

1500 SW Arrowhead Road  
Topeka, KS 66604-4027



Phone: 785-271-3100  
Fax: 785-271-3354  
<http://kcc.ks.gov/>

Shari Feist Albrecht, Chair  
Jay Scott Emler, Commissioner  
Pat Apple, Commissioner

Sam Brownback, Governor

VIA CERTIFIED MAIL

**NOTICE OF PENALTY ORDER**  
16-DPAX-105-PEN

September 3, 2015

William C. Wesselman  
Time Warner Cable Business, LLC  
13820 Sunrise Valley Drive  
Herndon, VA 20171

This is a notice of penalty assessment for violation of the Kansas Underground Utility Damage Prevention Act (KUUDPA) discovered during an investigation conducted on April 30, 2015, by Kansas Corporation Commission Staff. For a full description of the violation and penalty please refer to the Order that is attached to this notice.

**IF YOU ACCEPT THE PENALTY:**

You have been assessed a \$7,500 penalty. You have twenty (20) days from service of the Penalty Order to pay the fine amount. Checks or Money Orders should be payable to the Kansas Corporation Commission. Payments shall be mailed to the Fiscal Section of the Kansas Corporation Commission, 1500 SW Arrowhead Road, Topeka, Kansas 66604, and shall include a reference to the docket number of this proceeding. Credit card payments may be made by calling the Fiscal Office at 785-271-3113.

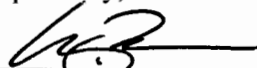
**IF YOU CONTEST THE PENALTY:**

You have the right to request a hearing. Requests for hearings must be made in writing, setting forth the specific grounds upon which relief is sought. The company must submit an original and seven copies of the request for hearing to the Commission's Secretary at 1500 SW Arrowhead Road, Topeka, Kansas 66604, within fifteen (15) days from the date of service of this Notice of Probable Noncompliance and Proposed Penalty Order.

**IF YOU FAIL TO ACT:**

Pursuant to K.A.R. 82-14-6(j), failure to pay or provide a written request for a hearing within fifteen (15) days or in the alternative, to pay the civil assessment in twenty (20) days, will be considered an admission of noncompliance and result in the Penalty Order becoming a final order.

Respectfully,

  
Andrew French, #24680  
Litigation Counsel  
(785)271-3361

**THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS**

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

In the Matter of the Investigation of Time    )  
Warner Cable Business, LLC of Herndon,    )  
Virginia, Regarding Violation(s) of the Kansas    )  
Underground Utility Damage Prevention Act    ) Docket No. 16-DPAX-105-PEN  
(KUUDPA) (K.S.A. 66-1801, et seq., and    )  
K.A.R. 82-14-1 through 82-14-5), and the    )  
Commission's Authority to Impose Penalties    )  
and/or Sanctions (K.S.A. 66-1,151).        )

**PENALTY ORDER**

The above-captioned matter comes before the State Corporation Commission of the State of Kansas (Commission). The Commission, being duly advised in the premises, and after having examined its files and records, finds and concludes as follows:

**I. JURISDICTION AND BACKGROUND**

1.       The Commission has jurisdiction and authority to administer and enforce the Kansas Underground Utility Damage Prevention Act (KUUDPA), as provided in K.S.A. 66-1801 *et seq.* Likewise, Kansas law grants the Commission full power and authority to do all things necessary and convenient in its exercise of its authority and jurisdiction pursuant to K.S.A. 2014 Supp. 66-1815 and amendments thereto.

2.       In its enforcement of KUUDPA, pursuant to K.A.R. 82-14-6, as amended, the Commission may investigate an entity under the Commission's jurisdiction and order a hearing on the Commission's own motion when the Commission believes the entity is in violation of the law or any order of the Commission.

3. The Commission shall impose civil penalties and injunctive actions against any person or entity subject to and found in violation of the provisions of KUUDPA, or any rule and regulation, or any order of the Commission. Each violation is subject to a penalty, not to exceed \$25,000, for each day the violation persists, with a maximum civil penalty of \$500,000 for any related series of violations. K.S.A. 66-1812, 66-1,151 and amendments thereto; and, K.A.R. 82-14-6.

