

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

**IN THE MATTER OF AN
INVESTIGATION INTO POLE
ATTACHMENTS**

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**DOCKET NO. 04-999-03
ELECTRIC LIGHTWAVE'S
COMMENTS ON THE DPU'S
DRAFT RULE**

INTRODUCTION

Electric Lightwave, LLC, welcomes this opportunity to submit comments to the Utah Public Service Commission ("Commission") in response to the draft rule filed on June 3, 2004, by the Division of Public Utilities ("Division" or "DPU") in Docket. No. 04-999-03, *In the Matter of an Investigation into Pole Attachments*. Electric Lightwave commends the Division on the excellent effort it has made crafting a rule in this complicated and contentious matter. We support the DPU's decision to advocate a uniform statewide ratemaking methodology for determining pole rental rates based upon the cable operator formula promulgated by the Federal Communication Commission ("FCC"). However, Electric Lightwave differs with the Division's presumption that telecommunications attachments consume 1½' space on utility poles. The rental rate PacifiCorp has long assessed Electric Lightwave in Utah recognizes that Electric Lightwave's attachments occupy only 1' of pole space. In addition, Electric Lightwave disagrees with many of the general terms and conditions included in PacifiCorp's template pole attachment agreement, which the Division enclosed with its draft rule.

POLE RENTAL RATES

Ratemaking Methodology

Statewide Uniformity

As stated in its initial comments in this docket, Electric Lightwave recommends the Commission promulgate a uniform statewide ratemaking methodology for all types of attaching entities. Variations in pole rental rates across particular types of attaching entities or geographic areas should not be permitted unless the physical characteristics of attachments differ greatly across joint users or the costs of installation and maintenance vary greatly over different parts of the state. No commenter in this docket has yet to argue that either condition occurs in Utah.

Occupied Space

With one important exception, Electric Lightwave also recommends that the Commission adopt the FCC's cable operator formula endorsed by the Division. Unlike the FCC's telecommunications carrier formula, its cable operator formula properly allocates pole costs among various joint users in proportion to the total usable space occupied. Adopting the FCC's cable operator formula causes the pole owner and the pole owner's customers to bear the costs associated with unusable pole space, costs which they would have to bear if there were no attaching entities.

Electric Lightwave's disagreement with the Division's application of the FCC's cable operator formula involves the amount of space occupied by telecommunications attachments. Telecommunications attachments take up at most 1' of space on a pole. Electric Lightwave has for years paid PacifiCorp pole rental rates that recognize its attachments consume no more than 1'. Indeed, "Exhibit A" to PacifiCorp's proposal attempting to revise its agreement with Electric

Lightwave acknowledges the fact that its attachments occupy only 1' of pole space. A copy of PacifiCorp's proposed "Exhibit A" is attached to these comments as Attachment 1.

Recognizing the actual amount of space occupied by telecommunications attachments has a large effect on the Division's provisional statewide pole rental rate. Consider the DPU's May 28, 2004, application of the FCC's cable operator formula, which was included with its June 3, 2004, draft rule. Substituting 1' for 1½' in line C.(2) yields a Use Ratio Per Pole of 7.41% instead of 11.11% and an Annual Pole Attachment Rate of \$6.17 as compared to \$9.26.

STANDARD CONTRACT

According to the DPU's industry memorandum of June 3, 2004, PacifiCorp submitted two Standard Contracts for review and comment by interested parties. §R746-345-3 of the Division's proposed pole attachment rule provides that public utilities must submit a standard pole attachment contract along with a tariff for the Commission's approval. Electric Lightwave's comments below pertain to provisions in both PacifiCorp's Standard "Pole Attachment Agreement" and "Joint Use of Facilities Agreement." A Microsoft Word copy of an earlier version of PacifiCorp's "Joint Use of Facilities Agreement" is attached to these comments as Attachment 2, which shows Electric Lightwave's recommended revisions in MS Word's "track changes" mode.

Article III. Licensee's Use of Poles

Section 3.02 Licensee's Right to Install Equipment

Electric Lightwave submits that PacifiCorp should be able to approve or deny applications within 30 days, not 45 as provided in this particular clause.

Section 3.03 Identification of Equipment

Electric Lightwave submits that suitable identification is all that is needed to mark attachments. In addition, Electric Lightwave does not have the resources to mark 5,000 poles per month that were installed prior to the effective date of the Standard Contract. A more reasonable requirement is 500 per month.

Section 3.04 Conformance to Requirements and Specifications

Electric Lightwave submits that National Electric Safety Code (“NESC”) requirements are sufficient to govern the technical characteristics of pole attachments, unless PacifiCorp and a particular attacher mutually agree to stricter standards. Moreover, attachers such as Electric Lightwave should be able to install grounding on their attachments where grounding conductor does not exist, provided NESC requirements are satisfied.

