MICHAEL L. GINSBERG (#4516)
Assistant Attorney General
PATRICIA E. SCHMID (#4908)
Assistant Attorney General
MARK L. SHURTLEFF (#4666)
Attorney General of Utah
Counsel for the DIVISION OF PUBLIC UTILITIES
160 E 300 S, 5th Floor
P.O. Box 140857
Salt Lake City, UT 84114-0857
Telephone (801) 366-0380

Submitted April 15, 2005

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of an Investigation into Pole Attachments	)	Docket No. 04-999-03 **INITIAL BRIEF**

The Division of Public Utilities (Division) hereby submits its brief addressing disputed issues between parties to pole attachment agreements in Utah.

I. Background.

During 2004 and into 2005, the Division conducted a series of technical conferences to facilitate negotiations of pole attachment agreements between various parties to the agreements in Utah. The main participants in these conferences were PacifiCorp, Qwest, Utah Rural Telecom Association ("URTA"), T-Mobile, and Utah Rural Electric Association ("UREA").

The Division originally met with Comcast at the commencement of its formal complaint against PacifiCorp, Docket No. 03-035-28. Comcast attorneys explained that Comcast was in the process of negotiating a new pole attachment agreement with PacifiCorp, but was

unable to come to agreement on several terms and conditions. Specifically at the time, Comcast objected to the assessment for unauthorized pole attachment fees that PacifiCorp assessed Comcast. The assessment amounted to over seven million dollars owed to PacifiCorp. See applicable filings in Docket No. 03-035-28 for details.

Subsequent to initial meetings with Comcast and PacifiCorp, URTA members requested meetings with the Division and then included PacifiCorp. URTA expressed many of the same concerns the Division heard from Comcast representatives. The Division concluded from these meetings that the current state administrative rules were not effective nor detailed enough to regulate pole attachments in Utah. The Division requested a statewide meeting of all interested parties to discuss with the Commission possible remedies to the problems now facing utilities and Attaching Entities in the joint use of poles (pole attachment agreements.)

The Commission concluded from the state-wide pole attachment conference that the Commission's current rule needed to be revised. Interested parties filed comments and met in technical conferences to come to a consensus on the language for the rule amendment. The Division submitted this consensus language to the Commission for consideration. Since then, the Commission published the amended rule for public comment, received comments, and adopted the rule on March 15, 2005. The amended rule is effective April 15, 2005.

After the rulemaking conferences concluded, the parties continued to work toward the development of standard contract terms and conditions. As a basis for these discussions, the parties started with PacifiCorp's contract, then added or modified the contract language based on comments filed by various parties. The Division kept a master copy of the contract with changes made throughout the course of the conferences. The parties have been unable to reach a consensus proposal for standard contract language. Each party's brief will explain the areas of

the standard contract they do not agree with and will proffer legal contractual language representing their position. The parties are each using jointly created exhibits in their filings: 1) a standard contract with references to unresolved issues (attached hereto as Exhibit No. 1), 2) a final issues list of unresolved issues, attached hereto as (Exhibit No. 2), and 3) a list of non-recurring fees which correlate to unresolved contractual issues (attached hereto as Exhibit No. 3.) The parties will also supply the Commission with a matrix of the issues with the reply briefs due May 13, 2005.

II. Issue No. 1 – Fees[1], Issue No. 5 – Audit Costs, & Issue No. 4 – Overlashing (second part of issue only.)

Parties disagree about whether it is appropriate to charge certain fees in addition to the annual pole attachment rental charge. Specific fees in dispute are application fees, pre-construction survey fees (inspections), and post-construction and removal verification fees (inspections), and fees for unauthorized attachments. Although parties also disagree on the dollar amount of fees, this issue will be addressed in individual company tariff and SGAT filings as required by the Commission proposed pole attachment rule.[2]

Parties also disagree on whether audit costs should be charged directly to Attaching Entities or included in the monthly pole attachment rental rate.

As shown in past practice and according to FCC regulation[3], pole owners charge monthly rental to any Attaching Entity that attaches its equipment, cables, wires, etc. to the pole owner's poles. In addition to monthly rental, Attaching Entities pay for make-ready on a time and materials basis. Make-ready is work performed by the pole owner or contractor to prepare

[1] See Exhibit No. 3 for list of non-recurring fees.

[2] PSC Rule R746-345.

[3] 47 CFR §§ 1.1401 – 1,218.

the pole for new attachments. Parties to the technical conference do not dispute there should be an annual rental charge and charges for make-ready. The Parties disagree on fees/charges beyond these two items.