## **II. ALLEGATIONS OF NONCOMPLIANCE**

4. Pursuant to the above authority, Commission Staff (Staff) investigated the activities and operations of Time Warner Cable Business, LLC (Respondent) on 15 occasions where Respondent failed to provide locates of its underground facilities within the time limits required by KUUDPA. See Report and Recommendation of Staff dated August 25, 2015, a copy of which is attached hereto as Attachment "A". As a result of this investigation, Staff reports the following:

- a. On April 30, 2015, Staff investigated 15 excavation sites in Johnson County where Respondent failed to provide locates requested by the excavator, resulting in lost work time for the excavators.
- b. Failure to provide the excavator with the location of the tolerance zone of the buried facility before excavation is a violation of K.S.A. 66-1806(a).
- c. The table on page two of the Report and Recommendation attached hereto sets out the date of work to begin, the type of work to be done, the hours Respondent was late in providing locates, and the penalty amount.

d. Staff issued Notices of Probable Noncompliance to Respondent on May 4, 2015. The Notice instructed Respondent to respond within thirty (30) days and to indicate whether Respondent accepted or disagreed with the findings of Staff's investigation. The notice also requested Respondent to provide written explanation of the actions taken by Respondent to prevent future KUUDPA violations. In the alternative, the Respondent could provide documentation explaining why Respondent disagreed with the findings to include identification of any errors in the Notice of Probable Noncompliance. The violation cited is as follows:

i. **Identification of location of facilities; duties of operator; liability for damages.** (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. K.S.A 2014 Supp. 66-1806.

e. Staff received a written response from Respondent to the Notice of Probable Noncompliance. In its response, Respondent agreed with the

information contained in the Notices of Probable Noncompliance and as a result, also agreed with Staff's finding of fault.

5. Staff recommends the Commission issue a civil penalty of \$7,500 for the violations of the Kansas Underground Utility Damage Prevention Act as alleged.

### **III. CONCLUSIONS OF LAW**

6. The Commission finds it has jurisdiction over Time Warner Cable Business, LLC (Respondent) because it is a public utility.

7. The Commission finds Respondent violated Kansas law governing underground utilities, including various provisions of the Kansas Underground Utility Damage Prevention Act, and is therefore subject to sanctions or fines imposed by the Commission.

8. Respondent is hereby assessed a \$7,500 penalty for violation of the Kansas Underground Utility Damage Prevention Act.

#### **THE COMMISSION THEREFORE ORDERS THAT:**

A. Time Warner Cable Business, LLC is hereby assessed a \$7,500 civil penalty for the violation of the Kansas Underground Utility Damage Prevention Act, K.S.A. 66-1801 *et. seq.*

B. Pursuant to K.S.A. 2014 Supp. 77-529, K.S.A. 66-118b, K.A.R. 82-1-215 and amendments thereto, any party may request a hearing on the above issues by submitting a written request, consisting of an original and seven (7) copies, setting forth the specific grounds upon which relief is sought, to the Commission's Secretary, at 1500 S.W. Arrowhead Road, Topeka, Kansas 66604 within fifteen (15) days from the date of service of this Order. If service is by certified mail, service is complete upon the date delivered shown on the Domestic Return Receipt. *Hearings will be scheduled only upon written request.* Failure to timely request a hearing shall be considered an admission of noncompliance and result in a waiver of

Respondent's right to a hearing. Furthermore, this Penalty Order will become a Final Order assessing a \$7,500 civil penalty against Respondent.

C. Attorneys for all parties shall enter their appearances in Commission proceedings by giving their names and addresses for the record. For civil penalties exceeding \$500, a corporation shall appear before the Commission by its attorney, unless waived by the Commission for good cause shown and a determination that such waiver is in the public interest. K.S.A. 77-515(c); K.A.R. 82-1-228(d)(2); K.A.R. 82-1-202(a). For civil penalties of \$500 or less, a corporation may appear by a duly authorized representative of the corporation. K.S.A. 2014 Supp. 66-1,142b(e) and amendments thereto.

D. Pursuant to K.A.R. 82-14-6, if you do not request a hearing, the payment of the civil penalty is due in twenty (20) days from date of service of this Order. Checks and Money Orders shall be payable to the Kansas Corporation Commission. For credit card payments, include type of card (Visa, MasterCard, Discover, or American Express), account number and expiration date. Payments shall be mailed to the Fiscal Section of the Kansas Corporation Commission, 1500 S.W. Arrowhead Road, Topeka, Kansas 66604. Credit card payments can be made by calling the Fiscal Office at 785-271-3351. The payment shall include a reference to the docket number of this proceeding.

