

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

In the Matter of a General Investigation )  
Regarding Whether Electric Utilities )  
Should be Considered an “Operator” of ) Docket No. 17-GIME-565-GIV  
Private Underground Lines Under the )  
Provisions of the Kansas Underground )  
Utility Damage Prevention Act. )

**NOTICE OF FILING OF PROPOSED AMENDED FINAL ORDER**

The Staff of the State Corporation Commission of the State of Kansas (“Staff” and “Commission”, respectively) and the Kansas Electric Cooperatives, Inc. (“KEC”), collectively “Joint Movants,” file their proposed Amended Final Order, attached hereto and made a part hereof by this reference, for issuance by the Commission in this docket. In support of thereof the Joint Movants state the following:

1. On July 27, 2017, the Commission issued its Order Opening General Investigation to explore the rights, obligations and liabilities that should be expected of parties regarding the provision of locates and excavation of underground electric service lines and to develop policy positions that will ensure the uniform application of the Kansas Underground Utility Damage Prevention Act (“KUUDPA”).<sup>1</sup>

2. On March 15, 2018, the Commission issued its Final Order finding Kansas electric utilities fall within the definition of an “operator” pursuant to K.S.A. 66-1802(j), and are required to provide locate marks for underground facilities owned by the utility upstream of the meter and for privately owned commercial underground electric facilities that are upstream of the customer controlled disconnect point, pursuant to K.S.A. 66-1806(a).<sup>2</sup>

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<sup>1</sup> Order Opening Investigation (Jul. 27, 2017).

<sup>2</sup> Final Order, pp. 32 – 33 (Mar. 15, 2018).

3. On April 26, 2018, the Commission issued an Order Denying In Part and Granting In Part Kansas Electric Cooperatives, Inc.'s ("KEC") Petition For Reconsideration Or, In the Alternative, Request For Implementation Period of the Final Order, (hereinafter "Reconsideration Order").<sup>3</sup> In the Reconsideration Order, the Commission affirmed its finding that Kansas electric utilities are required to provide locate marks for privately owned commercial underground electric facilities that are upstream of the customer controlled disconnect point.<sup>4</sup>

4. On May 24, 2018, the KEC filed a Petition for Review of the Commission's Final Order and the Commission's Reconsideration Order in the Shawnee County District Court. The District Court docketed this matter as Case No. 2018-CV-000411.

5. On July 27, 2018, the District Court signed an Agreed Order establishing a briefing schedule, and on October 28, 2018, the District Court signed an Agreed Order for Extension extending the briefing schedule.

6. On February 7, 2019, House Bill 2178 ("HB 2178") was introduced in the Kansas House of Representatives. The bill amended the KUUDPA and clarified that electric utilities do not fall within the definition of an "operator" of privately-owned underground lines under K.S.A. 66-1802(k), and therefore, are not required to provide locate marks for any privately-owned underground electric facilities, including privately-owned commercial lines that are upstream of the customer-controlled disconnect point.

7. On April 18, 2019, HB 2178 was enacted into law. HB 2178 amended KUUDPA in four key ways. First, HB 2178 simplified KUUDPA's definition of "operator," in part, to

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<sup>3</sup> Order on KEC's Petition for Reconsideration (Apr. 26, 2018).

<sup>4</sup> See *id.* at p. 15.

mean “any person who owns or leases” an underground facility subject to KUUDPA.<sup>5</sup> Second, HB 2178 refined when an electric public utility was not an “operator.”

An electric public utility shall not be considered an operator of any portion of an underground facility that is on another person's side of the point where ownership of the facility changes from the electric public utility to another person as determined by the electric public utility's rules and regulation, tariffs, service or membership agreement or other similar documents.

8. Third, HB 2178 requires the notification center to notify any person or excavator requesting locates that utilities are only required to identify the location of their own utility-owned facilities and are not required to identify the location of privately owned facilities.<sup>6</sup> Finally, HB 2178 clarified the duties of operators of tier 1 electric facilities:

If the operator of a tier 1 facility is a provider of electricity, the duty of the operator to mark shall not extend to another person's side of the point where ownership of the facility changes from the operator to another person as determined by the operator's rules and regulations, tariffs, service or membership agreements or other similar documents.<sup>7</sup>

9. On May 1, 2019, the District Court signed an Order Granting Joint Motion For Remand, remanding Docket No. 17-GME-565-GIV to the Commission for further proceedings consistent with the enactment of HB 2178. Therefore, Staff and the KEC present the attached proposed Amended Final Order finding electric public utilities are not “operators” under K.S.A. 2019 Supp. 66-1802(k) of underground electric facilities past the point where ownership changes from the utility to another person, and as such, utilities have no duty to mark facilities beyond the point of ownership change.

WHEREFORE, Staff and the KEC respectfully request that the Commission issue an Amended Final Order as set forth herein.

