

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-127-PEN

October 9, 2018

Steve Barron
AT&T
507 E Main
Union, Missouri 63084

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 13, 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,

Carly R. Masenthin

Carly R. Masenthin, S. Ct. No. 27944
Litigation Counsel
(785)271-3361
c.masenthin@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 Investigation of AT&T of)	
Union, Kansas, Regarding Violation(s) of the)	
Kansas Underground Utility Damage)	
Prevention Act (KUUDPA) (K.S.A. 66-1801,)	Docket No. 19-DPAX-127-PEN
et seq., and K.A.R. 82-14-1, et seq.), 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:

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 13, 2018 Commission Staff (Staff) investigated the activity and operations of AT&T (Respondent). *See* Report and Recommendation of Staff dated September 24, 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 13, 2018, Staff received an e-mail from Midland Contracting, Inc. advising that they performed excavation between Walnut Street and Roanoke Street in Seneca, Kansas. Midland Contracting stated they had properly obtained locate marks before the excavation; however, hit an unmarked phone cable owned by Respondent. Staff's investigation discovered locates were not properly provided by Respondent after being requested. Because Respondent did not properly provide locates, damage to a phone cable at the aforementioned location occurred. No injuries or additional property damage occurred.

- b. Respondent was notified by a Notice of Probable Noncompliance issued by Staff on July 3, 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 August 2, 2018, Respondent responded to the Notice of Probable Noncompliance. Respondent stated it failed to mark the particular area stated above. 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 AT&T 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. AT&T, 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: 10/09/2018

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

CRM/vj

ATTACHMENT “A”

STATE OF KANSAS



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

PHONE: 785-271-3220
FAX: 785-271-3357
<http://kcc.ks.gov/>

GOVERNOR JEFF COLYER, M.D.

SHARI FEIST ALBRECHT, CHAIR | JAY SCOTT EMLER, COMMISSIONER | DWIGHT D. KEEN, COMMISSIONER

REPORT AND RECOMMENDATION UTILITIES DIVISION

TO: Chair Shari Feist Albrecht
Commissioner Jay Scott Emler
Commissioner Dwight D. Keen

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

DATE: September 24, 2018

SUBJECT: Docket Number: 19-DPAx-127-PEN

In the Matter of the Investigation of AT&T 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-1062

EXECUTIVE SUMMARY:

Staff is recommending a civil penalty be issued to AT&T in the amount of \$500 for violation(s) of KUUDPA. On May 30, 2018, AT&T did not provide valid locates in Seneca, Kansas. Failure to provide accurate locates when given notice of excavation by an excavator is a violation of 66-1806 (a). A Notice of Probable Noncompliance (PNC) was issued to AT&T on July 3, 2018. AT&T responded to the PNC within 30 days 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:

KCC received a complaint via email from the excavator on June 13, 2018, regarding an unmarked underground AT&T phone line that was hit while installing a sewer main between Walnut and Roanoke St. in Seneca, Kansas (Attachment II). Staff's findings

indicate the excavator had a valid One Call ticket that stated AT&T had marked their facilities. Though AT&T marked a 100 pr buried cable within the scope of the ticket, they failed to mark a second parallel cable. When an excavator notifies underground utility operators of a planned excavation, each operator with facilities buried at that site must provide surface markings that indicate where all the utilities are located. AT&T failed to provide accurate locate marks depicting the tolerance zone to comply with this requirement of the law and warrants the assessment of a civil penalty.

B. Culpability:

AT&T is directly responsible for its actions by failing to provide accurate locate marks depicting the tolerance zone as Kansas law requires.

C. History of noncompliance:

Staff has issued three other KUUDPA Notice of Probable Non-compliances to AT&T in the past two years.

D. Response of excavator regarding noncompliance(s):

Response to the PNC as required by K.A.R. 82-14- 6 (c) was received by Staff on August 3, 2018. AT&T acknowledged that the locator failed to locate and mark all buried cable within the scope of the One Call ticket.

B. Aggravating/Mitigating Circumstances:

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

RECOMMENDATION:

Staff recommends a civil penalty be issued to AT&T in the amount of \$500 for violation of K.S.A. 66-1806 (a).

Attachments

Attachment I

PROBABLE NONCOMPLIANCE

Investigation: RJ-18-OC-1062

Company: AT&T

Division:

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 6/13/18, KCC Staff responded to a complaint made by Midlands Contracting Inc. (Midlands) about damage to an AT&T phone cable between Walnut Street and Roanoke Street, approximately 200 feet east of South 14th Street in Seneca, Kansas. Midlands hit the phone cable installing a new sewer main. Midlands provided supporting documents for their allegation. There was a valid One Call ticket #18164021. Based on the information provided by Midlands, the damaged facility did not have any locate marks. Staff concludes AT&T failed to correctly mark the line damaged. This is a violation of 66-1806 (a) above.

OPERATOR'S RESPONSE: (Attach verification if needed)

Operator's Authorized Signature: Steve Barron

Date: 8-2-2018

PIPELINE SAFETY USE ONLY:

Date reviewed: _____

Date reviewed: _____

Chief: _____

Inspector: _____

Inspection Type: One Call Inquiry/Complaint

Date Inspected: 06/13/2018

Inspected By: RJ

August 2, 2018

Mr. Leo Haynos
Chief of Pipeline Safety
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, Kansas 66604-4027

Subject: KCC #RJ-18-OC-1062

Mr. Haynos:

Allow this correspondence to respond in full to your letter dated July 3rd, 2018, relating to KCC investigation # RJ-18-OC-1062.