E. Failure to pay the \$7,500 civil penalty within twenty (20) days of the issuance of this Penalty Order will result in enforcement action against Respondent, including all sanctions, requirements, and penalties described above being enforceable without further action by the Commission.

F. The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further order or orders as it may deem necessary.

**BY THE COMMISSION IT IS SO ORDERED.**

Albrecht, Chair; Emler, Commissioner; Apple Commissioner

Dated: SEP 03 2015

*Amy Gilbert*  
ORDER MAILED SEP 04 2015

Amy L. Gilbert  
Secretary to the Commission

AF/vj

# **ATTACHMENT "A"**



**REPORT AND RECOMMENDATION  
UTILITIES DIVISION**

**TO:** Chair Shari Feist Albrecht  
Commissioner Jay Scott Emler  
Commissioner Pat Apple

**FROM:** Christie Knight, Damage Prevention Special Investigator  
Leo Haynos, Chief of Pipeline Safety  
Jeff McClanahan, Director of Utilities

**DATE:** August 25, 2015

**SUBJECT: Docket Number:** 16-DPAX-105-PEN  
In the Matter of the Investigation of Time Warner Cable, Regarding Violations of the Kansas Underground Utility Damage Prevention Act (KUUDPA) (K.S.A. 66-1801, et seq., and K.A.R. 82-14-1 through 82-14-5), and the Commission's Authority to Impose Penalties and/or Sanctions (K.S.A. 66-1,151).

**EXECUTIVE SUMMARY:**

Staff is recommending a civil penalty be issued to Time Warner Cable (TWC) in the amount of \$7,500 for 15 violation(s) of KUUDPA that occurred on April 30, 2015. The penalty is based on results of Staff investigations of 15 excavation sites where TWC failed to provide locates of its underground facilities within the time limits required by KUUDPA. All of the inspections occurred in Johnson County, Kansas. Failure to provide the excavator with the location of the tolerance zone of the buried facility before excavation begins is a violation of K.S.A. 66-1806(a).

**BACKGROUND:**

KUUDPA requires all operators to inform the excavator of the location of its underground facilities at a given excavation site. The locate is required to be completed within two working days after the day on which the excavator provided notice of its intent to excavate. Although KUUDPA allows an excavator to dig without locates being completed if the required marking time has expired, most excavators will wait for locates rather than take the risk of damaging underground utilities or endangering life and property. Postponing excavation because of the failure of utilities to complete locates for

excavators can result in costly downtime and scheduling problems including cancelation of contracts. In this case, Staff's field inspections determined 15 incidents where TWC did not provide timely locates for excavators. The following table provides the date locates were scheduled to be completed, the type of excavation work scheduled, and the number of hours between the excavation scheduled start date and Staff's field inspection.

<b>Ticket #</b>	<b>Work to Begin Date</b>	<b>Type of Work to be Done</b>	<b>Hours Late</b>	<b>Penalty Amount</b>
15180486	4/30/2015	Google Fiber	15.4 hrs	\$500
15180339	4/30/2015	Google Fiber	15.4 hrs	\$500
15180399	4/30/2015	Google Fiber	15.4 hrs	\$500
15180376	4/30/2015	Google Fiber	15.4 hrs	\$500
15180438	4/30/2015	Google Fiber	15.4 hrs	\$500
15180429	4/30/2015	Google Fiber	15.4 hrs	\$500
15180516	4/30/2015	Repair Water Drainage	12.4 hrs	\$500
15177825	4/28/2015	Replace Pole and Anchor	59.25 hrs	\$500
15177826	4/28/2015	Replace Pole and Anchor	59.3 hrs	\$500
15177829	4/28/2015	Replace Pole and Anchor	59.3 hrs	\$500
15177830	4/28/2015	Replace Pole and Anchor	59.4 hrs	\$500
15177817	4/28/2015	Replace Pole and Anchor	59.5 hrs	\$500
15179271	4/29/2015	Replace Pole and Anchor	35.6 hrs	\$500
15183467	4/30/2015	Replace Pole and Anchor	11.8 hrs	\$500
15180703	4/30/2015	Plant Shrubs	14.9 hrs	\$500
			<b>Total</b>	<b>\$7,500</b>

Although Staff only observed the above listed 15 incidents of late locates, we note that Kansas One Call records indicate 1,117 complaints of failure to provide timely locates were filed for Johnson County, Kansas, in April of 2015. Staff issued a Notice of Probable Noncompliance (PNC) to TWC on May 4, 2015. TWC has responded to the PNC as required by K.A.R. 82-14-6(c) and agreed the locates were not performed on time but argued extenuating circumstances delayed its response. Attachment I provides a copy of Staff's allegation and TWC's response to the PNC.

