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Submitted: April 16, 2004

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of an Investigation into Pole Attachments	)	**DOCKET NO. 04-999-03**
	)	
	)	**REPLY COMMENTS OF PACIFICORP AS TO ISSUES IN THIS PROCEEDING**

Pursuant to the Commission's Notice of Further Agency Action and Scheduling in the captioned proceeding, issued March 19, 2004, PacifiCorp, by its counsel, submits the following comments in reply to the initial comments of other parties with respect to the issues identified by the Commission in its Notice.

Rental Rates, Cost Recovery and Enforcement Penalties

PacifiCorp welcomes this proceeding as a means for the Commission to establish the fundamental ground rules and basic principles that govern both a pole owner's recovery of the costs it incurs in providing to cable companies and telecommunications carriers access to its infrastructure as well as other permissible charges that are necessary to safeguard that infrastructure.

Accordingly, this proceeding should establish the methodology that will be used in Utah to calculate the pole-attachment rental rate, but not the rate itself. Many of the national cable and telecommunications commenters urge the Commission to spare itself the trouble of reinventing the rental-rate methodology and simply to adopt the Federal Communications Commission ("FCC") formulas for pole and/or conduit rentals. Yet, many states that have exerted pole-attachment jurisdiction have declined to follow such an approach—with good reason.

PacifiCorp believes that, through this generic proceeding, the Commission should determine the factors, parameters and accounts that will be the elements of the methodology to best serve Utah consumers. It may well be determined in this proceeding that the FCC formula is not appropriate. For example, the FCC pole-attachment formula does not include accounts relating to transmission poles, because access is mandatory only for distribution poles, not transmission poles. Yet, PacifiCorp voluntarily permits access to its transmission poles in Utah. The FCC pole-attachment formula would clearly not suffice to establish the appropriate rate.

In FCC states, there are two formulas for pole-attachment rental rates: one for cable companies and one for telecommunications carriers. The difference is that the cable formula does not recover the cost of the space on the pole that is not usable for attachments, whereas the telecommunications formula does recover the costs associated with this unusable space. The usable space on a pole does not sit suspended in mid-air as in a Harry Potter universe, and it does not seem fair to require the electric utility (or, more accurately, electric utility customers) to underwrite the cable/telecom deployment. In this era of convergence, when cable companies are increasingly indistinguishable from telecommunications carriers, it may not make sense to adopt the FCC's bifurcated approach. Utah should decide for itself whether decisions made in the U.S. Congress eight years ago are the right decisions for Utah today. This would include a determination as to whether there should be one rental rate or two for attachments to distribution poles, and, if

one rate, whether that rate should recover only the cost of the usable space or a share of the cost of the unusable space as well.

By the same token, there are other costs incurred by pole-owning utilities that would not be incurred but for the attachments of others. Briefly, these include the costs associated with negotiating pole-attachment agreements, processing applications for licenses to attach to specific poles, performing make-ready work, inspecting the construction, inspecting the pole plant for compliance with the National Electrical Safety Code and periodically auditing the pole plant to insure the accuracy of the pole count.

Although the electric utility's right to recover these out-of-pocket costs should be beyond dispute, the "attaching community" nonetheless finds reasons to question this right. Accordingly, PacifiCorp looks to this proceeding to establish the principles that will fairly assign and allocate costs and benefits related to the use of electric infra- structure.

Finally, there is the question of the pole owner's right to impose meaningful and effective penalties as a deterrent to making attachments without following the licensing process. The licensing process established in every pole-attachment agreement is the only means by which a utility can determine whether proposed attachments can safely be made to its poles without jeopardizing the poles' capability to support the electric distribution infrastructure reliably. It is also the only means by which the utility can track attachments and invoice their owners for annual rent. It is the means by which the electric utility meets its cost-causation responsibilities and matches costs to the proper party.

Avoiding the lost time that the licensing process requires as well as the rent increase that follows are powerful incentives for attachers to avoid that process. PacifiCorp's experience in Utah is that thousands, *if not tens of thousands*, of unauthorized attachments have been made to its poles. Therefore, there must be equally powerful and meaningful penalties in order to enforce pole-attachment agreements and deter conduct that is unauthorized or unsafe or that compromises electric-service reliability, as well as to establish the obligation of attachers to pay the cost of periodically auditing for pole attachments. As tools that are essential to protect the infrastructure that serves Utah's electricity customers, the magnitude of fair and reasonable penalties must be established in this proceeding.

