

**ATTACHMENT B**

Examples of violations Comcast rep was disputing during walk outs

Pole Number	Map Number	Reason for violation	Duke Solution	Comcast response disputing violation	Invoice
092-379	5160 10D	40" clearance from top of riser	Replace with new Pole	Riser was installed after Comcast was there	Backbone
099-186	5160 10D	40" clearance from top of riser	Replace with new Pole	there is no pole with this number at this location	Backbone
033-826	5162 12D	40" clearance from top of riser	Replace with new Pole	Street light placed after Comcast was there	Backbone
020-965	5862 8(A-F)	40" clearance from top of riser	Replace with new Pole	Riser was installed after Comcast was there	Backbone
034-711	5862 8(A-F)	40" clearance from top of riser	Replace with new Pole	Riser was installed after Comcast was there	Backbone
027-762	5953 5J	40" clearance from top of riser	Replace with new Pole	Riser was installed after Comcast was there	Phase 10 part 2
072-782	5953 5J	40" clearance from top of riser	Replace with new Pole	Contact made by other providers post Comcast	Phase 10 part 2
688-970	5953 5J	40" clearance from top of riser	Replace with new Pole	Riser was installed after Comcast was there	Phase 10 part 2
027-779	5953 5J	40" clearance from top of riser	Replace with new Pole	Street light placed after Comcast was there	Phase 10 part 2
031-767	5953 5J	40" clearance form Dukes lowest wire	Replace with new Pole	Duke has to much slack in secondary	Phase 10 part 2
031-757	5953 5J	40" clearance form Dukes lowest wire	Replace with new Pole	Comcast has clearance ??	Phase 10 part 2
031-778	5962 24F	40" clearance from top of riser	Replace with new Pole	Riser was installed after Comcast. KDL also came in post Comcast	Backbone
031-790	5962 24F	40" clearance form Dukes lowest wire	Replace with new Pole	Riser was installed after Comcast. KDL also came in post Comcast	Backbone
041-847	6053 9J	40" clearance from top of riser	Replace with new Pole	Riser was placed after Comcast was there	Phase 10 part 2
027-737	6053 9J	40" clearance form Dukes lowest wire	Replace with new Pole	Street light placed after Comcast was there	Phase 10 part 2
027-731	6053 9J	40" clearance from top of riser	Replace with new Pole	Riser was placed after Comcast was there	Phase 10 part 2
027-723	6053 9J	40" clearance form Dukes lowest wire	Replace with new Pole	Riser was placed after Comcast was there	Phase 10 part 2
030-747	6055 32F	40" clearance form Dukes lowest wire	Replace with new Pole	Service wire to park installed after Comcast	Phase 10 part 2
025-785	6058 37F	40" clearance form Dukes lowest wire	Replace with new Pole	We are not on this pole anymore, post walkout	Backbone
025-708	6058 37F	40" clearance form Dukes lowest wire	Replace with new Pole	Transformer added after Comcast	Backbone
098-002	6062 41f	40" clearance form Dukes lowest wire	Replace with new Pole	No clearance violation ??	Backbone
018-543	6062 41f	40" clearance form Dukes lowest wire	Replace with new Pole	No clearance violation	Backbone
034-476	6062 41f	30" clearance form Dukes lowest wire	Replace with new Pole	Electron placed fiber after Comcast	Backbone
091-227	6062 41f	40" clearance from top of riser	Replace with new Pole	Street light placed after Comcast was there	Backbone
027-393	6062 41f	40" clearance from top of riser	Replace with new Pole	Riser was placed after Comcast was there	Backbone
025-489	6157 2G	40" clearance from top of riser	Replace with new Pole	Riser was placed after Comcast was there	Backbone Part 3
025-535	6157 2G	40" clearance form Dukes lowest wire	Replace with new Pole	Riser was placed after Comcast was there	Backbone Part 3
025-536	6157 2G	40" clearance form Dukes lowest wire	Replace with new Pole	No clearance violation	Backbone Part 3
025-540	6157 2G	40" clearance from top of riser	Replace with new Pole	No clearance violation	Backbone Part 3
018-110	6251 16J	30" clearance form Dukes lowest wire	Replace with new Pole	Riser was placed after Comcast was there	Phase 10 Part 2
027-849	6251 16J	30" clearance form Dukes lowest wire	Replace with new Pole	Street light placed after Comcast was there	Phase 10 Part 2
030-478	6253 18J	40" clearance from top of riser	Replace with new Pole	Riser was placed after Comcast was there	Phase 10 Part 1
687-941	6253 18J	40" clearance form bottom of transformer	Replace with new Pole	Riser was placed after Comcast was there	Phase 10 Part 1
036-668	6253 18J	40" clearance from top of riser	Replace with new Pole	Newer transformer replaced post Comcast	Phase 10 Part 1
027-411	6253 18J	40" clearance from top of riser	Replace with new Pole	Riser was placed after Comcast was there	Phase 10 Part 1
692-462	6253 18J	40" clearance from top of riser	Replace with new Pole	Wintek attached after Comcast, no violation then ??	Phase 10 Part 1
026-128	6253 15G	40" clearance form Dukes lowest wire	Replace with new Pole	Riser was placed after Comcast was there	Phase 10 Part 1
026-143	6256 15G	40" clearance from top of riser	Replace with new Pole	Comcast at 39" from lowest wire, but could have lowered	Backbone Part 3
026-330	6257 16G	30" clearance form bottom of street light	Replace with new Pole	Riser was placed after Comcast was there new apt building	Backbone Part 3
030-499	6353 23J	40" clearance from top of riser	Replace with new Pole	Street light placed after Comcast was there	Backbone Part 3
688-150	6353 23J	40" clearance from top of riser	Replace with new Pole	Riser was placed after Comcast was there	Phase 10 Part 1
041-986	6355 25J	40" clearance form Dukes lowest wire	Replace with new Pole	Transformer added after Comcast	Phase 10 Part 1
026-113	6356 28G	40" clearance form Dukes lowest wire	Replace with new Pole	Riser was placed after Comcast was there	Phase 10 Part 1
026-391	6357 29G	40" clearance from top of riser	Replace with new Pole	No clearance violation	Backbone Part 3
026-444	6357 29G	40" clearance from top of riser	Replace with new Pole	Riser was placed after Comcast was there	Backbone
				Wintek attached after Comcast.	Backbone



