Gerit F. Hull
Counsel
PACIFICORP
825 NE Multnomah, Suite 1700
Portland, OR 97232
Telephone: (503) 813-6559

Raymond A. Kowalski
TROUTMAN SANDERS LLP
401 9th Street, N.W., Suite 1000
Washington, D.C. 20004
Telephone: (202) 274-2909

Gary G. Sackett (USB #2841)
JONES WALDO HOLBROOK & MCDONOUGH, PC
170 S. Main Street, Suite 1500
Salt Lake City, Utah 84101
Telephone: (801) 534-7336

Attorneys for PacifiCorp, dba Utah Power

Submitted: May 13, 2005

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of an Investigation into Pole Attachments	)	**DOCKET NO. 04-999-03** **REPLY BRIEF OF PACIFICORP AS TO TERMS AND PROVISIONS OF THE STANDARD POLE ATTACHMENT AGREEMENT**

Pursuant to the Commission's Scheduling Order in the captioned proceeding, issued March 25, 2005, PacifiCorp, dba Utah Power, respectfully submits the following brief in reply to the initial briefs filed in this proceeding.

Introduction

Initial briefs have been filed in this proceeding by PacifiCorp, the Division of Public Utilities ("Division"), Qwest Corporation ("Qwest"), Comcast Cable Communications, LLC ("Comcast"), VoiceStream PCS II Corporation dba T-Mobile ("T-Mobile"), Utah Rural Telecom Association ("URTA") and Utah Telecommunication Open Infrastructure Agency ("UTOPIA"). PacifiCorp will respond below to the points made in the initial briefs of these parties.

Disputed Provisions of the Draft Standard Contract

I. Fees

1. Out of Pocket Costs to Process Pole Attachment Applications

Section 3.01 of the draft standard Utah Pole Attachment Agreement ("Standard Agreement") contemplates that the pole owner will establish and obtain approval from the Commission for a schedule of fees associated with the processing of applications from attaching entities for permission to attach their facilities to specific poles.

Positions of the Parties in the Initial Briefs

In support of the Standard Agreement as drafted, the Division points out that the annual pole attachment rental rate established by the formula in Rule R746-345-5 covers recurring costs or expenses that represent the pole owner's investment in poles. Non-recurring costs, such as costs for processing applications for permits, are not included in the rental rate calculation. These costs, according to the Division, should be charged directly to the attaching entity, provided that they are identifiable and not already recovered in the

rental rate.[1] PacifiCorp, in its initial brief, has taken essentially the same position.[2] Qwest, in its initial brief, also supports recovery of recurring costs and gives specific examples of the tasks that would be covered, noting that the Commission has already approved the fees associated with these tasks.[3]

Comcast, in its initial brief, opposes the Standard Agreement's requirement for attaching entities to pay the applicable fees associated with application processing and contends that the pole owner is already compensated through the rental rate because the rental rate formula[4] includes an element related to administrative costs.

PacifiCorp's Response

In seeking to persuade the Commission that its position is supported by applicable decisions of the Federal Communications Commission ("FCC"), Comcast misleads the Commission in two important respects. First, Comcast lifts a partial quote from the FCC's decision in *Texas Cable & Telecom. Ass'n v. Entergy Serv., Inc.*, 14 FCC Rcd 9138 ¶ 5 (1999). Comcast asserts that this case states that "'a separate fee for recurring costs such as applications processing or periodic inspections is not justified'..." Here the quote ends and Comcast completes the sentence, "…because it would result in double-recovery."[5] In fact, the quote continues in the FCC decision, "…*if* the costs are included in a rate based upon fully allocated costs." (emphasis added). In other words, Comcast changed the word "if" to "because" in order to twist the FCC decision into support for its position.

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[1] Division initial brief at 4.
[2] PacifiCorp initial brief at 7.
[3] Qwest initial brief at 2-3.
[4] Comcast initial brief at 11.
[5] Comcast initial brief at 12.

Coincidentally, PacifiCorp, in its initial brief at 6, cited the same FCC holding for the opposite position - that is, the position taken by the Standard Agreement and supported by PacifiCorp, the Division and Qwest, that application fees are recoverable if they are not included in the rent.[6] PacifiCorp, however, quoted the entire sentence, having no need to distort the quotation to support its argument.

Comcast seeks to mislead the Commission into thinking that all costs related to application processing are "recurring costs." That is not the case. Even the FCC decision quoted by Comcast, in the very same paragraph cited, states, "Non-recurring incremental costs are out-of-pocket expenses attributable to pole attachments. They include pre-construction, survey, engineering, make-ready, and change-out costs. Non-recurring incremental costs are directly reimbursable to the utility and are excluded from the incremental rate."

Second, Comcast misleads the Commission as to the precedential effect of a recent decision of the Public Utility Commission of Oregon in *Central Lincoln People's Utility District v. Verizon Northwest, Inc.*, 2005 Ore. PUC LEXIS 36 at 15.[7] Comcast fails to inform the Commission that the presiding Administrative Law Judge in that proceeding specifically limited the scope and applicability of that decision to the parties that were before the agency. The ALJ ruled,

> The proposed contract was presented based on the record in the contested proceeding between Verizon and CLPUD. While the contract may show the Commission's thinking as to what is considered just and reasonable between the parties on this record, it is not the contract to be used between all parties in every instance. *Central*

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[6] Although PacifiCorp cited a different case, both rely on the same 1987 rule making.
[7] Comcast initial brief at 14.

Lincoln People's Utility District v. Verizon Northwest, Inc., UM 1087, Memorandum, Issued February 9, 2005.

In other words, the Oregon Public Utility Commission has not ruled, as a matter of binding, universal regulation, that application processing expenses must be recovered through the rental formula, as implied by Comcast. Furthermore, it is clear from the very paragraph in the Oregon decision cited by Comcast that direct costs, such as special inspections, preconstruction, make ready, change-out, *and administrative costs related to these charges* **are** permitted to be charged in addition to the annual rental rate under Oregon Administrative Regulation 860-028-0110(6).[8] Verizon had complained that CLPUD was double-recovering these costs in both rental rates and processing fees; CLPUD did not brief this issue and apparently the Oregon commission held this against them.

URTA, which states that pole owners generally should recover their costs through the rental rate, concedes that "a modest application fee may be warranted to recover the costs of processing an application to that degree those costs are not recovered in the rental rate formula."[9] Note, a fee that may be modest to one attaching entity may not seem so modest to another. PacifiCorp seeks only its out-of-pocket, non-recurring costs - no more, no less.

There is overwhelming support in the record for recovery of costs associated with the processing of pole attachment applications by means of a direct charge to the attaching entity that submitted the application, with suitable Commission oversight to assure that these

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[8] The rule states, "The rental rates referred to in sections (3) and (4) of this rule do not cover the costs of special inspections or preconstruction, make ready, change out, and rearrangement work. Charges for those activities shall be based on actual (including administrative) costs." OAR 860-028-0110(6). Permitting fees cover average actual administrative costs of pre-construction processing of the attachee's application for permission to construct the attachment.

