

Jerold G. Oldroyd, Esq. (#2453)
Sharon M. Bertelsen, Esq. (#9759)
Ballard Spahr LLP
201 South Main Street, Suite 800
Salt Lake City, Utah 84111-2221
Telephone: (801) 531-3000
Facsimile: (801) 531-3001
OldroydJ@ballardspahr.com
BertelsenS@ballardspahr.com

Attorneys for Comcast Cable Communications, LLC

Submitted August 8, 2012

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Consolidated Applications)
of Rocky Mountain Power for Approval of) Docket No. 10-035-97
Standard Reciprocal and Non-Reciprocal Pole)
Attachment Agreements) **COMMENTS OF COMCAST CABLE**
) **COMMUNICATIONS, LLC**
)

Comcast Cable Communications, LLC, on behalf of its operating subsidiaries and affiliates (“Comcast”), hereby submits comments to the Amended Application of PacifiCorp, doing business in Utah as Rocky Mountain Power, filed with the Public Service Commission of Utah (the “Commission”) on February 9, 2012, for approval of its proposed standard pole attachment agreement to be used for cable and telecommunications companies desiring to attach equipment to the distribution poles of Rocky Mountain Power. These comments are submitted to the Commission pursuant to the Commission’s Scheduling Order in Docket No. 10-035-97 issued June 7, 2012, and the Order extending the comment period issued July 25, 2012.¹

¹ On August 6, 2012, Rocky Mountain Power filed a Settlement Stipulation with respect to this matter that has been executed by Rocky Mountain Power, CenturyLink, Utah Rural Telecom Association, and Electric Lightwave, LLC (“Stipulation”).

Comcast urges the Commission to carefully consider a few of Rocky Mountain Power's proposed changes to the standard Utah pole attachment agreement approved by the Commission in Docket No. 04-999-03 (referred to as the "Safe Harbor Agreement") for Rocky Mountain Power's use only, and its proposed schedule of non-recurring fees as the Fee Schedule defined in Article I (its tariff of non-recurring fees pursuant to Utah Admin. Code Rule R746-345-3, "Fee Schedule"). The Commission should consider whether Rocky Mountain Power's proposed changes would increase the costs of deployment or delay access for companies desiring to attach to Rocky Mountain Power's poles, and whether the proposed changes are reasonable.

I. INTRODUCTION

Pursuant to its jurisdiction recognized in 47 U.S.C. § 224(c),² the Commission opened Docket No. 04-999-03 in 2004 for the purpose of investigating issues associated with pole attachments.³ In that Docket, the Division of Public Utilities held a series of technical conferences, interested parties filed numerous pleadings,⁴ and the Commission adopted pole attachment rules (Utah Administrative Code Rule R746-345) and a standard pole attachment agreement (Safe Harbor Agreement). In adopting the Safe Harbor Agreement, the Commission stated:

² Under § 224(c), the Federal Communications Commission regulates pole attachments except where such matters are regulated by a state. *See also States That Have Certified That They Regulate Pole Attachments*, FCC Public Notice, DA 10-893, 25 FCC Rcd 5541 (Wireline Comp. Bur. 2010).

³ Pursuant to Utah Code Ann. § 54-4-13, the Commission has authority to prescribe reasonable compensation and reasonable terms and conditions for the joint use of poles by utilities, and determine whether pole attachment contracts are in the public interest.

⁴ The interested parties included PacifiCorp, the Utah Rural Telecom Association, the Utah Rural Electric Association, AT&T Corp., XO Utah, Inc., Qwest Corporation, Electric Lightwave, LLC, VoiceStream PSC II Corporation dba T-Mobile, the Utah Telecommunication Open Infrastructure Agency, and Comcast. Prior to Docket No. 04-999-03, Comcast filed a Request for Agency Action concerning PacifiCorp's assessment of unauthorized attachment penalties and survey costs. *See Comcast Cable Communications, Inc. v. PacifiCorp, dba Utah Power*, Docket No. 03-035-28.

