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Submitted May 10, 2011

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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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In the Matter of the Application of Rocky Mountain Power for Authority to Increase its Retail Electric Utility Service Rates in Utah and for Approval of its Proposed Electric Service Schedules and Electric Service Regulations	)	Docket No. 10-035-124
	)	<b>COMMENTS OF COMCAST CABLE COMMUNICATIONS MANAGEMENT, LLC</b>
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Comcast Cable Communications Management, LLC, on behalf of its operating subsidiaries and affiliates (“Comcast”), hereby submits its response to the motion filed by the Utah Rural Telecom Association (“URTA”) on May 3, 2011, to dismiss the pole attachment issues from this general ratemaking proceeding and to strike the pertinent testimony of Jeffrey M. Kent and Steven R. McDougal filed on behalf of PacifiCorp doing business in Utah as Rocky Mountain Power (“Motion to Dismiss, Motion to Strike, or Alternatively, Motion to Open a Separate Rulemaking Docket filed by the Utah Rural Telecom Association” or “Motion filed by URTA”). There comments are filed pursuant to the Order Shortening Time for Response to Motion issued by the Public Service Commission (the “Commission”) on May 4, 2011.

## I. INTRODUCTION AND HISTORY

In this general ratemaking proceeding, Rocky Mountain Power is proposing, among other things, changes to the Utah pole attachment scheme. The Commission should dismiss Rocky Mountain Power's request and apply the established pole attachment rental rate formula, which is just and reasonable, and fully compensates pole owners. If Rocky Mountain Power's costs have gone up, it should request a new calculation under the existing formula and the result would be a higher rate. Instead, Rocky Mountain Power is requesting a modification to add two new components to the pole attachment scheme. Rocky Mountain Power must follow the established procedures, and allow the Commission to conduct the appropriate review in accordance with the proper public notice and comment requirements. Rocky Mountain Power's request is another attempt to circumvent the Commission's established pole attachment scheme.

Comcast supports the Motion filed by URTA on May 3, 2011, and provides additional justification for the requested relief. Before doing so, Comcast believes it would be useful to discuss the importance of effective pole attachment regulations and the history of pole attachment regulations in Utah.

Effective pole attachment regulations, like the Commission's pole attachment scheme adopted in Docket No. 04-999-03,<sup>1</sup> are necessary to encourage competition in communications and deployment of advanced services, which are important federal and state goals.<sup>2</sup> The Federal Communications Commission ("FCC") in a recent proceeding reviewed its regulations implementing Section 224 of the Communications Act, as amended, 47 U.S.C. § 224, governing the rates, terms and conditions for pole attachments. The FCC acknowledged that pole

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<sup>1</sup> *In the Matter of an Investigation into Pole Attachments.*

<sup>2</sup> *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 10 Stat. 56, Preamble (1996) (goal of Telecommunications Act of 1996 is "[t]o 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"); *Public Service Commission of Utah 2010 Annual Report* (Nov. 12, 2010).

attachment regulations play a vital role in the deployment of advanced services.<sup>3</sup> Utah's pole attachment regulations, including the timeline,<sup>4</sup> rental rate formula, and additional regulations provide a predictable, timely process for companies seeking to obtain pole attachments, while maintaining a utility's interest in safety and reliability of its network, and allowing the Commission a verifiable straight-forward process to administer. Utah's rental rate formula adequately compensates pole owners, while encouraging additional investment in broadband, video and telecommunications infrastructure.<sup>5</sup>

In 2006, the Commission amended its rules on pole attachments in Utah Administrative Code Rule R746-345 (the "Rules"), and approved the Utah Pole Attachment Standard Contract as a "safe harbor" agreement (the "Safe Harbor Agreement") for parties unable to reach an agreement on pole attachment terms through negotiations. *See In the Matter of an Investigation into Pole Attachments*, Docket No. 04-999-03.<sup>6</sup> In that docket, the Commission established a pole attachment rental rate formula in Utah Administrative Code Rule R746-345-5.A, which is considered just and reasonable unless determined otherwise by the Commission. The Safe Harbor Agreement, approved by the Commission on March 27, 2006, is currently available to any attacher who is unable to reach an agreement on pole attachment terms through negotiations with any pole owner.<sup>7</sup> The final Rules and Safe Harbor Agreement are the result of exhaustive