[9] URTA initial brief at 1.

costs are not double-recovered. No party that opposed reimbursement has made a persuasive counter-argument. The Commission should adopt Section 3.01 of the Standard Agreement as drafted with respect to the payment of application processing fees.

2. Fee for Unauthorized Attachments

Section 5.02 of the Standard Agreement contains a provision for the imposition of a fee for making unauthorized attachments, pursuant to an approved schedule of fees. None of the parties who filed initial briefs in this proceeding opposed the concept of an unauthorized attachment fee. The only question is the dollar amount of the fee.

Positions of the Parties in the Initial Briefs

PacifiCorp argued that the Commission's decision in the recent case of *Comcast Cable Communications, Inc. v. PacifiCorp,* Docket No. 03-035-28, issued December 21, 2004, provides the best guidance and points to a per-pole unauthorized attachment fee of $60.00 plus back rent for the years that the attachment has been on the pole.[10]

The Division supports an assessment to encourage compliance with permitting requirements. The Division would go further and allow an assessment for failing to correct safety or engineering issues after notice from the pole owner. The Division defers setting the amounts of these assessments to a cost docket.[11]

URTA states that an unauthorized attachment fee may be justified.[12] Qwest points out that its approved SGAT already provides for the recovery of unpaid rental as a deterrent to unauthorized attachments.[13] Comcast advocates a maximum unauthorized attachment

[10] PacifiCorp initial brief at 10.
[11] Division initial brief at 5.
[12] URTA initial brief at 1.
[13] Qwest initial brief at 3.

penalty of five years' back rent, subject to a reduction if the attaching entity can prove that the attachments were on the poles for less than five years.[14]

PacifiCorp's Response

It is clear to all of the participants in this proceeding that the threat of some form of financial assessment is absolutely necessary to encourage attaching entities to take seriously their obligations under their access agreements with pole owners. In that regard, PacifiCorp endorses and supports assessments for unauthorized attachments to poles.

Back rent by itself is not a sufficient deterrent to unauthorized pole attachments. Such a mild potential penalty actually functions as an *incentive* to routinely make attachments without permits because it avoids the cost of a permit application and any subsequent make-ready construction and postpones the payment date of rent that would otherwise be due under the agreement. Naturally, attaching entities have the incentive to get attachments on the poles as quickly as possible, thereby hastening the production of revenues. If the revenues to be derived from the provision of service via the unauthorized attachments significantly outweigh the total potential penalty that will have to be paid upon their discovery, the penalty may simply be regarded as an offset to these revenues, and the attacher may choose to attach without a permit and without performing requisite make-ready work.

As the Division has pointed out, the integrity of the infrastructure and its ability to safely and reliably support the delivery of electric, telephone, cable television and wireless

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[14] Comcast initial brief at 21. While Comcast cited the FCC's decision in *Mile Hi Cable Partners v. Pub. Serv. Co. of Colo.*, 15 FCC Rcd 11450 (2000), as support for its position, the penalty adopted by the FCC in *Mile Hi* was back rent for five years, *plus interest.*

and wireline telecommunications are at stake here. In a perfect world, no penalties for unauthorized attachments would ever be assessed. But the world is not perfect and meaningful financial incentives and deterrents are required to protect the infrastructure and ensure safe conditions. For this reason, the meaningful Standard Agreement provisions suggested by PacifiCorp should be adopted by the Commission.

3. Pre- and Post-Construction Inspection Fees

There is a "placeholder" at Section 3.25 of the Standard Agreement for language pertaining to pole inspection fees. In addition, Section 3.01 of the Standard Agreement contemplates a schedule of fees pertaining to inspections associated with the placement of new attachments or the removal of existing attachments, as triggered by the filing of a permit application.

Positions of the Parties in the Initial Briefs

The Division has noted that, "PacifiCorp, justifiably, conducts inspections for new attachments and the removal of attachments to ensure that work performed by an Attaching Authority [sic] conforms to safety and engineering standards….[T]he costs of these inspections are passed on to the Attaching Entity. The Division supports appropriately applied pre- and post-inspections fees, but standards should be developed to limit the extent of such inspections that are chargeable to Attaching Entities. The costs of periodic routine inspections should be included in the annual pole attachment rental rate."[15]

The Division understands and correctly distinguishes between inspection efforts that are caused by and related to attachments (or removal of attachments) of a particular

[15] Division initial brief at 4-5.

attaching entity, and routine, periodic inspections that are not related to any particular entity. PacifiCorp's practice of billing the attaching entity for inspections of *its* attachments recovers the costs of doing so from the entity that causes it. Otherwise, all entities on the pole, large and small, would bear these costs, effectively subsidizing the most active attaching entity in the state.

Although Qwest does not specifically say that it charges for pre- and post-construction inspections, Qwest notes that its SGAT includes charges related to a Field Inquiry and to Pole Verification associated with attachments.[16] URTA believes that pre- and post-construction inspection fees should be included in the rental rate and not separately charged. However, URTA's position is grounded on the administrative impact on itself *as a pole owner*. URTA feels that it would be simpler for it to recover these costs through the rental rate.[17]

Comcast does not object to paying the actual, reasonable and necessary costs associated with the pole owner's inspection of the pole plant prior to allowing attachments to determine the extent of the make-ready work that is required. Comcast objects, however, to paying pre-determined fees for varying levels of inspections, especially if the attaching entity provides much of the information itself.[18] Comcast objects to paying anything for the pole owner's follow-up, post-construction inspection.[19]

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[16] Qwest initial brief at 2-3.
[17] URTA initial brief at 1-2.
[18] Comcast initial brief at 14-15.
[19] Comcast initial brief at 17-18.

PacifiCorp's Response

Comcast seems concerned that a pre-determined fee is not necessarily related to the actual cost involved in performing work that it agrees is necessary and reimbursable. Comcast is not comforted by the fact – which it acknowledges – that the fees will be reviewed by the Commission in the individual pole owner's tariff or SGAT filing. In this regard, it is important to note that these fees are not arbitrary dollar amounts. The fees are based on the pole owner's cost experience in performing these tasks. They are an average of the actual costs involved. Using an average simplifies the recordkeeping for the pole owner and provides the attaching entity with cost certainty. The individual pole owner will be able to demonstrate the valid relationship between its proposed fees and the costs involved to provide the services in question in connection with its tariff or SGAT filing. Accordingly, fees are a valid method for recovering these charges.

PacifiCorp feels that pole owners should be able to recover all costs incurred as a result of the accommodation of the attaching entities. This includes the cost to inspect the installation work performed by the attaching entity, to ensure that attachments have been made (or removed) in accordance with the obligations contained in the permit and the access agreement. Prudent infrastructure management requires such inspections, and the costs thereof should be directly borne by the entity that made (or removed) the attachments.

II. Timeframes

1. Permit Processing

Section 3.02 of the draft Standard Agreement states that the pole owner must grant or deny a permit application within 45 days of receipt or the attaching entity may proceed with the installation. Forty-five days is the federal standard for processing permits, and this

timeframe was supported in the initial briefs of PacifiCorp,[20] Comcast,[21] and Qwest.[22] There was no dispute in the Technical Conferences as to this basic requirement. The dispute was over how to handle special circumstances where pole owners or attaching entities required a shorter or longer processing time than normal.