While the Commission will still permit parties to negotiate unique terms that could differ from what is provided herein, these are in the nature of “safe harbors.” Agreements which contain these provisions would be approved by the Commission (if other terms are reasonable); they will be the default provisions for the generic agreements or where parties do not, or cannot, propose alternative mutually agreed upon terms.⁵

Pursuant to Utah Administrative Code Rule R746-345-3(A), a pole owner must petition the Commission for any changes to the rates, terms, or conditions of the pole owner’s tariff or the standard Safe Harbor Agreement. Such a petition for change must include a showing as to why the rate, term, or condition is no longer just and reasonable.

II. COMCAST’S COMMENTS ON THE AMENDED APPLICATION

Rocky Mountain Power is seeking changes to the Safe Harbor Agreement for Rocky Mountain Power’s use only, and Rocky Mountain Power proposes a schedule of non-recurring fees as the Fee Schedule defined in Article I. Under Utah Administrative Code Rule R746-345-3(A), the burden is on Rocky Mountain Power to demonstrate to the Commission that the terms or conditions in the Safe Harbor Agreement are no longer just and reasonable. Rocky Mountain Power has not fully explained why it believes certain provisions in the Safe Harbor Agreement are no longer reasonable and why its proposed changes to the agreement and the Fee Schedule are reasonable. In particular, Comcast urges the Commission to carefully consider the following issues: overlashing, service drops, when rental charges should apply, and fees.

A. Overlashing

Pursuant to Section 3.01 of the Safe Harbor Agreement, “[a]dditional permitting applications for overlashing are not required for a Licensee in its existing pole space,” and a fourteen day prior notice to the pole owner is required.

⁵ February 2, 2006 letter from the Commission to the parties in Docket No. 04-999-03.

Rocky Mountain Power has determined that the overlashing language in the Safe Harbor Agreement is not adequate to mitigate safety concerns involving overhead lines, and has proposed language that limits overlashing without an application to relatively light weight and small diameter conductors. Rocky Mountain Power originally proposed restrictions on overlashing such that the licensee may overlash forty-eight (48) and fewer count fiber cable, or coaxial cable of equivalent weight, without submitting an application, and a ten day prior notice to Rocky Mountain Power is required. Rocky Mountain Power subsequently determined that a single ninety-six (96) or fewer count fiber cable or coaxial cable of equivalent diameter and weight could be substituted for the 48 count fiber originally proposed and submitted that change with the Stipulation. Under Rocky Mountain Power's proposal, any other overlashing would require the licensee to submit an application, with payment of an application fee, and receive approval prior to installation.

Rocky Mountain Power's proposed restrictions on overlashing are inconsistent with the positions of the Commission and the Federal Communications Commission ("FCC"). The FCC has found overlashing to be a critical aspect of implementing the 1996 Telecommunications Act because overlashing promotes competition and does not require any advance permission, notification, or payment. According to the FCC, an overlashing party is not required to obtain prior approval from a utility if that party has a primary wire attachment already in place, however, a utility is entitled to notice of the overlashing and may recover any make-ready costs

incurred for strengthening the pole to support the weight of additional wires.⁶ The U.S. Court of Appeals for the District of Columbia Circuit affirmed this important pro-competitive policy.⁷

Allowing attachers to overlash without a permit is not only consistent with federal law, it is consistent with rulings from other certified state commissions that have incorporated rules that promote expeditious overlashing. For example, the New York Public Service Commission adopted a standard that allows parties to overlash upon notice, up to pre-determined load limits.⁸ According to Comcast's engineers, virtually all of Comcast's overlashes are well within the New York standard. In announcing this standard, the New York Commission recognized that: "Typically a fiber cable overlashed to an existing coaxial cable facility with a common trunk and feeder cable configuration adds very little to the existing facility's overall weight and bundle diameter. Consequently there is little concern about ice and wind loading,"⁹ even though New York is situated within a "heavy" load zone. When a New York attacher determines that the overlash will exceed the limit, the attacher is merely required "to provide the pole owner with a 'worst case' pole analysis from the area to be overlashed, to be sure the additional facilities will

⁶ See *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Commission's Rules and Policies Governing Pole Attachments*; Report and Order, 13 FCC Rcd 6777, ¶¶ 59-69 (1998), Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶¶ 73-85 (2001).