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<sup>3</sup> See *Implementation of Section 224 of the Act*, WC Docket No. 07-245, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, FCC 11-50, ¶ 6 (rel. April 7, 2011) ("*FCC's April 2011 Pole Attachment Order*").

<sup>4</sup> The FCC recently adopted a timeline, which is modeled after the timeline used in Utah that applies to all requests by telecommunications carriers and cable operators for attachment in the communications space on a pole. *FCC's April 2011 Pole Attachment Order*, ¶ 40.

<sup>5</sup> See *FCC's April 2011 Pole Attachment Order*, ¶ 2-3 (citing to the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 6001(k)(2)(2009)); see also Statement of FCC Chairman Julius Genachowski to the *FCC's April 2011 Pole Attachment Order*.

<sup>6</sup> Pursuant to Utah Code Ann. § 54-4-13, the Commission has the authority to prescribe reasonable compensation and reasonable terms and conditions for the joint use of poles by utilities, and to determine whether pole attachment contracts are in the public interest. Utah law provides that a public utility must allow any attaching entity nondiscriminatory access to utility poles at rates, terms, and conditions that are just and reasonable.

<sup>7</sup> The Safe Harbor Agreement is also referred to as a "standard contract" in Utah Admin. Code R746-345-3. It incorporates the Commission's Determinations dated September 6, 2005, and February 2, 2006.

negotiations by the parties to that proceeding and were, to a large extent, relied upon by the FCC in modifying its pole attachment rules.<sup>8</sup>

In 2010, in Docket No. 10-035-97, Rocky Mountain Power sought approval from the Commission for non-reciprocal and reciprocal standard pole attachment agreements.<sup>9</sup> Rocky Mountain Power attempted to set forth its own proposed standard terms for negotiating agreements with pole attachers.<sup>10</sup> However, the Commission's rules clearly provide that in the event the parties are unable to agree upon a pole attachment agreement form, the Safe Harbor Agreement is to be used. Rocky Mountain Power, at a technical conference held in that proceeding on October 4, 2010, indicated that it would re-assess and clarify its objectives in the docket. Accordingly, on October 5, 2010, the Commission, with the agreement of the parties, suspended the remaining schedule in the docket until further order by the Commission.<sup>11</sup> That docket remains open. Many of the issues raised by Rocky Mountain Power in this general ratemaking proceeding, including inspection fees and unauthorized pole attachment fees, remain in issue in Docket No. 10-035-97.

Now, Rocky Mountain Power is proposing changes to Utah's pole attachment scheme in a general ratemaking proceeding that subjects the Commission to a strict statutory time frame for resolution. *See* Utah Code Ann. § 54-7-12(3)(a). This is not the proper procedure.

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<sup>8</sup> *See* Statement of FCC Chairman Julius Genachowski to the *FCC's April 2011 Pole Attachment Order*.

<sup>9</sup> Docket No. 10-035-97 consolidated the Applications of Rocky Mountain Power for Approval of Standard Reciprocal and Non-Reciprocal Pole Attachment Agreements (Docket No. 10-035-43).

<sup>10</sup> *See* Rocky Mountain Power, Supplemental and Clarifying Filing in Docket No. 10-035-43, at p. 2.

<sup>11</sup> *See* Order Suspending Procedural Schedule in Docket No. 10-035-97 (Oct. 5, 2010).