March 5, 2015

Via E-mail to: [Jeremy.Gibson@duke-energy.com](mailto:Jeremy.Gibson@duke-energy.com)

Jeremy Gibson  
Joint Use Specialist  
139 Fourth Street  
Cincinnati, OH 45202

**Re: Duke Energy Suspension of New Pole Attachment Permits**

Dear Mr. Gibson:

I am writing concerning Duke Energy's ("Duke's") apparent suspension of new pole attachment applications in Indiana. Comcast strenuously objects to Duke's refusal to process any pole attachment applications during the pendency of the parties' ongoing litigation.

Earlier this week, you not only rejected an application for attachment in Pendleton, Indiana, but also stated that "Comcast is currently suspended from new attachments." Presumably, this blanket suspension is in response to certain disputed invoices and the resultant litigation between Duke and Comcast.

Such retaliation for a payment dispute is not only costly and disproportionate to the circumstances, but also unjust and unreasonable under governing law. Duke's refusal to process Comcast's pole attachment applications until certain charges are paid or the parties' litigation is resolved runs afoul of the pole attachment rules and policies of the Federal Communications Commission ("FCC"). The FCC has stated that attachers may have a good faith dispute with pole owners without bringing the processing of new permits to a complete halt.<sup>1</sup>

Should Duke continue to refuse to process new permits for pole attachments by Comcast until the dispute is fully resolved, Comcast may be compelled to pursue appropriate regulatory relief. Furthermore, to the extent that Comcast's Motion to Dismiss in the ongoing litigation is not granted, Comcast may deem it necessary to add a counterclaim or otherwise seek injunctive relief due to Duke's retaliatory actions.

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<sup>1</sup> See, e.g. *Kansas City Cable Partners Kansas d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599 (Cable Serv. Bur. 1999) at ¶ 18 ("Debt collection is not permissible grounds for denial of access.").

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March 5, 2015

Comcast expects Duke to begin processing attachment applications immediately. On behalf of Comcast, I would like to discuss this matter with you and confirm a mutually satisfactory resolution of the immediate application as well as all future applications. Please contact me (248) 233-6811 or [dale\\_kirk@cable.comcast.com](mailto:dale_kirk@cable.comcast.com) at your earliest convenience or direct me to the appropriate person(s) to discuss this matter.

