THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Shari Feist Albrecht, Chair
Jay Scott Emler
Pat Apple

In the Matter of a General Investigation Regarding Whether Electric Utilities Should be Considered an "Operator" of Private Underground Lines Under the Provisions of the Kansas Underground Utility Damage Prevention Act.	)))))	Docket No. 17-GIME-565-GIV

FINAL ORDER

This matter comes before the State Corporation Commission of the State of Kansas (Commission). Having reviewed the pleadings and record, and being fully advised in the premises, the Commission makes the following findings:

Background

1. On July 27, 2017, the Commission issued its *Order Opening General Investigation*, initiating an investigation of "the rights, obligations and liabilities that should be expected of the parties regarding the provision of locates and excavation over underground electric service lines and to develop policy positions that will ensure the uniform application of [the Kansas Underground Utility Damage Prevention Act] KUUDPA."[1] The *Order Opening General Investigation* noted the Commission's *Final Order* in Docket No. 15-KCPE-544-COM (15-544 Docket), which directed Commission Utilities Staff (Staff) to "make a Report and Recommendation (R&R) preliminary to the Commission opening a general investigation to determine whether electric utilities should be considered an 'operator' of private underground lines under . . . KUUDPA."[2] The *Final Order* in the 15-544 Docket "required Staff's R&R to 'include

[1] *Order Opening General Investigation*, Ordering Clause A (July 27, 2017).
[2] *Id.*, ¶ 1.

a description as to how other Kansas electric utilities[3] handle the marking of private underground lines and provide a brief survey of how other states address the issue."[4]

2. Staff submitted an R&R to the Commission, dated May 24, 2017, which was incorporated into the *Order Opening General Investigation*.[5] In its R&R, Staff provided a detailed background and analysis of the above issues, recommended the opening of this general investigation, provided the results of a brief survey of how other states address responsibilities for marking underground electric lines, summarized the practices of 16 Kansas electric utilities regarding electric service line markings, and offered seven specific questions for comment by interested parties.[6]

3. Staff also indicated that no standard practice exists among Kansas utilities for locating/marking underground electric service lines.[7] That is, "[i]n general, all Kansas electric utilities provide locates of underground facilities up to the company defined demarcation point of service. However, the location of the customer point of service varies widely by location and by class of customer."[8] Staff stated that KUUDPA's "primary intent . . . is to minimize the risks associated with digging near underground facilities"[9] and that "it is in the public interest to clearly define the endpoints of underground electric service lines that are required to be located by KUUDPA."[10]

4. Staff's questions offered to interested parties for comment were as follows:

A. Regarding underground electric service lines, how should the Commission interpret the term "operator" at K.S.A. 66-1802(j)?

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[3] I.e., other than KCP&L.
[4] *Order Opening General Investigation*, ¶ 1.
[5] *Id.*, ¶ 2.
[6] *Id. See* Staff's R&R, pp. 1-8 and Exhibit 2 (May 24, 2017) (May 24, 2017 R&R).
[7] May 24, 2017 R&R, p. 2.
[8] May 24, 2017 R&R, p. 2.
[9] May 24, 2017 R&R, p. 2.
[10] May 24, 2017 R&R, p. 2.

B. Should the utility service provider be required to provide locates for residential underground electric service up to the location of the customer meter or the building wall of the residence, whichever is further downstream?
   a. What is the risk to the customer of not providing locates under this scenario?
   b. What is the risk/cost to the utility of being required to provide locates under this scenario?
C. For commercial customers, should the utility service provider be required to provide locates up to the building wall, the current transformer cabinet, or the customer meter, whichever is further downstream?
   a. What is the risk to the customer of not providing locates under this scenario?
   b. What is the risk/cost to the utility of being required to provide locates under this scenario?
D. If it is required to locate customer-owned facilities, should the utility service provider only be required to locate those facilities to the boundaries of the common utility easement?
E. What is the liability of an operator in providing locates for customer installed/owned facilities?
F. If an operator is not required to provide locates of customer installed/owned facilities, should the operator be required to alert the customer to the fact that locating customer-owned facilities is the customer's obligation?
G. What are the best practices that may be employed by an excavator to avoid damaging customer-owned facilities when no locate marks are present or the provided locate marks are of questionable accuracy?[11]

5. Staff stated that "all Kansas utilities provide locates for buried electric facilities that are owned *and* operated by the utility."[12] However, Staff continued:

> In the case of the customer owning facilities upstream of the meter, Staff views the customer as owning the conductor while the company owns the energy flowing in the conductor. As stated in the 15-544 Docket, Staff believes the utility in this case also operates the customer's line because the utility maintains functional control of the facility. For this scenario, the KUUDPA phrase, "owns or operates" indicates both parties, the utility (as owner of the energy and operator of the conductor) and the customer (as owner of the conductor) could be considered to meet the definition of operator found in KUUDPA. However, in nearly every case, the customer will not be considered an "operator" because of the statutory private use exception. This leaves the utility as the only entity that could be considered the operator responsible for locating the underground facilities.[13]

[11] May 24, 2017 R&R, pp. 2-3.
[12] May 24, 2017 R&R, p. 6.
[13] May 24, 2017 R&R, p. 6.

6. Staff noted the fact that a utility "more than likely did not construct the customer-owned conductor and may be unable to provide precise locates without consulting construction records."[14] Thus, Staff stated that "[a] requirement to provide locates without having all records available for consultation may increase the utility's liability from inaccurate locates."[15]

7. Staff stated that, due to the utilities' "[v]arying interpretations of the phrase 'owns or operates'" found in K.S.A. 66-1802(j)'s definition of an "operator," Staff believes it is in the public interest to have the Commission provide an interpretation of the phrase "owns or operates" pursuant to KUUDPA. [16]

8. The Commission's *Order Opening General Investigation* also required that a procedural schedule be established.[17]

9. On September 12, 2017, the Commission issued a procedural schedule establishing deadlines for parties to file initial and reply comments in response to Staff's aforementioned questions, for filing of a Staff Report and Recommendation in response to any initial and reply comments, and for a Commission order establishing deadlines for further proceedings, "including, if necessary, pre-filed testimony, prehearing conferences, and a hearing."[18]

10. On September 12, 2017, the Commission granted intervention to Atmos Energy Corporation (Atmos), Black Hills/Kansas Gas Utility Company, LLC, d/b/a Black Hills Energy (Black Hills), and Kansas Electric Cooperatives, Inc. (KEC).[19]

11. On October 10, 2017, KEC filed initial comments.[20]

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[14] May 24, 2017 R&R, p. 6.
[15] May 24, 2017 R&R, p. 6.
[16] May 24, 2017 R&R, p. 7.
[17] *Order Opening General Investigation*, Ordering Clause B.
[18] *Order Setting Procedural Schedule and Designating Prehearing Officer*, ¶ 4 and Ordering Clause A (Sept. 12, 2017).
[19] *Order Granting Intervention to Atmos Energy, Black Hills Energy, and Kansas Electric Cooperatives, Inc.*, Ordering Clause A (Sept. 12, 2017).
[20] Initial Comments of Kansas Electric Cooperative's Inc. (Oct. 10, 2017).