Application Fees – An Attaching Entity, under most circumstances, must make application before attaching any of its equipment, cables, wires, etc. to a pole owner's pole. PacifiCorp charges an application fee to cover its costs for processing the application. Comcast argues that costs for application processing are covered by the annual pole attachment rental rate. According to Rule R746-345, the annual pole attachment rental rate covers the incremental cost of providing space to Attaching Entities and includes an amount that is sufficient to cover recurring costs or expenses that represent the pole owner's investment in the pole. Identifiable non-recurring costs that are directly attributable to providing access to poles, such as costs for processing applications, are not included in the rental rate calculation and should be charged directly to the attaching entity. A cost docket will determine and ensure that directly assignable costs charged to Attaching Entities are not double recovered through the annual rental rate.

Pre and Post Construction Inspection Fees – PacifiCorp charges inspection fees to examine poles before an Attaching Entity attaches, after the Attaching Entity attaches, and after an Attaching Entity removes its attachments. PacifiCorp charges three degrees of both pre and post inspections, Level 1 (Visual Inspection), Level 2 (Visual Inspection), and Level 3 (Pole Analysis Inspection – pole loading analysis performed.) Although parties agree that the pole owner has the right to inspect, the parties disagree about the extent of the inspections and the costs that are passed on to the Attaching Entities.

PacifiCorp, justifiably, conducts inspections for new attachments and the removal of attachments to ensure that work performed by an Attaching Authority conforms to safety and

engineering standards. The inspections typically entail inspection of the entire pole line, rather than spot checks. Although these inspections concurrently allow PacifiCorp to update its records, to spot unauthorized attachments, and to identify safety violations posed by other parties, the costs of these inspections are passed on to the Attaching Entity. The Division supports appropriately applied pre- and post-inspection fees, but standards should be developed to limit the extent of such inspections that are chargeable to Attaching Entities. The costs of periodic routine inspections should be included in the annual pole attachment rental rate.

Unauthorized Attachment Fees – In Docket No. 03-035-28, the Commission supported PacifiCorp's assessment of fees for unauthorized attachments as per the agreement entered by the parties. However, the Commission did not agree with the amount that PacifiCorp actually assessed. In this docket, the Commission will determine whether such "sanctions," "assessments" or "penalties" should be allowed. The amount of any assessment or penalty will be determined in a cost docket.

Rule R746-345 contemplates a permitting process. The permitting or application process allows the pole owner to ensure compliance with applicable safety and engineering standards. It is not unreasonable, then, to use a penalty assessment to encourage compliance with the permitting requirements. Nor is it unreasonable to allow the pole owner to require an Attaching Entity to correct safety or engineering problems, or to face a penalty charge for failing to do so after notice.

Compensation for Third Party Overlashing – At issue is whether a third party that overlashes to an existing Attaching Entity's cable or wire should pay rental to the pole owner. Arguably, the Attaching Entity already pays rent for this space. However, if a third-party is allowed to access a pole without bearing any burden for the fee, it has a competitive advantage

over competing entities that are required to pay the fee. The Division recommends that third-party overlashes should be subject to the same fee arrangement and other Attaching Entities.

Audit Charges – During the technical conferences, Comcast took a position that the cost of periodic audits, or joint audits, should be included in the annual rental charge and not charged separately to Attaching Entities. The Division disagrees with this position. It is anticipated that the joint audits will be conducted every five years or longer. These audits will be designed to provide information for all Attaching Entities to update their respective property records and identify compliance issues. The Division analyzed the possibility of including the audit in the annual rental charge and concluded that the pole owner would only recover a fraction of the actual cost to perform the audit. Since the joint audit will provide information to all Attaching Entities, the Division recommends that the Commission require all Attaching Entities to share in the direct cost of the audits.

III. Issue No. 2 – Timeframes.

Parties disagree on reasonable timeframes for application approval and make-ready work. The application timeframe includes the time it takes for an application to move through an approval process, which includes either a desk-top or physical review. Some parties assert that physical reviews are not necessary and that they unnecessarily lengthen the approval time period. In addition, some parties assert that the timeframe for the pole owner to complete make-ready should be limited and that the Licensee should have the right or ability to hire its own contractors to perform make-ready at its discretion, especially in circumstances where the pole owner is unable to meet make-ready deadlines. The parties agreed that a provision such as this would be acceptable only if the contractors were on a list pre-approved by the pole owner. See Section 3.18 of the contract concerning relocation projects. The Division supports short timeframes for these processes and also supports the Licensee right to contract for make-ready.

The Division recommends the Commission adopt a maximum 30 days for application turnaround, 30 days to perform make-ready, and a provision that the Licensee may hire an independent contractor to perform make-ready.