Sincerely,  
Dale H. Kirk  
248-233-6811  
Vice President, Engineering  
Comcast, Heartland Region

c.  
L. Birmingham, Comcast  
M. Browne, Esq.  
E. Langley, Esq.  
J. Seiver, Esq.

14 FCC Rcd 11599, \*; 1999 FCC LEXIS 3254, \*\*

In the Matter of Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City,  
Complainant v. Kansas City Power & Light Company, Respondent and In the Matter of Kansas  
City Power & Light Company, Complainant v. Kansas City Cable Partners d/b/a Time Warner

Cable of Kansas City, Respondent

File No. PA 99-001; File No. PA 99-002

FEDERAL COMMUNICATIONS COMMISSION

14 FCC Rcd 11599; 1999 FCC LEXIS 3254

**RELEASE-NUMBER:** DA 99-1376

July 15, 1999 Released; Adopted July 14, 1999

**ACTION:** [\*\*1] CONSOLIDATED ORDER

**JUDGES:**

By the Deputy Chief, Cable Services Bureau

**OPINIONBY:** JOHNSON

**OPINION:**

[\*11599] 1. In this Order we consider a pole attachment complaint ("Complaint") filed by Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City ("Time Warner") against Kansas City Power & Light Company ("KCPL"). The Complaint was filed pursuant to Section 224 of the Communications Act of 1934, *as amended*, n1 and Subpart J of the Commission's Rules. n2 Pursuant to Section 224, the Commission adjudicates disputes between utilities and cable operators concerning allegedly unjust and unreasonable pole attachment rates, terms, and conditions. The Complaint alleges effective denial of access to poles owned by KCPL and requests that the Commission order KCPL to immediately approve all of Time Warner's pending applications for attachment to KCPL's poles in Overland Park, Kansas. The Complaint also requests that we order KCPL to immediately grant access to all poles that do not need replacement or to which attachment can be made temporarily, pending replacement, without causing a safety hazard. The Complaint further requests that we order KCPL to immediately commence make-ready [\*11600] work and change-out of poles where KCPL [\*\*2] has deemed it necessary and to grant immediate access upon completion of work. n3 Lastly, Time Warner asks that we order KCPL to respond to all future applications within thirty days as specified in the pole attachment agreement.

n1 [47 U.S.C. § 224](#).

n2 47 C.F.R. §§ 1.1401-1.1418.

n3 Make-ready refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. A pole change-out is the replacement of a pole to accommodate additional users.

2. The Complaint and a motion for expedited action ("Motion I") were filed on May 7, 1999. KCPL notified the Commission of its intent to answer Motion I by letter dated May 12, 1999,

and filed an opposition to Motion I ("Opposition I") on May 18, 1999. Time Warner filed a reply to Opposition I ("Reply I") on May 21, 1999. KCPL filed its response to the Complaint ("Response") on June 7, 1999. Time Warner filed its reply to the Response ("Reply") on June 14, 1999. On June 17, 1999, KCPL filed a motion for designation for hearing ("Motion II"), and Time Warner filed its opposition to Motion II ("Opposition II") on June 21, 1999. KCPL filed its reply [\*\*3] to Opposition II ("Reply II") on June 29, 1999. At that point in time, the record was closed. Although KCPL subsequently filed some additional motions, the Commission's rules allow for a response to a complaint and a reply to that response. n4 "No other filings and no motions other than for extension of time will be considered unless authorized by the Commission." n5 We decline to authorize, accept or address any additional motions filed after the Reply II was filed on June 29, 1999.

n4 47 C.F.R. § 1.1407(a).

n5 *Id.*

3. In Motion I, Time Warner requests that the Commission adopt an expedited pleading cycle for this proceeding. Time Warner asserts that the Commission has stated it will expedite complaints involving access and requests that the time to submit a response to its complaint be shortened from 30 days to 10 days and the time for reply by Time Warner be shortened from 20 days to 7 days. In Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 ("*Local Competition Order*"), n6 the Commission acknowledged that "time is of the essence" n7 and, in response to a request for an expedited review process, established complaint procedures [\*\*4] to ensure a full record for the Commission when considering a complaint. n8 We stated that "by implementing specific complaint procedures for denial of access cases, we seek to establish swift and specific enforcement procedures that will allow for competition where access can be provided." n9 The Commission anticipated that all relevant information would be available to it upon receipt of the complaint, and stated that final decisions would be resolved expeditiously. n10 We did note, however, that a request for additional information from the Commission must be responded to within 5 days. n11 While we agree that access complaints should be [\*11601] handled expeditiously, we decline to establish a pleading cycle specific to this case. As we stated in the *Local Competition Order*, "because we are using the expedited process described herein, we do not believe stays or other equitable relief will be granted . . .". We believe the normal pleading cycle established by our rules is appropriate in this case as opposed to the hybrid process requested by Time Warner. Therefore, we will deny Time Warner's Motion I. We have, however, completed an expedited review of the Complaint.

