Approved: April 11, 2002 Carl Dean Holmes
Date

MINUTES OF THE HOUSE COMMITTEE ON UTILITIES.

The meeting was called to order by Chairman Carl D. Holmes at 9:07 a.m. on March 14, 2002 in Room 526-S of the Capitol.

All members were present except: Representative Carl Krehbiel

Committee staff present: Robert Chapman, Legislative Research
Dennis Hodgins, Legislative Research
Mary Torrence, Revisor of Statutes
Jo Cook, Administrative Assistant

Conferees appearing before the committee: Leo Haynes, Kansas Corporation Commission
Dick Brewster, BP
Ron Gaches, Williams, El Paso & Northern Natural Gas
Barb Conant, Kansas Trial Lawyers Association
Jim Tyler, Westar Energy

Others attending: See Attached List

SB 490 - Kansas underground utility damage prevention act, regulations

Chairman Holmes opened the hearing on **SB 490**.

Leo Haynes, Chief of Pipeline Safety for the Kansas Corporation Commission, appeared in support of **SB 490** (Attachment 1). Mr. Haynes provided a brief history on the bill and explained the changes being made to the Act. He stated that those changes will serve as a foundation on which to build regulations for more effective administration of the One Call law.

Dick Brewster, Director of Government Affairs for BP America, testified in support of **SB 490** (Attachment 2). Mr. Brewster stated the bill contains new definitions not in current law and a provision that allows an operator to improve the precision of marking the location of any underground facilities.

Ron Gaches, on behalf of The Williams Companies, El Paso Pipeline, and Northern Natural Gas, spoke to the committee in support of **SB 490**.

Barbara Conant, Director of Public Affairs for the Kansas Trial Lawyers Association, addressed the committee in support of **SB 490** (Attachment 3).

Jim Tyler, Senior Manager of Design and Support Services for Westar Energy, appeared in support of **SB 490** (Attachment 4). Mr. Tyler stated the changes proposed in this bill clarify key issues in regard to marking underground facilities.

Written testimony in support of **SB 490** (Attachment 5) was submitted by Robert Krehbiel, Kansas Independent Oil and Gas Association.

The conferees responded to questions from the committee.

Chairman Holmes closed the hearing on **SB 490**.

Substitute HB 2100 - Unsolicited consumer telephone calls; do-not call list

Representative Dillmore distributed a proposed balloon to **Substitute for HB 2100** (Attachment 6). A memorandum from Steve Rarrick to Jim McCabria, both with the Attorney General's office, regarding the delegation of authority to a non-government agency by the states as it applies to no call legislation (Attachment 7). Neil Woerman, Director of Budget and Special Projects for the Attorney General's office, distributed a memo regarding fiscal information on the substitute bill (Attachment 8). Representative Sloan distributed proposed amendments (Attachment 9)

Representative Dillmore moved to adopt his proposed balloon. Representative Kuether seconded the motion. During discussion, Steve Rarrick responded to questions from the committee. Additionally, Staff provided an explanation of the substitute language. On Call of the Question, the motion carried. Representative Loyd requested his 'yes' vote be recorded. Representatives Lightner, Morrison, McLeland, Dahl, and Compton requested their 'no' votes be recorded. Representative Sloan moved to adopt the second amendment listed (See Attachment 9). Representative Dillmore seconded the motion. The motion carried. Representative Sloan moved to adopt the first amendment listed (See Attachment 9). Representative Dillmore seconded the motion. The motion carried. Representative Sloan moved to adopt the fifth amendment listed (See Attachment 9). Representative Dillmore seconded the motion. The motion carried. Representative Sloan moved to conceptually amend page 3, item 6(c) to include language that the telemarketer that cannot provide that service will have until January 1, 2004 to come into compliance. Representative McClure seconded the motion. The motion carried. Representative Goering moved to amend section 1, subsection 3 to read "Telephone Solicitor" means any natural person, firm, organization, partnership, association or corporation whose primary business is making consumer telephone calls, including, but not limited to, calls made by use of automatic dialing-announcing device. Representative McLeland seconded the motion. The motion failed. Chairman Holmes announced that the committee will continue working the bill tomorrow.

SB 397 - Access to public right-of-way by telecommunications providers

Representative Dillmore moved to report **SB 397** favorable for passage. Representative Lightner seconded the motion. The motion carried. Representative Goering will carry the bill.

The meeting adjourned at 10:48 a.m.

The next meeting will be March 15, 2002.

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.

HOUSE UTILITIES COMMITTEE GUEST LIST

DATE: March 14, 2002

NAME	REPRESENTING
Leo Haynos	Kansas Corporation Commission
Mark Schreiber	Westar Energy
Jim Tyler	Westar Energy
Jim Allen	EKOGA
Dion Rose	Williams
Ron Gaches	GBBA
Dick Brewster	BP America
Steve Rarrick	Attorney General
Karla Olsen	Westar Energy
Bruce Graham	KEPCo
Robert Krehbiel	KIOGA
Whitney Damron	KS Information Consortium
Jack Glaves	PH-Duke & [illegible]
Stuart Little	Westar Energy
Delbert Bath	Tom Sloan
Mary Baxter	Guest of Tom Sloan
Darcy Meese	Water District No. 1 - Johnson Ct.
Carolyn Gaston	Sprint
Colleen Harrell	KCC
Paula Lentz	KCC

HOUSE UTILITIES COMMITTEE GUEST LIST

DATE: March 14, 2002

NAME	REPRESENTING
Bob Totten	Ks Contractors Association
Mike Murray	Sprint
Rob Anderson	Atmos Energy

Before the House Utilities Committee

Comments by the

Staff of the Kansas Corporation Commission

March 14, 2002

Senate Bill 490

Thank you Mr. Chair and members of the Committee. I am Leo Haynos, Chief of Pipeline Safety for the Kansas Corporation Commission, (KCC), and I am appearing today on behalf of the KCC Staff.

