Approved April 8, 1989
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Representative Michael O'Neal at
Chairperson

3:30 a.m./p.m. on March 21, 1989 in room 522-S of the Capitol.

All members were present except:

Representatives Peterson, Sebelius and Shriver, who were excused.

Committee staff present:

Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes Office
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee:

Bernie Bianchino, U.S. Sprint
Professor Arthur Chaykin, Washburn University School of Law
Pat Hubbell, A.T.S.F.
Richard D. Kready, K.P.L. Gas Service Company
Conni L. McGinness, Kansas Electric Cooperatives, Inc.
Phillip A. Lesh, Norton Decatur Cooperative Co., Inc., Norton, submitted written testimony.
Jerry Coonrod, Kansas Gas and Electric
Dennis Clyde, Kansas Trial Lawyers Association.

**HEARING ON S. B. 145 - Civil procedure, service of process and venue**

Bernie Bianchino testified under this bill entering into an arrangement under which U.S. Sprint will provide service to businesses and commercial users throughout the country, those users are in effect purchasing services controlled from the state of Kansas. The services rendered by U. S. Sprint can be used by the customer at his principal business location, branch office or from any telephone located anywhere in the United States. He said U.S. Sprint's services are international in scope and the users who businesses are operated with this service should be subject to suit in the state of Kansas if they refuse to pay for those services, see Attachment I.

Professor Arthur A. Chaykin, Washburn University School of Law, explained his constitutional analysis of S.B. 145, see Attachment II.

Pat Hubbell, A.T.S.F. proposed an amendment to S.B. 145. The amendment would add transportation services to this bill, see Attachment III.

The hearing was closed on S.B. 145.

**HEARING ON S.B. 155 - Overhead power line safety act**

Richard D. Kready, K.P.L. Gas Service, testified S.B. 155 was proposed to prevent deaths, injuries and damages resulting from contact with high voltage power lines. Unless danger against contact with high voltage overhead lines has been guarded against, no person, tool or equipment is to be moved within 10 feet of overhead lines. Safety arrangements may be made with the public utility. There is no charge for this service unless the utility company has to reroute the electricity or temporarily relocate the power lines. The utility company must commence work on clearances and other safety precautions within three working days after payment has been made. If a person violates this act there is a $1,000 penalty for each violation. The bill also requires warning signs to be posted on cranes and similar equipment to remind the operators of the 10 foot clearance requirement. K.P.L. Gas Service will provide signs to contractors, **see Attachment IV.**

Conni L. McGinness, Kansas Electric Cooperatives, Inc., testified in support of S.B. 155. She stated this bill would help educate and prevent accidents. The bill would also help prevent costly litigation that all the consumer members would have to pay for, regardless of the outcome, that a little prevention would have prevented, see Attachment V.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,

room 522-S, Statehouse, at 3:30 xam/p.m. on March 21, 1989.

Written testimony was submitted by Phillip A. Lesh, Norton-Decatur Cooperative Electric Company, Inc., of Norton, in support of S.B. 155, see Attachment VI. This testimony was presented to the Senate Judiciary Committee.

Jerry Coonrod, Kansas Gas and Electric testified in support of S.B. 155.

Dennis Clyde, Kansas Trial Lawyers Association, distributed the written testimony of Donald W. Vasos who could not attend the Committee meeting to deliver his testimony, see Attachment VII.

Mr. Clyde stated the name of the bill should be changed to read, Overhead Power Line Immunity Act. The bill is written to give immunity to utilities if someone is injured from contacting power lines. He said the Kansas Trial Lawyers oppose S.B. 155 in its entirety.

There being no other conferees, the hearing was closed on S.B. 155.

CONSIDERATION OF BILLS:

**S.B. 126 - Municipal judges, training, testing and continuing judicial education**

Representative Solbach moved to table S. B. 126. Representative Roy seconded the motion. The motion passed.

**S.B. 151 - Unlawful to arrange drug sale or puchase using communications facility**

A motion was made by Representative Buehler and seconded by Representative Jenkins to report S.B. 151 favorably for passage. The motion was withdrawn.

The Committee discussed striking the words "committing" and "causing".

A motion was made by Representative Vancrum and seconded by Representative Buehler to eliminate the words "committing in causing or facilitating" in lines 23 and 24, and "or in attempting" in line 27. In line 28, add the words "or facilitating " after Kansas Statutes Annotated. The motion passed.

Representative Buehler moved to report S.B. 151, as amended, favorably for passage. Representative Jenkins seconded the motion. The motion was withdrawn.

Representative Gomez moved to amend line by striking the words "shall be a" and inserting "may be charged as a ". Representative Everhart seconded the motion. The motion passed.

Representative Buehler moved and Representative Jenkins seconded to report S.B. 151, as amended, favorably for passage. The motion passed.

**S.B. 262 - Method of trial for misdemeanor and traffic infraction cases**

A motion was made by Representative Vancrum to amend S.B. 262 by striking lines 24 and 25 and adding "prior to trial". The motion was seconded by Representative Whiteman. The motion passed.

Representative Hochhauser moved and Representative Vancrum seconded to report S.B. 262, as amended, favorably for passage. The motion passed.

**S.B. 263 - Notice of plea of insanity**

A motion was made by Representative Solbach and seconded by Representative Jenkins to report S.B. 263 favorably for passage. The motion was withdrawn.

Representative Snowbarger moved to amend the bill by striking the language in line 24 after "to" and inserting "assert the". Line 25 should read "defense of insanity or other defense involving the presence of mental disease". The same changes in language should be made in lines 30 and 31. The motion was seconded by Representative Solbach. The motion passed.

A motion was made by Representative Snowbarger and seconded by Representative Lawrence to report S.B. 263, as amended, favorably for passage.

The Committee meeting was adjourned at 5:40 p.m. The next meeting will be Wednesday, March 22, 1989, at 3:30 p.m. in room 313-S.

TESTIMONY
OF
B. A. BIANCHINO
TO THE KANSAS HOUSE OF REPRESENTATIVES
COMMITTE ON JUDICIARY REGARDING
SENATE BILL NO. 145

March 21, 1989

US Sprint is grateful to the Committee for requesting our views regarding proposed changes in K.S.A. 60-604, 60-605, and 60-308. These changes will recognize the special interest that the State of Kansas has in the telecommunication industry as well as clarify existing law regarding venue and jurisdiction of causes of action involving partnerships.

We live in an information age. Conversations travel over telecommunications networks with crystal clarity. We can hear a pin drop. Business is regularly transacted by telephone, both nationally and internationally. As technology advances, statutes regarding jurisdiction should be modified to clarify their application to modern technology and modern business transactions.

US Sprint is a Limited Partnership, 80.1% owned by United Telecommunications, which is a Kansas corporation with its principal place of business in Johnson County. While US Sprint is technically a Delaware limited partnership, we have thousands of employees in Kansas and our Network Operations Control Center (NOCC) is located in Johnson County. From this Center, we manage and otherwise operate our national telecommunications system. Computers located at this NOCC continually monitor switches around the country and react instantaneously to problems on our network. This Center is the life blood of US Sprint's network and without it our network could not function effectively.

The addition of K.S.A. 60-308(b)(11) recognizes that in entering into an arrangement under which US Sprint will provide service to business and commercial users throughout the country, those users are in effect purchasing services controlled from the State of Kansas. It recognizes that the services rendered by US Sprint can be used by the customer at his principal business location, branch office or from any telephone located anywhere in the United States and, soon, from many foreign countries. It recognizes that our

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service is indeed international in scope and that the users whose businesses are operated with our service should be subject to suit in this state if they refuse to pay for those services.

Since jurisdictional statutes are often attacked under the "minimum contacts" constitutional test, we have reviewed the wording of K.S.A. 60-308(b)(11) and have asked Mr. Arthur Chaykin, a visiting professor at Washburn Law School, to provide a memorandum addressing its constitutionality. Copies of this Memorandum have been distributed to the Committee.

In reviewing the statute as it was originally proposed, we developed minor modifications which would, we believe, ensure its constitutionality by limiting its application to services provided using equipment or facilities managed, operated or monitored from the State of Kansas. This modification is intended to prevent the filing of suits by companies who may only have limited equipment or facilities in Kansas, such as a switch, a switch station or microwave tower. If adopted with modification, this statute would allow only suits where the plaintiff has significant operations in Kansas.

