

the Certificates of Convenience (“COC”) issued to KGS and BHE in Cowley, Sedgwick, Sumner, Reno, and Rice counties.³ The primary issue stems from COCs issued to KGS and BHE (including their predecessors) dating back to the 1930s. Highly summarized, the COCs at issue granted a utility the authority to serve a territory based on generic political boundaries (i.e., the name of a city or county, such as the “City of Goddard”) instead of using more definitive, permanent reference points.⁴ Some of the COCs at issue granted authority to serve an area of a county — but excluded a city — such as the dispute here.⁵ As cities expand and annex territory, these COCs create ambiguity as to which utility is authorized to provide service within these buffer areas, or “seams,” around a city.⁶

3. There were two related issues presented in Staff’s Initial R&R with different urgency: (1) Resolving the current dispute between KGS and BHE regarding the service of territory annexed by City of Goddard in 2009 (“Goddard Issue”); and (2) Resolving similar issues relating to the COCs issued to KGS and BHE in the counties identified in paragraph 2 above (“Metes and Bounds Issue”).

4. On October 22, 2024, the Commission opened a general investigation into these issues and ordered Staff to file a Report and Recommendation (“R&R”) on the Goddard Issue within thirty (30) days after receiving comments on that issue from BHE and KGS.⁷ The

³ *Id.*

⁴ *Id.*, p. 1.

⁵ *Id.*, pp. 1-2 (noting KGS was authorized to serve the “City of Goddard,” while BHE was authorized to serve Sedgwick County but excluded the City of Goddard).

⁶ *Id.*, p. 2. This issue arguably also intrudes on the Commission’s statutory authority and duty to govern public utility service areas. *See* K.S.A. 66-131(a) (“No...public utility...governed by the provisions of this act shall transact business in the state of Kansas until it shall have obtained a certificate from the corporation commission that public convenience and necessity will be promoted by the transaction of said business and permitting said applicants to transact the business of a common carrier or public utility in this state....”).

⁷ Order Opening General Investigation and Setting Comment Deadlines (Oct. 22, 2024).

Commission also ordered the parties to work on a procedural schedule for briefing on Metes and Bounds Issue.⁸

BHE’S AND KGS’ ARGUMENTS ON THE GODDARD ISSUE

5. On December 23, 2024, BHE filed its comments regarding the Goddard Issue.

6. In its argument to service the Goddard area, BHE points to a COC issued to it (via its predecessors) by the Commission in 1935 (“1935 COC”), which authorized service to Sedgwick County but excluded all incorporated cities, unless they were specifically named in the COC.⁹ The language of the 1935 COC issued to BHE states:

PROVIDED that said applicant corporation shall not be authorized to transact such business other than the wholesale sale of gas in any incorporated cities in said counties, except in the following cities and vicinities thereof: Lyons, Nickerson, Sterling, and Wichita (industrial, commercial and domestic) and industrial gas only in the city of Hutchison, Kansas, and the vicinity thereof.¹⁰

7. BHE argues that KGS was only granted authority to service “Sections 26 through 35 of Range 02W, Township 27S” via its COC issued by the Commission in Docket No. 75,015 in 1964.¹¹ Thus, the argument goes, since the disputed Goddard Area development is being constructed entirely in Section 21 of the aforementioned area, BHE is the only entity authorized by the Commission to serve the Goddard Area, regardless of Goddard’s annexation of the area and expanding its political boundaries.¹²

⁸ *Id.*

⁹ Reply Comments of BHE/Kansas Gas Utility Company, LLC d/b/a BHE Energy (Dec. 23, 2024) (“BHE Reply Comments”).

¹⁰ Staff’s Report and Recommendation (Feb. 21, 2025) *quoting* Certificate, Docket No. 16,167 (Nov. 27, 1935) (“Goddard R&R”).

¹¹ BHE Reply Comments, p. 2. The parties and Staff appear to refer to the Goddard Area as “Section 21 of 274S02W” or a variation thereof, so the Commission will likewise refer to the Goddard area in this fashion, although it seems more of a shorthand description, and does not appear to be a proper legal description.

¹² *Id.*; *see* Goddard R&R, pp. 3-4; *see supra* FN 11.

