

³ K.S.A. 66-1801, *et seq*; Staff R&R, pp. 4-5.

KCP&L exercises over such facilities, among other reasons.⁴ Therefore, the inaccurate markings constituted a violation of KUUDPA.

4. On November 19, 2015, KCP&L filed its Response to Staff's Report and Recommendation. In its Response, KCP&L admits that it did mark the Complainants' privately owned underground service line.⁵ KCP&L further notes its practice of marking such facilities "to assist its customers."⁶ However, with regard to locating responsibilities, KCP&L disagrees with Staff's interpretation of KUUDPA. In particular, KCP&L believes that only an entity "exercising powers of ownership or legal control" over facilities should be considered the "operator" of such facilities under KUUDPA.⁷ As such, KCP&L argues the Complainants were the operator of the damaged underground service line, and KCP&L had no obligation to accurately locate the facilities.⁸

II. Staff's Reply to KCP&L's Response

A. KCP&L's Interpretation of "Operator" Conflicts with the Plain Language of KUUDPA.

5. KUUDPA defines the term "Operator" as follows:

"Operator" means 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.⁹

6. As noted above, KCP&L contends that only entities "exercising powers of ownership or legal control" over facilities should be considered the "operator" of such facilities under KUUDPA. KCP&L apparently bases this interpretation on a separate provision of

⁴ Staff R&R, p. 4.

⁵ KCP&L's Response to Staff's Report and Recommendation, November 19, 2015, ¶ 10. (KCP&L Response, ¶ 10.)

⁶ KCP&L Response, ¶ 14.

⁷ KCP&L Response, ¶¶ 17-19.

⁸ KCP&L Response, ¶¶ 37-38.

⁹ K.S.A. 66-1802(j). Emphasis added.

KUUDPA, which refers to “the underground facilities of the operator.”¹⁰ A plain reading of the statute does not support KCP&L’s interpretation.

7. The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained.¹¹ When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. Where 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.¹²

8. 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.¹³ The legislature instead stated that any person who either owns *or* operates facilities is responsible for providing locates. In its R&R, Staff identified a number of factors showing KCP&L does, in fact, operate private service lines upstream of the meter because it exercises functional control over such facilities.

9. Furthermore, the two KUUDPA provisions¹⁴ cited by KCP&L are not in conflict when Staff’s interpretation is followed. Specifically, the phrase “facilities of the operator” in K.S.A. 66-1806(a) simply refers to the facilities owned or operated by the operator when read together with the definition of “operator” in K.S.A. 66-1802(j). In other words, the phrase “facilities of the operator” clearly encompasses facilities under the operator’s functional control under a plain reading of the statute.

¹⁰ KCP&L Response, ¶ 18; K.S.A. 66-1806(a).

¹¹ *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607, 214 P.3d 676 (2009).

¹² *Double M Constr. v. Kansas Corporation Comm’n*, 288 Kan. 268, 271-72, 202 P.3d 7 (2009).

¹³ For instance, the legislature *could have* defined an operator as “any person who owns *and* operates underground facilities” or, simply, “any person who owns underground facilities.”

¹⁴ K.S.A. 66-1802(j) and 66-1806(a).

10. If KCP&L's interpretation – that K.S.A. 66-1806(a) only refers to facilities actually owned by an operator – is adopted, the phrase “or operates” in K.S.A. 66-1806(j) would be impermissibly read out of the statute and given no effect. Kansas courts are quite clear that 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.¹⁵ KCP&L's flawed interpretation presumes that the phrase “or operates” in K.S.A. 66-1806(j) is useless or meaningless. As a result, KCP&L has created a conflict where none existed.

11. Next KCP&L twists Staff's interpretation of the term “operator,” claiming it would broadly cover any facilities over which a utility's energy flows.¹⁶ This is clearly not Staff's interpretation. Staff is only arguing a utility is an operator when it exercises a high degree of operational control over facilities – as KCP&L does with service lines upstream of meter facilities. However, Staff does note that controlling when and how power flows over a line is a strong indicator of operational control. Staff also notes that KCP&L does not contest that it owns the energy in the customer-owned line upstream of the meter.