Comcast, for example, disagrees with the provisions in the second paragraph of Section 3.02 of the draft Standard Agreement that would permit the parties to negotiate longer or shorter application turn-around times as circumstances require.[23] Despite Comcast's misgivings about the negotiation process, it makes good sense to provide such flexibility in the contract between the parties. Yet, even absent the negotiation paragraph, the attaching entity would be completely protected from unreasonable delay by the additional provision of Section 3.02 that allows the attaching entity to proceed with the installation of its facilities if the pole owner has not responded to the permit application within 45 days.

Quite surprisingly, the Division[24] and URTA[25] urge the Commission to modify Section 3.02 to provide for a 30-day application processing period. This position was not espoused by them during the Technical Conferences and consequently there was no opportunity for representatives of the pole owners to explain the impact that such a short timeframe would have. Suffice it to say here that such a requirement would be onerous and costly. Essentially, it puts the pole owner to the choice of accepting an inordinate number of

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[20] PacifiCorp initial brief at 11.
[21] Comcast initial brief at 23.
[22] Qwest initial brief at 3.
[23] Comcast initial brief at 22.
[24] Division initial brief at 7.
[25] URTA initial brief at 3.

installations that have been authorized by default, thereby jeopardizing the reliability of the infrastructure, or hiring extra personnel and passing along even greater costs than those already complained of. Forty-five days strikes a better balance and should remain the standard for application turnaround.

2. Make-Ready Work

As part of the processing of permit applications, the pole owner will inform the attaching entity of the extent of the make-ready work that will be necessary in order for the desired poles to accommodate the proposed attachments. Under Section 3.09 of the draft Standard Agreement, the pole owner will also provide an estimate of how long it will take to accomplish the make-ready work.

Positions of the Parties in the Initial Briefs

PacifiCorp supports this sensible approach, together with a requirement for the attaching entity to pay for the estimated cost of the make-ready work prior to commencement of the work.[26] Comcast acknowledges that some degree of flexibility is appropriate, but it wants a default deadline as well. Comcast suggests 60 days as a default, modeled after the approach used in New York (which, incidentally, requires payment in advance of the estimated cost of the construction).[27] Comcast also favorably recommends the Vermont approach, which has a sliding scale of work time frames, beginning with 120 days and also requires pre-payment for the work.[28] Comcast would add a requirement that the pole owner coordinate the work of all attaching entities involved. In the event the

[26] PacifiCorp initial brief at 13.
[27] Comcast initial brief at 25.
[28] *Id.*

proposed default timeframe is not met, Comcast would add a requirement that the attaching entity be allowed to hire its own contractor to perform the make-ready work.[29]

Qwest supports Section 3.09 of the Standard Agreement as drafted.[30] The Division, however, advocates a 30-day time limit for completion of the work, plus the right of the attaching entity to hire its own sub-contractor to perform the work, regardless of whether the pole owner can complete the make-ready work within the 30 days.[31]

URTA suggests a 30-day default time period for completion of the make-ready work, but would permit the parties to negotiate a longer period. If the pole owner is unable to complete the work within 30 days and a longer period has not been agreed upon, the attaching entity would have the right to hire its own sub-contractor to perform the work.[32]

UTOPIA, which did not participate in the Technical Conferences and only now comes forward, requests a 30-day default time period for completion of the make-ready work. Under UTOPIA's proposal, once the pole owner informs the attaching entity of the estimated cost of the make-ready work, the attaching entity would have the option to choose a qualified contractor to perform the work instead. If the attaching entity agrees to pay the pole owner the estimated cost of the make-ready work, the pole owner would have 7 days within which to inform the attaching entity that it will complete the work within the 30-day time period or to state when it believes the make-ready work can be completed. Once the 7-day period has passed, the pole owner must timely compete the make-ready work or suffer a

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[29] Comcast initial brief at 29.
[30] Qwest initial brief at 3.
[31] Division initial brief at 6-7.
[32] URTA initial brief at 4.

penalty of $1,000.00 per pole.[33] Presumably, no penalty would apply if the pole owner informed the attaching entity up front that the make-ready work would take longer than 30 days.

PacifiCorp's Response

Thirty days as a default timeframe for completion of all forms of make-ready work is completely and utterly unrealistic. Some projects involve work on hundreds of poles. The work can involve everything from adding a guy wire and anchor, to rearrangement of existing facilities belonging to several attaching entities, to replacement of an existing pole and transferring of existing attachments to the new pole. Critically, this work may involve rearrangement of electric utility facilities.

Comcast has been a vocal advocate for expeditious completion of the make-ready process, but even Comcast has stated its willingness to accept a default timeframe that is twice as long as that proposed by the Division, URTA and UTOPIA. Furthermore, the New York and Vermont examples cited by Comcast show that other states have recognized the potential complexity of such projects and have attempted to craft measurable standards that bear a meaningful relationship to reality.

The "let us do it ourselves" approach appeals to the attaching entity's desire for a self-help remedy, but the price of that remedy is unacceptable. That price is loss of control over the integrity of the infrastructure, and potential chaos as attaching entities – who are competitors in the marketplace – rush to deploy their facilities without regard for safety and the continuity of electric service or the installed facilities of their competitors. See, for

[33] UTOPIA initial brief at 5.

example, the instances of reckless installations cited by Qwest in its comments in Docket No. 04-999-03, filed April 13, 2005. It is imperative that pole owners maintain contractual privity with entities performing work on the critical facilities used to provide essential services. The pole owner is held responsible for providing these essential services using its own infrastructure; therefore, the pole owner must have the ability to control the work. The electric utility must retain control over work performed on electric facilities.

Section 3.09 of the Standard Agreement is a reasonable attempt to balance the interests of attaching entities to commence service as quickly as possible and the interests of pole owners in assuring the integrity and safety of the infrastructure. In the event the Commission accepts the addition of a default deadline as the starting point for negotiations or a fall back in the event negotiations fail, any timeframe that is shorter than 90 days would be problematic.

Comcast's proposal that the pole owner coordinate the work of all attaching entities involved in a make-ready project is unreasonable. Comcast's proposal is all the more problematic because Comcast asks the Commission to require attaching entities to pay currently-attached entities for their transfer and relocation costs. Currently, neither attaching entities nor pole owners have an express right to collect these costs. In Utah, as far as PacifiCorp is aware, each utility has always borne these costs. So if a third telecommunications provider is attaching and a pole has to be changed out, the new entity pays only for the pole change-out and the other utilities, including the electric utility, bear

their own transfer costs.[34] Comcast would like the pole owner to collect transfer cost data from the current attachers and invoice the new attacher for these amounts, obtain payment, and distribute the payment to the existing attachers. Presumably, the pole owner would have to mediate disputes between competing telecommunications providers and collect on past due accounts. Comcast offers no mitigation to the pole owner for the risk of non-payment. Similarly, Comcast offers no funding source for the administrative costs of this operation. This proposal would create an expensive and unnecessary bureaucracy. The Commission should endorse current practices, whereby the pole owner notifies the attaching entities that they must move when necessary to accommodate new attachments.

