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Submitted June 21, 2004

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of an Investigation into Pole Attachments	)	Docket No. 04-999-03 **COMMENTS TO THE DRAFT PROPOSED RULE AND CONTRACTS OF THE DIVISION OF PUBLIC UTILITIES**

Comcast Cable Communications, LLC, formerly Comcast Cable Communications, Inc. ("Comcast"), by and through its attorneys, Ballard Spahr Andrews & Ingersoll, LLP, hereby submits these Comments in response to the proposal from the Division of

Public Utilities (the "Division"), dated June 3, 2004, setting forth proposed rules governing pole attachment in Utah by the Utah Public Service Commission (the "Commission").

I. INTRODUCTION

The Division's proposed formula for determining pole attachment rates incorporates the formula for attachments to poles by cable operators providing cable services adopted by the Federal Communications Commission ("FCC"), 47 C.F.R. § 1.1409 (the "FCC Cable Formula"), with one exception. Instead of assigning one foot of usable space to the communication attachers, the proposed rule assigns 1.5 feet.

The rule, as proposed, raises four areas of substantial concern:

1. The usable space presumption of 1.5 feet as applied to cable operators will result in over compensation to the utility pole owner and thereby create a penalty against cable operators by requiring unreasonable compensation, in violation of Utah Code Ann. § 54-4-13.

2. The proposed rule does not incorporate the use of publicly filed data for determining the pole rate, and thereby creates the likelihood of on-going disagreements between the pole owners and communications attachers.

3. The failure of the proposed rule to incorporate certain material terms and conditions creates the likelihood that the pole owner will be unnecessarily compensated by collecting permitting fees, inspection fees and audit fees that are, or should be reflected in the pole rate.

4. The model pole attachment agreement submitted by PacifiCorp does not reflect a fair representation of the interests of both pole owners and attachers. The agreement is deferential to the interests of PacifiCorp and is hostile to the interests of competitive communications providers. Accordingly, as discussed more fully below, Comcast is submitting a sample agreement as a reasonable and more workable alternative to the PacifiCorp contract.

II. THE PROPOSED RULE WILL RESULT IN OVER COMPENSATION OF POLE OWNERS AND SUBSIDY TO OTHER ATTACHERS

Utah Code Ann. § 54-4-13 prescribes a compensation rate to pole owners that must be reasonable and supported by reasonable terms and conditions. The proposed rule attempts to meet the mandate of Section 54-4-13 by modifying the FCC Cable Formula and applying the rate to all pole attachers, including cable operators and telecommunications providers. The modification proposed by the Division changes the usable space presumption and presumes that all attachers occupy 1.5 feet of usable space. In contrast, the FCC Cable Formula assumes that cable attachers occupy only one foot of usable space. The modification of usable space presumption proposed by the Division would result in a pole attachment rate that exceeds the reasonableness standard under the FCC Cable Formula and would result in cable attachers subsidizing pole owners.

Section 224 of the Pole Attachment Act sets forth certain guidelines for determining when a pole attachment rate is just and reasonable.[1] Section 224(d)(1)[2] defines "a just and reasonable rate" as ranging from the statutory minimum based on the incremental costs of providing pole attachments, to the statutory maximum based on fully allocated costs of pole attachments.[3]

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1 Pub. L. No. 95-234, 92 Stat. 35 (1978), codified at 47 U.S.C. § 224.

2 47 U.S.C. § 224(d)(1)("[A] rate is 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, or the percentage of the total duct or conduit capacity, 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, duct, conduit, or right-of-way.").

3 *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, *In the Matter of the Implementation of 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103 ¶ 8 (2001), *aff'd sub nom Southern Co. Servs. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002).