Section 3.05 Nonconforming Equipment

Electric Lightwave notes that PacifiCorp did not attach an Exhibit B to its template agreements. In Oregon, PacifiCorp has proposed sanctions equal to the higher of \$200.00 per pole or twenty times the annual pole rental fee. Sanctions in this range are excessive, especially since PacifiCorp and its customers may be entitled to monetary damages if a joint user’s attachments harm them. If the Commission decides sanctions are necessary, Electric Lightwave submits that the amount for not conforming to NESC or agreed upon standards should be no more than \$25.00 per pole per year, or three times the annual pole rental rate, whichever is higher.

In addition, Electric Lightwave submits that PacifiCorp must notify attachers in advance of undertaking corrective work in conjunction with the terms of Section 3.05 and assume liability

when doing so. Moreover, when necessary to perform corrective work without advance notification, PacifiCorp should advise attaching entities of the work performed within five days. Finally, attaching entities should not have to pay PacifiCorp more than the reasonable costs of undertaking corrective work.

Section 3.06 Time to Complete Installation

Electric Lightwave does not object to having to install its attachments within 90 days of receiving approval so long as the this clause contains an exception for circumstances beyond its control.

Section 3.09 Pole Replacement for Licensee's Benefit

PacifiCorp's proposed Section 3.06 appears to require an attaching entity to pay for the installation of a new pole and compensate PacifiCorp for the remaining life of the existing pole when replacing a pole for an attaching entity's benefit. Electric Lightwave submits that compensating PacifiCorp for the remaining life of the existing pole is sufficient. Even then, in order to prevent double recovery, poles replaced for the benefit of attaching entities should be excluded from mortality studies used to determine PacifiCorp's allowable depreciation accrual rates. Should the Commission disagree and require attaching entities like Electric Lightwave to pay for the cost of new poles instead of the old, the proceeds that PacifiCorp receives should be deducted from its rate base, similar to accepted accounting treatment of payments for aid to construction.

Section 3.16 Relocation of Attachments at Owner's Option

Electric Lightwave acknowledges that in times of emergency it may be necessary for PacifiCorp to remove and relocate or replace a joint user's attachments, but emergencies should

not absolve PacifiCorp of all liability. Furthermore, an attaching entity should only be responsible for paying PacifiCorp the reasonable expenses incurred in performing emergency work.

Sections 3.17 and 3.21 Removal of Attachments by Licensee, Inspection and Occupancy Survey

These two sections require attaching entities to pay various application and inspection fees, including reimbursing PacifiCorp for expenses incurred conducting “occupancy surveys.” Such fees and reimbursements for applications, inspections, surveys, audits and the like, if permitted, would allow PacifiCorp to double recover its revenue requirement. The annual carrying charges embodied in the FCC’s cable operator formula are all that is necessary to compensate PacifiCorp for prudently incurred capital expenditures, operating expenses and overhead. In fact, the Division’s provisional calculations include a \$3.0 M annual allowance for PacifiCorp’s audit expenses.

Finally, PacifiCorp should submit the results of occupancy surveys to the affected attaching entities within 30 days. Objections raised to inventory data should also be valid grounds for disputing and withholding pole rental payments.

Article V. Rental Payments

Section 5.02 Sanctions

Electric Lightwave again notes that PacifiCorp has not included Exhibit B with its template agreement, but the sanctions that PacifiCorp has proposed in Oregon for failing to enter into a contract or failing to have a valid permit are even greater than the excessive penalties it proposed for nonconforming equipment. The penalties that PacifiCorp has attempted to impose upon Electric Lightwave in Utah are equally unreasonable. In any event, once the Commission

approves a standard agreement as part of a filed tariff, PacifiCorp may seek redress before the Commission, and the Commission may impose fines on attaching entities for not complying with its rules.

Section 5.03 Billing and Payments

Electric Lightwave submits that 60 days should be allowed to remit pole rental payments and that it and other attaching entities should have the ability to withhold disputed amounts.

CONCLUSION

Electric Lightwave respectfully requests that the Commission take its foregoing comments into account when fixing pole rental rates and related terms and conditions.

Respectfully submitted this 21st day of June, 2004.

ELECTRIC LIGHTWAVE, LLC.

Charles Best
Associate General Counsel

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of **Electric Lightwave's Comments on the DPU's Draft Rule** submitted in Docket No.04-999-03, to be e-mailed or mailed by first class mail, postage prepaid, this 21st day of June, 2004 to the following:

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