12. On October 12, 2017, Midwest Energy, Inc. (Midwest), Westar Energy, Inc. (Westar), Kansas City Power & Light Company (KCP&L), Pioneer Electric Cooperative, Inc. (Pioneer), Southern Pioneer Electric Company (Southern Pioneer), The Empire District Electric Company (Empire), Rex Schick of K&W Underground, Inc., and R. Lee Chapman of Heartland Midwest filed initial comments.[21] Midwest also filed Attachments A and B to its initial comments.[22]

13. On October 13, 2017, Darren C. Pack of Progressive Environmental & Safety filed initial comments.[23]

14. On November 13, 2017, KEC filed reply comments.[24]

15. On November 14, 2017, KCP&L filed reply comments.[25]

16. On November 15, 2017, Midwest, Pioneer and Southern Pioneer filed joint reply comments.[26]

17. On December 15, 2017, Staff filed its Report and Recommendation (December 15, 2017 R&R) in response to the parties' initial and reply comments. Staff's December 15, 2017 R&R recommended that "the Commission find operators of underground electric service lines are obligated to provide locate marks under K.S.A. 66-1806 up to the electric metering point," or as an alternative, that utility operators be "responsible for locating that portion of a customer-owned

[21] *See* Initial Comments of Midwest Energy, Inc.; Westar Energy, Inc.'s Comments in Response to Commission Questions; Initial Comments of Kansas City Power & Light Company; Initial Comments of Pioneer Electric Cooperative, Inc. and Southern Pioneer Electric Company; Responses of The Empire District Electric Company; Comments of Rex Schick of K & W Underground, Inc.; and Comments of R. Lee Chapman of Heartland Midwest (Oct. 12, 2017).
[22] Attachment A is the Kansas One-Call Excavator's Manual; Attachment B is the Kansas One-Call Safe Digging Tips.
[23] Comments of Darren C. Pack of Progressive Environmental & Safety (Oct. 13, 2017).
[24] Reply Comments of Kansas Electric Cooperatives, Inc. (Nov. 13, 2017).
[25] Reply Comments of Kansas City Power & Light Company (Nov. 14, 2017).
[26] Joint Reply Comments of Midwest Energy, Inc., Pioneer Electric Cooperative, Inc., and Southern Pioneer Electric Company (Nov. 15, 2017).

electric service line that is in a public easement and upstream of the meter."[27] Staff attempted to support its alternative recommendation by stating that "it is not practical to require all customers owning a short section of service line in a public easement to become members of Kansas-811. On the other hand, any excavation over these unmarked lines would constitute a risk to public safety. While a utility operator may not have construction records for the section of service line in the utility easement, the operator will have records indicating which customers are served from the transformer."[28] Thus, Staff concluded that using these records "and available locating equipment . . . the utility could be reasonably expected to provide accurate locates to the edge of the utility easement."[29]

18. On January 4, 2018, KCP&L, Westar, Pioneer, Southern Pioneer, Midwest, Empire, and KEC filed a Motion for Clarification Regarding Procedural Schedule and Request for Round Table Discussion and/or Evidentiary Hearing (Motion for Clarification). The Motion for Clarification noted that "[w]hile Staff's R&R did summarize the comments of the parties, Staff also provided a recommendation on how the Commission should ultimately decide the substantive issues in this case, rather than a recommendation on the next steps to be taken procedurally."[30] The Motion for Clarification also stated the Joint Movants' concern that "the Commission might convert the January 25, 2018 Order into an Order deciding the substantive issues, rather than setting the next procedural steps for the docket," thus depriving the Joint Movants of an opportunity to respond to Staff's substantive recommendations in its R&R.[31] The Joint Movants sought assurance that they would be afforded an opportunity to respond "in some forum before the

[27] December 15, 2017 R&R, p. 8.
[28] December 15, 2017 R&R, p. 7.
[29] December 15, 2017 R&R, p. 7.
[30] Motion for Clarification, ¶ 2.
[31] Motion for Clarification, ¶ 3.

Commissioners."[32] The Joint Movants ultimately asked the Commission to order "a round table discussion with Commissioner participation and/or an evidentiary hearing. If the Commission rejects that request, Joint Movants request the Commission's Order . . . establish dates by which Joint Movants may file their written responses to Staff's R&R."[33]

19. On January 25, 2018, the Commission issued an *Order Establishing Further Proceedings*.[34] The Order found a round table and/or an evidentiary hearing unnecessary and allowed the parties to file written responses to Staff's December 15, 2017 R&R by February 12, 2018.[35]

20. On February 12, 2018, Westar, KCP&L, Midwest, Pioneer, Southern Pioneer and KEC filed responses to Staff's December 15, 2017 R&R.[36] On February 13, 2018, Empire likewise filed a response to the R&R.[37]

Discussion

a. The meaning of "operator" in K.S.A. 66-1802(j)

21. K.S.A. 66-1801 through K.S.A. 66-1816 are the KUUDPA statutes, which govern the prevention of damage to underground utilities in Kansas. Under KUUDPA, K.S.A. 66-1802(j) defines an "Operator" as "any person who owns or operates an underground tier 1 or tier 2 facility, except for any person who is the owner of real property wherein is located underground facilities

[32] Motion for Clarification, ¶ 4.
[33] Motion for Clarification, p. 4.
[34] Due to an inadvertent error, the *Order Establishing Further Proceedings* was subsequently amended by the Commission's *Amended Order Establishing Further Proceedings*, dated February 15, 2018. There is no material difference between the two Orders.
[35] *Order Establishing Further Proceedings*, ¶ 4.
[36] *See* Westar Energy, Inc.'s Reply to Commission Staff's Report and Recommendation; Kansas City Power & Light Company's Response to Staff's Report and Recommendation; Joint Response of Midwest Energy, Inc., Pioneer Electric Cooperative, Inc., Southern Pioneer Electric Company, and Kansas Electric Cooperatives, Inc. (Feb. 12, 2018).
[37] Response of The Empire District Electric Company to Staff's Report and Recommendation (Feb. 13, 2018).

for the purpose of furnishing services or materials only to such person or occupants of such property."

22. In its *Order Opening General Investigation*, the Commission's first question presented to the parties for comment was: "Regarding underground electric service lines, how should the Commission interpret the term 'operator' at K.S.A. 66-1802(j)?"[38] The Commission finds this to be the central and controlling question in this investigation. All the other questions and issues addressed by the parties are secondary to this question and must be considered in light of its answer. Put simply, whether, and to what extent, a person incurs obligations to provide locates for underground electric facilities under KUUDPA turns on whether that person is an "operator" pursuant to K.S.A. 66-1802(j). The parties provided no citation to any legal authority, nor is the Commission aware of any such authority, which supports the argument that an operator's obligations under KUUDPA may be abrogated or ameliorated by logistical or practical hurdles the operator may face in complying with those obligations.

23. The extensive discussion and analysis of K.S.A. 66-1802(j) in the parties' comments demonstrates the controlling nature of the interpretation of "operator" for determining one's duty to provide locates under KUUDPA. KCP&L, Westar, Empire, KEC, Midwest, Pioneer, and Southern Pioneer all offered variations of the same interpretation of "operator" under K.S.A. 66-1802(j), namely, that an "operator" is a person who owns or operates as one with ownership rights/interests and responsibilities (i.e., via a lease or other agreement) over an underground tier 1 or tier 2 facility.[39] In other words, according to the utilities, a person who does not own

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[38] *Order Opening General Investigation*, ¶ 5.A.

[39] *See* KCP&L's Initial Comments, ¶¶ 11, 16, 20; Westar's Initial Comments, ¶ 4 (adopting and incorporating KCP&L's legal arguments from KCP&L's Legal Brief in Docket No. 15-KCPE-544-COM); Empire's Initial Comments, p. 1.A. (defining an "operator" as "the entity that owns or maintains the underground facilities"); KEC's Initial Comments, ¶¶ 10-11 (stating that "[t]he term clearly looks toward an ownership interest of some type"); Midwest's Initial Comments, ¶¶ 4, 18 (stating that "[o]wnership of the line or lines is the crucial consideration" and "ownership is a requisite component"); Pioneer's and Southern Pioneer's Initial Comments, ¶¶ 5-6 (adopting and

underground facilities, or have ownership-type rights and responsibilities by which the person may operate underground facilities, is not an "operator" under K.S.A. 66-1802(j).[40]

24. R. Lee Chapman and Darren C. Pack briefly addressed the interpretation of K.S.A. 66-1802(j) in their respective comments, but provided no legal basis for their opinions.[41] Therefore, the Commission gives no weight to their comments on the interpretation of the statute. Rex Schick stated he had no opinion on the statute's interpretation.[42]

25. KCP&L provided the most extensive discussion on the interpretation of K.S.A. 66-1802(j), and Westar, Pioneer and Southern Pioneer have explicitly adopted KCP&L's legal reasoning on the question.[43] Therefore, the Commission finds it prudent to address KCP&L's arguments specifically and then address any separate arguments raised by other utilities.