Other Terms and Conditions

The near-limitless range of issues addressed in the initial comments filed by other parties provides ample

support for the position taken by PacifiCorp in its own Initial Comments: The Commission should confine the scope of this proceeding to basic rate methodology and related financial charges and not allow the proceeding to degenerate into an unmanageable exercise that tries to address and codify all possible terms and conditions of attachments.

The Division of Public Utilities ("Division") correctly pointed out in its "Request to Open an Investigative Docket," dated March 11, 2004, that the Commission's enabling authority is Utah Code Ann. § 54-4-13(1), which addresses the use by one public utility of facilities belonging to another public utility. When "public utilities have *failed to agree* upon such use or the terms and conditions or compensation for the same, the commission may, by order, direct that such use be permitted, and prescribe a reasonable compensation and reasonable terms and conditions for the joint use" (emphasis added).

It could not be clearer that the statute contemplates utilities will first attempt to negotiate the terms and conditions that will govern their joint use of facilities. This flexibility permits the parties to take into account the specific fact that affect their relationship, including such factors as the nature of the existing plant in the geographic area where the facilities are to be shared; the extent to which other utilities are sharing the same plant; the nature of the service to be provided over the facilities to be attached to the existing plant; and unique circumstances that may be dictated by weather, geography and topography.

This is the same approach that obtains in states where the FCC regulates pole attachments. The federal regulatory scheme established in § 224 of the *Pole Attachments Act*, 47 U.S.C. § 224, and implemented in the FCC's rules, 47 C.F.R. §§ 1.1401 *et seq.*, is complaint-driven. It does not establish the permissible and impermissible terms and conditions of attachment. Rather, it permits – in fact, encourages – negotiations of agreements between the parties and leaves to case-by-case adjudication any disputes that cannot be resolved.

In its *Telecom Order*, 13 FCC Rcd 6777 (released February 6, 1998), in Section III, "Preference for Negotiated Agreements and Complaint Resolution Procedures," the FCC stated, "[t]he statute, legislative policy, administrative authority, and current industry practices all make private negotiation the preferred means by which pole-attachment arrangements are agreed upon between a utility pole owner and an attaching entity." (¶ 10, footnotes omitted.)

Several parties in their initial comments are already urging the Commission to go beyond this approach and permit inquiry into specific terms and conditions that will benefit their unique deployment or business plan in Utah. The Commission should resist this approach, which would deprive individual parties of the flexibility to craft unique agreements that meet their needs or, worse, imposes one party's favored terms and conditions on its competitors.

One size does not fit all. Opening this proceeding to consider the wide range of issues related to the terms and conditions of attachment as suggested in many of the initial comments would assure that this proceeding will drag on for an inordinate period of time and deprive the stakeholders of the resolution that they need the most.

Summary and Conclusion

PacifiCorp supports the investigation of the advisability of establishing the *methodology* of computing the pole-attachment rental rate, as well as other charges applicable to pole attachments, through the tariff process. As also pointed out by the Division, the tariff process is established in Utah Administrative Code § R746-345-2, Tariffs and Contracts. Issues to explore the rental rate computation methodology as well as the appropriate level of other charges related to pole attachments are appropriate to establish rates and charges that are unique to and proper for Utah.

On the other hand, issues to consider every possible factual circumstance that could arise (which in reality simply facilitate the unique business plans of all of the various telecommunications service providers) are unnecessary and exceed even the federal approach to pole-attachment regulation.

Wherefore, PacifiCorp requests that the Commission limit the issues in this proceeding to:

A. Determination of the attachment rental rate methodology;

B. Determination of the proper charges for contract initiation, processing applications for licenses to attach to specific poles, performing make-ready work, inspecting the construction, inspecting the pole plant for compliance with the National Electrical Safety Code and periodically auditing the pole plant to insure the accuracy of the pole count; and other costs that would not be incurred but for attachments by others; and

C. Determination of the proper level of penalties to enforce pole-attachment agreements and deter unauthorized and unsafe attachments.

Issues to determine other terms and conditions of attachment Should be beyond the scope of this proceeding,

and PacifiCorp urges the Commission to issue an order to that effect.

Respectfully submitted this 16th day of April, 2994.

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Certificate of Service

I certify that I have served a copy of the foregoing REPLY COMMENTS OF PACIFICORP by first-class mail or by e-mail attachment the following participants in the captioned proceeding, April 16, 2004.

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