III. Customer Service Drops

Section 3.02 of the Standard Agreement authorizes attaching entities to make service drop installations to poles without seeking prior approval from the pole owner. Instead, the Standard Agreement requires that attaching entities provide quarterly notifications of all service drop installations to pole owners. The existing language would require prior pole owner approval for service drops that are the first attachments on a pole or that are placed outside the space used by another attachment of the attaching entity.

Positions of the Parties in the Initial Briefs

Both Qwest[35] and the Division support the existing language in the Standard Agreement. The Division notes that the Commission's proposed rules do not consider service drops installed within an attaching entity's existing space to be a new attachment for

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[34] The effect of Comcast's cost reimbursement proposal is an anti-competitive market entry barrier that puts new telecommunications providers at a competitive disadvantage. These aspects are discussed more fully under section VII of this brief, under the "Relocation Costs" topic.
[35] Qwest initial brief at 3.

the purposes of assessing rental charges. Further, because service drop installations rarely require pole loading assessments, the Division does not believe that an extensive application process is necessary for such attachments.[36] The Division, however, recognizes that service drops that are installed in a new attachment space and service drops that are an attaching entity's first attachment to a pole are subject to rental assessments.[37]

Similarly, URTA supports the language in the Standard Agreement, with one modification. The existing language contains an exception to the notification requirement for service drops that are self-supporting wire or wires that do not require the use of messenger strand and a lashed cable. The URTA proposed that this exception be deleted in order to ensure that pole owners are aware of all service drop attachments.[38]

In its initial brief, PacifiCorp takes essentially the same position as the Division, Qwest, and URTA. However, PacifiCorp suggests that Section 3.02 be clarified to more explicitly provide that the pole attachment application process and associated fees are applicable in the limited cases where a service drop is the attaching entity's first attachment to a pole or where the service drop is outside the space already used by another attachment of the attaching entity.[39]

Comcast, however, objects not only to making an application for a limited set of service drops, but also to providing any notification for a majority of its service drop installations. Comcast maintains that it should not be subjected to a prior application for any service drops. Further, it argues that the quarterly notification requirement should be limited

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[36] Division initial brief at 7.
[37] *Id.*
[38] URTA initial brief at 4.
[39] PacifiCorp initial brief at 13-14.

to service drops that constitute a first attachment to a pole or those that are made outside the attachment space used by one of its existing attachments.[40]

PacifiCorp's Response

Comcast maintains that requiring prior approval for service drops, even in the limited circumstances contemplated in the Standard Agreement and cited by PacifiCorp, would hamper its ability to compete. With no basis in truth, Comcast speculates that PacifiCorp is only interested in collecting additional application and inspection fees.[41] As to notification requirements, Comcast seeks to limit the notification to requirement to the two categories of service drops that would be subject to the rental rate. Comcast states that it is "confused why PacifiCorp would want attachers to report other kinds of service drops."[42] However, the New York Order, quoted and relied upon by Comcast, requires notification of all service drops, not simply a limited category.[43]

Pole owners must manage the pole infrastructure for the benefit of not only their customers, but also for the benefit of all attaching entities. In order to effectively manage the pole infrastructure and ensure safe and efficient use thereof by third parties, it is imperative that pole owners be notified of the existence of all attachments made to pole infrastructure. The modifications to the Standard Agreement proposed by PacifiCorp best accomplish this goal. PacifiCorp's approach fairly balances the desire of attaching entities to make service drop installations in an expeditious manner while reserving prior application requirements in a very limited number of circumstances.

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[40] Comcast initial brief at 31.
[41] Comcast initial brief at 30.
[42] Comcast initial brief at n. 77.
[43] Comcast initial brief at n. 75.

IV. Overlashing

The existing language in the Standard Agreement contains a "placeholder" for the addition of language addressing the application and permitting requirements applicable to overlashing. Section 5.04 of the Standard Agreement provides that if an attaching entity permits a third party to overlash its facilities for compensation, the compensation shall be paid directly to the pole owner by the third party. There is a fundamental disagreement between pole owners and attaching entities as to the appropriate permitting and fee requirements that should be applied to overlashing.

1. Permitting

Positions of the Parties in the Initial Briefs

PacifiCorp believes that a prior-approval process is necessary for overlashed attachments in order for the pole owner to make a prior determination whether particular poles can support the additional burden resulting from overlashed attachments.[44] This prior-approval process should be equally applicable to overlashing by existing licensees and to third parties overlashing to an existing licensee's facilities. [45] There is no engineering basis for a distinction.

Qwest supports prior permitting requirements for overlashing. It proposes, however, an exception for the permitting requirements related to "temporary overlashings," which

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[44] PacifiCorp initial brief at 18.

[45] In the Technical Conferences, PacifiCorp explored the possibility of defining conditions under which prior approval for overlashing might not be required. It originally seemed possible to define such conditions in terms of whether the pole is a tangent pole, an angle pole or a dead-end pole; whether the pole is guyed; whether the pole supports a transformer; the span length between poles; and the number of cable/telecommunications wires already on the pole. However, the number of possible combinations of such factors renders it wholly impractical to formulate those situations that would not warrant prior approval.

Qwest defines as new cable that is overlashed to an existing strand of cable until services can be transferred from the existing cable to the new cable.[46]

In contrast, the Division does not see the need to employ an application process for overlashing. The Division states that overlashing does not typically present loading issues and that a notification requirement is sufficient.[47] The Division does not address whether the notification requirement it envisions would involve prior notification before overlashing or notification at some point after the overlashing was performed.

URTA takes the position that there is no need for prior notice, applications, or fees for overlashing. Indeed, the language it proposes be added to Section 3.01 contains *no* mention of any notification requirement for overlashing. Rather, the language proposed by the URTA would allow an attaching entity to overlash without prior approval to any existing attachment or other equipment, regardless of whether the existing attachment or equipment was owned by the entity performing the overlashing.[48] Under URTA's proposal, the attaching entity would only be responsible to ensure that all overlashes conform with the construction standards set forth in the Standard Agreement.

Comcast likewise disputes the need for permitting requirements applicable to overlashing. However, Comcast acknowledges that even the FCC's precedents allow pole owners and attaching entities to negotiate a prior notice requirement.[49] Comcast acknowledges too that Bountiful City Power presently requires permits for overlashing. It

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[46] Qwest initial brief, Section 3.01 of Attachment A.
[47] Division initial brief at 8.
[48] URTA initial brief at 5.
[49] Comcast initial brief at note 84.

notes, however, that the City's poles are located in a high wind area that has experienced significant pole failures and that the City processes the applications expeditiously.[50]

PacifiCorp's Response

It is unreasonable to suggest that an overlashing application requirement cannot be justified unless there have been catastrophic pole failures. The very rationale of the application requirement is to prevent such an occurrence and to ensure compliance with the National Electrical Safety Code and all the terms of the pole contact agreement, including rental charges. This is to the benefit not only of electric customers but of cable and telecommunications customers as well. Bountiful City Power understands this and has set a commendable example.