The FCC, in adopting the FCC Cable Formula adopted a compensation structure based upon allocated cost and imposes a pole attachment rate at or near the statutory maximum. *See FCC v. Florida Power Corp*, 480 U.S. 245 (1986). The FCC Cable Formula incorporates the presumption of usable space of one foot to each cable operator. The FCC explained this presumption as follows:

> The *1977 Senate Report* indicated a Congressional intent that cable system pole attachments be responsible for no more than 12 inches of the usable space on a pole, including actual space occupied plus clearance space. The Commission established a rebuttable presumption of one foot as the amount of space a cable television attachment occupies when calculating a maximum rate under an interim formula. We subsequently refined our methodology for determining the amount of usable space and retained the one foot presumption in the [FCC Cable Formula]. The same presumption also applies to telecommunications service providers.
>
> The presumptions used in the [FCC Cable Formula] have been repeatedly affirmed since the enactment of the Pole Attachment Act.[4]

The United States Supreme Court has repeatedly held that the FCC Cable Formula, is fully compensatory to the pole owner. *See National Cable & Telecommunication Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002); *FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987). The proposed rule increases the usable space allocation by 50% for each cable operator. The impact of the proposed modification would significantly increase compensation to pole owners beyond their fully allocated cost.

The cable penalty would be detrimental to the development of competition in Utah's telecommunication and video service markets. The Division's formula would result in an annual pole attachment rent of approximately $11.00 per pole, which represents an increase of

[4] *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachment, In the Matter of the Implementation of 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103 ¶ 8 (2001), *aff'd sub nom Southern Co. Servs. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002).

over 230% above the current Tariff 4 rate.[5] To assess the additional infrastructure cost, at that magnitude, could potentially delay the expansion of broadband facilities throughout Utah and delay the deployment of additional services, including potentially Voice over Internet Protocol.

In addition, the presumption of usable space assumes that all attachers occupy the same amount of usable space. While in some limited cases cable companies may occupy more space, the overwhelming majority of cable attachments occupy one foot or less of space. The actual attachment occupies inches, not one foot. However, in order to provide for clearance between cable and other attachments, and for administrative convenience, cable operators have always accepted responsibility for one foot of space. Comcast continues to believe that one foot is the appropriate allocation to cable companies and other attachers whose facilities are placed in one foot of pole space. Incumbent telephone companies, such as Qwest, have multiple strands of copper conductors requiring in some cases as much as two or three feet of space. Comcast is concerned that the proposed rule requires Comcast to assume responsibility for more space than it actually uses, while traditional telephone companies are assigned less. The result would be a discriminatory subsidy to those companies based on space that Comcast is charged for but will never use.

III. THE RATE SHOULD BE BASED ON PUBLICLY FILED DATA

The pole attachment rate should be calculated on the basis of information that is easily verifiable by all parties. With the exception of the number of poles that the utility owns, the Division's sample PacifiCorp calculation is based on publicly filed data. Proceeding in this

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5 *See Public Service Commission of Utah Electric Service No.* 4 (commonly referred to as Tariff 4). The rate that would be generated by the proposed rule would greatly exceed the rate contained in the Division's sample calculation based on Year End 2001 numbers. Using more recent 2003 data, and the pole count 357,900 contained in the Division's sample, the resulting annual pole attachment rent would be almost $11.00 per pole, nearly $2.00 per pole higher than the example.

fashion allows for efficient derivation of pole rates, without the "data battles" that consistently plague utility rate-making. Certainly pole owners like PacifiCorp and Qwest file this data with regulatory agencies. To the extent that some pole owners do not file similar data, Comcast urges the Commission to adopt a rule requiring them to do so annually. In addition, Comcast requests that the Commission adopt a rule requiring pole owners to file all information not currently reported (such as pole count numbers) to further assist administration of the regulations. Reliance on this type of publicly available data will allow pole owners and attachers to resolve rate issues without the Commission's involvement.

IV. TERMS AND CONDITIONS

At a minimum, the Division's proposed rule should regulate certain fees imposed by the pole owner in connection with the terms and conditions of a pole attachment agreement. Fees, such as audit fees, permitting fees and inspection fees, are often assessed against pole attachers without regard to the fact that the costs incurred by the pole owner are included in the fully allocated cost mechanism in the FCC Cable Formula for determining pole attachment rates. Without additional regulation, there is a serious risk that the pole owner will recover costs both in the pole rental and again in fees. Such recovery of fees exceeds the standard for reasonable compensation under 54-4-13 of the Utah Code.