26. The Commission agrees with KCP&L that the definition of "operator" in K.S.A. 66-1802(j) must be understood "in accordance with the intent of the legislature."[44] It is "[t]he most fundamental rule" of statutory interpretation that the intent of the legislature is ascertained "through the statutory language [the legislature] employs, giving ordinary words their ordinary

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incorporating KCP&L's legal arguments from KCP&L's Legal Brief in Docket No. 15-KCPE-544-COM and stating that "the term 'operator' . . . under K.S.A. 66-1802(j)" means "an entity that has actual operational 'control' or service responsibility (through ownership, agreement, contract, tariff and/or rule and regulation) over the Tier 1 or Tier 2 facilities"); KCP&L's Reply Comments, p. 2 (stating that "[i]f the utility does not own or have maintenance obligations for the facilities (for example, pursuant to the terms of a special contract with the customer) it cannot reasonably be classified as the 'operator' of the facilities . . ."); and Midwest's, Pioneer's and Southern Pioneer's Reply Comments, ¶ 1 (stating that "[t]he electric utility should only be determined to be the 'operator' of those underground electric facilities for which it owns and operationally controls that are upstream of the Service Point as defined under each utility's applicable tariffs, rules and regulations and/or contract with the customer"). This definition of "operator" excludes "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 person or occupants of such property." *See* K.S.A. 66-1802(j).

[40] *See e.g.* KCP&L's Response to Staff's Report and Recommendation, ¶ 3 (Feb. 12, 2018) (stating that "[t]he facilities owned by a private party, and not leased or legally assigned to the utility in some manner, are not the underground facilities of the utility, and therefore, the utility is not the operator of such facilities").

[41] *See* R. Lee Chapman, Initial Comments, p. 1; *see also* Darren C. Pack, Initial Comments, p. 1.

[42] Rex Schick, Initial Comments, p. 1.

[43] *See* fn. 39, *supra*. KCP&L's legal arguments in its Initial Comments are essentially the same as its legal arguments in its Legal Brief in Docket No. 15-KCPE-544-COM (Aug. 22, 2016).

[44] KCP&L's Initial Comments, ¶ 7.

meaning."[45] Canons of statutory construction will not be employed to interpret a statute that is plain and unambiguous.[46] "It is only if the statute's language or text is unclear or ambiguous that" courts will apply canons of statutory construction or turn to legislative history.[47]

27. As noted above, K.S.A. 66-1802(j) defines an "Operator" as "any person who owns or operates an underground tier 1 or tier 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 person or occupants of such property." K.S.A. 66-1802(p) defines a "Tier 1 facility" as "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."

28. The key phrase in the definition of "Operator" above is: "person who ***owns or operates*** an underground tier 1 . . . facility." KCP&L stated: "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."[48] Hence, KCP&L concluded that the meaning of "operates" is "obviously ambiguous and further statutory construction and analysis is necessary to determine the legislature's intent."[49]

29. The Commission rejects KCP&L's argument that the word "operates" in this context is unclear and ambiguous.[50] KCP&L has provided no basis for the alleged clarity of the word "owns" versus the alleged ambiguity of the word "operates," other than preference and bald assertion. Neither "owns" nor "operates" is defined in K.S.A. 66-1802(j) itself, nor anywhere else in the KUUDPA statutes, and KCP&L has provided no reason for concluding that the word "owns"

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[45] *State v. Stallings*, 284 Kan. 741, 742, 163 P.3d 1232 (2007).
[46] *In re K.M.H.*, 285 Kan. 53, 79, 169 P.3d 1025 (2007).
[47] *Id.*
[48] KCP&L's Initial Comments, ¶ 9.
[49] KCP&L's Initial Comments, ¶ 9.
[50] The Commission likewise rejects Staff's conclusion that "[t]he definition of 'operator' in KUUDPA is ambiguous." *See* December 15, 2017 R&R, p. 7.

has a more generally accepted meaning than does the word "operates." As a general proposition, determining the *meaning* of the words "owns" and "operates" in a particular context is distinct from determining *the factual question* of whether a person or entity actually "owns" or "operates" something based on that meaning. Thus, KCP&L's statement that "[t]he statute essentially uses the term being defined to define itself"[51] does not *ipso facto* give the word "operates" an "obviously ambiguous" or unclear meaning. Moreover, a term is not rendered legally unclear or ambiguous simply because parties disagree about the term's meaning, as they do in this case.[52]

30. Rather, statutory language is ambiguous "where the statute contains provisions or language of doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language, and leaves [a court] generally uncertain which one of two or more meanings is the proper meaning."[53] More precisely, "[a] statute is ambiguous when two or more interpretations can fairly be made."[54]

31. Kansas courts often use dictionaries to arrive at the plain meaning of a term.[55] Here, KCP&L appealed to Merriam-Webster's definition of the term "operate," namely, "to perform a function; exert power or influence."[56] In the 15-544 Docket, Staff argued for the definition of "operate" from the Oxford dictionary: "to control the functioning of (a machine, process, or system)."[57] Dictionary.com defines "operate" variously as "to work or use a machine, apparatus, or the like; to act effectively; produce an effect; exert force or influence."[58] These definitions do

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[51] KCP&L's Initial Comments, ¶ 9.
[52] *See* December 15, 2017 R&R, p. 2.
[53] *State v. Paul*, 285 Kan. 658, 661–62, 175 P.3d 840 (2008).
[54] *Petty v. City of El Dorado*, 270 Kan. 847, 851, 19 P.3d 167, 170 (2001).
[55] *See e.g. In re Estate of Strader*, 301 Kan. 50, 57, 339 P.3d 769 (2014); *Sturdy v. Allied Mut. Ins. Co.*, 203 Kan. 783, 789, 457 P.2d 34 (1969).
[56] *See* KCP&L's Initial Comments, ¶ 17.
[57] Docket No. 15-KCPE-544-COM, Commission Staff's Brief on KUUDPA Responsibilities, ¶ 15 (Aug. 22, 2016). *See* https://en.oxforddictionaries.com/definition/operate, accessed online February 28, 2018.
[58] http://www.dictionary.com/browse/operate?s=t, accessed online February 28, 2018.

not leave the term "operates" as "doubtful or conflicting [in] meaning" with uncertainty as to "which one of two or more meanings is the proper meaning."[59] Rather, the Commission finds these definitions are essentially identical and overlapping, and provide the plain meaning of the term "operates" in K.S.A. 66-1802(j).

32. KCP&L argued that the term "operates" in K.S.A. 66-1802(j) means to operate underground electric facilities pursuant to the "legal right to control such facilities similar to the control exercised by an owner (such as via a lease or management agreement)."[60] Thus, KCP&L read K.S.A. 66-1802(j) as effectively rendering an operator "any person who owns or operates [on the basis of rights similar to ownership (i.e., lease or management agreement)] an underground tier 1 or tier 2 facility."[61] Put more succinctly, KCP&L has rendered K.S.A. 66-1802(j) as reading: "'Operator' means any person who owns or *effectively owns* an underground tier 1 facility." The Commission rejects this rendering because the immediate context of K.S.A. 66-1802(j) is devoid of any indication that the word "operates" carries with it the notion of ownership, rights of ownership, or effective ownership. Moreover, the words "leased," "legally assigned," or the like appear nowhere in the KUUDPA statutes.[62] KCP&L has read the "rights of ownership" idea into the word "operates," contrary to the rule that "[t]he court will not read into a statute that which the legislature has plainly excluded."[63] Moreover, KCP&L has rendered the phrase "or operates" superfluous by effectively reducing both sides of the phrase "owns or operates" to "owns,"

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[59] *State v. Paul*, 285 Kan. at 661–62.
[60] KCP&L's Initial Comments, ¶ 11.
[61] KCP&L's Initial Comments, ¶¶ 16, 18. *See* KCP&L's Response to Staff's Report and Recommendation, ¶ 3 (stating that "a utility's legal obligation to mark its underground facilities extends only to the facilities the utility owns ***or to which it has ownership rights***" (emphasis added)).
[62] *See* KCP&L's Initial Comments, ¶ 11.
[63] *Brown v. Bd. of Educ., Unified Sch. Dist. No. 333, Cloud Cty.*, 261 Kan. 134, 142, 928 P.2d 57 (1996).

contrary to the presumption that "the legislature does not intend to enact superfluous or redundant legislation."[64]

33. The Commission finds that the term "operator" in K.S.A. 66-1802(j), when interpreted according to its plain meaning, means a person who either owns an underground tier 1 or tier 2 facility, or performs a function with respect to; exerts power or influence over; or controls the functioning of; that is, operates, an underground tier 1 or tier 2 facility, with the exception of "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 person or occupants of such property."