12. KCP&L continues its argument by analogizing this situation to that of transmission service from SPP over facilities of other incumbent utilities. KCP&L states,

Staff's new interpretation of the term “operator” fails to recognize the difference between transmitting power over a line versus actually exercising the powers of ownership or legal control over such line. As an example, it is obvious that when KCP&L transmits its power over transmission lines owned by Westar and operated by Southwest Power Pool (SPP), KCP&L is not “operating” those transmission lines. The same analysis applies to the lines on private property owned by KCP&L's customers.¹⁷

13. KCP&L's analogy is faulty. However, the example of transmission service is a helpful analogy for understanding Staff's position because, in both cases, the tariff establishes

¹⁵ *Southwestern Bell Tel. Co. v. Beachner Constr. Co.*, 289 Kan. 1262, 1269, 221 P.3d 558 (2009).

¹⁶ KCP&L Response, ¶¶ 19-20.

¹⁷ KCP&L Response, ¶ 20.

which entity exercises functional control of the facilities. When KCP&L utilizes transmission service over SPP's network, such service is subject to the terms of SPP's tariff. Under SPP's tariff, KCP&L has no right or means to control the transmission facilities of Westar or any other incumbent transmission owner. The present situation is quite the opposite. Under KCP&L's tariff, it is granted extensive control over privately-owned service lines upstream of meter facilities. In fact, KCP&L's tariff grants the Company rights of control similar to those exercised by an owner or lessee of the facilities. For instance, the tariff affords KCP&L sole control over energizing and de-energizing the line and over facility design. It also creates prohibitions against certain customer operation of the facilities.¹⁸ Therefore, in the example above, KCP&L is actually more akin to SPP, who, under its legally-binding tariff, has been granted functional control of facilities it does not technically own.

14. Staff also notes KCP&L's Response extensively cites the "Excavator's Manual" published by Kansas One Call in support of its position.¹⁹ The Excavator's Manual is not a legal authority and merely describes a prudent approach for *excavators*. It is not a manual for *operators*. Furthermore, the manual contains a clear disclaimer that it "does not, in any way, take the place of the [KUUDPA statute] or any regulations developed by the [KCC]." The disclaimer continues, "...none of the information in this booklet should be used for litigation purposes whatsoever."²⁰

15. Even if the Commission were to consider the language from the Excavator's Manual and other One-Call materials, such language would not fully support KCP&L's position. For instance, KCP&L cites language that utilities will not mark privately owned "power or

¹⁸ See Staff R&R, p. 4. See KCP&L Tariff Sections 1.22, 5.04, 7.04, 8.03(A)(1), 8.03(A)(6), etc. KCP&L qualifies as an operator of the subject facilities even under its own suggested definition (exercising powers of ownership or legal control), since the tariff grants it powers of legal control.

¹⁹ KCP&L Response, ¶¶ 21-22.

²⁰ KCP&L Response, Attachment B, see "Disclaimer" immediately following cover page.

electric service [lines]...from the meter to your home.”²¹ In other words, the disclaimer addresses facilities *downstream* of the meter, not *upstream*. Staff agrees utilities have no obligation to locate facilities downstream of the customer’s meter. Staff’s recommendation only applies to upstream facilities. Furthermore, these materials show – at most – that Kansas One Call is unsure of utilities’ statutory responsibilities and is, therefore, providing only limited guidance on the issue.

B. Staff’s Interpretation of KUUDPA is Consistent with Commission Regulations and KCP&L’s Tariff.

16. Neither Commission regulations nor KCP&L’s tariff provisions conflict with the correct statutory interpretation of KUUDPA, as set forth in Staff’s R&R.²² For instance, K.A.R. 82-14-3(c) requires each operator to “file and maintain maps of the operator’s underground facilities or a map showing the operator’s service area with the notification center.” KCP&L, in its Response, implies that it cannot comply with this rule under Staff’s interpretation of “operator,” because it “neither has nor maintains a database of such privately owned facilities, and has no authority to require the facility owner to provide them.”²³ Staff notes that KCP&L may comply with the rule by simply filing a “map showing [its] service area.”²⁴ The Company is not required to compile maps of all privately-owned facilities in its service territory. KCP&L, through its locate contractors, has been providing locates of service lines for at least a decade with few problems brought to Staff’s attention. If KCP&L decides it is now necessary to create records or diagrams of these facilities, it is free to do so. However, that would be a management decision, not the result of a regulatory requirement.