The KCC Staff supports Senate Bill 490 which proposes several minor revisions to the Kansas Underground Utility Damage Prevention Act. The act is also known by its acronym KUUDPA, or simply the One Call law.

This law requires that excavators notify the utilities two days before they begin to dig and requires that utilities mark the location of their underground facilities at the excavation site within two days of receiving notice. In 2001, utility operators subject to KUUDPA were required to mark their facilities 2,600,000 times. Although the system generally works well considering the volume of use, Kansas utilities still suffered

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over $4 million of damage in 2000. The main concern however, is not the money lost because of damaged utilities. The main concern is safety and continuity of service. Safety of the excavator while digging is an immediate consideration along with safety of the public.

The KCC Staff began an effort to study the effectiveness of the One Call law in 2000 in response to House Resolution 6011. This effort grew into a task force made up of 48 individuals representing all of the various stakeholder groups affected by the One Call law. Last year, the KCC Staff sponsored HB 2521 which incorporated all of the recommendations of the task force. HB2521 proposed removing most of the exemptions for water, sewer, and oil production facilities. It also proposed a large number of revisions that dealt with the logistics of day to day operations of the law. This approach of combining all of the task force's recommended revisions in one bill resulted in a bill that was controversial in part and, at best, can be described as complicated. As you know, the bill failed on the House floor last year.

For SB 490, the KCC staff has taken an approach different from HB 2521 in proposing modifications to the One Call law. SB 490 does not contain the controversial sections of HB 2521 that required water, sewer, and oil and gas production facilities to become members of One Call. The KCC

Staff feels it would be more appropriate to allow these issues to be debated on their own merit at a later date. For the most part, the changes proposed in SB 490 deal with the logistics of day to day operations of the law that were included in the task force report and in HB 2521. As described in the supplemental note, several amendments were offered to our proposed language in the Senate Utilities Committee. At Chairman Clark's request, the KCC Staff organized a meeting of all conferees of the bill and worked to reach consensus on the amendments that were offered. This meeting, which was attended by those offering amendments and other interested parties, resulted in the version of the bill before you today.

When comparing SB 490 with the present One Call law, there are 4 revisions that the KCC Staff considers significant. Three of the significant changes deal with improving communication between the excavators and the operators. The three significant changes are:

1. An increase in the ticket life to fifteen calendar days while giving the utility two full days to perform the facility locates. The KCC Staff estimates that 30% of all locate requests are updates of previous requests By allowing a longer ticket life and more time to perform the locates, we expect to improve the efficiency of locating.

2. A requirement to whiteline an excavation site. This provision will require the excavator to mark off the area where digging is planned with white paint or flags if the excavator is not able to provide a sufficient description of the site. In this way, the locator knows precisely what area is to be marked and does not mark areas where locates are not needed.

3. A requirement for an operator to give positive response for every locate request. Often, some of the utilities that are notified to provide locates do not have utilities at the dig site. Under the current law, a utility can simply ignore a locate requests if it has no facilities present. As a result, the excavator may make repeat locate requests because all the excavator knows is that some utilities have not provided locates. The proposed provision in SB 490 will require an operator with no facilities at the excavation site to leave an "all clear" mark or some other type of notification in order for the excavator to know that the site is clear to begin digging.

The fourth change the KCC Staff considers to be significant is intended to enhance public safety. This revision is a new requirement for excavators using trenchless excavating techniques to develop operating guidelines for their

equipment. It would require the development of a formal plan of operating procedures to demonstrate the excavator has considered possible scenarios to avoid contact with underground facilities. Minimum requirements for the guidelines will be prescribed in regulations.

I also wish to address the two provisions in this bill that were proposed by utilities and are included as paragraphs (e) and (f) on Page 5 of the bill. The intent of paragraph (e) is to exempt the operator from liability for economic damages to an excavator for late locates, provided that the late locates are not the result of gross negligence on the part of the operator. For example, Staff may consider repeated late locates for no valid reason to be grossly negligent. However, late locates because of weather conditions or an unusually high volume of locate requests may not be considered grossly negligent as long as steps were being taken to remedy the situation. This provision would limit only the economic liability resulting from late locates. It would not prevent an operator from being held liable for economic damages in cases such as inaccurate locates. In any event, the KCC would still have the authority to levy civil penalties against an operator for any untimely or inaccurate locates.

The portion of this amendment labeled as paragraph (f) would not allow the KCC to consider the merits of an excavator's complaint

about late locates if the excavator waited more than one year from the discovery of the problem before filing a complaint with the KCC. The intent of this paragraph is to prevent the costly and time consuming process of researching documents to determine the merits of an incident occurring too far in the past.

In conjunction with SB 490, the KCC Staff will prepare regulations that address the task force's recommendations on the best practices for routine operations. The proposed regulations will supplement the statute and provide specific instructions for the daily operation of the One Call law. The KCC Staff expects to complete work on the regulations after passage of the bill. SB 490 does include a provision that the changes in the bill shall take effect after January 1, 2003 in order to allow implementation outside of the normal digging season.

In summary, the KCC Staff believes the changes proposed in SB 490 will serve to update the One Call statutes and enhance the safety of excavating near underground facilities. The incorporated changes will also serve as a foundation on which to build regulations for more effective administration of the One Call law.

This concludes my testimony, and I will now stand for questions.

Comments to:

The Kansas House Committee on Utilities

In Support of:

Senate Bill No. 490

Submitted By:

Dick Brewster
Director, Government Affairs
BP America

March 14, 2002

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ATTACHMENT 2

Mr. Chairman, Members of the Committee, for the record, my name is Dick Brewster, and I am Director of Government Affairs for BP.

I appreciate the chance to offer you our thoughts on S. B. 490. We strongly support passage of this legislation. We believe it is an important step in providing for the safety of human life, and the protection of property and the environment.

I won't take your time to go through the bill, section by section. Others will do that. But I will make some brief and general comments about the bill and the reason it is important to us.