n6 [11 FCC Rcd 15499 \(1997\)](#). [\*\*5]

n7 *Id.* at P1224.

n8 *Id.* See 47 C.F.R. § 1.1403(b).

n9 *Local Competition Order* at P1224.

n10 *Id.* at P1225.

n11 *Id.* at n. 3020.

4. In its Motion II, KCPL has requested that this proceeding be designated for hearing. We deny the Motion. The pole attachment complaint procedures are designed to ensure a simple and expeditious process. n12 The Commission may resolve the complaint based upon the filings, it may meet with the parties to clarify issues, and it may, at its discretion, order evidentiary proceedings. n13 Whether to hold a hearing on any issue related to a complaint is solely at the discretion of the Commission. n14 We have before us sufficient information upon which to base our decision. n15 Therefore, we will not hold a hearing in this proceeding and we will deny KCPL's Motion II.

n12 See [First Report and Order, CC Docket 78-144, Adoption of the Rules for the Regulation of Cable Television Pole Attachments, 68 F.C.C. 2d 1585 at P36 \(1978\)](#).

n13 47 C.F.R. § 1.1411.

n14 *Id.*

n15 *Id.*

5. On June 30, 1999 KCPL filed a complaint ("KCPL Complaint") against Time Warner alleging that Time Warner [\*\*6] violated its agreement with KCPL regarding the process by which Time Warner may overlash additional cable to its existing lines. The KCPL Complaint alleges that Time Warner's practices regarding notice and application for attachments are unjust and unreasonable. KCPL does not place in issue the rates, terms or conditions of the pole attachment agreements between the parties and therefore, it does not invoke the Commission's jurisdiction. Rather, KCPL makes an issue of Time Warner's failure to comply with KCPL's interpretation of the rates, terms, and conditions of the agreements. n16 The remedies sought by KCPL would enjoin Time Warner from behavior which KCPL asserts is in violation of the pole attachment agreements between the parties. The Commission will not assert its jurisdiction merely to enforce the terms of a pole attachment agreement. n17 The Commission's authority under Section 224 "does not supplant that of the local jurisdiction when the issue between the [\*11602] parties is a breach of contract not involving unjust or unreasonable contractual terms, rates or conditions." n18 We dismiss the complaint for failure to state a rate, term or condition which is claimed to be unjust and [\*\*7] unreasonable. n19 In doing so, we make no determination whether the rates, terms and conditions in the agreements between KCPL and Time Warner involving overlash are just and reasonable. n20 Because we are dismissing the KCPL Complaint as invalid on its face, we decline to accept or address any additional pleadings in that matter which are now moot.

n16 The terms of the agreement are memorialized in a letter dated October 8, 1996 to Michael A. Rump and Edward A. Caine, counsel for KCPL from Gardner F. Gillespie, attorney for Time Warner.

n17 See [Appalachian Power v. Capitol Cablevision Corp., 49 Rad. Reg. 2d \(P & F\) 574 \(1981\)](#)

(The utility filed a complaint asking the Commission to order payment of unpaid pole attachment fees by the cable system. The cable system cross-complained that the rate was unreasonable. The Commission ruled on the cross-complaint, setting an appropriate rate, and dismissed the utility's complaint for lack of jurisdiction as a contractual matter to be resolved by a local court.); *see also*, [Tele-Ception of Winchester, Inc. v. Kentucky Utilities Co.](#), 49 Rad. Reg. 2d (P & F) 1572 (1981); [Cablecom-General, Inc. v. Central Power and Light Co.](#), 50 Rad. Reg. 2d (P & F) 473 (1981); [Texarkana TV Cable Co., Inc. v. Southwestern Electric Power Co.](#), 49 Rad. Reg. 2d (P & F) 1043 (1981) (Each of these three cases involved a complaint about unreasonable rates and a counterclaim by the utility for non-payment. In each case the Commission set a reasonable rate then dismissed the counterclaim as a breach of contract issue to be decided by a local court.)  
[\*\*8]

n18 [Marcus Cable Associates, L.P. v. Texas Utilities Electric Co.](#), 12 FCC Rcd 10362 at P10 (1997).

