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Submitted: ~~June 22,~~October 29, 2004

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of an Investigation into Pole Attachments	~~)~~))))) ~~)~~ ~~)~~	**DOCKET NO. 04-999-03** **COMMENTS OF PACIFICORP TO THE DIVISION OF PUBLIC UTILITIES ON ITS ~~DRAFT OF REVISED POLE ATTACHMENT RULES~~MODIFICATIONS TO PACIFICORP'S JOINT-USE AGREEMENT**

Pursuant to the revised procedural schedule in the above-captioned proceeding and the invitation of the Division of Public Utilities ("Division") dated October 15, 2004, PacifiCorp, by its counsel, submits the following comments regarding the modifications to PacifiCorp's Joint-Use Agreement developed by the Division.

Introduction

In earlier comments filed in these proceedings,[1] PacifiCorp stated its opposition to the adoption of a uniform pole attachment rental rate and a standard pole attachment agreement to govern all pole attachments throughout the state of Utah. PacifiCorp advocated instead the development of a rate methodology, with other terms and conditions of attachment to be negotiated between the parties or addressed by the Commission in a separate proceeding. PacifiCorp remains opposed to the establishment of a uniform rental rate and to a requirement to use a standard contract for all pole attachments in Utah, as now proposed by the Division. Notwithstanding this fundamental position, PacifiCorp has reviewed the modifications to the Standard Agreement proposed by the Division and is providing its analysis of remaining issues. PacifiCorp has divided its concerns into two separate categories: (1) generalized issues implicated by the Standard Agreement, and (2) limited issues related to the mutuality and fairness of the Agreement's terms as implemented.

I. EXPLANATION OF GENERALIZED ISSUES IDENTIFIED BY PACIFICORP

A. Use of a Standard Contract

PacifiCorp objects to and opposes the mandatory and universal use of a "standard contract" that would govern the relationship between all pole owners and attaching entities

[1] ~~See~~ PacifiCorp's Initial Comments, filed April 1, 2004, and Reply Comments, filed April 16, 2004. See also~~,~~ Comments of PacifiCorp to Proposed Rule 746-345, filed October 1, 2004, and Comments of PacifiCorp to the Division on Its Draft of Revised Pole Attachment Rules, filed on June 22, 2004.

in Utah. No single contract can possibly cover all of the facts and circumstances that can arise from company to company or from region to region in Utah. The result of attempting to force all pole owning utilities to use the same contract will be unrealistic compromises that will satisfy no one. Under the present practice of requiring submission of a template contract, there is the proper degree of standardization: All attaching entities doing business with the respective pole owners in Utah are subject to the same rates, terms and conditions that apply to other attaching entities doing business with the same pole owners. This degree of standardization suffices to prevent discrimination and allows all attaching entities to compete on the same footing for the same customers. And, while the rates, terms and conditions for pole attachments may not be uniform throughout Utah, this procedure strikes the proper balance with the need to accommodate the unique variations in facts and conditions that exist from company to company and from place to place.

As explained in more detail below, the difficulties inherent with attempting to craft a single standard agreement to apply to all pole owners and all attaching entities is particularly evident given the differing implications of joint-use and non-joint-use relationships, wireless attachments and attachments made to transmission facilities.

B. Application of a Joint-Use Agreement in Non-Joint-Use Contexts

PacifiCorp's Joint-Use Agreement contemplated a voluntary and reciprocal sharing arrangement between two pole-owning entities. As such, it does not account for mandatory access provisions contemplated by the Division's proposed rules. As PacifiCorp has stated in earlier comments filed in this proceeding, it does not believe that the Commission has the authority to impose a mandatory access requirement. However, to the extent the

Commission has such authority, the "Whereas" clauses and Section 2.03 of the Agreement appear to contradict the proposed rules. Accordingly, the application of a joint-use contract template to non-joint-use contexts is problematic and creates unworkable ambiguity. Other examples in the proposed Standard Agreement include:

- The third, fourth and fifth "Whereas" clauses make little sense in a non-joint-use context and contradict the requirement of mandatory access contained in the Division's proposed rules.
- The term "Parties" as used in the Standard Agreement can refer to a pole-owning licensee or a non-pole-owning licensee, and the lack of clarification creates ambiguity in the Agreement.
- Section 3.04 contains a section related to grounding. This provision, as written, only logically applies to attachers making telecommunications attachments and has no relevance to a cable operator stringing fiber optic cable. Further, this provision has problematic implications for entities making wireless attachments, because wireless attachments are frequently made above the electric utility space, requiring entrance into the electric utility space for reasons other than making connections to the neutral.
- Section 4.04 only makes sense in a joint-use context. As such, the Division's omission of the second paragraph should be reconsidered.
- Section 7.02 is strictly applicable to pole-owning licensees and should not be struck, as applied to such licensees.

