

Jerold G. Oldroyd, Esq. (#2453)  
Anthony C. Kaye, Esq. (#8611)  
Angela W. Adams, Esq. (#9081)  
Ballard Spahr Andrews & Ingersoll, LLP  
One Utah Center, Suite 600  
201 South Main Street  
Salt Lake City, Utah 84111-2221  
Telephone: (801) 531-3000  
Facsimile: (801) 531-3001

Michael D. Woods, Esq.  
Comcast Cable Communications, Inc.  
183 Inverness Drive West, Suite 200  
Englewood, Colorado 80112  
Telephone: (720) 267-3236

J. Davidson Thomas, Esq.  
Cole, Raywid & Braverman, LLP  
1919 Pennsylvania Avenue, N.W.  
Second Floor  
Washington, D.C. 20008  
(202) 282-9873

Attorneys for Comcast Cable Communications, Inc.

**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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In the Matter of the Proposed Revisions of	)	Docket No. 03-035-T11
PacifiCorp, dba Utah Power & Light	)	
Company, to its Schedule 4 – Pole	)	<b>COMCAST CABLE</b>
Attachments – Cable Television Tariff by	)	<b>COMMUNICATIONS, INC.’S</b>
Advice Filing 03-09	)	<b>STATEMENT OF ISSUES</b>
	)	

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Comcast Cable Communications, Inc. (“Comcast”), by and through its attorneys,  
hereby submit its Statement of Issues.

## I. INTRODUCTION

PacifiCorp, dba Utah Power & Light Company (“PacifiCorp”) proposes an increase in its cable pole attachment rate, which is currently less than \$5.00 per pole per year, to nearly \$10.00. For attachments used to provide telecommunications, PacifiCorp is expecting carriers to pay \$29.20 per pole—nearly six (6) times the current rate. Comcast has identified some of the methodological flaws in PacifiCorp’s proposed rates below. Apart from those mechanical problems, however, Comcast has serious questions about allowing the monopoly provider of pole space in Utah to impose a two-fold to six-fold rate increase on certain attachments when (1) Utah should be and is encouraging facilities-based competition; (2) a number of competitors are emerging from the financial difficulties of the last several years and are seeking to deploy facilities and (3) there exists no basis under Utah law for such a telecommunications surcharge.

PacifiCorp’s rate methodology, which is purportedly based on the Federal Communications Commission’s (“FCC”) formula for setting rates in FCC jurisdictions, is inappropriate for use in Utah, which has certified to the FCC that the State regulates the terms and conditions of pole attachments. The Utah Public Service Commission (the “Commission”) should establish rates based on the economic reality of providing cable and telecommunications services in Utah. If the Commission allows rates at the level sought by PacifiCorp, the State should prepare itself for the real possibility that some new facilities-based services will never be offered, and some existing services will be discontinued. The details of this economic reality will be set forth in formal proceedings before the Commission.

The methodological flaws that Comcast has identified so far in PacifiCorp’s rate proposal are: (1) the improper inclusion of transmission pole investment and costs; (2) an unjustified administrative and general expense “surcharge”; and (3) a failure to use updated

financial information. Together, these errors, which are detailed below, result in an unreasonable cable rate. Moreover, PacifiCorp has failed to provide its underlying financial source data.

## **II. PACIFICORP'S PROPOSED RATES ARE UNREASONABLE AND SHOULD BE REJECTED**

### **A. PacifiCorp's Rate Methodology Violates the Commission's Rate Requirements**

The Commission has the authority to regulate pole attachments under Utah Code Ann. § 54-4-13, and has implemented regulations that limit pole attachment rates to “a fair and reasonable portion of the utility’s costs and expenses for the pole plant . . . investment jointly used with cable television companies.”<sup>1</sup>

When calculating its proposed rates, PacifiCorp has ignored these limits and instead offered a rate methodology designed to recover more than a “fair and reasonable portion of the . . . costs and expenses” for its pole plant investment, consistent with Comcast’s use of PacifiCorp’s poles.