34. Having determined the plain meaning of the word "operates" in K.S.A. 66-1802(j), the Commission need not resort to any "canons of construction" in order to further interpret the word. However, the Commission finds it important to dispose of KCP&L's additional statutory construction arguments for its interpretation of "operator."

35. KCP&L attempted to support its inferred "rights of ownership" notion for the word "operates" by looking to the usage of "operator" in K.S.A. 66-1806(a) and K.A.R. 82-14-3(f). K.S.A. 66-1806(a) states:

> (a) Within two working days, beginning on the later of the first working day after the excavator has filed notice of intent to excavate or the first day after the excavator has whitelined the excavation site, an operator served with notice, unless otherwise agreed between the parties, shall inform the excavator of the tolerance zone of ***the underground facilities of the operator*** in the area of the planned excavation by marking, flagging or other acceptable method.[65]

K.A.R. 82-14-3(f) states:

> (f) Except in cases of emergencies or separate agreements between the parties, each operator of a tier 1 facility shall perform one of the following, within the two working days before the excavation scheduled start date assigned by the notification center:

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[64] *Stanley v. Sullivan*, 300 Kan. 1015, 1021, 336 P.3d 870 (2014).
[65] Emphasis added.

> (1) Inform the excavator of the location of the tolerance zone of ***the operator's underground facilities*** in the area described in the notice of intent of excavation; or
> (2) notify the excavator that the operator has no facilities in the area described in the notice of intent of excavation.[66]

KCP&L interpreted the bolded phrases in the above statute and regulation to mean that the definition of "operates" in K.S.A. 66-1802(j) must include the concept of "ownership rights."[67] This does not follow. The word "of" in K.S.A. 66-1806(a)'s phrase, "the underground facilities of the operator," does not necessarily translate to "owned by." Had the legislature intended such a meaning, it could easily have used the words "owned by." Likewise, the phrase "the operator's underground facilities" in K.A.R. 82-14-3(f) *may or may not* be construed to indicate ownership. The question cannot be settled on the basis of grammatical construction alone. The phrase does not necessarily convey ownership, and KCP&L has not pointed to anything in the immediate context of the regulation that implies ownership.

36. Moreover, KCP&L's interpretation of K.S.A. 66-1806(a) and K.A.R. 82-14-3(f) "prove too much." The phrases "facilities of the operator" and "operator's underground facilities" do not allow for the concept of ownership-type interests such as leases or management agreements.[68] If the underground electric facilities at issue are merely leased or managed by the operator, then those facilities are not the "facilities of the operator" or the "operator's underground facilities." In other words, the phrases must either convey that the operator *actually owns* the facilities, excluding any idea of leases, management contracts or the like, or they can just as easily mean "facilities of the [person who operates the line as a non-owner]" or the "[non-owner

[66] Emphasis added.
[67] *See* KCP&L's Initial Comments, ¶¶ 11, 16.
[68] *See* ¶ 23 of this Order, *supra*.

operator's] underground facilities." Opting for KCP&L's interpretation necessarily turns the phrase "owns or operates" in K.S.A. 66-1802(j) into "owns or owns."

37. The Commission agrees that statutes must be interpreted together in an effort to reconcile the provisions and thereby make them consistent.[69] However, the Commission finds that the definition of "operator" ascertained from the plain meaning of K.S.A. 66-1802(j) controls the understanding of the term "operator" in K.S.A. 66-1806(a) and K.A.R. 82-14-3(f), not the other way around, as KCP&L would have it. That is, K.S.A. 66-1806(a) and K.A.R. 82-14-3(f) should be read in light of, and consistent with, the plain meaning of "operator" in K.S.A. 66-1802(j). Thus, the Commission finds the phrases "facilities of the operator" and "the operator's underground facilities" properly refer to the facilities owned *or operated* by the operator.

38. KCP&L conceded that the phrase "owns or operates" in K.S.A. 66-1802(j) "can encompass entities other than the actual legal owner of a facility."[70] KCP&L nonetheless argued that "[a] word in a statute must be interpreted in the context of 'the company it keeps' to avoid ascribing a meaning so broad that it is inconsistent with its accompanying words,"[71] and therefore concluded that the word "operates" in the statute, because it "keeps company" with the word "owns," must "include persons who have ownership rights and responsibilities for the facilities . . . but are not actual owners of the facilities."[72] The Commission finds KCP&L's argument unpersuasive for several reasons.

39. First, as stated above, the immediate context of K.S.A. 66-1802(j) provides no indication that "ownership rights," "leases," or "management agreements" are in any way related to the meaning of the word "operates." This, by itself, militates strongly against KCP&L's

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[69] *See* KCP&L's Initial Comments, ¶ 10.
[70] KCP&L's Initial Comments, ¶ 20.
[71] KCP&L's Initial Comments, p. 10.
[72] KCP&L's Initial Comments, ¶ 20.

interpretation of the word. Second, KCP&L misapplied the statutory construction principles of *noscitur a sociis* and *ejusdem generis*.[73] As KCP&L stated, the principle of *noscitur a sociis* stands for the proposition that "[a] word is given more precise content by the neighboring ***words*** with which it is associated."[74] This means that where a word is surrounded by a list or group of other words with which it is associated, only then will the particular word be given more precise content.[75] The principle does not suggest that one particular word in the context of another particular word, without any contextual signifiers that the two words are related to one another in meaning, is therefore "given more precise content" by the single neighboring word.[76] KCP&L's error is easily demonstrated by substituting the phrase "owns or operates an underground tier 1 facility" in the statute with the phrases: "owns or operates a car," "owns or operates a hotel," or "owns or operates a restaurant." In each of these hypothetical phrases, the word "operates" has no necessary connection to "ownership" or "ownership rights." People often operate cars, hotels and restaurants without having any ownership rights over them. Some other contextual clues are needed if the word "operates" is to be invested with the notion of "ownership rights," beyond the mere fact that the words "owns or operates" appear together. By KCP&L's interpretation, all manner of words could be redefined according to the interpreter's mere preference.

40. The principle of *ejusdem generis* is equally inapposite in this case because the word "operates" is not "general and ambiguous," as KCP&L asserted,[77] and the phrase "owns or operates" is not "a statutory enumeration."[78] It is simply a statutory phrase containing two verbs,

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[73] *See* KCP&L's Initial Comments, ¶¶ 20-22.
[74] KCP&L's Initial Comments, ¶ 21 (citing *Yates v. U.S.*, 135 S.Ct. 1074, 1085 (2015)) (Emphasis added).
[75] *See Yates*, 135 S.Ct. at 1085. *See also Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226 (2008).
[76] *See* KCP&L's Initial Comments, ¶ 21.
[77] *See* KCP&L's Initial Comments, ¶ 22.
[78] *See* KCP&L's Initial Comments, ¶ 22.

neither one of which has been demonstrated by KCP&L to be more general or specific than the other.[79]

41. KCP&L argued that, because "KUUDPA provides for penalties to be assessed against 'operators' for violation of the Act," it constitutes "a penal statute and ambiguous terms, such as 'owns or operates' should be interpreted narrowly, in favor of those subject to their application."[80] The Commission reiterates that the phrase "owns or operates" is not ambiguous. Moreover, a statute may only be given a "narrow" interpretation if such an interpretation is a valid one. KCP&L's interpretation of "operates," whether one considers it narrow or broad, is invalid because it reads the notion of "ownership rights" into the definition of "operates," something clearly not intended by the legislature. KCP&L's proposed "narrow" interpretation of "operates" ends up redefining the word, and thus, the Commission rejects KCP&L's argument on this point.

42. KCP&L further argued that "[i]nterpreting KUUDPA in a way that holds an entity legally responsible for assets over which it does not possess a legal right to control is an unreasonable result."[81] KCP&L's argument here assumes what it needs to prove, namely, that it has no legal right to control customer facilities upstream of a customer-controlled disconnect point. However, if KCP&L does, in fact, operate customer-owned lines upstream of such a disconnect point, then it is not unreasonable to assert that KCP&L has a legal right to control such lines.