C. Application of Standard Agreement to Wireless Providers

While PacifiCorp does not dispute the right to non-discriminatory access for wireless providers, the terms of such access should be governed by a separate agreement that addresses the particular concerns related to wireless attachments. The implementation of one agreement for both wireless and non-wireless communications providers is unworkable. For example, wireless attachments are typically made above the electrical space, which creates numerous safety concerns not applicable to other communications attachers. Further, the nature of wireless attachments creates different burdens on utility poles that should be accounted for using separate rate methodology for such attachments.

D. Relationship Between the Division's Proposed Modifications to the Standard Agreement and Its Proposed Rules

Inconsistencies exist between the Standard Agreement and the terms of the Division's proposed rules governing pole attachments. Further, the relationship between the tariff, the Standard Agreement and Statement of Generally Applicable Terms ("SGAT") is unclear. Attempting to craft a Standard Agreement based on rules that have not yet been implemented or finalized creates a cart-before-the-horse situation that will inevitably result in disputes before the Commission.

E. Application of Standard Agreement to Transmission Facilities

Attachments made to transmission facilities create implications not contemplated by the Standard Agreement or the rules and should be the subject a separate agreement. Section 2.01 of the Standard Agreement appears to indicate that there is no mandatory access as to transmission facilities, and the Division's proposed rules are ambiguous as to this point.

Section R746-345-1.2 requires mandatory access to "utility poles." This term is not defined, and it is unclear whether the term includes transmission facilities. Further, R746-

345-5.A states that the rental rate must be "based on the pole owner's investment in distribution poles," and it is unclear from the rules what rate would be applicable for attachments made to transmission facilities. Notwithstanding PacifiCorp's comments opposing mandatory access and the rate formula provided in the proposed rules, such provisions should be limited in application to distribution poles.

Further, the Division's addition of the phrase "as provided in this Agreement" to Section 2.01 of the Agreement creates internal inconsistency with the other terms contained in that section. In the proceeding paragraph, the Agreement contemplates that attachments made to transmission facilities "shall be governed by a separate agreement." Accordingly, it is unclear what the additional language suggested by the Division is intended to accomplish.

F. Applicable Fees and Sanctions

The proposed rules state that the tariff, SGAT or standard contract shall set forth non-recurring charges for inspections, surveys, applicable processing. The rules also mandate that the SGAT, tariff *and* standard agreement shall include back-rent recovery or unauthorized attachment fees and a process for determining liability. However, in its modifications to the Agreement, the Division omitted PacifiCorp's fee schedule and the schedule setting forth applicable sanctions. Accordingly, there is no guidance provided as to appropriate application and inspection fees and sanctions. Instead, the Division's language added to Section 3.05 simply references back to the UAR,[2] which does not set forth specific amounts for fees or sanctions or appropriate mechanism for imposing sanctions. This problem is also implicated by the terms contained in Section 3.09, where the Division suggests imposing sanctions for a licensee's failure to move its facilities, and Section 5.02,

[2] This reference should be to the Utah Administrative Code, or "UCA."

allowing for the imposition of sanctions for the failure to have a written contract, the failure to have permit, and the failure to install and maintain equipment properly. In order to eliminate ambiguity and to comply with the requirements of the proposed rules, the Standard Agreement should set forth a specific fee schedule for applications, inspections and the various categories of sanctionable behavior by licensees.

G. Dual Reference to State and Federal Law

In Section 2.03, the reference to both federal and state law creates ambiguity and the risk of disputes, as requirements related to pole attachments differ between applicable state and federal provisions. Such reference would only make sense in the event that Utah were to have adopted wholesale the rules established by the Federal Communications Commission ("FCC"). However, even in that case, the rules proposed by the Division do not mirror the rules or precedent followed by the FCC, but instead depart dramatically from the FCC's rate formula, as well as the allowance under federal law for parties to negotiate terms to pole attachment agreements that differ from the FCC's regulations. Unless these inconsistencies are addressed in the proposed rules, any reference the 1996 Telecommunications Act or the FCC's rules governing pole attachments should be excluded from the Standard Agreement. Otherwise, an unknowable universe of precedent relating to pole attachments will be created, because parties will be forced to choose between inconsistent and conflicting state and federal law and precedent.