### **III. ARGUMENT**

#### **A. ROCKY MOUNTAIN POWER HAS FAILED TO PROVIDE PROPER NOTICE.**

In a general ratemaking proceeding, a public utility anticipating to file an application for an increase in rates pursuant to Utah Code Ann. § 54-7-12 “shall file with the Commission a non-binding notification of its intent to file such application at least 30 days prior to the anticipated filing date of the application. The notification shall be served on all parties that participated in the public utility’s last prior general rate case . . . .” *See* Utah Admin. Code Rule R746-700-1.A. Such a ratemaking application of an electric utility would not naturally include communications service providers with pole attachments and other parties interested in a proposed change to the pole attachment scheme.

On December 1, 2010, by letter to “the Commission and parties,” Rocky Mountain Power provided notice that it “intends to file a general rate case on or about January 17, 2011.”<sup>12</sup> On February 3, 2011, the Commission issued a Notice of Scheduling Conference in this general ratemaking proceeding, Docket No. 10-035-124. That same day, Rocky Mountain Power attempted to provide notice by email to Comcast and other certain cable and telecommunications providers.<sup>13</sup> It is not clear that all interested parties<sup>14</sup> ever received actual notice of this proceeding, or are even aware that their pole attachment costs may be increased. Not all parties that participated in Docket No. 04-999-03 received the email. Rocky Mountain Power has not provided any evidence that proper notice was provided or received.

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<sup>12</sup> *See* Docket No. 10-035-124, Letter from Yvonne R. Hogle, Senior Counsel, Rocky Mountain Power to the Public Service Commission of Utah. (Dec. 1, 2010) (noting copies to Service List in Docket No. 09-035-23).

<sup>13</sup> *See* Email from Barbara Ishimatsu, Rocky Mountain Power Legal Counsel, to Comcast counsel and others (Feb. 3, 2011).

<sup>14</sup> Section 63G-3-102(10) of the Utah Administrative Rulemaking Act defines “interested person” as “any person affected by or interested in a proposed rule, amendment to an existing rule, or a nonsubstantive change made under Section 63G-3-402.”

**B. THE MOTION TO DISMISS SHOULD BE GRANTED BECAUSE ROCKY MOUNTAIN POWER HAS FAILED TO MEET ITS BURDEN OF PROOF.**

Rocky Mountain Power is proposing (1) an additional component to the pole attachment rental rate formula to include the Administrative Support costs it claims it incurs to accommodate the joint use of its poles, and (2) a fee schedule of non-recurring joint use charges. The reason for the proposed changes according to Rocky Mountain Power is because, “[t]he rate in effect since 2006 does not include Administrative Support costs incurred by the Company for managing joint use attachments to its poles. To the extent joint use fees are less than costs, electric rate payers unfairly subsidize joint use.”<sup>15</sup>

Utah Administrative Code Rule R746.345-5.B provides that

A pole owner or attaching entity may petition the Commission to review a pole attachment rental rate, rate formula, or rebuttable presumption as provided for in this rule. The petition must include a factual showing that a rental rate, rate formula or rebuttable presumption is unjust, unreasonable or otherwise inconsistent with the public interest.

Rocky Mountain Power has the burden of proving, in a petition, that the current rental rate formula is unjust, unreasonable or otherwise inconsistent with the public interest. It has not provided support for its assertion that electric rate payers unfairly subsidize joint use attachments to its poles. There is no basis in fact or law to support this testimony because there is no subsidy.

**(1) Rocky Mountain Power does not provide support for its request for an additional component to the pole attachment rental rate formula.**

Pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224, the FCC is authorized to regulate the rates, terms and conditions imposed by utilities on cable television systems and providers of telecommunications service that have attachments to a utility’s poles, conduits and rights-of-way to ensure that the pole attachers have nondiscriminatory access and

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<sup>15</sup> Testimony of Jeffrey Kent, p. 3, at lines 54-57.

that such rates, terms and conditions are just and reasonable. Section 224(d)(1) specifies that each pole attachment rate should be deemed just and reasonable if it:

assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole. . . .