Last session, a bill modifying the current "one call" law, or the underground utility damage prevention act, was heard by this committee. Unexpectedly, the bill drew opposition from many sources, and was finally defeated on the House floor.

Senate Bill 490 is not as inclusive as was last year's bill. In the Senate Utilities Committee, several groups offered amendments, but the bill did not generate significant opposition. The Senate Committee Chairman asked that the several groups that thought some amendment to the bill was needed get together and develop a consensus bill. I believe what you have before you today is such a bill.

It contains several new definitions that are not in current law, and it contains a provision that we believe to be the most important provision in the act. It is the so-called "white lining" requirement. This provision will allow an operator to improve the precision of marking the location of any underground facilities.

Our operations in Southwest Kansas cover vast unplatted areas, though some of our operations are within platted areas. With the white lining provision, the excavator can tell us where he or she wants to dig, and we can more easily protect him or her from injury. Checking our facilities along a planned excavation line will work much better than trying to check a quarter section.

Senate Bill 490 will help us inform excavators of the location of our lines and help protect them and their workers from injury and death. Of course, we do not like to incur the expense and down time that results when our lines are hit. But more than that, we do not want anyone to suffer injury or be killed because there was not an adequate opportunity to locate and mark our underground facilities.

And, as we modify our own operations this legislation will help protect our own workers and contractors who excavate for us. We can be better assured that our excavations and those involved in making those excavations are safe.

We urge you to approve S.B. 490 and commend it to the full House for passage. I appreciate the chance to appear before the Committee. I'll be glad to answer any questions.

Respectfully Submitted,

Dick Brewster

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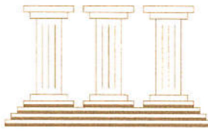

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Members of the House Utilities Committee

FROM: Barbara Conant, director of public affairs
Kansas Trial Lawyers Association

RE: SB 490

DATE: March 14, 2002

Rep. Holmes and members of the House Utilities Committee, thank you for the opportunity to express our support for SB 490. I am Barb Conant, director of public affairs of the Kansas Trial Lawyers Association.

We appreciated being included in the working group that drafted the amendments to SB 490. With these amendments adopted by the Senate Utilities Committee and Senate Committee of the Whole, KTLA supports SB 490.

Thank you for the opportunity to submit our support of SB 490.

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ATTACHMENT 3

Terry Humphrey, Executive Director

Jayhawk Tower • 700 SW Jackson, Suite 706 • Topeka, Kansas 66603-3758 • 785

E-Mail: triallaw@ink.org

Testimony before the
House Utilities Committee
By
Jim Tyler, Senior Manager, Design and Support Services
Westar Energy
March 14, 2002

Chairman Holmes and members of the committee, I am Jim Tyler, senior manager, design and support services for Westar Energy. I have been actively involved in underground damage prevention since 1998, and I serve as chairman of the Operating Committee for Kansas One Call.

Westar Energy completed about 235,000 locate requests in 2001 and is one of the largest excavators in the state with installation of poles, down guys and numerous types of underground facilities throughout our service area.

Westar Energy supports Senate Bill 490. The changes proposed in this bill clarify key issues in regard to marking underground facilities. This bill will help reduce costs associated with locating facilities without encroaching on the purpose of the underground utility damage prevention act and without placing an undue burden on excavators.

Changing the amount of time to perform the locate and extending the ticket life after the locate will serve two important purposes to utilities and excavators. First, it will provide additional time to fulfill locating requests, the volume of which is very sporadic. It is difficult at times to appropriately manage the peaks and valleys of requests to locate. Second, the additional time added to the ticket life from 10 working days to 15 calendar days will reduce our need to remark facilities due to the ticket life expiring.

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818 South Kansas Avenue / P.O. Box 889 / Topeka, Kansa
Office Telephone: (785) 575-6300

The use of "whitelining" in poorly defined areas will also benefit utilities and excavators. The addition of this business practice will clarify the exact area of intent to excavate when the excavator is unable to convey the location to the locating service. Whitelining will reduce the utilities time to mark questionable areas and ensures the excavator that the utility marked the entire area of excavation with certainty.

Limits placed on the area to be marked for work completed within 15 calendar days will improve our ability to respond to excavator requests and provide manageable areas to locate facilities within the time restraints of this act. We incur additional costs for locating underground facilities due to repeat requests to mark large areas where excavation cannot be completed within the required time or that need to be remarked due to the end of the ticket life of 10 working days.

Senate Bill 490 is a good example of balancing interest of various parties. Westar Energy supports this measure.

STATE OF KANSAS
HOUSE OF REPRESENTATIVES

COMMITTEE ON UTILITIES

HEARING ON SENATE BILL 490
MARCH 21, 2001

TESTIMONY OF
ROBERT E. KREHBIEL, EXEC VICE-PRESIDENT
KANSAS INDEPENDENT OIL AND GAS ASSOCIATION

HOUSE UTILITIES

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ATTACHMENT 5

WRITTEN STATEMENT OF THE KANSAS INDEPENDENT OIL AND GAS ASSOCIATION

Chairman Holmes and members of the Committee:

The Kansas Independent Oil and Gas Association believes the amendments to the Kansas Underground Utility Damage Prevention Act contained in Senate Bill 490 resolve some problems with the existing statute and provides additional clarity to the provisions most relevant to oil and gas producers.

The definition of "facility" does not include production petroleum lead lines or saltwater disposal lines or injection lines unless they are located on platted lands or are located inside the corporate limits of any city. This is current law and remains unchanged. The definition of "production petroleum lead line" and the definition of "platted land" have been added for the first time to help clarify the meaning of these terms.

With these provisions intact, the Kansas Independent Oil and Gas Association supports the amendments contained in SB 490.

Thank you very much.