8. BHE also argues that it has existing lines close to the Goddard Area and “was ready, willing and able” to service the Goddard Area.¹³ Further, BHE argues that Commission precedent forecloses the possibility that a service area is granted automatically when a city expands its political boundaries through annexation.¹⁴

9. KGS also filed comments regarding the Goddard Issue on December 23, 2024.

10. KGS argues its COC to serve the “City of Goddard” issued by the Commission in Docket No. 64,714-U in 1961, specifically granted it authority to serve the city, including territory when the city annexes an area since it then becomes the “City of Goddard”.¹⁵ KGS argues that Commission precedent does not prevent the expansion of authority granted in a COC when the granting COC uses language of a political boundary rather than a metes and bounds description.¹⁶ Thus, because its COC specifically authorizes service in the “City of Goddard,” its expansion equates to an expansion of the authority issued in its COC.¹⁷

11. KGS also advances the position that the 1935 COC issued to BHE authorized serving area in the counties listed, but it included language that specifically excluded municipalities in those counties “*unless* they are explicitly included” in that COC.¹⁸ KGS augments this interpretation argument with statutory and policy authority, and that “a public utility paradox” would emerge if annexation did not lead to its authority to service the area, citing territory around Goddard it currently services after the city expanded in the 1960s in order to “meet its obligations to Goddard.”¹⁹

¹³ *Id.*, p. 3.

¹⁴ *Id.*, pp. 2-3. *See infra* discussion at ¶¶ 15-16.

¹⁵ Reply Comments of Kansas Gas Service on Territory Annexed in 2009 by Goddard, Kansas (Dec. 23, 2024) (“KGS Reply Comments”).

¹⁶ *Id.*, p. 2-3. *See infra* discussion at ¶¶ 15-16.

¹⁷ *Id.*, pg. 3.

¹⁸ *Id.*, pp. 4-5 (emphasis in original).

¹⁹ *Id.*, pp. 5-7.

12. Finally, KGS argues allowing BHE to service the Goddard Area would lead to waste and a duplication of services since it already has the infrastructure in place.²⁰

STAFF'S GODDARD REPORT AND RECOMENDATION

13. Staff filed its Goddard R&R on February 21, 2025. Staff ultimately sides with KGS in the Goddard Area dispute, noting KGS already has the infrastructure in place and is serving the area, replacing that infrastructure would be a wasteful duplication of services, and that BHE only raised this issue once the Goddard Area was being actively developed, despite the annexation event occurring about 15 years ago.²¹

14. Staff began its report by outlining the COCs involved (and described above), noting that, historically, it was common practice for the Commission to issue “legacy certificates” to a utility based purely on political boundaries.²² That practice was replaced by the Commission by issuing COCs based on definitive reference points which avoid territorial disputes, such as the one presented here.²³

15. Staff analyzed a similar dispute in 1987, in Consolidated Docket Nos. 153,240-U, 154,990-U, and 155,339-U, wherein the Commission considered a territory dispute outside of Lawrence based on a comparable argument that a COC’s authority expanded as a city annexed territory.²⁴ There, the Commission issued the following ruling:

The Commission rejects the theory that annexation by cities automatically creates and extends authority for public utilities where they have not previously been certificated by the Commission. The Commission has sole authority to issue certificates pursuant to K.S.A 66-131 and it rejects the theory automatic dual certification occurs as a result of annexation. Henceforth, all certificates for public utilities to operate within the city limits of a city shall be based on a metes and

²⁰ *Id.*, pp. 7-8. BHE proposes to reimburse KGS for the infrastructure installed by KGS in the Goddard area since those facilities are already installed. *See* BHE Reply Comments, p. 3.

²¹ Goddard R&R, pp. 1, 5.

²² *Id.*, p. 4.

²³ *See id.*

²⁴ *Id.*, p. 3.

bounds description of the area rather than allowing such rights to follow expansion of the city limits.²⁵

16. BHE and KGS also cite this language in their comments and, predictably, argue different interpretations.²⁶ BHE posits this language means that since it is expressly authorized to service Section 21 of 274S02W, it holds the sole right to service the Goddard Area.²⁷ KGS argues that the COCs at issue predate this Commission decision, so “the scope of these certificates must be based on the language used and context present when they are issued.”²⁸

17. Staff concludes that in the instant Docket, consideration should be given to “whether one utility or the other better preserves the public convenience.”²⁹ And, given the COCs in question did not establish permanent boundaries, “it appears the Commission intended to allow KGS to serve the whole City of Goddard and exclude BHE from serving Goddard.”³⁰ Staff ultimately recommends as follows:

Both KGS and BHE have available infrastructure to serve the Goddard Development. Serving the Goddard development by either utility is generally in the public interest. KGS is certificated to serve the City of Goddard specifically. BHE's certification excludes the City of Goddard specifically. KGS is already serving the territory. Replacing KGS infrastructure with BHE infrastructure would result in wasteful duplication of facilities. Therefore, Staff recommends the Commission affirm that KGS is the sole certificate holder for the Goddard Development.³¹

²⁵ *Id.* Staff also notes that this language appears to be a rejection of Staff's recommendation in that docket “that dual certification would occur automatically as a result (of Staff's recommendation) because the certificate would automatically extend into the annexed area.” *Id.*

²⁶ See generally BHE Reply Comments and KGS Reply Comments.

