

determination on how to proceed in this docket, will not disrupt any established procedural schedule, and it will not prejudice the rights of any party hereto.

WHEREFORE, KCP&L respectfully requests the Commission accept the attached Response to Staff's Reply and consider the same in its deliberations in this matter.

Respectfully submitted,

/s/ Roger W. Steiner

Robert J. Hack (KS #12826)
Telephone: (816) 556-2791
E-mail: Rob.Hack@kcpl.com
Roger W. Steiner (KS #26159)
Telephone: (816) 556-2314
E-mail: Roger.Steiner@kcpl.com
Kansas City Power & Light Company
One Kansas City Place
1200 Main Street – 16th Floor
Kansas City, Missouri 64105
Facsimile: (816) 556-2787

Glenda Cafer (#13342)
Telephone: (785) 271-9991
Terri Pemberton (#23297)
Telephone: (785) 232-2123
CAFER PEMBERTON LLC
3321 SW 6th Avenue
Topeka, Kansas 66606
Facsimile: (785) 233-3040
E-mail: glenda@caferlaw.com
E-mail: terri@caferlaw.com

ATTORNEYS FOR KANSAS CITY POWER &
LIGHT COMPANY

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the above was electronically served, hand-delivered or mailed, postage prepaid, this 18th day of December, 2015 to:

ANDREW FRENCH, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
a.french@kcc.ks.gov

SAMUEL FEATHER, OFFICE OF GENERAL COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
s.feather@kcc.ks.gov

STEPHEN AND KAREN GRADWOHL
11791 W 112 ST
OVERLAND PARK, KS 66210
KAREN@OHCKC.ORG

MARY TURNER, DIRECTOR, REGULATORY AFFAIRS
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PL, 1200 MAIN ST (64105)
PO BOX 418679
KANSAS CITY, MO 64141-9679
MARY.TURNER@KCPL.COM

/s/ Roger W. Steiner
Roger W. Steiner

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

KANSAS CITY POWER & LIGHT COMPANY'S RESPONSE TO STAFF'S REPLY

1. Staff asserts that the Commission must find KCP&L has violated KUUDPA by failing to provide accurate locates if the Commission determines KCP&L is the operator of the facilities.¹ Staff claims that KCP&L “relies solely on its assertion that it is not the operator of such facilities and is, therefore, not responsible for providing accurate locates.” KCP&L made clear in its Answer and Motion to Dismiss filed on June 11, 2015, and in its Response to Staff Report and Recommendation filed on November 19, 2015, that it contested Staff’s assertion that the lines were mismarked. KCP&L’s locate contractor, USIC Locating Services, Inc. (“USIC”), has advised KCP&L that all lines were properly marked, including the private lines. Furthermore, the excavator’s understanding of the situation is not a matter of record and impacts the analysis in this case. If the Commission determines that KCP&L is the operator of these private lines, then the factual issues in dispute should go to hearing.

- 1 -

ATTACHMENT A

I. K.S.A. 66-1802(j) IS NOT CLEAR AND UNAMBIGUOUS

2. Staff states that a plain reading of the KUUDPA statute, K.S.A. 66-1802(j), does not support KCP&L's interpretation of the term "operator" as used in the statute. Staff presents the rules of statutory construction that say "the intent of the legislature governs if that intent can be ascertained", and "[w]here there is no ambiguity, the court need not resort to statutory construction. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the legislature's intent."² Staff is apparently arguing that the statute is clear and unambiguous. This is directly in conflict with the record in this docket so far.

3. First, KUUDPA fails to provide the definition of "operator" beyond saying it is the person who "owns or operates" an underground system. It is clear what "owns" means – an entity holding legal title of the facilities falls under the definition – but it is not clear what "operates" means. The statute essentially uses the term being defined to define itself when it says "operator" is any person who "operates" an underground facility. This is obviously ambiguous and further statutory construction and analysis is necessary to determine the legislature's intent.

4. Second, Staff states that, if the legislature had intended only the *owner* of a facility to be responsible for providing locates, it would have stated so in the statute.³ Staff indicates that by adding "or operates" to the statute the legislature meant to encompass entities that had "functional control" over such facilities. KCP&L submits that adding "or operates" to the statute was meant to include persons who had ownership rights and responsibilities (perhaps through lease agreements) but were not actual owners of the facilities. The rules of statutory

² Staff Reply, p. 3, ¶s 6, 7.

³ Staff Reply, p. 3, ¶8.

ATTACHMENT A

construction known as *noscitur a sociis* and *ejusdem generis* are applicable and support KCP&L's interpretation.

