Jerold G. Oldroyd, Esq. (#2453)
Angela W. Adams, Esq. (#9081)
Ballard Spahr Andrews & Ingersoll, LLP
One Utah Center, Suite 600
201 South Main Street
Salt Lake City, Utah 84111-2221
Telephone: (801) 531-3000
Facsimile: (801) 531-3001

Martin J. Arias, Esq.
Comcast Cable Communications, LLC
1500 Market Street
Philadelphia, Pennsylvania 19102
Telephone: (215) 320-7316

J. Davidson Thomas, Esq.
Jill M. Valenstein, Esq.
Genevieve D. Sapir, Esq.
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Ave., N.W.
Second Floor
Washington, D.C. 20006
Telephone: (202) 828-9873

Attorneys for Comcast Cable Communications, LLC

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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of an Investigation into Pole Attachments	)	Docket No. 04-999-03 **COMCAST'S COMMENTS TO DRAFT STANDARD POLE ATTACHMENT AGREEMENT**

Comcast Cable Communications, LLC, formerly Comcast Cable Communications, Inc. ("Comcast"), by and through its attorneys, Ballard Spahr Andrews & Ingersoll, LLP, hereby submits these comments to the draft standard Pole Attachment Agreement.

I. INTRODUCTION

A. Procedural Background

On March 11, 2004, the Division of Public Utilities ("Division") ordered the Utah Public Service Commission ("Commission") to open an investigative docket regarding pole attachments (hereinafter "Division Order").[1] The Division requested that the Commission establish new and revised regulations pertaining to the joint use of facilities owned by utilities.[2] The Division also requested that the "docket provide a forum to investigate the general terms and conditions" of pole attachment agreements and other issues.[3]

This docket grew largely out of PacifiCorp's request for Commission approval to nearly double its pole attachment rates in October 2003, from $4.65 to $9.20.[4] Following that proposed rate increase, Comcast filed a complaint against PacifiCorp alleging inappropriate charges for pole attachments, audits and "unauthorized attachment" penalties and rents. The complaint also raised issues regarding what Comcast believed were unjust and unreasonable terms and conditions in PacifiCorp's proposed pole attachment agreement.[5] Other parties that attach to PacifiCorp's poles have also "voiced concerns over PacifiCorp's rates, and the terms and conditions contained in PacifiCorp's pole attachment agreement."[6]

1. The Commission's Pole Attachment Rule

Pursuant to the Division's directives, the Commission drafted and published a proposed pole attachment rule on September 1, 2004.[7] In issuing its proposed rule, the Commission

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1 *Matter of an Investigation Into Pole Attachments*, Request to Open an Investigative Docket, Docket No. 04-999-03 (Mar. 11, 2004 Utah Div. of Pub. Util.).

2 *Id*. at 1.

3 *Id*. at 2.

4 *Id*.

5 The issues involving the specific audit and unauthorized attachment penalties between the parties were resolved by the Commission late last year. *See Comcast Cable Comm., Inc. v. PacifiCorp*, Report and Order, Docket No. 03-035-28 (Issued Dec. 21, 2004 Pub. Serv. Comm'n Utah) (hereinafter "*Comcast v. PacifiCorp*").

6 Division Order at 2.

remarked that it was prompted to reexamine pole attachment issues due to "the increasing magnitude of disputes concerning the entire attachment process…"[8] The Commission further commented that it believed it had drafted rule that is "consistent with both state and federal law and sets terms which are conducive to the public interest and well being of the State of Utah and its citizens generally."[9]

Although the rule is not yet final, the proposed rule attempts to balance the interests of the various parties by establishing a pole attachment rate formula based on the widely-used Federal Communications Commission's ("FCC") cost-based formula, ensuring that pole owners receive any costs incurred due to pole attachments, but prohibiting over-recovery. The proposed rule also attempts to provide a mechanism for both pole owners and attachers to label unlabeled poles during routine maintenance and creates a dispute resolution forum, *inter alia*. This rule is a significant step towards clarifying the rights and responsibilities of the various parties and reducing future disputes. To realize the goals stated at the outset of this proceeding, however, the Division also recognized that adopting a reasonable, state-wide pole attachment agreement was another critical component of effective and cooperative joint use.[10]

2. Pole Attachment Agreement

To that end, the Division held a series of technical conferences. During these collaborative sessions, pole owners and attachers, along with Division staff, attempted to craft a reasonable pole attachment agreement based on PacifiCorp's model agreement, which was the

(...continued)

[7] Utah Bull., Sept. 1, 2004, Vol. 2004, No. 17, at 29 (Notice of Proposed Rule). The Commission has since issued several versions of the rules for comment. Comments on the latest version were filed April 14, 2005 ("Proposed Rule"). *See In the Matter of An Investigation into Pole Attachments*, Comcast's Comments to the Draft Proposed Rule, Docket No. 04-999-03, submitted April 14, 2004.

[8] Proposed Rule, at 29.

[9] *Id*.

[10] Division Order at 1.

cause of so much concern among attachers prior to the commencement of the proceeding. With Division staff's assistance, the parties have made great strides in revising that model and developing a reasonable state-wide standard pole agreement (hereafter "Agreement"). Nevertheless, there remain 10 significant areas of disagreement which the Commission is tasked with resolving: (1) Fees; (2) Timeframes; (3) Service Drops; (4) Overlashing; (5) Audit Costs; (6) Easements; (7) Relocation Costs; (8) Disputed Bills; (9) Indemnity, Liability and Damages and (10) Insurance and Bonds.[11]

B. The Parties

Comcast is a provider of broadband communications service which today includes "traditional" cable television service as well as information services and high-speed cable modem services for residential and business customers within the State. In addition to these services, Comcast is and/or will be offering state-of-the-art broadband services such as video on demand and Internet-Protocol ("IP") enabled communications services, including Voice Over IP or ("VoIP") telephone services. Comcast has been working hard to bring the full complement of broadband products and services to its service areas within the State. Through its predecessors, which include among others, Tele-Communications, Inc., TCI, Insight Cablevision, and AT&T Broadband, Comcast has been providing communications services to residents of Utah since the 1970's.

In order to provide those services, Comcast must install a significant portion of its communications facilities on utility poles owned by, among others, PacifiCorp (and its predecessor Utah Power). Many of Comcast's attachments date back several decades, prior to PacifiCorp's acquisition of Utah Power. Because PacifiCorp owns and controls the vast majority

[11] *See* Final Issues List, Pole Attachment Contract, issued Apr. 1, 2005.

of poles in Utah, Comcast and its predecessors have little choice but to rent space on PacifiCorp's poles.

The parties' joint use relationship has historically been cooperative and friendly. However, a series of events beginning in 2002 drastically changed that relationship—for the worse. Essentially, PacifiCorp has traded effective joint use management practices for profiteering.[12] Comcast is hopeful that the standardized agreement, together with the new pole attachment rule, will help reestablish cooperation between Comcast and PacifiCorp. Indeed, effective joint use management is critical to Comcast's ability to provide cost effective services to consumers.

C. The Commission's Task

This Commission's authority over pole attachments is derived from 47 U.S.C. § 224(c), which provides that the FCC has jurisdiction over the rates, terms and conditions of pole attachments *except* where an individual State certifies that it regulates the such matters. Utah has made the requisite certification.[13] Like the FCC,[14] in order to fulfill its statutory duties, this Commission is charged with ensuring that rates, terms and conditions of attachment are just and reasonable.[15] Since submitting its certification that it regulates pole attachments to the FCC, however, this Commission has had few opportunities to consider what pole attachment rates, terms and conditions meet the just and reasonable standard.

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[12] Comcast maintains cooperative relationships with the other pole owners in the State.

[13] Utah Code § 54-4-13; *Utah Cable Television Operators Ass'n v. Public Serv. Comm'n of Utah*, 656 P.2d 398, 403 (Utah 1982).

[14] Pursuant to 224(b)(1), and subject to 224(c), the FCC is obligated to provide that the rates, terms and conditions for pole attachments are just and reasonable.

[15] Utah Code § 54-4-13; *Utah Cable Television Operators Ass'n v. Public Serv. Comm'n of Utah*, 656 P.2d 398, 403 (Utah 1982). The Commission is also bound by federal law to "consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services," when regulating pole attachments. 47 U.S.C. 224(c)(2)(B).

1. The FCC Offers a Wealth of Precedent

That said, the Commission need not "reinvent the wheel." The FCC has built an extensive body of law over the course of 26 years through literally hundreds of litigated cases and rulemakings that can provide extensive guidance in resolving the 10 disputed issues.[16] Indeed, application of the FCC's rate formula and the numerous other pole attachment rules and case law, developed in response to Congressional mandate, ensures that facilities-based competition proceeds at fair rates, terms and conditions, notwithstanding monopoly ownership and control of distribution facilities and utilities' "superior bargaining position in pole attachment matters."[17]

2. Other Certified State Commission Rules Can Offer Guidance

The Commission should also look to pole attachment law established in other certified states when considering the disputed issues. For example, in August 2004, the New York Public Service Commission ("NY PSC") comprehensively reformed the pole attachment and conduit occupancy processes that telephone and electric utility pole owners must follow to accommodate cable operators' and competitive local exchange carriers' new and existing attachments. This reformation followed several collaborative sessions and extensive briefing by numerous utilities, facilities-based providers and labor unions. There was also significant staff participation. Specifically, the NY PSC recognized that in order for attachers to be competitively viable, attachers need accelerated pole access to complete upgrades and new builds for deployment of important new services, including broadband, digital television and local exchange service. As a

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[16] The FCC has adjudicated approximately 300 complaints. *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, Report and Order*, 13 FCC Rcd 6777 at ¶ 8, n. 37 (1998).

[17] *TCA Management v. Southwestern Public Service Co.*, 10 FCC Rcd 11832, ¶ 15 (1995) (citing S. Rep. No. 95-580, 95th Cong. 1st Sess. at 13). *See also Selkirk Comm., Inc. v. Florida Power and Light Co.*, 8 FCC Rcd 387, ¶ 17 (1993) ("Due to the inherently superior bargaining position of the utility over the cable operator in negotiating the rates, terms and conditions for pole attachments, pole attachment rates cannot be held reasonable simply because they have been agreed to by a cable company.").

result, the purpose of the NY PSC regulations[18] is to expedite the attachment process, minimize delays and disputes, and create structural performance incentives for both parties conducive to achieving the goal of vibrant competition. Comcast strongly urges the Commission to consider the disputed issues and the parties' positions with these various objectives in mind.

The Vermont Public Service Board also extensively revised its rules following a recent pole proceeding.[19]

3. The Competitive Environment Must Also Be Considered

The competitive landscape in which this Agreement is being considered cannot be ignored. Cable operators are competing with direct broadcast satellite ("DBS") providers, whose access to subscribers depends upon retailers eager to sell their equipment, not pole owners seeking to deploy their own core or competitive services. To the extent cable operators once held a dominant position in multi-channel video distribution, DBS has changed the landscape by gaining a large portion of the core video market. As the FCC has recognized, "[t]oday, almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers."[20] DBS providers, such as DirecTV and Dish Network, have become formidable competitors and have succeeded in luring away significant numbers of viewers, as well as market share. In fact, DBS has seen nearly double-digit rates of growth over the last year alone, while cable's share of the market is declining.[21] Moreover, it is Comcast's understanding that DBS providers in Utah promise to provide customer service in just 48 hours. If Comcast is unable to gain access to poles necessary to serve a particular customer in a timely manner

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[18] *Proceeding on Motion of the Commission Concerning Certain Poles Attachment Issues,* Order Adopting Policy Statement on Pole Attachments, Case 03-M-0432 (NY Pub. Serv. Comm'n August 6, 2004) ("New York Order").

[19] *See generally*, VT PUB. SERV. BD. R. 3.700, *et. seq.*

[20] 11th Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 20 FCC Rcd. 2775, ¶ 4 (2005).

[21] *See id.* at ¶ 5.

(including the ability to make expeditious service drops on a competitive timeframe), it runs a high risk of losing the customer to DBS.

Of equal concern to Comcast is the emergence of broadband over power lines ("BPL"). This technology is touted to provide access to broadband services using electric power lines. BPL offers the potential for the establishment of a significant new medium for extending broadband access to homes and businesses. In fact, the FCC has recognized that because power lines reach virtually every residence and business in every community and geographic area in this country, BPL service could be made available nearly everywhere.[22] Accordingly, it is essential that this Commission assure that utilities do not use their pole ownership to disadvantage their competitors through unreasonable terms and conditions of attachment.[23] While energy companies are in the process of developing BPL, ILECs now have standards for fiber to the home and plan to offer services that compete directly with cable, such as video-on-demand. In this highly competitive environment, as a non-pole owning attacher, Comcast is concerned that structural opportunities exist for pole owners to use their control over bottleneck pole facilities to delay access. The Commission must therefore act with these important considerations in mind.