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<sup>5</sup> See 2019 Kansas Laws Ch. 33, § 1; codified at K.S.A. 2019 Supp. 66-1802(k). For reference, the definition previously referred to “any person who owns or operates . . .” (Emphasis added).

<sup>6</sup> See 2019 Kansas Laws Ch. 33, § 2; codified at K.S.A. 2019 Supp. 66-1805(q).

<sup>7</sup> 2019 Kansas Laws Ch. 33, § 3; codified at K.S.A. 2019 Supp. 66-1806(d)(2).

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

Before Commissioners:     Dwight D. Keen, Chair  
                                     Shari Feist Albrecht  
                                     Susan K. Duffy

In the Matter of the General Investigation     )  
Regarding Whether Electric Utilities Should )  
Be Considered an “Operator” of Private     )     Docket No. 17-GIME-565-GIV  
Underground Lines Under the Provisions of )  
The Kansas Underground Utility Damage     )  
Prevention Act.                                     )

**AMENDED FINAL ORDER**

This matter comes before the State Corporation Commission of the State of Kansas (“Commission”). Having reviewed the pleadings and record, and being fully advised in the premises, the Commission makes the following findings and conclusions:

**I. BACKGROUND**

1. On July 27, 2017, the Commission issued its Order Opening General Investigation to explore the rights, obligations and liabilities that should be expected of parties regarding the provision of locates and excavation of underground electric service lines and to develop policy positions that will ensure the uniform application of the Kansas Underground Utility Damage Prevention Act (“KUUDPA”).<sup>1</sup>

2. On March 15, 2018, the Commission issued its Final Order finding Kansas electric utilities fall within the definition of an “operator” pursuant to K.S.A. 66-1802(j), and are required to provide locate marks for underground facilities owned by the utility upstream of the meter and for privately owned commercial underground electric facilities that are upstream of the customer controlled disconnect point, pursuant to K.S.A. 66-1806(a).<sup>2</sup>

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3. On April 26, 2018, the Commission issued an Order Denying In Part and Granting In Part Kansas Electric Cooperatives, Inc.'s ("KEC") Petition For Reconsideration Or, In the Alternative, Request For Implementation Period of the Final Order, (hereinafter "Reconsideration Order").<sup>3</sup> In the Reconsideration Order, the Commission affirmed its finding that Kansas electric utilities are required to provide locate marks for privately owned commercial underground electric facilities that are upstream of the customer controlled disconnect point.<sup>4</sup>

4. On May 24, 2018, the KEC filed a Petition for Review of the Commission's Final Order and the Commission's Reconsideration Order in the Shawnee County District Court. The District Court docketed this matter as Case No. 2018-CV-000411.

5. On July 27, 2018, the District Court signed an Agreed Order establishing a briefing schedule, and on October 28, 2018, the District Court signed an Agreed Order for Extension extending the briefing schedule.

6. On April 18, 2019, HB 2178 was enacted into law. HB 2178 amended KUUDPA in four key ways. First, HB 2178 simplified KUUDPA's definition of "operator," in part, to mean "any person who owns or leases" an underground facility subject to KUUDPA.<sup>5</sup> Second, HB 2178 refined when an electric public utility was not an "operator."

An electric public utility shall not be considered an operator of any portion of an underground facility that is on another person's side of the point where ownership of the facility changes from the electric public utility to another person as determined by the electric public utility's rules and regulation, tariffs, service or membership agreement or other similar documents.

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<sup>3</sup> Order on KEC's Petition for Reconsideration (Apr. 26, 2018).

<sup>4</sup> *See id.* at p. 15.

<sup>5</sup> *See* 2019 Kansas Laws Ch. 33, § 1; codified at K.S.A. 2019 Supp. 66-1802(k). For reference, the definition previously referred to "any person who owns or operates . . ." (Emphasis added).

7. Third, HB 2178 requires the notification center to notify any person or excavator requesting locates that utilities are only required to identify the location of their own utility-owned facilities and are not required to identify the location of privately owned facilities.<sup>6</sup> Finally, HB 2178 clarified the duties of operators of tier 1 electric facilities:

If the operator of a tier 1 facility is a provider of electricity, the duty of the operator to mark shall not extend to another person's side of the point where ownership of the facility changes from the operator to another person as determined by the operator's rules and regulations, tariffs, service or membership agreements or other similar documents.<sup>7</sup>

8. On May 1, 2019, the District Court signed an Order Granting Joint Motion For Remand, remanding Docket No. 17-GME-565-GIV to the Commission for further proceedings consistent with the enactment of HB 2178.

## **II. AMENDED ORDER**

9. By enacting HB 2178 into law, the Kansas legislature has clarified the duties of operators, particularly operators of tier 1 facilities and their marking requirements. As such, the Commission finds it necessary to rescind portions of its previous Orders issued in this matter.