⁷ See *Southern Company Services, Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002) (FCC's decision on overlashing balanced concerns of utility pole owner with efficiency gains that overlashing brings to the cable industry).

⁸ Specifically, "[a]n Attacher, whose facility has a pre-existing NESC calculated span tension of no more than 1,750 lbs., shall be allowed to overlash a pre-determined maximum load of not more than 20% to the existing communications facility. Existing facilities with an NESC calculated span tension of less than 1,000 lbs. shall be allowed a pre-determined overlash of up to 40% of such pre-existing facilities." New York Public Service Commission Order Adopting Policy Statement on Pole Attachments, Matter No. 03-00432, Appendix A at p. 9 (August 6, 2004).

⁹ *Id.* at pp. 8-9.

not excessively burden the pole structures . . . and for future attachment applications and engineering.”¹⁰ In no case is a permit required.

Comcast objects to any permitting requirement for overlashing, however, Comcast has no objection to compromising on this issue and incorporating the New York standard into the agreement. Comcast is an established company with vast construction experience and is perfectly capable of ensuring the integrity of Rocky Mountain Power’s plant, without which Comcast would be unable to serve its own customers.

B. Service Drops

The Safe Harbor Agreement, Section 3.02, provides that licensees have the right to install service drops without prior approval by the pole owner. This includes service drops from poles on which the licensee has an existing pole attachment and service drops from poles on which the licensee may not originally have had an attachment, as long as the pole is adjacent to poles on which the licensee does have authorized attachments. Under Section 3.02 of the Safe Harbor Agreement, “when Licensee installs service drops, Licensee must follow all procedures applicable to Attachments generally, except for filing applications and payment of fees, and shall submit notification to the Pole Owner on a quarterly basis.”

Under Rocky Mountain Power’s proposed change, “when Licensee installs service drops, Licensee must follow all procedures applicable to Attachments generally, except **that filing Applications and payment of fees occurs after installation.**” (Emphasis added.) As for the notification requirement, Rocky Mountain Power proposed in its Amended Application that the licensee be required to notify Rocky Mountain Power of the installation of service drops within ten business days after installation, instead of notification on a quarterly basis. In the Stipulation,

¹⁰ *Id.*

Rocky Mountain Power agreed that the licensee would be required to notify Rocky Mountain Power within thirty days after installation, instead of notification on a quarterly basis. Rocky Mountain Power states that an application is required for service drops to poles so that it can review the safety requirements.

Comcast believes that attachers should have the ability to install services drops from an existing pole attachment or a pole that is adjacent without submitting an application and without payment of a fee. Generally, drop poles are treated differently than regular mainline attachments because cable operators must meet customer service requirements to provide service to new customers within a very brief time from the date of request and because there are key physical differences between distribution and drop poles.¹¹

There is no debate that the basic integrity of electric and communications distribution networks must be maintained and that safety is paramount. Comcast and all the pole owners and attachers in this Docket are interested in safety and they are under the same obligations to comply with the National Electrical Safety Code (“NESC”) and other applicable safety codes. In addition to the NESC requirements and specifications, there are procedures in the Safe Harbor Agreement to resolve safety issues.

Rocky Mountain Power has not fully explained why the service drop procedures in the Safe Harbor Agreement are no longer reasonable and why its proposed changes are reasonable. Accordingly, Comcast requests that the Commission deny Rocky Mountain Power’s request to change procedures for service drops.