5. Under the principle of *noscitur a sociis*, “a word is known by the company it keeps – to ‘avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.’”⁴ “A word is given more precise content by the neighboring words with which it is associated”.⁵ In K.S.A. 66-1802(j), the word “operates” comes after and is joined in the phrase with the word “owns”, indicating that “operates” is intended to include situations related to or similar to ownership of the facilities, without requiring actual ownership by title.

6. The principle of *ejusdem generis* states: “Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”⁶ Again, the specific term “owns” precedes the general and ambiguous term “operates”. The latter must be read in the context of the former. This doctrine of statutory construction supports KCP&L's position that the term “operates” requires the person to possess some type of ownership rights to the facilities.

7. Another rule of statutory construction states that “penal statutes should be strictly construed in favor of those subject to their application.”⁷ KUUDPA provides for penalties to be assessed against “operators” for violation of the Act.⁸ As such, it is a penal statute and ambiguous terms, such as “operates” should be interpreted narrowly, in favor of those against whom the statute is being applied. Staff proposes an interpretation that would result in the

⁴ *Yates v. U.S.*, 135 S.Ct. 1074, 1085; (2015).

⁵ *Yates* at 1085, citing to *United States v. Williams*, 533 U.S. 285, 294; 128 S.Ct. 1830 (2008).

⁶ *Yates* at 1086.

⁷ *McCabe V. Duran*, 39 Kan.App.2d 450, 453 (2008).

ATTACHMENT A

Commission broadly sweeping many entities under the definition of “operator” on facilities for which they have never been considered responsible in the past and who have reasonably read the KUUDPA statutes as not including them for this purpose. Staff’s interpretation would subject these entities to penalties in contradiction to the general rule that penalty statutes should be interpreted narrowly, in favor of those subject to their application.

8. Third, KUUDPA does not state “operator” means the entity that has “functional control”, which is how Staff defines it. Staff reads into the statute the “functional control” language, while asserting KCP&L is in error by reading into the statute the “ownership rights” language in its interpretation.⁹ Staff indicates that the legislature could have stated in the statute that it was only intended to apply to the owners of facilities if that was its intent. This assertion ignores the clear explanation KCP&L provided in its Response to Staff’s Report that the words “or operates” in the statute are intended to address situations where the entity has ownership rights without actually owning the facilities (*i.e.*, leasing arrangements). This argument by Staff also ignores the fact that, if the legislature intended for the statute to apply as Staff argues, it could have used the words “over which the entity has functional control”, or “over which the entity’s energy flows”. The Legislature chose not to apply the statute that broadly.

9. Staff is correct that another rule of statutory construction states “statutes should be construed to avoid unreasonable results, and a court will presume that the legislature does not intend to enact useless or meaningless legislation.”¹⁰ But Staff is wrong that KCP&L’s interpretation would “read out” of the statute the words “or operates”. As previously explained, those words address situations where the entity has ownership rights but not actual ownership.

⁸ *Double M Constr., Inc. v. State Corp. Com’n*, 288 Kan. 268, 272 (2009).

⁹ Staff Reply, p. 3, ¶s 8, 9.

¹⁰ Staff’s Reply, p. 4, ¶10, citing to *Southwestern Bell Tel. Co. v. Beachner Constr. Co.*, 289 Kan. 1262, 1269 (2009).

ATTACHMENT A

However, Staff's interpretation does lead to unreasonable results, as it would hold an entity legally responsible for assets over which it does not possess a legal right to control.

10. In addition to reading into the statute the words "functional control", Staff further adds to the statute its definition of this term to mean a situation where the entity "exercises a high degree of operational control over facilities".¹¹ This definition of "functional control" is not contained in the statute, just as the words "functional control" are not included in the statute. Staff cannot argue that the statute is clear and unambiguous, while also asserting key terms of the statute should be interpreted in a way not provided for by the plain language of the statute.

II. OTHER ARGUMENTS PRESENTED BY STAFF

11. Staff argues that KCP&L has a great deal of operational control over the private facilities at issue in this case.¹² Actually, KCP&L only has control over how its power is delivered to the privately owned facilities, but after that point, once the power is delivered, KCP&L no longer has control. Staff argues that KCP&L controls "when and how" power flows over the privately owned facilities.¹³ This is incorrect. The customer determines when its lines are ready to be energized and requests KCP&L to do so. The customer determines when it needs to perform maintenance, modifications or upgrades to its privately owned facilities and requests KCP&L to de-energize the lines to allow for such work. KCP&L does not determine when power flows over privately owned facilities, the customer does. As for how power flows over privately owned facilities, that is determined and controlled by the design of the facilities. Private facilities are designed, installed, maintained, paid for and owned by the customer. KCP&L does not control the design or where the private lines are placed on the owner's property. Staff further notes KCP&L control because unauthorized work done to the metering

¹¹ Staff Reply, p. 4, ¶11.

¹² Staff Reply, p. 4, ¶11.