Congress defined “a zone of reasonableness for pole attachment rates that extends from the utility’s incremental costs to the cable operator’s share of the utility’s fully allocated costs.”<sup>16</sup>

Incremental costs refer to those costs that the utility would not have incurred ‘but for’ the cable attachments, and fully allocated costs refer to capital costs and operating expenses of owning and maintaining the poles.<sup>17</sup> The FCC, in a series of orders, has reaffirmed the cable rate formula that cable television system attachers and utilities could use to determine a maximum allowable just and reasonable pole attachment rate. It is well established law that pole owners receive adequate compensation to the extent that they recover their marginal costs from pole attachers. As a result, the cable rate has been found by the courts, including the U.S. Supreme Court, to be fully compensatory.<sup>18</sup> It is a straight-forward, simple and economic approach for determining just and reasonable pole attachment rates that relies on publically available data.

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<sup>16</sup> *American Cablesystems of Florida, Ltd. v. Florida Power and Light Company*, 10 FCC Rcd 10934 (Com. Car. Bur. 1995).

<sup>17</sup> *Id.*

<sup>18</sup> *See, e.g., Alabama Cable Telecommunications Association v. Alabama Power Co.*, Order, 16 FCC Rcd 12209 (2001), *review denied sub. nom. Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11<sup>th</sup> Cir. 2002) (“[A]ny implementation of the [FCC cable pole attachment rate] (which provides for much more than marginal cost) necessarily provides just compensation.”), *cert. denied*, 540 U.S. 937 (2003); *FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987) (finding that it could not “seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory”); National Broadband Plan at p.110 (“To support the goal of broadband deployment, rates for pole attachments should be as low and as close to uniform as possible. The [cable rate formula] has been in place for 31 years and is ‘just and reasonable’ and fully compensatory for utilities.”) Congress has also repeatedly found the cable rate to be “just and reasonable.” *See* Communications Amendment Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087 (1982); Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

Utah has certified to the FCC that it effectively regulates the rates, terms and conditions of pole attachments, and in Docket No. 04-999-03, the Commission adopted the FCC's cable rate formula as the single uniform rate for application to all attachers because it fairly compensates utilities and avoids creating barriers for new and existing technologies.<sup>19</sup> Although the FCC does not retain jurisdiction over pole attachments in states that certify that they regulate pole attachments, utilities must comply with 47 U.S.C. § 224 and FCC orders concerning pole attachments are persuasive.<sup>20</sup>

Rocky Mountain Power has failed to meet the burden clearly provided by R746.345-5.B. Further, it has not provided any justification for modifying the current rental rate formula or adding accounts to it. Therefore, this issue should be dismissed.

**(2) Rocky Mountain Power's proposed schedule of non-recurring joint use charges is inconsistent with Docket No. 04-999-03.**

Rocky Mountain Power proposes to include a fee schedule of non-recurring charges as part of its Schedule 4. This is a list of charges that, according to Rocky Mountain Power, have been in use since 2002, and are not included in the pole attachment rental rate.

Rocky Mountain Power proposes, for example, to charge separate fees for various inspections. The Commission has already determined that it is reasonable for pole owners to "charge an application fee, actual cost for make-ready work (after accepted), and unauthorized attachment fees. Application fees should cover the expected cost of doing the survey and engineering work required to determine what make ready work must be done to accommodate the application."<sup>21</sup> Further, the Commission expressly stated that "post construction and removal verification inspection fees cover activities the costs of which the [C]ommission believes are to

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<sup>19</sup> See Comments of Utah Public Service Commission to FCC in WC Docket No. 07-245, p. 1 (Mar. 7, 2008).

<sup>20</sup> See *States That Have Certified That They Regulate Pole Attachments*, Public Notice, DA 10-893, WC Docket No. 10-101, 25 FCC Rcd 5541 (W.C.Bur. 2010).