¹¹ See *Mile Hi Cable Partners, L.P. v. Public Service Commission of Colorado*, Order, 15 FCC Rcd 11450 (Cable Serv. Bur. 2000) (attached need only notify pole owner of attachment to drop pole), *affirmed on review*, 17 FCC Rcd 6268 (2002), *review denied sub nom. Public Service Commission of Colorado v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

C. When Rental Charges Should Apply

Section 3.01 of the Safe Harbor Agreement states that “[r]ental fees shall not apply until the attachment identified on the application is physically in place.” Rocky Mountain Power’s proposed change for its standard pole attachment agreement would make rental fees apply when the application is approved.

Pursuant to Utah Administrative Code Rule R746-345-5, the pole attachment rental rate shall be “charged as an annual per attachment rental rate for each attachment space **used** by an attaching entity.” (Emphasis added.) The rental fees should apply when the attachment is physically in place and not when the application is approved.

Rocky Mountain Power has not fully justified its proposed change to make rental fees apply when the application is approved and accordingly, Comcast requests that the Commission deny Rocky Mountain Power’s request to change procedures for service drops.

D. Fees

Under the Safe Harbor Agreement and the Commission's September 6, 2005 directive, pole owners may charge an application fee, actual cost of make-ready work (after accepted), and unauthorized attachment fees of \$25 plus back rent. 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. Post construction and removal verification inspection fees are recovered through the pole attachment rental charge.¹² Utah Administrative Code Rule R746-345-5(A)(4) states that “[a] pole owner may not assess a fee or charge in addition to an annual pole attachment rental rate, including any non-recurring fee or charge

¹² See September 6, 2005 letter from the Commission to the parties in Docket No. 04-999-03.

described in Subsection R746-345-3(A)(2), for any cost included in the calculation of its annual pole attachment rental rate.”

1. Application Fees

Rocky Mountain Power has proposed an application fee of \$55.64 per pole. According to Rocky Mountain Power, the application fee is to be calculated using costs that are based on activity in Utah.

Comcast is concerned that Rocky Mountain Power’s proposed application fee may include double recovery. For example, in *Cavalier Telephone*, the FCC invalidated the utility’s application fee of \$50 per permit or \$4 per pole¹³ (whichever was larger) because the utility failed to show that the fees were not already recovered in the rental rate.¹⁴ The FCC explained that a just and reasonable pole attachment rate assures a utility of recovery of not less than the incremental cost of providing pole attachments nor more than the fully allocated costs. If the fully allocated costs already include administrative costs, then the utility may not recover those same administrative costs again as incremental costs. The FCC then explained the differences between incremental costs and fully allocated costs and how they may be subject to double recovery:

Incremental costs may consist of both recurring and non-recurring costs. 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. We [the FCC] stated

¹³ Often attachers submit a whole run of poles together on one application. Both pole owners and attachers often find it easier to manage submission, review and approval if the applications are submitted in manageably-sized groups.

¹⁴ *See Cavalier Tel., LLC v. Virginia Electric and Power Co.*, 15 FCC Rcd 9563, ¶ 22 (Cable Serv. Bur. 2000), *vacated by settlement*, 17 FCC Rcd 24414 (Enf. Bur. 2002). In issuing the *vacatur*, the Commission specifically stated that its decision “does not reflect any disagreement with or reconsideration of any of the findings or conclusions contained in” *Cavalier Tel., LLC v. Virginia Electric and Power Co.*

that a “separate charge or fee for items such as application processing or periodic inspections of the pole plant is not justified if the costs associated with these items are already included in the rate, based on fully allocated costs, which the utility charges the cable company since the statute does not permit utilities to recover in excess of fully allocated costs.”¹⁵

Thus, if the utility books the administrative costs of providing application services to a FERC account that is factored into the fully allocated rate, the utility may not recover those administrative costs again in an application fee. The FCC further explained that since the application fee did not appear to reflect actual costs, “[i]t may be a recurring cost recoverable through the annual fee and included in the carrying charges when calculating the maximum rate.”¹⁶ As such, the FCC concluded that the application fee effectively increased the annual fee beyond the maximum permissible rate and was therefore unjust and unreasonable.

