

1500 SW Arrowhead Road
Topeka, KS 66604-4027



Phone: 785-271-3100
Fax: 785-271-3354
<http://kcc.ks.gov/>

Shari Feist Albrecht, Chair
Jay Scott Emler, Commissioner
Pat Apple, Commissioner

Sam Brownback, Governor

VIA CERTIFIED MAIL

NOTICE OF PENALTY ORDER
16-DPAX-070-PEN

August 20, 2015

Justin Clements
Kansas Gas Service,
A Division of ONE Gas
7421 W 129th St
Overland Park KS 66213

This is a notice of penalty assessment for violation of the Kansas Underground Utility Damage Prevention Act (KUUDPA) discovered during an investigation conducted on April 30, 2015, by Kansas Corporation Commission Staff. For a full description of the violation and penalty please refer to the Order that is attached to this notice.

IF YOU ACCEPT THE PENALTY:

You have been assessed a \$7,500 penalty. You have twenty (20) days from service of the Penalty Order to pay the fine amount. Checks or Money Orders should be payable to the Kansas Corporation Commission. Payments shall be mailed to the Fiscal Section of the Kansas Corporation Commission, 1500 SW Arrowhead Road, Topeka, Kansas 66604, and shall include a reference to the docket number of this proceeding. Credit card payments may be made by calling the Fiscal Office at 785-271-3113.

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 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 Notice of Probable Noncompliance and Proposed Penalty Order.

IF YOU FAIL TO ACT:

Pursuant to K.A.R. 82-14-6(j), failure to pay or provide a written request for a hearing within fifteen (15) days or in the alternative, to pay the civil assessment in twenty (20) days, will be considered an admission of noncompliance and result in the Penalty Order becoming a final order.

Respectfully,

Andrew French, #24680
Litigation Counsel
(785)271-3361

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

Before Commissioners: Shari Feist Albrecht, Chair
 Jay Scott Emler, Commissioner
 Pat Apple, Commissioner

In the Matter of the Investigation of **Kansas**)
Gas Service, A Division of ONE Gas, of)
Overland Park, Kansas, Regarding) Docket No. 16-DPAX-070-PEN
Violation(s) 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).)

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, Kansas law grants the Commission full power and authority to do all things necessary and convenient in its exercise of its authority and jurisdiction pursuant to K.S.A. 2014 Supp. 66-1815 and amendments thereto.

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 \$500,000 for any related series of violations. 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, Commission Staff (Staff) investigated the activities and operations of Kansas Gas Service, A Division of ONE Gas (Respondent) on 15 occasions where Respondent failed to provide locates of its underground facilities within the time limits required by KUUDPA. See Report and Recommendation of Staff dated July 27, 2015, a copy of which is attached hereto as Attachment "A". As a result of this investigation, Staff reports the following:

- a. On April 30, 2015, Staff investigated 15 excavation sites where Respondent failed to provide locates requested by the excavator, resulting in damage to its natural gas facilities and lost work time for the excavators that damaged the line. No injuries or property damage occurred as a result of these damages.
- b. Failure to provide the excavator with the location of the tolerance zone of the buried facility before excavation is a violation of K.S.A. 66-1806(a).
- c. The table on page two of the Report and Recommendation attached hereto sets out the date of work to begin, the type of work to be done, the hours Respondent was late in providing locates, and the penalty amount.

d. Staff issued Notices of Probable Noncompliance to Respondent on May 4, 2015. The Notice instructed Respondent to respond within thirty (30) days and to indicate whether Respondent accepted or disagreed with the findings of Staff's investigation. The notice also requested Respondent to provide written explanation of the actions taken by Respondent to prevent future KUUDPA violations. In the alternative, the Respondent could provide documentation explaining why Respondent disagreed with the findings to include identification of any errors in the Notice of Probable Noncompliance. The violation cited is as follows:

i. **Identification of location of facilities; duties of operator; liability for damages.** (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. K.S.A 2014 Supp. 66-1806.

e. Staff received written a response from Respondent to the Notice of Probable Noncompliance. In its response, Respondent agreed with the information contained in the Notices of Probable Noncompliance and as a result, also agreed with Staff's finding of fault.

