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Support for House Bill 2178 – relating to the definition of "operator" and duty to mark under the Kansas Underground Utility Damage Prevention Act (KUUDPA)

Before the Kansas House Judiciary Committee
Feb. 12, 2019

Presented by Leslie Kaufman, Director of Government Relations & Legal Counsel
Kansas Electric Cooperatives, Inc.
On behalf of
Kansas Electric Cooperatives, Inc.
Sunflower Electric Power Corp.+
Kansas Electric Power Cooperative, Inc.++
Kansas Cooperative Council+++

Chairman Patton and members of the House Judiciary Committee, thank you for the opportunity to appear today on behalf of Kansas Electric Cooperatives, Inc., (KEC), Sunflower Electric Power Corp. (Sunflower), Kansas Electric Power Cooperatives, Inc. (KEPCo), the Kansas Cooperative Council and our respective members to comment in support of HB 2178. I am Leslie Kaufman, and I serve as Director of Government Relations & Legal Counsel for KEC.

KEC is the Kansas statewide service organization for 28 electric distribution cooperatives and three generation and transmission cooperatives. Formed on August 18, 1941, and headquartered in Topeka, KEC represents the interests and provides needed services and programs to the electric co-ops that serve Kansans. Our major programming areas include advocacy, education, communications and safety/loss control. Sunflower and KEPCo are members of KEC, and KEC is a member of the Kansas Cooperative Council.

Introduction:

In order to help frame the discussion today, it is important to remember two key aspects of the Kansas Underground Utility Damage Prevention Act (KUUDPA):

- KUUDPA was originally enacted to protect utility lines from damage; and
- KUUDPA has historically recognized that certain private lines fall outside the purview of the act's marking requirement.

Also, HB 2178 is not intended to relieve electric utilities of the marking requirements currently placed on utilities under statute. As we will explain, it is intended to prevent

saddling electric providers with new obligations and legal duties once the Kansas Corporation Commission's (Commission) March 15, 2018, and April 26, 2018, orders (the orders) in Docket Number 17-GIME-565-GIV become effective April 30, 2019, under what we believe is a clear misinterpretation of the statue.

I would be remiss if I did not recognize that staff at the Commission has been very willing to dialogue with us over several months on the various legislative options we proposed to address our concerns with the orders. While this end product is the KEC's bill, their insights have been helpful to us in our drafting process, and we appreciate that.

I would also clarify that when I use "utility" in this statement, I am referring to electric utilities, although gas, communications, and water providers also fall under KUUDPA. References to "customer" in this testimony also include the member-owners of a cooperative.

Historic Application of KUUDPA:

Consistently, electric utilities mark underground facilities based on ownership of the facility (line). The utility marks the line it owns, and the customer is responsible for the line on the customer's side of an ownership demarcation point. That demarcation point is specified in the utility's tariffs, rules and regulations, service or membership agreements, or similar documents and customers have access to these documents. For investor-owned utilities, those tariffs are approved by the Commission.

All electric utilities are required to participate in the state's One-Call Program (8-1-1). "Kansas One-Call" is the underground utility notification center for the state of Kansas. Through this center, excavators can notify operators of underground facilities of proposed excavations to request that the underground facilities be marked before digging commences. When a utility is notified of a potential excavation, the utility marks, or has a contracted company mark, the area over the utility's line to reflect the line and the required tolerance zone. If the utility has no line in that area, it informs the excavator of that fact. On the private side of the line, a landowner may hire a private line-marking service to attempt to locate private lines. Under some conditions, a utility may offer courtesy locates but is not required to perform such services.

KEC requested introduction of House Bill 2178 to maintain the historical application of the law, which will be disrupted if the Commission's orders issued in Docket 17-GIME-565-GIV take effect. The orders declare electric utilities to be "operators" of private commercial electric lines upstream of a customer-controlled disconnect. This is problematic for utilities if there is no customer-controlled disconnect at the point where ownership changes and that disconnect is located farther down the customer's private line, which is the case with many co-op installations. It is in these instances where the utility will be required to mark lines they do not own, maintain, or know where the lines are located if the Commissions orders go into effect.

