

STATE OF KANSAS



CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027

PHONE: 785-271-3100
FAX: 785-271-3354
<http://kcc.ks.gov/>

GOVERNOR JEFF COLYER, M.D.
SHARI FEIST ALBRECHT, CHAIR | JAY SCOTT EMLER, COMMISSIONER | DWIGHT D. KEEN, COMMISSIONER

NOTICE OF PENALTY ORDER

19-DPAX-073-PEN

August 28, 2018

Jerry Watkins
Black Hills Energy Corporation
2330 N Hoover Rd.
Wichita, Kansas 67205

This is a notice of penalty assessment for violation(s) of the Kansas Underground Utility Damage Prevention Act (KUUDPA) discovered during an investigation conducted on June 11, 2018, by Kansas Corporation Commission Staff. For a full description of the violation(s) and penalty please refer to the Order that is attached to this notice.

IF YOU ACCEPT THE PENALTY:

You have been assessed a \$500 penalty. You have twenty (20) days from the date of service of the Penalty Order to pay the fine amount. Checks should be payable to the Kansas Corporation Commission. Payments shall be mailed to the Fiscal Section of the Kansas Corporation Commission, 1500 S.W. Arrowhead Road, Topeka, Kansas 66604, and shall include a reference to the docket number of this proceeding.


IF YOU CONTEST THE PENALTY:

You have the right to request a hearing. Requests for hearings must be made in writing, setting forth the specific grounds upon which relief is sought. The company may electronically file its request for hearing within fifteen (15) days from the date of service of this Penalty Order, and e-mail or mail a copy of the request for hearing to the Litigation Counsel listed below. If the company does not have access to the internet, it must submit an original and seven copies of the request for hearing to the Commission's Secretary at 1500 SW Arrowhead Road, Topeka, Kansas 66604, within fifteen (15) days from the date of service of this Penalty Order, and provide a copy to the Litigation Counsel listed below.

IF YOU FAIL TO ACT:

Pursuant to K.A.R. 82-14-6(j), failure to submit a written request for a hearing within fifteen (15) days or, in the alternative, to pay the civil assessment in twenty (20) days from date of service of this Penalty Order will be considered an admission of noncompliance and result in this Penalty Order becoming a Final Order where after the Commission may order further sanctions.

Respectfully,



Cole Bailey, S. Ct. No. 27586
Litigation Counsel
(785)271-3186
c.bailey@kcc.ks.gov

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

Before Commissioners: Shari Feist Albrecht, Chair
 Jay Scott Emler
 Dwight D. Keen

In the Matter of the Investigation of Black)	
Hills Energy Corporation of Wichita,)	
Kansas, Regarding Violation(s) of the Kansas)	
Underground Utility Damage Prevention Act)	Docket No. 19-DPAX-073-PEN
(KUUDPA) (K.S.A. 66-1801, <i>et seq.</i> , and)	
K.A.R. 82-14-1, <i>et seq.</i> , and the)	
Commission's Authority to Impose Penalties)	
and/or Sanctions (K.S.A. 66-1,151).)	

PENALTY ORDER

The above-captioned matter comes before the State Corporation Commission of the State of Kansas (Commission). The Commission, being duly advised in the premises, and after having examined its files and records, finds and concludes as follows:

I. JURISDICTION AND BACKGROUND

1. The Commission has jurisdiction and authority to administer and enforce the Kansas Underground Utility Damage Prevention Act (KUUDPA), as provided in K.S.A. 66-1801 *et seq.* Likewise, K.S.A. 66-1815 grants the Commission full power and authority to adopt all necessary rules and regulations for carrying out the provisions of K.S.A. 66-1801 through 66-1814, *et seq.*

2. In its enforcement of KUUDPA, pursuant to K.A.R. 82-14-6, as amended, the Commission may investigate an entity under the Commission's jurisdiction and order a hearing on the Commission's own motion when the Commission believes the entity is in violation of the law or any order of the Commission.

3. The Commission shall impose civil penalties and injunctive actions against any person or entity subject to and found in violation of the provisions of KUUDPA, or any rule and regulation, or any order of the Commission. Each violation is subject to a penalty, not to exceed \$25,000, for each day the violation persists, with a maximum civil penalty of \$1,000,000 for any related series of violations. *See* K.S.A. 66-1812, 66-1,151 and amendments thereto; and, K.A.R. 82-14-6.