5. Staff recommends the Commission issue a civil penalty of \$7,500 for the violations of the Kansas Underground Utility Damage Prevention Act as alleged.

III. CONCLUSIONS OF LAW

6. The Commission finds it has jurisdiction over Kansas Gas Service, A Division of ONE Gas (Respondent) because it is a public utility.

7. The Commission finds Respondent violated Kansas law governing underground utilities, including various provisions of the Kansas Underground Utility Damage Prevention Act, and is therefore subject to sanctions or fines imposed by the Commission.

8. Respondent is hereby assessed a \$7,500 penalty for violation of the Kansas Underground Utility Damage Prevention Act.

THE COMMISSION THEREFORE ORDERS THAT:

A. Kansas Gas Service, A Division of ONE Gas, of Overland Park, KS 66213, is hereby assessed a \$7,500 civil penalty for the violation of the Kansas Underground Utility Damage Prevention Act, K.S.A. 66-1801 *et. seq.*

B. Pursuant to K.S.A. 2014 Supp. 77-529, K.S.A. 66-118b, K.A.R. 82-1-215 and amendments thereto, any party may request a hearing on the above issues by submitting a written request, consisting of an original and seven (7) copies, setting forth the specific grounds upon which relief is sought, to the Commission's Secretary, at 1500 S.W. Arrowhead Road, Topeka, Kansas 66604 within fifteen (15) days from the date of service of this Order. If service is by certified mail, service is complete upon the date delivered shown on the Domestic Return Receipt. *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 \$7,500 civil penalty against Respondent.

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. K.S.A. 77-515(c); K.A.R. 82-1-228(d)(2); K.A.R. 82-1-202(a). For civil penalties of \$500 or less, a corporation may appear by a duly authorized representative of the corporation. K.S.A. 2014 Supp. 66-1,142b(e) and amendments thereto.

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 date of service of this Order. Checks and Money Orders shall be payable to the Kansas Corporation Commission. For credit card payments, include type of card (Visa, MasterCard, Discover, or American Express), account number and expiration date. Payments shall be mailed to the Fiscal Section of the Kansas Corporation Commission, 1500 S.W. Arrowhead Road, Topeka, Kansas 66604. Credit card payments can be made by calling the Fiscal Office at 785-271-3351. The payment shall include a reference to the docket number of this proceeding.

E. Failure to pay the \$7,500 civil penalty within twenty (20) days of the issuance 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; Apple Commissioner

Dated: **AUG 20 2015**

Amy Gilbert
ORDER MAILED AUG 21 2015

Amy L. Gilbert
Secretary to the Commission

AF/vj

ATTACHMENT "A"

**REPORT AND RECOMMENDATION
UTILITIES DIVISION**

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

FROM: Christie Knight, Damage Prevention Special Investigator
Leo Haynos, Chief of Energy Operations and Pipeline Safety
Jeff McClanahan, Director of Utilities

DATE: July 27, 2015

SUBJECT: Docket Number: 16-DPAX-070-PEN
In the Matter of the Investigation of Kansas Gas Service, A Division of ONE Gas, 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).

EXECUTIVE SUMMARY:

Staff is recommending a civil penalty be issued to Kansas Gas Service, A Division of ONE Gas (KGS), in the amount of \$7,500 for 15 violation(s) of KUUDPA that have occurred on April 30, 2015. The penalty is based on results of Staff investigations of 15 excavation sites where KGS failed to provide locates of its underground facilities within the time limits required by KUUDPA. All of the inspections occurred in Johnson County, Kansas. Failure to provide the excavator with the location of the tolerance zone of the buried facility before excavation begins is a violation of K.S.A. 66-1806 (a).

BACKGROUND:

KUUDPA requires all operators to inform the excavator of the location of its underground facilities at a given excavation site. The 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 utilities 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 cancellation of contracts. In this case, Staff's field inspections determined 15 incidents where KGS did not provide timely locates for excavators. The following table provides the date locates were scheduled to be completed, the type of excavation work scheduled, and the number of hours between the excavation scheduled start date and Staff's field inspection.

