

Natasha Ernst California Bar No. 801268
NextG Networks of California, Inc.
2216 O'Toole Ave
San Jose, CA 95131
Telephone: (408) 954-1580
Facsimile: (408)383-5397
nernst@nextgnetworks.net

Attorney for NextG Networks of California, Inc.

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of
ROCKY MOUNTAIN POWER for Approval
of Standard Non-reciprocal Pole Attachment
Agreement

DOCKET No. 10-035-43

**REPLY COMMENTS OF NEXTG
NETWORKS OF CALIFORNIA, INC.**

Pursuant to the Commission's August 3, 2010 Amended Scheduling Order in this docket, NextG Networks of California, Inc. ("NextG") respectfully submits these Reply Comments to the Reply Comments of PacifiCorp, doing business in Utah as Rocky Mountain Power ("Rocky Mountain Power"), filed August 31, 2010, regarding the agreement submitted by Rocky Mountain Power in the above referenced docket (the "Agreement").

SECTION 4.02: ATTACHMENT SPACE

In its Reply Comments, Rocky Mountain Power states that NextG was "mistaken" in its interpretation of section 4.02 of the Agreement. If NextG was mistaken and now correctly understands that Rocky Mountain Power will permit attachments of equipment outside of the usable space in the "unusable" or "common" space below the communication space, then NextG withdraws its request for modification of section 4.02.

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SECTIONS 5.01 AND 5.02: INDEMNIFICATION, LIMITATION OF LIABILITY

In its Reply Comments, Rocky Mountain Power does not show willingness to listen to the concerns of NextG regarding the requirement that NextG be forced to indemnify Rocky Mountain Power for its own admitted negligence, contrary to public policy.

Rocky Mountain Power has oligarchy, if not monopoly, ownership of the utility distribution poles in its service area. NextG does not own any utility distribution poles in Utah. This unequal bargaining power gives Rocky Mountain Power an unfair advantage and ability to dictate terms of the pole attachment agreement, from which NextG seeks the Commission's protection in this docket.

Dissimilar to other states, the State of Utah does not protect companies from unequal bargaining power regarding indemnification provisions, except for construction contracts. State law states "an indemnification provision in a construction contract is against public policy and is void and unenforceable" to the extent damages are caused by the fault of the owner. Utah Code Ann. § 13-8-1(2)–(3). NextG requests the Commission extend this same sort of protection as a matter of public policy to attachers so that they are not forced to cover "damages caused by Rocky Mountain Power's ordinary negligence," which is currently required by section 5.01 of the Agreement.

This protection would also be in line with the Federal Communications Commission's ("FCC") determination in *The Cable Television Association of Georgia v. Georgia Power Company*, Order, 18 FCC Rcd 16333, 16334 (Enf. Bur. 2003), that pole owners should extend mutual indemnification terms to attaching entities. The FCC recognized that placing an unfair and harsher burden on attaching entities is neither just nor reasonable and not the public interest,

and NextG requests the Commission recognize the same and order Rocky Mountain Power to offer mutual indemnification and liability language to attaching entities.

POLE TOP ATTACHMENTS

In its Reply Comments, Rocky Mountain Power admits it allows pole top antenna attachments; however, it refuses to allow them under the Agreement because “the provision reflects a policy that a joint use contract is not the appropriate vehicle to provide for such attachments that extend into, and above, the space already allocated for the Company’s electric distribution facilities.” This language artful avoids stating that Rocky Mountain Power is willing to lease pole top antenna space at rates extraordinarily exceeding those allowed under a joint use contract, such as the Agreement.

NextG approached Rocky Mountain Power in December 2009 regarding attaching fiber and wireless equipment to the distribution poles owned by Rocky Mountain Power. As a distributed antenna system (“DAS”) provider, NextG has dozens of pole attachment agreements with utilities across the country that allow for the attachment of wireless antennas at the pole top. Some of these agreements restrict pole top wireless antennas to only secondary and stub poles, but many allow pole top attachment over primary distribution as well. Rocky Mountain Power has refused to work with NextG to allow pole top attachments on any types of its poles under the Agreement. R746-345-5(A)(3)(a) assumes that the average pole height equals 37.5 feet, therefore, Rocky Mountain Power should allow pole top attachment on poles at or below 37.5 feet above ground level at the regulated rate outlined in R746-345-5.

