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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of an Investigation into Pole Attachments	)	Docket No. 04-999-03
	)	**REPLY BRIEF OF COMCAST ON UNRESOLVED TERMS AND PROVISIONS OF THE STANDARD POLE ATTACHMENT AGREEMENT**

Comcast Cable Communications, LLC, formerly Comcast Cable Communications, Inc. ("Comcast"), by and through its attorneys, Ballard Spahr Andrews & Ingersoll, LLP, hereby submits this reply brief regarding the unresolved rates, terms and conditions of the Standard Pole Attachment Agreement.

I. INTRODUCTION

The parties involved in this docket have dedicated substantial resources to the negotiation of a state-wide Standard Pole Attachment Agreement ("Agreement"). PacifiCorp has suggested that this Agreement will simply "provide a 'safe harbor'" "by approving generic terms and conditions that are presumed fair and reasonable."[1] However, the terms of this Agreement go beyond establishing a "safe harbor" for parties to fall back on. This Agreement provides terms and conditions that are available to any attacher or pole owner. Although parties are always free to negotiate the terms and conditions of a particular agreement, parties will also be free to adopt the standard Agreement, or any portion thereof.

The current draft of the proposed pole attachment rule supports this position. Specifically, proposed R746-345-3(C) provides that if parties to a proposed pole attachment agreement cannot agree on the terms of the agreement, they can petition the Commission for resolution. "Pending resolution by the Commission, the parties shall use the *standard contract* or SGAT." *Id.* (emphasis added). Comcast believes that this standard Agreement should be treated like a schedule of generally available terms, meaning that any party to a pole attachment negotiation can choose to adopt all of the Agreement or any portion of the Agreement in lieu of

[1] Brief of PacifiCorp as to Terms and Provisions of the Standard Pole Attachment Agreement (hereinafter "PacifiCorp Brief"), filed April 15, 2005, p. 2.

negotiating specific terms. Accordingly, the Commission should reject PacifiCorp's assertion that the terms developed in this proceeding are subject to rebuttal.[2]

II. DISPUTED ISSUES

A. Fees

1. Application Fees

Contrary to PacifiCorp's claim that the application fee issue centers around whether a pole owner should be able to recover the costs "associated with servicing pole attachments," [3] the principal dispute is *how* those costs should be recovered: directly from each attacher or through the annual pole rent. Comcast agrees that actual, out-of-pocket costs reasonably and necessarily incurred by the pole owner for a *particular attacher*, such as for the performance of make-ready work, should be recovered directly from that attacher. That is not in dispute. The issue is whether allowing a pole owner to recover costs that are not necessarily associated with a particular attacher,[4] directly from each individual attacher, instead of indirectly as a component of the annual pole rent, may lead to double-recovery. As Comcast demonstrated in its opening brief, unless each pole owner's application fees, together with their pole attachment rates, are continuously scrutinized by the Commission, it will be difficult, if not impossible, to ensure that pole owners do not over-recover.[5]

Comcast agrees with PacifiCorp that "the FCC has not ruled that fees for application processing or periodic inspections of the pole plant may not be charged," but rather "that [these]

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2 *Id*.

3 *Id*. at 5.

4 *E.g.*, the administrative costs for the salaries and other costs associated with employees that process applications.

5 *See* Comcast opening brief entitled "Comcast's Comments To Draft Standard Pole Attachment Agreement" (hereinafter, "Comcast Brief"), filed April 15, 2005, pp. 11-14.

fees may not be charged *if* [they] are already recovered in the rental rate that is based on fully allocated costs."[6] That said, Comcast is aware of no FCC case where a pole owner has been able to demonstrate that charging application processing fees, in addition to fully allocated rent,[7] was reasonable and did not lead to over-recovery. Instead, the FCC has consistently ruled that the administrative costs associated with pole attachments,[8] including application fees, are or should be recovered in the annual rent and may not be charged directly to attachers.[9]

Indeed, even in the *GTE Southwest* case, which was cited by PacifiCorp in support of its argument that application fees should be recovered directly, the FCC found that each of the three administrative fees at issue led to over-recovery and was unreasonable. Specifically, in rejecting GTE's argument that the costs associated with the administrative fees imposed on the attacher were not already recovered in the annual rent, the FCC ruled:

> The record contains no explanation of the fees contested by Complainant. The "Billing Event Fee" appears to be an administrative fee for costs associated with the billing process. It also appears to be a recurring cost recoverable through the annual fee. These costs, however, are included in the carrying charges when calculating the maximum rate. The "Billing Event Fee" effectively increases the annual fee beyond the maximum permissible rate and, therefore, results in an annual fee that is unjust and unreasonable. The "CATV Pole License Agreement" fee and the "Assignment Agreement" fee represent non-recurring administrative costs. These costs are typically included in the carrying charges used to calculate the maximum rate. Such charges might be reasonable to the extent they represented actual

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[6] PacifiCorp Brief at p. 6 (citing *Texas Cable & Telecom. Ass'n v. GTE Southwest, Inc.*, 14 FCC Rcd 2975 (1999)).

[7] *See* Notice of Change in Proposed Rule, Utah State Bulletin, March 15, 2005, Vol. 2005, No. 6, proposed R746-345-5 (employing the FCC rate formula for "fully-allocated" costs, rather than incremental costs).

[8] *E.g.*, fees for the administrative and other general costs associated with pole attachments for all attachers.