Pole loading is a key determiner of whether and what make-ready work is required to accommodate overlashing. During the course of the technical conferences in this docket, PacifiCorp entertained the possibility that engineers from pole owning utilities and attachers could develop engineering standards that would identify pole-attachment configurations where pole loadings would clearly be within the zone of reasonableness subsequent to overlashing. The hope was to find a set of configurations where no make-ready work would be required on the basis of pole loading. If this could be accomplished, it would arguably form the starting point in a rational argument that overlashing should not be subject to permitting requirements. However, PacifiCorp's analysis, described below, demonstrates that permitting is a necessary process to ensure that overlashed attachments meet pole loading requirements.

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[50] Comcast initial brief at note 87.

PacifiCorp gathered data on attachments from several entities participating in the docket. PacifiCorp paired this data with its own data relating to structural integrity and its own attachments. That data is presented in the attached Tables 1 through 4. The most important thing demonstrated by the tables is that there are a number of structural criteria that affect pole loading and these criteria drive results that are highly variable. The results vary dramatically for particular pole-attachment combinations, to the extent that no useful "rule of thumb" can be derived.

Each table presents pole loading calculations as a percentage of maximum capacity for one typical electrical conductor scenario on a 40 foot, class 4 pole. The calculations were performed for a number of different span lengths between poles and for a number of different attachment scenarios. The results of both vertical and transverse loading calculations are presented. Vertical loading is the support that poles are required to provide to sustain the vertical forces placed upon them by the weight of the pole, conductors, and all hardware mounted on the pole, plus any vertical forces resulting from guy tensions. Transverse loading is the support that poles are required to provide to sustain transverse forces placed upon them by the wind acting on the pole, conductors, and all hardware mounted on the pole, and any transverse forces resulting from line angles and wire tensions. For individual pole-attachment-span length combinations, the tables demonstrate that pole loadings can vary from approximately 20% to over 100% after overlashing. Permitting facilitates completion of the engineering work required to determine what pole loading will result in a particular case.

Notably, the tables present results only for the limited set of poles described as tangent poles. Tangent poles are poles directly in line with the pole on either side. Angle

poles are poles where there is angular relationship between the spans on either side of the pole. The severity of the angle between spans dictates the additional transverse loading due to angle poles. There are 360 degrees on the compass, and at least 90 of them are useful in analyzing loading in angle pole lines. A 90 degree angle presents the greatest increase in transverse load, and any increased mass attached to the pole magnifies transverse loading exponentially in this case. Thus, to provide for all angle pole scenarios in the tables, each cell would be replaced by at least 90 cells, representing the results of the pole loading for each degree.

The attached tables demonstrate that pole loading analysis cannot be distilled into a simple rule to be applied by personnel without engineering training. The pole-attachment scenarios analyzed may be common, but they are certainly not all-encompassing. They are based only on one pole class/height combination. In addition to taking the angle pole issue into account, the tables would have to be reproduced for each available height/class combination—perhaps another dozen or two combinations. These variables, in addition to those shown in the table—electric conductor size, attachment type and size, and span length, in addition—have to be correctly identified or measured, in order to facilitate the loading calculation.

The permitting process is designed to ensure that these data are properly collected and analyzed. Foregoing the permitting process for overlashing would significantly compromise system safety. PacifiCorp urges the Commission to decide this issue on the side of safe system operation and require appropriate permitting for overlashing.

2. Fees

Positions of the Parties in the Initial Briefs

In its initial brief, PacifiCorp distinguished between overlashing by an existing attaching entity and overlashing by third parties. With regard to overlashing by an existing attaching entity, PacifiCorp is not seeking a rental charge for attachments that a licensee overlashes to existing attachments within its attachment space.[51] However, it is appropriate to allow PacifiCorp to recover the costs associated with processing applications for both new attachments and overlashed attachments. In addition, it is wholly appropriate for the pole-owning utility to collect rent for overlashing by third parties.

Qwest supports rental fees for overlashing. It proposes, however, an exception for the fee requirements related to "temporary overlashings," which Qwest defines as new cable that is overlashed to an existing strand of cable until services can be transferred from the existing cable to the new cable.[52]

The Division addresses the issue of compensation for third party overlashing, stating that a third-party that overlashes to an attaching entity's existing attachment should pay rental to the pole owner. Otherwise, the third party would have a competitive advantage over other attaching entities that are required to pay the rental rate for their attachments.[53] Comcast argues that Section 5.04 of the Standard Agreement should be removed, contending that allowing a pole owner to charge rent for third-party overlashing results in a pole owner's collecting rent more than once for the same space.[54]

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[51] PacifiCorp initial brief at 17.
[52] Qwest initial brief, Section 3.01 of Attachment A.
[53] Division initial brief at 5-6.
[54] Comcast initial brief at 37-38.

PacifiCorp's Response

The Division is correct in pointing out that third-party overlashers should not be given a competitive advantage over other attachers that are required to pay the rental rate for their attachments. Nor, we would add, should an attaching entity be permitted to gain an advantage over its competitors by defraying its pole attachment costs by selling overlashing rights. Furthermore, as PacifiCorp pointed out in its initial brief,[55] states such as Louisiana have recognized that allowing an existing attaching entity to re-sell its pole space is an abuse of the basic access rights afforded to cable and telecommunications providers and completely distorts the intention of the mandatory access requirement. The potential for over-collection claimed by Comcast should never materialize, because PacifiCorp's rate proceedings before the Commission will properly account for all representative revenues in connection with PacifiCorp's pole attachment operations.

V. Audit Costs

Section 3.24 of the Standard Agreement provides that a pole owner may conduct an audit of attachments made to its facilities no more frequently than once every five years.[56] The cost of the audit is to be apportioned among all licensees maintaining attachments in the audited territory in proportion to the number of poles occupied by each licensee.

Positions of the Parties in the Initial Briefs

The Division supports this approach and recognizes that it would be impossible for pole owners to recover the entirety of their actual cost to perform the audit through the rental

[55] PacifiCorp initial brief at 19.
[56] As a practical matter, such audits may be a continuous process, covering no more than approximately one-fifth of the pole plant each year.

rate. Moreover, the Division states that the audit contemplated in the Standard Agreement would benefit all attaching entities and that it is just and reasonable to expect those benefiting from the audit to share proportionately in its cost.[57] Qwest and PacifiCorp also support the existing language in the Standard Agreement. In contrast, URTA and Comcast believe that audit costs are properly recovered through the rental rate.

PacifiCorp's Response

URTA proposes an exception if an audit is requested by a particular party. In that case, the entity requesting the audit would be responsible for their "own costs caused by their participation in the Audit."[58] This approach fails to compensate a pole owner for its costs related to an audit, even if the audit were conducted pursuant to a request from a licensee. At best, an attaching entity is only responsible for the costs it incurred in an audit it requests.

In addition, URTA would strike language in the Standard Agreement requiring an attaching entity to pay any disputed amount 90 days after making an objection to the results of an audit.[59] That provision is intended to serve as an incentive for both parties to resolve objections and should remain in the Standard Agreement. Otherwise, there is no incentive for attaching entities to engage in good-faith negotiations to resolve disputed amounts.

