does not explicitly require notification by a call to 9-1-1, the Commission notes that the KUUDPA statutory scheme applies statewide and there may be municipalities without 9-1-1 capability. However, under the circumstances presented here, 9-1-1 is the published contact number for emergency personnel of the City of Topeka.

55. Under the plain language of KUUDPA’s statutory scheme, the escaping gas presented a clear and present danger that required N-Line to take action to fulfill its duty to the public, which has been articulated by the Kansas Courts as follows:

“[KUUDPA] creates a statutory duty to the public to ensure the safety and integrity of underground facilities.”⁸⁰

KUUDPA “create[s] a mandatory program designed to protect the State’s underground utility infrastructure from excavation damage and to protect the public from harm.”⁸¹

Given that public safety is the primary goal of KUUDPA, the purpose of K.S.A. 2012 Supp. 66-1810 is to ensure the immediate dispatch to the excavation location of facility and emergency personnel and to protect persons and property and to minimize hazards from the damage to the underground facility.

56. The facts demonstrate that N-Line was excavating within Topeka city limits when N-Line damaged the KGS service line. In Topeka and Shawnee County, 9-1-1 is the published emergency number for fire, police, ambulance, and sheriff personnel. Under KUUDPA, the excavator has the obligation to make the notifications necessary to minimize the hazards to the public under the circumstances presented here. An attempted phone call to a personal friend who is a firefighter who may or not have been on duty does nothing to dispatch emergency personnel to the excavation location and by itself is insufficient action to fulfill the excavator’s duty under KUUDPA.

57. The facts in the record do not demonstrate that anybody representing the emergency personnel of the municipality was “informed” of the broken gas line as required by K.S.A. 2012 Supp. 66-1810.

iii. Appropriateness of the \$5,000 civil penalty

⁸⁰ *Double M Constr. v. Kan. Corp. Comm’n*, 288 Kan. 268, 272, 202 P.3d 7 (2009).

⁸¹ *Kansas One-Call System, Inc. v. State of Kan.*, 294 Kan. 220, 223, 274 P.3d 625 (2012).

58. N-Line asserts that even if there had been a violation of K.S.A. 2012 Supp. 66-1810, the amount of the penalty recommended by Staff is excessive in light of the facts of this case and the Commission's precedent in other similar cases.⁸² In support of this assertion, N-Line makes reference to mitigating circumstances and past Commission orders involving cases in which an excavator failed to notify emergency personnel that resulted in either no penalty or a \$500 penalty.⁸³ N-Line also makes a culpability argument by noting that N-Line did not intentionally violate any of the KUUDPA provisions.⁸⁴

59. Staff disagrees with N-Line's assertion and cites to a different Commission case, the Double M case, in which Staff recommended a \$25,000 civil assessment be issued based on Staff's findings that the excavator did not have a valid Notice of Intent of Excavation prior to excavating and that a death occurred as a result of the excavator's actions.⁸⁵ Staff likened that case to the present case in that N-Line did not have a valid Notice of Intent of Excavation; however, the consequence of that violation did not directly lead to any injury or loss of property and as such, Staff did not recommend a penalty for that violation.⁸⁶ In this case, however, Staff noted that N-Line's failure to call emergency personnel arguably contributed to property damage and a fatality and for that reason, Staff recommended that a \$25,000 civil assessment was appropriate, but after accounting for mitigating actions taken by N-Line, recommended a reduced penalty of \$5,000.⁸⁷

60. N-Line argues that the facts of the Double M case are unlike the facts of this case in that Double M failed to give notice of its excavation and failed to ascertain the location of the

⁸² N-Line Response, ¶ 15.

⁸³ Id. at ¶¶ 16-17.

⁸⁴ Id. at ¶ 16.

⁸⁵ Staff Reply, ¶ 12; citing Docket No. 07-MMCP-469-SHO (Double M).

⁸⁶ Id.

⁸⁷ Id.

underground facilities resulting in death of an excavator employee, whereas in this case, N-Line gave notice, ensured that the facilities were marked, and pot-holed the property to identify the location and depth of the gas lines.⁸⁸

61. N-Line and Staff are relying on Commission ‘precedent’ to support their respective positions regarding the appropriateness of the amount of a civil penalty. Further, the respective ‘precedents’ advanced by N-Line and Staff are not directly comparable to one another and fines imposed in previous cases does not constitute binding precedent on the Commission which considers and weighs the facts and circumstances of each case brought before it. Further, the precedential value of Commission orders is governed by the Kansas Rules and Regulations Filing Act,⁸⁹ specifically K.S.A. 2012 Supp. 77-415, and is not applicable in this matter.

62. Reliance on past Commission orders in which penalties were assessed under different facts and circumstances is without merit. Further, the Commission rejects N-Line’s culpability argument since there is no culpability distinction in KUUDPA.

63. The Commission adopts Staff’s recommendation and finds that N-Line shall pay a \$5,000 civil penalty for its violation of K.S.A. 2012 Supp. 66-1810. The Commission finds this \$5,000 penalty to be reasonable when considering the following mitigating circumstances: N-Line attempted to immediately contact the gas company by calling the number on the flag, N-Line called Kansas One Call and KGS to report the incident within 24 minutes, N-Line thought there was only one relatively small leak—it did not realize the gas service line was pulled out of the compression fitting service tap on the main line, KGS agreed with N-Line and initially thought there was only one gas leak.

⁸⁸ N-Line Response, footnote 12.

⁸⁹ K.S.A. 2012 Supp. 77-415 through 77-438.

64. The Commission has considered N-Line's assertions of mitigating facts, such as N-Line being in operation for approximately twenty years and has not previously been cited by Staff for notices of probable non-compliance⁹⁰, and that a penalty of \$5,000 "is an extremely large sum to a small operation like N-Line"⁹¹, a "small company with limited means to pay a large fine."⁹²

65. The Commission is not persuaded that the recommended \$5,000 penalty is excessive based on the facts and circumstances in this matter. Staff already took into account specific mitigating factors that in Staff's judgment, were appropriate to reduce the baseline \$25,000 civil penalty to \$5,000. While, in N-Line's opinion, this is an excessive penalty amount, it must be remembered that there are other factors which justify the imposition of a penalty, most notably that there was a fatality associated with this incident.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

(A) The Consent Decree between Kansas Gas Service, a Division of ONEOK, Inc. and the Staff of the Kansas Corporation Commission is hereby approved.

(B) N-Line shall pay a \$5,000 civil penalty for its violation of K.S.A. 2012 Supp. 66-1810.

(C) The parties have fifteen days, plus three days if service of this order is by mail, from the date this order was served in which to petition the Commission for reconsideration of any issue or issues decided herein. K.S.A. 66-118; K.S.A. 2012 Supp. 77-529(a)(1).

(D) The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further orders as it may deem necessary and proper.

⁹⁰ N-Line Response, ¶ 17.

⁹¹ N-Line Response, ¶ 17.

⁹² N-Line Response, ¶ 17; citing Staff Report, p. 12.

BY THE COMMISSION IT IS SO ORDERED.

Sievers, Chmn; Wright, Com.; Albrecht, Com.

Dated: **APR 17 2013**


ORDER MAILED APR 17 2013

Patrice Petersen-Klein
Executive Director

RB

APR 17 2013

CERTIFICATE OF SERVICE

12-GIMG-584-GIP

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing Order was served by electronic service on this 17th day of April, 2013, to the following parties who have waived receipt of follow-up hard copies.

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