ATTACHMENT A

components could be considered tampering by KCP&L's tariff. The meter is owned and installed by KCP&L, not by the customer. It is difficult to envision work a customer would need to perform on the metering components or how that situation implies KCP&L has functional control of the service or secondary line to a commercial property.

12. Staff also indicates KCP&L's example of the Southwest Power Pool ("SPP") is faulty.¹⁴ In fact, Staff argues that the SPP arrangement supports Staff's position in this case. According to Staff, SPP is given functional control over the facilities of Westar via its tariff provisions, and therefore, KCP&L could not have functional control over those facilities by virtue of transmitting its power over the facilities. Apparently Staff is saying KCP&L would have functional control over Westar's facilities if it transmitted power over the facilities, except for the fact that SPP is declared to have such control by the terms of its tariff. KCP&L fails to see how this is instructive to the interpretations being argued here. KCP&L's point with the example was to show the absurdity of attributing to an entity functional control of facilities owned by another simply because it transmits power over those facilities. Staff's response does not change that fact.

13. While KCP&L commends Staff for its concern for public safety, Staff's recommendation does not improve public safety as it claims. Staff acknowledges that KCP&L does not have maps showing where the private facilities are located, and that KCP&L is not required to compile maps of all privately-owned facilities in its service territory." "It can comply with the rules by simply filing a 'map showing [its] service area.'"¹⁵ Staff notes that KCP&L is already marking privately-owned facilities. At Staff's request, KCP&L agreed to continue to assist customers by attempting to mark their underground facilities to the best of KCP&L's

¹³ Staff Reply, p. 4, ¶11.

¹⁴ Staff Reply, p. 4, ¶s 12, 13.

ATTACHMENT A

ability even though it was not responsible for doing so under KUUDPA. In other words, Staff's recommendation would not improve public safety beyond what already exists today. Privately owned lines would continue to be marked to the best of KCP&L's ability without the benefit of maps or diagrams or specific knowledge of where those private lines exist on the property, just as is done today. Staff's recommendation only shifts liability from the owner of private facilities to all of KCP&L's customers.

14. Staff claims that if KCP&L cannot accurately mark privately owned customer facilities then it is doing a disservice to customers and safety because customers assume that KCP&L's markings are accurate. In fact, KCP&L does not have maps or drawings of customer-owned facilities and can only locate such facilities based upon educated guesswork and locating equipment readings without the benefit of maps or drawings. At Staff's request, KCP&L agreed that it would continue to assist customers by attempting to mark privately owned underground facilities to the best of KCP&L's ability even though it was not responsible for doing so under KUUDPA. KCP&L did not and cannot guarantee accurate locates for privately-owned lines. It is on a best efforts basis and Staff was aware of that at the time of the agreement. KCP&L's agreement to mark private lines at the request of Staff does not mean that the Company is in agreement with Staff's interpretation of KUUDPA. Additionally, Staff's argument that customers simply assume that KCP&L's markings are accurate implies that excavators, who routinely work with location markings and who are also subject to KUUDPA regulations, are uninformed regarding the ability to accurately locate private lines.

15. Staff completely missed the point of KCP&L's discussion regarding the KUUDPA rules on filing and maintenance of maps of the operator's underground facilities. Staff argues that KCP&L can comply with this provision of the KUUDPA rules by simply

¹⁵ Staff Reply, p. 6, ¶16.

ATTACHMENT A

providing a map of its service territory which is exactly how KCP&L currently complies. However, KCP&L was not arguing its ability to comply with the map requirement, KCP&L was pointing to the language of the requirement that refers to maps of “the operator’s underground facilities” as further evidence that Staff’s proposed definition of the word “operator” is not supported by the language of the KUUDPA rules and regulations. This language, use of the possessive form of the word operator, clearly points to ownership or ownership rights of the underground facilities.

16. Staff points to language in the Excavator’s Manual as supportive of its interpretation of KUUDPA although Staff left out a relevant portion of the quote in order to make its point. The Manual states, “The notified facility/utility owners **will not** mark privately owned underground lines. [Emphasis included in original.] These include **but are not limited to**; power or electric service, water and sewer pipes from the meter to your home...” [Emphasis added.] Staff’s exclusion of the words “but are not limited to” implies that power or electric service lines from the meter to the home are the only privately owned electric service lines the utility will not mark and therefore everything upstream of the meter is the utility’s responsibility under KUUDPA to mark. That is not what the language says.

17. Staff claims its present interpretation is consistent with its past position on this issue.¹⁶ The Company is not aware that the Staff has ever asked the Commission to hold an electric utility liable for markings to lines that it did not own.