In addition to the general notice provided by the statute, US Sprint intends to place its business and commercial customers on actual notice of the existence of this statute and advise them of the fact that US Sprint's network is operated from Kansas.

K.S.A. 60-604 addresses the venue of actions filed pursuant to 60-308(b)(11). It would place venue in the county where equipment used in the rendering of services is located if suit is brought against a domestic corporation or a foreign corporation qualified to do business in this state. And the modification to K.S.A. 60-605 would provide the same venue in actions involving non-resident defendants.

Additionally, the modification requested to K.S.A. 60-605(1) would clarify the law regarding the county where a plaintiff partnership is deemed to be located for purposes of venue. Last year Senate Bill 270 was enacted. It allows suits by and against partnerships. The modification to K.S.A. 60-605(1) clarifies the counties in which a plaintiff partnership would be present for venue purposes. Under this modification the partnership would be present in the county where a partner resides or if the partner is a corporation

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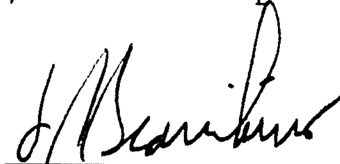
(such as the general partner of US Sprint) in the county where the corporate partner maintains a principal place of business or has its registered office. This modification will be helpful for all partnerships doing business here in Kansas.

We believe this Bill will help the State of Kansas lead the way in attracting high technology companies. The days of personal, face-to-face meetings in business transactions are quickly drawing to a close. Significant business undertakings are many times consummated by teleconferences, both audio and visual, which are carried over telecommunication networks. We must recognize that these electronic meetings and the service providers who make them possible should have equal access to our courts with those who do business "the old fashioned way." We believe this statute is fair since it only extends jurisdiction to claims made by plaintiffs with significant operations in Kansas against commercial or business users. And, we ask that the State of Kansas recognize the realities of modern commerce by adopting this statute.

If you have any questions, I would be pleased to answer them at this time.



B.A. Bianchino
Vice President and
Associate General Counsel
US SPRINT COMMUNICATIONS
COMPANY LIMITED PARTNERSHIP

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M E M O R A N D U M

RE: Constitutional Analysis of Proposed KSA 60-308(b)(11) [Senate Bill No. 145].

FROM: Arthur A. Chaykin*

I. Introduction and Overview:

This memorandum undertakes a constitutional analysis[1] of proposed KSA 60-308(b)(11), or Senate Bill 145. Senate Bill 145 provides as follows:

> (b) Submitting to jurisdiction -- process. Any person, whether or not a citizen or resident of this state, who in person or through an agent or instrumentality does any of the acts hereinafter enumerated, thereby submits the person and, if an individual, the individual's personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of these acts:...

> (11) entering into an express or implied arrangement, whether by contract, tariff or otherwise, with a corporation or partnership (either general or limited) residing or doing business in this state under which

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*Visiting Associate Professor of Law, Washburn University School of Law. This memorandum was prepared under contract with US Sprint Communications Company. The opinions expressed herein are solely the author's and should not be attributed to Washburn University, the School of Law, or its faculty.

[1]The venue provisions require no constitutional analysis because venue is a matter of the allocation of business among state courts. It has no constitutional dimension.

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such corporation or partnership has supplied communication services or equipment (including, without limitation, telephonic communication services) for a business or commercial user where the services supplied to the user are managed, operated or monitored within the State of Kansas.[2]

Conceptually, S.B. 145 can be effective in expanding the jurisdictional grasp of the Kansas courts to reach business defendants[3] who arrange for phone service that is to be at least partially provided[4] within the State of Kansas. The constitutional ramifications of S.B. 145 can be understood in the following terms: (1) An assertion of "long arm" jurisdiction over an out of state defendant must coincide the due process clause of the Fourteenth Amendment of the United States Constitution. The touchstone for the Fourteenth Amendment analysis is the minimum contacts test.[5]

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[2]The underlined portion is a recent modification to Senate Bill 145, and may not be reflected in the original printed Bill.

[3]It is important to note that S.B. 145 has no impact on consumers who arrange for phone service. S.B. 145 is limited to those who arrange to use phone service for business purposes.

[4]Specifically, "managed, operated, or monitored" from within Kansas.

[5]See, International Shoe v. Washington, 326 U.S. 310 (1945) ["International Shoe"]; Shafer v. Heitner, 433 U.S. 186 (1977) ["Shaffer"] Kulko v. Superior Court, 436 U.S. 84 (1978) ["Kulko"] World Wide Volkswagen v. Woodson, 444 U.S.
(Footnote Continued)

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(2) Long arm provision provides a platform upon which jurisdiction is based. (3) The Supreme Court of the United States has already approved assertions of jurisdiction where defendant enters into a contract with plaintiff that is to be wholly or partially performed within the forum state.[6] Several Kansas cases have recognized the same principle.[7] (4) In order to pass the minimum contacts test, there must be some act by which the defendant "purposely avails" itself to the assertion of jurisdiction.[8] (5) A narrowly drafted "special interest" long arm statute may be effective in

(Footnote Continued)
286 (1980) ["V.W."]; Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) ["Burger King"]. The minimum contacts test controls regardless of whether the long arm in question operates through property (quasi in rem) or directly on the person. Rush v. Savchuk, 444 U.S. 320 (1980).

[6]The best known example of this is the Burger King case in which the Court allowed Florida to assert a franchisee in Michigan on the basis that the Franchisor was a resident of Florida, performed some of its obligati8ons as a franchisor in Florida, and the defendant was on notice, through a Florida choice of law provision, that Florida had a strong interest in any litigation arising out of the contract.

[7]See, Pedi-Bares, Inc. v. P&C Food Markets, Inc., 567 F.2d 933, 977 (10th Cir. 1977), Continental American Corp. v. Camera Controls Corp., 692 F.2d 1309 (10th Cir. 1982).

[8]See, World Wide Volkswagen. For a Kansas case, see Schlatter v. Mo-Comm. Futures, Ltd., 233 Kan. 324, 662 P.2d 553 (1983) (act of state directors could not be sued in their personal capacities when they had no purposeful contacts with Kansas).

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expanding the scope of constitutionally permissible jurisdiction by imbuing certain activities of the defendant with jurisdictional significance.[9]

Essentially S.B. 145 combines the concepts of "partial performance" which has already been approved in cases like Burger King, with the "special interest" long arm concepts, already accepted in cases like McGee. As a result, S.B. 145 should allow our courts to understand the special jurisdictional significance of the purchase of telecommunications by out of state defendants.

In the remainder of this memorandum, a more detailed review of S.B. 145 will be provided. Part II is a brief discussion of the need for S.B. 145. Part III describes the manner in which arranging or contracting for goods and services may subject a defendant to jurisdiction. Part IV discusses the mechanism by which a "special interest" long arm like S.B. 145 can augment the jurisdictional significance of defendant's activities. Part V confronts the problem of "purposeful availment" and reaches the conclusion that S.B. 145 will be most effective when

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[9]See, e.g., McGee, supra, where the Court noted that the articulation of a special interest in the state's long arm made it reasonable to assert jurisdiction over an out of state insurer.

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defendant receives some actual notice of the jurisdictional significance of its activities. The question of whether a notice requirement should be included in the statute will be explored. The memorandum will conclude that S.B. 145 provides a constitutionally viable mechanism for encouraging and protecting Kansas' status as a major telecommunications center.

II. Current Problems and the Need for S.B. 145:

Assume a telecommunications company with its headquarters in Missouri, however, it is comprised of two partners, one of whom is a resident of Kansas. The vendor phone company begins to provide long distance phone service to a telemarketing firm in Georgia. The Georgia customer may now begin calling into and from a variety of states. The phone calls themselves will be carried by various switches and lines within the phone network. All of the switches are ultimately controlled by the National Operations Center [NOC] in Kansas. The Georgia customer runs up a bill of $48,000, at which point the vendor recognizes that the account is delinquent. It will also be assumed that the delinquent bill is comprised of some 20,000 individual phone calls, but that less than ten of them were made into Kansas.