Robert E. Krehbiel

Dillman

PROPOSED AMENDMENT TO HOUSE BILL NO. 2100

Strike all after the enacting clause in the proposed substitute bill adopted on motion of Representative Myers and insert:

Section 1. K.S.A. 2001 Supp. 50-670 is hereby amended to read as follows: 50-670. (a) As used in this section and section 2, and amendments thereto:

(1) "Consumer telephone call" means a call made by a telephone solicitor to the residence of a consumer for the purpose of soliciting a sale of any property or services to the person called, or for the purpose of soliciting an extension of credit for property or services to the person called, or for the purpose of obtaining information that will or may be used for the direct solicitation of a sale of property or services to the person called or an extension of credit for such purposes~~;~~.

(2) "Unsolicited consumer telephone call" means a consumer telephone call other than a call made:

(A) In response to an express request of the person called;

(B) primarily in connection with an existing debt or contract, payment or performance of which has not been completed at the time of such call; or

(C) to any person with whom the telephone solicitor or the telephone solicitor's predecessor in interest ~~had~~ has an ~~existing~~ established business relationship ~~if--the--solicitor-is-not-an employee,-a-contract-employee-or-an-independent-contractor--of--a provider-of-telecommunications-services;-or~~.

(3) "Telephone solicitor" means any natural person, firm, organization, partnership, association or corporation who makes or causes to be made a consumer telephone call, including, but not limited to, calls made by use of automatic dialing-announcing device~~;~~.

(4) "Automatic dialing-announcing device" means any user terminal equipment which:

(A) When connected to a telephone line can dial, with or

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without manual assistance, telephone numbers which have been stored or programmed in the device or are produced or selected by a random or sequential number generator; or

(B) when connected to a telephone line can disseminate a recorded message to the telephone number called, either with or without manual assistance~~;~~.

(5) "Negative response" means a statement from a consumer indicating the consumer does not wish to listen to the sales presentation or participate in the solicitation presented in the consumer telephone call.

(6) "Established business relationship" means the existence of an oral or written arrangement, agreement, contract or other such legal state of affairs between the telephone solicitor and a consumer, where both parties have a course of conduct or established pattern of activity for commercial or mercantile purposes and for the benefit or profit of both parties. The "established business relationship" must exist between the consumer and business directly, and does not extend to any related business entity or other business organization of the telephone solicitor or related to the telephone solicitor or such solicitor's agent, including, but not limited to, a parent corporation, subsidiary partnership, company or other corporation or affiliate.

(b) Any telephone solicitor who makes an unsolicited consumer telephone call to a residential telephone number shall:

(1) Identify themselves;

(2) identify the business on whose behalf such person is soliciting;

(3) identify the purpose of the call immediately upon making contact by telephone with the person who is the object of the telephone solicitation;

(4) promptly discontinue the solicitation if the person being solicited gives a negative response at any time during the consumer telephone call;

(5) hang up the phone, or in the case of an automatic dialing-announcing device operator, disconnect the automatic dialing-announcing device from the telephone line within 25 seconds of the termination of the call by the person being called; and

(6) a live operator or an automated dialing-announcing device shall answer the line within five seconds of the beginning of the call. If answered by automated dialing-announcing device, the message provided shall include only the information required in subsection (b)(1) and (2), but shall not contain any unsolicited advertisement.

(c) A telephone solicitor shall not withhold the display of the telephone solicitor's identifying information and telephone number from a caller identification service when that number is being used for telemarketing purposes ~~and--when--the--telephone solicitor's--service--or--equipment--is--capable--of-allowing-the display-of-such-number~~.

(d) A telephone solicitor shall not transmit any written information by facsimile machine or computer to a consumer after the consumer requests orally or in writing that such transmissions cease.

(e) A telephone solicitor shall not obtain by use of any professional delivery, courier or other pickup service receipt or possession of a consumer's payment unless the goods are delivered with the opportunity to inspect before any payment is collected.

(f) No supplier shall make or cause to be made any unsolicited telephone call to the residential telephone number of any consumer in this state who has given notice to the information network of Kansas, in accordance with section 2, and amendments thereto, of such consumer's objection to receiving consumer telephone calls.

(g) Local exchange carrier and telecommunications carriers shall not be responsible for the enforcement of the provisions of this section.

~~(g)~~ (h) Any violation of this section is an unconscionable act or practice under the Kansas consumer protection act.

~~(h)~~ (i) This section shall be part of and supplemental to the Kansas consumer protection act.

New Sec. 2. (a) A consumer living or residing in Kansas may give notice of such consumer's objection to receiving unsolicited consumer telephone calls to such consumer's residential telephone number. Such consumer's telephone number shall be listed in Kansas' no-call database by payment of a fee of $2 and doing one of the following:

(1) Completing a written form designed by the attorney general and the information network of Kansas for the purpose of recording a consumer's notice of objection to receiving unsolicited consumer telephone calls and submitting that to the information network of Kansas;

(2) calling a toll-free number established by the attorney general and the information network of Kansas for the purpose of recording a consumer's notice of objection to receiving unsolicited consumer telephone calls and properly responding to the voice prompts; or

(3) accessing the appropriate internet site established by the attorney general and the information network of Kansas for the purpose of recording a consumer's notice of objection to receiving unsolicited consumer telephone calls and inputting the proper data requested by the website prompts.

(b) The no-call database shall consist of the aggregate collection of the telephone numbers of properly submitted notices of objection to receiving unsolicited consumer telephone calls. The information network of Kansas may maintain the no-call database in either a written or an electronic format.

(c) The telephone numbers of properly submitted notices of objection to receiving unsolicited consumer telephone calls shall become part of the no-call database in the quarter following the deadline for receipt of notice according to the following:

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(1) The receipt deadline for the quarter commencing January 1 and ending March 31 is November 1;

(2) the receipt deadline for the quarter commencing April 1 and ending June 30 is February 1;

(3) the receipt deadline for the quarter commencing July 1 and ending September 30 is May 1; and

(4) the receipt deadline for the quarter commencing October 1 and ending December 31 is August 1.