Ticket #	Work to begin date	Type of Work to be done	Hours late	Penalty Amt
15180486	4/30/2015	Google Fiber	15.4 hrs	\$500
15180339	4/30/2015	Google Fiber	15.4 hrs	\$500
15180399	4/30/2015	Google Fiber	15.4 hrs	\$500
15180376	4/30/2015	Google Fiber	15.4 hrs	\$500
15180438	4/30/2015	Google Fiber	15.4 hrs	\$500
15180429	4/30/2015	Google Fiber	15.4 hrs	\$500
15180516	4/30/2015	Repair Water Drainage	12.4 hrs	\$500
15177825	4/28/2015	Replace Pole and Anchor	59.25 hrs	\$500
15177826	4/28/2015	Replace Pole and Anchor	59.3 hrs	\$500
15177829	4/28/2015	Replace Pole and Anchor	59.3 hrs	\$500
15177830	4/28/2015	Replace Pole and Anchor	59.4 hrs	\$500
15177817	4/28/2015	Replace Pole and Anchor	59.5 hrs	\$500
15179271	4/29/2015	Replace Pole and Anchor	35.6 hrs	\$500
15183467	4/30/2015	Replace Pole and Anchor	11.8 hrs	\$500
15180703	4/30/2015	Plant Shrubs	14.9 hrs	\$500
			Total	\$7,500

Although Staff only observed the above listed 15 incidents of late locates, we note that Kansas One Call records indicate 1,117 complaints of failure to provide timely locates were filed for Johnson County, Kansas in April of 2015. Staff issued a Notice of Probable Noncompliance (PNC) to KGS on May 4, 2015. KGS has responded to the PNC as required by K.A.R. 82-14-6(c) and agreed the locates were not performed on time but argued extenuating circumstances delayed its response. Attachment I provides a copy of Staff's allegation and KGS's response to the PNC.

ANALYSIS:

Rationale for Penalties:

A. Gravity of noncompliance:

Once an excavator notifies underground utility operators of a planned excavation, each operator with facilities buried at that site must provide within two working days surface markings that indicate where the utilities are located. Failure in providing accurate and timely locate marks depicting the tolerance zone is a high-risk activity with the potential for significant consequences to public safety. Not providing locates potentially gives the excavator a false sense of security by indicating the buried facilities are not in the vicinity of the proposed excavation.

This effect may result in the excavator causing even greater damage to the buried utility because of the speed and force with which excavation normally is performed in areas clear of underground obstacles. Because providing timely and accurate markings for the excavators is the most fundamental measure a facility owner takes to prevent damage to its buried facilities, the fact that KGS failed to comply with this requirement of the law warrants the assessment of a civil penalty.

B. Culpability:

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

C. History of noncompliance:

Staff has issued similar PNCs to KGS for alleged KUUDPA violations in the past.

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

In its response, KGS notes the Johnson County area is experiencing an unprecedented amount of locate requests due to the ongoing AT&T and Google Fiber overbuild projects. KGS agrees with Staff's allegation that the subject locate requests were not marked on time. KGS states their contract locator contacted the excavator and informed them the locates would be late and obtained the "assent" of the excavators regarding locating the gas lines after the deadline. KUUDPA allows excavator and utility operator involved with a proposed excavation site to work out an agreement as to the time and scope of the required locates.¹ In the case of the above listed 15 incidents, however, Staff contends the excavator did not agree to modify its original request as evidenced by the excavator filing a Non-Response ticket with Kansas One Call.² If the excavator had consented to KGS's request to delay providing locates, a Non-Response ticket would not have been requested from Kansas One Call. While Staff appreciates KGS informing the excavator that locates would not be performed as required by KUUDPA, a unilateral declaration by KGS that locates would not be completed on time does not relieve KGS of its obligations under KUUDPA. In its response, KGS states it has increased its staffing of contract locators in an effort to meet the increase in locate requests and continues to add contract staff. Staff contends KGS's efforts to meet locating demands were inadequate as a remedy and not in time to be effective. While Staff acknowledges the significant increase in locate requests has placed a strain on the locating workforce, we note the increased excavation activity was anticipated for at least six months which gave KGS sufficient time to hire and train additional locators to meet the demand.

¹ K.S.A. 66-1806(a) requires locates be provided within two working days unless "otherwise agreed between the parties".

² A Non-Response ticket is a designation provided by Kansas One Call alerting its members to the fact that an excavator is alleging that one or more utility operators has failed to provide locates before the excavator scheduled start date.