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To date, plaintiff phone companies in Kansas have had only mixed success asserting jurisdiction over such defendants. Certainly, in cases involving some direct illegal activity in Kansas, or some other kind of affiliating contact, the courts have been willing to assert jurisdiction[10]. However, at least in cases where the phone calls to Kansas were a small part of the total bill, and there were no other affiliating contacts, at least one court has suggested a lack of minimum contact[11]. Under current law, our courts are forced to focus on such contacts as the number of phone calls defendant completed into Kansas. Telecommunications services have no easily located place of "manufacture." As a result the courts have been understandably reluctant to employ KSA 60-308(b)(5) which already allows for long arm jurisdiction when defendant enters into a contract to be performed partially or wholly in this state. Therefore, the only resort is the general "transaction of business" long arm, KSA 60-308(b)(1).

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[10]See, e.g., US Sprint Communications Company v. Buscher, 1988 U.S. Dist. LEXIS 1536 (D. Kan. 1988); US Sprint Communications Company v. Boran, 1988 U.S. Dist. LEXIS 1762 (D. Kan. 1988).

[11]US Sprint Communications Company v. Central Air Freight, Inc. 1988 U.S. Dist. LEXIS 13643 (D. Kan. 1988)["CAF"].

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Unfortunately, 308(b)(1), in the telecommunications field, encourages a court to do little more than count phone calls into Kansas. The truly significant contacts, however, are the extensive services provided in Kansas for purposes of delivering and performing the telecommunications service, the substantial economic impact that such service has on Kansas, and the knowledge or constructive knowledge of the customer who contracts for telecommunications services with a provider operating and partially residing in Kansas. Unfortunately, under our present long arm, the relevancy of such contacts are not easily perceived. Therefore, it makes sense to alter the long arm statute so that the contacts that truly relate to the underlying transaction can be properly analyzed in light of the realities of modern commerce, and the special state interests involved.

III. <u>Relating the Contacts to the Litigation; Arrangement for Goods and Services</u>:

The activity by which defendant "purposely avails" itself to Kansas jurisdiction is the arrangement for telecommunications services that will be "managed, operated or monitored" in Kansas. The term "arrangement" must be employed because of the nature of the telecommunications business. The service is supplied upon request, there is really no contract for it in the technical legal sense.

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However, from a practical point of view, a business user negotiates and arranges for phone service in a manner quite similar to the way any other major good or service would be obtained. Therefore, arrangement for telecommunications service can be a jurisdictionally significant event. As noted earlier, the "manufacture" of phone service has no obvious location. S.B. 145 would ground the manufacture of the service in Kansas, provided that certain criteria are met. The "managing, operating, or monitoring" describes a meaningful activity which should be equivalent to manufacture of goods or performance of a contract wholly or partially within this state, as already provided in KSA 60-308(b)(5)[12] S.B. 145 encourages the court to focus on the jurisdictionally significant contacts. It also puts defendants on "constructive notice" that these contacts may have jurisdictional significance in Kansas.[13]

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[12]The use of KSA 60-308(b)(5) has had a checkered history, at its outer reaches, in Kansas. Compare, Misco-United Sup., Inc. v. Richards of Rockford, Inc., 215 Kan. 849, 528 P.2d 1248 (1974) (declining jurisdiction) with Pedi-Bares, 567 F.2d 933 and Continental American Corp., 692 F.2d 1309 (finding jurisdiction). However, there is no doubt that the concept behind KSA 308(b)(5) is constitutionally viable. See, e.g., Tom Togs, Inc. v. Ben Elias Industries Corp., 318 N.C. 361, 348 S.E.2d 782 (1986).

[13]S.B. 145 should contain some language that asures
(Footnote Continued)



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IV. Special Interest Long Arms:

The concept of the special interest long arm as it relates to the assertion of jurisdiction over out of state defendants is poorly understood. As previously noted, the concept of a state having a "special interest" in asserting jurisdiction dates back at least to the old McGee case. Courts around the country have been casual in their approach to state interests in asserting long arm jurisdiction. Such interests have been discovered when there is a specific special interest long arm, as in McGee.[14] where there is some non-jurisdictional statute or doctrine that gives the state some "special" interest,[15] or where the state merely has an economic interest in protecting a given class of plaintiffs.[16] Much of this generalization and confusion is

(Footnote Continued)
that the action or claim arises out of the telecommunications service. This insures a close nexus between the contact and the litigation.

[14]Also see Stuckey v. Stuckey, 434 So.2d 513 (La. Ct. Apls. 1983) (child support).

[15]See Texas Commerce Bank National Association v. Interpol 80 Ltd. Partnership, 703 SW2d 765 (Ct. Apls. TX 1985) (mineral rights).

[16]See Tom Togs, Inc. v. Ben Elias Industries Corp. 318 N.C. 361, 348 SE2d 782 (1986) (takes "judicial notice" that
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unfortunate because the real usefulness of the concept of the special state interest is that it may, in some cases serve to give the defendant a "fair warning" that it may reasonably be expected to be called into court in the forum state. Obviously, a bald interest in protecting all resident plaintiffs, which is sometimes asserted as a special interest, adds little to the fair warning defendant receives. It would seem that the best warnings that defendant might be exposed to long arm jurisdiction would be presented by the long arm statute itself.

An interesting case on this point is Beco Corporation v. Roberts & Sons Construction Co., Inc., 114 Idaho 704, 760 P.2d 1120 (1988). In Beco, an out of state defendant contracted with an in-state contractor to perform some construction work at an out of state site. The court, employing a general "transacting business" long arm, allowed for jurisdiction over the defendant. The court relied heavily on the argument that Idaho had a special interest in asserting jurisdiction over this defendant because the plaintiff was an Idaho resident. The court also found that the quantity and quality of contacts were greater than those

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the state of North Carolina has a special interest in the textile industry).

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found in McGee, in which the Supreme Court upheld jurisdiction. An interesting dissent pointed out that McGee was firmly grounded on "California's statutorily expressed 'maifest interest' in the subject matter of the suit (a narrowly drawn long arm statute dealing with insurance companies...[and California insureds])." The dissent pointed out that the Idaho long arm was not narrowly drawn, nor was it related to any particular industry or cause of action. Finally, the dissent complained that the defendant had no contacts with Idaho that demonstrated any kind of "purposeful intent" or consent to suit. However, in footnote 10 of the opinion the dissent noted:

> However, constructive consent may, under certain circumstances, be given through state jurisdictional statutes. This is particularly appropriate when the state has expressed its interest in the subject matter of the suit through a narrowly drawn special jurisdictional statute. When a defendant acts within a state which has such a special statute, such as a statute relating to a foreign insurance company's soliciting business in a state, it may establish constructive consent to jurisdiction.

Quite correctly, the dissent also noted that the Supreme Court has "re-emphasized" the importance of special jurisdictional statutes. For instance, in Shaffer, the Court was careful to note that Delaware had no "special interest long arm" that purported to assert jurisdiction over the directors of the Greyhound Corporation on the basis

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of their directorship status. The Court therefore viewed any assertion of state interest in extending jurisdiction over out of state directors of local corporations as a post hoc rationalization. Similarly, in Kulko, the court refused to allow California to assert jurisdiction in an action for support over an out of state father on the basis that the state had a special interest in the welfare of resident children. The Court noted that the long arm articulated no such interest. In both cases, there is at least some implication that a special interest long arm might have altered the Court's qualitative analysis by magnifying the importance of whatever minimal contacts the defendant might have had with the forum and the litigation.[17]

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[17]Burger King, supra, can be viewed in a similar light. There, the interest was created by the franchise contract itself, which provided that Florida law would govern the transaction. Although the Court was unwilling to equate the interests that pertain to choice of law with the interests that pertain to jurisdiction, it was clear that the Court was glad to have some tangible and demonstrable interest available. But see, Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) where the Court allowed for the assertion of jurisdiction over an out of state defendant absent a "special interest long arm." The Court also downplayed the relationship between choice of law interests and jurisdictional interests. However, the activity in New Hampshire was practically systematic and continuous, and therefore the interest analysis was neither crucial nor prominent.