(d) A notice of objection to receiving unsolicited consumer telephone calls shall remain in effect for ~~two~~ five years from the date that telephone number first appears in the no-call database. The notice of objection may be renewed for additional two-year periods by payment of a fee of $2 and using the methods provided in subsection (a).

(e) If a consumer whose telephone number is part of the no-call database changes telephone numbers, such consumer shall submit a new notice of objection to receiving unsolicited consumer telephone calls and provide the new number to the information network of Kansas.

(f) A consumer may revoke notice of objection to receiving unsolicited consumer telephone calls by completing a written form designed by the attorney general and the information network of Kansas for the purpose of revoking a consumer's notice of objection to receiving unsolicited consumer telephone calls and submitting that completed form to the information network of Kansas. A consumer may also revoke notice of objection to receiving unsolicited consumer telephone calls by accessing the appropriate internet site established by the information network of Kansas and inputting the proper data requested by the website prompts. Upon receipt of such revocation notice, the information network of Kansas will remove the relevant telephone number from the no-call database according to the same schedule used for adding telephone numbers to the no-call database as provided in subsection (c). In addition, the information network of Kansas

may remove a telephone number from the no-call database if the Kansas certified local exchange carrier responsible for the assignment of the relevant telephone number indicates in writing, or if available, by internet, to the information network of Kansas that the consumer who submitted the objection to receiving unsolicited consumer telephone calls is no longer assigned to that telephone number.

(g) A person or entity desiring to make unsolicited consumer telephone calls in Kansas may obtain a copy of the no-call database for such person's or entity's lawful use, or for the lawful use by such entity's employees, or for the lawful use by such person's or entity's independent contractors for use in their business, so long as the independent contractor is regularly associated with the person or entity and is engaged in the same or related type of business as the person or entity, by doing the following:

(1) Signing a written confidentiality agreement prepared by the attorney general and the information network of Kansas that: (A) Restricts use of the no-call database exclusively for the purpose of compliance with this section; and (B) prohibits the transfer of the copy of the no-call database to any person or entity who has not submitted the signed written confidentiality agreement and payment to the information network of Kansas for receipt of a copy of the no-call database; and

(2) submitting the signed confidentiality agreement along with payment in an amount equal to $25 per quarter for each Kansas area code to the information network of Kansas for providing a copy of the no-call database in downloadable electronic format. Those persons or entities desiring to obtain access to only part of the no-call database may do so by submitting the signed confidentiality agreement along with a request designating by area code the portion or portions of the no-call database they desire and providing payment in the amount of $25 per quarter per area code to the information network of

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Kansas for providing a copy of the requested portion of the no-call database in downloadable electronic format. The information network of Kansas may require payment of a media and handling charge from persons who request a computer disk copy of the no-call database.

(h) No supplier who obtains a copy of the no-call database shall use that information for purposes other than compliance with this section. Information contained in the no-call database shall be used only for the purpose of compliance with this section or in a proceeding or action for violations of this section. Such information shall not be considered a public record pursuant to K.S.A. 45-215 et seq., and amendments thereto.

(i) Moneys collected pursuant to subsection (g) shall be used first to pay the cost of the database maintained by the information network of Kansas. Any moneys collected pursuant to subsection (g) in excess of the cost of the database maintained by the information network of Kansas shall be paid to the attorney general to investigate and prosecute violations of this section. Penalties and fees recovered from prosecutions of violations of this section shall be paid to the attorney general to investigate and prosecute violations of this section.

(j) The attorney general may enter into agreements with private entities, as determined necessary by the attorney general, to comply with the provisions of this act related to the creation and maintenance of the no-call data base.

Sec. 3. K.S.A. 2001 Supp. 50-670 is hereby repealed.

Sec. 4. This act shall take effect and be in force from and after July 1, 2003, and its publication in the statute book.

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ATTORNEY GENERAL
CARLA J. STOVALL

CONSUMER PROTECTION &
ANTITRUST DIVISION

MEMORANDUM

(PROTECTED BY ATTORNEY CLIENT/WORK PRODUCT PRIVILEGE AND RELATED TO A PENDING INVESTIGATION/CASE IN LITIGATION)

To: Steve Rarrick, DAG
From: Jim McCabria, AAG
Subject: Delegation of Authority to Non-government Agency
Date: March 13, 2002

Background

The industry proposal offers a "no call" telemarketing law that grants to the Direct Marketing Association (DMA) the authority to maintain the list which solicitors must consult prior to conducting business in Kansas via telemarketing in order to avoid penalties for calling consumers whose numbers appear on the list. The industry proposal purports to require DMA to "offer to consumers at least one method of registration at no cost" for a period of five years. The proposal also purports to require the DMA to give telephone solicitors access to the list without requiring membership in their association, but does not specify what charges they can make, whether the DMA can charge more for nonmembers than members, or when the list must be provided to telephone solicitors. All these specifics are delegated to the DMA, with no finding and adoption of the current policies or practices, and no limitation on the DMA's ability to change those policies and practices at future times. Further, DMA is required to make the list available to the attorney general "in an electronic format" "at no cost", but again fails to provide any details on when this list is to be provided.

Issue

Does Article 2, Section 1 of the Kansas Constitution present a basis for a court to find the bill, if passed into law, to be a violation of that section's prohibition on delegation of legislative authority to non-government entities?

Conclusion

The Kansas Supreme Court has declared that it is an unlawful delegation of legislative authority to grant legislative powers to a non-governmental agency. Gumbhir v. Kansas State Board of Pharmacy, 228 Kan. 579, 618 P.2d 837 (1980). Kansas law, as described in Gumbhir, indicates that such a violation occurs when:

1) the statute creates obligatory rules
2) the private entity has the ability to affect the performance of those obligations
3) there are penalties for a breach of the rules

The industry proposal meets each of these criteria. The statute requires telephone solicitors to access the list to avoid statutory penalties for calling numbers on the list. The DMA is delegated the authority to set its own standards for maintaining and providing access to the list by telephone solicitors who are required to access

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the list, and is delegated the authority to change those standards at any time. The industry proposal gives the DMA the ability to make decisions the Kansas Constitution requires the legislature to decide.