43. KCP&L then appealed to "other sources" to support its interpretation of the term "operator" in K.S.A. 66-1802(j), namely, the Kansas One-Call "Excavator's Manual"[82] and the Kansas One-Call brochure, "Safe Digging Tips."[83] The Commission notes the "Disclaimer"

[79] *See* KCP&L's Initial Comments, ¶ 22.
[80] KCP&L's Initial Comments, ¶ 26.
[81] KCP&L's Initial Comments, ¶ 27.
[82] KCP&L's Initial Comments, ¶ 28.
[83] KCP&L's Initial Comments, ¶ 29.

provided at the beginning of the Excavator's Manual, stating that the manual merely "serve[s] as a guide to assist excavators" in safe digging, and "does not, in any way, take the place of the Kansas Underground Utility Damage Prevention Act (KUUDPA)[,] the state statute, or any regulations developed by the Kansas Corporation Commission."[84] The Manual further states that "none of the information contained in this booklet should be used for litigation purposes whatsoever."[85] Thus, the Commission finds that wherever the Manual differs from the plain meaning of K.S.A. 66-1802(j) as expounded in this Order, the Manual is incorrect, has no binding authority, and stands in need of revision. The Commission finds this is also true of Kansas One-Call's brochure, "Safe Digging Tips."[86] Indeed, a central reason this general investigation was opened was so that the Commission could investigate the veracity of the "established understanding in the industry" of the term "operator" in the Excavator's Manual.[87]

44. None of KCP&L's arguments from the rules of statutory construction are convincing, and thus, KCP&L's interpretation of "operator" fails. Now, the Commission must determine the factual question of whether an electric utility in Kansas "operates" privately-owned underground facilities over which the utility's electrical power is transported,[88] where the customer has no ultimate power to de-energize the facility.

b. The factual question of who "operates" privately-owned underground facilities over which a utility's electrical power is transported, and where the utility has ultimate power to de-energize the facility.

45. In paragraph 31 above, the Commission found that the term "operate" means to perform a function/control the functioning of (a machine, process, or system), to work or use a machine, apparatus, or the like; to exert power or influence. Thus, the Commission must determine

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[84] Kansas One-Call Excavator's Manual, p. 1. *See* KCP&L's Initial Comments, Attachment B.
[85] *Id.*
[86] *See* KCP&L's Initial Comments, Attachment C.
[87] *See* KCP&L's Initial Comments, ¶ 28.
[88] *See* KCP&L's Initial Comments, ¶ 8.

whether an electric utility performs a function/controls the functioning of, works, or exerts power or influence over privately-owned commercial underground electric facilities "at least as far as the meter,"[89] or even to the point where the customer has ultimate power to de-energize the facility.

46. KCP&L argued that "[i]t is not sensible to interpret the term 'operator' under K.S.A. 66-1802(j) as broadly covering any facilities over which a utility's energy flows."[90] KCP&L claimed that it has no "control" over its customers' privately-owned facilities, and that imposition of "certain standards for the owner of a private underground line to follow to protect the public safety and the utility's system . . . does not rise to the level of exercising control or rights similar to ownership over those private facilities."[91] KCP&L continued:

> KCP&L only has access to the customer's privately-owned secondary conductors for the purposes of maintaining metering integrity, restricting access to higher voltage primary equipment for safety reasons and for protecting other customers' facilities from inadvertent damage. KCP&L personnel do not disconnect or energize customer owned secondary conductors unless instructed to do so by the customer or unless an emergent safety issue is identified or if it is necessary to disconnect the customer for non-payment. . . . The customer continues to have control over how its private facilities are configured. Downstream of the point of delivery, the customer determines the path of the facilities and the use of the power because the power and the facilities used to carry it beyond that point belong to and are controlled by the customer. KCP&L does not control the design specifications for underground service lines. . . . [T]he customer has full functional control of where the line is located and whether a switch or disconnect is placed upon the line. Although the customer must coordinate with KCP&L if the customer wants to de-energize or re-energize his lines, doing so is for the purpose of ensuring the safety of KCP&L's facilities as well as the customer's. The customer still determines when those events are necessary and schedules with KCP&L when they are to occur.[92]

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[89] *See* December 15, 2017 R&R, p. 2.
[90] KCP&L's Initial Comments, ¶ 11.
[91] KCP&L's Initial Comments, ¶ 18. *See* KCP&L's Reply Comments, p. 2 (stating that a utility "cannot reasonably be classified as the 'operator' of the facilities simply because the customer might need access to its transformer to disconnect service or because the facilities are part of the network over which power travels to reach the customers' location").
[92] KCP&L's Initial Comments, ¶¶ 18-19.

47. Westar, although not addressing the specific definition of the term "operates," argued that K.S.A. 66-1802(j) "should be interpreted as per the individual utility's Commission-approved tariff, applicable electric codes, and negotiated agreements with customers regarding the service point constituting the point of demarcation between the utility's wiring and the customer's wiring."[93] Westar also argued that "[t]he utility should not be required to locate customer-owned facilities."[94]

48. KEC essentially repeated KCP&L's arguments regarding the factual question of who "operates" privately-owned underground facilities,[95] and added that "KUUDPA does not provide a right of entry for a utility if deemed an 'operator' under KUUDPA."[96]

49. In line with KCP&L's comments, Midwest, Pioneer and Southern Pioneer asserted that "[i]t would be unreasonable and inappropriate to interpret the 'operator' under K.S.A. 66-1802(j) as broadly covering any facilities over which a utility's energy flows, even if the utility does not have a legal possessory interest in the facilities."[97] Midwest, Pioneer, Southern Pioneer, and KEC also disagreed with the proposition that a utility "operates" the line simply "because the electric utility's service traverses customer-owned lines."[98]

50. Empire argued that the term "operates" is synonymous with "maintains,"[99] and concluded that "[t]he utility service provider should be required to locate the underground facilities it owns."[100]

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[93] Westar's Initial Comments, ¶ 5. *See* Westar Energy, Inc.'s Reply to Commission Staff's Report and Recommendation, ¶ 4 (Feb. 12, 2018) (Westar's Reply to Staff R&R).
[94] Westar's Initial Comments, ¶ 19.
[95] *See* KEC's Initial Comments, ¶¶ 12, 14, 17, 20.
[96] KEC's Initial Comments, ¶ 15.
[97] Joint Reply Comments of Midwest Energy, Inc., Pioneer Electric Cooperative, Inc., and Southern Pioneer Electric Company, ¶ 3. (Joint Reply Comments). *See* Joint Response of Midwest Energy, Inc., Pioneer Electric Cooperative, Inc., Southern Pioneer Electric Company, and Kansas Electric Cooperatives, Inc., ¶ 11. (Joint Response).
[98] Joint Response, ¶ 6.
[99] Empire's Initial Comments, ¶¶ A and B.
[100] Empire's Initial Comments, ¶ B.

51. The dictionary definition of "operate" uses the word "control."[101] Moreover, KCP&L emphasized its claim that it has no "control" over privately-owned underground electric facilities.[102] Thus, in determining whether a particular utility exercises control over privately-owned underground electric lines, the Commission finds it necessary to provide a brief explanation of what it means to "control" something like an underground electric line. KCP&L did not attempt to define the word "control," but simply asserted it has no control over privately-owned commercial lines because it has no control over *where* those lines are put in the ground nor over the purposes for which the customer will use the power coming over the lines nor whether the line contains a customer disconnect.[103] KCP&L attempted to support its argument that it has no control over privately-owned lines by appealing to the example of KCP&L power being transmitted "over transmission lines owned by Westar and operated by SPP."[104] In such a case, KCP&L claimed that it is not "operating," that is, controlling, the transmission lines.[105] According to KCP&L, the kind of control that the term "operates" requires can only be exercised by a person with ownership rights and responsibilities over the underground facilities.[106]

52. Webster's Dictionary defines "control" as "to exercise restraining or directing influence over; to have power over."[107] The Oxford English Dictionary defines "control" as "[d]etermine the behavior or supervise the running of; maintain influence or authority over; regulate (a mechanical or scientific process)."[108]

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[101] *See* ¶¶ 31 and 45 of this Order, *supra*.
[102] KCP&L's Initial Comments, ¶ 18.
[103] *See* KCP&L's Initial Comments, ¶¶ 17-19
[104] KCP&L's Initial Comments, ¶ 24.
[105] KCP&L's Initial Comments, ¶ 24.
[106] KCP&L's Initial Comments, ¶ 25.
[107] https://www.merriam-webster.com/dictionary/control, accessed online March 6, 2018.
[108] https://en.oxforddictionaries.com/definition/control, accessed online March 6, 2018.