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S.B. 145 substantially conforms to the requirements the court has erected for special interest long arms. By articulating the interest Kansas has where telecommunications services are to be provided by an entity at least partially residing here, and partially performing here, the long arm puts the defendant on notice that "arranging" for the service may be a jurisdictionally significant act. The "fair warning" provided by the statute can be improved if "actual notice" is provided to the defendant. This will be discussed below.

V. The Problem of "Purposeful Availment":

Under the minimum contacts test, the focus is on the purposeful activities of the defendant which assure that it is fair and reasonable to require defendant to submit to the court's jurisdiction. See V.W.. The concept is well stated in Misco-United Supply, Inc. v. Richards of Rockford, Inc. _Kan._, 528 P.2d 1248, 1252 (1974) (single phone call into Kansas regarding goods to be produced outside state insufficient to support jurisdiction):

> The [Supreme] court also stated that the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state, and that the application of the "minimum contacts" rule will vary with the quality and nature of defendant's activity; but it is essential in each case that there be "some act by which the defendant purposefully avails itself of the



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privilege of conducting activities within the forum State," thereby invoking the "benefits and protections of its laws." Id. discussing Hanson v. Denckla, 357 U.S. 235, 251 (1958).

Several recent attempts to extend jurisdiction have run aground due to the lack of any purposeful activity on the part of the defendant. For instance, in Asahi Metal Industry Co., Ltd. v. Superior Court _U.S._, 107 S. Ct. 1026 (1987), the Court held that it was improper to extend long arm jurisdiction over a foreign manufacturer who sold components to a foreign assembler, who then shipped some of those products to the United States. As a general statement, it cannot be denied that it is the defendant's activities which are the focal point of the due process analysis. See CAF, supra. It may be possible to convert activity which appears to be unilateral activity of the plaintiff into purposeful activity of the defendant. The key lies in the drafting of the statute.[18] Where a state

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[18]This problem is closely related to the idea of a state articulating a "special interest" in its long arm so as to put the defendant on notice that the state has a special interest in certain activities that are likely to subject the defendant to jurisdiction. For example, assume a state had a statute that said, "any insurer who deals with an insured who resides in this state is subject to jurisdiction of the courts of this state for any dispute arising out of the insurance, regardless of whether the
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declares that certain narrow activities will result in the extension of jurisdiction, in a sense defendants are on notice that the state has a "special interest" that render it reasonable to subject them to suit in that state. As a result, the insurance company in McGee was subject to suit in California even though it did not sell the policy to the insured when he lived in California. Nevertheless, the Court upheld the extension of jurisdiction in McGee partly because California had a narrowly drafted long arm that put insurers on notice that they were subject to jurisdiction if any of their insureds resided in California. Given the practicalities of litigation, and the fact that life insurance has no set location, the unilateral move of the plaintiff was, in a sense, converted into purposeful availment by the defendant.[19] In all likelihood,

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insured resided in this state at the time the policy was sold." This statute is very similar to the one that was upheld in McGee. The idea is that a narrowly drafted long arm can sometimes put defendants on "constructive notice" that the state has a special interest in a given area that will subject them to jurisdiction automatically. To put it another way, the defendant is subject to jurisdiction unless he stays clear of the special activity.

[19]Although McGee is certainly still good law, it is true that the case represents a "high water mark" for the extension of personal jurisdiction. See, Note, Long Arm Jurisdiction in Commercial Litigation: When is a Contract a
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however, the special quality of the defendant's activity with regard to the state long arm must be brought home to the defendant. Thereby, the defendant recognizes that it is truly foreseeable that jurisdiction in Kansas is a possibility. In such circumstances, a court may reasonably find that the defendant acquiesced to jurisdiction when it failed to act with notice of the consequences.[20]

The conversion of non-feasance into a purposeful event can be explored through a series of Kansas cases. In Misco-United Sup. Inc. v. Richards of Rockford, Inc. 215 Kan. 849, 528 P.2d 1248 (1974) the court held that a defendant who called Kansas to place an order was not subject to jurisdiction pursuant to KSA 60-380(b)(5). This was in spite of the fact that plaintiff sent a confirmatory invoice to defendant indicating that payment was due in

(Footnote Continued)
Contract, 61 B.U. L. Rev. 375, 378 (1981). It is a bit difficult to predict how the Court would react to such a statute now that it has decided cases like Asahi Metals. Still, in several cases after McGee, the Court noted the absence of a "special interest long arm" as an important factor in its determination that jurisdiction was improper. See, Shaffer and Kulko, supra.

[20]In other words, the proposed statute might be changed so that the defendant receives notice entering into or remaining in an "arrangement" for phone services with the vendor may result in the assertion of jurisdiction in Kansas over any dispute regarding the arrangement.

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Wichita, KS. The court relied on the argument that the defendant did nothing more than place the order and receive the unilateral invoice. All the other activities were performed outside of Kansas, and therefore it was not a contract to be "performed in whole or in part by either party in this state." KSA 60-308(b)(5).[21] The court also found that there was no purposeful activity by the defendant to support Kansas jurisdiction. Pedi-Bares, Inc. v. P&C Food Markets, Inc. 576 F.2d 933, 977 (10th Cir. 1977) distinguished Misco-United on the grounds that Pedi-Bares actually manufactured the product in Kansas and "accepted" the order in Kansas. This was sufficient in spite of the fact that Pedi-Bares was not registered to do business in Kansas and that defendant was on notice of Pedi-Bares' Kansas status by instructions as to where payment should be made. Under Misco-United, this would seem to be a unilateral act. In Continental American Corp. v. Camera Controls Corp. 692 F.2d 1309 (10th Cir. 1982), Pedi-Bares was extended to include a situation where payment was

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[21]The court did not rely on the statutory language of (b)(5). In Kansas, the long arm is interpreted to exert jurisdiction to the full extent allowed by due process. Misco-United, supra, at 1251. In Kansas, therefore, the "statutory analysis" and the minimum contacts test are normally intertwined.



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contemplated in Kansas, but the manufacturing was to occur out of state. The court emphasized the strong interests of Kansas in asserting jurisdiction over an out of state defendant of this type[22], and the fact that defendant did make partial payments into Kansas. The court reasoned that when a defendant makes some payments on a contract in Kansas, and then stops making payments on that contract, it should expect to be hauled into a Kansas Court. Continental, supra, at 1314.

A final case in this line is Schlatter v. Mo-Comm Futures, Ltd. where the court refused to extend jurisdiction over three out of state directors of a limited partnership which was selling securities in Kansas. The court rejected assertions of jurisdiction under KSA 60-308(b)(1), (2) and (6). KSA 60-308(b)(6) purports to assert jurisdiction over any person "acting within this state as director, manager, trustee or other officer of any corporation organized under the laws of or having a place of business within this state..." In Schlatter the corporation had no place of business in state at the time the cause of action accrued, although it did have a Kansas office at the time suit was

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[22] See §V, infra.



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filed. The court was unwilling to find that the directorship status at the time the suit was filed created general jurisdiction in Kansas and refused to assert specific jurisdiction on the grounds that there were no purposeful activities in Kansas.[23] The court also noted that the defendants had no knowledge of the Kansas activity.

Although these cases do not form a bright line, it can be garnered that the quality and the amount of purposeful activity required in order to assert jurisdiction may be partially affected by (1) the nature of the long arm itself and (2) the degree of knowledge that the defendant has or should have concerning the impact of a given act in Kansas. Arguably, where the long arm itself puts defendant on notice that action in Kansas may be contemplated if the defendant engages in activity that the state deems to be within its special interest, then the eventual assertion of jurisdiction may be more supportable, even where the

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[23]General jurisdiction refers to the idea that a defendant has such systematic or continuous contacts with the state that there is jurisdiction for all purposes. Specific jurisdiction involves contacts that may not be systematic, but have such a close relationship to the litigation that they allow for assertion of jurisdiction over the defendant for that cause of action. For a protracted discussion of the distinction, see, Helicopteros Nacionales de Colombia, SA v. Hall, 466 US. 408, 104 S. Ct. 1868, 80 L.Ed.2d 404 (1984).

activity is quite minimal. However, the assertion of jurisdiction becomes less controversial when defendant is put on some kind of notice, even if that notice is somewhat unilateral, that continued commercial activity with the defendant could result in Kansas litigation. This would seem to be consistent with the Burger King case in which the Court noted that the franchise contract between defendant and plaintiff provided, somewhat unilaterally, for the application of Florida law. Even though almost all of the actual activity regarding the contract transpired in Michigan, the Court did not find the assertion of Florida jurisdiction unreasonable given the selection of Florida law and the long, involving, and on-going relationship contemplated by the parties. See also, Beco Corporation v. Roberts & Sons Construction Co., Inc., 114 Idaho 704, 760 P.2d 1120 (1988) ["Beco"] (contracting to perform construction work outside Idaho with an Idaho resident may subject defendant to jurisdiction in the state).