²¹ Kansas One Call brochure attached to KCP&L’s Answer (errata) filed Jun. 12, 2015 as Attachment D.

²² KCP&L Response, ¶¶ 23-25, 31-34.

²³ KCP&L Response, ¶ 23.

²⁴ K.A.R. 82-14-3(c).

17. KCP&L also extensively cites its tariff to demonstrate its provisions do not conflict with KUUDPA. Upon examination of the cited provisions, Staff agrees that KCP&L's tariff does not conflict with KUUDPA. KCP&L's tariff does not address responsibilities under KUUDPA. Therefore, the cited provisions do not conflict with either of the statutory interpretations advanced by KCP&L and Staff.

18. Furthermore, even if conflicting language exists, the statutory language will control. In that case, Staff would support tariff changes specifically noting KCP&L's status as an operator of customer service lines upstream of meters for purposes of KUUDPA. Regardless, when interpreting statutory language, Commission regulations and KCP&L's tariff provisions are relevant only insofar as they describe the extent of control KCP&L exercises over particular facilities – subjecting it to the definition of an operator under KUUDPA.

C. KCP&L Currently Provides Locates for Private Service Lines Upstream of Meter Facilities

19. An important fact only marginally addressed in KCP&L's Response is the reality that KCP&L already routinely provides locate services for privately-owned service lines in its service territory.²⁵ While KCP&L terms this service a "courtesy," it undercuts any implication that the Company is incapable of accurately locating private lines.

20. Furthermore, if KCP&L is truly only providing the service as a "courtesy," it is doing a disservice to safety in the area by providing a false sense of security to its customers. Under KCP&L's current practices, its customers have no reason to believe their utility is not providing, or responsible for providing, accurate locates of underground service lines.

21. Of course, the reality is that KCP&L *is* responsible for locating these facilities and is currently fulfilling this responsibility by routinely providing accurate and competent locates of

²⁵ KCP&L Response, ¶¶ 10, 14.

private facilities upstream of customer meters. Furthermore, in its most recent damage summary report, KCP&L notes 64 damages in the last 18 months to underground secondary or underground service lines.²⁶ In its reports and locating practices,²⁷ KCPL has consistently agreed with Staff's interpretation that locates upstream of the meter are the responsibility of the utility.

22. Staff commends KCP&L for recognizing and affirmatively executing this duty instead of relying on the faulty legal interpretation it now advances in this proceeding. Public safety is paramount for both Staff and the Company, and safety is best promoted by requiring KCP&L to provide locates of all facilities it operates, whether they are owned by the utility or the customer.

D. Staff's Interpretation of KUUDPA is Consistent with Its Past Application of the Statute

23. In its Response, KCP&L also contends Staff is advancing a new definition of the term "operator" that has not historically been applied.²⁸ Staff is unaware of any "historical" definition. However, Staff's position on this issue has been consistent: KCP&L is responsible for providing accurate locates of all facilities it operates, including private service lines upstream of a meter. Staff has consistently interpreted KUUDPA and the associated regulations in this manner.

24. In the past, Staff has sent multiple notices of probable noncompliance (PNCs) to KCP&L regarding inaccurate locates performed on customer-owned service lines upstream of

²⁶ The damage summary report is required to be filed with the Commission pursuant to K.A.R. 82-14-3(v).

²⁷ If KCP&L has no responsibility to mark the subject underground facilities, Staff questions why the company pays its contractors for such work and why the company *allows* its contractors to perform such work.