II. ALLEGATIONS OF NONCOMPLIANCE

4. Pursuant to the above authority, on June 11, 2018 Commission Staff (Staff) investigated the activity and operations of Black Hills Energy Corporation (Respondent). *See* Report and Recommendation of Staff dated August 7, 2018, a copy of which is attached hereto as Attachment “A” and is hereby incorporated by reference. As a result of this investigation, Staff reports the following:

- a. On June 11, 2018, Staff performed an onsite inspection at 328 N Oliver in Wichita, Kansas. Staff’s investigation discovered locates were not provided by Respondent after being requested. Because Respondent did not provide locates, damage to a Black Hills’ gas service line at the aforementioned address occurred. No injuries or additional property damage occurred.
- b. Respondent was notified by a Notice of Probable Noncompliance issued by Staff on June 15, 2018, citing the violation of K.S.A. 66-1806(a) as follows:

(a) Within two working days, beginning on the later of the first working day after the excavator has filed notice of intent to excavate or the first day after the excavator has whitelined the excavation site, an

operator served with notice, unless otherwise agreed between the parties, shall inform the excavator of the tolerance zone of the underground facilities of the operator in the area of the planned excavation by marking, flagging or other acceptable method.

- c. Staff's Notice of Probable Noncompliance notified Respondent of the investigation results. The letter instructed Respondent to respond within thirty (30) days and to indicate whether it accepted or disagreed with the findings of Staff's investigation. The notice also requested Respondent to provide written explanation of the actions taken by it to prevent future KUUDPA violations. In the alternative, the Respondent could provide documentation explaining why it disagreed with the findings, including identification of any errors in the Notice of Probable Noncompliance.
- d. On June 21, 2018, Respondent responded to the Notice of Probable Noncompliance. Respondent stated it agreed with the information contained in the Notice of Probable Noncompliance and as a result, has discussed this incident with its locator in order to prevent any further non-locates. Staff recommends a fine of \$500 for this violation.

5. KUUDPA requires all operators to inform the excavator of the location of the operator's underground facilities at a given excavation site within a 48-inch tolerance zone. A locate is required to be completed within two working days after the day on which the excavator provided notice of its intent to excavate. Although KUUDPA allows an excavator to dig without locates being completed if the required marking time has expired, most excavators will wait for locates rather than take the risk of damaging underground facilities or endangering life and property. Postponing excavation because of the failure of utilities to complete locates for

excavators can result in costly downtime and scheduling problems, including but not limited to, cancellation of contracts.

6. Staff recommends the Commission issue a total civil penalty of \$500 for the above-described violation(s) of the Kansas Underground Utility Damage Prevention Act as alleged.

III. CONCLUSIONS OF LAW

7. The Commission finds it has jurisdiction over Black Hills Energy Corporation because it is an entity subject to the requirements of the Kansas Underground Utility Damage Prevention Act, which the Commission is required to administer and enforce pursuant to K.S.A. 66-1813. Specifically, the Commission finds Respondent to be acting as an operator who operates Tier 1 facilities as defined in K.S.A. 66-1802.

8. The Commission finds Respondent violated Kansas law governing underground utilities, including various provisions of the Kansas Underground Utility Damage Prevention Act, as described above, and is therefore subject to sanctions or fines imposed by the Commission. Specifically, the Commission finds Respondent failed to comply with K.S.A. 66-1806(a) for the above listed incident(s).

9. The Commission finds a civil penalty is warranted due to Respondent's violation(s) of the Kansas Underground Utility Damage Prevention Act. Accordingly, pursuant to K.S.A. 66-1812 and K.S.A. 66-1,151, the Commission concludes the Respondent shall be assessed a \$500 penalty for violation(s) of the Kansas Underground Utility Damage Prevention Act.

10. The Commission finds and concludes Respondent shall be afforded an opportunity to request a hearing on the assessment of this civil penalty. Pursuant to K.A.R. 82-

14-6(j), the Commission finds and concludes Respondent shall have 15 days from the date of service of this Penalty Order to request a hearing on the matter. Pursuant to K.A.R. 82-14-6(i), and (j), the Commission finds and concludes Respondent's failure to pay the assessed civil penalty within 20 days or request a hearing within 15 days from the date of service of this Penalty Order shall be considered an admission of noncompliance. To ensure uniformity and consistency among Commission proceedings, the Commission finds and concludes any hearing on this matter before the Commission shall be conducted in a manner consistent with the Kansas Administrative Procedure Act, K.S.A. 77-501 *et seq.*

THE COMMISSION THEREFORE ORDERS THAT:

A. Black Hills Energy Corporation, is hereby assessed a \$500 civil penalty for the violation(s) of the Kansas Underground Utility Damage Prevention Act, K.S.A. 66-1801 *et. seq.*