A plaintiff attempting to assert jurisdiction under S.B. 145, KSA 60-308(b)(11) would be in a much stronger position if defendant was put on actual notice of the fact that arranging or continuing its phone service could subject it to Kansas jurisdiction. Furthermore, inclusion of such a notice requirement in S.B. 145 may be desirable.

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VI. <u>Conclusion</u>:

For the reasons discussed above S.B. 145 should be an aid to resident telecommunications companies by removing the disability they face by their inability to define the place in which the service is manufactured. At the same time, S.B. 145 is fair to defendants by giving them fair notice of Kansas' special interest and notice of the significance of the act of arranging or continuing their telecommunications service. S.B. 145 could be improved by the addition of the following language at the end of the bill:

> Provided that, as soon as feasible, defendant is put on reasonable notice that arranging or continuing such telecommunication may result in the extension of jurisdiction pursuant to this statute.

This small proviso assures fairness to the defendant by allowing for an opportunity to discontinue phone service so as to avoid a purposeful availment to Kansas jurisdiction. Given the business context, and the nature of the telecommunications business, this procedure S.B. 145 protects Kansas' interests, assures fairness to the parties, and improves efficiency in the courts by giving meaning to the contacts that are relevant to the constitutional inquiry.

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*Session of 1989*

# SENATE BILL No. 145

By Committee on Judiciary

2-3

AN ACT concerning civil procedure; relating to service of process and venue; amending K.S.A. 60-604 and 60-605 and K.S.A. 1988 Supp. 60-308 and repealing the existing sections.

*Be it enacted by the Legislature of the State of Kansas:*

Section 1. K.S.A. 1988 Supp. 60-308 is hereby amended to read as follows: 60-308. (a) *Proof and effect.* (1) Service of summons may be made upon any party outside the state. If upon a person domiciled in this state or upon a person who has submitted to the jurisdiction of the courts of this state, it shall have the force and effect of personal service of summons within this state; otherwise it shall have the force and effect of service by publication.

(2) The service of summons shall be made (A) in the same manner as service within this state, by any officer authorized to make service of summons in the state where the defendant is served or (B) by sending a copy of the summons and of the petition to the person to be served in the manner provided in K.S.A. ~~1985~~ *1988* Supp. 60-314 and amendments thereto. No order of a court is required. An affidavit of the server shall be filed stating the time, manner and place of service. The court may consider the affidavit, or any other competent proofs, in determining whether service has been properly made.

(3) No default shall be entered until the expiration of at least 30 days after service. A default judgment rendered on service outside this state may be set aside only on a showing which would be timely and sufficient to set aside a default judgment rendered on personal service within this state.

(b) *Submitting to jurisdiction — process.* Any person, whether or not a citizen or resident of this state, who in person or through

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45 an agent or instrumentality does any of the acts hereinafter enum-
46 erated, thereby submits the person and, if an individual, the indi-
47 vidual's personal representative, to the jurisdiction of the courts of
48 this state as to any cause of action arising from the doing of any of
49 these acts:
50 (1) Transaction of any business within this state;
51 (2) commission of a tortious act within this state;
52 (3) ownership, use or possession of any real estate situated in
53 this state;
54 (4) contracting to insure any person, property or risk located
55 within this state at the time of contracting;
56 (5) entering into an express or implied contract, by mail or oth-
57 erwise, with a resident of this state to be performed in whole or in
58 part by either party in this state;
59 (6) acting within this state as director, manager, trustee or other
60 officer of any corporation organized under the laws of or having a
61 place of business within this state or acting as executor or admin-
62 istrator of any estate within this state;
63 (7) causing to persons or property within this state any injury
64 arising out of an act or omission outside of this state by the defendant
65 if, at the time of the injury either (A) the defendant was engaged
66 in solicitation or service activities within this state; or (B) products,
67 materials or things processed, serviced or manufactured by the de-
68 fendant anywhere were used or consumed within this state in the
69 ordinary course of trade or use;
70 (8) living in the marital relationship within the state notwith-
71 standing subsequent departure from the state, as to all obligations
72 arising for maintenance, child support or property settlement under
73 article 16 of this chapter, if the other party to the marital relationship
74 continues to reside in the state;
75 (9) serving as the insurer of any person at the time of any act
76 by the person which is the subject of an action in a court of com-
77 petent jurisdiction within the state of Kansas which results in judg-
78 ment being taken against the person; ~~or~~
79 (10) performing an act of sexual intercourse within the state, as
80 to an action against a person seeking to adjudge the person to be
81 a parent of a child and as to an action to require the person to

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82 provide support for a child as provided by law, if (A) the conception
83 of the child results from the act and (B) the other party to the act
84 or the child continues to reside in the state~~.~~*; or*
85 *(11) entering into an express or implied arrangement, whether*
86 *by contract, tariff or otherwise, with a corporation or partnership,*
87 *either general or limited, residing or doing business in this state*
88 *under which such corporation or partnership has supplied com-* — transportation services, or
89 *munication services or equipment, including, without limitation, tel-*
90 *ephonic communication services, for a business or commercial user*
91 *where* ~~*such services are supplied to the user, either partially*~~
92 ~~*or wholly, through the use of equipment or facilities of any*~~
93 ~~*type located*~~ *the services supplied to such user are managed, op-*
94 *erated or monitored within the state of Kansas. As soon as feasible*
95 *after entering into such express or implied arrangement, such person*
96 *is put on reasonable notice that arranging or continuing such te-* — transportation services, or
97 *lecommunication may result in the extension of jurisdiction pursuant*
98 *to this section.*
99 (c) Service of process upon any person who is subject to the
100 jurisdiction of the courts of this state, as provided in subsection (b),
101 may be made by serving the summons upon the defendant outside
102 this state, as provided in subsection (a)(2), with the same force and
103 effect as though summons had been personally served within this
104 state, but only causes of action arising from acts enumerated in
105 subsection (b) may be asserted against a defendant in an action in
106 which jurisdiction over the defendant is based upon this subsection.
107 (d) Nothing contained in this section limits or affects the right
108 to serve any process in any other manner provided by law.
109 Sec. 2. K.S.A. 60-604 is hereby amended to read as follows: 60-
110 604. An action against a domestic corporation, or against a foreign
111 corporation which is qualified to do business in this state, other than
112 an action for which venue is otherwise specifically prescribed by
113 law, may be brought in the county~~,~~ *in which:*
114 (1) ~~in which~~ Its registered office is located~~, or~~*;*
115 (2) ~~in which~~ the cause of action arose~~, or~~*;*
116 (3) ~~in which~~ the defendant is transacting business at the time
117 of the filing of the petition~~, or~~*;*
118 (4) ~~in which~~ there is located tangible personal property which