#### **1. Improper Use and Inclusion of Transmission Poles**

PacifiCorp includes its investment in transmission poles and related costs to determine the net cost of a bare pole and the carrying charges, respectively. The vast majority of poles to which communications companies, particularly cable operators, are attached are distribution poles. Even if it was proper to include transmission poles in its pole rate calculation, PacifiCorp has failed to account for the additional usable space on transmission poles. PacifiCorp’s calculation merely contemplates poles that have 13.5 feet of usable space. This is the presumptive usable space average set by the FCC in its pole formula for poles that are an

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<sup>1</sup> See Utah Admin. Code § R746-345-3.A.

average of 37.5 feet tall.<sup>2</sup> Transmission poles, on the other hand, are much taller and thus typically contain more usable space. Moreover, charging Comcast for poles it does not occupy is contrary to one of the factors the Commission employs to determine if a rate is fair and reasonable.<sup>3</sup> In order to charge for attachments to PacifiCorp's transmission poles in a fair and reasonable manner, PacifiCorp should propose two separate rates: one for attachments to distribution poles, another for attachments to transmission poles.

## 2. Improper Administrative & General Surcharge

PacifiCorp adds on an extra \$00.41 “per attachment” to the annual “Basic Rate” for what PacifiCorp claims to be a “Surcharge for actual A&G costs directly associated to pole attachments.” Significantly, PacifiCorp already imposes various additional administrative fees on attachers that the utility claims it is entitled to recover in connection with pole attachment applications processing and performing inspections. Moreover, because PacifiCorp is already recovering its fully allocated administrative and general costs in the relevant carrying charges,<sup>4</sup> it is inappropriate to recover these costs again in the form of a surcharge. Indeed, such double-recovery is inconsistent with the Commission's fair and reasonable cost considerations<sup>5</sup> and basic principles of monopoly utility rate making.

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<sup>2</sup> See *Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453, ¶ 16 (rel. Apr. 3, 2000) (“To avoid a pole by pole rate calculation, the Commission adopted rebuttable presumptions of . . . an average 37.5 foot pole height [and] 13.5 feet of usable space. . . .”) (hereinafter “2000 Order”).

<sup>3</sup> See Rule R746-345-3(C)(2) (In determining whether a rate is fair and reasonable, the Commission will look to “[t]he utility’s investment in pole plant *used for attachments*.”) *Emphasis added*.

<sup>4</sup> See Section II.B., below.

<sup>5</sup> See Rule R746-345-3(C)(4). (One factor the Commission considers when judging whether a rate is fair and reasonable is the “incremental or carrying cost factors of pole plant.”).

### 3. Rates Are Not Based on Current Publicly Reported Data

Instead of properly calculating its 2003 pole rates based on the most recently available financial data, Year-End 2002 in this case, PacifiCorp uses Year-End 2001 data and increases its rates by 2.5% each year through 2003. There is no evidence that PacifiCorp has experienced a 2.5% growth rate for each of those years, and PacifiCorp is not entitled to annual increases that may not be supported by actual data.

Even if PacifiCorp's rate calculations were compliant, PacifiCorp has provided no verifiable source data to support its rate calculations. Attachers paying pole attachment rates must have the opportunity to review the data underlying a utility's rate calculations so that it may verify the accuracy of the data.

Finally, because PacifiCorp files Federal Energy Regulatory Commission ("FERC") Form 1 data on a company-wide versus statewide basis, Comcast is unable to collect the relevant data from the FERC.<sup>6</sup> It is therefore essential that the Commission ensure that PacifiCorp's underlying financial data is accurate and reliable before it allows PacifiCorp to modify its rates.<sup>7</sup>

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<sup>6</sup> See, e.g., 47 C.F.R. § 1.1404(g)(2)(requiring utilities regulated by the FCC to derive their rate "[d]ata . . . from ARMIS, FERC 1 or other reports filed with state or federal regulatory agencies (identify source)). "Congress did not believe that special accounting measures or studies would be necessary [in determining pole rates] because most cost and expense items attributable to utility pole . . . plant were already established and reported to various regulatory bodies. . . ." *Alabama Cable Telecomm Ass'n v. Alabama Power*, 15 FCC Rcd 17346 at ¶ 5 (rel. Sept. 8, 2000). Reliance on publicly available data has allowed utility pole owners and attaching parties to resolve hundreds of rate issues without FCC involvement.

<sup>7</sup> Note also that utilities, including PacifiCorp, view joint use departments as profit-making ventures. See, e.g., Conference Brochure from the JOINT WIRE AND POLE USAGE, BEST PRACTICES TO MAXIMIZE REVENUE OPPORTUNITIES AND MINIMIZE ATTACHMENT COSTS CONFERENCE, scheduled for December 8-9, 2003 in Scottsdale, Arizona, (advertising Paul Brown, PacifiCorp's Managing Director of Distribution Support, as delivering the Keynote Address entitled: Maximize Joint Use Revenue and Cost Recovery Potential). PacifiCorp also uses *Joint Use Solutions* as its consultant with respect to joint use issues. On its website, *Joint Use Solutions* emphasizes that "[e]ffective development and management of utility assets is often underemphasized. We can enhance your awareness and understanding of how a small investment can produce significant returns. Let us assist you in realizing untapped revenue and reducing operational costs." <http://www.jusolutions.com/>.

