



**Testimony of Tom Shimon
Executive Director, Kansas One-Call
Before the House Utilities Committee
On House Bill No. 2456
January 24th, 2012**

Good morning Mr. Chairman and members of the committee. Thank you for the opportunity to provide testimony on HB 2456.

Kansas One-Call, Inc (KOC) was established by a group of utilities in 1983 as a member managed non-profit corporation. Its primary purpose is to serve as the communications link between excavators and utilities anytime and anywhere in the state where excavation is to take place. KOC assumed the *de facto* role of the "notification center" when the first underground damage prevention statute was signed into law in 1993. KOC has performed these duties quite successfully for the past twenty-nine years.

Kansas One-Call comes today as a *neutral* party to HB 2456, mainly because of the current unsettled litigation between Kansas One-Call and the State of Kansas. If not for the unsettled litigation, I am positive that KOC would be *against* HB 2456 for the following reasons.

Each year, KOC is required by its bylaws to hold an annual meeting for the election of directors and the transaction of such other business as may properly come before it (KOC Bylaws). KOC is also required to report to the membership the corporation's business activities for the preceding year and the general financial condition of the corporation (KOC Bylaws).

Quorum - At any meeting of the members of this corporation, a majority of the members shall constitute a quorum, and a vote by the majority of such quorum shall be sufficient to transact any and all business properly before such members (KOC Bylaws). **Voting** - All General Members in good standing shall have one vote. All acts and resolutions of the organization may be approved by a majority of the members who vote thereon (KOC Bylaws). **Voting by Proxy** - Voting by proxy shall be allowed and statutes of the State of Kansas shall control the voting proxy (KOC Bylaws).

The Bylaws of Kansas One-Call serve as the supreme governing document of the organization, setting out the form, manner and procedure in which Kansas One-Call shall be run. In addition to the Bylaws, the board has adopted corporate policies and procedures, although the Bylaws take precedence over these policies/procedures.

It is Kansas One-Call's belief that the amendment proposed in HB 2456 attempts to override a private corporation's governing policies and procedures, including those rights granted to Kansas corporations through other statutes.

The key provision in 17-6502(c) which provides as follows:

(c) Without limiting the manner in which a stockholder may authorize another person or persons to act for such stockholder as proxy pursuant to subsection (b), the following shall constitute a valid means by which a stockholder may grant such authority: (1) A stockholder may execute a writing authorizing another person or persons to act for such stockholder as proxy. Execution may be accomplished by the stockholder or the stockholder's authorized officer, director, employee or agent signing the writing or causing the stockholder's signature to be affixed to the writing by any reasonable means, including, but not limited to, facsimile signature;

The underlined language makes the methodology of proxies very broad. K.S.A. 17-6502(c) suggests one manner in which a proxy may be granted. It in no way limits other methodologies, including **proxy by default** (MGA Law Offices). This is legal and quite common throughout many industries. The proxy solicitation makes it very clear that the failure to respond on the election of directors will be deemed to be a grant of proxy to vote yes for all nominees. Many fortune 500 companies use the same methodology. Moreover, the suggestion that the proxies need to go by certified mail, return receipt is not necessary. As long as the proxies are sent postage prepaid then United States mail delivery is assumed and all due process requirements have been met (MGA Law Offices).

KOC adopted "proxy by default" in December 2002. Prior to 2003, KOC established a quorum by sending voting ballots to the general membership and was required to obtain a fifty (50) percent return rate plus one to do so. Every year, it required significant man hours to call and remind the membership to sign and return their ballots. For the years 2001 and 2002, KOC came close to being unable to hold its annual meeting for the lack of a quorum of the general membership. It was only because of KOC using all of the manpower at its disposal (physically phoning members and expending hundreds of manhours faxing documents back and forth in the final hours preceding the annual meeting) that KOC was able to hold its annual meeting and elect the next year's directors.

Prior to May 2011, KOC never received a single complaint on its voting process using "proxy by default". Even today, no general member of KOC has yet to complain about the process. The first complaint was lodged in May 2011 by the Kansas Rural Water Association (not a member of KOC) immediately following KOC's annual meeting. The next was an article in "The Kansas Lifeline, July 2011". Around August 4th, 2011, I was contacted by the Kansas Attorney General's office and was asked to submit information on KOC's election policies and procedures. KOC's last communication with the AG's office was on Aug 17th, 2011. I can only assume that the process currently in place must be legal as KOC has not received a cease and desist order from the Kansas Attorney General's office.