Discussion

You indicated that North American Safety Valve Industries, Inc. v. Wolgast, 672 F.Supp. 488 (D.Kan. 1987) was cited to you as authority for the proposition that the industry proposal does not constitute an unconstitutional delegation of legislative authority. I respectfully disagree with this analysis. A more appropriate characterization of the holding in Wolgast would be that it is not an unconstitutional delegation of legislative authority to grant the Kansas Department of Human Resources (or any state agency) the ability to adopt specific standards which have been promulgated by a private entity, if that adoption is in accordance with all of the administrative protocol required for such a process, including mandatory procedural safeguards.

Highly summarized, the issue before the Wolgast court was whether the Kansas Boiler Safety Act (K.S.A. 44-913, *et seq.*) was an unconstitutional delegation of legislative authority to the American Society of Mechanical Engineers, a private entity which promulgates the National Board Inspection Code and the Boiler and Pressure Vessel Code. A specific and identifiable version of these nationally recognized codes were adopted by the Kansas Dept of Human Resources in carrying out the Boiler Safety Act.

The Wolgast court recognizes there are two avenues to challenge a delegation of legislative authority:

1) invalid delegation to a private group or
2) the delegated authority fails to provide adequate standards to guide the administrative agency in exercising its authority. Wolgast, 672 F.Supp at 491.

Thus, Wolgast recognizes that it is NEVER permissible to grant legislative authority to a private entity. Indeed, Plaintiff in Wolgast proceeded only on the first theory. The facts present in Wolgast made it clear that the comprehensive nature of the Act at issue was very specific in the standards that the Secretary of Human Resources had to apply in adopting the standards. One of those factors was to comply with nationally recognized codes.

"Acting within this permitted authority, the defendant secretary fulfilled his mandated duty by adopting boiler safety rules and regulations which did incorporate by reference the codes the legislature suggested". Wolgast 672 F.Supp at 492. Plaintiff argued that because the National Board could change the regulations at its discretion, the National Board, rather than the secretary, had the ultimate authority to determine how the act would be administered. However, because the act contained mandatory procedural safeguards, the Court found that claim "specious".

These safeguards included - prior to any regulation being adopted or changed, whether the change or rule promulgated by ASME or devised by the secretary - that the rule or changes to the rule had to be submitted to the secretary and to the attorney general for review AND be scheduled for public hearings on the adoption of the rule - after public notice to all interested parties. None of these safeguards are present in the industry proposal here.

Here, the broad, general language of the industry proposal offers NO specifics on the fees to be charged consumers for alternative methods of registration beyond the "one free method", the fees to be charged to solicitors wanting the list, what dates the list will be provided to telephone solicitors and the attorney general,

what information the DMA can require of a consumer before placing them on the list, and what information the DMA can require of a telephone solicitor before providing it access to the list. Indeed, the statute does not adopt any particular procedure or require the Attorney General to adopt any specific procedure to be set forth in a contract with the DMA - it merely adopts the DMA and leaves it to that entity to determine those issues. The complete delegation of those issues to the DMA is not comparable to the safeguards provided by the established rule/regulation adoption process discussed in Wolgast. The industry proposal is therefore not supported by the Wolgast decision; to the contrary, the Wolgast decision would suggest the industry proposal is an improper delegation of legislative authority.

A case with similar facts to those presented by the industry proposal is Gumbhir v. Kansas State Board of Pharmacy, 228 Kan. 579, 618 P.2d 837 (1980). The Gumbhir case involved a challenge to the pharmacist registration statute, K.S.A. 65-1631. That statute provided that a person could not be admitted as a pharmacist in Kansas unless they had an undergraduate degree from a university that had been accredited by the American Council on Pharmaceutical Education (ACOPE) - a non-governmental agency.

The Supreme Court found the statute in Gumbhir unconstitutional. ACOPE retained the right to set its own standards for accreditation, could change those standards at any time, did not accredit graduate programs and accredited no program outside the United States. The plaintiff in Gumbhir had his undergraduate degree from a non-U.S. university and two graduate degrees in pharmacy-related disciplines from U.S. universities.

Under the industry proposal, neither the legislature nor the attorney general have the authority to mandate the standards that DMA has implemented or may implement for maintaining the list or providing access to the list. Not only does the industry proposal not specify and adopt the standard (policies and practices) currently used by the DMA for maintaining and providing access to the list (like the specific national codes adopted in Wolgast), but the proposal actually allows the DMA to change its policies and practices at any time in the future.

The industry proposal is therefore an impermissible delegation of authority to a non-governmental entity in two ways. First, it delegates to the DMA power to determine the fees to be charged consumers for alternative methods of registration beyond the "one free method", the fees to be charged to solicitors for access to the list, the dates the list will be provided to telephone solicitors and the attorney general, what information the DMA can require of a consumer before placing them on the list, and what information the DMA can require of a telephone solicitor before providing it access to the list. Second, it delegates to the DMA the power to change its determination of those issues at any time in the future. As in Gumbhir, the DMA retains the right to set its own standards for maintaining and providing access to the list and can change those standards at any time. The industry proposal fails to provide the procedural safeguards present in Wolgast, the decision cited by the industry.

If the legislature adopts the industry proposal as submitted, it will be passing a no-call law that will invite constitutional challenge on the grounds it constitutes an unlawful delegation of legislative authority to a non-governmental entity. By contrast, SB 538, Substitute for SB 296, and HB 2767 all specify the price for accessing the list, the dates the list is to be made available, and the cost to the consumer to register. In addition, these bills if enacted would require legislative action to change any of those standards.

