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Submitted October 28, 2004

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of an Investigation into Pole Attachments)	Docket No. 04-999-03
)	
)	LIST OF ISSUES IN RESPONSE TO
)	THE DRAFT STANDARD
)	CONTRACT 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 this List of Issues in response to the Standard Form Contract

from the Division of Public Utilities (the “Division”), dated October 18, 2004. Comcast believes that the following outstanding issues must be addressed and implemented into the final form contract:¹

1. The Standard Contract Should Establish *Objective* Criteria for Processing Attachment Requests and Granting or Denying Access.

Access decisions must be based on objective criteria, like the National Electrical Safety Code, and applied on a non-discriminatory basis in order to ensure that attachment and make-ready decisions are fair and reasonable. Accordingly, the Standard Contract’s language should reflect that access decisions must be made based on the objective criteria set forth by 47 U.S.C. § 224, namely, capacity and safety, reliability and generally applicable engineering purposes. Additionally, a utility should not be permitted to reserve space unless the utility has a planned need for that space pursuant to a bona fide development plan that reasonably and specifically projects a need for that space.

2. The Standard Contract Should Establish Appropriate Fee Schedules.

The fee schedule attached to the Standard Contract should reflect all routine and non-routine fees, including reasonable procedures for required periodic adjustment. The fees must not be duplicative, *i.e.*, they must not allow pole owners multiple recovery on a specific charge, either through multiple separate charges, which, in fact, cover similar functions or through pole rental payments. All fees should be cost-based and should not provide for reimbursement over and above these actual costs.

Application processing fees, inspection charges, make-ready, sanctions for non-compliance, and other costs must, therefore, be carefully examined to ensure there is no double-

¹ Attached as Exhibit 1 is Comcast’s comments and revisions to the Division’s proposed Standard Contract.

recovery. Comcast believes that any fees proposed by pole owners should be reviewed and approved by the Commission to ensure there is no double recovery, as it is extremely difficult for licensees to make that determination without assistance from the regulator.

3. All References to Unusable Equipment Should be Removed From the Standard Contract.

The references to “Unusable Equipment” allow the pole owner unreasonable discretion in determining what types of Equipment may be attached to poles. Since a pole owner can only deny access when there is insufficient capacity and for reasons related to safety, reliability and generally applicable engineering standards, the Standard Contract should reflect the fact that licensees are permitted to install any type of Equipment that is safe in accordance with industry standards based on objective and nondiscriminatory criteria, like the NESC rules.

4. Licensees Should Not Have to Permit All Equipment.

Licensees should not have to secure permits for every piece of “Equipment” because most of the items listed under the definition of “Equipment” are incidental to actual Attachment. Such a requirement could easily be subject to pole-owner abuse.

5. The Commission Should Adopt a Standard Application Form.

Some pole owners require licensees to provide information on an application that is unrelated to, or unnecessary for, the request to attach. For example, some applications require detailed load information about all other Equipment attached to the pole (*i.e.* that of other licensees and the owner), information that the owner should already have in its possession and can subsequently be used for its own benefit rather than to assist in determining if access should be granted. Indeed, PacifiCorp has attempted to introduce such a burdensome and abusive application form. The Commission cannot allow this.

Applications can also include other burdensome and discriminatory requirements that a utility does not impose on either itself or other Joint Users. It is, therefore, essential that the Commission approve a standard application form during this proceeding.

6. Overlapping Should be Distinguished From New Attachments in the Standard Contract.

Given the importance of overlapping to the deployment and upgrade of advanced facilities-based services and competition, Comcast believes that the overlapping process in this Standard Contract must be readily distinguishable from the “Application” process and should be contained in a separate section with distinct requirements. As to those specific requirements, liberal procedures for overlapping are to be encouraged. Attachers need not “obtain additional approval from or consent of the utility for overlapping other than the approval obtained for the host attachment.” *Amendment of Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103, ¶ 75 (2001), *aff’d Southern Company Services, Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002)(“Overlappers are not required to give prior notice to utilities before overlapping. However, FCC rules do not preclude owners from negotiating with pole users to require notice before overlapping.”). Accordingly, Comcast urges the adoption of a provision providing reasonable notice, rather than separate application, to the pole owner prior to overlapping.

7. Existing Attachments Should not be Subject to Newly Adopted Safety Guidelines.

NESC Section 013.B.2 provides that “[e]xisting installations, including maintenance replacements, that currently comply with prior editions of the Code, need not be modified to comply with these rules except as may be required for safety reasons by the administrative authority.” Accordingly, the Standard Contract should provide that attachments previously compliant with applicable safety specifications at the time that they were installed do not need to be modified to comply with updated requirements. Requiring licensees to modify

attachments in order to keep all attachments in compliance with the most current regulations would impose an unreasonable burden on licensees, as well as on the pole owners. For that very reason, the NESC clause above ensures that when new regulations are introduced, attachments that were previously compliant do not need to be modified. The Standard Contract should reflect this position.