H. Obligation to Mark Poles Rather than Individual Attachments

Section 3.03 sets forth the obligation of an attaching entity to identify and mark its attachments to a pole owner's poles. The Division proposed to change this requirement by

requiring a licensee only to mark the pole supporting its attachments, rather than the individual attachments. The Division's changes to Section 3.03 operate to undermine the purpose of the provision.

Requiring licensees to mark a pole supporting numerous attachments, rather than the individual attachments serves no purpose because non-specific hash marks on poles made by attaching entities fail to provide needed information to the pole owner or other attaching entities. On the other hand, marking ownership of individual attachments serves the important purpose of assisting the pole owners in determining attachment ownership for the enforcement and correction of safety and construction violations, as well as for notification purposes. Labeling attachments in this way helps to minimize factual disputes over such matters as rental payments and penalties for unauthorized attachments. Further, the amended language in the Agreement is inconsistent with the proposed R746-245-4, which requires labeling for each attachment.

I. Omission of PacifiCorp's Distribution Construction Standards from Standard Agreement

The Division's modifications remove the references to PacifiCorp's Distribution Construction Standards in both Article I (Definitions) and in Section 3.04. This raises the issue of whether a pole owner has the right to promulgate its own construction standards to supplement the safety requirements of the NESC based on local concerns and issues. Further, the omission raises internal inconsistencies and ambiguities in the Standard Agreement. The last paragraph of Section 3.02 refers specifically to "construction and other standards and terms set forth in their Agreement," despite the omission of the reference to PacifiCorp's Distribution Construction Standards in the same section.

J. Rental Rate Formula

The reference to Rule R746-345-5 in Section 5.01 prevents pole owners from recovering the cost of unusable space and is ambiguous as to the appropriate rate for attachments made to transmission facilities and wireless attachments. Further, R746-345-5.B has the effect of preventing the pole owner from charging for multiple, separate attachments (not overlashes) by the same entity on a pole. PacifiCorp maintains that the Division's formula encourages abuses by attaching entities because it does not allow for full cost recovery.

K. Removal of Provisions Assuring Creditworthiness

The Division's modifications include the removal of the article providing assurance regarding the creditworthiness of attaching entities. The removal of Article VI places the interests of PacifiCorp and its customers at risk. Concerns regarding bankruptcy require that pole owners be given adequate assurances that attaching entities are able to pay for the benefits they have requested and received from PacifiCorp and other pole owners. Such assurances are properly met by mandating a surety or performance bond, and the Standard Agreement should be modified accordingly. Similar requirements are standard in most performance contracts.

L. Modification to Indemnification Provisions

The changes made to Article IX are unworkable and make little sense in either a joint-use or non-joint-use context. Specifically, reciprocal liability between a pole owner and a non-pole-owning licensee for repair or replacement of defective poles makes little sense.

II. ISSUES RELATED TO MUTUALITY AND FAIRNESS

A. Electronic Notification System

It is unclear how the requirement contained in the definition of "Electronic Notification System" or "ENS" and in Section 3.01, that all Parties designate and consent to an ENS, will be implemented. PacifiCorp's operations span six service territories, and it would be unnecessarily costly and burdensome for PacifiCorp to be required to implement a different ENS in Utah from what it operates in its other service territories.

B. Definition of "Inspection"

The Division's modifications to the definition of the term "Inspection" appears to have the effect of eliminating a pole owner's ability to verify the number of attachments on its facilities. An important aspect of managing attachments made by third parties is the ability of a pole owner to ensure that its facilities have the capacity to support attachments requested. In order to make such a determination, a pole owner must maintain an accurate record of how many attachments are being supported by a particular pole. This information benefits both pole owners and licensees. Further, ascertaining the number of attachments on a pole is often a logical consequence of a thorough inspection.

C. Non-recurring Charges

The effect of the Division's additional language "legally authorized and identifiable" contained in the definition for "Non-recurring Charges" is unclear and should be clarified to avoid potential disputes. The Agreement should specify what laws shall govern the imposition of non-recurring charges and how the charges should be identified. This is of particular concern given the deletion of PacifiCorp's fee schedule and the lack of guidance in the proposed rules regarding fee amounts.

D. Undefined Term

The word "affiliate" added by the Division in last sentence of Section 2.02 should be defined in Article I of the Standard Agreement to avoid ambiguity.

E. Mutuality and Intent of Section 3.02

The implications and intent behind the Division's suggested language in the first sentence of Section 3.02 are unclear and appear to be inconsistent with the other additional language suggested in that section. While allowing that the time for processing applications can vary depending on the number of poles at issue, the Division has suggested language that, if a pole owner fails to act on an application within 45 days, the application is deemed approved. Further, the modifications suggested by the Division to Section 3.06 allow licensees to obtain an extension to the 90-day deadline for the completion of installation of large projects. In the interests of fairness and mutuality in the terms of the Standard Agreement, it logically follows that pole owners should be entitled to a similar extension, upon written notice to licensees, for processing applications.