B. Pursuant to K.A.R. 82-14-6(j) and amendments thereto, any party may request a hearing by electronically filing its request for hearing within fifteen (15) days from the date of service of this Penalty Order, and e-mail or mail a copy of the request for hearing to the Litigation Counsel listed on the Notice of Penalty Assessment. If the company does not have access to the internet, it must submit an original and seven copies of the request for hearing to the Secretary for Commission at 1500 SW Arrowhead Road, Topeka, Kansas 66604, within fifteen (15) days from the date of service of this Penalty Order, and provide a copy to Litigation Counsel. Hearings will be scheduled only upon written request. Failure to timely request a hearing shall be considered an admission of noncompliance and result in a waiver of Respondent's right to a hearing. Furthermore, this Penalty Order will become a Final Order assessing a \$500 civil penalty against Respondent. Any hearing on this matter before the

Commission shall be conducted in a manner consistent with the Kansas Administrative Procedure Act, K.S.A. 77-501 *et seq.*

C. Attorneys for all parties shall enter their appearances in Commission proceedings by giving their names and addresses for the record. For civil penalties exceeding \$500, a corporation shall appear before the Commission by its attorney, unless waived by the Commission for good cause shown and a determination that such waiver is in the public interest. *See* K.S.A. 77-515(c); K.A.R. 82-1-228(d)(2); K.A.R. 82-1-202(a).

D. Pursuant to K.A.R. 82-14-6, if you do not request a hearing, the payment of the civil penalty is due in twenty (20) days from the date of service of this Order. A check shall be made payable to the Kansas Corporation Commission. Payments shall be mailed to the Fiscal Section of the Kansas Corporation Commission, 1500 S.W. Arrowhead Road, Topeka, Kansas 66604. The payment shall include a reference to the docket number of this proceeding.

E. Unless a hearing is requested, failure to pay the \$500 civil penalty within twenty (20) days from the date of service of this Penalty Order will result in enforcement action against Respondent, including all sanctions, requirements, and penalties described above being enforceable without further action by the Commission.

F. The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further order or orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Albrecht, Chair; Emler, Commissioner; Keen, Commissioner

Dated: 08/28/2018

A handwritten signature in dark ink, appearing to read "Lynn M. Retz", is written over a horizontal line.

Lynn M. Retz
Secretary to the Commission

CB/vj

ATTACHMENT “A”

**REPORT AND RECOMMENDATION
UTILITIES DIVISION**

TO: Chair Shari Feist Albrecht
Commissioner Jay Scott Emler
Commissioner Pat Apple

FROM: Robert Jackson, Damage Prevention Special Investigator
Leo Haynos, Chief of Pipeline Safety
Jeff McClanahan, Director of Utilities

DATE: August 7, 2018

SUBJECT: Docket Number: 19-DPAV-073-PEN
In the Matter of the Investigation of Black Hills Energy Regarding Violations of the Kansas Underground Utility Damage Prevention Act (KUUDPA) (K.S.A. 66-1801, et seq., and K.A.R. 82-14-1 through 82-14-5) and the Commission's Authority to Impose Penalties and/or Sanctions (K.S.A. 66-1,151) / RJ-18-OC-1060

EXECUTIVE SUMMARY:

Staff is recommending a civil penalty be issued to Black Hills Energy (BHE) in the amount of \$500 for a violation of KUUDPA. BHE did not provide locates prior to excavation on June 11, 2018, in Wichita, Kansas. Failure to provide the excavator with the location of the tolerance zone of a buried facility before excavation begins is a violation of K.S.A. 66-1806(a). A Notice of Probable Noncompliance (PNC) was issued to BHE on June 15, 2018. BHE responded to this PNC as required by K.A.R. 82-14-6(c). A copy of the PNC and the response is included as Attachment I.

ANALYSIS:

Rationale for Penalties:

A. Gravity of noncompliance:

Failure to provide accurate locate marks depicting the tolerance zone is a high-risk activity with the potential for significant consequences to public safety. After receiving a valid locate request from the excavator, BHE failed to mark the hit 1" service line at 328 N. Oliver. Failure to comply with this requirement of the law warrants the assessment of a civil penalty.

B. Culpability:

BHE is directly responsible for its actions in failing to provide accurate locates as Kansas law requires.

C. History of noncompliance:

Staff has issued a total of 7 KUUDPA Notices of Probable Noncompliance to BHE in the past two years. These alleged violations were for similar issues regarding failure to provide timely and accurate locates.