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[22] *Amendment of Part 15 regarding new requirements and measurement guidelines for Access Broadband over Power Line Systems/CARRIER CURRENT SYSTEMS, INCLUDING BROADBAND over POWER LINE SYSTEMS*, 19 FCC Rcd 21265, (2005) (for the purpose of adopting rules for broadband over power lines to increase competition and promote broadband service to all Americans).

[23] Congress amended the Pole Attachment Act in 1996 to mandate nondiscriminatory access to ensure that "no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order*, 11 FCC Rcd 15499, 1123 (1996). Indeed, part of the rationale for requiring access was the recognition that utilities could enter competitive lines of business such that there would be additional incentives to deny access to attachers. *Alabama Power*, 311 F.3d 1357, 1358 (11th Cir. 2002) ("Perhaps fearing that electricity companies would now have a perverse incentive to deny potential rivals the pole attachments they need, Congress made access mandatory."); *cert. denied*, 124 S.Ct. 50 (U.S. Oct 06, 2003) (No. 02-1474).

The upgrade of existing plant and the addition of fiber is also a critical element of the government's mission to transition from analog broadcasting to digital broadcasting. The FCC initiated the transition to digital television in the early 1990's in order to reclaim portions of the analog broadcast spectrum for essential government services, like emergency communication, and for use by mobile services. For cable subscribers to receive digital transmissions, however, cable operators must be able to upgrade their plant to a level capable of transmitting signals in a digital format. In the FCC's words, "participation by the cable industry during the transition period is likely essential to the successful introduction of digital broadcast television and the rapid return of the analog spectrum to the [FCC]."[24] Expeditious upgrades are therefore not only important for consumers, but serve a compelling public interest.

Finally, since September 11, 2001, the federal government has also urged industry and regulators to encourage facilities-based competition in an effort to "provide the nation with redundant communications infrastructure."[25]

D. Summary Of Comcast's Position On Disputed Issues

As mentioned above, there are 10 disputed issues in the Agreement that the Commission must resolve: (1) Fees; (2) Timeframes; (3) Service Drops; (4) Overlashing; (5) Audit Costs; (6) Easements; (7) Relocation Costs; (8) Disputed Bills; (9) Indemnity, Liability and Damages and (10) Insurance and Bonds.[26]

Comcast urges the Commission to ensure that any fees and charges allowed under the final Agreement are cost-based and not otherwise recovered in the rent, in accordance with

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[24] *In re Carriage of the Transmissions of Digital Television Broadcast Stations*, FCC op. 98-153, at 10 (July 10, 1998).

[25] Chairman Michael K. Powell, "Digital Broadband Migration Part II," Opening Remarks at Press Conference (Oct. 23, 2001). Expeditious access to poles is essential to the development of this "redundant communications infrastructure."

[26] *See* Final Issues List.

proposed R746-345-3. Post-construction and verification removal fees are unreasonable. Comcast performs its own post-construction inspections and if Comcast fails to remove an attachment, the pole owner may assess unauthorized attachment fees.[27] The constant threat of excessive, non cost-based fees and penalties creates a hostile market environment for all communications attachers seeking to innovate and deploy services in Utah.

Enforceable timetables for the performance of pre-construction surveys and make-ready are also essential to ensure that facilities-based providers, like Comcast, may deliver the advanced communications services their customers desire in a timely manner. Similarly, competitive communications providers cannot wait for the pole owner to process applications prior to making customer service drops. Franchise customer service requirements and federal regulations mandate that cable operators provide service to new customers within a very brief time from the date of request. There are also significant, physical differences between distribution and service poles that make prior permitting unnecessary.

Overlashing is a non-invasive construction technique that is critical to cable upgrades and the expeditious and cost-effective delivery of advanced broadband services. PacifiCorp's overlash permitting requirements are causing Comcast's upgrade extreme delays and forcing Comcast to incur costs (in the form of unreasonable application and inspection fees) that would be better spent providing Utah's residents with advanced services. Unrestricted overlashing is a long-standing standard industry practice and no other pole owner in Utah requires permits for overlashing.

To further reduce disputes and promote a fair and cooperative joint-use environment in Utah, each party, including the pole owner, should pay for the relocation and other costs incurred

[27] Unauthorized attachment fees themselves must be reasonable and provide the attacher the incentive to apply for permits and also provide an incentive for the pole owner to perform timely audits.

by their own business needs. When there is a dispute over make-ready costs or other fees, attachers should not be compelled to pay disputed charges. That kind of requirement gives pole owners untoward leverage over attachers. Pole owners often pressure attachers to pay disputed bills or risk a work stoppage. Indemnity clauses in pole attachment agreements must also balance the interests of the parties. Reciprocal indemnity ensures that each party is responsible for losses occasioned by its own misconduct. Insurance and bond requirements must also be reasonable and be tailored to the attacher's circumstances.

Comcast believes its proposals, set forth in detail below, will further the Commission's goals in this proceeding by offering solutions that are consistent with both state and federal law, reduce the incidence of disputes, and, at the same time, truly benefit Utah's residents and the overall public interest in the form of less expensive, advanced communications services.

II. DISPUTED ISSUES

A. Fees

The current version of the Agreement contains several fees that if retained would allow a pole owner either to over-recover or are otherwise unjust and unreasonable, in violation of state and federal law.

1. Application Fees

Section 3.01 of the proposed Agreement requires that when a Licensee requests permission to attach to a pole that it also "submit payment" of application processing fees. Currently, PacifiCorp is the only utility in Utah charging Comcast application processing fees.[28]

[28] Although Staff did not submit with this Agreement the original Fee Schedule proposed by PacifiCorp, PacifiCorp's proposal included a flat "Application Processing" fee of $26.65 + $4.00 per pole. Moreover, even though these same fees and charges were contained on the Fee Schedule that was attached to the unjust and unreasonable pole agreement that Comcast refused to sign, PacifiCorp has nevertheless imposed these fees on Comcast. Indeed, Comcast is expecting invoices totaling up to nearly half a million dollars from PacifiCorp for "applications processing" and "inspection" fees associated mainly with overlashes that Comcast performed over the last year and a half. There is no evidence that any inspections actually occurred, as PacifiCorp has never provided any information that would suggest an inspection of any kind occurred, pursuant to Comcast's applications.

Purportedly, these fees cover the salaries and other costs of PacifiCorp's Joint Use staff associated with processing applications in the utility's Portland, Oregon headquarters.[29]

These types of "recurring" costs, however are already recovered through the Commission's annual rental rate formula.[30] Indeed, the FCC has consistently held that "[a] separate fee for recurring costs such as applications processing or periodic inspections is not justified" because it would result in double-recovery.[31] For example, FERC Accounts used to calculate an electric utility's pole attachment rate include such administrative costs as salaries, bonuses, office supplies and expenses, travel, supervision fees, premiums payable to insurance companies, payment of certain employee pensions and life insurance premiums, to name a few items.[32]

While it is theoretically possible to back these costs out of the relevant FERC Accounts that factor in to the annual rate so that they may be charged directly to each attacher as an application processing fee, that is a complicated and time consuming endeavor. To prevent double-recovery for pole owners charging application processing fees, the Commission would need to hold a ratemaking procedure each time the pole owner sought to raise its pole attachment rates, which is typically on an annual basis. Engaging in these types of annual ratemakings

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[29] All of PacifiCorp's pole attachment applications are processed at the utility's Portland headquarters, where the Joint Use staff consists of approximately 25 employees.

[30] *See* proposed UAR 746-345-5(A)("The rental rate for pole attachments must, on average, be sufficient to cover the *recurring costs* experienced by the pole owner as a result of the attachments.") (emphasis added). *See also* Comcast Comments to rules (correcting characterization of applicable processing, permitting and inspections as "non-recurring" charges). By contrast "[n]on-recurring incremental costs [like pre-construction survey and make-ready charges] are directly reimbursable to the utility and are excluded from the incremental [rental] rate." *Texas Cable & Telecom. Ass'n v. Entergy Serv., Inc*., 14 FCC Rcd 9138 ¶ 5 (1999).

[31] *Id.*. *See also Texas Cable & Telecom. Ass'n v. GTE Southwest Inc., 14 FCC Rcd 2975* (1999) ("The "Billing Event Fee" appears to be an administrative fee for costs associated with the billing process. It also appears to be a recurring cost recoverable through the annual fee. These costs, however, are included in the carrying charges when calculating the maximum rate. The "Billing Event Fee" effectively increases the annual fee beyond the maximum permissible rate and, therefore, results in an annual fee that is unjust and unreasonable.").

[32] *See* 18 C.F.R. Part 101, FERC Accounts 920-931 and 935. Together, these Accounts are factored into the administrative carrying charge of the FCC's pole attachment rental rate formula.

would not only be a significant waste of Commission, pole owner and attacher resources, but such a process is entirely inconsistent with Congress' intent to design a "stable and certain regulatory framework that may be applied simply and expeditiously requiring a 'minimum of staff, paperwork and procedures consistent with fair and efficient regulation.'"[33]

For these and other reasons, the FCC has consistently rejected utility efforts to back out portions of the administrative accounts included in the annual rate to allow pole owners to recover certain costs directly. For example, in *Texas Cable & Telecom. Ass'n v. Entergy Serv., Inc*., Entergy claimed that its application fees were appropriate because it deducted a portion of costs booked to FERC Accounts and thus did not double-recover. The FCC found Entergy's arguments unpersuasive:

> [Entergy] points out that "…to the extent those costs are booked to FERC accounts included in the Commission's pole attachment formula, a deduction is made from the appropriate FERC account. Entergy does not, therefore, recover twice for any costs." Entergy also asserts that, if it did include those costs in the accounts, they would be reflected in the pole attachment rate and be borne by all attachers…" That costs included in a [sic] such a rate are borne by all users is expected. Entergy has not made a persuasive argument that the annual rate it would charge together with these fees would be significantly less than one based upon fully allocated costs, or that recovering these costs through direct reimbursement rather than through the annual fee is preferable.[34]

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[33] *Alabama Cable Telecomm. Ass'n v. Alabama Power Co*., 15 FCC Rcd 17346, at ¶ 5 (2000) (citing legislative history of the pole act mandating that the FCC institute a "simple and expeditious" formula). "Congress did not believe that special accounting measures or studies would be necessary because *most* cost and expense items attributable to utility pole, duct and conduit plant were already established and reported to various regulatory bodies, in this case, to the [FERC]." *Id*. (emphasis added). *See also In the Matter of Time Warner Entertainment v. Florida Power and Light Co.*, 14 FCC Rcd 9149 at ¶ 7 (rel. June 9, 1999) ("The methodology used to arrive at a pole attachment rate should be simple and, preferably, based on publicly identifiable and verifiable data.") (citing *First Report and Order*, 68 FCC 2d 1893 (1978) and the Pole Attachment Order, 2 FCC Rcd 4387 (1987)); S. Rep. No. 95-580, 98th Cong., 1st Sess. (1977) (providing that "[p]ermitting the use of non-public data would also contravene the FCC's mandate in providing for a simple and expeditious process rather than a full-blown rate case.").

[34] *Texas Cable & Telecom. Ass'n v. Entergy Serv., Inc*., 14 FCC Rcd 9138 ¶¶ 13-14 (1999). *See also The Cable Television Ass'n of Georgia v. Georgia Power Co*., 18 FCC Rcd 16333, ¶ 18 (2003), ("Through the annual rate derived by the Commission's formula, an attacher pays a portion of the total administrative costs incurred by a utility. Included in the total plant administrative expenses is a panoply of accounts that covers a broad spectrum of expenses. A utility would doubly recover if it were allowed to receive a proportionate share of these expenses based on the fully-allocated costs formula and additional amounts for administrative expense. The allocated portion of

(continued...)

Other Public Utility Commissions, including in certified states where PacifiCorp operates, have reached the same conclusion. Specifically, earlier this year, the Oregon PUC ruled that "[t]he salaries of the people involved with 'joint-use issues' or pole maintenance and operation must be calculated and allocated as part of the carrying charge."[35] The Oregon PUC further held that "administrative charges related to processing new attachments should be allocated with the carrying charges."[36]

In order to avoid numerous lengthy, wasteful and unnecessary ratemakings, the best way to ensure that pole owners do not over-recover in violation of the Commission's pole rental formula, would be to prohibit the collection of separate fees for applications processing and require that these costs are booked to the appropriate FERC accounts.

2. Pre-Construction Survey Fees

Pre-construction survey fees are non-recurring charges associated with a pole owner's inspection of its plant to determine whether make-ready is necessary on a particular pole or pole line identified in an attacher's application.[37] Comcast does not object to paying the actual, reasonable and necessary costs associated with this task.[38] Most pole owners in Utah do, indeed,

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administrative expenses covers any routine administrative costs associated with pole attachments… Georgia Power has not argued persuasively that recovering these costs through direct reimbursement rather than through the annual rental rate is preferable or reasonable.") *recon. denied*, 18 FCC Rcd. 22287 (Oct. 29, 2003) (hereinafter "Georgia Power case").