Kansas Attorney General

Memorandum

To:	**Rep. Carl Holmes, chair**
	House Utilities Committee
From:	**Neil A. Woerman**
	Director of Budget and Special Projects
Re:	**No-Call Fiscal Note Information, proposed Sub. for HB 2100**
Date:	**March 13, 2002**

I understand the committee has requested fiscal note information on substitute language for HB 2100 which was approved by your committee today. This language appears to be identical to the language I referred to in a memo yesterday as the DMA bill, except that unnecessary language in New §2(e) of the original proposal has been deleted and subsections following have been renumbered. Thus, where my prior memo referred to New §2(f), it is now New §2(e). The memo I offered yesterday summarized some of the fiscal impact differences we see between the language of bills based on SB 528 and the DMA language. Assuming the DMA language is constitutional and the state is able to enforce it, the DMA bill will cost more to administer and enforce with less opportunity for revenue to offset those costs.

First it is appropriate to note that the DMA language may very well be unconstitutional as an unlawful delegation of legislative authority, as the committee has been told, or at the least be unenforceable should the DMA decide at any point that it is unwilling to carry out any of the responsibilities the state of Kansas would attempt to impose upon the DMA in New §2(a). However, this fiscal note information will assume the law to be constitutional and that DMA will cooperate fully with the requirements of New §2(a).

Here we will use the costs provided for SB 538 as the baseline and make modifications by category to show where fiscal differences exist and why they occur.

The bills' timing: We indicated yesterday that timing of implementation would be one of the factors that would cause our fiscal note to change. Under SB 538, enforcement could not occur until July 1, 2003. One year was provided to allow registration processes to be developed and ramp up, consumers to be informed and to have an opportunity to register, and telemarketers would have the opportunity to plan for incorporation of the Kansas numbers to exclude from their solicitations. Under the DMA bill, the provisions would be enforceable July 1, 2002. Thus, enforcement costs to the Attorney General's office would begin immediately instead of being phased in nearly a year later. This has a significant impact on initial staffing costs in the table which is included as the last page of this document. This would occur at the same time as a new flurry of registration can be expected to be occurring, so that the office of Attorney General would be first meeting these new enforcement and registration demands simultaneously.

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The affirmative defense: The committee has heard from several sources that the affirmative defense provisions now found in New §2(e) will require more extensive investigations, more extensive discovery, will result in more complex cases and many more cases which will go to trial rather than settle. Our response has been that we could attempt to achieve an appropriate level of enforcement with twice the enforcement staff as under SB 538. Thus, the following table phases in very quickly in Fiscal Year 2003 six positions dedicated to enforcement rather than the three enforcement positions shown under SB 538. Operating expenses are adjusted as well, particularly enhancing travel and other costs which are related to the increased level of litigation anticipated.

The Attorney General's role in registration; no state income from database sales: The DMA bill has been depicted to the committee as not imposing a significant registration role on the Attorney General. In New §2(a) the DMA bill states "Consumers desiring to register for such service may contact the direct marketing association or the attorney general....The attorney general may inform a Kansas consumer whether the consumer's telephone number appears on the current list. The attorney general may compile a list of telephone numbers from consumers desiring to register for such service. The attorney general shall forward the list to the direct marketing association in an electronic format no less than 15 days prior to the date of the next quarterly update...." We can only assume that the committee wants the Attorney General to take registrations or this language would not be included. While the DMA bill does not require the Attorney General to partner with INK, we could attempt to contract with INK to assist the Attorney General in providing this service at least through the Internet (as opposed to consumers paying the DMA the $5 fee it charges for each Internet registration). Since INK would receive no revenue from sale of the database as under SB 538, we assume we would need to pay INK for this service at a similar estimate of costs as was provided for under SB 538 (approximately $10,000 in the first year), and we would note that there would be an ongoing cost to maintain this registration program. Additionally, either INK or the Attorney General could maintain a system of telephone registration similar to that in Missouri. We believe consumers would expect such a system. We know of no reason to assume any different costs than the approximate $50,000 in the first year estimated under SB 538, again with no mechanism to recoup these costs through the sale of the database, and with these costs continuing on an ongoing basis. Certainly INK would not advance this money as its board has agreed to do if there is no method of recoupment. I am only concerned that the above may over-simplify and thus understate costs regarding this whole issue of the Attorney General's role in registration, in that under SB 538 registration responsibilities were largely the purview of INK, while investigation and enforcement were the Attorney General's primary responsibility. The DMA bill does get the Attorney General's office, a law office, into business with which it has little familiarity – statewide registration, and it is likely we will not be as efficient in collecting and maintaining statewide registrations in electronic format as would INK, an agency whose primary mission is access to and maintenance of electronic data.

Lower enforcement income potential: Under the DMA bill it also is much less likely than under SB 538 that enforcement could become self-funding. First, SB 538 provides that penalties as well

as fees collected from violators would be used to fund enforcement. The DMA bill relies on the existing Consumer Protection Act provisions which only allow for use of recouped fees and expenses. This in itself can be estimated to cut potential enforcement revenue which can be used to fund enforcement in half. The other half would go to the state general fund, but it is not clear that this SGF revenue would be likely to be turned around and put back into the program for enforcement. Further, given the more protracted litigation resulting from the affirmative defense mentioned above, it is likely that enforcement revenue will be slower to begin coming in. Where we may cautiously estimate enforcement income of at least $200,000 in the first year under SB 538, it is our opinion that this amount should be cautiously estimated at no more than $100,000 in the first and second years under the DMA bill. This adds to the state burden of financing enforcement under the DMA bill, which already is much higher as a result of the affirmative defense itself.