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119 is the subject of an action for the possession thereof if immediate
120 possession is sought in accordance with K.S.A. 60-1005 *and amend-*
121 *ments thereto* at the time of the filing of the action~~.~~*; or*
122 *(5) equipment or facilities for use in the supply of communication*
123 *services, including, without limitation, telephonic communication*
124 *services, are located, where the subject of such action relates to*
125 *communication services supplied or rendered, in whole or in part,*
126 *using such equipment or facilities.*

transportation services, or

transportation services, or

127 Sec. 3. K.S.A. 60-605 is hereby amended to read as follows: 60-
128 605. An action against a nonresident of this state, or against a cor-
129 poration which is not qualified to do business in this state, other
130 than an action for which venue is otherwise specifically prescribed
131 by law, may be brought in the county~~,~~ *in which:*
132 (1) ~~in which~~ The plaintiff resides~~,~~*;* or if the plaintiff is a cor-
133 poration, in the county of its registered office or in which it maintains
134 a place of business~~, or~~*; or if the plaintiff is a partnership, either*
135 *general or limited, in the county of the residence of a partner, in*
136 *the county of the registered office of a corporate partner or in the*
137 *county in which the partnership maintains a place of business;*
138 (2) ~~in which~~ the defendant is served~~, or~~*;*
139 (3) ~~in which~~ the cause of action arose~~, or~~*;*
140 (4) ~~in which~~ the defendant is transacting business at the time
141 of the filing of the petition~~, or~~*;*
142 (5) ~~in which~~ there is property of the defendant, or debts owing
143 to the defendant~~, or~~*;*
144 (6) ~~in which~~ there is located tangible personal property which
145 is the subject of an action for the possession thereof if immediate
146 possession is sought in accordance with K.S.A. 60-1005 *and amend-*
147 *ments thereto* at the time of the filing of the action~~.~~*; or*
148 *(7) equipment or facilities for use in the supply of communication*
149 *services, including, without limitation, telephonic communication*
150 *services, are located where the subject of such action relates to*
151 *communication services supplied or rendered, in whole or in part,*
152 *using such equipment or facilities.*

transportation services, or

153 Sec. 4. K.S.A. 60-604 and 60-605 and K.S.A. 1988 Supp. 60-
154 308 are hereby repealed.
155 Sec. 5. This act shall take effect and be in force from and after
156 its publication in the statute book.
157

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Testimony Before

HOUSE JUDICIARY COMMITTEE

Senate Bill #155
Overhead Power Line Safety Act

By RICHARD D. KREADY
KPL GAS SERVICE
Director of Governmental Affairs

March 21, 1989

KPL Gas Service supports passage of SB 155 to prevent deaths, injuries and damages resulting from contact with high voltage power lines.

The main thrust of this bill is explained in Section 3 (page 2, beginning at line 50) -- Unless danger against contact with high voltage overhead lines has been guarded against, no person, tool or equipment is to be moved within 10 feet of those lines. The 10-foot limitation has been selected to coincide with the OSHA requirement (sub-part N, # 1926.550) for operating cranes, hoists and similar equipment.

To guard against danger when any person desires to temporarily operate within 10 feet of a high voltage overhead power line, Section 4 requires arrangements be made with the public utility. In most instances, there will be no cost for this protection. The person or persons requesting safety arrangements will be responsible only for costs incurred by the utility when it is necessary to re-route the electricity or temporarily relocate the power line. The persons will not be (the utility will be) responsible for temporary mechanical barriers (i.e. insulating blankets) or temporary deenergization and grounding of the conductors.

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Unless otherwise agreed to, the utility must commence work on such clearances or other safety precautions within three working days after payment has been made. Certainly there are times such work can and will be done almost immediately, but the three working days will allow the time to arrange for additional materials and equipment (i.e. more insulating blankets) when the utility doesn't have an adequate supply available at that location. Dispute arbitration is provided in subsections (c) and (d) in this Section.

Section 5 requires warning signs to be posted on cranes and similar equipment to remind the operators of the 10 feet clearance requirement. Due to the large number of contractors leasing such equipment, many states have inserted this requirement in their laws to provide a safety reminder to the "occasional" equipment operators. KPL Gas Service has no specific position on this Section. If Kansas too includes this in the law, it is our intention (as some utilities have done in other states) to have a quantity of signs printed which we will give to contractors.

Civil penalties are provided in Section 6. Of the 14 states with similar laws we have studied, nine include criminal penalties. We are not certain Kansas needs criminal penalties to address this problem, so we support this bill which begins with only civil penalties set by the court of <u>not more than</u> $1,000 for each violation. We feel this gives the judge freedom to make the penalty fit the severity of the violation. Our company does not stand to profit from the penalty, but we do feel the judge needs the ability to put some teeth in the penalty -- particularly for repeat offenses.

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Subsection (b) of Section 6 clarifies what happens if a physical or electrical contact happens after a person fails to obtain the temporary clearances or use other safety precautions mentioned in this bill. That person is responsible for the resulting damages, not just the civil penalties prescribed in subsection (a). This is not unlike the worthless check laws which clearly state the person is responsible for restitution in addition to any civil and criminal penalties.

Exemptions for authorized persons, highway vehicles, agricultural equipment, railroads and others are in Section 7. Section 8 was added on the Senate floor to clarify that this act does not limit or modify the comparitive negligence statutes.

Before responding to your questions, I want to discuss a few minor points.

- This bill would not propose penalties on a thirteen-year-old boy who flies a kite into a power line.

  ***Section 3 (beginning at the end of line 51) states that, "no person...shall store, operate, maintain, move or transport any tool, machinery, equipment, supplies or materials, within 10 feet of any high voltage overhead line..." I don't believe a kite would be defined as a tool, machinery, equipment, supply or material.***

- This bill would not require people to move their buildings if they are located closer than 10 feet from a high voltage power line.

  ***A building would not be defined as a tool, etc. However, the bill would prevent persons or tools, etc. from working within that area unless danger of contact has been guarded against.***

- This bill does not prohibit anyone from working within 10 feet of high voltage lines.

  ***Reasonable safety precautions are to be taken to prevent electrocutions. Upon notification, the utilities are required to respond to protect the workers from injury or death.***

- This bill does not give the utilities an additional 10 foot easement.

  ***No property right is being transferred. Things can be built adjacent to the lines, but protection is required while the work is being done.***

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• This bill will <u>not</u> prevent people from mowing the grass within 10 feet of a utility pole in their yard or in a city park.

*Distribution lines running up and down the alley behind peoples' homes are typically 20 to 30 feet in the air, thus requiring notification only if the person or equipment could reasonably be expected to get 10 to 20 feet above ground (within 10 feet of that line).*

• This bill will <u>not</u> prevent your typical homeowner from washing their windows or from cleaning out their gutters and down spouts.

*To avoid a burden on typical homeowners, this bill excludes lines with lesser voltages. The service lines coming into a typical residence are 240 volts (480 volts into larger commercial facilities), which is less than the 600 volts required to be included in this Act. However, we'll be glad to respond if they call us when they expect to work near <u>any</u> of our lines.*

• This bill **<u>will</u>** require danger of contact to be guarded against when a crane, backhoe or aluminum ladder is going to be used within 10 feet of a high voltage power line.

*This should make it safer to work around power lines, and keep people from severely injuring or killing themselves.*

Although there was no opposing testimony in the Senate, as you further study this proposal, you might hear someone say that they don't want to be required to make these safety arrangements. They might try to convince you that they are professionals, and should be allowed to determine for themselves if they need a utility to provide protection. Of course, I wouldn't be here today if I hadn't developed a different opinion over the years. Many times when work is being done near a power line with no anticipation of contact, some material falls the wrong way or the wind pushes some equipment just a little off course, or perhaps someone looses their balance momentarily and allows their ladder or a tool to angle close enough that the electricity arcs from our line. The result is, at minimum, a loss of electric service to others (many times including traffic signals, police and fire alarms or even hospitals in addition to computers that keep our businesses operating and the appliances we rely upon at home).

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Unfortunately, the results go much further than the minimum in too many instances. The person having contact with the high voltage power line is usually severely injured if not electrocuted, and others dependent on affected traffic signals, electrically operated life-support systems or hospitals also can find their lives in danger.

We encourage you to enact this law as an effort to prevent overhead power line accidents.

To assist your review, we have attached a summary comparison of similar laws in 14 other states.

