July 13, 2005

BY HAND DELIVERY

Ms. Julie Orchard
Utah Public Service Commission
Heber M. Wells Building, 4th Floor
160 East 300 South
Salt Lake City, UT 84111

Re: Docket No. 04-999-03 – Supplemental Comments of UTOPIA in Response to the Supplemental Comments Filed by Qwest Corporation

Dear Ms. Orchard:

Enclosed please find the following: an original and 5 copies of the *Supplemental Comments of UTOPIA in Response to the Supplemental Comments Filed by Qwest Corporation* and a disk with an electronic version of the filing. We have also e-mailed a copy of the filing to lmathie@utah.gov.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Parsons Behle & Latimer

Vicki M. Baldwin

VMB/gm
Enclosures

WILLIAM J. EVANS (5276)
VICKI M. BALDWIN (8532)
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, UT 84145-0898
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

DAVID J. SHAW
Utah Telecommunication Open Infrastructure Agency
1385 West 2200 South, #302
West Valley City, Utah 84119
Telephone: (801) 955-3790
Facsimile: (801) 908-7225

Attorneys for UTOPIA

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of an Investigation into Pole Attachments.	Docket No. 04-999-03 **SUPPLEMENTAL COMMENTS OF UTOPIA IN RESPONSE TO THE SUPPLEMENTAL COMMENTS FILED BY QWEST CORPORATION**

On July 6, 2005, Qwest Corporation ("Qwest") filed supplemental comments ("Qwest's Comments") in the above-captioned docket suggesting the Utah Public Service Commission ("Commission") add language to the proposed pole attachment rules incorporating the National Electric Safety Code ("NESC") and the Bellcore rules. The Utah Telecommunication Open Infrastructure Agency ("UTOPIA") respectfully submits these Supplemental Comments in response to Qwest's Comments.

UTOPIA COMMENTS

A. Adoption of the Bellcore Rules Is Unjustified and Would Be Unfair and

Discriminatory.

Qwest has requested that the Commission modify the language of proposed R746-345-3.A.2 of the Utah Administrative Code to incorporate the NESC and Bellcore rules. Qwest's Comments at 4. As justification for this amendment, Qwest claims that all attaching entities in Utah have been required to follow the NESC and Bellcore rules over several decades. Id. at 2. Qwest asserts that all attaching entities in Utah have consistently followed the NESC and Bellcore rules. Id. at 3. Qwest also asserts that as a result of following the NESC safety rules and Bellcore rules, the new attaching entity is always responsible for paying for any and all make ready work necessary. Id. at 2. UTOPIA disagrees with Qwest's assertions and its proposal.

UTOPIA does not deny that the NESC or similar safety rules have likely been applied for pole attachments in Utah for many years. Nor does UTOPIA deny the wisdom of applying safety standards for pole attachments. However, it is unnecessary to require that the language of the rule be changed so that the NESC is specifically incorporated into the rules because this is done in the way the rules are currently drafted.

The standard pole attachment contract being considered as part of this docket specifically requires that the licensee of a pole place and maintain its equipment in conformance with the NESC. Utah Pole Attachment Agreement § 3.04. Proposed R746-345-3.A requires that this standard pole attachment agreement or a Statement of Generally Available Terms be submitted to the Commission for approval. Therefore, the rules as proposed already require conformance with the NESC and Qwest's proposal is superfluous. Also, allowing the safety requirements to be specified in the contract and then providing that the contract be approved by the Commission allows more flexibility in the event that new rules are adopted or the rules are changed. Therefore, the rule as originally proposed (without Qwest's amendments) serves the purpose of incorporating safety rules in the most efficient manner.

That being said, UTOPIA does not understand the relationship between incorporating the NESC safety rules into the regulations and requiring the attaching party to bear the expense for "any and all make ready work." Qwest Comments at 2. NESC regulates safety and attachment rules, not the method by which make ready work is reimbursed. Contrary to Qwest's assertion, Bellcore rules are not required to be followed by all attaching entities in Utah, and have not been consistently followed by all attaching entities in Utah. They are only requirements under explicit contract terms as applied to Qwest's poles. Other utilities, like PacifiCorp, are not bound by the Bellcore rules and do not impose such contractual rules on its attachers. If the largest pole owner in Utah, PacifiCorp, and the municipal utilities are neither bound by, nor do they impose the Bellcore rules on attachers to their poles, the Bellcore rules cannot be considered a standard of the entire utility industry and should not be incorporated into the language of R746-345-3.A.2. While Qwest's current practice may be to impose the Bellcore rules on poles that it owns, it does not have authority to impose its own corporate rules on poles owned by other utilities and municipalities in Utah. The Commission should not grant Qwest that authority.

Imposing the costs of "any and all make ready" work on the new attacher in all cases as suggested by Qwest is unfair and discriminatory, especially in light of the pro-competition

legislative purpose of the Telecommunications Act of 1996 ("1996 Act"). Qwest's justification for requiring a new entrant to pay all make ready costs is that it has always been done that way. Such a position ignores the stated intent of Congress in passing the 1996 Act, which is to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." FTA, Pub. L. No. 104-104, pmbl., 110 Stat. 56 (1996). Congress explicitly recognized that rapid telecommunications deployment required a new regulatory paradigm, including the right of this Commission to review and modify the way things had always been done.