²⁸ KCP&L Response, ¶¶ 14-15, 27, 35, 40.

the meter.²⁹ In every case, the investigation was closed after the utility addressed the reasons for its failure to accurately locate secondary underground services. The PNCs were based on Staff's consistent position that the utility is the operator of service lines upstream of meter facilities. As noted in KCP&L's Response, Staff terminated an earlier investigation when KCP&L agreed in writing to continue locating such facilities.³⁰ While KCP&L may not agree with Staff's approach, it cannot argue that Staff is somehow advancing a "new" interpretation of the KUUDPA statute or regulations.

E. The Accuracy of KCP&L's Locates

25. KCP&L states that it does not agree with Staff's conclusion that the facilities described in Staff's R&R were inaccurately marked.³¹ However, 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. Attachment 2 to Staff's R&R shows the KCP&L owned facilities were accurately marked. It also shows the KCP&L operated facilities owned by the customer, which were not accurately marked. In addition, Attachment 2 shows KCP&L locates for underground electric facilities on the west side of the building where no electrical conductor exists (inaccurate locates).

26. KCP&L declined to factually refute Staff's evidence and ultimate conclusions on this issue. Therefore, if the Commission determines KCP&L is the operator of the subject facilities for purposes of KUUDPA, the Commission must find KCP&L has violated KUUDPA by failing to provide accurate locates.

²⁹ PNCs are issued pursuant to K.A.R. 82-14-6(a). Staff investigates very few excavation damages to underground electric conductors. Unlike the gas utilities, there is no requirement for KCPL to provide staff immediate notice when such damage occurs. Gas utilities are required to provide such notifications pursuant to certain settlement agreements approved by the Commission. See Docket No. 14-ATMG-156-GIP, Order, August 19, 2014, ¶ 9; Docket No. 13-DPAX-250-GIV, Final Order, February 20, 2013, ¶ 9.

³⁰ KCP&L Response, ¶ 14, Attachment A. Staff notes that KCP&L agreed to provide locate services even though the Company maintained at that time that it was not required to do so under its interpretation of KUUDPA.

³¹ KCP&L Response, ¶ 38.

27. Staff recognizes KCP&L has proposed the Commission open a rulemaking proceeding or generic docket to evaluate this issue.³² While such a proceeding would also be an appropriate forum to examine KCP&L's statutory duties, the present docket presents an actual controversy between the utility and the Complainants. As such, Staff believes this is an appropriate forum to examine KCP&L's responsibilities under KUUDPA. Furthermore, delaying a decision on this issue deprives the Complainants of finality and a potential remedy.

WHEREFORE Staff submits its *Reply to KCP&L's Response to Staff's Report and Recommendation* and requests the Commission issue an order consistent with Staff's Report and Recommendation dated September 28, 2015, and for such other relief as the Commission deems just and proper.

Respectfully submitted,



Andrew French, #24680
Senior Litigation Counsel
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, KS 66604
Phone: (785)-271-3361
Fax: (785)-271-3167
Email: a.french@kcc.ks.gov
Attorney for Commission Staff

³² KCP&L Response, ¶¶ 36, 40.

CERTIFICATE OF SERVICE

15-KCPE-544-COM

I, the undersigned, certify that a true and correct copy of the above and foregoing docket was served via electronic service this 10th day of December, 2015, to the following:

ROGER W. STEINER, CORPORATE COUNSEL
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PL, 1200 MAIN ST (64105)
PO BOX 418679
KANSAS CITY, MO 64141-9679
Fax: 816-556-2787
roger.steiner@kcpl.com

MARY TURNER, DIRECTOR, REGULATORY AFFAIR
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PL, 1200 MAIN ST (64105)
PO BOX 418679
KANSAS CITY, MO 64141-9679
Fax: 816-556-2110
mary.turner@kcpl.com

SAMUEL FEATHER, OFFICE OF GENERAL COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
Fax: 785-271-3167
s.feather@kcc.ks.gov

ANDREW FRENCH, SENIOR LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
Fax: 785-271-3314
a.french@kcc.ks.gov

STEPHEN AND KAREN GRADWOHL
STEPHEN AND KAREN GRANDWOHL
11791 W 112 ST
OVERLAND PARK, KS 66210
karen@ohckc.org

/s/ Vicki Jacobsen

Vicki Jacobsen