In addition, the Division's modified language to the last paragraph of Section 3.02 provides "that all overlashes [must] conform with the construction and other standards and terms set forth in their Agreement and be liable for any nonconformance of violations." First, as mentioned above, the Division's modifications include the omission of all references to PacifiCorp's Distribution Construction Standards. Accordingly, it is unclear what construction standards the new language in Section 3.02 is intended to implicate. Second, as addressed herein at Section I.I, there is no mechanism set forth in the Standard Agreement or the rules to address the methodology to be employed for holding a licensee

"liable" for noncompliance with whatever standards are to be applicable. Finally, two minor typographical errors should be corrected to avoid confusion: "their Agreement" should read "the Agreement" and "of violations" should read "or violations."

F. Clarification of Section 3.08

The Division's modification to Section 3.08 allowing for an additional 10 days before the pole owner is permitted to remove an attachment in accordance with this provision creates the opportunity for dispute. In order to simplify the implementation of this provision, the language should simply provide that licensees have 30 days from notification given by the pole owner to elect to either perform the necessary work or have the pole owner perform the work. If such notice is not given, the pole owner should be able to remove the attachment after 30 days from the notification, without having to wait an additional amount of time.

G. Clarification of Section 3.09

Section 3.09 should be amended to clarify that the pole owner is not obligated to cover the costs incurred by licensees related to transferring attachments to new poles pursuant to this provision.

H. Reasonableness of Section 3.16

The Division modified the terms of Section 3.16 by removing the requirement that licensees provide written warranties that all third-party consents, permits and grants have been obtained. Written warranties provide much needed protection from possible liability of the pole owner for a licensee's failure to obtain such consents, permits and grants from third parties. The language contained in the original version of Section 3.16 imposes a reasonable

requirement on third parties, as written warranties are only required upon request. If a licensee has indeed complied with its obligation to obtain all necessary consents and permits, providing written evidence of such compliance would not be difficult or overly burdensome. Accordingly, the Division's modifications to Section 3.16 should be reconsidered.

I. Clarification of Section 3.18

The implication of the Division's proposed modification of changing "application fee" to "notification fee" in Section 3.18 is unclear and appears to create an inconsistency with the requirements of Section 3.02. As discussed above in Section I.F, there is no indication in the Commission's rules or in the Agreement what the proper fee for application for or notice of removal would be in light the Division's modifications to the Agreement removing all references to PacifiCorp's fee schedule. Further, Section 3.02 requires that licensees submit an application before changing the position of any attachments. Thus, the modification to Section 3.18 referring to "notification fees" rather than "application fees" appears to contradict the requirements set forth in Section 3.02.

J. Fairness of Section 3.20

The implication of the additional language provided by the Division is unclear. If the suggested language could operate to require PacifiCorp to forfeit control over its facilities to the public or licensees, PacifiCorp strongly objects to the Division's modification because such changes operate to impose an unreasonable and unworkable term on pole owners.

K. Clarification of Section 3.22

The Division's proposed modifications to Section 3.22 create ambiguity and the potential for dispute. First, it is unclear what is meant by the addition of the words "non-

routine" to describe a particular inspection. This should either be clarified in the definitions section or within Section 3.22. Second, it seems unfair to require other licensees to share the cost of an inspection, on a *pro rata* basis or otherwise, that is necessitated by the non-compliance of another licensee's attachment.

As to the modifications to the terms governing occupancy surveys, it is unclear how the Division's suggested language would be logically implemented. There is no indication in the Agreement as to what process would or could be implemented whereby all the parties to one Standard Agreement would come together and agree on a contractor, the scope of the survey and the reimbursable portion of the survey. Without further guidance, reaching such an agreement between numerous parties with conflicting and differing interests and motivations would be extremely difficult and would no doubt result in disputes.

Conclusion

As explained above, the concept that all pole attachments in Utah should be governed by the same rates, terms and conditions, regardless of the pole owner or attaching entity, cannot be implemented without creating instances of fundamental unfairness, unjust over- or under-compensation, and improper subsidization by utility customers. Further, the Division's modifications render the Standard Agreement internally inconsistent and inconsistent with the Division's proposed rules. If not corrected, such inconsistencies will create unworkable situations that will only lead to disputes between poles owners and attaching entities.

Therefore, for the reasons stated in these comments, PacifiCorp respectfully urges the Division to revise its approach to creating a Standard Agreement in a manner that satisfies the concerns set forth above.