The Commission's orders impose a new requirement on utilities to mark private "commercial" lines. We believe that would be interpreted by Commission staff to mean

all non-residential lines, regardless of the utility's customer class names. But more importantly, the March 15 and April 26 orders, once effective on April 30, 2019, expand the historical duty of care owed by a utility.

At common law, distributors of electricity are neither liable for occurrences which cannot be reasonably anticipated nor insurers against accidents and injuries. *Murphy v. Central Kansas Electric Cooperative Ass'n*, 178 Kan. 210, 214, 284 P.2d 591 (1955). However, because of the dangerous nature of their product, they are required to exercise the highest degree of care to avoid injury to others. *Wilson v. Kansas Power & Light Co.*, 232 Kan. 506, 510-12, 657 P.2d 546 (1983) (citing *Henderson v. Kansas Power & Light Co.*, 184 Kan. 691, 339 P.2d 702 [1959]). The degree of care required of distributors of electricity is the degree which would be used by prudent persons engaged in the industry, under like conditions and commensurate with the dangers involved and the practical operation of the plant**, to guard against contingencies which can be reasonably foreseen and anticipated**. *Folks v. Kansas Power and Light co., 243 Kan. 57, 61 (1988). (Emphasis added)*

Since the utility's responsibility for a line has historically been based on ownership, the customer is responsible for the installation, siting, maintenance and expense of a private line on the customer's side of the point of ownership demarcation. By the very nature of private lines being private, the utility will not have actual knowledge of the landowner's personally installed electric line placement, whether the private lines branch, or the condition of the private lines. The Commission, through the March and April orders, will require utilities to mark any commercial lines on the private/customer side of the line upstream of a customer-controlled disconnect. For lines the utility does not own and thus, lacks knowledge of, which will be the case with private lines, the orders expand the scope of liability beyond what beyond what a utility can reasonably foresee and anticipate.

Even if utilities tried to comply with the orders, we believe the act of entering private property for purposes of attempting to inventory and map a private line or private network of lines falls outside existing utility easements and agreements. Although tariffs and other utility-customer agreements often include broad language allowing utilities to enter upon private property in emergencies or to protect the utility's own system, utilities and property owners alike have not envisioned a utility could enter for a broad-based, full-property search of private real estate for purposes of mapping private utility lines on that property. We are bolstered in this argument because KUUDPA requires only certain lines that are installed by an operator to be locatable. The current definition of "operator" specifically excludes the private landowner with facilities/lines that serve only their own private need.

> '"Operator" means any person who owns or operates an underground tier 1 or 2 facility, except for any person who is the owner of real property wherein is located underground facilities for the purpose of furnishing services or

materials only to such persons or occupants of such property." K.S.A. 66-1802(j).'*

So, neither the landowner nor the utility has had an expectation that utilities would randomly wander private property in search of a line.

Kansas' real property owners hold tightly to their private property rights interests and could view entry as a trespass. We agree. We believe such the entry can fall outside the bounds of easements and other contracts between the utility and the customer, and the landowner would have a legitimate concern. Thus, the Commission's orders pose a challenge for utilities between complying with an order and potential trespass. Although the Commission was not persuaded by the trespass arguments, we continue to view the issue as one ripe for potential dispute.

While the change in duty of care may have been an unintended consequence of the Commission's orders (that a utility mark an underground line it was unaware of, or could not have reasonably foreseen or anticipated), if left unanswered, the orders substantially change the definition of "operator" from its historical application and unilaterally expands the duty of care owed by a utility.

Commission Action:

As a bit of background, on July 27, 2017, the Commission opened a general investigation docket seeking comment on how "operator," and more specifically the phrase "or operates," should be interpreted for purposes of marking lines under KUUDPA. The current definition of "operator" is noted above. It is clearly understandable what "owns" means, but "or operates" is not specifically defined.

Six electric utility companies filed comments in the docket, including KEC, and all argued in some manner that "owns or controls" should be interpreted as an ownership interest in the underground line and that utilities should not be required to mark lines beyond their point of ownership change from the utility to the customer. That approach is consistent with a holistic reading of KUUDPA, the manner in which utilities have historically approached marking under KUUDPA, and with what we believe the legislature intended when KUUDPA is read holistically.