<sup>21</sup> Letter from the Commission to the interested parties in Docket No. 04-999-03 (Sept. 6, 2005).



be recovered through the pole attachment rental charge.”<sup>22</sup> Therefore, any fees in addition to the application fee, the cost of performing accepted make-ready work, and unauthorized attachment fees are unreasonable.<sup>23</sup> The Commission adopted a pole rental rate formula for all attachers and services based on the FCC’s cable rate formula. Those authorized pole attachment rates fairly compensate utilities.<sup>24</sup> Pole owners should not be permitted to conduct additional inspections of attachers’ facilities at an attacher’s expense, and receive reimbursement through the rental rate formula.<sup>25</sup>

Rocky Mountain Power has provided no evidence to support its request, other than the fact that it has been charging these fees since 2002. It has made no effort to reconcile the fees with previous findings of the Commission. Its request should therefore be summarily dismissed.

**C. ROCKY MOUNTAIN POWER’S REQUEST SHOULD BE ADDRESSED IN A RULEMAKING PROCEEDING AND NOT A GENERAL RATEMAKING PROCEEDING.**

Under the Utah Administrative Rulemaking Act, Utah Code Ann. § 63G-3-101 *et seq.*, a substantive rule is invalid if it is not promulgated in accordance with the proper rulemaking procedures. An interested party may petition an agency to request the amendment of a rule and the agency must, within 60 days, either deny the petition or initiate a rulemaking proceeding and follow the rulemaking procedures of Section 63G-3-301, which include public notice through publication and the public’s right to comment. *See* Utah Code Ann. § 63G-3-601.

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<sup>22</sup> *Id.*

<sup>23</sup> Additionally, the FCC has consistently held that “[a] separate fee for recurring costs such as applications processing or periodic inspections, is not justified, if the costs are included in a rate based upon fully allocated costs” because it would result in double recovery. *Texas Cable & Telecommunications Association v. Entergy Services, Inc.*, DA 99-1118, 14 FCC Rcd 9138, ¶5 (Cab. Servs. Bur. 1999).

<sup>24</sup> *See Comments of the Utah Public Service Commission* in FCC Docket No. 07-245, filed Mar. 7, 2008.

<sup>25</sup> *See Mile Hi Cable Partners, L.P. v. Public Service Company of Colorado*, DA 00-1476 15 FCC Rcd 11450, ¶ 8 (Cab. Serv. Bur. 2000) (“a separate charge or fee for periodic inspections of the pole plant, including a pole count survey, is not justified if the costs associated with the inspection are already included in the rate, based on fully allocated costs”), *aff’d sub nom. Public Service Company of Colorado v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

In Docket No. 04-999-03, PacifiCorp and all interested parties, including the Commission, carefully negotiated each element of the rate formula. All recurring and non-recurring costs were analyzed in detail. All parties and the general public were statutorily afforded an opportunity to provide input to the Commission and participate in the rulemaking process.

In contrast, in this general ratemaking proceeding, Rocky Mountain Power is asking the Commission to fundamentally change the nature of Utah's pole attachment scheme, and depart from the FCC's cable rate formula without the same procedural protections.

Comcast supports URITA's Motion and urges the Commission to move Rocky Mountain Power's request to be addressed in a new rulemaking proceeding or returned to the open Docket No. 10-035-97 which was suspended and left open. A rulemaking proceeding would allow for proper notice and comment, and would allow all interested parties the opportunity to participate.

### **III. CONCLUSION**

For the foregoing reasons, the Commission should dismiss the pole attachment issues, or in the alternative, move the pole attachment issues, from this general ratemaking proceeding to a new rulemaking proceeding or to Docket No. 10-035-97.

RESPECTFULLY SUBMITTED this 10th day of May, 2011.

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**CERTIFICATE OF SERVICE**  
**Docket No. 10-035-124**

I hereby certify that on the 10th day of May, 2011, an original, five (5) true and correct copies, and an electronic copy of the foregoing **COMMENTS OF COMCAST CABLE COMMUNICATIONS MANAGEMENT, LLC** were hand-delivered to:

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