Respectfully submitted this 29th day of October 2004.

~~Pursuant to the revised procedural schedule in the above-captioned proceeding and the invitation of the Division of Public Utilities ("Division") dated June 3, 2004, PacifiCorp, by its counsel, submits the following comments regarding the draft pole attachment rules developed by the Division.~~

~~Introduction~~

~~In earlier comments filed in this proceeding,[3] PacifiCorp stated its opposition to the adoption of a uniform pole attachment rental rate and a standard pole attachment agreement to govern all pole attachments throughout the state of Utah. PacifiCorp advocated instead the development of a rate *methodology*, with other terms and conditions of attachment to be negotiated between the parties or addressed by the Commission in a separate proceeding. PacifiCorp remains opposed to the establishment of a uniform rental rate and to a requirement to use a standard contract for all pole attachments in Utah, as now proposed by the Division.~~

~~PacifiCorp opposes the methodology developed by the Division on several grounds, including the fact that the methodology would not recover from Attaching Entities their fair share of the cost of the unusable space on a pole. Failure to recover a fair share of attachment costs results in subsidies from electric customers to other classes of customers. This is unfair. PacifiCorp opposes as well the Division's proposed methodology that~~

[3] See PacifiCorp's Initial Comments, filed April 1, 2004 and Reply Comments, filed April 16, 2004.

requires the cost of non-routine audits of pole attachments to be recovered through the pole attachment rental rather than through cost reimbursement. This would result in PacifiCorp and its customers picking up a significant cost of audits that are undertaken solely for the purpose of auditing other parties' pole attachments.

PacifiCorp has reviewed the proposed rules and is providing its suggested revisions to the proposed rules in the form of a redlined version, attached hereto.[4] PacifiCorp will discuss below, section by section, the reasons for each of its edits.

Explanation of PacifiCorp's Suggested Revisions to the Division's Proposed Rules

Rule R746-345.

PacifiCorp suggests revising the title of the main rule to make the purpose and scope of the rule more clear and consistent with terminology and definitions contained in the various subsections of the rule. As will be discussed below, PacifiCorp is suggesting that subsection 4, Pole Labeling, be broadened to include labeling not only of poles but also of pole attachments. For this reason, the index reference in the main rule to subsection 4 should conform to the suggested revision of subsection 4.

R746-345-1. Authorization.

[4] The proposed rules were redlined using the "track changes" feature of Microsoft Word. This will enable the Commission and the parties to readily identify PacifiCorp's proposed edits.

PacifiCorp recommends that the term "telecommunications companies," rather than "telecommunications corporations," be used throughout. This would be consistent with the term "cable television companies" that is used throughout the proposed rules.

R746-345-2. General Definitions.

Subsection B. Pole Attachment.

PacifiCorp suggests that "attachment" be changed to "such equipment," in subsection B. in order to avoid defining "pole attachment" in terms of itself.

Subsection C. Pole Owner.

PacifiCorp's change to subsection C. is suggested as an improvement in the wording.

R746-345-3. Tariffs and Contracts.

PacifiCorp objects to and opposes the mandatory and universal use of a "standard contract" that would govern the relationship between all Pole Owners and Attaching Entities in Utah. PacifiCorp does not object to and supports the present practice of submitting a template contract. For this reason, PacifiCorp recommends changing "Standard Contract" to "template contract" where the term appears in the rules.

No single contract can possibly cover all of the facts and circumstances that can arise from company to company or from region to region in Utah. The result of attempting to force all pole owning utilities to use the same contract will be unrealistic compromises that

~~will satisfy no one – not Pole Owners or Attaching Entities. In this regard, PacifiCorp suggests that this subsection be amended to state that standard charges, such as application processing, are to be specified in the template contract, but that other Pole Attachment work, such as surveys, engineering and pole change-out, be billed on a time-and-materials basis for costs actually incurred.~~

~~As to Pole Owners, the vast divergence in the size of staffs who handle joint use matters will, of necessity, require differences in the terms and conditions of attachment, permitting processes, and the like. As to Attaching Entities, there will be great reluctance to pay standardized rates if they do not reasonably reflect true costs.~~

~~Under the present practice of requiring submission of a template contract, there is the proper degree of standardization: all Attaching Entities doing business with the respective Pole Owners in Utah are subject to the same rates, terms and conditions that apply to other Attaching Entities doing business with the same Pole Owners. This degree of standardization suffices to prevent discrimination and allow all Attaching Entities to compete on the same footing for the same customers. And while the rates, terms and conditions for pole attachments may not be uniform throughout Utah, this procedure strikes the proper balance with the need to accommodate the unique variations in facts and conditions that exist from company to company and from place to place.~~