10. The revisions to KUUDPA make clear an electric public utility is not an “operator” of underground facilities that extend past the point where ownership of the facility changes from the electric public utility to another.<sup>8</sup> The electric public utility's rules and regulations, tariffs, service or membership agreements, or other similar documents, detail where this change in ownership occurs.<sup>9</sup>

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<sup>6</sup> See 2019 Kansas Laws Ch. 33, § 2; codified at K.S.A. 2019 Supp. 66-1805(q).

<sup>7</sup> 2019 Kansas Laws Ch. 33, § 3; codified at K.S.A. 2019 Supp. 66-1806(d)(2).

<sup>8</sup> 2019 Kansas Laws Ch. 33, § 1; codified at K.S.A. 2019 Supp. 66-1802(k).

<sup>9</sup> See *id.*

11. Moreover, the clarifications to KUUDPA also clearly establish an “operator’s” duty to mark underground facilities does not extend beyond where ownership of the facility changes from the electric public utility to another.<sup>10</sup>

### **III. FINDINGS AND CONCLUSIONS**

12. The Commission finds its interpretation of certain KUUDPA provisions, and the analyses that led to those interpretations, as detailed in its Final Order and Reconsideration Order, are inconsistent with Kansas law given the passage of HB 2178. Accordingly, the Commission finds and concludes it must revise its ordering paragraphs in its Final Order and Reconsideration Order to comply with Kansas law.

13. The Commission finds and concludes its ordering paragraphs contained within its Final Order and Reconsideration Order must be revised to be consistent with HB 2178’s amendments. Specifically, the Commission finds and concludes electric public utilities are not “operators” under K.S.A. 2019 Supp. 66-1802(k) of underground electric facilities past the point where ownership changes from the utility to another person, and as such, utilities have no duty to mark facilities beyond the point of ownership change.

### **IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:**

A. Kansas electric public utilities fall within the definition of an “operator” only for that portion of an underground electric facility that the public utility owns or leases pursuant to K.S.A. 2019 Supp. 66-1802(k). An electric public utility is not an “operator” of any portion of an underground facility that is on another person’s side of the point where ownership of the facility changes from the electric public utility to another person as determined by the electric public

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<sup>10</sup> 2019 Kansas Laws Ch. 33, § 3; codified at K.S.A. 2019 Supp. 66-1806(d)(2).



utility's rules and regulation, tariffs, service or membership agreement or other similar documents pursuant to K.S.A. 2019 Supp. 66-1802(k).

B. Kansas electric public utilities are required to provide locate marks for underground facilities in a manner consistent with the Kansas Underground Utility Damage Prevention Act as amended by HB 2178. This obligation supersedes previous Commission holdings articulated in this proceeding, including the holding that utilities must mark privately-owned electric commercial facilities upstream of a customer controlled disconnect. All portions of the Final Order and Reconsideration Order that are inconsistent with HB 2178 are hereby declared to be null and void.

C. This Amended Orders supersedes the Final Order and the Reconsideration Order.

D. Parties have 15 days, plus three days if service is by mail, from the date of service of this Order to petition the Commission for reconsideration or request a hearing, as provided in K.S.A. 77-542.

E. 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.

**BY THE COMMISSION IT IS SO ORDERED.**

Keen, Chair; Albrecht, Commissioner; Duffy, Commissioner

Dated: \_\_\_\_\_

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Lynn M. Retz  
Executive Director

**VERIFICATION**

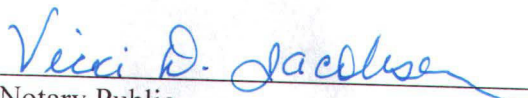
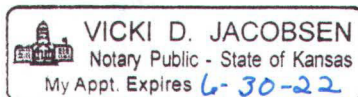
STATE OF KANSAS                     )  
  ) ss.  
COUNTY OF SHAWNEE            )

Robert E. Vincent, of lawful age, being duly sworn upon his oath deposes and states that he is Litigation Counsel for the State Corporation Commission of the State of Kansas; that he has read and is familiar with the foregoing *Notice of Filing of Proposed Amended Final Order*, and attests that the statements therein are true and correct to the best of his knowledge, information and belief.



Robert E. Vincent, S.Ct. #26028  
Senior Litigation Counsel  
The State Corporation Commission  
of the State of Kansas

SUBSCRIBED AND SWORN to before me this 23<sup>rd</sup> day of September, 2019.

  
Notary Public

My Appointment Expires: 6-30-22

## **CERTIFICATE OF SERVICE**

17-GIME-565-GIV

I, the undersigned, certify that a true and correct copy of the above and foregoing Notice of Filing of Proposed Amended Final Order was served electronically this 23rd day of September, 2019, to the following:

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