²⁷ See BHE Reply Comments, pp. 2-4.

²⁸ KGS Reply Comments, p. 3.

²⁹ Goddard R&R, p. 4.

³⁰ *Id.*, p. 5.

³¹ *Id.*

ANALYSIS AND FINDINGS

18. Staff correctly notes that the Commission has the sole authority to issue COCs to a utility pursuant to K.S.A. 66-131, which provides that no public utility shall transact business in Kansas without obtaining a COC from the Commission and “that public convenience and necessity will be promoted” by transacting said business. So, Staff rightly frames the ultimate issue as, “What promotes the public convenience and necessity?”³²

19. The Kansas Supreme Court has provided guidance on what constitutes “public convenience” and “necessity” when two or more utilities are vying for the same territory:

In determining whether [a] certificate of convenience should be granted, the public convenience ought to be the [C]ommission's primary concern, the interest of public utility companies already servicing the territory secondary, and the desires and solicitations of the Applicant a relatively minor consideration.³³

The Court further reasoned that the authority vested in the Commission by K.S.A. 66-131 was “intended to put reasonable limitations to the evils attendant on unnecessary duplication of public utilities.”³⁴ Also, the Commission is vested with the “power to regulate and limit the extent of territory in which a utility may extend its operations, and thus prevent wasteful competition and duplication of service”³⁵

20. Both BHE and KGS make compelling, logical arguments to serve the Goddard Area in this situation. On one hand, BHE contends it has the exclusive right to service the Goddard Area because a city’s annexation of territory does not automatically expand the authority granted in a “legacy” COC. KGS meanwhile points to the plain language of the COCs at issue

³² *Id.* (italics removed).

³³ *Kansas Gas & Electric Co. v. Public Service Commission of Kansas*, 122 Kan 462, 251 P. 1097, 1099 (1927).

³⁴ *Id.*, at 1098.

³⁵ *Kansas Gas & Electric Co. v. Public Service Commission of Kansas*, 124 Kan 690, 261 P. 592, 592, 594 (1927)

and understandably argues it is the only utility authorized to provide service in within the city limits of Goddard.

21. There are several factors, however, that tip the scale in KGS' favor regarding servicing the Goddard Area. First, KGS has historically followed Goddard's annexations and provided service to those annexed areas, and as such, it has already installed the infrastructure to serve the disputed area.³⁶ Second, BHE waited roughly 15 years after the annexation to raise this issue — once it became apparent there was a financial incentive to do so when it was actively being developed.³⁷ Finally, it would be wasteful, needlessly duplicative and an unnecessary use of resources for BHE to replace existing KGS lines in the Goddard Area.³⁸

22. Based on the Parties' comments and Staff's R&R, the Commission finds that public convenience and necessity will be promoted by affirming KGS' authorization to service the Goddard Area. It is important to note that this decision does not authorize or condone a utility rushing in and placing infrastructure to try and "beat the punch" so it later can argue it is already best situated to serve a potentially disputed service area. This decision rests on the specific facts presented, and the remainder of this Docket hopefully will prevent disputes like this in the future.

THEREFORE, THE COMMISSION ORDERS:

A. KGS is authorized to service the Goddard Area, by virtue of its COC to serve the "City of Goddard."

B. Any party may file and serve a Petition for Reconsideration pursuant to the requirements and time limits established by K.S.A. 77-529(a)(1).³⁹

³⁶ See *supra* ¶ 11.

³⁷ See *supra* ¶ 13.

³⁸ See *supra* ¶ 19.

³⁹ K.S.A. 66-118b; K.S.A. 77-503(c); K.S.A. 77-531(b).

BY THE COMMISSION IT IS SO ORDERED.

French, Chairperson; Keen, Commissioner; Kuether, Commissioner

Dated: 03/20/2025



Abigail D. Emery
Acting Secretary to the Commission

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CERTIFICATE OF SERVICE

25-GIMG-114-GIG

I, the undersigned, certify that a true copy of the attached Order has been served to the following by means of electronic service on 03/20/2025.

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