Comcast's argument for recovery of audit costs through the rental rate is based on an inapplicable FCC complaint case. In its initial brief, Comcast states that requiring recovery of audit costs through the rental rate is "consistent with well-established federal law."[60]

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[57] Division initial brief at 6.
[58] URTA initial brief at 5.
[59] *Id.*
[60] Comcast initial brief at 39.

However, the only cited support for its position is one, lower-level FCC bureau decision which binds only the parties to that complaint case, and which involved yearly audits as well as audits triggered when the utility "reasonably suspected" safety violations – a fact situation that is radically different from the ordinary audit situation being considered here.

Comcast claims that the FCC has "consistently held" that audit costs should be recovered through the rental rate.[61] Yet Comcast offers no evidence that audit costs are already included in the rental rate. If a pole owner can factually demonstrate that the accounts captured in the rental formula do not pick up the audit costs, there would be no double recovery by allowing for a direct audit charge. Moreover, directly billing for audit costs in proportion to the number of poles occupied more fairly distributes the costs among attaching entities. The approach advocated by Comcast would require smaller attaching entities to bear costs caused by larger entities. The Commission should see the unfairness in this approach and require the cost-causer to shoulder its fair share of the burden.

VI. Easements

Section 3.11 of the Standard Agreement states, "The right of access to pole owner's poles granted by this Agreement does not include any right of access to the land upon which the pole is situated nor does it include any right to cross the land from pole-to-pole with Licensee's Equipment and such access rights are specifically disclaimed."

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[61] *Id.*

Positions of the Parties in the Initial Briefs

This language was proposed jointly by Qwest and PacifiCorp and has the Division's support.[62] Both URTA and Comcast oppose the proposed language.

PacifiCorp's Response

URTA states that "requiring proof of easements as a condition to approve an Attachment application is onerous and unnecessary."[63] This statement is based on an erroneous interpretation of Section 3.11. The existing language does not require an attaching entity to provide proof that it has obtained the required easement rights in order to secure a permit. Rather, it simply clarifies that the Standard Agreement does not grant a legal right to an easement or right-of-way.[64] Indeed, pursuant to PacifiCorp's proposed approach, such proof would only be required in the event the pole owner has reason to believe the attaching entity has failed to obtain the requisite authority.[65]

Comcast likewise misinterprets Section 3.11. In its initial brief, it asserts that the language in that section is intended to disclaim granting a right of access to easements "owned or controlled" by the pole owner. That is simply not the case. The language in the Standard Agreement simply means that whatever easement rights might exist in any given situation do not spring from the Standard Agreement. In other words, in any given situation, an attaching entity's property rights might derive from operation of law, from having been independently procured from a land owner, or even from the pole owner in cases where the pole owner owns or has an apportionable easement or right-of-way and these rights are

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[62] Division initial brief at 8.
[63] URTA initial brief at 6.
[64] Division initial brief at 8.
[65] PacifiCorp initial brief at 25.

properly apportioned and obtained by the attacher. If an easement or right-of-way is not owned or controlled by the pole owner, the pole owner cannot convey a valid easement or right-of-way to the attaching entity, and that is what the Standard Agreement makes clear. In every situation, the attaching entity is required to secure all authorizations *that may be necessary* or verify that no easement or other rights-of-way are required. The Standard Agreement clarifies that the burden is on the licensee to determine what authorization must be obtained and to lawfully obtain it.

This is entirely consistent with federal law, specifically § 224(f)(1) of the Pole Attachments Act, which Comcast also mischaracterizes. In citing a partial quote from § 224(f)(1), Comcast claims that "Congress clearly obligates pole owners to provide access to 'any right-of-way owned or controlled by it', including 'private easements.'"[66] While Comcast is correct that § 224(f)(1) does require a pole owner to provide access to easements and rights-of-way owned or controlled by it, the words "private easements" appear nowhere in § 224(f)(1) and are not covered by that provision. Moreover, Comcast's interpretation is contrary to Utah law, which provides that a non-dedicated easement is apportionable to a cable operator *only* if consent is obtained from the private property owner.[67] The Standard Agreement is consistent with Utah property law and should be retained.

VII. Relocation Costs

Sections 3.12 through 3.16 of the Standard Agreement deal with how costs are to be borne under various situations that require facilities on the poles to be rearranged on existing

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[66] Comcast initial brief at 40.
[67] Utah Code Ann. § 54-4-13.

poles or requires the poles themselves to be replaced and the facilities transferred to the new poles.

Positions of the Parties in the Initial Briefs

In its initial brief, PacifiCorp raises the threshold question whether the pole owner has the absolute right to reclaim space on its poles being used by attaching entities whenever the pole owner's core business needs require the space.[68] PacifiCorp disagrees with the federal approach, supported by Comcast, that only space that has been reserved pursuant to a bona fide development plan can be reclaimed.[69] No other commenters opposed the requirement of Section 2.03 and 3.12 that space reservations require a bona fide development plan.

T-Mobile, however, would further restrict the pole owner's reclamation rights, limiting the pole owner's right to reclaim space on the pole to one year. T-Mobile's position is premised on the assumption that, in most instances, T-Mobile pays the pole owner to replace the existing pole with a taller, stronger pole in order to accommodate its wireless attachments.[70]

PacifiCorp's Response

Although the pole owner becomes the owner of the new pole in these cases, PacifiCorp is sympathetic to T-Mobile's position. PacifiCorp's position is based on existing utility poles and its right to use their full capacity for their original purpose. PacifiCorp

[68] PacifiCorp initial brief at 26-27.
[69] Comcast initial brief at 44.
[70] T-Mobile initial brief at 2-3.

would agree to not seek to "reclaim" attachment space on a pole that would not exist were it not for the replacement of that pole with a taller, stronger pole by a wireless attaching entity.

For the reasons stated in its initial brief at 26-27, PacifiCorp urges the Commission to delete the requirement for a bona fide development plan as it appears in Sections 2.03 and 3.12. This would give full effect to Section 3.17 of the Standard Agreement, strongly supported by PacifiCorp, which allows the pole owner to require attaching entities to remove or relocate their attachments. Anything less gives attaching entities – renters – greater rights in the pole than the owners of the pole.

The Division is correct in its assessment that these sections of the Standard Agreement are about "Who pays?"[71] URTA suggests that the guiding principle must be that the cost causer pays.[72] The Division points out that the rental rate would not compensate the pole owner if the pole owner had to bear the cost of relocating the facilities of attaching entities in order for the pole owner to improve and expand its core business. Accordingly, with respect to the reclamation of attachment space for core business uses, the Division advocates payment of relocation costs by the attaching entities.[73] PacifiCorp agrees.

The Division[74] and Qwest[75] support Sections 3.12 through 3.17 as drafted. With the revisions noted above, PacifiCorp does as well. Although there seems to be general agreement that pole owners and attaching entities alike should bear the costs relating to their own facilities and that the cost causer should pay for pole replacements, Comcast takes the position that once it has installed an attachment on the pole, it should not be forced to incur

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[71] Division initial brief at 9.
[72] URTA initial brief at 6.
[73] Division initial brief at 10.
[74] *Id.*
[75] Qwest initial brief at 4. (Qwest has suggested non-substantive, clarifying edits.)

any expense for activities undertaken for the benefit of another party, especially the pole owner.[76] Such a protectionist outcome would clearly operate to stifle the provision of competitive telecommunications service in Utah. Requiring a competitive new attaching entity to pay not only its own cost of making attachments, but also the cost of rearranging or transferring the existing facilities of other telecommunications carriers and cable companies, would put a burden on the competitive new provider that its predecessors in the market did not have to bear. The Commission should avoid this outcome and adopt Sections 3.12 through 3.16, with the modifications suggested herein.