35 *Central Lincoln People's Utility District v. Verizon Northwest, Inc*., UM 1087, Order No. 05-042, p. 15 (Jan. 19, 2005) (hereinafter "Oregon Order").

36 *Id*. pp. 15-16.

37 "Make-ready" generally refers to the modification of poles or lines, including the rearrangement or relocation of attachments on a pole, or the installation of guy wires and anchors (which help stabilize a pole), to accommodate additional facilities and/or attachers. It also can mean a pole "change-out," which is the replacement of a pole when needed to accommodate additional attachers. Make-ready becomes necessary, for example, to make space available when a party seeks access to a particular pole that does not have adequate clearance space to accommodate existing attachments, as well as a new attachment, while maintaining compliance with applicable safety code requirements.

38 *See Texas Cable v. Entergy*, 14 FCC Rcd 9138, ¶ 10 ("[Attachers] may be held only to the agreed to obligation to reimburse [the pole owner] for the actual costs of necessary engineering survey expenses.").

charge for the actual engineering time to conduct the survey, in accordance with the Commission's proposed rules.[39]

PacifiCorp, on the other hand, charges one of three, *pre-determined* survey fees, depending on the "level" of the inspection that PacifiCorp unilaterally decides is necessary.[40] The first level involves a visual inspection. The second level involves a measured (with a stick) inspection. The third, a full pole loading analysis.[41] While Comcast recognizes that the dollar amounts associated with PacifiCorp's Fee Schedule will be addressed in individual company tariff and SGAT filings, Comcast objects to these fees because of the manner in which they are currently assessed, especially in conjunction with PacifiCorp's detailed application requirements.

Specifically, PacifiCorp's application form requires the attacher to include detailed measurements of all attachments on the pole (including PPL's), and identify any necessary make-ready, including pre-existing safety violations of all attachers and what corrective action needs to be taken, *inter alia*.[42] In other words, by virtue of its detailed application, PacifiCorp essentially forces the attacher itself to perform a pre-construction survey. Moreover, it is important to bear in mind that Comcast recently paid PacifiCorp almost a million dollars to

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[39] *See* UAR R746-345-3 ("Other pole attachment work such as engineering [and] make-ready . . . shall [be] billed on a time-and-materials basis for costs actually incurred. . . .").

[40] Similar to the unreasonable application fees that PacifiCorp currently charges Comcast, in 2003 PacifiCorp also began charging for these various levels of inspections, even though the prior pole attachment agreement did not provide for them and PacifiCorp unilaterally imposed them. Moreover, as far as Comcast knows, PacifiCorp has never provided any support for how these flat fees were determined.

[41] By contrast the language in the current draft Agreement merely requires that the application contain: "the specific equipment to be installed, the map number (to the extent identifiable or provided by the Pole Owner and part of the pole number), both party's [sic] pole numbers (to the extent that the pole numbers are on the poles and identifiable as the party's pole number), street address of nearest physical location identifier of the pole in question, the space desired on each pole, and any additional information reasonably requested by Owner as reasonable necessary to properly review the request for attachment." Section 3.01 of proposed Agreement. This is consistent with standard industry practices. PacifiCorp's detailed application far exceeds anything required by most pole owners.

[42] *See* PacifiCorp's "Pole Attachment Application Package, dated Feb. 2004, "Pole Application Field Definitions" (requiring the attacher to "indicate who needs to take corrective action, and what corrective action should be taken to resolve existing violations, or to accommodate [its] proposed attachment.") (attached hereto as Exhibit 1).

collect much of the same information required on the application form.[43] It is, therefore, difficult to understand how PacifiCorp can justify charging any "level" of pre-construction inspection fee when the attacher is required to perform all the work![44]

Indeed, the FCC has consistently required pole owners to refund attachers for collecting the kind of "detailed physical measurements" and other data required by PacifiCorp on its application form, not only because the pole owner benefited[45] but because the information should have been in the pole owner's possession to begin with.[46]

In sum, PacifiCorp should not be permitted to use this proceeding as an opportunity to codify its unreasonable application and pre-construction survey practices. Instead, the Commission should clarify in this Agreement that if an attacher performs its own pre-construction survey, the pole owner should be precluded from charging additional fees and must reimburse the attacher for any data that benefits the pole owner or another attacher. Pole owners should also be prohibited from charging for full pole loading studies unless they can demonstrate

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[43] The 2003 audit conducted by Osmose for PacifiCorp allowed PacifiCorp to create a brand new database of *all* its distribution poles and *all* communications attachments on those distribution poles, complete with pole address, mapstring numbers, GPS coordinates and digital photographs. *See Comcast v. PacifiCorp*, at 44.

[44] In addition, although Comcast has received invoices for pre-construction surveys that have allegedly taken place, PacifiCorp does not provide any supporting documentation to demonstrate that any inspections have actually occurred or what was found.

[45] *Newport News Cablevision, Ltd. v. Virginia Elec. and Power Co.*, 7 FCC Rcd 9, ¶ 11 (1992) ("We do, however, find that certain inspection procedures employed by VEPCO would be unreasonable if Newport News were to pay for the full cost of the inspection. Specifically, we find that VEPCO's detailed, physical measurements of clearances between attachments is unreasonable. These detailed, physical measurements determine more than safety violations. VEPCO's own submissions demonstrate that such detailed measurements yield information concerning safety problems of all pole users. This is a benefit to non-cable pole users because they can learn about their own safety problems at cable's expense.").

[46] *See, e.g., Knology, Inc. v. Georgia Power Co.*, 18 FCC Rcd. 24615, ¶¶ 42-43 (2003) ("Knology does not contend that Georgia Power should have had in its possession, and provided to Knology, this type of specific information. Rather, Knology asserts that Georgia Power could have saved Knology the costs of ascertaining some very basic information regarding Georgia Power's pole network—such as the characteristics of the poles themselves of the identities of other attachers (regardless of the exact location/condition of attachments)—which undoubtedly was in Georgia Power's possession. Georgia Power never credibly refutes Knology's claims. Indeed, Georgia Power states that it requires all attachers—not just Knology—to identify and locate other attachers on the pole. Assuming that is the case, Georgia Power does not explain why it has no records at all relating to the attachments on its poles."). This is especially true in the case of PacifiCorp, which just performed an extensive audit and inspection. *See* n. 43, *supra*.

that such studies are absolutely essential in a particular case and did not benefit any other party. Comcast agrees to pay the reasonable, actual and necessary amounts associated with a typical pre-construction survey, consistent with long-standing pole attachment law and the Commission's proposed rules.

3. Post Construction Inspection Fees

Section 3.25 of the draft Agreement gives pole owners the right to perform inspections of "Licensee's Attachments…at any time." While Comcast agrees that a pole owner should have the absolute right to inspect its plant, which party should be responsible for the costs incurred to perform those inspections is another question. Comcast is a well-established entity with vast plant construction experience and does not believe it is reasonable for pole owners to charge attachers for the performance of post-construction inspections. Comcast already pays to perform its own post-construction surveys to ensure that their contractors have built to code. To be precise, Comcast's contractors are required to build to the NESC and other applicable codes; and Comcast does not issue the check to its contractor until Comcast has performed a quality check. This is standard industry practice.[47]

Consequently, if a pole owner chooses to perform routine post-construction inspections, for their own peace of mind, those costs should be incurred by the pole owner.[48] To the extent a post-construction inspection is performed by the pole owner, the inspection should occur within

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[47] Comcast also relies on these inspections to verify plant integrity, without which it would be impossible to deliver its services.

[48] *See, e.g.*, Docket No. 6553, *Investigation Into Tariff Filing of Verizon New England, Inc., d/b/a Verizon Vermont, re: Revisions to its Pole Attachment Tariff*, Recommended Decision of John P. Bentley, Esq. To Vermont Public Service Board at p. 21(issued May 19, 2003) ("It is unreasonable to expect the costs of post-construction inspection to be borne by the licensee. The entities performing the required work are established cable operators that have extensive experience in construction. Even newer entities are presumptively qualified to build networks. There is no reasonable justification for charging them with Verizon's costs [sic] should Verizon wish to buy peace of mind through a post-construction inspection."), *aff'd in part, Docket No. 6553, Investigation Into Tariff Filing of Verizon New England, Inc., d/b/a Verizon Vermont*, re: Revisions to its Pole Attachment Tariff, Order (Vt. PSB Oct. 22, 2003) (ruling that attachers should only be forced to incur the cost of post-construction inspections when violations are discovered).

a reasonable time, such as 30 days. Comcast believes that 30 days is a reasonable period to ensure that attachers are not held responsible for non-compliant attachments resulting from intervening conditions. The time period should begin upon notice to the pole owner that construction is complete. Once the time period has elapsed, all relevant attachments would be deemed compliant (*i.e.*, later corrections could not be charged to the attacher).

Comcast further believes that attachers should be given notice of any post-construction inspections so they have an opportunity to participate. Following the inspection, the pole owner should be required to provide attachers with a written copy of the inspection findings in order to verify that the post-construction inspection actually occurred and for the attacher's records. Comcast would agree to incur the cost to inspect any non-compliant attachments found as a result of the inspection process proposed here.

Any other time that a pole owner seeks to inspect its plant, in addition to post-construction inspections and the periodic audits described in Section 3.24, the pole owner should incur the cost unless the pole owner has legitimate, articulated safety concerns and discovers a non-compliant condition.

4. Removal Verification Fees

Section 3.20 of the draft Agreement requires that any time a Licensee removes an Attachment that it provide notice and "submit payment of all applicable fees." These fees, otherwise known as "removal verification fees," are allegedly charged to cover the cost to inspect the poles contained in the notification to ensure that the attacher is no longer attached.

As far as Comcast is aware, PacifiCorp is the only pole owner that charges such fees, which are unreasonable on several levels. First, if an attacher fails to vacate a pole contained in the notice, that attachment will be picked up during the 5 year periodic audit and the attacher will be assessed a penalty. Second, a pre-construction inspection performed on behalf of another

attacher would also reveal that the attachment still exists. Third, there is no way for an attacher to verify that such an inspection was actually performed. Last, even if PacifiCorp were actually performing such inspections, a removal verification inspection is a colossal waste of pole owner and attacher resources, given that there is no legitimate reason to perform them.[49]

5. Unauthorized Attachment Penalties

Proposed R746-345-3(A)(2)(c) requires each pole owner's tariff, standard contract, and SGAT to include "any back rent recovery or unauthorized pole attachment fee …" Allowing each pole owner to establish its own penalty would result in prolonged tariff proceedings, other disputes and needless inconsistency and confusion, however. Instead, Comcast urges the Commission to establish a reasonable penalty and penalty cap in the final Agreement.

Specifically, Comcast suggests that any standardized unauthorized attachment penalty be based on an approximation of the actual costs that may be incurred when an attacher does not have a permit, namely, back rent owed.[50] This is consistent with the Commission's finding in the *Comcast v. PacifiCorp* case that the penalty should "bear [some] relation to the economic harm suffered by [the pole owner]."[51]

One way to structure such a penalty is to tie the calculation of the back rent owed to audit frequency, which, according to the draft Agreement, is approximately every 5 years.[52] At the same time, the penalty should not preclude the use of more precise information regarding the

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[49] Indeed, Comcast has been forced to wait months for PacifiCorp to process simple permits. Therefore, PacifiCorp should not be utilizing its labor force to make sure an attacher removed its attachment. Instead, it should be facilitating the attachment process.

[50] *See e.g., Mile Hi Cable Partners v. Pub. Serv. Co. of Colo.*, 15 FCC Rcd 11450, ¶ 13 (2000) ("[The Pole Owner] suggests that the cost avoided by [the Attacher] for unauthorized attachments is the present value of fourteen years of annual fees plus some speculative amount related to supposed increased safety risks and administrative costs. First, it is unreasonable to infer that the alleged unauthorized attachments at issue have existed for fourteen years. Second, because [the Attacher] must always comply with safety concerns, there is no cost avoided by [the Attacher] related to safety issues. Third, because [the Attacher] is obligated to pay the maximum allowable rent, which is based upon fully allocated costs, any indirect administrative costs are recovered in the annual fee.").

[51] *Comcast v. PacifiCorp*, at 37.

[52] *See* Section 3.24.

attachment date and there must also be a reasonable cap.[53] The unauthorized attachment penalty adopted by the FCC in *Mile Hi Cable Partners v. Pub. Serv. Co. of Colo.*, 15 FCC Rcd 11450 (2000), effectively accomplishes these goals by allowing the pole owner to recover back rent from the time of the last inventory or for 5 years, whichever is less, plus interest.[54] Importantly, the FCC found that this penalty provided "incentive for [attachers] to comply with a reasonable application process while encouraging utilities not to delay audits of unauthorized attachments."[55] Indeed, based on Comcast's experience as a multi-state operator, the *Mile Hi* 5 year back rent penalty cap is contained in the vast majority of pole attachment agreements.