~~PacifiCorp notes that Subsection C., Exception, has been proposed by the Division. Under this subsection the Pole Owner or the Attaching Entity may seek Commission approval of a "case specific contract." PacifiCorp believes that, as the rules were written by the Division, the exception will become the rule and the Commission will find itself confronted with a heavy workload of requests for case specific contracts that take into account the unique variations in facts and conditions that exist from company to company and from place to place.~~

~~The better approach would be to make available template agreements at the outset, while keeping available the Exception process for use if, *after good faith negotiations* (a requirement that PacifiCorp suggests be added), the parties are unable to agree on unique terms and conditions to govern their relationship.~~

~~Regarding the establishment of the relationship, PacifiCorp recommends that subsection B., Adoption of the Standard Tariff Contract, be modified and simplified to state that the relationship is established when the parties have executed the template agreement. The concept of the Attaching Entity "notifying" the Pole Owner of an effective date seems out of step with the fundamental nature of a contract.~~

~~PacifiCorp has recommended a change to subsection A.2.c., rate recovery and penalty for unauthorized attachments, to make it clear that the template agreement must provide for recovery of back rent and penalties for unauthorized attachments that may be~~

discovered, as well as the procedures for determining the liability of the Attaching Entity to pay such amounts.

R746-345-4. Labeling.

The proposed rule permits, but does not require, Pole Owners to label their poles to identify the poles that they own. PacifiCorp suggests that the rule should require, rather than merely allow, the Pole Owner to label its poles as to ownership. In addition, PacifiCorp suggests that the rule be broadened to require Attaching Entities as well to label their facilities as to ownership. Labeling both poles and Pole Attachments in this way can eliminate help prevent factual disputes over such matters as rental payments and penalties for unauthorized attachments and expedite restoration of service in the event of outages.

R746-345-5. Rate Formula and Methodology.

Because PacifiCorp so strongly disagrees with a requirement that the same dollar amount pole attachment rate must apply to all poles in Utah, PacifiCorp offers no comment on whether the $9.26 rate calculated by the Division as the universal rental rate is the proper rental rate. PacifiCorp believes that the notion of a universal rental rate is inconsistent with the bedrock concept of rental rates being based on the historical costs of the Pole Owner. The costs incurred by some pole owning utilities will be greater or less than the costs incurred by other pole owning utilities. The net cost of a bare pole cannot possibly be the same from utility to utility. To the extent that the universal rental rate is greater or less than the cost-based rate of any given pole owning utility, that utility's rate payers will either be

~~subsidizing the Attaching Entities or be subsidized by the Attaching Entities. Neither circumstance is fair, just, or reasonable. For this reason, PacifiCorp will focus on the methodology that underlies the Division's calculations.~~

~~*Subsection 5.B.2. Formula Definitions.*~~

~~While PacifiCorp's suggested edits up to this point in subsection 5 are essentially cosmetic, in subsection 5.B.2.a. PacifiCorp notes that the rate of return element has been omitted from the definition of the carrying charge rate. This factor is included in the federal model on which this formula is patterned and must be included here as well. Failure to do so unconstitutionally deprives the Pole Owner of the full measure of just compensation for the use of its property and shifts this burden to the utility's rate payers.~~

~~In this subsection as well, the Division has proposed to require the Pole Owner's costs of conducting non-routine audits of pole attachments to be recovered in the annual rent. PacifiCorp strongly opposes this treatment because such non-routine tasks generate out-of-pocket costs that would not be incurred but for the presence of the Attaching Entities' attachments. These costs are no different than pre-construction surveys, engineering, make-ready and pole change-outs, which the Division's proposed rule recognizes as costs that are to be reimbursed on a dollar-for-dollar basis in addition to rent. Accordingly, PacifiCorp has suggested modified language for this subsection.~~

~~Finally, PacifiCorp believes that the definition of "Net Cost of Bare Pole," in Subsection 5.B.2.b., should reference the "total number of poles," not the number of "poles used for attachments." Otherwise, the total cost of pole ownership would not be properly spread over the full universe of poles and the attachment rate would be substantially and artificially inflated.~~

~~*Subsection 5.B.3. Rebuttable presumptions.*~~

~~The Division's rebuttable presumptions omit any presumption regarding the Unusable Space on the poles. This is equivalent to advocating that the rental rate may not include an Attaching Entity's share of the cost of the Unusable Space on the pole. PacifiCorp strongly disagrees with this position.~~