For example, maintenance of facilities and related costs are accounted for in the FCC Cable Formula. Accordingly, pole owners should not also receive reimbursement for periodic inspections.[6] The proposed rule should, at a minimum, include restricting pole owners from charging inspection fees to attachers for multiple inspections, the frequency of which is

6 *See Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 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 Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

determined in the sole discretion of the pole owner. PacifiCorp for example, is requiring six levels of inspections and demands a fee at each level of inspection. The attacher has no way of verifying that the fee is cost-based, and is afforded no remedy but to pay the fee and file a complaint with the Commission. However, the proposed rule, could allow PacifiCorp to recover all such costs in the pole rate, and to continue to assess inspection fees against Comcast and other attachers.

The proposed rule should also limit overly broad surveys and audits conducted by, or at the request of, the pole owner that primarily benefits the pole owner. Utilities, like PacifiCorp, use pole audits to survey their electrical plant for the purpose of updating internal information regarding the poles and updating and correcting the utilities' own safety violations. The pole owner gains valuable information for their internal use, however, the party attached to the pole bears the cost of the audit.

Finally, Comcast absolutely opposes the definition of "carry charge rate" contained in the Division's proposed formula. The definition states that "[c]arrying charges shall include the Pole Owner's cost of conducting audits directly relating to the provision of Pole Attachments." Proposed Rule R746-345-5.B.2.a. As the Division is aware, this matter is directly at issue in litigation between Comcast and PacifiCorp. *See Comcast Cable Communications, Inc. v. PacifiCorp*, Utah PSC Docket 03-035-28. There are serious questions concerning the way in which utilities account for such audits (e.g., are they part of pole administration and maintenance expense, reported to Federal Energy Regulatory Commission and recovered under electric service rates?). In addition, the inclusion in the proposed rule of audit costs and thereby a regulatory guarantee of recovery through a rental surcharge, would create incentives for abuse by the utility and would result in on-going disputes between pole owners and attachers.

V. PACIFICORP'S MODEL POLE ATTACHMENT AGREEMENT

Comcast believes that the sample agreement submitted by PacifiCorp to the Division and circulated for comment (the "PacifiCorp Agreement") is problematic in a number of important respects. Accordingly, Comcast offers a sample agreement, attached as Exhibit A, as a reasonable and ultimately more workable alternative to the PacifiCorp Agreement. Comcast has been attempting to negotiate an agreement with PacifiCorp similar if not identical to the PacifiCorp Agreement and after nearly two years it *still* does not have a final agreement. Upon information and belief, Comcast states that other cable operators throughout PacifiCorp's multistate services territory are in similar positions. Therefore, Comcast is concerned that PacifiCorp is seeking this Commission's *imprimatur* on a contract that is deeply flawed and hostile to the interests of competitive communications providers. To the extent that the Commission considers adopting a form similar to the PacifiCorp Agreement, Comcast requests that the PacifiCorp Agreement be amended as follows:

- **WHEREAS CLAUSE**

The fifth "Whereas" clause states that PacifiCorp, in its sole discretion, shall determine whether a particular pole is suitable for the service requirements of the Licensee. This provision conflicts with 47 U.S.C. § 224(f) which provides that a utility may only deny access to its poles where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering practices. Therefore, Comcast believes this provision should be stricken from the PacifiCorp Agreement and replaced with the following language:

> *WHEREAS, applicable law requires PacifiCorp to allow attachments to its poles unless there is insufficient capacity or access is not possible for reasons of safety, reliability or generally applicable engineering purposes.*

- **ARTICLE 1. DEFINITIONS**

Definition of "Attachment" – A Licensee pays for a foot of space on a pole and a utility may only charge one rate per each foot of usable space that the Licensee occupies. This includes all incidental equipment necessary for the attachment of the mainline cable, as well as any overlashing. There is no justification for charging for "each individual piece of equipment" or for separate "overlashes" to pre-existing attachments on its poles. Accordingly, Comcast requests that the definition of "Attachment" be deleted and replaced. The language should use the Commission's definition set forth at Utah Admin. Code § R746-345-2(B):

> "Pole Attachment" – The attachment by a Public Utility, telecommunications corporation or cable television company of equipment that requires a bolt, bracket, hook, or other device to secure attachment to a utility pole.