**B. PacifiCorp's Rate Also Exceeds a Just and Reasonable Rate Under the FCC Formula**

PacifiCorp's rate methodology is not only inconsistent with the factors that the Commission considers when determining whether a rate is fair and reasonable, PacifiCorp's calculations are also contrary to the FCC formula—a rate formula that has existed for over 20 years and upon which the vast majority of states rely to set just and reasonable pole attachment rates. Indeed, the various factors relied upon by the Commission are similar to the elements that make up the FCC's own cable formula.<sup>8</sup> Moreover, PacifiCorp's calculations in this case are based in significant part on the FCC formula,<sup>9</sup> except, of course, for the noted departures detailed above, which allow PacifiCorp to recover more than its fully allocated costs.

The rate formulation that the FCC must follow actually creates a range of compensation, the low end of which is the “incremental costs [or] those costs the utility would not have incurred ‘but for’ the pole attachments in question,” and the high end of which is an allocation of the fully-loaded “operating expenses and capital costs [including a return on investment] that a utility incurs in owning and maintaining poles that are associated with the

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<sup>8</sup> A rate is just and reasonable under the FCC formula 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. . . .” 47 U.S.C. § 224 (d). This formulation is similar to the Commission's Rule R746-345-3(A).

<sup>9</sup> For example, PacifiCorp has calculated its net bare pole investment by subtracting accumulated depreciation and accumulated deferred taxes in pole plant, from its gross investment in poles. This sum is further reduced by a 15% presumed investment in cross arms and appurtenances, then divided by the total number of poles PacifiCorp has in service. This is also how the FCC calculates net investment in bare poles. Similarly, PacifiCorp's carrying charges, like the FCC's, are comprised of the depreciation expenses, the administrative and general expenses, the maintenance expenses, taxes and the authorized costs of capital. Finally, PacifiCorp relies on the FCC's use ratio of 7.41% (i.e., 1 foot of space occupied by the attachment over 13.5 feet of usable space). Nevertheless, as discussed, PacifiCorp's proposed rate tariff allocates improper additional costs to both cable operators and telecommunications providers alike.

space occupied by the pole attachments.”<sup>10</sup> Therefore, anything above incremental costs is a contribution to the utility’s overall revenue requirements. In this regard, most utilities recover such out-of-pocket, or incremental costs in advance of any pole attachment through the imposition of “makeready” expenses and, therefore, receive at least the minimum required by law.<sup>11</sup> “Makeready” generally refers to the modification of existing plant to accommodate additional facilities. Nevertheless, the FCC has long interpreted the rate formula statute to provide that when application of the formula reduces a contractual pole rental rate, the FCC will only reduce the rate to the statutory maximum.<sup>12</sup>

PacifiCorp’s rate calculations are calculated at the highest range (i.e., at fully allocated costs) of the FCC pole rate formula. But, because of the way PacifiCorp has improperly manipulated the FCC formula, PacifiCorp is attempting to recover more than its fully allocated costs. The most PacifiCorp should be permitted to recover, pursuant to the Commission’s regulations, are its fully allocated costs, consistent with the FCC methodology. Even with the removal of the flaws that Comcast has identified here, PacifiCorp would still be receiving compensation at the upper (fully allocated) end of this permissible rate range.

### **C. PacifiCorp’s Telecommunications Rate Should Not Be Implemented**

Finally, Comcast strongly urges the Commission to maintain a single pole attachment rate to be applied to both cable operators and telecommunications providers attached to PacifiCorp’s poles. Imposing a separate, higher telecommunications rate even approaching

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<sup>10</sup> *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, 13 FCC Rcd. 6777, ¶ 96 n. 303 (rel. Feb. 6, 1998).

<sup>11</sup> 2000 Order at ¶ 7.