**ANALYSIS:**

**Rationale for Penalties:**

**A. Gravity of noncompliance:**

Once an excavator notifies underground utility operators of a planned excavation, each operator with facilities buried at that site must, within two working days, provide surface markings that indicate where the utilities are located. Failure in providing accurate and timely locate marks depicting the tolerance zone is a high-risk activity with the potential for significant consequences to public safety. Not providing locates potentially gives the excavator a false sense of security by

indicating the buried facilities are not in the vicinity of the proposed excavation. This effect may result in the excavator causing even greater damage to the buried utility because of the speed and force with which excavation normally is performed in areas clear of underground obstacles. Because providing timely and accurate markings for the excavators is the most fundamental measure a facility owner takes to prevent damage to its buried facilities, the fact that TWC failed to comply with this requirement of the law warrants the assessment of a civil penalty.

**B. Culpability:**

TWC is directly responsible for its actions in failing to provide accurate and timely locates as Kansas law requires.

**C. History of noncompliance:**

Staff has issued similar PNCs to TWC for alleged KUUDPA violations in the past.

**D. Response of the utility operator regarding noncompliance(s):**

In its response, TWC states that a huge increase in locate requests compared to past year's excavation activity has placed a strain on the ability of its locating workforce to meet the demand. Regarding six of the locate requests, TWC states their contract locator was working with the excavator and informed them the locates would be late. While Staff appreciates TWC informing the excavator that locates would not be performed as required by KUUDPA, such notice does not relieve TWC of its obligations under KUUDPA.

TWC has increased its staffing of contract locators in an effort to meet the increase in locate requests and continues to add contract staff. Staff contends TWC's efforts to meet locating demands were inadequate as a remedy and not in time to be effective. While Staff acknowledges the significant increase in locate requests has placed a strain on the locating workforce, we note the increased excavation activity was anticipated for at least six months which gave TWC sufficient time to hire and train additional locators to meet the demand.

**E. Aggravating/Mitigating Circumstances:**

Staff concludes there are no extenuating circumstances in these cases that would cause us to modify the recommended penalty amount of \$7,500 for failure to provide timely locate markings.

**RECOMMENDATION:**

Staff recommends a civil penalty be issued to Time Warner Cable, in the amount of \$7,500 for violation(s) of KUUDPA:

- Failure of a facility owner to properly identify location of facilities is a violation of K.S.A. 66-1806, Identification of location of facilities; duties of operator; liability for damages.

Attachments

ATTACHMENT I

13820 Sunrise Valley Drive  
Herndon, VA 20171



May 28, 2015

Mr. Leo M. Haynos  
Chief of Pipeline Safety  
Utilities Division  
Kansas Corporation Commission  
1500 SW Arrowhead Road  
Topeka KS 66604-4027

RE: KLL Investigation #7118

Dear Mr. Haynos:

I am writing to you on behalf of Time Warner Cable ("TWC") in response to this matter.

USIC is our contractor who responds on behalf of TWC to requests submitted for location of facilities. Attached to this response is a memorandum from USIC outlining the proposed remedial action to address the concerns raised in this investigation. It is our belief that the concerns raised by this investigation will be addressed by the USIC plan to increase staffing in the Johnson County area. TWC will continue to monitor the progress USIC is making towards this goal.

Accordingly, we respectfully request that the Kansas Corporation Commission accept this proposal as a satisfactory resolution to the current investigation with respect to TWC. Please do not hesitate to contact me with any further questions at 703-561-8959 or [william.wesselman@twcable.com](mailto:william.wesselman@twcable.com).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Wesselman", with a long horizontal line extending to the right.