Comcast's proposal is also consistent with the Division's proposed rule that "Pole Attachment rates shall be determined as a per pole charge." Proposed Rule § R746-345-5(B).

Definition of "Commission" – The PacifiCorp Agreement improperly identifies the Utah Public Service Commission as the "Utah Public <u>Utility</u> Commission." This language should be changed to accurately indicate the name of the Commission as the "*State of Utah Public Service Commission*."[7]

Definition of "Unusable Equipment" – Comcast objects to this definition. The Licensee should be able to install any type of equipment that is safe in accordance with industry standards, based on objective and nondiscriminatory safety codes like the National Electrical Safety Code ("NESC"). Consequently, this definition and accompanying Section 3.17 seem

[7] This error may result from the fact that the PacifiCorp Agreement is virtually identical to a form that PacifiCorp has been seeking to impose in Oregon where the regulatory agency there is known as the "Oregon Public Utility Commission."

arbitrary and unnecessary, and also redundant of Sections 3.04 and 3.05. Comcast therefore requests that it be deleted from the PacifiCorp Agreement.

- **ARTICLE II. SCOPE OF THE AGREEMENT**

Section 2.01, ¶ 2 – This paragraph gives PacifiCorp the authority to terminate its consent to attach to transmission facilities if, for any reason, it believes that attachment is "no longer feasible." This is overly broad and should be amended to state that PacifiCorp may only withdraw consent for attachment if "Joint Use is no longer *reasonably* feasible, *due to insufficient capacity or if access is no longer possible for reasons of safety, reliability or generally applicable engineering purposes.*"

Section 2.01, ¶ 3 – This paragraph states that nothing in the PacifiCorp Agreement obligates PacifiCorp to grant Licensee use of any of its poles. However, the Licensee has a right of access to utility poles under 47 U.S.C. § 224(f), Utah Code Ann. § 54-4-13 and Utah Admin. Code § R746-345. This entire paragraph should be stricken from the PacifiCorp Agreement.

Section 2.02, ¶¶ 1, 2 – Comcast objects to the first two paragraphs of this section and they should be deleted as an unlawful restriction on the use of communications plant. Pole owners may not limit the types of services that cable operators provide, as long as those services are lawful, and there is no pole-rate or other justification for the pole owner knowing the nature and type of lawful communications over an attacher's network. [8]

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[8] *See In the Matter of Amendment of Rules and Policies Governing Pole Attachments, In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶ 84 (May 25, 2001) (declining to adopt regulations that would require cable operators to certify as to the type of service they are offering). Furthermore, the United States Supreme Court has confirmed that Section 224 of the Pole Attachment Act "reaches any attachment (including wireless attachments) by a cable television system . . ." *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002).

Section 2.02, ¶ 3 – Comcast has no objection to the restriction on assignment of its attachments without prior consent, "*provided such consent shall not be unreasonably withheld*." Thus, the language italicized above should be added to the end of this paragraph.

Section 2.03 – PacifiCorp does not have an absolute right to deny applications for pole attachment. As stated above, the Licensee has a right of access under 47 U.S.C. § 224, Utah Code Ann. § 54-4-13 and Utah Admin. Code § R746-345. This section of the PacifiCorp Agreement should be amended to permit the utility to reject applications provided it done so on a non-discriminatory basis, using reasonable judgment and only in instances where there is insufficient capacity or access is not possible for reasons of safety, reliability or generally applicable engineering purposes. Finally, since the Licensee has a right of access to the poles, the final sentence of this section should be deleted in its entirety.

- **ARTICLE III. LICENSEE'S USE OF POLES**

Section 3.01 – This section requires the Licensee to file a separate application and pay a raft of potential applicable fees each time it intends to overlash its existing attachments with either its own facilities or those of a third party. Comcast should not have to permit,[9] or pay for, every piece of equipment it attaches to PacifiCorp's poles. This is not only unjust and unreasonable but also contravenes long standing industry standards and practices.