n19 *See* 47 C.F.R. §§ 1.1406(b) & 1.1404(e).

n20 The Commission has repeatedly affirmed its position encouraging cable systems to overlash on its existing lines. *See* Report and Order, Implementation of Section 703(e) of the [Telecommunications Act of 1996, CS Docket No. 97-151, Amendment of the Commission's Rules and Policies Governing Pole Attachments](#), 13 FCC Rcd 6777 at PP59, et seq. (1998); *see also* Public Notice, DA 95-35 (January 11, 1995).

6. Section 224(b)(1) of the Act provides that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable" n21 except where these matters are regulated by a State. n22 Section 224(f) provides that a utility must provide nondiscriminatory access to its poles except "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." n23 We have concluded that "under the 'just and reasonable' standard, we have ample authority [\*\*9] to consider terms and conditions in our ultimate decision on a complaint." n24 Further, we have concluded that "where onerous terms or conditions are found to exist on the basis of evidence, a cable company may be entitled to a rate adjustment or the term or condition may be invalidated." n25 We have also determined that we may take action when a utility has engaged in unjust or unreasonable practices. n26 Private negotiation is the preferred method for creating pole attachment arrangements and for dispute resolution. n27 Should negotiations fail, the parties may seek resolution of disputes by the Commission by filing a complaint. n28

n21 [47 U.S.C. § 224\(b\)\(1\)](#).

n22 [47 U.S.C. § 224\(c\)\(1\)](#).

n23 47 C.F.R. § 224(f).

n24 [Memorandum Opinion and Order on Reconsideration, Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, CC Docket No. 86-212](#), 4 FCC Rcd 468 at P25 (1989).

n25 *Id.* at P26.

n26 Cable Information Services, Inc., *et al v. Appalachian Power Company*, PA 79-0008, 81 F.C.C. 2d. 383 at P25 (1980); *Newport News Cablevision, Ltd. Communications, Inc. v. Virginia Electric Power Company*, PA 87-0006, 7 FCC Rcd 2610 (1992). [\*\*10]

n27 Report and Order, Implementation of Section 703(e) of the *Telecommunications Act of 1996*, CS Docket No. 97-151, *Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777 at PP10-21 (1998).

n28 *See* Part 1, Subpart J of the Commission's Rules, 47 C.F.R. §§ 1.1401-1.1418.

[\*11603] 7. On September 30, 1998, Time Warner filed applications to place new attachments on poles owned by KCPL together with maps indicating overlashing of existing attachments to begin upgrading Time Warner's cable system in Overland Park, Kansas. Time Warner was informed by KCPL that a number of the poles needed to be replaced at the expense of Time Warner. KCPL informed Time Warner that the replacement was necessary because KCPL's contractor, Capital Electric, had determined that the poles would not meet National Electrical Safety Code ("NESC") guidelines for wind and ice loading conditions after Time Warner's attachments had been added. Time Warner hired its own consulting engineers ("BHC") n29 for an independent evaluation of the poles. BHC examined a sample of 52 of the poles that KCPL identified as needing replacement and determined that [\*11] many of the poles it examined either would meet NESC guidelines or were in need of replacement before additional attachments would be added. n30

n29 Brungardt, Honomichi, & Co. Complaint at p. 5.

n30 Complaint, Ex. A at p. 3.

8. Through January and February 1999, the parties engaged in a dialogue over engineering methods and other issues related to determining the number of poles needing replacement and who should bear the cost of that replacement. n31 By letter dated February 22, 1999, Time Warner reminded KCPL of the requirement in the pole attachment agreement that applications be processed within 30 days and the requirement of the Commission's rules that a response in writing be provided within 45 days. n32 Time Warner then insisted that KCPL provide the following information by February 26, 1999:

For all listed applications submitted in September 1998, provide us with a final determination regarding which poles need to be replaced, as well as sufficient backup information so that we can understand the basis for that determination. As to these poles, also advise us of the cost to Time Warner for any poles for which Time Warner is responsible for paying the replacement [\*\*12] cost. In addition, set forth exactly when each pole can be replaced, assuming that Time Warner provides immediate payment of any costs to be charged to it, with the understanding that we would want the pole replacement to proceed in the order the poles are listed on the chart. n33

n31 *Id.* at pp. 5-7.

n32 Complaint, Ex. A, Attachment 8, at p. 2.

n33 *Id.* at p. 3.