William C. Wesselman  
Counsel

Enclosure (1)

**To:** Time Warner  
**From:** Steve Preister, General Manager- USIC Locating, Kansas  
**Date:** May 15, 2015  
**Re:** KCC Investigation #7118

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### **Investigation #7118**

On 4/30/2015, KCC staff performed an audit on the following Non-Response tickets within Johnson County: #15190515, #15190531, #15190536, #15190541, #15190546, #15190550, #15190692, #15190705, #15190722, #15190730, #15190736, #15190738, #15190925, #15190937, and #15190973. It was observed that each of these tickets audited were either not marked, in the process of being marked or the locator was just arriving to mark. Each of these tickets were late in being marked, thus warranting the Probable Noncompliance. This is a violation of the Statute K.S.A. 66-1906 Identification of location of facilities; duties of operator; liability for damages. (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; (b) if the operator of tier 2 facilities cannot accurately mark the tolerance zone, such operator shall mark the approximate location to the best of its ability, notify the excavator that the markings may not be accurate, and provide additional guidance to the excavator in locating the facilities as needed during the excavation; and (d) if the operator of a tier 1 facility has no underground facilities in the area of the proposed excavation, such operator, before the excavation start date, shall notify the excavator that it has no facilities in the area of proposed excavation by telephone, facsimile, marking the area all clear or by other technology that may be developed for such purposes.

**Causal Factors-** The Johnson County area is experiencing an exuberant amount of incoming ticket volume during this time due to the AT&T GIGA POWER and Google fiber to the home overbuild. The original tickets were late in getting completed. However, notes indicate calls were placed to the excavator informing them tickets would be completed after the scheduled WTB. The USIC locators responded to all non response tickets listed on the day they were called in.

**Corrective Actions-** USIC has added 60 technicians to the area this year versus last year to deal with the added work load. USIC has approximately 30 more technicians in training for the Johnson County area at the present time to assist in dealing with the added work load. In addition, USIC is actively recruiting for a new hire class to begin on 6/1/15. Current local USIC crews are working over the weekend. Outside assistance is also being brought in when available to assist over the weekends.

ktw/ Excavator	TKT Type	WTB Date	Mark / Status Date	NOTES
15190515/ Nick Cable	non response	4/30/15	4/30/15	locator noted working with excavator AT&T Project Tkt
15190531/ Nick Cable	non response	4/30/15	4/30/15	locator noted working with excavator AT&T Project Tkt
15190536/ Nick Cable	non response	4/30/15	4/30/15	locator noted working with excavator AT&T Project Tkt
15190541/ Nick Cable	non response	4/30/15	4/30/15	locator noted working with excavator AT&T Project Tkt
15190546/ Nick Cable	non response	4/30/15	4/30/15	locator noted working with excavator AT&T Project Tkt
15190550/ Nick Cable	non response	4/30/15	4/30/15	locator noted working with excavator AT&T Project Tkt
15190692/ Judy Moecker	non response	4/30/15	5/3/15	marked
15190705/ Par Electric	non response	4/30/15	4/30/15	marked
15190722/ Par Electric	non response	4/30/15	4/30/15	marked
15190730/ Par Electric	non response	4/30/15	4/30/15	marked
15190736/ Par Electric	non response	4/30/15	4/30/15	marked
15190738/ Par Electric	non response	4/30/15	4/30/15	marked
15190925/ Par Electric	non response	4/30/15	4/30/15	marked
15190937/ Par Electric	non response	4/30/15	4/30/15	marked
15190973/ Homeowner	non response	4/30/15	4/30/15	marked

PLEASE FORWARD THE ATTACHED DOCUMENT (S) ISSUED IN THE ABOVE-REFERENCED DOCKET TO THE FOLLOWING:

NAME AND ADDRESS	NO. CERT. COPIES	NO. PLAIN COPIES
ANDREW FRENCH, LITIGATION COUNSEL KANSAS CORPORATION COMMISSION 1500 SW ARROWHEAD RD TOPEKA, KS 66604-4027 ***Hand Delivered***		
WILLIAM C. WESSELMAN, COUNSEL TIME WARNER CABLE BUSINESS LLC 13820 SUNRISE VALLEY DR HERNDON, VA 20171		

**ORDER MAILED SEP 04 2015**

The Docket Room hereby certified that on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, it caused a true and correct copy of the attached ORDER to be deposited in the United States Mail, postage prepaid, and addressed to the above persons.