IV. Issues No. 3 – Service Drops, & Issue No. 4 – Overlashing (first part of issues only.)

Parties disagree on whether a full application is necessary before installing service drops or overlashing, or if notification after the fact is sufficient.

PacifiCorp's new contract requires an application for service drops. The Attaching Entities object, stating that the 30-day application process is too time consuming and burdensome to provide them flexibility to install service drops in a timely fashion to meet customer expectations and state rules regarding telephone installations. The parties favoring notification suggest quarterly notification. Of course, the quarterly notification would require sufficient information (pole number attached to, specifications of equipment/cable/wires attached, etc.) Furthermore, service drops do not normally require engineering or load bearing assessments, a major part of the application process. Thus, the application process is not necessary.

Based on discussion at the technical conferences, the Division concluded that the application process serves two main purposes: it (1) creates a record to track attachments for rental charges, and (2) ensures that the network (pole lines) remains in compliance with national safety and engineering standards. Under Rule R746-345, service drops that are installed within the Attaching Entity's existing space are not considered a new attachment for the purpose of charging rental. Therefore, notification of such attachments is sufficient. Where the service drop is installed in a new attachment space or to a pole that did not previously have attachments of the Attaching Entity, the service drop is subject to rent.

Regarding overlashing, Comcast and others argue that the original application process should resolve questions about pole loading (the burden the attachment will place on the pole). Technically, the overlashing places little additional burden on the pole and should not, in normal circumstances, exceed safety and engineering standards. The Division agrees that overlashing should not typically present a loading problem and notification of overlashing should be sufficient so long as the notification contains enough information to meet the pole owner's needs (pole number attached to, specifications of equipment/cable/wires attached, etc.)

V. Issue No. 6 – Easements.

Parties disagree whether the current language restricts lawful access rights to right-a-way and easements owned and/or controlled by the pole owner. Section 3.11 of the standard contract states, "The right of access to pole owner's poles granted by this Agreement does not include any right of access to the land upon which the pole is situated nor does it include any right to cross the land from pole-to-pole with Licensee's Equipment and such access rights are specifically disclaimed." This language was added at the request of PacifiCorp and Qwest but was not accepted by Comcast. The Division believes that this language merely clarifies that the contract itself does not give a legal easement or right-a-way and that such right must exist regardless of a pole attachment agreement. The Division recommends the Commission adopt the current language.

VI. Issues No. 7 – Relocation Costs.

Parties disagree on who should bear the cost of relocation when required by the pole owner for the pole owner's benefit (accommodating new customer request etc.)

The issue of relocation costs comes down to one main point: who pays. Parties have agreed that the Attaching Entity should bear the full cost of relocation when the relocation is at its request, or for its sole benefit. Parties also agree that all parties should share in costs when all parties benefit from the relocation. A third situation, the situation in dispute, is when the relocation is at the request of the pole owner for the pole owner's sole benefit (accommodating new customer request, upgrading its facilities, etc.).

Sections 3.12 through 3.17 of the standard contract outline the provisions for relocation and the monetary responsibility of parties. Section 3.12 sets forth the pole owner's right to request a licensee to move its attachments when the request is made solely for the owner's benefit. Section 3.12 states:

> Section 3.12 Interference with Pole Owner's or other Licensees' Equipment
>
> If, in Pole Owner's reasonable judgment, Licensee's existing Attachments on any pole interfere with Pole Owner's or other pole attachers' existing Equipment *or prevent the placing of any additional Equipment by Pole Owner required for its core utility service and included in Pole Owner's bona fide development plan as described in Section 2.03*, Pole Owner will notify Licensee of the rearrangements or transfers of Equipment or pole replacements or other changes required in order to continue to accommodate Licensee's Attachments. If Licensee desires to continue to maintain its Attachments on the pole and so notifies Pole Owner in writing within thirty (30) days, Licensee may perform the necessary work (subject to Pole Owner's approval based on safety issues), or Licensee shall authorize Pole Owner to perform the work. Should Licensee authorize Pole Owner to perform the work, Pole Owner shall make such changes as may be required, and Licensee, upon demand, will reimburse Pole Owner for the entire expense thereby actually and reasonably incurred. If Licensee does not so notify Pole Owner of its intent to perform the necessary work or authorize Pole Owner to perform the work, Licensee shall remove its Attachments from the affected pole or poles within an additional ten (10) days from such original notification by Pole Owner for a total of forty (40) days; provided,