53. While all of the utilities in this case have different tariffs, none of them argued that where they service customers with privately-owned underground lines, it is the customer who owns the electricity flowing over those lines upstream of the meter. Further, none of the utilities asserted that the customer ultimately or independently controls when and how power flows over the privately-owned line upstream of the meter, or downstream of the meter absent a customer-controlled disconnect point at the meter.[109]

54. The fact that the utilities own the energy upstream of the meter, and ultimately control when and how power flows over all lines upstream of the point where the customer has the power to independently de-energize the line, demonstrates the utilities are the ones *performing/controlling the functioning of the process or system* of electrical flow over the lines.[110] The utilities are certainly *using* the apparatus that is the service line to send electricity to the customer, and by having ultimate authority over when and how electricity flows, they are exerting power or influence on the privately-owned lines.[111]

55. Moreover, by making the ultimate determination as to when and how electricity flows over a privately-owned line upstream of the disconnect point, the utilities exercise the restraining or directing influence over that electricity,[112] not the customer. The utilities "determine the behavior or supervise the running of" and "regulate" the flow of electricity over the privately-owned lines, and therefore, they are exercising "control" over those lines.[113]

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[109] *See* Westar's Initial Comments, ¶¶ 14-15 (stating that National Electric Code (NEC) articles applying to disconnects mean "the utility requires disconnects at the meter if the meter is remote and the customer would need utility intervention to disconnect the underground circuit when the meter is on the building"). *See also* Pioneer's and Southern Pioneer's Initial Comments, ¶ 11 (stating that "Pioneer and Southern Pioneer's service and title to the energy it provides over its electric facilities . . . clearly passes to the customer at the meter" and "in all cases the customer may install and own a breaker or disconnect switch on the customer side of the meter to unilaterally disconnect the flow of energy over the customer-owned facilities at any point in time").

[110] *See* ¶ 45 of this Order, *supra*.

[111] *See* ¶ 45 of this Order, *supra*.

[112] *See* ¶ 52 of this Order, *supra*.

[113] *See* ¶ 52 of this Order, *supra*.

56. In KCP&L's case, it asserted that the customer determines when de-energizing or re-energizing of its lines is necessary and schedules with KCP&L when those events occur.[114] However, KCP&L previously asserted that its "personnel do not disconnect or energize customer owned secondary conductors unless instructed to do so by the customer ***or unless an emergent safety issue is identified*** or if it is necessary to disconnect the customer for non-payment."[115] Thus, the customer *does not* always determine when de-energizing or re-energizing of its lines happens.[116] Indeed, KCP&L's statement that "the customer ***must coordinate with KCP&L*** if the customer wants to de-energize or re-energize his lines,"[117] is an admission that the customer does not have ultimate power over its happening. The utility alone has the authority and power to control whether electricity is on or off in the privately-owned line upstream of the point where the customer can independently de-energize the line.

57. KCP&L's arguments that it has no control over privately-owned commercial lines because it has no control over *where* those lines are put in the ground nor over the purposes for which the customer will use the power coming over the lines nor whether the customer opts for a disconnect[118] are irrelevant to whether KCP&L "operates" or "controls" the line.[119] Once power ceases to flow over the line, where such cessation is ultimately under KCP&L's control, the line

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[114] KCP&L's Initial Comments, ¶ 19. *See* ¶ 46 of this Order, *supra*.
[115] KCP&L's Initial Comments, ¶ 18. *See* ¶ 46 of this Order, *supra*. (Emphasis added).
[116] *See* KCP&L's General Rules and Regulations Applying to Electric Service, Section 7.07(A) (stating that "[t]he Company shall have the right to curtail (including voltage reduction), interrupt or suspend electric service to the Customer for temporary periods as may be necessary for the inspection, maintenance, alteration, change, replacement, or repair of electric facilities, or for the preservation or restoration of its system operations or of operations on the interconnected electric systems of which the Company's system is a part"). KCP&L's Commission-approved Rules and Regulations can be accessed online at http://www.kcpl.com/my-bill/for-home/rate-information/rules-and-regulations.
[117] KCP&L's Initial Comments, ¶ 19.
[118] *See* KCP&L's Initial Comments, ¶¶ 17-19.
[119] Contrary to KCP&L's assertions, its tariff demonstrates that the customer may not ultimately hold the right to determine where an underground line will be located. *See* KCP&L's General Rules and Regulations Applying to Electric Service, Section 6.04 (stating that "[t]he Customer's installation must conform with all . . . reasonable requirements of the Company").

is of no more use to the customer than an unattached garden hose. At that point, it matters not at all where the customer has chosen to place the line, for what purpose the customer might want to use it, or the reason KCP&L de-energized the line.[120] Once the underground facility is dead, the customer can do nothing with it that correlates to the purpose for which it was installed, namely, to have electrical power running through it.[121]

58. KCP&L's attempt to demonstrate its lack of control over privately-owned lines by resorting to the example of KCP&L power being transmitted "over transmission lines owned by Westar and operated by SPP"[122] also fails. When KCP&L utilizes transmission lines owned by Westar and operated by SPP, KCP&L's service is subject to SPP's tariff terms.[123] Pursuant to SPP's tariff, KCP&L cannot control the transmission facilities of Westar or any other incumbent transmission owner.[124] Thus, in this example, the Commission agrees that KCP&L does not exercise any ownership or control over the transmission lines. However, when it comes to privately-owned underground service lines upstream of a customer-controlled disconnect within KCP&L's service territory, KCP&L's tariff grants it a substantial level of control, akin to Westar or SPP's control in KCP&L's example.[125] Commission Staff's Brief on KUUDPA Responsibilities in the 15-544 Docket[126] detailed KCP&L's level of control under its tariff:

> For instance, KCP&L controls the design specifications for every underground service line.[127] And once the line is energized, the customer is not allowed to 'rearrange, damage, injure, destroy, alter, or interfere with'

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[120] I.e., for safety or consumer protection purposes. *See* ¶ 46 of this Order, *supra*

[121] This is also why the Commission rejects KEC's attempt to imply that a cooperative's "sending electrons to the cooperative member for that cooperative member's self-determined use" does not make the cooperative one who "operates" the system. *See* KEC's Initial Comments, ¶ 20. "Sending electrons" to the customer is the sole reason for the underground line's existence. To control that is to control everything of importance regarding the line.

[122] *See* ¶ 51 of this Order, *supra.*

[123] *See* 15-544 Docket, Commission Staff's Reply to KCP&L's Response to Staff's Report and Recommendation, ¶ 13 (Dec. 10, 2015).

[124] *Id.*

[125] *Id.*

[126] Cited in Staff's December 15, 2017 R&R, p. 2. *See* Commission Staff's Brief on KUUDPA Responsibilities, ¶¶ 16-19.

[127] KCP&L Rules and Regulations, Section 8.03(A)(6).