8. The Standard Contract and Fee Schedule Should Not Include Sanctions for Failure to Comply With Applicable Safety Guidelines.

Such “sanctions” are contrary to standard industry practices and provide an incentive for pole owners to abuse the safety inspection process and create a hostile pole attachment environment. It is often difficult to determine which Party, including the pole owner, is responsible for a particular violation. If pole owners are able to profit from safety violations through the imposition of sanctions, the pole owner will have incentive to find violations and hold licensees responsible for any questionable or non-compliant circumstances without regard to determining which Party is actually responsible for specific violations.

For these reasons, pole owners should not be entitled to charge for, or receive, sanctions for safety violations. Rather, the Parties should have a mechanism for determining who is responsible for a specific problem and that Party should be responsible to correct the violation. Since the network integrity is equally important to both the pole owners and third party attachers, sanctions are not necessary to deter attachers from installing non-compliant attachments.

9. The Standard Contract Should Contain Language Holding Pole Owners Liable for Gross Negligence or Willful Misconduct.

Pole owners cannot be exempt from all liability under the terms of the Standard Contract. Pole owners should not be able to shift the responsibility for gross negligence or willful misconduct to licensees.

10. The Standard Contract Should Include a Timeline for the Completion of Make-Ready Work.

Licensees are often faced with substantial delays when seeking access due to pole-owner make-ready delays. This is true even at times when the pole owner is able to perform its own make-ready on a timely basis. Make-ready should be completed within 30 days after make ready is authorized by license, and no more than 75 days after the Licensee applies to attach. If the Owner is unable to meet the deadline, the Licensee should have the option of hiring an approved, third party electrical contractor to perform the work, consistent with the second paragraph of Section 3.04 of the Standard Contract and FCC rules.

11. Licensees Should Not Have to Pay for Relocating Their Attachments for the Benefit of Others, Including the Pole Owner.

According to the terms of the federal Pole Attachment Act “An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way.” *See* 47 U.S.C. §224(i). The Standard Contract should reflect this rule.

12. The Standard Contract Should not Contain a Provision Allowing for Sanctions in the Event That the Parties do not Have a Contract.

Allowing a pole owner to sanction a third party attacher for failure to have a contract motivates pole owners not to negotiate or contract with third parties, whom the owners can then sanction for failing to have a contract. The pole owners already have superior bargaining strength because they own essential facilities. A “failure to have a contract” sanction exacerbates this inequality in bargaining power by giving pole owners a motivation not to negotiate provisions of a contract.

Another reason sanctions for “failure to have a contract” are improper is because such sanctions would be non-compensatory penalties. Owners already have the right to recover any actual costs incurred to make poles available for attachment.

13. Unauthorized Pole Attachment Fees Should be Set by the Commission.

As with all other charges, the Commission should approve of a specific fee for unauthorized pole attachments. While Comcast does not object to a “reasonable” unauthorized attachment penalty for unpermitted attachments, that penalty must bear “a reasonable relationship to the actual damage[s].” The FCC has agreed with this position in deciding to cap unauthorized attachment fees at five years back rent. *Mile Hi Cable Partners v. Pub. Serv. Co. of Colo.*, 15 FCC Rcd 11450, ¶¶ 10-13 (2000), *aff’d*, *Pub. Serv. Co. of Colo. v. FCC*, 356 U.S. App. D.C. 137, **14-15 (2003).

A penalty no greater than that specified in *Mile Hi* is appropriate here. The proposed Standard Contract allows Occupancy Surveys to occur at five year intervals. That provision, coupled with a 5 year limitation on back rent penalties provides the “incentives” for Owners in Utah not to delay audits, or for the parties to otherwise follow their obligation under the law, contract and reasonable joint-use practices.

It is important to have the Commission approve of and set a fee for unauthorized attachments because this issue is the source of serious disagreement between pole owners and licensees. *See, e.g., Comcast v. PacifiCorp*, Docket No. 03-035-28. PacifiCorp has historically been unwilling to deviate from the fee as set forth in its standard form contract. Accordingly, licensees cannot meaningfully negotiate the amount of this fee. Additionally, PacifiCorp’s fee is facially unreasonable and unjust and is not consistent with the fee amount condoned by the FCC. In fact, in the FCC opinion cited above, the FCC specifically held that the fee contained in PacifiCorp’s standard form contract is excessive and unreasonable. *Mile-Hi*, 15 FCC Rcd 11450,

¶¶ 20, 22. For these reasons, it is critical that the Commission address and decide the appropriate charge for unauthorized pole attachments.

RESPECTFULLY SUBMITTED this 28th day of October, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October, 2004, an original, five (5) true and correct copies, and an electronic copy of the foregoing **LIST OF ISSUES IN RESPONSE TO THE DRAFT STANDARD CONTRACT OF THE DIVISION OF PUBLIC UTILITIES** were hand-delivered to:

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