9. KCPL responded in a lengthy letter dated February 26, 1999, in which they committed to completing the engineering review by March 5, 1999. n34 This letter advised that

Time Warner is responsible for the replacement of (1) all poles which are currently overloaded due to Time Warner's or its predecessors' cable loadings and (2) all poles that will become overloaded as a result of Time Warner's cable upgrade program. KCPL is willing to permit Time Warner to proceed with its upgrade project provided that the following conditions are met (1) a method acceptable to both parties is reached for resolving any controversy regarding how many poles will be replaced and who will pay [\*11604] for them, (2) Time Warner will submit overlash and pole attachment applications for KCPL approval, and (3) the past due balance [\*\*13] on invoices submitted to Time Warner must be brought current. n35

It further advised that "the cost to replace a pole typically ranges between \$ 3,000 to \$ 5,000, depending on the class and length of pole and the equipment attached to the pole. A more specific estimate of costs cannot be done until the review process is completed. As soon as practicable, KCPL will provide Time Warner with an estimate of the costs." n36 By letter dated March 22, 1999, KCPL notified Time Warner of the estimated costs: \$ 556,275.

n34 Complaint, Ex. A, Attachment 9, at p. 3.

n35 *Id.* at p. 4.

n36 *Id.*

10. With a letter dated April 27, 1999, Time Warner sent a check in the amount of \$ 556,275 to KCPL. The letter recited that, "This amount includes payment for pole replacements that Time Warner believes are not its responsibility to replace. If our companies cannot agree on a proper and fair allocation of the pole replacement costs, Time Warner reserves the right to contest these charges and to seek a refund of a portion of this payment . . . ." The letter requests that KCPL begin replacing poles with 25 already identified by Time Warner in an April 21, 1999, letter and proceeding in [\*\*14] order to poles identified by Time Warner in subsequent correspondence. The letter ultimately requests that Time Warner be notified by April 30, 1999, that work has commenced. No such notice appears in the record. KCPL acknowledges that the check was tendered. n37

n37 *See* Opposition at p. 10.

11. The Commission's rules provide that denial of access must be in writing and that it must be explicit and absolute. n38 Only two permissible reasons for denial of access are acceptable -- insufficient capacity or reasons of safety, reliability and generally applicable engineering purposes. n39 The *Local Competition Order* provides guidance on necessary and sufficient conditions for denial of access based upon these reasons. Where capacity can be expanded to accommodate the attachment, access cannot be denied on the grounds of insufficient capacity. n40 The utility may rely on the NESC to provide standards for safety, reliability, and generally applicable engineering standards, n41 but the utility is not the final arbiter of such issues and its conclusions are not presumed reasonable. n42

n38 47 C.F.R. § 1.1403(b).

n39 47 C.F.R. § 1.1403(a).

n40 *Local Competition Order* at PP1161-1163. [\*\*15]

n41 *Id.* at P1151.

n42 *Id.* at P1158. *See also* Mile Hi Cable Partners, *et al.*, v. Public Service Company of Colorado, FCC 99-25, 1999 WL 79632, P19 (1999).

12. The parties have adopted these principles in their negotiations. The matters in contention are whether certain poles should be changed out and, for poles that do require replacement, who should bear the cost. KCPL has recognized the validity of the analysis for compliance with the NESC performed [\*11605] by Time Warner's contractor. n43 There is no explicit approval or denial of specific requests for access included in the pleadings. KCPL notified Time Warner which poles would accommodate its proposed attachments and which poles would require replacement to accommodate the proposed attachment. Although KCPL's February 26, 1999 letter articulates conditions which must be met to proceed with the project, none of these conditions are acceptable reasons for denial of access to the poles.

n43 *See* Response at P13; Response, Ex. 2, at P20.