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Overhead Powerline Safety
Comparative Statutes

| Date of Statute/State | 1955 Tennessee | 1960 Georgia | 1963 Arkansas | 1963 Oklahoma | 1967 Alabama | 1969 Nebraska | 1971 Texas | 1972 Alaska |
|---|---|---|---|---|---|---|---|---|
| High Voltage Threshold | 750 volts | 750 volts | 440 volts | 750 volts | 750 volts | 750 volts | 600 volts | 750 volts |
| Distance Threshold | 6 feet | 8 feet | 10 feet | 6 feet | 6 feet | 10 feet<br>10' equip. | 6' person | 10 feet |
| Civil Penalty/Criminal Penalty | Criminal | Criminal | Criminal | Criminal | Criminal | Criminal & Civil | Criminal | Criminal |
| Civil Liability for Damages | No | No | No | Yes | No | No | Yes | Yes |
| Temporary Clearance/ Costs | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Mandatory Warning Signs | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Exemptions For: | | | | | | | | |
| Highway Vehicles | No | No | No | No | No | No | No | No |
| Agric. Equipment | No | No | No | No | No | Yes | No | No |
| Railroad Activities | Yes | Yes | Yes | Yes | Yes | No | No | Yes |
| Government Emergency Responders | No | No | No | ----- | No | No | No | Yes |
| Storage or Maintenance of Equipment Near Line Prohibited | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |

Overhead Powerline Safety
Comparative Statutes-Supplement II

| Date of Statute/State | 1973 S. Dakota | 1977 N. Dakota | 1980 Arizona | 1983 Colorado | 1988 Mississippi | 1988 Utah | Proposed Kansas Legislation | 14 State Basis |
|---|---|---|---|---|---|---|---|---|
| High Voltage Threshold | 750 volts | 600 volts | 600 volts | 600 volts | 600 volts | 600 volts | 600 volts | 440 volts - 1<br>600 volts - 6<br>750 - 7 |
| Distance Threshold | 6 feet | 10 feet | 6'-<50 kv<br>10'->50 kv | 10 feet | 10 feet | 10 feet | 10 feet | 6 feet - 6<br>10 feet - 9<br>8 feet - 1 |
| Civil Penalty/Criminal Penalty | Criminal | Civil | Civil | Civil | Civil | Civil | Civil | Civil - 5<br>Criminal - 8<br>Both - 1 |
| Civil Liability for Damages | Yes | No | Yes | Yes | Yes | Yes | Yes | Yes - 8<br>No - 6 |
| Temporary Clearance/ Costs | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes - 14 |
| Mandatory Warning Signs | Yes | No | No | No | Yes | No | Yes | Yes - 10<br>No - 4 |
| Exemptions For: | | | | | | | | |
| Highway Vehicles | No | Yes | No | Yes | No | No | Yes | Y-2 N-12 |
| Agric. Equipment | No | Yes | No | Yes | Yes | No | Yes | Y-4 N-10 |
| Railroad Activities | Yes | Yes | No | No | No | No | Yes | Y-8 N-6 |
| Government Emergency Responders | ----- | Yes | No | Yes | No | No | Yes | Y-3 N-11 |
| Storage or Maintenance of Equipment Near Line Prohibited | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes-14 |

TESTIMONY

Before the House Judiciary Committee

S.B. 155, The Overhead Power Line Safety Act

Tuesday, March 21, 1989

By Conni L. McGinness
Director, Legislative Relations
Kansas Electric Cooperatives, Inc.

House Judiciary
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Attachment V

TESTIMONY

May it please the Committee, my name is Conni McGinness, and I am Director of Legislative Relations for Kansas Electric Cooperatives (KEC). KEC is the statewide service organization representing 34 rural electric cooperatives in the state, who in turn have a membership of over 170,000 consumers. I am speaking here today on behalf of KEC and its member systems in support of S.B. 155. Last year, we ourselves were going to ask for high-voltage line safety legislation.

The electric cooperatives are concerned about safety; pure and simple. We want to prevent loss of life and limb. This legislation, we believe, will help educate and prevent such terrible accidents.

Unfortunately, most of the time our cooperatives are not even informed about people working by and under high-voltage lines until after a tragic accident; after the fact; after it is too late to take preventative action. Then, as you can well imagine, a lawsuit is filed and all the consumer-members pay for the costly litigation, regardless of the outcome, that a little prevention would have cured. Prevention that could have saved a life or a limb. S.B. 155 can play a large role in that act of prevention. We strongly encourage your support establishing the Overhead Power Line Safety Act.

Thank you for allowing me to testify today, and I would be willing to answer any questions you may have.

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Att V

SENATE BILL No. 155

Committee on Transportation and Utilities

TESTIMONY OF PHILLIP A. LESH

I am appearing in support of Senate Bill No. 155. As an employee of an electric cooperative for the past 34 years, I am aware of a number of serious accidents, of which some, I believe, would have been avoided if this bill had been law during that time. I have no statistical data for the entire state for any specific period of time, but I would like to relate three recent incidents of which I have general knowledge, which, I believe, will demonstrate the need for remedial legislation.

During a recent 19 month period, there have been three serious accidents resulting in two fatalities and one permanently disabling injury, all within an area which would fall within a circle with a 60 mile radius. Although they occurred within a small area, three different utility companies' lines were involved. Damages are being litigated, and I am not at liberty to discuss them in detail or to identify the parties involved. But they represent typical situations which the proposed legislation addresses, so I would like to describe them in general terms.

The first incident occurred when an oil drilling rig was erected very close to a high voltage line. The utility discovered it after the fact, and asked that it be notified when the rig was to be lowered. Later activities on the site, without the utility company's knowledge, resulted in contact with the high voltage, and a fatality was the result.

The second incident occurred when farm equipment with an extendable auger contacted a high voltage line, resulting in a fatality. In this case, the utility was notified immediately following the accident.

The third incident occurred when an oil tank battery was being installed near a high voltage line. The line was contacted, and the result was a permanently disabling injury. The accident did not cause a permanent fault to the electrical system, so the utility did not know when it occurred, and learned of the incident two days later.

In all three cases, the utility lines were installed with clearances in compliance with the National Electrical Safety Code. The utilities were not made aware of the activity in advance, so had no opportunity to take precautionary measures. Under present conditions, a utility can be in total compliance with safety code, unaware of any activity to be initiated and therefore helpless to take preventive measures, but be subjected to costly litigation, which, in the case of the cooperatives, results in a cost to every member, who is also the ratepayer.

Electric utilities throughout the state of Kansas do, through advertising and other methods, try to emphasize the need for the public to be more aware of overhead lines and the importance of calling the utility before operating machinery or other equipment in a manner that may result in contact with high voltage. I sincerely believe that the passage of this legislation will enable the industry to deliver this message more effectively, which can only help to prevent loss of life and disabling injury.

Thank you very much for the opportunity to address this very important issue.

Phillip A. Lesh
Norton-Decatur Cooperative Electric Co., Inc.
P. O. Box 360
Norton, Kansas 67654

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Attachment VI

STATEMENT OF

DONALD W. VASOS
Vasos, Kugler & Dickerson
Ten Cambridge Circle, Suite 200
10 East Cambridge Circle Drive
Kansas City, Kansas 66103
(913) 342-3100

ON

SENATE BILL 155

3/15/89

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Attachment VII

## I. THE HAZARDS OF HIGH VOLTAGE ELECTRICITY.

The utility distributes electricity throughout populated urban areas over bare metal conductors at voltages of 7,200 volts.

An energized wire is a deadly, silent hazard. One cannot use his or her senses of sight, smell or hearing to determine whether an overhead wire is energized.

The same wire is used for construction of the phase (hot) wires is used for neutral. They are identical, and the ordinary lay person has no way of identifying which of the lines is energized.

## II. RIGHTS AND DUTIES OF AN ELECTRIC UTILITY.

Consistent with lawful rules and regulations of the KCC, applicable National Electrical Safety Code (NESC) standards, and municipal ordinances, the utility has sole control over the design, maintenance and construction of its overhead distribution system. The consumer has no realistic control over such decisions. Only the utility has the training, personnel and equipment required to build and maintain overhead wires. In that regard, only the utility (to the exclusion of all other persons), has the right to:

(a) select the point of service to the customer's premises;

(b) repair or maintain its lines;

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(c) relocate, bury, isolate, or barricade its lines;

(d) energize or de-energize its lines.