Comcast urges the Commission to closely examine Rocky Mountain Power’s proposed rate for its per pole application fee to ensure that there is no double recovery.

2. Unauthorized Attachment Fees

Pursuant to the Commission’s directive, “[t]he unauthorized attachment fee shall be the back rent to the last audit plus \$25 per pole.”¹⁷ Rocky Mountain Power’s Fee Schedule in its Amended Application proposes an unauthorized attachment fee of \$100 per pole plus back rent consisting of 5 years of rent at the current rental rate unless credible evidence supports a lesser period. Pursuant to the Stipulation, the following would be added to the Fee Schedule:

The Unauthorized Attachment Fee shall be waived if Licensee presents credible evidence of any of the following: approval by and payment of rent to a putative pole owner; good faith belief of pole ownership; or of attaching in good faith.

¹⁵ *Cavalier Tel.* at ¶ 22 (footnotes omitted), citing *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387 at ¶ 44 (1987).

¹⁶ *Cavalier Tel.* at ¶ 22.

¹⁷ See September 6, 2005 letter from the Commission to the parties in Docket No. 04-999-03.

The Unauthorized Attachment Fee shall also be waived if Licensee presents credible evidence the attachment was in place prior to January 1, 2007.

Although Comcast believes that the current unauthorized attachment fee of \$25 plus back rent is sufficient to discourage non-compliance with authorization processes and should make the pole owner whole for revenue lost, the FCC recently determined that unauthorized attachment provisions in a pole attachment agreement which include an unauthorized attachment fee of \$100 would be reasonable.¹⁸ If the Commission determines that an unauthorized attachment fee of back rent plus \$100 per pole is reasonable, Comcast respectfully requests that the Commission accept the \$100 unauthorized attachment fee for unauthorized attachments going forward from the date of the Commission's order changing the fee. Comcast agrees with the language added by the parties to the Stipulation to waive the unauthorized attachment fee if the licensee presents credible evidence of approval by and payment to a putative pole owner, evidence of good faith belief of pole ownership, or evidence of attaching in good faith.

3. *Other Miscellaneous Fees*

Under Rocky Mountain Power's proposed Fee Schedule for its standard pole attachment agreement, other miscellaneous fees would be invoiced at the actual cost. These fees are to be applicable to recover the cost of work necessitated by licensee requests that are not otherwise recovered in the annual rental charge or other fee categories, such as actual or estimated charges for make-ready work and labor for emergency restoration work. Rocky Mountain Power has indicated that this category of miscellaneous fees would include, for example, the cost for an estimator's time to prepare a detailed cost estimate for make-ready work. This example is inconsistent with the Commission's September 6, 2005 directive, which states that "[a]pplication

¹⁸ See *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, ¶¶ 113-118 (2011).

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.” Comcast urges the Commission to ensure that Rocky Mountain Power does not receive double recovery for miscellaneous costs which have been included in the rental charge or the application fee.

The FCC has acknowledged that in numerous instances, pole owners have double charged attachers for incremental non-recurring fees.¹⁹ The FCC will “look closely at make-ready and other charges to ensure that there is no double recovery for expenses for which the utility has been reimbursed through the annual fee.”²⁰ Utilities have tried to roll additional fees into seemingly innocuous and lawful tasks to disguise their true nature. Often these include fees for conducting surveys and audits that the utility claims are to verify billing records or to inspect for safety hazards. Although it may appear reasonable, at first blush, for utilities to require reimbursement for such surveys and audits, the charges the utilities demand go far beyond reimbursement and do not bear a reasonable relationship to the costs the utilities incur or the benefit bestowed on attachers. Sometimes the bills include administrative overhead charges that the pole owner has already collected as a part of the rental rate. Other times, pole owners require attachers to undergo repetitive and inefficient engineering reviews and inspections prior to approving attachment applications. Often these inspections can be consolidated or coordinated more efficiently, however, the pole owners assess these unverifiable charges to the attachers and thus, have no incentive to keep costs down. A critical aspect of achieving just and reasonable rates is determining which administrative costs the utility includes in its rental rate base to ensure