On April 20, 2018, AT&T locate vendor USIC received locate request 18164021, with a due date of April 25. On April 24, USIC responded to the request, and the locator marked a 100pr AT&T buried cable within the scope of the request but failed to mark a 50pr AT&T buried cable that ran in a parallel path within 24 inches of the 100pr cable.

Midlands Construction damaged the unmarked 50pr cable on April 30, 2018, while working on a sewer project, even though the 50pr cable was within the tolerance zone of the marked cable. After conducting an initial and a follow-up investigation, USIC accepted responsibility for failing to locate and mark the 50pr cable. USIC's investigations, however, did not include an interview with the locator because he stopped working for USIC on April 26, prior to the damage incident. Thus, it is not known why he did not mark the 50pr cable.

The circumstances surrounding this damage have been covered with the USIC locators and the importance of conducting thorough site and records reviews when performing work for AT&T have been stressed.

Please contact me, should you have any questions.

Respectfully,

Steve Barron
AT&T
Sr Admin Envir Health & Safety
Damage Prevention Kansas/Missouri

507 E Main Union, Mo 63084
314-420-1973

Robert Jackson

From: Leo Haynos
Sent: Wednesday, June 13, 2018 1:08 PM
To: Christie Knight; Suzanne Gonzales; Robert Jackson
Subject: RE: Damage Report - Seneca, KS

From: Christie Knight
Sent: Wednesday, June 13, 2018 11:53 AM
To: Suzanne Gonzales <s.gonzales@kcc.ks.gov>; Leo Haynos <l.haynos@kcc.ks.gov>
Subject: Fwd: Damage Report - Seneca, KS

Sent from my iPhone

Begin forwarded message:

From: Brad Wegner <brad@midlandscontracting.com>
Date: June 13, 2018 at 10:59:58 AM CDT
To: "utilitydamage@kcc.ks.gov" <utilitydamage@kcc.state.ks.us>
Cc: Troy Cumpston <Troy@midlandscontracting.com>, "Clyde Wilberger (Clyde.Wilberger@hakco.com)" <Clyde.Wilberger@hakco.com>, Shane Wegner <shane@midlandscontracting.com>
Subject: Damage Report - Seneca, KS

This is an EXTERNAL EMAIL. Think before clicking a link or opening attachments.

Dear Sirs,

Our company is filing a complaint in accordance with Statute 66-1806, paragraph (h) of the Kansas Underground Utility Damage and Prevention Act against AT&T Kansas for failure to mark a phone cable in Seneca, KS. We ask that the Commission investigate our claim and issue the maximum penalties allowed by the Act for this violation.

On April 30, 2018, our personnel hit an unmarked phone cable in an alley located between Walnut Street and Roanoke Street, approximately 200 feet east of South 14th Street. A map of this location is attached. Our Notice of Intent to excavate was obtained through the Kansas One Call system on April 20, 2018 via ticket number 18164021. An update to this ticket was done with the update ticket number being 18154351. The One Call Ticket is attached.

Details of the utility hit are as follows:

Our crew was digging in the alley to install a new sewer manhole as part of the 2017 Sewer Replacement Project for the City of Seneca. One set of markings were present in the alley for a phone cable owned by Rainbow Communications. The crew positively located this cable using vacuum excavation and this cable was not damaged. However, another unmarked cable, owned by AT&T Kansas was in the ground approximately 26" laterally from this cable. During our excavation we hit this second cable and

damaged it. AT&T was notified of the hit and they repaired their cable later that day. Our crew incurred downtime due to this delay and we reserve the right to seek damages for this lost time.

Evidence for our claim includes:

1. Video: Link to video via Dropbox:
<https://www.dropbox.com/s/ok691fjs7pipgk1/Seneca%20-%20ATT%20Utility%20Hit%20Video.mov?dl=0>
 2. Photo: Link to photo via Dropbox:
<https://www.dropbox.com/s/eondjgyve0p6o2k/Seneca%2C%20KS%20Phone%20Cable%20Hit%20-%20After%20repair.png?dl=0>
 3. Incident Investigation Report is attached
- Video and photo can be sent to you via thumbdrive if necessary.

Witnesses to the unmarked phone cable are:

Joe Cervantes – Superintendent, Midlands Contracting: (308) 233-4497

Brian Rusche – Utility Supervisor, City of Seneca, KS: (785) 294-1388

Phone numbers for AT&T are:

(800) 778-9140 (from One Call Ticket)

(800) 894-0374 (obtained from AT&T Damage Claim Invoice received by Midlands. AT&T claim number is SWBT-05-201804-01-0245-CMK)

Please review this and let us know if additional information is needed.

Thanks in advance,

BRAD WEGNER, P.E. — Vice President
Midlands Contracting, Inc.
PO Box 1065 Kearney, NE 68848
o: 308.237.7979 | c: 308.627.4387 | f: 308.234.5390
brad@midlandscontracting.com

CERTIFICATE OF SERVICE

19-DPAX-127-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 10/10/2018.

STEVE BARRON, SR ADMIN ENVIR HEALTH & SAFETY
AT&T
507 E MAIN
UNION, MO 63084

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

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

/S/ DeeAnn Shupe

DeeAnn Shupe