For these reasons, rather than allow a pole owner to impose some arbitrary penalty that has "no relation to the economic harm suffered," like the $250 per pole penalty that PacifiCorp proposed at the outset of this proceeding, equal to approximately 54 years of back rent at current

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[53] *See Georgia Power* at ¶ 22 ("[A] hard-and-fast rule requiring back rent to the date of the last inspection could grossly overcompensate [the pole owner] if an unauthorized attachment were installed long after the last inspection. While providing for calculation based on the date of the last inspection might be a reasonable proxy where no other information is available, it precludes the use of more precise information regarding attachment, which would permit an accurate calculation of back rent. Alternatively, if the use of actual attachment dates is not practical, a reasonable maximum period could be included to ensure that he back rent assessment is not unreasonable.").

[54] *Mile Hi Cable Partners v. Pub. Serv. Co. of Colo.*, 15 FCC Rcd 11450, ¶ 14 (2000) ("[A] reasonable penalty for unauthorized attachments will not exceed an amount approximately equal to the annual pole attachment fee for the number of years since the most recent inventory or five years, whichever is less, plus interest at a rate set for that period by the [IRS]…The information submitted by Complainant summarizes our experience and demonstrates that an amount equal to no more than five years annual fee is reasonable. This penalty will provide incentive for Complainant to comply with a reasonable application process while encouraging utilities not to delay audits of unauthorized attachments.") (hereinafter "*Mile Hi*"), *aff'd, Pub. Serv. Co. of Colo. v. FCC*, 2003 U.S. App. LEXIS 9450, **14-15 (D.C. Cir. 2003). "In its analysis, the FCC…showed that most utilities currently charge a one-time fee of $15.00 to $25.00 per pole, or charges based on back rent for no more than three years. Finding no reason to doubt [the Complainant's] uncontested expert testimony regarding industry practices, the [FCC] correctly figure that an attachment rate based on the years of unpaid annual rent, on average $3.77 per pole plus interest, would put the charge right in the middle of the industry range… In addition…under the FCC's unauthorized attachment rate, a violating cable company would face the same penalty, five times the rental rate plus interest, even for an unauthorized attachment that had only been in place for two weeks.").

[55] *Mile Hi* at ¶ 14. In affirming the Cable Bureau's decision, the full Commission further held that an unauthorized attachment fee that does not approximate the back rent actually owed, is "unenforceable on grounds of public policy as a penalty." *Mile Hi Cable Partners, LP, et al v. Pub. Serv. Co. of Colorado*, 17 FCC Rcd 6268 (2002) (citing the *Restatement (Second) of Contracts* § 356). Similarly, the Utah Supreme Court "has long had a policy against the imposition of liquidated damages that constitute a penalty for breach of a contractual agreement." *Woodhaven Apartments v. Washington*, 942 P.2d 918, 920 (Utah 1997).

rental rates, the Commission should incorporate the reasonable and balanced 5 year back rent penalty standard, with an additional provision allowing the attacher to demonstrate that its attachments existed for a shorter period.

B. Timeframes

The timely performance of applications processing (which includes conducting the pre-construction survey and issuing the make-ready estimate) and make-ready performance is essential to ensure expeditious pole access. In turn, expeditious access is the key to ensuring the delivery of advanced communications services and robust competition, all for the benefit of Utah's residents. To that end, this Agreement must contain enforceable timetables for applications processing and make-ready performance, along with consequences for a pole owner's failure to adhere to them.

1. Applications Processing

Section 3.02 provides that a pole owner must either approve or deny applications within forty-five (45) days of receipt of the application. If notice is not received within that time period, the attacher may proceed with the attachment. This standard is consistent with the federal pole attachment rules that were adopted pursuant to the 1996 Telecommunications Act and guarantees that monopoly pole owners cannot abuse their control of the essential pole facility to deny timely access to attachers.[56] Indeed, if pole owners do not commence pre-construction surveys within a reasonable amount of time, the delay jeopardizes Comcast's ability to provide communications

[56] *See Cavalier Telephone, LLC v. Virginia Electric and Power Company*, 15 FCC Rcd 9563, ¶ 15 (2000) ("Our rules require [a utility] to grant or deny access within 45 days of receiving a complete application for a permit. We have previously stated that the Pole Attachment Act seeks to ensure that no party can use its control of facilities to impede the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields. We have interpreted the Commission's rules, 47 C.F.R. § 1.1403 (b), to mean that a pole owner "must deny a request for access within 45 days of receiving such a request or it will otherwise be deemed granted.") (internal citations omitted), *vacated by settlement, Cavalier Telephone Settlement Order*, 17 FCC Rcd 24414 (2002) (stating the vacatur did "not reflect any disagreement with or reconsideration of any of the findings or conclusions contained" in the original order issued in 2000) (hereinafter "*Cavalier*").

services on a timely and cost competitive basis. Comcast, therefore, urges the Commission to retain this critical, pro-competitive provision.

Section 3.02 further provides, however, that "from time to time, the forty-five (45) day processing standard may not be feasible for various reasons including, but not limited to: a requirement of the Licensee for more expeditious handling to accommodate a small but urgent project; a requirement of the Pole Owner for additional handling time to accommodate a Licensee's large project or an unusually high volume of applications from several different licensees." Such open-ended provisions invite abuse and thwart the deployment and provision of advanced services. Moreover, Comcast is highly skeptical that a pole owner, like PacifiCorp, that has caused numerous delays for Comcast, would ever agree to "expedited handling" of anything.

For example, since PacifiCorp began requiring permits for overlashing in 2003, it has taken PacifiCorp between 5-8 months to process applications, whether they contain 1 or 50 poles to be overlashed![57] These delays are inexcusable, especially in this case, where Comcast has performed virtually all the pre-construction engineering, as required by PacifiCorp's detailed application.[58] Moreover, due to the overlash delays, Comcast constantly risks losing customers, including entire developments and apartment complexes, and, in the process, has strained franchise relationships. At times, PacifiCorp fails to respond altogether. For example, there have been instances where Comcast has waited over a year to receive pole change out estimates from PacifiCorp and, in the end, was forced to reroute and put facilities underground at

[57] These kinds of inexcusable and anti-competitive delays are one of the main reasons Comcast strongly objects to having to wait for a permit to overlash, especially considering that PacifiCorp's requirement is contrary to standard industry practices and important federal policies. Prior to 2003, PacifiCorp merely required Comcast to notify PacifiCorp of any overlash and Comcast was allowed to proceed in 48 hours if PacifiCorp did not respond. As far as Comcast knows, this process was a workable solution for both parties and caused no problems. Coincidentally, PacifiCorp's overlash permit requirement was simultaneous with its imposition of applications processing and inspection fees. *See also* Section II.D., *infra*.

[58] *See* Exhibit 1 (PacifiCorp's Application Form).

extraordinary cost. Comcast has not experienced delays with any other pole owner in Utah, even small pole owners that do not have 25 dedicated joint use employees like PacifiCorp.

While Comcast would welcome a more expeditious process for small projects and understands that it might be difficult to process entire large projects in 45 days, Comcast urges the Commission to retain the 45 day rule for all jobs. If pole owners are unable to process all the poles in a large application, there is a workable alternative solution that provides the attacher with some certainty, while ensuring plant integrity. In New York, for example, after a comprehensive generic pole proceeding, including significant Commission and stakeholder involvement and participation, the NY PSC adopted the FCC's 45 day rule.[59] In addition, the NY PSC rules require that if the pole owner cannot meet the 45 day deadline, it may hire an approved contractor to conduct the pre-construction survey.

If a pole owner fails to meet the deadline and fails to hire a contractor within 45 days of the application filing date, the attacher is permitted to hire an approved contractor to conduct the pre-construction survey.[60] The NY PSC rejected pole owner and union arguments that collective bargaining agreements limited the use of outside contractors. Instead, the NY PSC recognized that "[s]ince time is the critical factor in allowing Attachers to serve new customers, it is reasonable to require the utilities either to have an adequate number of their own workers available to do the requested work, to hire outside contractors themselves to do the work, or to allow Attachers to hire approved outside contractors."[61]

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59 New York Order, Appendix A at 3.

60 *Id*.

61 New York Order, Policy Statement, at 3.

This approach, which the FCC also considers a critical element in the expeditious deployment of communications service,[62] is gaining popularity among certified state regulators. Attaching parties in Vermont, for example, also have the right to hire contractors to perform pre-construction surveys when the pole owner fails to meet the requisite deadline.[63] Moreover, as discussed above, PacifiCorp essentially requires attachers or their contractors to perform the pre-construction survey already by virtue of its detailed application.

Comcast cannot function in today's fiercely competitive communications environment if it is forced to beg for prompt access to poles. Comcast must have tools like enforceable timetables to effectively compete in the market and cannot rely on a pole owner's discretionary timetables.

2. Make-Ready Timetables

For the same reasons, enforceable make-ready deadlines are equally critical. Comcast is often faced with substantial delays when seeking access due to the nonperformance of timely make-ready on the part of the pole owner, even at times when the pole owner is able to satisfy its own service requirements. While there is some agreement among the parties that the make-ready

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62 *See, e.g, Implementation of the Local Competition Provisions in the Telecommunications At of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶ 1182 (rel. Aug. 8, 1996) ("Utilities stress the importance of ensuring that only qualified workers be permitted in the proximity of utility facilities. Some utilities seek to limit access to their facilities to the utility's own specially trained employees or contractors, particularly with respect to underground conduit...While we agree that utilities should be able to require that only properly trained persons work in the proximity of the utilities' lines, we will not require parties seeking to make attachments to use the individual employees or contractors hired or pre-designated by the utility. A utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access will be able to use any individual worker who meets that criteria. Allowing a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers and cable operators and would inevitably lead to disputes over rates to be paid to the workers.") ("*Local Competition Order*); *aff'd Southern Co. v. FCC*, 293 F.3d 1338, 1350-51 (11th Cir. 2003).

63 *See* VT. PUB SER. BD. R. 3.708(G)("All Pole-Owning Utilities and Attaching Entities shall maintain a list of contractors whom they allow to perform Make-ready surveys, Make-ready, or other specified tasks upon their equipment. In the event that a Pole-Owning Utility cannot perform required Make-ready in a timely manner, the attaching party may demand that outside contractors be sought. The Pole-Owning Utility shall thereupon exercise best efforts to hire one or more contractors from the list to perform required work, under the supervision and control of the Pole-Owning Utility.").

process should be performed within a specific time period, the parties cannot not reach consensus as to what that specific time period should be. PacifiCorp suggested that make-ready timetables be based on the complexity of a particular job, but the parties could not agree on the definition of "complex." While Comcast appreciates PacifiCorp's efforts in this regard, there are several, simpler ready-made solutions.

For example, following the New York rulemaking, pole owners are now required to "complete make-ready within 45 days of the date payment is received by the owner."[64] Although Comcast believes that make-ready can certainly be performed in 45 days, Comcast is agreeable to a 60 day make-ready deadline.

Similarly, in Vermont, a pole owner must meet certain deadlines, dependent on the size of a particular job.[65] If the pole owner in Vermont is unable to meet the deadline, the attacher "may demand that outside contractors be sought."[66]

The right to use outside contractors to perform make-ready work, even in the electrical space, is also consistent with FCC rules. Indeed, while the FCC allows utilities to require that

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64 New York Order, Appendix A at p.4.

65 *See* VT. PUB SER. BD. R. 3.708(E). Make-ready work on fewer than 0.5% of a company's poles or attachment shall be completed within 120 of authorization and payment. Make-ready work on 0.5% or more but less than 3% of a company's poles or attachments shall be completed within 180 of authorization and payment. Make-ready work on more than 3% of a company's poles or attachments shall be completed within a time to be negotiated between all the affected owners and attachers. The time shall be negotiated in good faith and shall be reasonable in light of [the other timetables]. While Comcast believes these timetables are too lengthy, and prefers a turn around period closer to New York's rules, Comcast has no particular objection to flexible, but certain and enforceable timeframes that are dependent on the size of the project.