Expenses vs. Revenue: In SB 538, it was believed that the conservatively estimated revenue stream from sale of the database would cover the cost to INK of phone and Internet registration, and INK was confident enough in this to commit to the project on that basis, with proceeds exceeding their costs going to the Attorney General for enforcement. This office believed that given the timing of the bill, startup and initial enforcement costs could be financed from consumer fees and expenses collected from other cases, and that within the first year of enforcement, collection of fees would be sufficient to cover enforcement costs. It was believed the initial outlay by this office would be no more than $150,000 before recoveries would cover costs and begin to repay the initial outlay. It was believed that in the first year a minimum of $200,000 would be recouped from fines and fees. In fact, our input to the Senate sponsors in the drafting of SB 538 was directed toward accomplishing this self-funding goal, while maintaining free registration for consumers. While a challenge, we believed we were able to establish a plan for implementation of SB 538 which would accomplish that. Under the DMA bill we do not believe that is possible for the reasons explained above.

We would be hard pressed to assume that revenue recouped from fees and expenses alone would exceed $100,000 each in Fiscal Years 2003 and 2004 . With this revenue stream each year and assuming we advanced an amount in FY 2003 equal to the $150,000 we would have advanced under SB 538 from recouped consumer fees, it is believed that $175,112 in supplemental revenue would be required from the state general fund in Fiscal Year 2003 to meet the $425,112 in expenses estimated below. In FY 2004, again assuming only a $100,000 revenue stream from recouped fees in litigation, $277,640 in state general fund money would be required. We believe SB 538 would require no infusion of state general fund money.

The following table makes the adjustments generally described above to those expenses which had been specified for SB 538 and adds an additional category for anticipated expenses of more complex litigation..

Cost Category	Position Detail	FY 2003	FY 2004
Salaries	Office Asst. (12 months in FY 2003 & FY 2004)	$21,528	$21,528
	2 Asst. Attys. Gen. (1 for 12 months in FY 2003; another for 8 months)	$74,602	$89,522
	2 Legal Assts. (1 for 12 months in FY 2003; another for 8 months)	$44,685	$53,622
	2 Special Agents (1 for 12 months in FY 2003; another for 8 months)	$51,688	$62,026
Salaries - Total		**$194,506**	**$228,702**
Benefits		**$46,681**	**$54,888**
Communications	Assumes inclusion of $50,000 for phone registrations in FY 2003 and $25,000 in FY 2004	**$67,525**	**$38,650**
Printing/Copying		**$5,000**	**$5,000**
Office Rent		**$14,400**	**$14,400**
Remodeling Cost		**$6,000**	
Travel		**$8,000**	**$10,000**
Depositions, Transcripts & Similar Litigation Costs		**$10,000**	**$10,000**
Computer Dev. Costs	Assumes inclusion of $10,000 to INK in FY 2003 and $4,000 to maintain in FY 2004 plus costs for complaint system	**$25,000**	**$8,000**
Books, Supplies		**$3,000**	**$3,000**
Desks & Furniture		**$21,000**	**$2,000**
Computers/Software		**$14,000**	**$2,000**
Server/Software		**$10,000**	**$1,000**
TOTAL		**$425,112**	**$377,640**

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Proposed Amendments to S. B. 538

1. Amend page 2, lines 11-21, to read:

(6) "established business relationship" means the existence, within the preceding 36 months, of an oral or written arrangement, agreement, contract or other such legal state of affairs between the telephone solicitor and a consumer . . .

2. Amend page 5, lines 13-25, to read:

(2) submitting the signed confidentiality agreement along with payment in an amount ~~equal to $25 per quarter for each Kansas area code to the information network of Kansas for providing a copy of the no-call database in downloadable electronic format. Those persons or entities desiring to obtain access to only part of the no-call database may do so by submitting the signed confidentiality agreement along with a request designating by area code the portion or portions of the no-call database they desire and providing payment in the amount of $25 per quarter per area code~~ established by the attorney general to the information network of Kansas for providing a copy of the requested all or a portion of the no-call database in downloadable electronic format. The attorney general shall establish by rules and regulations the fee for providing the no-call downloadable database, which fee shall be not less than $100 nor more than $600 per quarter, based on the number of area codes for which the database is requested and the amount necessary to recover costs of administering and maintaining the database. The information network of Kansas may require payment of a media and handling charge from persons who request a computer disk copy of the no-call database.

And amend the first two sentences in subsection (i) on page 5, in lines 32-39 to read:

(i) Moneys collected pursuant to subsection (g) shall be used ~~first~~ to pay the cost of the database maintained by the information network of Kansas. ~~Any moneys collected pursuant to subsection (g) in excess of the cost of the database maintained by the information network of Kansas shall be paid to the attorney general to investigate and prosecute violations of this section.~~

3. Amend page 3, lines 20-25, to read:

New Sec. 2. (a) A consumer living or residing in Kansas may give notice of such consumer's objection to receiving unsolicited consumer telephone calls to such consumer's residential telephone number. ~~There shall be no cost to the consumer for such notice of objection.~~ Such consumer's telephone number shall be listed in Kansas' no-call database by paying a biennial fee of $7 and doing any of the following . . .

And amend the last sentence in subsection (i) on page 5, in lines 37- 39, to read:

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All moneys collected from fees paid by consumers pursuant to subsection (a) and from penalties and fees recovered from prosecutions of violations of this section shall be paid to the attorney general to investigate and prosecute violations of this section.

4. Add a subsection at the bottom of page 5, to read:

(k) On or before the first day of each regular legislative session, the attorney general shall report to the standing committees of the house and senate which hear and act on legislation relating to telecommunications issues a report on the status of implementation of the provisions of this act, including, but not limited to, the number of consumers who have given notice of objection, the number of requests for the database, revenues received from the respective sources of revenue under this act, the number of complaints received alleging violations of this act and actions taken to enforce the provisions of this act.

5. On page 4, after line 12, add a sentence to read:

The attorney general and the information network of Kansas shall ensure that consumers are given clear notice that telephone numbers are not immediately added to the no-call database upon submission of a consumer's notice of objection and that it may be as long as 90 days before telephone solicitors receive a new no-call database which includes the consumer's telephone number.