> however, that Pole Owner in any emergency may require Licensee to remove its Attachments within the time required by the emergency. If Licensee has not removed its Attachments at the end of the forty (40) day period, or in the case of emergencies, within the period specified by Pole Owner, Pole Owner may remove Licensee's Equipment at Licensee's sole risk and expense, and Licensee will pay Pole Owner, upon demand, for all costs thereby incurred by Pole Owner. [Italics added for emphasis]

Parties agree that a pole owner has the right to reserve space for its core utility based on a "bona-fide business plan." Parties do not agree that the pole owner should be allowed to cause costs to an Attaching entity to enforce this right. However, the pole owner bears a significant amount of legal and monetary responsibility regardless of the contractual relationship to, and presence of pole attachments. The rental rate paid by Attaching Entity captures only the "incremental cost" associated with allowing others to attach to the pole owner's poles. It does not cover the costs associated with the relocation of Attaching Entities attachments in this circumstance. Therefore, the Division supports the pole owner's right to improve and expand its core business without incurring the costs associated with the presence of Attaching Entity attachments to its poles. The Division recommends the Commission adopt Sections 3.12 through 3.17 of the standard contract.

VII. Issue No. 8 – Disputed Bills.

Parties disagree that disputed bills must be paid prior to resolution. There are two alternatives for disputed amounts: 1) the Attaching Entity pays the disputed amount and then seeks a refund of such payments upon proof and verification that the billing of the disputed amount was incorrect, or 2) the Attaching Entity withholds payment for disputed amounts and the pole owner seeks payment upon proof and verification that the billing is correct. In either case a monetary and evidentiary burden is incurred. The Division proposes a third alternative to

this situation. The contract should allow an Attaching Entity to dispute billed amounts and withhold payment but for only a certain amount of time, 60 days maximum. The burden of proof should remain with the Attaching Entity. The Division offers the following language to replace the second paragraph of Section 5.03 of the standard contract:

> *Date when payment is due*. Except as otherwise provided in this Agreement or as agreed by the Parties, Licensee shall pay all charges within thirty (30) days of the invoice date. Late charges and interest shall be imposed on any delinquent amounts. All bills shall be paid to the address designated from time to time in writing by Pole Owner.
>
> *Charges in dispute*. The Licensee may, within the thirty day payment period, notify the Pole Owner of any amount in dispute. The period for payment of disputed amounts shall be extended an additional thirty (30) days to allow the parties reasonable time to resolve the dispute. If the matter is not settled within that timeframe, sixty (60) days from the invoice date, the disputed amount must be paid, but is subject to late charges and interest as specified in Section 8.03.
>
> If, after timely notice of the dispute, the Licensee pays the disputed amount prior to resolution, but the matter is later resolved in the Licensee's favor, the Pole Owner must refund any amounts owed, including any late charges, with interest accruing at the rate specified in Section 8.03 from the later of the date Licensee paid the disputed portion, or the date upon which Licensee provided Pole Owner notice of the amount in dispute.

VIII. Issue No. 9 – Indemnity, Liability, and Damages.

The parties offer different suggestions for this contract provision. The pole owner should be held harmless for any actions of Attaching Entities and the presence of its attachments. Likewise, the Attaching Entity should have limited protection against cost or claims arising from a pole owner's negligent conduct or failure to properly maintain its poles. The Division offers the following language:

> Limitation of Liability and Indemnification

Except for liability caused by the gross negligence or intentional misconduct of Pole Owner, Licensee shall indemnify, protect and hold harmless Pole Owner, it successors and assigns, from and against any and all claims, demands, causes of action, costs (including attorney's fees) or other liabilities for damages to property and injury or death to persons which may arise out of, or be connected with: (a) the erection, maintenance, presence, use or removal of Licensee's Equipment; or (b) any act of Licensee on or in the vicinity of Pole Owner's poles. Except for liability caused by the gross negligence or intentional misconduct of Pole Owner, Licensee shall also indemnify, protect and hold harmless Pole Owner, its successors and assigns from and against any and all claims, demands, causes of action, costs (including attorney's fees), or other liabilities arising from any interruption, discontinuance, or interference with Licensee's service to its customers which may be caused, or which may be claimed to have been caused, by any action of Pole Owner undertaken in furtherance of the purposes of this Agreement. In addition, Licensee shall, upon demand, and at its own sole risk and expense, defend any and all suits, actions, or other legal proceedings which may be brought against Pole Owner, or its successors and assigns, on any claim, demand, or cause of action arising from any interruption, discontinuance, or interference with Pole Owner's service to Pole Owner's customers to the extent caused, or which may be claimed to have been caused, by any action of Licensee. To the extent Licensee shall be found to have caused such interruption, discontinuance, or interference, Licensee shall pay and satisfy any judgment or decree which may be rendered against Pole Owner, or its successors or assigns, in any such suit, action, or other legal proceeding; and further, License shall reimburse Pole Owner for any and all legal expenses, including attorneys fees, incurred in connection therewith, including appeals thereof.