66 VT. PUB SER. BD. R. 3.708(G). The Illinois Commerce Commission, which also regulates pole attachments, recently ruled that attachers should have the right to use outside contractors to perform make-ready, recognizing that work delays have a detrimental impact on competition. *See AT&T Communications of Illinois Inc., TCG Illinois and TCG Chicago, Verified Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company (SBC Illinois) pursuant to Section 252(b) of the Telecommunications Act of 1996*, 03-0239, Arbitration Decision, pp. 110-111 (ICC 2003) ("The delay in completing work in a reasonable time can affect AT&T's ability to compete. SBC has argued that this could be seen as conflicting with its collective bargaining agreement. The FCC has adopted rules that prohibit pole owners from requiring attaching parties to use the pole owner's workers. The workers from AT&T must have the same qualifications. We agree with AT&T. If SBC is unable to complete the requested work within a reasonable time frame SBC may permit AT&T to conduct Field Survey Work and Make Ready Work itself or through its contractors. If SBC is unable to meet the requested completion date, AT&T will have the option of performing the Make Ready Work to meet the requested completion date.").

only qualified individuals have physical access to their poles and facilities, the FCC expressly prohibits utilities from forcing third party attachers to use a utility's own employees to perform make-ready. In establishing the rule, the FCC explained that to "[a]llow[] a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers and cable operators and would inevitably lead to disputes."[67] Affirming its pro-competitive rule on reconsideration, the FCC further stated:

> We have been presented with no facts or arguments that necessitate modification of the Commission's decision that otherwise, qualified, third-party workers may perform pole attachment and related activities, *such as make-ready work*, in the proximity of electric lines…We reiterate that a utility may require individuals who will work attaching or *making ready attachments* of telecommunications or cable system facilities to utility poles, in the proximity of electric lines, have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access will be able to use any individual workers who meet these criteria. Thus, utilities may ensure that individuals who work in proximity to electric lines to perform pole attachments and related activities meet utility standards for the performance of such work, but the utilities may not dictate the identity of the workers who will perform the work itself. As we stated in the *Local Competition Order*, allowing a utility to dictate that only specific employees or contractors be used would impede access and lead to disputes over rates to be paid to the workers.[68]

The FCC's third-party worker rule was upheld on appeal as "measured and reasonable" by the United States Court of Appeals for the Eleventh Circuit, in *Southern Company v. FCC*, 293 F.3d 1338, 1351 (11th Cir. 2002) (finding that the FCC's "guideline represents an attempt to balance the interests involved in a measured and reasonable way…").

Further, in the *Cavalier* case, the FCC admonished Virginia Power over its make-ready delays and reminded the utility of the third-party worker rule:

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67 *Local Competition Order* at ¶ 1182 (internal citations omitted).

68 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Order On Reconsideration, 14 FCC Rcd 18049, ¶ 86 (1999) (emphasis added and internal citations omitted).

> [Cavalier] also alleges that [Virginia Power] has refused to allow it to use third party contractors for make-ready work, even when the contractors were similarly trained and qualified as those employed by [Virginia Power]. [Virginia Power] argues that while the Commission has required it to allow qualified workers to work in proximity to electric lines, it is not required to allow its own electric facilities to be handled by non-employees or contractors. According to [Virginia Power], it does not allow multi-party engineers and contractors under the control of another company to work on its facilities. We have stated that 'a utility may require that individuals who will work attaching or making ready attachments of telecommunications or cable system facilities to utility poles, in the proximity of electric lines, have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access will be able to use any individual workers who meet these criteria.[69]

Although the FCC did not force Virginia Electric to use outside contractors in the *Cavalier* case, it strongly urged the electric company to "consider that alternative," and cautioned Virginia Power that "[it] cannot use its control of its own facilities to impede [Cavalier's] deployment of telecommunications facilities."[70]

Finally, to further ensure that make-ready proceeds on a timely basis for all parties, it is essential that the final, standard Agreement contain a provision requiring the pole owner to coordinate necessary make-ready and other work between the parties. This important coordination function is the exclusive responsibility of the pole owner. The Pole Attachment Act itself requires pole owners to "notify other attachers of any pending work, which will affect their attachments."[71] The FCC has ruled:

> [Although the pole owner] believes that it is not responsible for managing attachments to the pole or notifying attachers when safety violations must be corrected or when make-ready or other work which may affect the attachments is going to be performed… [the pole owner] cannot abrogate its duties as pole owner or force

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69 *Cavalier* at ¶ 18 (internal citations omitted).

70 *Id*.

71 *Cavalier* at ¶ 17 (citing 47 U.S.C. § 224(h)); Compare Exhibit 1 (PacifiCorp's Application Process Flow), (requiring attacher to "complete coordination of communications make-ready").

> [the attacher] to accept [pole owner's] duties towards other attachers…Due to the inherent disparity in the relationship of the [attacher] and the [pole owner] to the other parties that have attached to a pole, we find that [the pole owner] is responsible for coordinating and notifying the attaching parties. Any costs incurred…in managing and maintaining its poles is passed through …in the form of make-ready costs or the pole rental fee.[72]

The coordination function extends to coordinating make-ready payments between parties.[73] This is a critical element of the pole owner's responsibility because attachers have no privity of contract with each other and cannot force reimbursements for work performed on behalf of another attacher. This can lead to delays for all parties.

For example, Comcast recently received several notices from PacifiCorp requiring Comcast to rearrange its facilities to "accommodate [a] new attach[er.]" However, PacifiCorp's notices are devoid of any information about the new attacher (like contact information) or how Comcast is supposed to recover its costs for accommodating the new attacher. As a result, Comcast has had to spend time and money simply contacting the new attacher and trying to arrange for pre-payments from the new attacher. This is not Comcast's responsibility. As the pole owner, PacifiCorp is in a much better position to require the new attacher to pay Comcast prior to the performance of any work. Such a requirement in the Agreement would facilitate make-ready work for all parties.

Following its recent rulemaking, the Vermont Public Service Board recognized that because the pole owner has exclusive "control of the pole" it is the pole owner's responsibility to facilitate joint use and incorporated the coordination function into its rules.[74] This Commission should similarly include this requirement in the Agreement.

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72 *Cavalier* at ¶ 17.

73 *See Cavalier* at ¶ 16 (requiring pole owner to ensure proper payments are shared by parties).

74 VT. PUB SER. BD. R. 3.708(B)("During the Make-ready process, the Pole Owner is presumed to have control of the pole and is responsible for meeting all time limits…").

In sum, Comcast is agreeable to a 60 day make-ready deadline or to performance timelines based on the size of a particular job, as the current Vermont rules provide. In either case, Comcast urges the Commission to give attachers the right to demand the use of outside contractors when make-ready timetables are not met. Only then, can Comcast ensure timely delivery of important advanced communications services to Utah's residents. Giving attachers the option to retain qualified contractors to perform work the pole owner which the pole owner is unable to complete in a timely fashion also provides a structural incentive for pole owners, who would rather perform make-ready work themselves, to meet enforceable timetables. Including an additional requirement that the pole owner coordinate necessary make-ready, including payments, is also critical for expeditious access and deployment.

C. Service Drops

The draft Agreement allows attachers, like Comcast, to install service drops without submitting an application. This provision reflects standard industry practice in Utah and around the nation. Regulators and pole owners alike recognize that franchise customer service requirements and federal regulations mandate that cable operators (and other service providers) provide service to new customers within a very brief time from the date of request, often just 7 days. Regulators and pole owners also recognize that there are key physical differences between distribution and drop poles.[75] Indeed, at the present time, no pole owner in Utah requires

[75] *See* New York Order, Appendix A at 3. ("There are differences between the facilities placed on drop poles and those attached to distribution poles. In order to fulfill requests for service expeditiously, Attachers need to obtain access to individual poles not previously licensed in order to meet their obligations to customers. Service or drop poles are required to support cables and wires that serve an individual premise or building when that structure is a significant distance from the main distribution pole. Service drops themselves do not normally require conventional framing hardware nor the drilling of the pole for attachments as main distribution facilities do. Installation of services requiring drop pole attachments has been performed in the past without notable incident, except Pole Owners may not have been compensated for the use of their poles. As long as the installation of service drops can be done safely and within the requiems of all relevant codes, procedures and processes, they will be allowed without prior consent or licensing. Attachers are required to inform Owners of such attachments within 10 business days after they are made…"). *See also* Oregon Administrative Rules, OAR 860-028-0120 (allowing attachers to apply for permit for service drops within 7 days of installation).

Comcast to submit permits *prior* to making a customer service drop. Even PacifiCorp currently allows Comcast to install drops to meet customer service requests and thereafter submit "applications" on a quarterly basis for rental assessment purposes.[76]

Nevertheless, during recent teleconferences and e-mail exchanges between the parties, PacifiCorp has indicated that it intends to change this universal practice and require applications (along with application fees) for customer service drops that are the first attachment on the pole or attached outside the attacher's existing allocated space.[77] PacifiCorp claims this drastic change in practice is necessary in order to avoid any "surprises" in the event another attacher is trying to make a service drop on the same pole.[78] Comcast is not aware that such occurrences are a real concern and is mystified by PacifiCorp's apparent departure from the current practice. Even PacifiCorp admits that any such conflict between attachers would be a "special case."[79] This leads Comcast to only one conclusion: PacifiCorp is not concerned about any special surprises, it merely wants an excuse for charging additional application and inspection fees.

Requiring an attacher, like Comcast to permit customer service drops prior to installation would wreak havoc on Comcast's business. Indeed, Comcast would be unable to compete for any customer. For example, municipal over-builders promise services within a very short period of time. DBS similarly guarantee service to customers within 48 hours of a request. In order to

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[76] Prior to PacifiCorp's implementation of the quarterly notice rule, PacifiCorp did not require any notice for service drops.

[77] *See* E-mail from Raymond Kowalski (outside counsel to PacifiCorp) to Krystal Fishlock, *et al*., dated March 31, 2005 (attached hereto as Exhibit 2). It is important to note that these types of service drops (first on the pole and outside the attacher's one foot of space) are the *only* kind that occupy pole space and would be subject to notice requirements and rental fees. Comcast believes that PacifiCorp wants notification of these kinds of drops for rental assessment purposes only. Comcast agrees that PacifiCorp and other pole owners are entitled to rent for these kinds of drops because they occupy attachment space. Comcast is, therefore, confused why PacifiCorp would want attachers to report other kinds of service drops, and PacifiCorp has failed to explain. Other kinds of drops (*e.g*., mid-span drops off the attacher's own cable) do not occupy pole space and may not be charged rent.

[78] *Id*.

[79] *Id*.

compete, Comcast currently attempts to meet or beat that DBS timeframe. These real-world examples demonstrate just how absurd any prior permitting requirement would be.

PacifiCorp has offered no legitimate reasons for revising the current practice in Utah. Indeed, given PacifiCorp's track record on application turn around time—5-8 months on even the smallest applications—Comcast would be hard pressed to keep and attract any customers at all. Comcast agrees that pole owners deserve rent for certain types of service drops and Comcast will continue to submit quarterly notification for drops that are the first attachment on a pole or outside its allocated one foot of space for rental assessment purposes.

D. Overlashing

1. Background

No cable operator can deliver the kind of advanced digital and broadband services (such as video-on-demand and VoIP) that Comcast's Utah customers demand without advanced, high-capacity transport facilities. Fiber is the glass key that unlocks broadband, because fiber is the only technology that can support extremely high capacities over great distances at reasonable cost. To deliver broadband services Comcast must deploy fiber optics deep into its network. Fortunately, fiber optic cables are extremely lightweight—by far the lightest facilities on the pole—and can be overlashed to existing support wires that are themselves already attached to poles.[80]

Fiber overlashing is a non-invasive construction technique. Unlike affixing a new attachment to a pole which sometimes requires the rearrangement of other occupants' facilities, and always requires the drilling of a pole, placement of a through-bolt, clamp and steel strand, fiber overlashing is non-invasive. Overlashed conductors occupy the same foot of space licensed

[80] Overlashing is the lashing of additional wires, such as fiber optic conductors, to a wire support strand already attached to the pole with a clamp and through bolt. Communications conductors are placed on the support strand and secured by wrapping the strand and the conductor(s) with a thin filament applied by a lashing machine.

to the attaching party, and require the installation of no additional hardware to the pole, making additional licenses and payments unnecessary. Additionally, because fiber optic cables are so light, overlashing adds no appreciable load to the pole. Typical (.59-inch) fiber optic conductors used in cable construction today weigh only 50 pounds per 1000 feet, and are more than six and one-half times lighter than ¾-inch telephone copper bundles and nearly twelve times lighter than electric wires (for "0000" service wire). For these and other reasons, policy makers and regulators actively encourage unrestricted overlashing as a means to foster competition and service innovation in an expeditious manner.[81]

While the FCC has always encouraged overlashing without pole owner interference,[82] four years ago the FCC clarified its overlash policy and expressly declared that "neither the host attaching entity nor the third party overlasher must obtain additional approval or consent of the utility for overlashing other than the approval obtained for the host attachment."[83] The United States Court of Appeals for the District of Columbia Circuit affirmed this important, pro-

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81 *Amendment of Rules and Policies Governing Pole Attachments, In the Matter of Implementation of Section 703(e) of The Telecommunications Act of 1996*, 16 FCC Rcd 12103, Consolidated Partial Order on Reconsideration, ¶ 73 (2001) ("Cable companies have, through overlashing, been able for decades to replace deteriorated cables or expand capacity of existing communications facilities, by tying communications conductors to existing, supportive strands of cable on poles. The 1996 Act was designed to accelerate rapid deployment of telecommunications and other services, and to increase competition among providers of these services. Overlashing existing cables reduces construction disruption and associated expense.") (hereinafter "2001 Pole Order"); *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd, ¶ 62 (1998) ("We believe overlashing is important to implementing the 1996 Act as it facilitates and expedites installing infrastructure essential to providing cable and telecommunications services to American communities. Overlashing promotes competition [and helps] provide diversity of services over existing facilities, fostering the availability of telecommunications services to communities, and increasing opportunities for competition in the marketplace.") (hereinafter "1998 Pole Order").