Because of the peculiarly hazardous conditions involved in cases of electrical injury, courts have uniformly held thaT the duty to exercise the highest degree of care includes the following:

A. Duty to Anticipate Uses of Acts Around Lines.

In Murphy v. Central States Electric Cooperative Ass'n., 178 Kan. 210, 215, 284 P.2d 591 (1955), the court recognized that the high degree of care required of distributors of electricity mandates that care be commensurate with the danger, and "provide such protection as will safely guard against any contingency that is reasonably to be anticipated." The act or use to be anticipated is not given a narrow or restricted meaning, and includes acts or uses made by persons "while engaged in any of the duties of life in that section or community." Logan v. Electric Co., supra, 99 Kan. 381, 385 (1916).

Thus, the duty to anticipate is based not upon actual knowledge of the specific use which does result in injury, but from the stringing, operating and maintaining of the dangerous wires themselves. Because the wires contain lethal voltages, the utility must anticipate legitimate uses, inspect for hazardous conditions, and take appropriate corrective action, i.e., insulate the wires, place them out of reach of contact, provide



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warning signs or discontinue service. Miller v. Leavenworth-Jefferson Elec. Corp., 653 F.2d 1378, 1384 (10th Cr. 1981).

B. Duty to Insulate or Isolate Lines.

In Henderson v. Kansas Power & Light Co., 184 Kan. 691 (1959), the court stated:

> Courts generally, if not universally, hold that the duty to exercise the highest degree of care in the maintenance of high-voltage power lines over private property or streets and highways requires the power company to insulate its wires carefully and properly at all places where others have the right to go, either for work, pleasure or business, or where there is a reasonable probability of contact with them, but the duty to insulate is not absolute and if the company maintains its wires at such height above ground that there is n o reason to anticipate that contact will be made with such wires, then insulation is not required. The wire must either be insulated or placed beyond the danger line of contact at places where contact is reasonably to be anticipated. 184 Kan. at p. 698 (Emphasis added.)

C. Duty to Inspect.

An electric utility must make "frequent and careful inspections" of its equipment. Moseley v. Garden City Irr. Power Co., 159 Kan. 194, 152 P.2d 799 (1944).

D. Duty to Warn.

In Worley v. Kansas Electric Power Co., 138 Kan. 69, 23 P.2d 494 (1933), the defendant power company extended its high-voltage line over private property. Following construction of the line, a tenant of the property owner built a silo in close proximity to the defendant's line. The height of the wire was 20 feet, and the top of the silo 18 feet, above grade.



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Decedent, an employee of the tenant, was killed when he came in contact with the line while tramping ensilage in the top of the silo. Suit was brought against the power company for negligence in failing to post signs or give other warnings of the dangerous voltage. The court affirmed a verdict for the plaintiff, stating:

> We think it is not an unreasonable requirement that such a company should place warning signs of danger for the protection of those coming within the danger zone. 138 Kan. at p. 74.

In its Employee Safety Manual, KPL acknowledges it has such a duty:

> d. Should an employee notice some particularly dangerous place where there is no warning sign, he shall report the condition at once in order that an appropriate sign may be placed or the dangerous condition eliminated if possible. (Pl. Exh. 62; Vol. VI)

E. Duty to Terminate Service.

The KCC grants each utility express authority to de-energize a line at any time a dangerous condition on a customer's premises is observed. (See e. g., KCC Electric Rules and Regulations 5.08.01). A utility is required to terminate service where clear hazards are discovered. Followill v. Gas & Electric Co., 113 Kan. 290 (1923).

Even if the line is known to be energized, there is no way for the lay person to know the voltage of the energized overhead line.

Electricity travels over metal conductors at the approximate speed of light, certainly faster than the ability of any human being to react before injury.

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The slightest, unintended brush contact with an energized overhead wire is virtually certain to result in instantaneous serious injury or death. There is no second chance - no ability to react.

Because of this, courts of virtually all states, including Kansas, have recognized that electricity is one of the most dangerous instrumentalities known to man, which requires the electric utility to exercise the utmost or highest degree of care to protect the public from danger.

## III. THE PROPOSAL IMPOSES GREATER BURDENS ON PERSONS INJURED IN KANSAS BY FOREIGN UTILITIES.

For Kansas served by foreign utilities, the proposal will impose burdens not shared by out of state customers. A substantial portion of eastern Kansas is served by KCP&L, a Missouri corporation. KGE with its principal place of business in Wichita, is a West Virginia Corporation. In the event S.B. 155 is enacted, it will only govern the rights of persons injured or killed in Kansas. It will have no effect on the rights or obligations of Missouri and West Virginia residents served by the same utility. Thus, a Missouri resident injured in Missouri by the negligence of KCP&L will have greater protection than would a Kansan injured in his own state. However, if he happens to sustain an injury in Missouri, he would not be subject to the burdens of S.B. 155, and would be afforded the greater protections afforded by Missouri law. Surely, such an anamoly should not be permitted.



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IV. INNOCENT USERS ARE PENALIZED FOR HAZARDS CREATED BY THE ELECTRIC UTILITY.

NESC Table 234-1 permits a utility to run a bare conductor, energized with 8.700 volts, within 5 feet of a building, including a dwelling. Until a 1977 NESC rules change, the permitted clearance was 3 feet. There is no current NESC rule that requires that lines installed under the old rule be upgraded to the new standard. Under either standard, the minute the homeowner or farmer places a ladder against the wall of his 2 story frame dwelling for needed painting, repair or maintenance, he or she is in violation of the 155's 10 foot rule. In instances where the utility failed to maintain even a 5 foot clearance, an injured person or his survivors are nevertheless burdened with yet another defense, even though it was the utility, not the customer, that placed the line so close to the dwelling.

Before S.B. 155 is even considered, KPL and other utilities should give some assurance that it will be able to relocate lines adjacent to buildings and other objects, to maintain a clearance of at least 10 feet, plus any additional clearance to accomodate foreseeable activity that will occur.

V. THERE IS NO EVIDENCE THAT THE PROPOSAL HAS BEEN COORDINATED WITH THE NESC AND KCC, OR THAT IT WILL NOT CONFLICT WITH EXISTING SAFETY STANDARDS.

In Kansas, the electric utility industry is subject to regulation by the KCC. Moreover, all utilities are required to comply with the standards of the National Electrical Safety



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Code (NESC) promulgated by the Institute of Electrical and Electronic Engineers. The utilities governed by the NESC are substantial contributors to standards making organizations. I. e., they assist in making the rules by which they are governed. Electric Cooperatives funded by the REA are also governed by separate federal regulations, rules and bulletins, unique to the REA.

KPL should be required to give the legislature assurance that S.B. 155 will not adversely affect the existing regulatory mechanism. Certainly, where conflict or impairment exists, a thorough study should first be conducted to determine its effect on public safety.

## VI. THE PROPOSAL IMPOSES UNREASONABLE BURDENS ON PERSONS INJURED OR KILLED BY HAZARDOUS OVERHEAD WIRES.

The bill imposes the following burdens:

a. permits the utility to delay implementation of safety measures until it is paid, or the matter of payments has been decided by arbitration;

b. leaves the decision as to the level of protection to be afforded to the utility.

And, even if the utility violates the clearance requirements of the NESC, and a person is thereby injured or killed as a result of line contact, the bill imposes on the victim a civil penalty of $2,000.00 <u>and</u> liability for payment of damages to a negligent utility's distribution system.



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## VII. CONCLUSION.

S.B. 155 is euphimistically titled "the Overhead Power Line Safety Act." It is in reality the overhead power line immunity act. It's obvious purpose is to provide utility defense attorneys with yet another defense, even in those cases involving negligence by the utility. E. g., if safety were indeed the objective of the bill, why should a utility be permitted to withhold "safety precautions" until it is paid.. Payment of expense has no relationship to whether the utility with the duty to exercise the highest degree of care is adequately protecting the public safety. If safety is the concern, why is the injured person required to pay a civil penalty, even in those cases where the utility has violated applicable safety standards? And, is there any rational connection between safety and the requirement that the injured person or a decedent's estate pay the utility for the cost of repairing overhead lines damaged by line contact? If immunization is not the objective, why does 6(b) of the act exempt the utility that owns and strings the wire from liability for personal injury and damage? Finally, if S.B. 155 is truly a safety act, then excepting agricultural workers from coverage in a state like Kansas is nothing less than inexcuseable. Persons engaged in argricultural pursuits are entitled to as safe a place to work and live as residents of urban areas.

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