13. Both parties must meet the requirements of the NESC. KCPL is insisting that Time Warner choose between what it frames as two engineering methodologies [\*\*16] to determine which poles require replacement. It asserts that the results of its methodology is essentially the same as that of Time Warner's contractor, BHC, although it concedes that BHC's method is more precise than its predictive model. n44 KCPL allows that BHC's method is "more apt to identify poles that fail the requirements of the NESC as a result of problems with actual vertical clearances." n45 KCPL's method makes assumptions about the height of attachments n46 and consider, primarily, longitudinal loading. n47 BHC's method determines the actual placement of attachments and focuses on transverse loading. n48

n44 Response at P13.

n45 Response at p. 17.

n46 Reply, Ex. C.

n47 Response, Ex.3, at P9 & Ex. 4, Attachment 8.

n48 Response, Ex. 4, Attachment 4.

14. The main issue then is not whether poles need to be replaced, but who is responsible for that replacement. KCPL's analysis provided only an estimate of the number of poles needing replacement. In one sample of 50 poles which KCPL had identified as Time Warner's responsibility to replace, KCPL later determined, based on BHC's findings, that 9 did not need replacement, 28 were overloaded by KCPL, 10 were [\*\*17] overloaded with Time Warner facilities, and 3 were overloaded with a combination of telephone and Time Warner attachments. n49 The February 26, 1999 letter asserts, and Time Warner concurs n50 that Time Warner will be responsible for replacing all poles that are overloaded due to Time Warner's current attachments and those poles that will become overloaded as a result of Time Warner's attachments. KCPL, in the document estimating costs for Time Warner at \$ 556,275, identified 152 poles out of 347 needing replacement that are KCPL's responsibility to replace. n51 There is no indication that replacement of these poles has begun.

n49 Response, Ex. 2, at P22.

n50 Reply, n. 7.

n51 Response, Ex. 3, Attachment 4 (March 25, 1999).

15. Time Warner has tendered payment for the cost of replacing poles according to KCPL's preferred methodology, with the reservation that it will seek refunds as appropriate. Time Warner has chosen a more precise methodology and both parties agree that it assures compliance with NESC standards. KCPL has identified under its less precise method poles which tentatively need to be replaced. [\*11606] Time Warner's contractor has begun eliminating from that number [\*\*18] poles which do not need to be replaced. KCPL advises that on May 24, 1999, their contractor, Capital Electric, began planning for pole replacements and that KCPL has retained contract crews to replace poles on sections 1, 2 and 3, the ones on which BHC has completed its review. n52 KCPL should commence replacement of the remaining poles which the parties have essentially agreed need to be replaced. As Time Warner appears to be willing, and obligated, n53 to pay for the additional engineering analysis, which KCPL has stated is acceptable to it, Time Warner can continue to assess the rest of the poles identified for replacement while change out progresses on those poles already conclusively identified for it.

n52 Response at p. 23.

n53 Pole Attachment Agreement, Article IV, Clause 1.

16. The tenor of the Response is that KCPL is continuing to pressure Time Warner to accept the results of its methodology. Because KCPL's methodology is merely an estimate, and Time

Warner has paid the estimated cost, KCPL must proceed. As stated above, time is of the essence on access matters and dilatory cooperation is as effective as denial. KCPL is protected as it has in hand a tendered payment [\*\*19] for its costs. Should it later be determined that some of those costs are not incurred or should be incurred by KCPL, a refund may be appropriate.

17. KCPL has interjected into this proceeding its conflict with Time Warner regarding applications for or notice of overlashing by Time Warner of its own facilities. Whether any of the requirements related to this topic are just and reasonable are not an issue in this proceeding. The issue of overlashing is relevant only to the extent that the proposed expansion of Time Warner's system involves replacement of poles to accommodate the overlashing. Identification of poles needing replacement has been accomplished; KCPL cannot deny access to enforce unrelated procedural requirements of the pole attachment agreement. n54

n54 *See* 47 C.F.R. § 1.1403(a).

18. Neither can KCPL condition access on payment of a disputed claim. KCPL has insisted that all past due balances be brought current by Time Warner. Time Warner states that they fully intend to "pay a fair price for all work performed," but indicates that the appropriate amount is in dispute. n55 Debt collection is not permissible grounds for denial of access.

n55 Reply, Ex. B, at P4. [\*\*20]

19. The record indicates a significant number of poles at issue which currently violate NESC loading standards, some with existing Time Warner attachments and some with only KCPL attachments. KCPL asserts that it did not agree to allow Time Warner to attach to poles which were already overloaded in violation of NESC standards or which would become overloaded in violation of NESC standards when Time Warner's attachment was added. n56 KCPL has stated its obligation to meet NESC standards. It appears that a number of poles that need replacement violate NESC requirements prior to attachment by Time Warner and the violation of the NESC would not be caused by Time Warner's facilities. Correction of the pre-existing code violation is reasonably the responsibility of KCPL and only additional expenses [\*11607] incurred to accommodate Time Warner's attachment to keep the pole within NESC standards should be borne by Time Warner. n57

n56 Response at P18.

n57 *Local Competition Order* at P1212.

