



Comcast Cable Communications, Inc. (“**Comcast**”), by and through its attorneys, Ballard Spahr Andrews & Ingersoll, LLP, hereby complains against PacifiCorp, dba Utah Power (“**PacifiCorp**”), as follows:

### **PARTIES**

1. Claimant Comcast, by and through its subsidiaries, is a cable operator with cable system facilities in the State of Utah.

2. Respondent PacifiCorp; is —a public utility engaged in transmitting, distributing, and marketing electric power and energy in the State of Utah. PacifiCorp owns a network of utility poles in the State of Utah to which Comcast has attached its cable equipment.

### **JURISDICTION AND VENUE**

3. Jurisdiction over this dispute is properly held by the Commission pursuant to Utah Code Ann. §§ 54-1-2.5, 54-4-1, 54-4-13, and 63-46b-1, *et. seq.*

### **GENERAL ALLEGATIONS**

4. On December 20, 1999, PacifiCorp and Comcast, through its various predecessors in interest, entered into a Pole Contact Agreement (“**Agreement**”). (A true and correct copy of the Agreement is attached as Exhibit A; a true and correct copy identifying Comcast’s predecessors in interest is attached as Exhibit B).

5. Comcast has the right to apply to PacifiCorp for non-exclusive licenses permitting Comcast to attach its cables to PacifiCorp’s utility poles. (*See* 47 U.S.C. 224, Utah Code Ann. 54-4-13, Utah Admin. Code R. 746-345-1 *et. seq.*, and Agreement).

6. The Agreement provided that to attach equipment to any of PacifiCorp’s utility poles, Comcast would be required to apply for and obtain PacifiCorp’s permission.

7. The Agreement further provided that, pursuant to the Annual Distribution Pole Attachment Rental Rate, as submitted by PacifiCorp and approved by the Public Service Commission, Comcast would pay PacifiCorp an annual pole attachment rental rate of \$4.65 per pole per year. (*See* Attachment A to Exhibit A.)

8. This Rate, commonly referred to as Tariff 4, sets the annual pole attachment rate at \$4.65 per pole but makes no mention of the penalty or rent due for unauthorized pole attachments. Therefore, there is no “rate” set by the Commission for unauthorized pole attachments.

9. The Agreement also provided:

Unless sooner terminated as herein provided, this Agreement shall remain in full force and effect unless and until it is terminated by either Party upon three hundred sixty-five (365) days’ notice to the other Party...

(Agreement, § 10.1).

10. In or about January 2002, PacifiCorp notified Comcast of its intention to terminate the Agreement effective December 31, 2002.

11. Although the parties have engaged in good faith negotiations regarding a new, written license agreement, no such license agreement has been executed.

12. Currently, the parties are conducting business with one another and Comcast continues to pay PacifiCorp an annual pole attachment rental rate of \$4.65 per pole.

13. Sometime prior to February 2003, PacifiCorp notified Comcast of its intent to conduct an audit of its network of utility poles to identify unauthorized pole attachments.

14. PacifiCorp did not permit Comcast to participate in the audit process. For example, PacifiCorp did not permit Comcast to participate in selecting contractors and did not allow Comcast to accompany contractors in conducting the audit. Furthermore, PacifiCorp failed to adopt procedures that would allow Comcast the right or ability to verify the results of the audit.

15. Beginning in February 2003, PacifiCorp notified Comcast that in auditing a portion its network it had identified approximately 15,312 pole attachments in the Ogden, Layton and American Fork districts for which it could not locate the appropriate licensing records and applications. (True and correct copies of PacifiCorp's audit findings are attached as Exhibits C-M). Since PacifiCorp's audit is ongoing, and many areas have yet to be surveyed, Comcast anticipates that PacifiCorp will continue to identify allegedly unauthorized attachments.

16. PacifiCorp demanded a \$250.00 per pole penalty charge, which is more than 50 times the annual rental value, for the pole attachments for which PacifiCorp failed to locate the licenses or applications. (*See Exhibits C-M*).

17. PacifiCorp's letter asserted that PacifiCorp had the right to collect the \$250.00 per pole penalty pursuant to a contract with Comcast. However, the \$250.00 penalty was never included in any contract and has never been part of any contract negotiations.

18. As a result of this audit, PacifiCorp demanded payment of the \$250.00 per pole penalty charge—totaling \$3,828,000. PacifiCorp immediately stopped processing all pending pole attachment applications and demanded payment of the \$3,828,000 before it would resume processing pending applications or process any new pole attachment applications.

19. Comcast is in the process of upgrading its network, and pole attachments are essential to Comcast's ability to conduct business. Therefore, Comcast was forced to pay the penalty demanded by PacifiCorp.

20. Although Comcast paid the penalty demanded by PacifiCorp, PacifiCorp has failed to process many of Comcast's applications for pole attachments, some of which were filed with PacifiCorp as early as November 2002.

21. Comcast paid the \$3,828,000 to PacifiCorp on the express condition that Comcast would be allowed to contest PacifiCorp's audit results and would reserve "the right to petition the applicable legal or regulatory body having jurisdiction over pole attachment matters within the state of Utah." PacifiCorp agreed to the foregoing condition, and to an expedited review of Comcast's claim, by letter agreement dated September 8, 2003. (A true and correct copy of the September 8, 2003, letter agreement is attached as Exhibit N).

22. Comcast disputes PacifiCorp's claim that the attachments identified in its audit, which remains unverified, are actually unauthorized.

23. Comcast is currently conducting a preliminary audit of the areas in which PacifiCorp claims there are unauthorized attachments. During the course of this preliminary audit, Comcast has located approximately 8,000 utility poles for which it has been billed by and has been paying rents to PacifiCorp, but on which it has no attached facilities.