> the line.[128] KCP&L also controls the operation of a service line because it uses the facilities to transfer energy to the meter, where ownership of the energy is transferred.[129] . . . Under KCP&L's tariff, the customer has no legal right to use or otherwise control the energy until it is metered.[130] Of course, this is necessary to ensure accurate metering and customer safety.[131] However, the legal effect of these restrictions is that KCP&L, through its tariff, has retained legal ownership of the energy until it is metered. . . . Under KCP&L's tariff, any risk of power loss does not transfer to the customer until the metering occurs. Absent customer tampering or intentional unauthorized use, the tariff does not allow KCP&L to charge a customer for power loss between the delivery point and the meter.[132] In that instance, the customer would simply pay for energy recorded by the meter.[133] Therefore, the tariff-defined point of delivery is irrelevant, because risk of loss and legal ownership rights do not transfer to a customer until energy is metered. The control KCP&L exercises over energy in a private underground service line (rising to the level of legal ownership) demonstrates that it operates the facility to deliver energy to the customer.[134]

59. The Commission acknowledges that tariff provisions will vary somewhat among Kansas electric utilities, but absent a tariff provision allowing customers independently to de-energize privately-owned underground lines, the Commission finds the utility "operates" such privately-owned lines, based on the above analysis. In addition, the Commission rejects KCP&L's argument that it will be treated differently than other utilities given the Commission's interpretation of K.S.A. 66-1802(j) in this Order.[135] Rather, KCP&L will have responsibility to

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[128] KCP&L Rules and Regulations, Section 1.21: Definitions – Tampering.
[129] Docket No. 15-KCPE-544-COM, Direct Testimony of Leo M. Haynos, p. 7 (July 6, 2016) (Haynos Direct).
[130] *See* KCP&L Rules and Regulations, Section 1.21: Definition of Tampering: Pursuant to this section, the customer may not "rearrange, damage, injure, destroy, alter, or interfere with…service wires…"; Section 1.22: Definition of Unauthorized Use: "…the unmetered use of electricity resulting from unauthorized connections, alterations or modifications to service wires…"; *see also*, Sections 5.01(H) and 5.04(B), "If an unauthorized interference or physical diversion of service is involved, the Company may discontinue service immediately;" *see also*, Section 6.01 – The "customer's installation" only includes facilities "to transform, control, regulate, or utilize" energy. The customer arguably cannot perform any of these functions until energy is metered, so any line upstream of the meter should not be considered the "customer's installation."
[131] Docket No. 15-KCPE-544-COM, Direct Testimony of Emeka Y. Anyanwu, p. 8 (Aug. 3, 2016).
[132] *See* KCP&L Rules and Regulations, Section 9.15: Metering - Billing Adjustments. *See also*, Sections 1 (Definitions), 4 (Billing and Payment), and 6 (Customer's Service Obligations).
[133] KCP&L Rules and Regulations, Section 9.14: Metering – Evidence of consumption.
[134] Commission Staff's Brief on KUUDPA Responsibilities, ¶¶ 16-19.
[135] *See* KCP&L's Initial Comments, ¶ 30.

mark privately-owned commercial underground facilities to the same endpoint as do the rest of the utilities. KCP&L's service design will simply have to conform to the statute.

60. Moreover, with respect to tariffs, the Commission rejects Westar's argument that "K.S.A. 66-1802(j) should be interpreted as per the individual utility's Commission-approved tariff, applicable electric codes, and negotiated agreements with customers regarding the service point constituting the point of demarcation between the utility's wiring and the customer's wiring."[136] Tariffs must ultimately conform to the plain meaning of statutes, not the other way around. Thus, the Commission finds that, to the extent a utility's tariffs do not conform to the plain meaning of K.S.A. 66-1802(j) as set forth above, the utility's tariffs must be amended to bring them into conformity with the statute. The same is true of the Kansas One-Call Excavator's Manual and "Safe Digging Tips."[137]

61. Based on the definition of the terms "operate" and "control," the Commission finds that Kansas electric utilities *control* privately-owned commercial underground service lines over which the utility's energy flows, where the customer does not have independent or ultimate power to de-energize the service line. KCP&L in particular exercises additional control by virtue of the fact that "[a]ll underground service facilities installed by the Customer shall meet [KCP&L's] specifications and be approved by [KCP&L] in advance of their installation."[138] Thus having control, the Commission finds the utilities "operate" the privately-owned underground service lines in such circumstances.

62. The Commission finds it has not "expand[ed]" the definition of "operator" provided in K.S.A. 66-1802(j),[139] but rather, has interpreted the definition according to the legislature's

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[136] Westar Energy, Inc.'s Reply to Commission Staff's Report and Recommendation, ¶ 4.
[137] *See* ¶ 43 of this Order, *supra*.
[138] KCP&L's Rules and Regulations Applying to Electric Service, Section 8.03(A)(6).
[139] *See* Pioneer's and Southern Pioneer's Initial Comments, ¶ 11; *see also* KCP&L's Initial Comments, ¶ 32.

intent as evidenced by the statute's plain language. The Commission agrees the legislature *could have* written the statute to say explicitly that a "public utility [is] responsible for marking all facilities, including privately-owned facilities,"[140] but it need not have done so in order to affirm that proposition. More importantly, however, the legislature did not require a public utility to mark *all* facilities. Instead, the legislature gave a narrow application to the word "operates" in K.S.A. 66-1802(j), such that, along with K.S.A. 66-1806(a), it brings the public utilities into the ambit of responsibility for marking all underground electric facilities, including privately-owned facilities, *upstream of a customer-controlled disconnect point*. The Commission finds that electric public utilities operate privately-owned commercial underground electric facilities because it is uncontested in this docket that the utilities own the electric power running through such underground facilities upstream of the meter, and ultimately control that electric power on portions of underground facilities where customers are prohibited from taking any unilateral and independent action on such underground facilities, when energized, without utility involvement.[141] Thus, the Commission agrees with Staff's recommendation that "the requirements of 'operators' as defined in KUUDPA . . . apply to facilities that are owned by the utility and to any customer-owned commercial electric service lines that are upstream of the customer's metering point."[142] The Commission finds that those same requirements apply to privately-owned facilities downstream of meters that have no customer-controlled disconnect point.

63. The Commission rejects Staff's "alternative approach" of holding utilities responsible for locating only "that portion of a customer-owned electric service line that is in a public easement and upstream of the meter"[143] because, as the above analysis demonstrates, the

[140] *See* KCP&L's Initial Comments, ¶ 32.
[141] *See* December 15, 2017 R&R, p. 3.
[142] December 15, 2017 R&R, p. 2.
[143] December 15, 2017 R&R, p. 8.

electric utilities are the "operator" of all privately-owned commercial underground electric service lines upstream of a customer-controlled disconnect point. Thus, the law does not permit approval of Staff's compromise recommendation.

c. Practical issues raised by the comments

64. At the outset, the Commission reiterates that the practical issues raised by the comments in this docket, including but not limited to: differing utility definitions of the "point of service" for commercial customers, liability for inaccurate locates and resulting damage to privately-owned lines,[144] lack of utility knowledge regarding the location of privately-owned underground lines,[145] a utility's lack of maps of privately-owned lines,[146] the legality of entering private property to provide locates,[147] differences among various states' laws regarding responsibility for providing locates,[148] and the availability of Kansas One-Call,[149] while significant and in need of addressing, are secondary to the statutory requirements placed on operators. That is, these practical issues must be resolved in a way that allows the utilities to comply with the KUUDPA statutes as they are currently written.

65. The Commission also finds it important to emphasize that K.S.A. 66-1802(j) and K.S.A. 66-1806(a) hold both the entity that *owns* the commercial underground line upstream of the customer-controlled disconnect point, and the entity that *operates* that same line, as responsible for providing accurate locates. Thus, the owner of an underground line, who may have greater knowledge of its location,[150] must work in concert with the utility in marking implicated facilities.

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[144] *See e.g.* Empire's Initial Comments, p. 2, ¶ B.b.
[145] *See e.g.* Midwest's Initial Comments, ¶ 9.
[146] *See e.g.* KCP&L's Initial Comments, ¶ 14.
[147] *See e.g.* KEC's Initial comments, ¶ 20.
[148] *See e.g.* KCP&L's Reply Comments, p. 5.
[149] *See e.g.* KEC's Reply Comments, ¶ 1.
[150] *See* KCP&L's Initial Comments, ¶ 38.

Such joint responsibility was no doubt intended to achieve KUUDPA's purpose of minimizing safety risks associated with digging near underground utilities.[151]

66. Toward the goal of minimizing digging risks, the Commission deems it best to clarify the universal endpoints at which the utilities' responsibility for marking underground electric service lines terminates.[152] While the point at which a utility's ownership of the underground service line ends may be a clear demarcation point, it is not an endpoint in accordance with K.S.A. 66-1806(a)'s requirement that an "operator" provide markings for the line. Because the KUUDPA statutes require a utility to mark all commercial underground lines upstream of a customer-controlled disconnect point, the Commission finds that such a point is the clear universal endpoint for utility marking responsibilities.