¹⁹ See, e.g., *Knology Inc. v. Georgia Power Co.*, 18 FCC Rcd 24615, ¶¶ 26 (2003) (“Utilities are not entitled to collect money from attachers for unnecessary, duplicative, or defective make ready work.”)

²⁰ *Cavalier Tel.*, 15 FCC Rcd 9563, ¶ 22.

that they are not recovered again as incremental or non-recurring costs during the installation process.

Comcast urges the Commission to carefully consider both the cost factors recoverable in the rental charge and the cost factors Rocky Mountain Power is attempting to recover as fees, to ensure that there are no double recoveries.

III. CONCLUSION

For the foregoing reasons, Comcast urges the Commission to deny certain changes, and carefully consider other changes, proposed by Rocky Mountain Power in its Amended Application.

RESPECTFULLY SUBMITTED this 8th day of August, 2012.

COMCAST CABLE COMMUNICATIONS, LLC

Jerold G. Oldroyd, Esq.
Sharon M. Bertelsen, Esq.
BALLARD SPAHR LLP
One Utah Center, Suite 800
201 South Main Street
Salt Lake City, Utah 84111-2221

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August, 2012, an original, five (5) true and correct copies, and an electronic copy of the foregoing **Comments of Comcast Cable Communications, LLC to Rocky Mountain Power's Amended Application in Docket No. 10-035-97** were delivered to:

Gary L. Widerburg
Commission Secretary
Public Service Commission of Utah
160 East 300 South, Fourth Floor
Salt Lake City, Utah 84111
psc@utah.gov

and true and correct copies were hand-delivered or electronically mailed to the addresses below:

Patricia Schmid
Assistant Attorney General
160 East 300 South, Fifth Floor
Salt Lake City, UT 84111
pschmid@utah.gov

Paul Proctor
Assistant Attorney General
160 East 300 South, Fifth Floor
Salt Lake City, UT 84111
pproctor@utah.gov

Casey Coleman
Division of Public Utilities
160 East 300 South, Fourth Floor
Salt Lake City, UT 84111
ccoleman@utah.gov

Michele Beck, Director
Office of Consumer Services
160 East 300 South, Second Floor
Salt Lake City, UT 84111
mbeck@utah.gov

Torry R. Somers
CenturyLink
6700 Via Austi Pkwy.
Las Vegas, NV 89119
torry.r.somers@centurylink.com

Barbara Ishimatsu
Rocky Mountain Power
201 South Main Street, Suite 2300
Salt Lake City, UT 84111
barbara.ishimatsu@pacificorp.com

Roger Moffitt
AT&T Mobility PCS
645 East Plumb Lane, B132
Reno, NV 89502
Roger.moffitt@att.com

Kira M. Slawson
Blackburn & Stoll, LC
257 East 200 South, Suite 800
Salt Lake City, UT 84111
kslawson@blackburn-stoll.com

Natasha Ernst
Crown Castle NG West Inc.
890 Tasman Drive
Milpitas, CA 95035
natasha.ernst@crowncastle.com

Cathy Murray
Integra Telecom
6160 Golden Hills Drive
Golden Valley, MN 55416
camurray@integratelecom.com

William Shaw
Baja Broadband
wshaw@bajabb.tv

Kirk Lee
Frontier Communications Corporation
Kirk.Lee@ftr.com

/s/ Sharon M. Bertelsen _____