~~The space factor needs to include the Unusable Space in addition to the Usable Space. As PacifiCorp has pointed out in its previous comments, the usable space does not exist in isolation. To the extent that Attaching Entities do not pay for a share of the historical costs associated with the entire pole, the rate payers of the Pole Owner are subsidizing the Attaching Entity. Accordingly, PacifiCorp has suggested edits to the definition of the Space Factor as well as to Rebuttable Presumptions that would result in a rental rate that reflects the true value of the space being occupied. This approach more equitably matches costs to the users of the property.~~

~~The general formula proposed by the Division in subsection 5.B. is exactly the same as the federal formula for determining the maximum pole rental rate[5], namely:~~

~~Maximum rate = Space Factor X Net Cost of a Bare Pole X Carrying Charge Rate~~

~~However, Iin the federal scheme, the Space Factor includes either the Usable Space or the Usable Space plus the Unusable Space, depending, respectively, on whether the Attaching Entity is a pure cable television company or a company (including a cable television company) that also provides telecommunications services.~~

~~By excluding Unusable Space from the Space Factor, the Division is effectively stating that, in Utah, the federal cable-only approach should apply to both cable-only attachers and telecommunications companys. While it would be entirely within the province of the Commission to make such a determination for Utah, such a determination would be completely out of step with the federal approach that limits the Usable-Space-only approach to the increasingly-rare instance of a company that provides only cable television service. Moreover, as noted above, such a determination results in subsidization of Attaching Entities by the rate-payers of the pole-owning utility.~~

~~The determination of an Attaching Entity's share of the cost of the Unusable Space need not turn on the nature of the service being provided by the Attaching Entity, as it does in the federal scheme. The decision many years ago by the Federal Communications Commission to include only Usable Space in the rental formula was made at a time when~~

[5] *See* Section 1.1409(e)(1),(2) of the rules of the Federal Communications Commission, 47 C.F.R. § 1.1409(e)(1),(2).

~~cable television was a fledgling industry and needed access to poles at the lowest possible price. That is not the case today. According to the April 12, 2004 issue of *Forbes* magazine, Comcast, for example, is the 70th largest company in the *world*. Media companies – cable or otherwise – today can pay their own way and should not rely on subsidies from electric rate payers. In short, the Division can and should recommend that in Utah the just and reasonable rent that Attaching Entities must pay for attaching their facilities to another utility's poles includes a share of the cost of the entire pole, not just the usable space on the pole.~~

~~Given this view, PacifiCorp believes that it is not necessary to follow the federal approach, which looks at the nature of the service provided as well as the nature of the service territory (*i.e.*, urban vs. non-urban) in order to compute the element of the Space Factor that relates to the unusable space. The Commission can determine, as a matter of policy, what portion of the cost of the Unusable Space shall be added to the Usable Space element to comprise the total Space Factor.~~

~~To this end, PacifiCorp's suggested edits to Subsection 5 of the rules offer the following:~~

- ~~A new subsection, 5.B.2.e., defining "Unusable Space" as the space on a pole other than Usable Space.~~
- ~~A new subsection, 5.B.3.d., creating a rebuttable presumption that the Unusable Space on a pole equals 27 feet;~~

- ~~A new subsection, 5.B.3.e., creating a rebuttable presumption that an Attaching Entity is responsible for 9 feet of the unusable space. (This figure was arrived at by beginning with the Unusable Space, *i.e.*, 27 feet, and dividing by 3, which is an assumption as to the number of attachers on any given pole.~~[6]
- ~~The word "wireline" to be added to subsection B.3.c.2.~~

~~To illustrate the effect of PacifiCorp's suggested change in approach to the Space Factor, under the Division's draft, the Space Factor would be .11 (1.5 feet divided by 13.5 feet of Usable Space); under PacifiCorp's approach, the Space Factor would be .28 (1.5 feet, plus 9 feet of Unusable Space, divided by total pole height). This difference illustrates the extent to which the Division's approach fails to properly allocate all of the true costs associated with each pole to the entities that benefit from the use of the pole.~~

~~*Subsection 5.B.4.*~~

~~In several places in the Division's proposed rules, PacifiCorp has suggested a change from "Public Utility" to "Pole Owner," in order to avoid confusion stemming from the fact that in Utah a telecommunications company or a cable television company is a public utility. Here is one of those places. In addition, PacifiCorp suggests that the phrase~~

[6] The federal scheme looks at the average number of attachers, depending on whether the service territory is urban or non-urban. The minimum average number of attachers in the FCC telecommunications rate formula is 2. ~~In PacifiCorp's experience, the average number of attachers, *including itself*, is 1.72.~~ PacifiCorp's proposed methodology ~~would not oppose a methodology, however, that~~ presumes that a typical joint use electric pole supports the attachments of the electric utility ~~itself~~, a cable company and a telecommunications company.

beginning with "such as audit costs…" is not necessary, since the matter of charging for audit costs is already dealt with in subsection 5.B.2.a.