20. The pole attachment agreements between KCPL and Time Warner n58 anticipate a process whereby Time Warner files an application to request a permit to attach. Upon receipt of the application, KCPL determines [\*\*21] whether the space is available, without the necessity of incurring make-ready or change-out costs. If so, KCPL approves the application for the permit and upon approval, Time Warner has the right to attach. If KCPL determines that make-ready or change-out costs must be incurred, KCPL gives Time Warner the estimated cost of the work. If Time Warner approves the estimate, the application for permit is approved and Time Warner reimburses KCPL for the actual costs incurred. Apparently, Time Warner's upgrade of its

Overland Park system overwhelmed the application process, requiring KCPL to review a large number of applications in a timely manner. Time Warner challenged KCPL's methodology for determining the estimate for necessary make-ready and change-out work and that challenge had merit based upon the apparent agreement among the two engineering firms used by the parties. Time Warner's applications also appear to be a catalyst for KCPL's discovery that many of its poles did not meet NESC standards even without Time Warner's attachments. We believe that KCPL has had adequate time to adjust to the Time Warner upgrade of its system which will involve a substantial number of additional applications [\*\*22] and that KCPL should not be allowed to hold up the upgrade unnecessarily. Time Warner, by tendering its payment of KCPL's estimate, despite the estimate's apparent faults, satisfied its requirements under the agreements and should be able to proceed with the upgrade.

n58 *See, for example*, Pole Attachment Agreement for Community Antenna Television System dated March 20, 1984 between KCPL and Telecable of Overland Park, Inc.

21. The record in this matter is notable for the number of points upon which Time Warner and KCPL do agree. The Commission has consistently promoted the negotiation process for resolving pole attachment complaints. The record indicates that on numerous occasions, the parties were close to an agreement. However, because of the lengthy delay that Time Warner has already suffered, which is preventing Time Warner from providing upgraded services to its customers, we believe it is necessary to order KCPL to grant the applications and proceed with the make-ready and change-out work. The applications should be approved, and Time Warner should be responsible only for the actual costs for make-ready or change-out work which is made necessary because of Time Warner's [\*\*23] attachments. We believe, based on the record, that both KCPL and Time Warner are capable of proceeding in this matter in good faith and that they will be able to reach agreement on the actual costs as the work is completed.

22. Accordingly, IT IS ORDERED, pursuant to Sections 0.321 and 1.1403 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1403, that the complaint filed by Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City, PA 99-001, IS GRANTED TO THE EXTENT INDICATED HEREIN.

23. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1406 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1406, that the complaint filed by Kansas City Power & Light Company, PA 99-002, IS DISMISSED.

24. IT IS FURTHER ORDERED, that Time Warner Cable of Kansas City's Motion for Expedited Action and Kansas City Power & Light Company's Motion for Designation of Proceeding for Adjudicatory Hearing ARE DENIED.

[\*11608] 25. IT IS FURTHER ORDERED that Kansas City Power & Light Company SHALL COMMENCE WITHIN SEVEN (7) DAYS OF THE RELEASE OF THIS ORDER, pole change-out and make-ready work to make Kansas City Power & Light Company's poles ready for attachment by Time Warner Cable of Kansas City in [\*\*24] Overland Park, Kansas and SHALL PROCEED TO APPROVE WITHOUT DELAY all applications for access to poles in Overland Park, Kansas, submitted to it by Time Warner Cable of Kansas City between

September 1, 1998 and May 1, 1999.

26. IT IS FURTHER ORDERED that Time Warner Cable of Kansas City SHALL NOT overlash its own lines or make new attachments to poles which have been identified as not meeting the requirements of the National Electrical Safety Code, or which have been determined would be in violation of the National Electrical Safety Code upon overlashing or attachment by Time Warner Cable of Kansas City, until the necessary pole change-out and/or make-ready work for that pole is completed.

William H. Johnson

Deputy Chief, Cable Services Bureau