A Licensee has a right to overlash their original attachments without the utility's approval. In fact, overlashing promotes competition and reduces construction disruption and associated expenses, thereby serving the purposes of the Telecommunication Act of 1996. The Licensee should only be required to give *notice* to the utility of any overlashing so that the utility

[9] In fact, in connection with Comcast's Utah upgrade, PacifiCorp has been forcing Comcast to file separate permits merely for modifying an existing attachment with overlashed fiber.

knows the character of, and the parties responsible for, attachments on its poles, including third party overlashers. *See Cable Television Association of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333, ¶ 13 (2003) (holding that "neither the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment.").

Section 3.02 – In paragraph 1, the reference to Section 2.02 should be deleted as that section, as described above, unlawfully requires the attacher to certify as to the type of service it will be providing over its attachments. Paragraph 2 of this section should also be amended to permit PacifiCorp only to deny permission to install service drops "for reasons of safety, reliability or generally applicable engineering purposes." Paragraph 4 of this section should be deleted in its entirety because it limits the services that a Licensee may provide over its attaching equipment and prohibits all overlashing of its facilities unless agreed to by the utility.

Section 3.03 – Under this section, the Licensee is obligated to identify any of its new attachments and also mark any attachments installed prior to the effective date of an agreement. Specifically, the Licensee is required to mark a minimum of 5,000 prior attachments per month, and mark all such attachments before any transfer of ownership. Comcast considers the 5,000 minimum marking requirement onerous and believes it would be more reasonable to require marking for attachments during routine maintenance and upgrades provided PacifiCorp and the other attaching parties can agree on standards for the identifying mechanism.

Section 3.04, ¶ 1 – The first paragraph of this section should be amended to provide that in the event that there is a conflict between the requirements and specifications of the NESC, the Commission and PacifiCorp, the more stringent shall apply "*provided the standard is applied equally to all pole users, including PacifiCorp, on a nondiscriminatory* *basis."* In addition, for existing attachments, modifications should only be required for safety reasons and then only in accordance with applicable law. Requiring the Licensee to modify its attachments to meet the changing requirements of PacifiCorp is an unjust and unreasonable term and condition of attachment.

Section 3.04, ¶ 3 – While Comcast agrees with the terms of this section requiring licensing to indemnify the utility from liability for failure to abide by the safety terms of the paragraph, the Licensee should not be required to indemnify the utility in instances where such liability is the result of the utility's negligence or willful misconduct.

Section 3.05 – It is unreasonable for PacifiCorp to assess fees for a Licensee's deviations from the requirements and specification set forth by the NESC, the Commission or PacifiCorp. Licensee is already obligated to rectify the error, and if it fails to do so, the utility is permitted to perform such work at the sole risk and expense to Licensee. The Licensee is responsible for paying PacifiCorp for all costs it may incur for performing such work, and therefore, no additional fees are necessary or required. However, if PacifiCorp performs such work on non-conforming equipment, it should be insulated from liability, unless such liability results from the negligence or willful misconduct of PacifiCorp. In addition, this section should be amended to assure that the utility is only reimbursed for the *reasonable and actual* costs incurred for performing work on non-conforming equipment.

Section 3.06 – This section should be amended to permit the Licensee to request in writing an extension of time for installation of large projects that cannot be completed within the 90-day time frame. Such extension of time shall remain subject to the written approval of the utility.

Section 3.07 – This section requires Licensee to pay to rearrange or transfer its own equipment where it interferes with the utility's equipment. This section should be amended to ensure that the Licensee will be reimbursed to accommodate subsequent attachments made by the utility. *See* 47 U.S.C. § 224(i). Finally, Section 3.07 should be amended to provide that if Licensee fails to remove its attachments within 30 days, PacifiCorp may remove such equipment and Licensee shall reimburse PacifiCorp for the *reasonable and actual* costs incurred by PacifiCorp.