82 *Common Carrier Bureau Cautions Owners of Utility Poles*, FCC Public Notice, DA 95-35 (1995) (cautioning utility pole owners "to be aware of their responsibilities pertaining to cable television pole attachments" and warning against "unreasonably preventing cable operators from overlashing fiber to their existing lines.").

83 *See* 2001 Pole Order.

competitive policy.[84] Since that time, the FCC has rejected further attempts by pole owners to craft pole attachment agreement language that seeks to end-run the FCC's overlash policy.[85]

2. Overlashing in Utah

Despite the various advantages of unrestricted overlashing, most importantly for Utah's residents, upon expiration of Comcast's 1999 Pole Attachment Agreement, in 2003, PacifiCorp radically changed its overlash requirements and demanded applications, along with (of course) application and inspection fees.[86] Prior to that time, PacifiCorp allowed Comcast to overlash upon 48 hours notice. Prior to 2000, Comcast overlashed without any notice, as was the custom nation-wide. Virtually, no other pole owner in Utah, including the second largest pole owner, Qwest, requires permits for overlashing.[87]

During the technical sessions, PacifiCorp claimed that permitting (including detailed engineering studies of all attachments) prior to overlashing was necessary because its poles were extremely overloaded and that even a simple overlash consisting of the lightest fiber optic cable would cause its poles to fall over. There are several reasons why PacifiCorp's dire prediction is extremely suspect, however.

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[84] *Southern Company Services, Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002) ("Overlashers are not required to give prior notice to utilities before overlashing. However, FCC rules do not preclude owners from negotiating with pole users to require notice before overlashing.").

[85] *Georgia Power*, ¶ 13 ("The New Contract provision challenged by Cable Operators requires Georgia Power's written consent to overlashing, which the utility may take up to 30 days to grant or deny. This new provision is unjust and unreasonable on its face. The Commission has expressly articulated a policy promoting overlashing, and stated [that approval from the utility is not required]. Georgia Power is therefore ordered to negotiate in good faith a reasonable provision consistent with Commission precedent.").

[86] Even though the parties have yet to enter an agreement that requires permits for overlashing, Comcast was forced to submit to PacifiCorp's unilateral demands for permits after PacifiCorp shut down Comcast's upgrade in 2003. Indeed, Comcast is anticipating approximately $400,000 worth of invoices from PacifiCorp for "applications processing" and inspections fees in the very near future, in relation to overlashing that occurred over the last year and a half.

[87] Bountiful City Power, a very small pole owner who is not covered by this proceeding, does require permits for overlashing. However, that City's poles are located in a particularly high-wind area and have suffered significant pole failures in the past. Moreover, Bountiful rapidly processes Comcast's permits.

First, since PacifiCorp began requiring Comcast to apply for permits in 2003, the only kinds of make-ready issues that PacifiCorp has identified involve *pre-existing* spacing, guy and bonding issues.[88] Comcast is aware of no loading issues.

Second, and perhaps most significantly, to suit its own needs, PacifiCorp has contradicted the claims it made about over-loaded poles in the technical sessions. For example, in a comprehensive report filed with the Utah Public Service Commission, last May "on the Utah outage of December 2003," PacifiCorp unequivocally stated that "[t]he company designs and constructs distribution systems with some level of margin to handle variations in load changes."[89] Indeed, according to PacifiCorp, "pole damage (33 poles replaced) was minimal during the storm."[90] The report also stressed that:

> Further evidence of the desire to maintain a robust system is apparent in the material purchase specifications and the standards used to construct the overhead and underground system. Our construction standards meet or exceed NESC requirements without over-building the power system. This approach is instrumental in balancing the cost to construct with the prices customers pay for service. They are an example of the company's desire to construct and maintain a system that will provide reliable service to customers. However, no system is designed to withstand mechanical impacts like tree limbs falling into power lines.[91]

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[88] Indeed, PacifiCorp will not allow Comcast to overlash until Comcast has corrected these pre-existing safety violations, whether Comcast's overlash has any further impact on the pole (which is unlikely, considering the light-weight character of fiber overlash) or whether Comcast was even responsible for the safety violation. This is unlawful. *See Cavalier* at ¶ 16 ("[Pole owner] suggests that [attacher] can expedite the permitting process by paying for and correcting these pre-existing safety violations or waiting up to 5 years for [pole owner] to correct them. [Pole owner] suggests that [attacher] has the option to expedite the make-ready process by contacting and working with attachers with outstanding violations. [Pole owner] argues that it is not required to ensure that other attachers pay their share of correcting violations. We find this to be unacceptable. While we find [pole owner]'s interest in correcting safety violations laudable, [attacher] is only held responsible for make-ready costs generated by its own attachments. [Pole owner] is prohibited from holding [attacher] responsible for costs arising from the correction of safety violations of attachers other than [attacher]. [Pole owner] must reimburse [attacher] for any payments made to [pole owner] to correct other attachers [sic] safety violations. It is up to [pole owner] to require other attachers to reimburse [pole owner] or otherwise pay for corrections of safety violations.").

[89] PUBLIC SERVICE COMMISSION INQUIRY REPORT, UTAH HOLIDAY STORM INQUIRY—2003 (submitted by Utah Power, May 13, 2004) at p. 173.

[90] *Id*. at p. 243.

[91] *Id*. at p. 182.

Third, during a February 11, 2005 technical session convened to discuss alternatives to PacifiCorp's overlash permitting requirements, Division staff asked PacifiCorp what it was doing to ensure plant integrity if its poles were so overloaded. As far as Comcast knows, that question remains unanswered.

The above evidence points to one conclusion: PacifiCorp's permitting requirement has nothing to do with concerns of overloaded poles. Rather, as with most of PacifiCorp's requirements that depart from standard industry practices, PacifiCorp seeks to profit from its non-cost based application and inspection fee program, and on top of that, wants Comcast to pay to upgrade its plant.[92]

3. New York's Overlashing Standard

Allowing attachers to overlash without a permit is not only consistent with federal law, it is consistent with recent rulings from other certified state commissions. Commissions that have recently examined the issue have followed the FCC's lead and incorporated rules that promote expeditious overlashing. Significantly, in the pole proceeding held in New York, where staff and stakeholders held several sessions on overlashing and also extensively briefed the issue, the NY PSC adopted a standard that allows parties to overlash upon notice, up to pre-determined load limits.[93] According to Comcast's engineers, virtually all of Comcast's overlashes are well within the New York standard.[94]

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[92] As Comcast established during the *Comcast v. PacifiCorp* case, it is no secret that PacifiCorp is in the midst of a $200,000,000 state-wide upgrade of its Utah outside plant (known as project Quantum Leap), which included an upgrade of its distribution facilities.

[93] New York Order, Appendix A at p. 9 (August 6, 2004).

[94] Specifically, "[a]n Attacher [] whose facility has a pre-existing NESC calculated span tension of no more than 1,750 lbs., shall be allowed to overlash a predetermined maximum load of not more than 20% to the existing communications facility. Existing facilities with an NESC calculated span tension of less than 1,000 lbs. shall be allowed a pre-determined overlash of up to 40% of such pre-existing facilities. *Id.*

In announcing this standard, the NY PSC recognized that: "Typically a fiber cable overlashed to an existing coaxial cable facility with a common trunk and feeder cable configuration adds very little to the existing facility's overall weight and bundle diameter."[95] Thus, the Commission had "little concern about ice and wind loading," even though New York is situated within a "heavy" load zone.[96]

Even when a New York attacher determines that the overlash will exceed the limit, the attacher is merely required "to provide the pole owner with a 'worst case' pole analysis from the area to be overlashed, to be sure the additional facilities will not excessively burden the pole structures…and for future attachment applications and engineering."[97] In no case is a permit required.

Contrary to PacifiCorp's claims during the technical sessions, the NY PSC did not base its decision to allow a pre-determined maximum load on whether pole owners in the state possessed any "back-up data." Pole owners in New York possess no more "back-up data" than PacifiCorp. In fact, considering the kind of data collected during PacifiCorp's last audit, there is little doubt that PacifiCorp has far, far more data—data that Comcast largely paid to collect.[98] PacifiCorp has provided no evidence that overlashing is problematic or has caused one pole to come down. Pole Owners in New York similarly were unable to produce evidence that overlashing caused poles to break or fall over, despite repeated requests by the Commission.

In sum, Comcast strongly objects to any permitting requirement for overlashing. As explained above, PacifiCorp's unreasonable overlashing requirements have already caused

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95 *Id*. at pp. 8-9.

96 *Id*. at p. 9. Unlike New York, Utah is fully situated within a "medium" ice/wind load district.

97 *Id*.

98 *See Comcast v. PacifiCorp*, at p. 12 ("PacifiCorp contracted with Osmose…to perform a comprehensive inspection that included obtaining GPS coordinates for each PacifiCorp pole, the number and ownership of all third-party attachment on those poles, a digital photograph of each pole, and documentation of all identified safety hazards on the poles.").

Comcast's upgrade significant delay, in turn jeopardizing its customer base and franchise relationships. Comcast has no objection to compromising on this issue and incorporating the New York standard into the final Agreement. Like attachers in New York, Comcast is an established company with vast construction experience and is perfectly capable of ensuring the integrity of PacifiCorp's plant, without which Comcast would be unable to serve its own customers. Finally, given the importance of overlashing to the deployment and upgrade of advanced facilities-based services and competition, Comcast believes that the overlashing process in this final standard Agreement must be readily distinguishable from the "Application" process and should be contained in a separate section with distinct requirements.

4. Third-Party Overlashing

Section 5.04 of the Agreement requires that if the attacher permits its facilities to be overlashed by a third party, the total compensation payable by the third party must be paid to the pole owner. This anti-competitive provision conflicts with long-standing FCC policy and would also lead to double-recovery because the third party overlasher occupies no additional space.[99]

The NY PSC in its recent pole order repealed its rule allowing pole owners to charge rent to third party attachers, recognizing that, like first party overlashers, third party overlashers occupy no additional space: "On balance, since pole rental is paid for space occupied, third party overlashing should not be treated differently from an Attacher lashing more facilities to its own

[99] "[The] record does not indicate that the third party overlashing adds any more burden to the pole than overlashing one's own attachment. We do not believe that third party overlashing disadvantages pole owners in either *receiving fair compensation* or in being able to ensure the integrity of the pole… Accordingly, we will allow third party overlashing subject to the same safety, reliability and engineering constraints that apply to overlashing one's own pole attachment. Concerns that third party overlashing will increase the burden on the pole can be addressed by compliance with generally accepted engineering practices." 1998 Pole Order at ¶ 68, *aff'd*, 2001 Pole Order at ¶ 75 ("We have stated that the third party overlasher is not separately liable to the utility for the usable space which the overlashing shares with the host attachment because there would be no additional usable space occupied. We expect and encourage the overlashing and host attaching entities to negotiate a just and reasonable rate of compensation between them for the overlashing, which will represent some sharing of the usable and unusable space costs.").

attachment, for which there is no additional charge. No additional space on the pole is used so no rental charge shall be made."[100]

Similarly, this Commission does not permit a pole owner to charge rent for an overlashed fiber because it occupies no additional attachment space. The same is true for third party overlashers. If the Commission does allow the pole owner to charge third party overlashers, the most the pole owner should be entitled to charge is half the annual rental rate to the original attacher and half to the third party overlasher. Anything more would lead to unlawful double-recovery.

Finally, any third-party overlashing that occurs will be exclusively located on the underlying attacher's facilities. Thus, the pole owner can hold the underlying attacher responsible for any damages caused by the third party overlasher, pursuant to the Agreement.

E. Audit Costs

It is no secret that PacifiCorp's 2002/2003 audit was controversial and engendered disputes in the State of Utah, not the least of which was between Comcast and PacifiCorp. Although part of the dispute between Comcast and PacifiCorp involved the unauthorized attachment penalty, Comcast was also required to pay a significant share of the cost for the performance of the audit itself.[101]

While Comcast objected to paying any amount for the audit, believing that PacifiCorp was the primary beneficiary, the Commission ruled that Comcast also received a benefit in the form of updated pole attachment records.[102] Now that PacifiCorp has populated its pole attachment database (largely on its attachers' dime) and attachers are submitting applications, the costs of any future periodic audits (counting and safety), as contemplated by Section 3.24, must

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100 New York Order, Policy Statement at p. 6.

101 *See Comcast v. PacifiCorp* at p. 46 (requiring Comcast to pay $895,270.42 in audit charges).

102 *Id*. at p. 45.

be considered a cost of doing business and incurred by PacifiCorp. Those costs would then be allocated to each attacher in the form of the annual rental rate. Requiring all pole owners in Utah to allocate these costs in the annual rent would ensure that costs are not being doubly-recovered and will go along way towards avoiding the kinds of cost-allocation disputes resulting from PacifiCorp's audit.