Conclusion

Even though Kansas One-Call is neutral on this issue, HB 2456 needs to be removed from any further consideration by this committee, not only for the current operator of the notification center, but any other future corporation that may operate the notification center.

Respectfully,

Tom Shimon

Executive Director

Kansas One-Call System, Inc.

Additional Information

In the District Court of Shawnee County, Kansas Division Six, Case No. 09-C-921, Kansas One-Call System, Inc., Plaintiff, vs. State of Kansas, Defendant. The court finds and concluded as follows:

Page 13 - "Here it is undisputed that neither the notification center nor Plaintiff rely on or use public funds, instead the utilities pay a set fee per call."

Page 14 - "While Plaintiff identifies itself interchangeably with the notification center, the two entities are not interchangeable. Plaintiff is a non-profit corporation that operates the 'notification center'."

Page 14 - "Even though Plaintiff may not be considered an instrumentality of the state, the notification center, established by the legislature and regulated by the KCC, may still be considered an instrumentality of the state, subject to KORA, because it is a separate entity."

Page 14 - "The court finds that, while Plaintiff itself is not a public agency subject to KORA, the notification center is a public agency subject to KORA."

Page 16 - "As discussed above, the notification center is a separate entity from Plaintiff, and the legislation at issue identifies the notification center as a 'public agency'."

Page 18 - "As discussed above, the KCC via the Legislature has significant regulatory control over the notification center's standards and practices of operation, and as a result of the supervision, the notification center is an instrumentality of the State of Kansas. Here the notification center is a subordinate group to both the Legislature and the KCC, both of which are supported by public funds and are subject to KOMA."

Sent out on white Paper

KANSAS ONE-CALL SYSTEM, INC.

**NOTIFICATION OF ANNUAL MEETING
OF
GENERAL MEMBERS AND PROXY SOLICITATION**

To the General Membership:

A meeting of General Members of Kansas One-Call System, Inc. will be held on Tuesday May 17th, 2011 at 10:30 A.M. The meeting will be conducted at the Tallgrass Country Club, 2400 North Tallgrass, Wichita, Kansas, 67226. All General Members of record, in good standing, at the close of business on December 31, 2010, will be entitled to vote in person or by proxy at this meeting. The agenda includes the election of directors for Kansas One-Call System, Inc., reports from the officers of the corporation and other general business matters.

Enclosed is a proxy form that we request be completed and returned in the self-addressed, stamped envelope provided. If you do not return the proxy your inaction will be deemed to be a grant of proxy to the officers of Kansas One-Call System, Inc. to conduct and transact any business that may properly come before the meeting, provided that, if the business is the election of directors your failure to return the written proxy will be deemed a grant of a proxy vote of yes for all nominees for director of Kansas One-Call System, Inc. Nominees are listed on the attached proxy ballot. The written proxy may be signed and returned by mail or fax to:

**Kansas One-Call System, INC.
Attention: Tom Shimon
Executive Director
8100 East 22nd Street North, Bldg. 2300
Wichita, Kansas 67226
Fax: 316-687-0629**

The officers and directors will bring before the meeting business and other matters of interest. The board will utilize your written proxy or proxy by default to address any and all matters which properly come before the meeting, or any adjournment(s). The written proxy or proxy by default shall be valid only for the upcoming meeting of the general members of Kansas One-Call System, Inc.

The 2010 Annual Report will be posted on the website very soon. If you wish to receive a printed copy of the report, contact Kansas One-Call and one will be mailed to you.

By Order of the Board of Directors

Fred Taylor
Secretary

Wichita, Kansas
March 31st, 2011

Sent out on Yellow Paper

KANSAS ONE-CALL SYSTEM, INC

Voting Proxy

The undersigned, a member of Kansas One-Call System, Inc., hereby grants to the officers of Kansas One-Call System, Inc. a proxy to vote the undersigned's voting rights as a member of Kansas One-Call System, Inc. at the annual meeting of the general members of the corporation. The undersigned grants to the Officers of Kansas One-Call System, Inc. a proxy to vote on any and all business matters and/or transactions pertaining to the business of Kansas One-Call System, Inc. that may properly come before the meeting. In the event this proxy is not completed by the undersigned and returned to Kansas One-Call System, Inc. a proxy by default will be effected granting all voting rights to the Officers of Kansas One-Call System, Inc. to address any and all business matters that come before the meeting.