On March 15, 2018, and April 26, 2018, the Commission issued orders:

- That an electric utility is an "operator" of private commercial underground electric facilities (lines) upstream of a customer-controlled disconnect, even though the utility has no ownership interest in the facility; and
- The Commission ordered that as an "operator" under KUUDPA, all electric utilities must mark private, commercial lines upstream of a customer-controlled disconnect under KUUDPA as of April 30, 2019, and thereafter.

The Commission determined utilities are "operators" because they can adjust the rate at which energy flows through the line and found the utility "owned" the electrons flowing through the line up to the meter. The determination was not based on an ownership

interest in the line, as utilities repeatedly noted had been the historic interpretation, and thus practice, under KUUDPA, but rather, a newly created “electron flow” theory of ownership.

The orders apply to all electric utilities, but because of the way some cooperative systems have evolved, the orders impact cooperatives more heavily than some other utilities. KEC sought reconsideration arguing the Commission’s determination that utilities are “operators” of private lines is inconsistent with the overall plain reading of KUUDPA and unfairly shifts additional liability to electric providers. We were denied on our key substantive issues.

The KEC sought judicial review in order to preserve our timeline for appeal. Upon joint motion by the KEC and the Commission, the court has granted a stay, thus allowing the KEC time to work with the Commission staff on potential statutory language and for KEC to seek legislative action. And now, we appear before your committee today.

Implications of the Commission’s order:

As noted above, the order, in declaring utilities “operators” of private lines did more than place a new marking requirement on electricity providers – it fundamentally changes the duty of care a utility has in regard to someone else’s electric lines.

The orders ignored the current and historical practice whereby utilities determine ownership based on a point of demarcation between the utility and the customer as set forth in their tariffs, rules and regulation, or service or membership agreements, regardless of whether there is a meter at that point or not. The documents referenced above are the basis for a contractual relationship between the parties. The order has essentially, by regulatory interpretation and not legislative action, altered or super-imposed conditions into those long-standing agreements and expanded the associated duty of care.

The orders, in our opinion, articulate a definition of “operator” that is inconsistent with legislative intent when the act is read holistically. Nonetheless, the Commission has determined electric utilities are “operators” of private lines for marking purposes. We are concerned that determination will be used in future matters to extend obligations and duties to utilities in other areas. For example, there was no legal distinction why the Commission limited their order to “commercial” private lines. What is to stop them from later requiring utilities to mark all private lines, including residential? If the Commission can deem electric utilities “operators” for marking purposes, what prevents the Commission from requiring us to maintain private lines? From our standpoint, the definition of “operator” must be clarified and the amendments set forth in HB 2178 accomplish that end (HB 2178, §1(j)).

Additionally, when taken as a whole, we believe KUUDPA, when referencing lines and facilities, means the actual physical structure of a line. We believe the flow of invisible energy through a private line was never intended under the act to denote some

ownership interest that then translates into control of a private line for KUUDPA purposes.

Solution – what will HB 2178 do:

To address the above noted concerns, KEC requested the bill before you today. In summary, HB 2178:

- Clarifies the definition of "operator," thus the act, by replacing the ambiguous, undefined phrase "or operates" with commonly understood language (HB 2178, §1(j)).
    - This resolves a long-standing ambiguity in the statute that has been problematic for the Commission and utilities

- By clarifying that the utility's duty to mark does not extend to private lines, HB 2178 clarifies the duty of care standard consistent with the historical duty of care placed upon utilities (HB 2178, §2(d)(2)).
    - Avoids a new and expanded regulatory mandate for electric utilities to mark someone else's private lines on private land.

- Continues the marking requirements based on ownership – the way electric utilities have understood and applied the statutes throughout KUUDPA's existence.
    - If electric utilities were required to mark a line pre-order, we believe the utility will still be required to mark that line under HB 2178.

- Continues KUUDPA's historical recognition of private property rights and responsibilities.

- Functionally, HB 2718 nullifies the Commission's March 15, 2018, and April 26, 2018, ensuring utilities are not defined as "operators" of private electric lines and, thus, are not required to mark private lines that the utility does not own or maintain.