Section 3.08 – In the event that Licensee's attachment interferes with PacifiCorp's existing equipment and a pole replacement is required, if Licensee provides PacifiCorp with documentation that the Licensee had previously paid to change out the same pole to accommodate its attachment, the Licensee shall only be required to pay for the incremental pole height and/or strength required for the attachment. If third parties or PacifiCorp benefit from such incremental height and/or strength, the costs shall be shared proportionally. Finally, PacifiCorp may not require the Licensee to pay to rearrange or transfer its attachment when PacifiCorp places additional equipment on its poles. PacifiCorp must bear those costs. *See* 47 U.S.C. §§ 224(h)-(i).

Section 3.12 – This provision states that PacifiCorp shall not be liable to Licensee for any interruption of Licensee's service, any interference with its operation or from removal of Licensee's attachment from the utility's poles. This is a one-sided provision and leaves the Licensee vulnerable to negligence or anti-competitive misconduct on the part of the utility. Consequently, this section should be amended to provide that PacifiCorp shall be liable in instances where such interference or interruption is the result of PacifiCorp's negligence or willful misconduct.

Section 3.14 – The Licensee should not be forced to provide a separate written warranty to PacifiCorp that it has obtained all the requisite permits, consents and licenses prior to obtaining permission to attach. Such a demand for warranty and other evidence demonstrating its licenses and permits often is used by the utility to delay approval of an application for attachment. Instead, such a warranty may be made part of this Agreement by including the following language:

> *Licensee warrants that it has the necessary authority, including permits, licenses, franchises and any other applicable regulatory requirements to operate its business in the public rights-of-way where PacifiCorp facilities are located.*

Accordingly, all reference to a "written warranty" and evidence of necessary approval should be deleted from this section. In addition, in the event that any authorizations, franchises, licenses, permits or consents obtained by Licensee are subsequently revoked or denied for any reason, Licensee should retain the right to pursue and exhaust all legal, administrative, and equitable remedies in all state and federal forums before Licensor may revoke Licensee's permission to attach to Licensor's poles.

Section 3.15 – This provision requires the Licensee to relocate, replace or repair its attachments that may be required by PacifiCorp. This section should be amended to account for work necessitated for the benefit of PacifiCorp or a third party. In that instance, the Licensee should alter, rearrange or relocate its facilities within sixty (60) days of notice from the utility that alteration rearrangement or relocation is necessary to accommodate the utility or a third-party attacher. However, the Licensee should be reimbursed for any costs incurred as a result of the alteration, rearrangement or relocation of its facilities, undertaken at the request of another party, including the utility, unless Licensee uses the occasion to modify its own facilities. If the Licensee shares in the benefit of such work, it shall pay a pro-rata share of the costs.

This section should also be amended to provide that PacifiCorp, in an emergency, may relocate or replace Licensee's attachments without incurring liability, *except in cases of PacifiCorp's negligence or willful misconduct.*

Section 3.17 – Comcast believes that the first two sentences of this section should be deleted in their entirety, as well as any reference to "Unusable Equipment." As stated above, the Licensee should be able to install any type of equipment that is safe in accordance with industry standards, based on objective and nondiscriminatory safety codes like the NESC.

Section 3.18 – The second sentence of this section should be stricken in its entirety. Allowing PacifiCorp such unlimited discretion to terminate the Agreement, at will, and for no reason, is unreasonable. PacifiCorp should only be permitted to terminate the Agreement when the Licensee is in default of a material term of this Agreement that is not cured.

Section 3.19 – This provision regarding reimbursement for damage to PacifiCorp's equipment should be reciprocal to provide the Licensee with equal protection from damage caused to the Licensee's equipment by the PacifiCorp.

Section 3.20, *Inspections* – Comcast should not be subject to unreasonable inspections. For example, if PacifiCorp is present during the installation of Comcast's equipment, Comcast should not have to also pay for a post-installation inspection. The periodic inspections proscribed under the Agreement should be limited to no more than once every three years (standard industry practice) unless specific conditions set forth in writing warrant more frequent inspections. In addition, the inspections should be performed by an independent, third-party contractor, approved by both PacifiCorp and the Licensee, and selected as a result of competitive bidding.