ITEM 1: Election of Directors

Jim Bradley – City of Ottawa	Dan Corpening – Panhandle Eastern	Dan Maschka – NNG
Don Hellwig – DS&O Elec. Coop	George Melling – KGS	Brent Murphy – KCPL
Rex Meyer – AT&T	Collie Roland – Westar	Joe Williams - COX
Pat Shaffer – Butler Co. RWD #5	Fred Taylor – Midwest Energy	Roy Rissky - KDOT

_____ YES (For All) Except _____

_____ NO (For All) Except _____

In the event this proxy is not completed by the undersigned and returned to Kansas One-Call System, Inc., a proxy by default will effected voting yes for all of the hereinabove identified nominees for directors.

WRITE IN VOTES: _____

DATED _____, 2011.

Authorized Signature _____

Name (Please Print) _____

Title _____

General Member Company Name _____

List any corrections to your address or principal contact below, along with contact phone number.

"Return Service Requested"

Taken from the United States Postal Services' website

1.4 Basic Treatment

1.4.1 General

Mail that is undeliverable as addressed is forwarded, returned to the sender, or treated as dead mail, as authorized for the particular class of mail. Undeliverable-as-addressed mail is endorsed by the USPS with the reason for nondelivery as shown in [Exhibit 1.4.1 USPS Endorsements for Mail Undeliverable as Addressed](#). All nonmailable pieces are returned to the sender.

Exhibit 1.4.1 USPS Endorsements for Mail Undeliverable as Addressed

Endorsement	Reason for Nondelivery
Attempted—Not Known	Delivery attempted, addressee not known at place of address.
Box Closed—No Order*	Post office box closed for nonpayment of rent.
Deceased	Used only when known that addressee is deceased and mail is not properly deliverable to another person. This endorsement must be made personally by delivery employee and under no circumstance may it be rubber-stamped. Mail addressed in care of another is marked to show which person is deceased.
Delivery Suspended to Commercial Mail Receiving Agency	Failure to comply with 508.1.8.1 through 508.1.8.3 .
Illegible*	Address not readable.
In Dispute*	Mail returned to sender by order of chief field counsel (or under 508.1.0 and 508.2.0) because of dispute about right to delivery of mail and cannot be determined which disputing party has better right to mail.
Insufficient Address*	Mail without number, street, box number, route number, or geographical section of city or city and state omitted and correct address not known.
Moved, Left No Address	Addressee moved and filed no change-of-address order.
No Mail Receptacle*	Addressee failed to provide a receptacle for receipt of mail.
No Such Number*	Addressed to nonexistent number and correct number not known.
No Such Office in State*	Addressed to nonexistent Post Office.
No Such Street*	Addressed to nonexistent street and correct street not known.
Not Deliverable as Addressed—	Mail undeliverable at address given; no change-of-address order on file; forwarding order expired.
Unable to Forward	

Outside Delivery Limits*	Addressed to location outside delivery limits of Post Office of address. Hold mail for out-of-bounds customers in general delivery for specified period unless addressee filed order.
Refused*	Addressee refused to accept mail or pay postage charges on it.
Returned for Better Address*	Mail of local origin incompletely addressed for distribution or delivery.
Returned for Postage	Mail without postage or indication that postage fell off.
Returned to Sender, Mailpiece Contains Nonmailable Contents.	Mail returned to sender due to contents that are nonmailable.
Returned to Sender Due to Addressee's Violation of Postal False Representation and Lottery Law*	Mail returned to sender under false representation order and lottery order.
Returned to Sender Due to Addressee's Violation of Postal False Representation Law*	Mail returned to sender under false representation order.
Returned to Sender Due to Addressee's Violation of Postal Lottery Law*	Mail returned to sender under lottery order
Temporarily Away*	Addressee temporarily away and period for holding mail expired.
Unclaimed*	Addressee abandoned or failed to call for mail.
Undeliverable as Addressed, Missing PMB or # Sign	Failure to comply with 508.1.8.2e.
Vacant*	House, apartment, office, or building not occupied. (Use only if mail addressed "Occupant.")

Kansas One-Call Membership