VIII. Disputed Bills

Section 5.03 of the Standard Agreement requires that attaching entities pay invoiced amounts, including disputed amounts, within 30 days. If an invoice dispute is resolved in favor of an attaching entity, the pole owner is required to promptly refund the money with interest. Similarly, Article XI provides that the occurrence of a force majeure event does not excuse a licensee's obligations to pay amounts when due.

Positions of the Parties in the Initial Briefs

PacifiCorp and Qwest support the existing language in the Standard Agreement. However, Comcast and URTA both take the position that there should be no obligation to pay disputed amounts until such time as the dispute is resolved. Comcast suggests that the parties should resort to the dispute resolution process set forth in the Commission's rules in the event there is a billing dispute.[77]

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[76] Comcast initial brief at 42.
[77] Comcast initial brief at 46.

In its initial brief, the Division proposes a compromise solution. It suggests that in the event of a billing dispute, an attaching entity would be entitled to withhold payment, but for no more than 60 days. In addition, the burden of proof remains on the attaching entity.[78] If a dispute is eventually resolved in favor of an attaching entity, the pole owner is required to refund amounts paid prior to resolution, plus interest.

PacifiCorp's Response

While PacifiCorp believes that the existing language is fair and reasonable, it is willing to accept the Division's approach. Placing the burden of proof on the complaining party properly discourages frivolous disputes raised solely to avoid paying owed amounts. In addition, the allocation of the burden of proof to the attacher is consistent with the Commission's December 21, 2004 and February 10, 2005 Orders issued in *Comcast v. PacifiCorp*, based on the attacher's status as a licensee on poles belonging to the owner.[79] The Division's approach strikes a fair balance between the concerns of pole owners and attaching entities.

IX. Liability and Damages; Indemnification and Warranties

There is a placeholder for Section 9.01 of the Standard Agreement for provisions governing these matters. In the Technical Conferences, the participants were unable to reach a consensus, particularly regarding mutual or reciprocal indemnification.

[78] Division initial brief at 11.
[79] Docket No. 03-035-02.

Positions of the Parties in the Initial Briefs

PacifiCorp[80] and the Division[81] have both submitted proposed language for this section that is very similar. Somewhat simplified, this proposed language:

- Requires the attaching entity to indemnify the pole owner against any claims arising from the presence or use of the attaching entity's equipment on the poles, except in instances where the claim was caused by the gross negligence or intentional misconduct of the pole owner;

- Requires the attaching entity to indemnify the pole owner from any claims arising from an interruption in the attaching entity's service, except in instances where the interruption was caused by the gross negligence or intentional misconduct of the pole owner;

- Requires the attaching entity to defend upon demand and, if necessary, satisfy any adverse judgment against the pole owner for claims related to any interruption in the pole owner's service to its customers alleged to have been caused by any action of the attaching entity;

- Warrants that the poles are constructed and maintained in accordance with prudent utility practices, but disclaims all other warranties;

- The Division's version would add a mutual disclaimer of liability for special, indirect, incidental, punitive, exemplary or consequential damages.

Qwest submits the language that it says the Commission has already approved as part of Qwest's SGAT.[82] Qwest's language requires the attaching entity to indemnify the pole owner from claims arising from the attaching entity's failure to comply with the terms of the access agreement (which presumably contains provisions governing standards for construction, maintenance and the like). Like the Division's language, Qwest's language would include a mutual disclaimer of liability for incidental, indirect, special or

[80] PacifiCorp initial brief at 31-32 and Attachment 1.
[81] Division initial brief at 11-13.
[82] Qwest initial brief at 4 and attachment.

consequential damages. URTA wants all indemnity provisions to be reciprocal.[83] Comcast similarly argues for mutual indemnity provisions.

PacifiCorp's Response

Comcast's argument is that pole owners have the upper hand in pole attachment negotiations and implies that, unless prevented, pole owners will force unfair, one-way indemnity provisions on attaching entities. Not so. Pole owners have no ability in Utah to deny access to an attaching entity; nor do they have the ability to dictate unreasonable terms.[84] Pole owners do not have the leverage that Comcast would like the Commission to think they have. That being the case, Comcast presents no valid reason why indemnity provisions must be reciprocal.

On the contrary, as outlined in PacifiCorp's initial brief (at 31-32), the attaching entity must take the poles as they find them. The sole obligation of the pole owner is to provide a platform that is constructed and maintained in accordance with good utility industry practice, and the language suggested by the Division and PacifiCorp requires that. However, the original and primary purpose of the poles is the safe and reliable provision of the pole owner's core business service. It makes good sense that, if an attaching entity – in many cases an uninvited licensee – impairs that infrastructure or causes an interruption in the core business service of the pole owner, the attaching entity should be responsible for the damage. Conversely, with no duty to the attaching entity beyond the provision of a sound platform, it makes no sense for the pole owner to bear the same responsibility to the

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[83] URTA initial brief at 10-12.
[84] *See* Proposed Rule R746-345-1.B.2.: "…[A] public utility must allow an attaching entity nondiscriminatory access to utility poles at rates, terms and conditions that are just and reasonable."

uninvited licensee (except, of course, in the event of grossly negligent or deliberate misconduct by the pole owner).

The investments in the poles by the pole owner and the attaching entity are disproportionate. The risks borne by the pole owner and the attaching entity are disproportionate. And it is perfectly logical and commercially reasonable that the duties of the pole owner and the attaching entity toward each other should be differentiated.

PacifiCorp urges the Commission to adopt the text provided by the Division and PacifiCorp for Section 9.1.

X. Insurance and Bonds

There is a placeholder in the Standard Agreement for text to cover insurance and bonding.

Positions of the Parties in the Initial Briefs

In the attachment to its initial brief, PacifiCorp provided suggested text, which it believes is commercially reasonable and appropriate. Qwest submitted the insurance text from its SGAT that the Commission has already approved.[85] The Division does not take a position, but URTA notes that insurance provisions are common in commercial agreements, such as pole attachment agreements, and offers text that it believes would be reasonable.[86] Comcast agrees that insurance provisions are common and reasonable. Comcast suggests, however, that rather than attempt to craft standard insurance language, this section of the

[85] Qwest initial brief at 4 and attachment.
[86] URTA initial brief at 12-14.

Standard Agreement should be left open for negotiation on a case-by-case basis between pole owners and attaching entities.[87]

PacifiCorp's Response

Under the Commission's procedures, parties are always free to negotiate and submit for approval negotiated contract provisions that may differ from the Standard Agreement. Thus, since all parties acknowledge that insurance provisions are commonplace in such agreements, the Commission should review and approve the provisions in this "safe harbor" Standard Agreement relating to insurance. The text submitted by PacifiCorp is the product of substantial risk assessment and is prudent for the utility industry. PacifiCorp urges the Commission to adopt it.