Section 3.20, *Occupancy Survey* – The Licensee should only be responsible for reimbursing the utility for the actual and reasonable expenses incurred in conducting an Occupancy Survey. In addition, if during the Occupancy Survey PacifiCorp also audits other attaching parties, in addition to Comcast, such costs should be passed through in rent to the attaching parties. *See Cable Television Association of Georgia v. Georgia Power Co.,* 18 FCC Rcd. 16333, ¶ 16 (2003). Also, the Licensee should be permitted more than sixty days to make any objections to the inventory data where a longer period is required by the Licensee to verify the inventory data and prompt notification is given to PacifiCorp. Finally, Comcast believes that any dispute amounts should be deposited into an independent escrow account.

- **ARTICLE IV. RENTAL PAYMENTS**

Section 4.01 – PacifiCorp may not assess pole rental charges for every "Attachment," as it is defined under the Agreement. Attaching entities should be assessed one annual rental fee per pole, as the Division proposes in its rules.

Section 4.02 – This section permits PacifiCorp to assess sanctions on Comcast for failing to have a written contract with PacifiCorp for Attachments on PacifiCorp's pole. This is an unjust and unreasonable term and condition of attachment. Whether there is a written contract is dependent upon negotiations between the parties. PacifiCorp has the unilateral right to prevent the parties from reaching agreement, simply by failing to enter into go forth negotiation. Under the proposed PacifiCorp Agreement, PacifiCorp would be allowed to assess fees and thereby benefit from its bad conduct. There is no Utah state law or regulation that anticipates the imposition of these types of fees by a utility upon a Licensee. In addition, under this section, PacifiCorp may impose a sanction upon the Licensee for failing to have a permit for "each piece of Licensee's Equipment." As stated above, it is unjust and unreasonable to require a permit for each piece of Licensee's equipment. Comcast should not have to permit, or pay for, every piece of equipment it attaches to PacifiCorp's poles.

Section 4.03 – Again, any disputed fees should be paid into an independent escrow account within 60 days of the invoice date instead of directly to PacifiCorp.

Section 4.04 – Comcast objects to this entire provision and believes it is unnecessary for inclusion in the PacifiCorp agreement.

- **ARTICLE V. CREDITWORTHINESS**

Section 5.01 – Comcast believes that this entire provision should be deleted. It is unreasonable to require the Licensee to submit a yearly financial statement to PacifiCorp.

Section 5.02 – Comcast objects to this provision in its entirety. Comcast is willing to comply with the bonding requirements under Section 7.03 of the PacifiCorp Agreement.

- **Article VI. INDEMNIFICATION**

The indemnification provisions under this section are completely one-sided and, therefore, unjust and unreasonable. The indemnification provisions should be made reciprocal to protect both PacifiCorp and the Licensee.

- **ARTICLE VIII. DEFAULT**

Section 9.01 – The default provision should be made reciprocal and permit each party the opportunity to cure any alleged default.

Section 9.02 – If Licensee fails to remove its equipment and PacifiCorp removes it, PacifiCorp should be released from liability *unless such damage is caused by PacifiCorp's negligence or willful misconduct*.

Section 9.03 – The Rights to Set-off provision is completely one-sided and unreasonable. This section should be deleted in its entirety.

- **ARTICLE X. GENERAL PROVISIONS**

Section 10.03 – The interest rate for late payments should be 1.5% *or the maximum rate permitted by law, whichever is less*.

Section 10.07 – This provision should be made reciprocal and state that the termination of the Agreement shall not release *either Party* from any liability under the Agreement.

Section 10.11 – Comcast believes that the representations and warranties should be made reciprocal and apply to both parties.

VI. CONCLUSION

For the foregoing reasons, Comcast urges the Commission to adopt principles of pole attachment regulation consistent with these comments.

RESPECTFULLY SUBMITTED this 21st day of June, 2004.

COMCAST CABLE COMMUNICATIONS, LLC

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June, 2004, an original, fifteen (15) true and correct copies, and an electronic copy of the foregoing **COMMENTS TO THE PROPOSED RULE AND CONTRACTS OF THE DIVISION OF PUBLIC UTILITIES** were hand-delivered to:

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