This approach is also consistent with well-established federal law. The FCC has consistently held that the "costs attendant to routine inspections of poles, which benefit all attachers, should be included in the maintenance costs account and allocated to each attacher in accordance with the Commission's formula."[103] For example, FERC Account 593 includes the expenses for inspection and maintenance of overhead distribution lines and is factored into the carrying charges that make up an electric utility's annual rent. Likewise, ARMIS Account 6411, includes all pole related expenses and determines the maintenance carrying charge in an ILEC's annual rental rate. Allowing these costs to be charged in the annual rental rate and again as a direct audit charge, would result in double-recovery. Further, as Comcast explained above, although it is theoretically possible to back these costs out of the relevant FERC and ARMIS Accounts, that is a complex exercise that will only lead to further disputes and prolonged rate-making cases.[104]

F. Easements

Contrary to the federal access requirements in the Pole Attachment Act, PacifiCorp has insisted on including an anti-competitive provision "specifically disclaim[ing]" that attachers

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103 *See, e.g., Georgia Power*, ¶ 16.

104 The Vermont Public Service Board has also recognized that pole owners have an obligation to maintain plant and should recover related expenses in the pole rent. *See* Docket No. 6553, Investigation Into Tariff Filing of Verizon New England, Inc., d/b/a Verizon Vermont, re: Revisions to its Pole Attachment Tariff, Order, p. 21 (Vt. PSB Oct. 22, 2003) ("Verizon ought to be allowed to inspect the poles to assure compliance with construction standards, and to charge the attaching entity for the inspections *where violations are discovered*. Subsequent inspections, on the other hand, are more likely to be for the benefit of Verizon and all attachers generally, and the cost of those inspections ought to be folded into the pole-attachment rental charge.") (emphasis added).

have any right under the Agreement to the pole owner's rights-of-way and easements.[105] While Comcast believes this provision has no legal effect, because Congress clearly obligates pole owners to provide access to "any right-of-way owned or controlled by it,"[106] including "private easements," retaining it will undoubtedly cause numerous disputes and lead to confusion. Moreover, a new facilities-based entrant that is not necessarily familiar with federal access requirements, for example, may feel compelled to spend time and money to obtain easements and other rights that, by law, it already has. Thus, the provision may also have a significant anti-competitive impact. Indeed, the FCC has rejected similar language in disputed pole attachment agreement cases.

In the *Georgia Power* case, for example, Georgia Power sought to include a comparable provision stating that the "[c]ontract does not give the [Licensee] 'any right to use Georgia Power's rights-of-way which must be separately agreed upon for further consideration.'"[107] Striking this provision, the FCC reminded Georgia Power of its Congressionally-mandated obligation to provide access to "*any*…right-of-way owned or controlled by it."[108] The FCC further ruled that because the rate formula "assures that Georgia Power receives just compensation under the Constitution, the utility is not entitled to additional payment for private easements."[109] Comcast has no objection to the remainder of Section 3.11, requiring attachers to obtain "necessary" authority and indemnify the pole owner for failing to have the requisite authority. However, the first sentence of Section 3.11 is designed to thwart, not facilitate, access and will cause needless disputes. Consequently, the first sentence must be deleted.

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105 *See* Section 3.11.

106 *See* 47 U.S.C.§ 224(f)(1).

107 *Georgia Power*, ¶ 25.

108 *Id*. at ¶ 26.

109 *Id*. at ¶ 27.

G. Relocation Costs

Comcast objects to the current language contained in Sections 3.12 through 3.17. Together, these sections are redundant, confusing and rife with internal inconsistencies. The current language also conflicts with federal access law in several significant ways. Comcast, therefore, believes these sections must be significantly revised and has offered alternative language (below) that clearly delineates the rights and responsibilities of all joint users, under various circumstances, consistent with nondiscriminatory access principles.[110]

1. Section 3.12

Section 3.12 requires that if "Licensee's existing Attachments on any pole interfere with Pole Owner's or other pole attachers' existing Equipment" the Licensee must incur all the costs. Comcast agrees that it is reasonable to expect an attacher to pay for any interference *caused* by that attacher. But, the existing language could be interpreted to mean that the attacher is responsible to pay these costs, whether or not it caused the interference, and there are is nothing in the current version of the Agreement that counters that language. Indeed, this is precisely how PacifiCorp currently operates. Specifically, it requires Comcast to pay for rearrangements that are required due to safety violations not necessarily caused by Comcast.[111]

As a result, Section 3.12 is not only vague, it conflicts with well-established pole attachment law that prohibits forcing an attacher to pay to correct safety violations caused by another attacher, including the pole owner.[112] Moreover, the Pole Attachment Act also requires

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110 Comcast has no objection to Section 3.18.

111 *See* n. 42 and 88, *supra* (discussing PacifiCorp's impermissible requirement that Comcast clean up all pre-existing violations prior to overlashing).

112 *See, e.g., Cavalier*, ¶ 16 (2000) (prohibiting utility from holding attacher responsible for costs arising from the correction of safety violations of other attachers).

any party, including the pole owner, that benefits from a modification (*i.e.*, if the other party must increase its capacity or correct a safety violation), to share the cost.[113]

Comcast's proposed language for Section 3.12 (Attached hereto as Exhibit 3), on the other hand, expressly states that "Licensee shall assume the entire cost incurred by Pole Owner and other licensees to…bring Licensee's Attachments into compliance..."

2. Section 3.13

Section 3.13 also conflicts with the federal Pole Attachment Act in that it requires the Licensee to pay for its own transfers in the event the pole owner must replace a pole solely for its own benefit. This type of provision undermines important nondiscriminatory access principles, ensuring that once a party obtains access to a pole, that party may not be forced to incur any expense for activities undertaken that solely benefit another party, including the pole owner, unless the original party also benefits.[114]

The NY PSC agrees and recently repealed its rule that held existing attachers responsible for subsequent rearrangements. The NY PSC had previously justified this rule because attachers in New York paid less than the fully allocated rate. Recognizing that attachers now pay fully allocated costs in New York, the NY PSC held: "in fairness to attachers, if an attachment is legal when made, subsequent rearrangements should be paid for by the Attacher that requires the rearrangement and not previous Attachers."[115]

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113 47 U.S.C. § 224(i) ("An entity that obtains an attachment to a pole . . . shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole. . . .").

114 *See* 47 U.S.C. §§ 224(h)-(i).

115 New York Order, Policy Statement, at p. 4. That includes the pole owner. *See id*., Appendix A, at p. 5.

Similarly, Comcast's proposal complies with applicable law in the vast majority of the country and ensures that any party, including the pole owner, that requests a modification, incurs all the costs, unless others benefit. (*See* Sections 3.12-3.14 of Exhibit 3).

3. Section 3.14-3.15

Comcast does not object to Section 3.14 entirely. Comcast agrees that a pole replacement performed on behalf of the Licensee should be paid for by the Licensee. But the last sentence of that section seems to indicate that only *licensees* who benefit from a pole replacement will share in the costs. Neither Section 3.14 nor any other existing provision specifies when, if ever, a pole owner would share in the costs of a pole change-out (*i.e.*, when it needed extra capacity or to correct a pre-existing safety violation).

Section 3.15 merely requires the Licensee to share in the cost when the pole owner requires a pole replacement. In this regard, it is essential to point out that when an attacher pays for a pole replacement, that activity upgrades the pole owner's plant and creates excess capacity that the pole owner can either use itself, at no additional cost, or rent out for additional fees.[116] Considering that Comcast and other attachers also pay fully allocated rent, any argument that the electric utility ratepayer subsidizes communications attachers, as some pole owners argue, may readily be dismissed.[117]

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[116] *See, e.g., Alabama Cable Telecomm. Ass'n v. Alabama Power Co*., 16 FCC Rcd 12103 at ¶¶ 58 (2001) ("In instances where attachers pay the costs of a replacement pole, the attacher actually increases the utility's asset value and defers some of the costs of the physical plant the utility would otherwise be required to construct as part of its core service.").

[117] Indeed, utility assertions that the fully allocated (FCC) formula subsidizes the activities of attaching parties is entirely without merit and has been rejected by the Supreme Court (*FCC v. Florida Power Corp*., 480 U.S. 245, 253-54 (1987) (finding that it could not be "seriously argued, that a rate providing for the recovery of fully allocated cost, including the cost of capital, is confiscatory."); Circuit Courts (*Alabama Power Co. v. FCC*, 311 F.3d 1357, 1358 (11th Cir. 2002) (finding that the FCC formula provides just compensation), *cert. denied*, 124 S.Ct. 50 (2003), and several state public utility commissions, including the California PUC. According to the California PUC, which codified the FCC cable formula in California, at Cal. Pub. Util. Code § 767.5:

> [T]he formula does not result in a subsidy since the formula is based upon the costs of the utility. A subsidy would require that the rate be set below cost. The fact that the rate is below the maximum amount that the utility could extract for its pole attachment through market power absent Commission intervention

(continued...)

Again, Comcast's proposal ensures that costs are fairly allocated to those who benefit. Allocating costs based on the associated benefit helps to balance the interests of the parties, facilitate pole access and reduce cost disputes, consistent with the goals of this proceeding.

4. Section 3.16

Section 3.16, which generally requires licensees to pay for their own costs, unless "otherwise expressly provided," should be moved to the beginning of the cost allocation section. Although Comcast does not believe this provision is necessary, its current position in the middle of the section is confusing.

5. Section 3.17

The first paragraph of this section conflicts with Sections 2.03 and 3.12 and provides the pole owner with a perpetual reservation of space. Specifically, Section 2.03 allows a pole owner to "reserve space on its pole if such reservation is consistent with a bona fide development plan that reasonably and specifically projects and identifies a need for that space in the provision of its core utility service." The pole owner must allow use of the reserved space and may reclaim it from the attacher when it has an actual need for the space. The attacher is then allowed to pay to remain on the pole. This provision is consistent with federal access provisions and FCC rules.[118] Similarly, Section 3.12 provides that when a pole owner needs reserved space (as described in Section 2.03) for its core utility service, it may ask the licensee to vacate the pole or pay to stay.

(...continued)

> does not constitute a subsidy. The embedded cost formula prescribed in § 767.5 applies to capital costs, net of accumulated depreciation, and also allows for recovery of the annual operating expenses of the utility's poles and support structures. This formula will therefore reasonably compensate incumbent Utilities for their ongoing operating expenses related to providing access to their support structures.

Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service, Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Services, R.95-04-043, I.95-04-044, Decision 98-10-058, at 55-56 (Cal. Pub. Util. Comm'n Oct. 22, 1998) (jointly decided).

[118] *See, e.g., Local Competition Order*, ¶¶ 1165-1170, *aff'd Southern Co. v. FCC*, 293 F.3d 1338, 1348-49 (11th Cir. 2003).

Section 3.17, however, essentially undermines the purpose of allowing a pole owner to reclaim space *only in the event it is reserved pursuant to a bona fide plan*. Instead, the language in this section requires the licensee to vacate the pole or pay for an upgrade to remain on the pole "at any time," even if the pole owner's reclamation is for the purpose of serving a new customer, including a competitor of the attacher's.

Finally, although Comcast essentially agrees with the overall intent of Section 3.17's second paragraph, Comcast proposes a separate section for modifications required due to third party requests. (*See* Section 3.14 of Exhibit 3). Comcast also added a sentence to its proposal for Section 3.14 that expressly requires the pole owner to coordinate make-ready payments between attachers, as discussed above. The current proposal merely requires the pole owner to disclose the third party's name but does nothing to ensure that proper payments are made. Comcast's addition is critical to achieving effective joint use.

Comcast's proposals, attached as Exhibit 3, balance the interests of all parties, facilitate joint use, and decrease the chance of cost and related disputes.

H. Disputed Bills

Section 5.03 of the Agreement currently provides that an attacher must pay all disputed amounts. This is unreasonable. Consider the dispute between Comcast and PacifiCorp. In 2003, PacifiCorp shut down Comcast's upgrade, not because of safety issues, but because Comcast and PacifiCorp were in an unrelated dispute over unauthorized attachment invoices. Eventually, after a three month suspension of its upgrade, mainly to the detriment of Utah's consumers, Comcast was forced to pay certain disputed amounts in order to continue the upgrade, even though much of those costs were later refunded.[119]

[119] *See Comcast v. PacifiCorp*, at 1 and 17.

Indeed, it is not uncommon for pole owners to shut down communications attacher projects in order to pressure the attacher into paying unrelated, disputed invoices. Section 5.03, as written, unreasonably reinforces this leverage. Instead, if there is a dispute, the parties should resort to the Dispute Resolution process set forth in the Commission's proposed pole attachment rules.

I. Indemnity, Liability and Damages

1. Background

Each term and condition contained in a pole attachment agreement must be reasonable and nondiscriminatory, consistent with state and federal law (*see* 47 U.S.C § 224(b)(1)). Pole owners, by virtue of their ownership and control of the essential distribution network, will always have the upper hand when negotiating a pole attachment agreement. Thus, the general contract terms contained in the final Agreement, including the indemnities, should serve to level the playing field and balance the interest of the various parties, in accordance with the Commission's stated goals.