18. Staff argues that KCP&L’s semi-annual Underground Damage reports indicate KCP&L’s agreement with Staff’s interpretation of the statute because it includes damage claims for underground secondary and underground service lines in its reports. This argument has no basis. In fact, KCP&L’s reporting is consistent with the Company’s position on KUUDPA, that

ATTACHMENT A

the utility is responsible for Company-owned lines. The report only includes claims for damage to KCP&L-owned lines. The “Service Line Underground” and “Underground Secondary” claims in KCP&L’s reports refer to residential service lines and residential secondary lines which the Company owns. It is true that these residential lines are upstream of the meter but the primary argument between Staff and KCP&L is whether the Company has responsibility for lines it does not own. The Company does not own secondary or service lines for commercial customers and therefore does not file claims for damage to those lines and they are not included in the report. Staff misrepresented the information in KCP&L’s Underground Damage reports.

19. Staff questions in footnote 27 “why the company pays its contractors for such work and why the company *allows* its contractors to perform such work.” [Emphasis in original.] As noted in KCP&L’s Response to Staff Report and Recommendation, KCP&L’s contract with its locator covers only its Company-owned facilities.¹⁷ The contract does not encompass privately-owned facilities. As for “allowing” KCP&L’s contractors to perform such work, as previously stated and as Staff is well aware, this is being done at the request of Staff.

19. Staff discusses a generic proceeding as if it would evaluate only KCP&L’s statutory duties and would not involve other parties.¹⁸ They ignore the fact that this decision could be precedential for other Kansas utilities. If the Commission decides in favor of Staff’s position, then the Commission’s order will need to note whether or not their decision is considered precedential.¹⁹ However, KCP&L fails to see how the Commission’s interpretation of this language in the KUUDPA could be applicable to only KCP&L.

¹⁶ Staff’s Reply, p. 8, ¶s 23, 24.

¹⁷ KCP&L Response to Staff Report & Recommendation, p. 9, ¶24.

¹⁸ Staff’s Reply, p. 10, ¶27.

¹⁹ Per the KCC website “Precedential orders may bind parties, establish policies, or interpret statutes or regulations in a way that applies against a person or company that was not a party to the original order. The KCC cannot treat an order as precedential unless the agency designates the order as precedential and makes the order available to the public.”

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WHEREFORE, KCP&L respectfully requests the Commission reject Staff's recommendation for the reasons set forth herein and in KCP&L's Response to Staff Report and Recommendation.

Respectfully submitted,

/s/ Roger W. Steiner

Robert J. Hack (KS #12826)
Telephone: (816) 556-2791
E-mail: Rob.Hack@kcpl.com
Roger W. Steiner (KS #26159)
Telephone: (816) 556-2314
E-mail: Roger.Steiner@kcpl.com
Kansas City Power & Light Company
One Kansas City Place
1200 Main Street – 16th Floor
Kansas City, Missouri 64105
Facsimile: (816) 556-2787

Glenda Cafer (#13342)
Telephone: (785) 271-9991
Terri Pemberton (#23297)
Telephone: (785) 232-2123
CAFER PEMBERTON LLC
3321 SW 6th Avenue
Topeka, Kansas 66606
Facsimile: (785) 233-3040
E-mail: glenda@caferlaw.com
E-mail: terri@caferlaw.com

ATTORNEYS FOR KANSAS CITY POWER &
LIGHT COMPANY

ATTACHMENT A

VERIFICATION

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

The undersigned, Mary Britt Turner, upon oath first duly sworn, states that she is the Director, Regulatory Affairs of Kansas City Power & Light Company, that she has reviewed the foregoing Comments, that she is familiar with the contents thereof, and that the statements contained therein are true and correct to the best of her knowledge and belief.

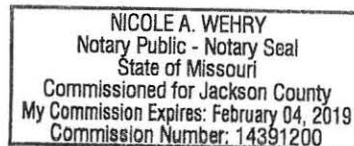
Mary Britt Turner
Mary Britt Turner
Director, Regulatory Affairs
Kansas City Power & Light Company

Subscribed and sworn to before me this 18th day of December 2015.

Nicole A. Wehry
Notary public

My commission expires:

Feb 4, 2019



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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the above was electronically served, hand-delivered or mailed, postage prepaid, this 18th day of December 2015 to:

ANDREW FRENCH, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
a.french@kcc.ks.gov

SAMUEL FEATHER, OFFICE OF GENERAL COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
s.feather@kcc.ks.gov

STEPHEN AND KAREN GRADWOHL
11791 W 112 ST
OVERLAND PARK, KS 66210
KAREN@OHCKC.ORG

MARY TURNER, DIRECTOR, REGULATORY AFFAIRS
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PL, 1200 MAIN ST (64105)
PO BOX 418679
KANSAS CITY, MO 64141-9679
MARY.TURNER@KCPL.COM

/s/ Roger W. Steiner
Roger W. Steiner