The contentious issue in the Technical Conferences was bonding, especially as a mechanism to ensure that the attaching entity would fulfill its financial obligations under the agreement. Comcast feels that bonding is not necessary, because, for example, rent is paid in advance.[88] Comcast does not completely oppose a bonding requirement, but suggests a triggering mechanism, such as failure to make a required reimbursement, before a bond or other financial security can be required.

PacifiCorp agrees with Comcast that bonding would not be necessary if all payments were made up front. Indeed, in its initial brief, PacifiCorp made the point that it was only willing to soften its position on financial security if payments of estimated amounts for make-ready work were required to be made in advance.[89] Prepayment of make-ready was

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[87] Comcast initial brief at 49.
[88] *Id.*
[89] PacifiCorp initial brief at 10.

not provided for in the Standard Agreement. Besides rent, which is paid in advance, payments under the Standard Agreement come due for reimbursable work performed by the pole owner. This work includes application processing, make-ready work, facilities relocation work performed in an emergency or when the attaching entity fails to perform the work, inspections, audits and the like. The cost of this work would be absorbed by the pole owner's customers if the attaching entity went bankrupt or otherwise refused to pay for it. Indeed, the triggering event, suggested by Comcast might well be the attaching entity's bankruptcy, which might only be filed after a substantial cost has been incurred by the pole owner. Comcast's proposal that the owner only be able to seek credit assurances after a missed payment does not cover this contingency and PacifiCorp opposes it for that reason.

In addition to charges for work performed on behalf of the attaching entity, amounts come due under the Standard Agreement for fees, unauthorized attachment charges, indemnity payments and the like. If the pole owner is to realize the payments it is allowed to receive under the Standard Agreement for these charges, it is necessary and prudent to allow the pole owner to require the reasonable credit assurances proposed by PacifiCorp. Finally, as noted by PacifiCorp in its initial brief, while rental charges are prepaid in advance, the prepayment is amortized over the billing cycle, so that at the end of the cycle, the pole owner has no payment certainty. Accordingly, the text provided by PacifiCorp in its initial brief should be added to the Standard Agreement.

Summary and Conclusion

For the reasons set forth above, PacifiCorp urges the Commission to modify the provisions of the Standard Agreement to the limited degree set forth in this brief and its initial brief to accomplish the following results:

- Allow the recovery of costs associated with processing pole attachment applications by means of direct charges to attaching entities;

- Require payment of estimated make-ready costs before the work is commenced;

- Set the penalty for making unauthorized pole attachments at $60 per pole, plus back rent;

- Allow recovery of costs incurred to inspect poles both before and after installation or removal of attachments by means of charges directly to the attaching entity;

- Maintain a 45-day turnaround time for responding to pole attachment permit applications;

- Allow the parties to negotiate the time required for performance of make-ready work or, if a default time period is established, set the default time period for at least 90 days;

- Allow installation of most service drops to be reported after the fact to the pole owner, but require prior permits for service drops outside of space currently used by an attaching entity or on poles not currently used by that attaching entity;

- Require prior approval for overlashing and require rent to be paid to the pole owner when a third party overlashes an attaching entity's facilities;

- Allow recovery of costs associated with periodic audits of pole attachments by means of a direct billing to attaching entities in proportion to the number of their attachments;

- Recognize that the burden is on attaching entities to obtain whatever rights-of-way may be necessary under Utah law;

- Allow the pole owner to reclaim rented space on poles when the demands of the pole owner's core business so require, unless the attaching entity paid to increase the capacity of the pole in question;

- Require all parties to bear their own cost of rearranging or transferring their own facilities;

- Place the burden of proof on attaching entities in the event of disputed bills and require attaching entities to pay disputed bills within 60 days;

- Not require reciprocal indemnification;

- Require normal, commercial levels of insurance and allow the pole owner to require surety bonds or other means of financial security for dollar amounts that are payable under the Standard Agreement.

Implementation of these provisions would serve the interests of the residents of the state of Utah by preserving the vital infrastructure that delivers not only electric, but also telephone, cable television, Internet and telecommunications services and by placing the risks and costs associated with these services on the shoulders of the entities that deliver these services and profit from their delivery.

RESPECTFULLY SUBMITTED this 13th day of May, 2005.

PACIFICORP

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Gerit F. Hull
PACIFICORP

Raymond A. Kowalski
TROUTMAN SANDERS LLP

Gary G. Sackett
JONES WALDO HOLBROOK & MCDONOUGH, P.C.

Certificate of Service

I certify that I have served a copy of the foregoing **Reply Brief of PacifiCorp as to Terms and Provisions of the Standard Pole Attachment Agreement** by first-class mail or by e-mail attachment the following participants in the captioned proceeding, on May 13, 2005.

Michael L. Ginsberg
Patricia E. Schmid
Assistant Attorneys General
Office of the Attorney General of Utah
160 E 300 S, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857
mginsberg@utah.gov
pschmid@utah.gov
Counsel for the Division of Public Utilities

Bradley R. Cahoon
Snell & Wilmer LLP
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah
bcahoon@swlaw.com
Counsel for Voicestream PCS II Corporation, dba T-Mobile

Robert C. Brown
Theresa Atkins
Qwest Service Corporation
1801 California Street, 49th Floor
Denver, CO 80202
Robert.brown@qwest.com
theresa.atkins@quest.com
Counsel for Qwest Corporation

Stephen F. Mecham
Callister Nebeker & McCullough
Gateway Tower East Suite 900
10 E. South Temple
Salt Lake City, Utah 84133
sfmecham@cnmlaw.com
Counsel for the Utah Rural Telecom Association

Charles Best
Associate General Counsel
Electric Lightwave, LLC
4400 N.E. 77th Avenue
Vancouver, Washington 98662-6706
charles_best@eli.net
Counsel for Electric Lightwave, LLC

Curt Huttsell, Ph.D.
Manager, State Government Affairs
Electric Lightwave, LLC
4 Triad Center, Suite 200
Salt Lake City, Utah 84180
chuttsel@czn.com

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

Jerold G. Oldroyd
Angela W. Adams
Ballard Spahr Andrews & Ingersoll
One Utah Center, Suite 600
201 South Main Street
Salt Lake City, Utah 84111-2221
oldroydj@ballardspahr.com
adamsaw@ballardspahr.com

J. Davidson Thomas
Jill M. Valenstein
Genevieve D. Sapir
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Ave., N.W., 2nd Fl.
Washington, D.C. 20006
dthomas@crblaw.com
jvalenstein@crblaw.com
gsapir@crblaw.com

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

Meredith R. Harris
AT&T Corp.
One AT&T Way
Bedminster, NJ 07921
harrism@att.com
Counsel for AT&T Corp.

Gregory J. Kopta
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
gregkopta@dwt.com
Counsel for XO Utah, Inc.

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

William J. Evans
Vicki M. Baldwin
Parsons Behle & Latimer
One Utah Center
201 South Main Street, Suite 1800
Salt Lake City, Utah 84145-0898
Counsel for Utah Telecommunications Open Infrastructure Agency

ATTACHMENT