As stated before, NextG is not raising an objection at this time to Rocky Mountain Power’s current practice of charging what the market will bear for pole top antennas on poles over 37.5 because those poles may fall outside of UAR R746-345. However, NextG requests the

Commission instruct Rocky Mountain Power to work with attachers to allow pole top antennas under the Agreement when the pole is at or below 37.5 feet and allow those attachments at the regulated rate. This is just, reasonable and within the explicit parameters of UAR R746-345.

WHEREFORE, NextG respectfully request that the Commission issue an order instructing Rocky Mountain Power to revise the Agreement as outlined above.

DATED this 20th day of September, 2010.

Respectfully submitted,



Natasha Ernst
NextG Networks of California, Inc.

Attorney for NextG Networks of California, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **COMMENTS OF NEXTG NETWORKS OF CALIFORNIA, INC.** to be served upon the following by electronic mail or *FedEx to the addresses shown below on or before September 21, 2010:

<p>Linda Wallace Utility Administration Manager NextG Networks, Inc. 2216 O'Toole Avenue San Jose, CA 95131 lwallace@nextgnetworks.net</p>	<p>Kira M. Slawson Blackburn & Stoll, LC 257 East 200 South, Suite 800 Salt Lake City, UT 84111-2048 KiraM@blackburn-stoll.com</p>
<p>Cheryl Murray Dan Gimble Michele Beck Office of Consumer Services 160 East 300 South, 2nd Floor Salt Lake City, UT 84111 cmurray@utah.gov dgimble@utah.gov mbeck@utah.gov</p>	<p>Paul Proctor Office of Consumer Services Heber M. Wells Bldg., Fifth Floor 160 East 300 South Salt Lake City, UT 84111 pproctor@utah.gov</p>
<p>Michael Ginsberg Patricia Schmid Assistant Attorney General Utah Division of Public Utilities Heber M. Wells Bldg., Fifth Floor 160 East 300 South Salt Lake City, UT 84111 mginsberg@utah.gov pschmid@utah.gov</p>	<p>Dennis Miller William Powell Philip Powlick Division of Public Utilities Heber M. Wells Building 160 East 300 South, 4th Floor Salt Lake City, UT 84111 dennismiller@utah.gov wpowell@utah.gov philippowlick@utah.gov</p>
<p>Daniel E. Solander Barbara Ishimatsu Rocky Mountain Power 201 South Main Street, Suite 2300 Salt Lake City, Utah 84111 Daniel.solander@pacificorp.com Barbara.ishimatsu@pacificorp.com</p>	<p>Norman G. Curtright Associate General Counsel QWEST CORPORATION Legal Department 20 East Thomas Road, 16th Floor Phoenix, Arizona 85012 Voice: (602) 630-2187 Fax: (303) 383-8484 Email: norm.curtright@qwest.com</p>
<p>Stephen F. Mecham Callister Nebeker & McCullough 10 East South Temple Suite 900 Salt Lake City, Utah 84133 Telephone: 801 530-7300 Facsimile: 801 364-9127</p>	<p>Cathy Murray Manager, Regulatory Affairs Department of Law & Policy Integra Telecom 6160 Golden Hills Drive Golden Valley, MN 55416</p>

Email: sfmecham@cnmlaw.com	Voice: (763) 745-8466 Fax: (763) 745-8459 Email: catherine.murray@integratelecom.com
Jerold G. Oldroyd, Esq. Sharon M. Bertelsen, Esq. Theresa A Foxley, Esq. Ballard Spahr LLP 201 South Main Street, Suite 800 Salt Lake City, Utah 84111-2221 oldroydj@ballardspahr.com bertelsens@ballardspahr.com foxleyt@ballardspahr.com	Curt Huttzell, Ph.D. FRONTIER COMMUNICATIONS CORPORATION 1387 West 2250 South Woods Cross, Utah 84087 Telephone: (801) 298-0757 Facsimile: (801) 298-0758 Email: Curt.Huttzell@frontiercorp.com
Bill Shaw Bajabb Broadband wshaw@bajabb.tv	*Julie P. Orchard Commission Administrator Utah Public Service Commission Heber M. Wells Building, 4th Floor 160 East 300 South Salt Lake City, UT 84111 ORIGINAL & 5 COPIES via FedEx
Data Request Response Center Rocky Mountain Power 825 NE Multnomah St., Suite 800 Portland, OR 97232 datarequest@pacificorp.com	Dave Taylor Rocky Mountain Power 201 South Main, Suite 2300 Salt Lake City, UT 84111 Telephone: (801) 220-2923 dave.taylor@pacificorp.com

Natasha Hunt