Pole Owner warrants that its work in constructing and maintaining the poles covered by this Agreement shall be consistent with prudent utility practices. **POLE OWNER DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE WARRANTY OF MERCHANTABILITY, FITNESS FOR PARTICULAR PURPOSE, AND SIMILAR WARRANTIES.** Pole Owner's liability to Licensee for any action arising out of its activities relating to this Agreement shall be limited to repair or replacement of any defective poles.

Notwithstanding the above, under no circumstances shall either Party be liable to the other Party for economic losses, costs or

damages, including but not limited to special, indirect, incidental, punitive, exemplary or consequential damages.

IX. Issue No. 10 – Insurance and Bond.

The Division does not currently have a position on this issue but reserves the right to respond to other parties' positions and recommendations in reply brief.

RESPECTFULLY SUBMITTED this 15th day of April, 2005.

UTAH DIVISION OF PUBLIC UTILITIES

Micheal Ginsberg
Assistant Attorney General
Patricia E. Schmid
Assistant Attorney General
160 E 300 S, 5th Floor
P.O. Box 140857
Salt Lake City, UT 84114-0857

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April 4, 2005, an original, five (5) true and correct copies, and an electronic copy of the foregoing **INITIAL BRIEF** were 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

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

Meredith R. Harris, Esq.
AT&T Corp.
One AT&T Way
Bedminster, New Jersey 07921
harrism@att.com

Martin J. Arias, Esq.
Comcast Cable Communications, LLC
1500 Market Street
Philadelphia, Pennsylvania 19102
martin_arias@comcast.com

J. Davidson Thomas, Esq.
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Avenue, N.W., 2d Floor
Washington, D.C. 20006
dthomas@crblaw.com

Genevieve D. Sapir, Esq.
Cole, Raywid & Braverman, LLP
2381 Rosecrans Avenue, Suite 110
El Segundo, California 90245
gsapir@crblaw.com

Curt Huttsell, Ph.D.
Manager, State Government Affairs
ELECTRIC LIGHTWAVE, LLC
4 Triad Center, Suite 200
Salt Lake City, Utah 84180
chuttsel@czn.com

Charles L. Best, Esq.
Associate General Counsel
ELECTRIC LIGHTWAVE, LLC
4400 N.E. 77th Avenue
Vancouver, Washington 98662-6706
charles_best@eli.net

Gerit F. Hull, Esq.
PacifiCorp
825 N.E. Multnomah, Suite 1700
Portland, Oregon 97232
gerit.hull@pacificorp.com

Charles A. Zdebski, Esq.
Raymond A. Kowalski, Esq.
Jennifer D. Chapman, Esq.
Troutman Sanders, LLP
401 Ninth Street, NW, Suite 1000
Washington, DC 20004-2134
charles.zdebski@troutmansanders.com
raymond.kowalski@troutmansanders.com
jennifer.chapman@troutmansanders.com

Gary Sackett, Esq.
Jones Waldo Holbrook & McDonough
170 South Main, #1500
Salt Lake City, Utah 84101
gsackett@joneswaldo.com

Robert C. Brown, Esq.
Qwest Services Corporation
1801 California Street, 49th Floor
Denver, Colorado 80202
Robert.brown@qwest.com

Michael Peterson
Executive Director
Utah Rural Electric Association
10714 South Jordan Gateway
South Jordan, Utah 84095
mpeterson@utahcooperatives.com

Stephen F. Mecham, Esq.
Callister Nebeker & McCullough
Gateway Tower East, Suite 900
10 East South Temple
Salt Lake City, Utah 84133
sfmecham@cnmlaw.com

Bradley R. Cahoon, Esq.
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101
bcahoon@swlaw.com

Gregory J. Kopta, Esq.
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101-1688
gregkopta@dwt.com

Danny Eyre
General Manager
Bridger Valley Electric Association, Inc.
Post Office Box 399
Mountain View, Wyoming 82939
derye@bvea.net

Mr. Carl R. Albrecht
General Manager / CEO
Garkane Energy Cooperative, Inc.
120 West 300 South
Post Office Box 465
Loa, Utah 84747
calbrecht@garkaneenergy.com

LaDel Laub
Assistant General Manager
Dixie Escalante Rural Electric Association
71 East Highway 56
HC 76 Box 95
Beryl, Utah 84714-5197
ladell@color-country.net