To that end, there should be no "limits" on the pole owner's liability to attachers. For example, some pole owners attempt to limit their liability to attachers to their "sole" or "gross" negligence. Similarly, consequential damages clauses are often one-sided. In other extreme cases, pole owner liability clauses are so one-sided that they can be interpreted to excuse the pole owner from virtually any and all liability.

To remedy these types of inequities, the FCC has ruled that indemnity clauses in pole attachment agreements must be reciprocal, where appropriate. In the *Georgia Power* case, for example, the FCC rejected utility arguments for a one way indemnity based on the unsupported allegation that cable operators pose a "far greater, and unwanted, risk" to the utility in the pole

attachment process.[120] Instead, the FCC ordered Georgia Power to negotiate a reciprocal clause, recognizing that "[a] reciprocal indemnification provision…simply would result in each party assuming responsibility for losses occasioned by its own conduct. Consequently, if Georgia Power is correct that the Cable Operators more frequently are the 'bad actors,' then the Cable Operators more frequently would be called upon to indemnify.").

Additionally, pole owners already recover their attorneys' fees in the annual pole rent and may not recover them again, directly in the event of a lawsuit.[121]

2. Comcast's Proposed Indemnity Language

Section 9.01 Indemnity: Reciprocity, Deadline For Submitting Claims, Gross Negligence, Shared Negligence

Licensee and Licensor agree to mutually indemnify each other to the extent of compensation for the full actual loss, damage or destruction of the other party's property that in any way arises from or is related to this Agreement or activities undertaken pursuant to this Agreement (including, without limitation, the installation, construction, operation or maintenance of Licensee's Attachments), except to the extent that such loss arises out of the party's own negligence, gross negligence or willful misconduct.

Licensee and Licensor further agree to indemnify, defend and hold each other harmless, and each other's parent, affiliates and subsidiaries and the agents, officers, employees and assigns of each ("Indemnitees"), from any and all losses, damages, costs, expenses (including, without limitation, reasonable attorneys' fees), statutory fines or penalties, actions or claims for personal injury (including death), damage to property, or other damage or financial loss of whatever nature, asserted by any third-party, in any way arising out of or connected with this Agreement or activities undertaken pursuant to this Agreement (including, without limitation, the installation, construction, operation or maintenance of Licensee's Attachments), except to the extent caused by the negligence, gross negligence or willful misconduct on the part of Indemnitees. The party against whom a third-party brings a claim, litigation, or proceeding for such losses or damages shall have the discretion to control the defense and/or settlement of any claim or litigation, or to allow Indemnitee(s) to control such litigation. If the party against whom

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120 *Georgia Power*, ¶ 31.

121 *See Georgia Power* at ¶ 18 (finding unreasonable a provision in a pole attachment agreement allowing the utility to recover for the "reasonable costs and expenses in the enforcement of this agreement;" and stating that "[t]hrough the annual rate derived by the Commission's formula, an attacher pays a portion of the total plant administrative costs incurred by the utility. Included in the total plant administrative expenses is a panoply of accounts that covers a broad spectrum of expenses. A utility would doubly recover if it were allowed to receive a proportionate share of these expenses based on the fully-allocated costs formula and additional amounts for administrative expenses. The allocated portion of the administrative expense covers any routine administrative costs associated with pole attachments, such as billing and legal costs associated with administering the agreement.").

a third-party brings a claim, litigation, or proceeding controls the defense of such action or proceeding, that party shall not dispose of, compromise or settle any claim or action without the Indemnitee'(s) consent, which consent will not be unreasonably withheld, and shall not create any obligations on behalf of the Indemnitee(s).

Licensee will further indemnify Licensor from subsequent taxes and fees that may be levied by municipalities or other governmental entities and related to or arising from the presence of Licensee's Attachments on Licensor's Poles, including but not limited to taxes or fees related to use of public rights-of-way, in association with this Agreement. Such fees that are levied would be in addition to the Attachment Fees reflected in this Agreement.

Without limiting any of the foregoing, Licensee assumes all risk of, and agrees to relieve Indemnitees of any and all liability for, loss or damage (and the consequences of loss or damage) to any Attachments placed on Licensor's poles and any other financial loss sustained by Licensee, whether caused by fire, extended coverage perils, or other casualty, except to the extent caused by the negligence, gross negligence or willful misconduct on the part of Indemnitees.

Notwithstanding anything to the contrary in this Agreement, Licensee further shall indemnify and hold harmless Indemnitees from and against any claims, liabilities, losses, damages, fines, penalties and costs (including, without limitation, reasonable attorneys' fees) whether foreseen or unforeseen, which the Indemnitees suffer or incur because of: (i) any discharge of Hazardous Materials resulting from acts or omissions of Licensee or the Licensee's predecessor in interest; (ii) acts or omissions of the Licensee, it agents, employees, contractors, representatives or predecessor in interest in connection with any cleanup required by law, or (iii) failure of Licensee or the Licensee's predecessor in interest to comply with environmental, safety and health laws.

In no event shall either party be liable to the other party for any special, consequential or indirect damages (including, without limitation, lost revenues and lost profits) arising out this Agreement or any obligation arising hereunder, whether in an action for or arising out of breach of contract, tort or otherwise.

Licensee shall indemnify, protect and hold harmless Indemnitees from and against any and all claims and demands for damages or loss from infringement of copyright, for libel and slander, for unauthorized use of television or radio broadcast programs and other program material, and from and against all claims, demands and costs for infringement of patents with respect to the manufacture, use and operation of the Indemnifying Party's Facilities.

Comcast's believes that the foregoing language fairly distributes responsibility for bad acts to the responsible party, whether that party is the pole owner or the attacher, consistent with the intent of this proceeding.

J. Insurance and Bond

1. Insurance

Comcast does not believe it is possible to incorporate a single insurance provision that suits all pole owner or attacher needs. Although most insurance language is fairly standard, small cable operators or CLECs without many pole attachments should not be required to meet the same criteria as large operators. Different pole owners may also have different standard requirements. So, rather than include specific language, Comcast suggests that as with all standard terms and conditions in an approved agreement, insurance provisions must be reasonable and tailored to both parties' needs.

2. Bond

With regard to a bond requirement, in general, Comcast does not believe a bond is necessarily appropriate. Most payments in this Agreement, including rent, are required to be made up front. Therefore, rather than include a provision allowing the pole owner to require a bond at any time, the agreement should instead allow a pole owner to require some type of security in the event a particular attacher fails to make a required reimbursement, such as for make-ready costs. Comcast suggests the following language:

Article X Bond Requirement

After a failure by Licensee to reimburse Licensor for costs incurred as required hereunder, Licensor may require a bond assurance or other financial security in a form satisfactory to Licensor in such amount as Licensor may reasonably require (not to exceed twice the unpaid amount), to guarantee the performance of Licensee's obligations under this Agreement. Licensee's provision of the bond or financial security shall not operate as a limitation upon the obligations of Licensee hereunder. Notwithstanding the foregoing, to the extent Licensee has made reimbursements as required hereunder for a period of one year after any delinquency, Licensor shall promptly return and/or remove any requirement for a bond, assurance or other financial security as specified under this section. The Bond shall not be used for disputed fees.

III. CONCLUSION

Current and future broadband deployment depends in significant part on Comcast's ability to work cooperatively with pole owners and deploy its facilities in a cost-effective and

expeditious manner. There is no debate that the basic integrity of electric and communications distribution networks need to be maintained and that safety is paramount. Comcast believes its proposals and solutions set forth above will serve these objectives, as well as the Commission's goals in instituting this proceeding, for the benefit of Utah's residents and the overall public interest.

RESPECTFULLY SUBMITTED this 15th day of April, 2005.

COMCAST CABLE COMMUNICATIONS, LLC

Jerold G. Oldroyd, Esq.
Angela W. Adams, Esq.
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
One Utah Center, Suite 600
201 South Main Street
Salt Lake City, Utah 84111-2221

Martin J. Arias, Esq.
COMCAST CABLE COMMUNICATIONS, LLC
1500 Market Street
Philadelphia, Pennsylvania 19102

J. Davidson Thomas, Esq.
Jill M. Valenstein, Esq.
Genevieve D. Sapir, Esq.
COLE, RAYWID & BRAVERMAN, LLP
1919 Pennsylvania Avenue, NW
Second Floor
Washington, D.C. 20006

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April, 2005, an original, five (5) true and correct copies, and an electronic copy of the foregoing **COMCAST'S COMMENTS TO DRAFT STANDARD POLE ATTACHMENT AGREEMENT** were hand-delivered to:

Ms. Julie Orchard
Commission Secretary
Public Service Commission of Utah
Heber M. Wells Building, Fourth Floor
160 East 300 South
Salt Lake City, Utah 84114
lmathie@utah.gov

and a true and correct copy, hand-delivered and electronically mailed to:

Michael L. Ginsberg, Esq.
Assistant Attorney Generals
Office of the Utah Attorney General
Heber M. Wells Building, Fourth Floor
160 East 300 South
Salt Lake City, Utah 84114
mginsberg@utah.gov

Marlin Barrow, Utility Analyst
State of Utah
Division of Public Utilities
Heber M. Wells Building, Fourth Floor
160 East 300 South
Salt Lake City, Utah 84114
mbarrow@utah.gov

Patricia E. Schmid, Esq.
Assistant Attorney Generals
Office of the Utah Attorney General
Heber M. Wells Building, Fourth Floor
160 East 300 South
Salt Lake City, Utah 84114
pschmid@utah.gov

Krystal Fishlock, Technical Consultant
State of Utah
Division of Public Utilities
Heber M. Wells Building, Fourth Floor
160 East 300 South
Salt Lake City, Utah 84114
kfishlock@utah.gov

and a true and correct copy mailed, postage prepaid thereon, to:

Meredith R. Harris, Esq.
AT&T Corp.
One AT&T Way
Bedminster, New Jersey 07921
harrism@att.com

Jill M. Valenstein, Esq.
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Avenue, N.W., 2d Floor
Washington, D.C. 20006
dthomas@crblaw.com

Martin J. Arias, Esq.
Comcast Cable Communications, LLC
1500 Market Street
Philadelphia, Pennsylvania 19102
martin_arias@comcast.com

Genevieve D. Sapir, Esq.
Cole, Raywid & Braverman, LLP
2381 Rosecrans Avenue, Suite 110
El Segundo, California 90245
gsapir@crblaw.com

J. Davidson Thomas, Esq.
Curt Huttsell, Ph.D.

Manager, State Government Affairs
ELECTRIC LIGHTWAVE, LLC
4 Triad Center, Suite 200
Salt Lake City, Utah 84180
chuttsel@czn.com

Charles L. Best, Esq.
Associate General Counsel
ELECTRIC LIGHTWAVE, LLC
4400 N.E. 77th Avenue
Vancouver, Washington 98662-6706
charles_best@eli.net

Gerit F. Hull, Esq.
PacifiCorp
825 N.E. Multnomah, Suite 1700
Portland, Oregon 97232
gerit.hull@pacificorp.com

Charles A. Zdebski, Esq.
Raymond A. Kowalski, Esq.
Jennifer D. Chapman, Esq.
Troutman Sanders, LLP
401 Ninth Street, NW, Suite 1000
Washington, DC 20004-2134
charles.zdebski@troutmansanders.com
raymond.kowalski@troutmansanders.com
jennifer.chapman@troutmansanders.com

Gary Sackett, Esq.
Jones Waldo Holbrook & McDonough
170 South Main, #1500
Salt Lake City, Utah 84101
gsackett@joneswaldo.com

Robert C. Brown, Esq.
Qwest Services Corporation
1801 California Street, 49th Floor
Denver, Colorado 80202
Robert.brown@qwest.com

Michael Peterson
Executive Director
Utah Rural Electric Association
10714 South Jordan Gateway
South Jordan, Utah 84095
mpeterson@utahcooperatives.com

Stephen F. Mecham, Esq.
Callister Nebeker & McCullough
Gateway Tower East, Suite 900
10 East South Temple
Salt Lake City, Utah 84133
sfmecham@cnmlaw.com

Bradley R. Cahoon, Esq.
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101
bcahoon@swlaw.com

Gregory J. Kopta, Esq.
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101-1688
gregkopta@dwt.com

Danny Eyre
General Manager
Bridger Valley Electric Association, Inc.
Post Office Box 399
Mountain View, Wyoming 82939
derye@bvea.net

Mr. Carl R. Albrecht
General Manager / CEO
Garkane Energy Cooperative, Inc.
120 West 300 South
Post Office Box 465
Loa, Utah 84747
calbrecht@garkaneenergy.com

LaDel Laub
Assistant General Manager
Dixie Escalante Rural Electric Association
71 East Highway 56
HC 76 Box 95
Beryl, Utah 84714-5197
ladell@color-country.net