Other considerations:

Judging from comments in the docket, your committee may hear opinions that utilities should be required to mark lines because they are experts in the field, and thus they know more about private lines than the landowner does. It defies logic to assume a utility that does not own the private property, does not own the private line, did not install the private line, or does not know if branches come off the line, somehow knows more about the line than the owner of the property/line. Additionally, simple knowledge of a particular industry or practice does not, and should not, impute legal responsibility. If I change the oil in my car and go for a drive having forgotten to replace the oil pan plug, that in no way makes the master mechanic down the street, who has never seen my car or visited with me, responsible for the damage to my car.

Some may argue that KUUDPA needs extensive revisions to address other issues. We respectfully request the committee defer discussions on broad-based changes to KUUDPA to another time. That is something that, to do properly, should involve lengthy

stakeholder discussions and requires more time than we have right now in light of the impending legislative deadline and the order's effective date of April 30, 2019.

You may also hear that adopting HB 2178 will have a negative effect on safety. We disagree. House bill 2178 is designed to maintain the current requirements placed on utilities – to mark the lines they own. We believe that if the utility is required to mark an underground electric line today, they will still be responsible for marking that line once HB 2178 is enacted. Thus, the historical safety aspects of KUUDPA are preserved under HB 2178.

If HB 2178 is not enacted, we believe safety could be undermined. The dependable level of confidence that has historically accompanied utility markings cannot be expected when a utility is dispatched to mark a private line the utility does not own or have knowledge of. The degradation of confidence in line marking if the Commission's orders stand is the real safety concern.

It might be helpful for the committee to know that KEC, in mid-December, notified parties to the 17-GIME-565-GIV docket that we planned to seek a statutory change to address our concerns with KUUDPA. At that time, we provided a proposed draft bill to those listed on the docket's official service list. Once the official bill was posted on-line, we forwarded a link to those same individuals and notified them of the hearing date.

Conclusion:

In summary, passage of HB 2178 is needed to clarify legislative intent that utilities are not "operators" of private lines they do not own or maintain. Passage of the bill is necessary to maintain consistency with the common law duties of utilities to guard against contingencies which can be reasonably foreseen and anticipated and to recognize that privately owned lines are not lines that could be reasonably foreseen or anticipated by the utility during the marking process. *Folks* supra. at p. 61.

We thank the committee for considering HB 2178 and respectfully request favorable action on the bill. We will be glad to respond to questions at the appropriate time and if a question arises at a later time, please feel free to contact us. Thank you.

Leslie Kaufman
Kansas Electric Cooperatives, Inc.

*K.S.A. 66-1802:
'(p) "Tier 1 facility" means an underground facility used for transporting, gathering, storing, conveying, transmitting or distributing gas, electricity, communications, crude oil, refined or reprocessed petroleum, petroleum products or hazardous liquids.

(q) "Tier 2 facility" means an underground facility used for transporting, gathering, storing, conveying, transmitting or distributing potable water or sanitary sewage.
(r) "Tier 3 facility" means a water or wastewater system utility which serves more than 20,000 customers who elects to be a tier 3 member of the notification center pursuant to this subsection…'

[+] *Sunflower, headquartered in Hays, Kansas, was formed in 1957 by six western Kansas distribution cooperatives. A sister company, Mid-Kansas Electric Company, was created in 2007 to acquire the assets of Aquila. Coal, natural gas, wind and hydropower are all components of Sunflower's and Mid-Kansas' generation and power supply mix. They employ a full-time workforce of 424 individuals and own and operate 115 kV and 345 kV transmission lines across nearly 2,400 miles in 55 Kansas counties. The distribution utilities that own Sunflower/Mid-Kansas serve members in 58 central and western Kansas counties.*

[++] *KEPCo headquartered in Topeka, Kansas, serves 19 cooperative members. KEPCo's power resources encompass coal, nuclear, diesel, solar, and hydropower allocations from federal projects. More than 50 percent of their energy mix does not emit any greenhouse gases. A staff of 23 provides expertise in engineering, information technology, power supply, transmission, rate design and accounting.*

[+++]*The Kansas Cooperative Council is a voluntary trade association representing all forms of member-owned, member-controlled cooperatively structured business in Kansas. Its mission is to promote, support and advance the interests, business success and understanding of agricultural, utility, credit and consumer cooperatives and their members through legislation and regulatory efforts, education, and public relations. In Kansas, co-ops operate in every county, serving over 600,000 members.*