<sup>12</sup> *See FCC v. Florida Power*, 480 U.S. 245, 254 (1987).

the rate that PacifiCorp has suggested (nearly \$30.00) would be tantamount to a penalty for facilities-based competition. Other certified states have considered whether imposing such a “telecommunications penalty” makes sense as a policy matter. All but one of the certified states to address the issue since 1996 have endorsed the cable formula for application to all competitors. For example, in 1998, California expressly extended the cable rate to telecommunications attachments.<sup>13</sup> Alaska has also adopted the cable formula for both cable and telecommunications attachments.<sup>14</sup> Just last month, New Jersey also implemented regulations clarifying that all pole attachments should be treated the same for rental calculation purposes.<sup>15</sup>

**D. PacifiCorp Failed to Provide the Requisite Statement With Its Tariff Filing**

In addition to PacifiCorp’s attempt to recover more than its fair share of costs, Comcast does not believe that PacifiCorp fully complied with the Commission’s requirement to “provide a statement as to the cable television companies [sic] acceptance or rejection of the proposed [rate] change,” in violation of Utah Admin. Code § R746-345-4. As far as Comcast can determine, attachers were simply notified of the rate change but were not given the opportunity to “accept or reject” PacifiCorp’s proposal.

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<sup>13</sup> *Order Instituting Rulemaking on the Commission’s Own Motion Into Competition for Local Exchange Service*, 1998 Cal. PUC LEXIS 879, p. 53-55 (1998) (finding “no convincing rationale justifying the adoption of different pole attachment rates” and further stating that “[t]he use of the existing cable pole attachment rates for all CLECs will also avoid the need for further protracted proceedings to prepare costs studies and to adjudicate default rates. . . . The use of the [existing statutory] formula constrains the default amount that may be charged for pole and conduit attachments, and, to that extent, promotes the emergence of a competitive local exchange market.”).

<sup>14</sup> *See In the Matter of the Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint Use Regulations Adopted Under 3 AAC 52.900 – 3 AAC 52.940*, Order Adopting Regulations, p. 3 (Oct. 2, 2002) (“Through [this Order] we propose to revise our regulations to apply the CATV formula to all attachers.”).

<sup>15</sup> *See* N.J.A.C. § 14:18-2.9(a).

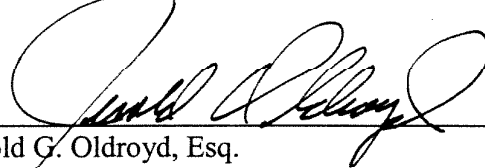


### III. CONCLUSION

For these reasons, the Commission should (1) reject PacifiCorp's cable rate methodology and order PacifiCorp to set its rates consistent with the Commission's requirements and the FCC formula; (2) require PacifiCorp to provide its underlying rate data; and (3) maintain one pole attachment rate for application to both cable and telecommunications providers.

DATED this 16<sup>th</sup> day of December, 2003.

COMCAST CABLE COMMUNICATIONS, INC.



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Jerold G. Oldroyd, Esq.  
Anthony C. Kaye, Esq.  
Angela W. Adams, Esq.  
Ballard Spahr Andrews & Ingersoll, LLP  
One Utah Center, Suite 600  
201 South Main Street  
Salt Lake City, Utah 84111-2221

Michael D. Woods, Esq.  
Comcast Cable Communications, Inc.  
183 Inverness Drive West, Suite 200  
Englewood, Colorado 80112

J. Davidson Thomas, Esq.  
Cole, Raywid & Braverman, LLP  
1919 Pennsylvania Avenue, N.W.  
Second Floor  
Washington, D.C. 20008

**CERTIFICATE OF SERVICE**

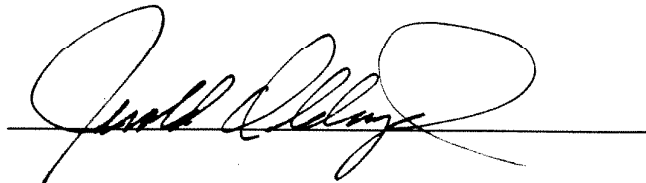
I hereby certify that on the 16<sup>th</sup> day of December, an original, fifteen (15) true and correct copies and an electronic copy of **COMCAST CABLE COMMUNICATIONS, INC.'S STATEMENT OF ISSUES** was hand-delivered to:

Ms. Julie Orchard  
Commission Secretary  
Public Service Commission of Utah  
Heber M. Wells Building, Fourth Floor  
160 East 300 South  
Salt Lake City, Utah 84114  
[lmathie@utah.gov](mailto:lmathie@utah.gov)

and a true and correct copy mailed, postage prepaid thereon, to:

D. Douglas Larson  
PacifiCorp  
825 N.E. Multnomah  
Portland, Oregon 97232

Data Request Response Center  
PacifiCorp  
825 NE Multnomah, Suite 800  
Portland, Oregon 97232

A handwritten signature in black ink, appearing to read "Julie Orchard", is written over a horizontal line.