24. In addition to the \$250.00 per pole penalty, PacifiCorp has demanded that Comcast reimburse PacifiCorp for the costs of the audit. This audit was undertaken solely by PacifiCorp for the purposes of updating its facilities and assessing its system of utility poles.

The audit has provided no benefit to Comcast and Comcast has not participated in the audit. Accordingly, all expenses of this audit should be the sole responsibility of PacifiCorp.

### **REQUEST FOR AGENCY ACTION**

25. Pursuant to Utah Code Ann. § 54-4-13(1), the Commission has “the power to regulate the rates, terms and conditions by which a public utility can permit attachments to poles of the public utility by cable television companies.” Utah Admin. Code R746-345-1(A).

26. Utah Admin. Code R746-345 applies to all public utilities that permit pole attachments to utility poles by cable television companies. R746-345-1(B).

27. Under the Commission’s rules, “[t]he rates for pole attachments will be based on **a fair and reasonable portion of the utility’s costs and expenses** for the pole plant, or type of pole plant, investment jointly used with cable television companies.” R746-345-3(A) (emphasis added).

28. If the parties to a pole attachment contract cannot come to agreement on these terms, the Commission will determine an amount that is “fair and reasonable.” R746-345-3(C).

29. The \$250.00 per pole penalty assessed by PacifiCorp is excessive, unreasonable, and far exceeds industry standards. It imposes an unfair burden on Comcast and does not properly reflect PacifiCorp’s cost and expenses. Because the penalty is not based on a fair and reasonable portion of PacifiCorp’s costs and expenses, it is objectively excessive. *See Public Service Co. of Colorado v. Federal Communications Comm.*, 328 F.3d 675 (D.C.Cir. 2003) (affirming *Mile Hi Cable Partners, L.P. v. Public Service Co. of Colorado*, 17 F.C.C.R. 6268 (Mar. 28, 2002) (holding that penalties of \$50.00 per unauthorized attachment per year and

\$250.00 per unauthorized attachment per year, are excessive, and further holding that a reasonable penalty may not exceed five times the annual rental rate)). *See also In the Matter of Investigation Into The Conditions for Cable Television Use of Utility Poles in the District of Columbia*, Case No. 815; Order No. 12733, D.C. Pub. Serv. Comm'n, 2003 D.C. PUC LEXIS 83, \*54-55 (2003) (limiting reasonable unauthorized attachment penalty to five times the current annual pole rental fee); *In the Matter of Application of Michigan Power Co. For Authority To Make Effective Its Proposed Pole Attachment Tariff*, Case Nos. U-8149, et al., Mich. Pub. Serv. Comm'n, 1986 Mich. PSC LEXIS 739, \*35 36 (1986) (affirming settlement agreement providing for unauthorized attachment penalties of three times the annual pole rental fee).

30. Allowing PacifiCorp to retain the \$3,828,000 assessed for allegedly unauthorized attachments would result in a windfall to PacifiCorp, totaling more than 50 times the rental rate it would otherwise be entitled to, and would be highly adverse to the public interests.

31. The penalty imposed by PacifiCorp is inconsistent with the intent and purpose of the 1996 Telecommunications Act, 47 U.S.C. 224, which attempts to encourage cable providers, such as Comcast, to upgrade and enhance their facilities and to provide new, advanced services to subscribers. "Fair and reasonable" rates further encourage entry into the market and discourage discriminatory pricing. The penalty unilaterally imposed by PacifiCorp unfairly increases the cost of providing such advanced services thereby discourages expansion of broadband networks.

32. Additionally, pursuant to the orders issued in *Mile Hi Cable Partners, L.P. v. Public Service Co. of Colorado* and its progeny, Comcast is entitled to offset any amounts that

may be due to PacifiCorp with any rents paid to PacifiCorp as a result of PacifiCorp's erroneous billing for nonexistent pole attachments. *Mile Hi Cable Partners v Public Service Co. of Colorado*, 15 FCC 11450, ¶ 16 (2000). In the event that the amount owed to Comcast is greater than the amount owed to PacifiCorp, PacifiCorp should be ordered to remunerate all remaining amounts to Comcast.

WHEREFORE, Comcast respectfully requests that the Commission enter an Order:

1. Declaring that Comcast is entitled to review and verify the conclusions of PacifiCorp's audit;
2. Declaring that a \$250.00 per pole penalty for any verified unauthorized attachments is not "fair and reasonable," and ordering PacifiCorp to refund the \$3,828,000 paid by Comcast, plus interest;
3. Declaring that PacifiCorp is entitled only to the fair and reasonable rental value for pole attachments that PacifiCorp can prove are unauthorized, if any;
4. Declaring that Comcast is entitled to offset any amounts owed to PacifiCorp with rents paid by Comcast for attachments that do not exist, or to reimbursement by PacifiCorp in the event that the amounts overpaid by Comcast exceed those owed to PacifiCorp for unauthorized pole attachments;
5. Declaring that Comcast is not liable for the cost of the audit; and
6. Awarding such other and further relief as the Commission deems just, reasonable and equitable.



RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of October, 2003.

COMCAST CABLE COMMUNICATIONS, INC.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 31<sup>st</sup> day of October, an original, eight (8) true and correct copies, and an electronic copy of **REQUEST FOR AGENCY ACTION** were hand-delivered to:

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

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

D. Douglas Larson  
PacifiCorp  
825 N.E. Multnomah  
Portland, Oregon 97232

Data Request Response Center  
PacifiCorp  
825 NE Multnomah, Suite 800  
Portland, Oregon 97232

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