D. Response of the utility operator regarding noncompliance(s):

BHE responded to this PNC as required by K.A.R. 82-14-6(c) and agreed with Staff's allegations as to the cause of the damage. BHE personnel failed to provide locates requested by the excavator. BHE has reviewed this damage and restated expectations for locator management and personnel to include following procedures and referencing system mapping.

E. Aggravating/Mitigating Circumstances:

Staff has not determined any circumstances that would cause modification of the recommended penalty amount of \$500.

RECOMMENDATION:

Staff recommends a civil penalty be issued to Black Hills Energy, in the amount of \$500 for violation(s) of KUUDPA.

Attachments

Attachment I

PROBABLE NONCOMPLIANCE

Investigation: RJ-18-OC-1060

Company: Black Hills Energy

Division: One Call

Regulation:

66-1806 (a) Identification of location of facilities; duties of operator;

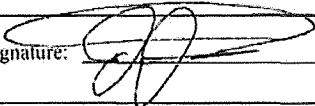
(a) Within two working days, beginning on the later of the first working day after the excavator has filed notice of intent to excavate or the first day after the excavator has whitelined the excavation site, an operator served with notice, unless otherwise agreed between the parties, shall inform the excavator of the tolerance zone of the underground facilities of the operator in the area of the planned excavation by marking, flagging or other acceptable method.

PROBABLE NONCOMPLIANCE DESCRIPTION:

On 06/11/18, KCC Staff responded to a Black Hills Energy (BHE) gas service line damaged at 328 N. Oliver Ave. in Wichita Kansas. A contractor hit the gas line installing the base of a new electronic sign. There was a valid One Call ticket #18244981. The line damaged did not have any locate marks. BHE failed to correctly mark the line damaged. This is a violation of 66-1806 above.

OPERATOR'S RESPONSE: (Attach verification if needed)

See attached response

Operator's Authorized Signature: 

Date: *6/21/18*

PIPELINE SAFETY USE ONLY:

Date reviewed: _____

Date reviewed: _____

Chief: _____

Inspector: _____

Inspection Type: One Call Inquiry/Complaint

Date Inspected: 06/07/2018

Inspected By: RJ

Facts Related to KCC Probable Noncompliance

Investigation #: RJ-18-OC-1060

Location: 328 N. Oliver, Wichita, Ks.

Scenario: Contract locate company (USIC) employee failed to locate 1" PE service correctly as required.

Description of line: The school maintenance employee had put in a locate to plant trees in front of their school, their locate was legal and they hit BHE unmarked 1" PE service with a Bob Cat auger machine. The school did have a legal locate for the site and other utilities were marked.

Follow Up: Black Hills met with its contract locate company (USIC) Supervisor and their locator on site to investigate why the gas line had not been marked correctly within the dig area as requested by the Kansas One Call ticket.

The issues found during this investigation at the property address of 328 N. Oliver where locate ticket #18244981 was active, that we believe were significant contributors to the incident:

- The USIC contract line locator needs to look closer at BHE service cards and check the area if they are not sure of their surroundings, from where the phone and electric lines were marked you can see the gas meter 50' away.
- The results were that a USIC Supervisor conducted audits on legal locates requests that the locator worked prior.

Black Hills reviewed the hit line with USIC management at our monthly meeting. Expectations were restated for USIC management and the locator involved that included; following procedures and referencing system mapping.

All schools serviced by BHE will be added to GT Viewer in the near future.

PROBABLE NONCOMPLIANCE

Investigation: RJ-18-OC-1060

Company: Black Hills Energy

Division: One Call

Regulation:

66-1806 (a) Identification of location of facilities; duties of operator;

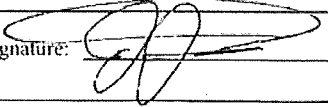
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Date reviewed: _____

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Chief: _____

Inspector: _____

Inspection Type: One Call Inquiry/Complaint

Date Inspected: 06/07/2018

Inspected By: RJ

Facts Related to KCC Probable Noncompliance

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CERTIFICATE OF SERVICE

19-DPAX-073-PEN

I, the undersigned, certify that the true copy of the attached Order has been served to the following parties by means of
first class mail/hand delivered on 08/29/2018.

JERRY A WATKINS, GENERAL MANAGER
BLACK HILLS/KANSAS GAS UTILITY COMPANY, LLC
D/B/A BLACK HILLS ENERGY
2330 N HOOVER
WICHITA, KS 67205
Fax: 316-772-2656
jerry.watkins@blackhillscorp.com

COLE BAILEY, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
Fax: 785-271-3354
c.bailey@kcc.ks.gov

/S/ DeeAnn Shupe

DeeAnn Shupe