E. Aggravating/Mitigating Circumstances:

Staff concludes there are no extenuating circumstances in these cases that would cause us to modify the recommended penalty amount of \$7,500 for failure to provide timely locate markings.

RECOMMENDATION:

Staff recommends a civil penalty be issued to Kansas Gas Service, A Division of ONE Gas, in the amount of \$7,500 for violation(s) of KUUDPA:

- Failure of a facility owner to properly identify location of facilities is a violation of K.S.A. 66-1806, Identification of location of facilities; duties of operator; liability for damages.

Attachments

ATTACHMENT I

Notice of Probable Noncompliance – KCC #7119

On 4/30/2015, KCC staff performed an audit on the following Non-Response tickets within Johnson County: #15190515, #15190531, #15190536, #15190541, #15190546, #15190550, #15190692, #15190705, #15190722, #15190730, #15190736, #15190738, #15190925, #15190937, #15190973. It was observed that each of these tickets audited were either not marked, in the process of being marked or the locator was just arriving to mark. Each of these tickets were late in being marked, thus warranting the Probable Noncompliance. **This is a violation of the Statute 66-1806**

Identification of location of facilities; duties of operator; liability for damages. (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. (b) If the operator of tier 2 facilities cannot accurately mark the tolerance zone, such operator shall mark the approximate location to the best of its ability, notify the excavator that the markings may not be accurate, and provide additional guidance to the excavator in locating the facilities as needed during the excavation. (c) The operator of tier 2 facilities shall not be required to provide notification of the tolerance zone for facilities which are at a depth at least two feet deeper than the excavator plans to excavate but does have to notify the excavator of their existence. (d) If the operator of a tier 1 facility has no underground facilities in the area of the proposed excavation, such operator, before the excavation start date, shall notify the excavator that it has no facilities in the area of proposed excavation by telephone, facsimile, marking the area all clear or by other technology that may be developed for such purposes.

Because of the large volume of locates being generated in the Johnson County area by the AT&T Giga Power and Google Fiber overbuild projects, a few locate tickets were processed after the two full working day time limit. Notes made by locators indicate calls were made to the excavators involved informing them that the tickets would be completed after the scheduled work-to-begin date in order to apprise them of the situation and to obtain their assent. The locators responded to all non-response tickets listed on the day they were assigned to the locator by a phone call to the person identified on the ticket.

USIC has added 60 Technicians to the area this year versus last year to deal with the added work load. USIC has approximately 30 more technicians in training for the Johnson County area at the present time to assist in dealing with the added work load. In addition, USIC is actively recruiting a new hire class to begin on 6/1/2015. Current local USIC crews are working over the weekends. Outside assistance is also being brought in when available to assist over weekends.

The activity level has created an overload and is not being helped by both projects speeding up their installations. Information originally giving work due dates as August are now being accelerated to due dates in May and June. This situation has exacerbated already hectic work schedules as both projects are ramping up the volume of due dates by increasing the number of installation crews almost overnight and showing no concern that facility operators cannot maintain locate levels in the current abnormal environment. With the unpredictability of the acceleration of these projects it is impossible to expect operators to maintain staff numbers to keep up with these highly variable locate leads. By the time an operator can react and increase the number of locate techs, the work level may increase even more or precipitously drop off.

PLEASE FORWARD THE ATTACHED DOCUMENT (S) ISSUED IN THE ABOVE-REFERENCED DOCKET TO THE FOLLOWING:

NAME AND ADDRESS	NO. CERT. COPIES	NO. PLAIN COPIES
ANDREW FRENCH, LITIGATION COUNSEL KANSAS CORPORATION COMMISSION 1500 SW ARROWHEAD RD TOPEKA, KS 66604-4027 ***Hand Delivered***		
JUSTIN CLEMENTS, KCC LIAISON FOR KGS KANSAS GAS SERVICE, A DIVISION OF ONE GAS, INC. 7421 W 129TH ST OVERLAND PARK, KS 66213-2634		

ORDER MAILED AUG 21 2015

The Docket Room hereby certified that on this _____ day of _____, 20_____, it caused a true and correct copy of the attached ORDER to be deposited in the United States Mail, postage prepaid, and addressed to the above persons.