Subsections 5.C. and 5.D.

PacifiCorp believes that subsection 5.C. should be stricken in its entirety. Subsection 5.C. is the subsection under which the Commission would compute the single, statewide average rental rate for all pole attachments. PacifiCorp has already stated the reasons for its opposition to a single universal rate and will not repeat those reasons here. Suffice it to say, with subsection 5.C. stricken, Pole Owners would be required to calculate their pole rental rates in accordance with the rate formula spelled out in the rules.

There would be no need for the Commission to calculate a rate, except in the case of disputes over whether any particular Pole Owner's rate is just and reasonable. PacifiCorp suggests that subsection 5.D. be renumbered 5.C. and converted to a mechanism by which Pole Owners and Attaching Entities could seek relief from the Commission in the event of disputes over the rental rate, the rental rate formula or the rebuttable presumptions employed in the rental rate formula. Note, disputes as to the other terms and conditions of attachment, as contained in the Pole Owner's template agreement, could be brought to the Commission for relief under subsection 3.C.

The fact that the Division saw fit to include the original subsection 5.D. suggests that the Division anticipates that the stakeholders in Utah are unlikely to accept a single,

universal rental rate. As with the terms and conditions of the "Standard Contract," PacifiCorp believes that the proposed exception will become the rule and parties will routinely seek relief from the statewide rate from the Commission. The better procedure would be to require Pole Owners to set their rental rates in accordance with the formula, to require Pole Owners to negotiate their differences in good faith, and to permit recourse to the Commission in the event that alternative efforts to resolve the dispute resolution measures have failed.

R746-345-6. Dispute Resolution.

PacifiCorp supports the Division's proposal for mediation of disputes related to attachments, permits, audits and billing based solely on mediation.[7] The parties to a dispute should not be precluded, however, from reaching a settlement on their own. Therefore, PacifiCorp has suggested changes to broaden subsection B. to cover the resolution of disputes by means of settlement.

Conclusion

The Division's proposed rules, though well-intentioned, are seriously flawed at this stage of their development, seriously flawed. The concept that all pole attachments in Utah should be governed by the same rates, terms and conditions, regardless of the Pole Owner, cannot be implemented without creating instances of fundamental unfairness, unjust over- or under-compensation, and improper subsidization by utility rate-payers. Moreover, the Division's draft improperly forbids Pole Owners from recovering the direct, out-of-pocket

[7] Note, PacifiCorp reads the rule to deliberately omit mediation relating to rates. PacifiCorp believes that rates are appropriately approved by the Commission during the tariff approval process. Accordingly, PacifiCorp opposes any suggestion to include rates in the mediation process.

~~costs of audits; omits the rate of return factor from the carrying charges; and fails to require Attaching Entities to bear their fair share of the entire cost of the pole.~~

~~PacifiCorp has attached hereto suggested revisions to the Division's proposed rules. PacifiCorp's revisions would require Pole Owners to compute their rental rates in accordance with a formula that closely comports with~~ based on ~~the federal telecommunications formula. PacifiCorp's revisions would continue the practice of submission of each Pole Owner's template agreement. PacifiCorp's revisions would establish a path for dispute resolution that begins with good faith negotiations between the parties, progresses through mediation or settlement discussions and, if necessary, ultimately ends at the Commission. PacifiCorp's revisions remedy the unjust and unfair results that the Division's rules would occasion. Therefore, for the reasons stated in these comments, PacifiCorp respectfully urges the Division to adopt PacifiCorp's proposed revisions or to revise the Division's proposed rules in a manner that satisfies the concerns expressed in these comments.~~

~~Respectfully submitted,~~

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Certificate of Service

I certify that I have served a copy of the foregoing **COMMENTS OF PACIFICORP TO THE DIVISION OF PUBLIC UTILITIES ON ITS MODIFICATIONS TO PACIFICORP'S JOINT-USE AGREEMENT** by first-class mail or by e-mail attachment the following participants in the captioned proceeding, this 29th day of October 2004.

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I hereby certify that a copy of the foregoing Comments of PacifiCorp to the Division of Public Utilities on Its Draft of Revised Pole Attachment rules in Docket Number 04-999-03; In the Matter of an Investigation into Pole Attachments, was sent via electronic means (email) on the 22TH day of June, 2004 to the following:

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