To ensure such rapid telecommunications deployment in a manner that is fair and equitable to both new entrants and incumbents, UTOPIA advocates the position set forth by the Vermont Public Service Board ("Vermont PSB") regarding lowest attachment and make ready expenses:

> [The telecommunications utility] generally wishes to keep its own pole attachments at the lowest actual attachment point on the pole. To accomplish this, [the telecommunications utility] and other telephone companies must sometimes lower their own cables to allow room for a new attacher. The commenters disagreed about how these costs should be paid. The Final Proposed Rule provides that under these circumstances the costs of lowering the existing lowest attachment will be divided equally between the new attacher and the existing attacher (usually a telephone company). The Board has concluded that before these circumstances can arise, the existing attacher must have originally placed its own facilities higher than is required by safety codes. Accordingly, the original attacher should share in the cost of freeing up space for the new attacher. Likewise, the new attacher is a cause of the relocation, and should pay a portion of that cost. To omit this provision would give telephone companies the right to impose additional and unnecessary costs on new attachers simply by setting their attachments high on new poles.

Vermont Public Service Board Rule 3.700 – Pole Attachments, Policy Explanation and Summary of Comments at 15, attached hereto as Exhibit A. UTOPIA believes that the methodology adopted by the Vermont PSB is fair and nondiscriminatory. As the Vermont PSB points out, the only reason a telecommunications utility would have to lower its facilities to become the lowest attacher when a new attacher requests attachment is because the telecommunications utility originally placed its facilities higher than required. Thus, if the telecommunications utility must lower its facilities to remain at the lowest position, fairness requires that it should bear its share of the costs to do so.

The Commission should also carefully consider the ramifications of Qwest's argument that its twisted-pair copper facilities should occupy the lowest pole position because copper lines are heavier than other lines. According to Qwest's Comments, this increased weight heightens the likelihood of line interference and safety risks if other lighter lines are placed lower than copper. Qwest Comments at 3. The risk of interference is that the heavier lines will become burdened with lag, ice or other conditions, make contact with the lighter lines and cause damage. Damage potential is created by the weight of heavier copper facilities clashing with lighter facilities, not vice versa. Consequently, any "lowest attacher rule" should be based on the weight of the facility rather than the owner of the facility. The Commission should not allow Qwest's status as the incumbent provider, or any other copper facility owner's status, to confer on it special rights or privileges for its fiber facilities. Similarly, a company's decision to maintain heavier copper facilities that have a higher likelihood of damaging lighter facilities should not automatically confer upon that company the ability to increase another's make ready costs to avoid line interference. Fairness requires that the owner of the heaviest facilities equally share with a new entrant the costs for make ready work to move such heavier facilities to the lowest position.

B. The Commission Should Disregard Qwest's Supplemental Comments Because They Were Filed After the Deadline.

In addition to the substantive issues raised above, UTOPIA agrees with the Comments filed by T-Mobile on July 12, 2005, that Qwest's Supplemental Comments were filed two months late and should therefore be disregarded by the Commission. As explained by T-Mobile, the Commission filed the Proposed Rules in this docket on February 28, 2005, and ordered that comments must be submitted no later than 5:00 p.m. on April 14, 2005. Disregarding this deadline, Qwest submitted supplemental comments on July 6, 2005, nearly three months after the deadline had expired. Allowing these comments to be considered would prejudice all the other parties in this docket and would make the comment period set forth pursuant to the Utah Administrative Rulemaking Act meaningless. See Utah Code Ann. § 63-46a-4(8) (providing that agency must set forth comment period before rules become effective). Accordingly, UTOPIA requests that the Commission disregard Qwest's Supplemental Comments.

CONCLUSION

Based on the foregoing, UTOPIA respectfully requests that the Commission reject Qwest's suggested changes to R746-345-3.A.2 of the proposed rules as stated in Qwest's Comments. Alternatively, if the Commission decides to entertain Qwest's late-filed comments, UTOPIA asks the Commission to adopt the cost-sharing methodology set forth by the Vermont PSB, which requires an entity choosing to deploy and maintain the heaviest facilities to equally share in the costs for make ready work to place such facilities at the lowest attachment position. UTOPIA further requests that the Commission clarify the cost-sharing methodology set forth in the Vermont rule to ensure that the right of lowest attacher be reserved for the heaviest facilities, currently copper, not fiber optic or other lighter facilities, regardless of which entity owns such facilities.

DATED this _____ day of July, 2005.

WILLIAM J. EVANS
VICKI M. BALDWIN
PARSONS BEHLE & LATIMER
DAVID J. SHAW
UTOPIA
Attorneys for UTOPIA

Vicki M. Baldwin

Direct Dial
(801) 536-6918
E-Mail
VBaldwin@pblutah.com

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of July, 2005, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing **SUPPLEMENTAL COMMENTS OF UTOPIA IN RESPONSE TO THE SUPPLEMENTAL COMMENTS FILED BY QWEST CORPORATION**, to:

Robert C. Brown, Esq.
Theresa Atkins, Esq.
Qwest Services Corporation
1801 California Street, 49th Floor
Denver, CO 80202
(303) 672-5839
(303) 295-7069 (fax)
robert.brown@qwest.com
theresa.atkins@qwest.com

Gerit F. Hull
Counsel
PACIFICORP
825 NE Multnomah, Suite 1700
Portland, OR 97232

Michael Ginsberg
Assistant Attorney General
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, Utah 84111
mginsberg@utah.gov

Gary G. Sackett
JONES WALDO HOLBROOK & MCDONOUGH, PC
170 S. Main Street, Suite 1500
Salt Lake City, Utah 84101

Stephen F. Mecham
Callister Nebeker & McCullough
Gateway Tower East Suite 900
10 East South Temple
Salt Lake City, UT 84133
Attorneys for Utah Rural Telecom Association

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

Michael D. Woods, Esq.
Comcast Cable Communications, LLC
183 Inverness Drive West, Suite 200
Englewood, Colorado 80112

Bradley R. Cahoon (5925)
SNELL & WILMER L.L.P.
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101

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

_____