67. Staff acknowledged the utilities' concern over increased utility liability if the utilities are required to provide markings for underground commercial service lines for which they have no construction records.[153] Staff noted the comments stating that "[t]his issue is of particular concern for commercial customers, which generally are served at higher voltage levels than residential customers."[154] Staff's "compromise position" sought to address this concern, but the Commission rejects Staff's compromise because it runs afoul of the law. However, given the Commission's interpretation of the plain meaning of K.S.A. 66-1802(j) above, the utilities do not provide a persuasive basis for their concerns over increased liability. KCP&L's argument that holding it responsible for marking privately-owned underground lines would simply shift liability "from the owner of those lines to the customers of the utilities for damages resulting from problems

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[151] *See* December 15, 2017 R&R, p. 2.
[152] *See* December 15, 2017 R&R, pp. 3, 7 (stating that "[i]n Staff's view, an endpoint of the utility's locate obligation that is universally evident to utilities, excavators, and customers is necessary in order [to] promote public safety. Staff believes this point of demarcation should be the customer meter").
[153] December 15, 2017 R&R, p. 2.
[154] December 15, 2017 R&R, p. 5

occurring" on the lines[155] fails to account for the Commission's finding above that *both* the owner of, and the non-owner utility that operates, the underground line must work together to provide accurate markings.[156] While liability is a significant issue, the Commission's chief concern is public safety and protection of vital underground infrastructure. Following KUUDPA's statutory guidelines best promotes such safety and protection.

68. A number of the intervenors argued that obligating utilities to provide markings for privately-owned underground electric lines would require the utilities to enter private property, thereby possibly subjecting the utilities to trespass violations.[157] This argument lacks merit because none of the utilities have cited any law as a basis for this claim. Thus, it amounts to nothing more than argument by assertion. Moreover, while the Commission believes there is merit to Staff's assertion that the utilities' right of ingress and egress to the meter translates to the same right for the purpose of providing locates,[158] the Commission need not rely on Staff's argument. Instead, the Commission finds that, where the KUUDPA statutes impose a duty upon an entity, the statutes necessarily allow the entity to take all reasonable steps to carry out that duty. The Commission rightly presumes the legislature would not obligate utilities to provide markings on privately-owned underground electric facilities while knowing that such an obligation would require the utilities to engage in unlawful behavior.[159]

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[155] *See* KCP&L's Response to Staff's R&R, ¶ 5.
[156] *See* ¶ 65 of this Order, ***supra***. KEC also fails to account for the joint responsibility for markings between owner and operator of the line. *See* KEC's Initial Comments, ¶ 18.
[157] *See* Pioneer's and Southern Pioneer's Initial Comments, ¶ 19; KCP&L's Response to Staff's R&R, ¶ 7; Joint Response of Midwest, Pioneer, Southern Pioneer, and KEC to Staff's R&R, ¶ 15.
[158] *See* December 15, 2017 R&R, p. 5.
[159] *See State v. Bee*, 288 Kan. 733, 737-38, 207 P.3d 244, 248-49 (2009) (stating the presumption "that the legislature expressed its intent through the language of the statutory scheme" and "that the legislature acted with full knowledge and information about the statutory subject matter, prior and existing law, and the judicial decisions interpreting the prior and existing law and legislation").

69. Regarding KCP&L's potential need to handle differences in underground utility damage prevention laws between Kansas and Missouri,[160] the Commission finds it cannot alter the plain meaning of the KUUDPA statutes in order to alleviate such statutory differences, no matter how well the present system is ostensibly working.[161] That prerogative belongs to the Kansas legislature.

70. Regarding the availability of Kansas One-Call, KEC's comment that "a landowner, a contractor/excavator or an electric utility can simply call Kansas One-Call to request marking of privately owned facilities"[162] does not nullify the fact that, under KUUDPA, electric utilities are "operators" of privately-owned commercial underground electric facilities and are therefore responsible for marking such facilities. Further, KEC has not demonstrated that all owners of privately-owned commercial underground lines upstream of the customer-controlled disconnect point are members of the notification center.[163] Thus, the Commission fails to see how KEC's proposal increases safety.

71. Regarding increased safety, the Commission finds the intervenors have again resorted to unsupported opinions about what will enhance safety. KCP&L merely asserted, without evidence, that "public safety is not enhanced by transferring liability for damages from excavators and the owners of private facilities to the customers of the electric public utilities . . . Making the public utility responsible for marking privately-owned facilities . . . does not equate to heightened public safety."[164] KCP&L conceded that "a utility company may have more experience with the

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[160] *See* KCP&L's Reply Comments, p. 5.
[161] *See* KCP&L's Reply Comments, p. 5.
[162] KEC's Reply Comments, ¶ 1.
[163] The requirement of K.S.A. 66-1805(a) notwithstanding.
[164] KCP&L's Initial Comments, ¶¶ 33-34. *Contra* KEC's Reply Comments, p. 7 (stating "[t]here will be no added safety for Kansans if the staff interpretation is adopted"). *See* Westar's Initial Comments, ¶¶ 7-8 (stating that Westar's interpretation of "operator" will "promote[] safety by having a clear point of demarcation between the utility and the customer where each is responsible for the lines that they installed and of which they have historic knowledge

general locating process than a customer,"[165] but then averred that "it does not necessarily follow that the utility has more knowledge regarding the underground facilities at a location than the owner of the property at the location."[166] The Commission reiterates its primary concern for public safety and for accurate markings of underground facilities, which can best be accomplished by the utility, with its experience, working together with the property owner, with his or her knowledge of the facilities, to provide such markings. KCP&L and the other commenters have not provided evidence-based arguments as to what will enhance safety.[167] Furthermore, the issue of who has responsibility for locates cannot be decided on the basis of competing factual opinions regarding what will lead to increased safety. As with all of the other practical issues, the legislature has already decided the question of markings responsibility through the plain meaning of K.S.A. 66-1802(j) and K.S.A. 66-1806(a).

72. Inasmuch as the various practical issues noted above need to be addressed more specifically or in-depth, or where other issues not mentioned arise, the Commission directs Staff to work with the affected parties to develop the appropriate solutions to those practical issues, which may be addressed in utility-specific dockets, including, but not limited to, amending tariff language, updating the Excavator's Manual, and revising Kansas One-Call publications.

THEREFORE, THE COMMISSION ORDERS:

A. Kansas electric utilities fall within the definition of an "operator" pursuant to K.S.A. 66-1802(j), and therefore, are required to provide locate marks for underground facilities

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regarding design and installation"). Westar's comment forecloses the possibility of increased safety where both utility and customer work together to provide locates.

[165] KCP&L's Initial Comments, ¶ 35.

[166] KCP&L's Initial Comments, ¶ 35.

[167] *Contra* KCP&L's Initial Comments, ¶ 36. K.S.A. 66-1803 does not indicate who is best able to provide locates for underground lines, but only that an excavator shall ascertain, in the prescribed manner, a location of all underground facilities in the proposed excavation area. K.S.A. 66-1809 simply requires the excavator to excavate with the necessary reasonable care, but again, provides no indication of who is best able to provide locates.

owned by the utility upstream of the meter and for any privately-owned commercial underground electric facilities that are upstream of the customer-controlled disconnect point, pursuant to K.S.A. 66-1806(a).

B. Staff is directed to work with the affected parties to develop appropriate solutions to the above-referenced practical issues under KUUDPA, which may be addressed in utility-specific dockets, including, but not limited to, amending tariff language, updating the Excavator's Manual, and revising Kansas One-Call publications.

C. The parties have fifteen (15) days from the date this Order was served by electronic mail in which to petition for reconsideration.[168]

D. The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further orders as it deems necessary.

BY THE COMMISSION IT IS SO ORDERED.

Albrecht, Chair; Emler, Commissioner; Apple, Commissioner

Dated: 03/15/2018

Lynn M. Retz
Secretary to the Commission

MJD

[168] K.S.A. 66-118b; K.S.A. 77-529(a)(1).

CERTIFICATE OF SERVICE

17-GIME-565-GIV

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