[9] *See, e.g.*, Comcast Brief at p. 13 (citing *Texas Cable & Telecom. Ass'n v. Entergy Serv., Inc.*, 14 FCC Rcd 9138 ¶¶ 13-14 (1999)). *See also Central Lincoln People's Utility District v. Verizon Northwest, Inc.*, UM 1087, Order No. 05-042, p. 15 (Jan. 19, 2005) ("The salaries of the people involved with 'joint-use issues' or pole maintenance and operation must be calculated and allocated as part of the carrying charge.").

> costs *for each individual agreement* and if, and only if, the amount reimbursed to the utility is not included in the accounts used to calculate the annual rate. The fees, as presented in this proceeding do not reflect actual costs *related to any particular agreement*. Further, they are an attempt to obtain reimbursement of portions of administrative accounts included in the carrying charges by allocating them to various agreements.[10] We find that the fees are an unjust and unreasonable rate, term or condition.[11]

PacifiCorp offered nothing during the collaborative sessions or in its brief that in any way explains or demonstrates that (1) the application fees it seeks to impose (and indeed currently charges attachers without any justification) are not otherwise recovered in the annual rent, (2) why it is preferable to charge those costs directly rather than through the rent or (3) what costs the fees it charges are intended to recover. PacifiCorp has simply declared, without support, that unless it can charge these fees directly, it will not recover its costs.

Qwest, similarly claims that because it charges administrative fees in other states, it should be allowed to charge various administrative fees in Utah.[12] Comcast is skeptical of Qwest's assertion that 13 certified state Commission's have actively "approved" its administrative fees. Rather, it is much more likely that Qwest's administrative pole attachment fees (described on pages 2-3 of its brief) are the result of unchallenged rate filings in certified states. The Commission should demand that Qwest share the results of any rate cases where a certified state Commission has *affirmatively* ruled that the imposition of application fees, in addition to fully allocated rent (based on the FCC formula), was reasonable and did not lead to double-recovery. Interestingly, Qwest has not asserted that it charges these fees in FCC states.

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[10] By comparison, in the *Knology, Inc. v. Georgia Power Co.*, 18 FCC Rcd. 24615 (2003) case, the FCC allowed Georgia Power to charge Knology directly for the costs to cover the "salaries and benefits," and other such costs associated with two employees that Georgia Power had "dedicated" to Knology's project. In other words, those costs were specifically related to a particular attacher. *See Knology* at ¶¶ 47-48.

[11] *Texas Cable & Telecom. Ass'n v. GTE Southwest, Inc*., 14 FCC Rcd 2975, ¶ 33 (1999) (emphasis added).

[12] Initial Brief of Qwest Corporation on Terms and Provisions of the Standard Pole Attachment Contract (hereinafter, "Qwest Brief"), filed April 15, 2005, p. 2.

Apparently Qwest understands that the FCC would find the imposition of its administrative fees, on top of the fully-allocated pole attachment rental rate, which is the same rate pole owners are permitted to charge in Utah, unreasonable.

Comcast appreciates the Division of Public Utilities' ("Division") proposal that "[a] cost docket will determine and ensure that *directly assignable* costs charged to Attaching Entities are not double recovered through the annual rent."[13] Nevertheless, as Comcast noted in its initial brief, the Division is mistaken in assuming that application fees are "non-recurring" costs "directly assignable" to attachers.[14] Application fees are recurring costs of the pole owner that are not directly assignable to one particular attacher. If the costs for processing applications were directly assignable to an individual attacher, the fee charged to attachers would be based on actual costs, as are make-ready and other engineering charges.[15] Instead, the application fees charged by PacifiCorp and Qwest are flat, approximated fees allegedly designed to "recover" the administrative and general costs associated with employees that process applications for all attachers.[16] That is why the FCC and other state certified Commissions have consistently held that such costs should be recovered through the annual rent.

Furthermore, even if it were possible to demonstrate that a pole owner's application processing costs were not otherwise recovered in the annual rent, as PacifiCorp and the Division suggest, such a process is imprecise, at best. As Comcast explained in its opening brief, "[w]hile

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13 Initial Brief (hereinafter "Division Brief"), filed April 15, 2005, p. 4.

14 *See* Comcast Brief at note 30.

15 Comcast Brief at note 30.

16 Comcast does not necessarily take issue with the Utah Rural Telecom Association's ("URTA") proposal that "[a] modest application fee may be warranted to cover the costs of processing an application to that degree those costs are not recovered in the rental rate formula," as URTA members do not plan to charge directly for pre-construction survey charges or the like. URTA Brief on Proposed Pole Attachment Standard Contract (hereinafter "URTA Brief"), filed April 15, 2005, at p. 1.

it is theoretically possible to back out [certain administrative costs] that factor into the annual rate so that they may be charged directly to each attacher as an application processing fee, that is a complicated and time consuming endeavor" and would demand continuous Commission oversight and ratemaking.[17] For example, electric utilities and ILECs typically increase their pole attachment rates annually, upon the filing of their financial information.[18] Consequently, the Commission would need open a new cost docket every year for each pole owner to ensure that the administrative costs a pole owner incurs for processing applications were not also booked to the administrative FERC and ARMIS accounts that make up any newly implemented pole attachment rental rate.

On the other hand, if pole owners in Utah were required to book these costs to the appropriate publicly filed FERC and ARMIS accounts, as Comcast proposes (and as the FCC generally requires), not only would pole owners be assured of recovering all their administrative costs through the rent without the risk of double-recovery, but no Commission intervention would be required. Indeed, reliance on publicly available data allows for "a stable and certain regulatory framework that may be applied simply and expeditiously requiring a 'minimum of staff, paperwork and procedures consistent with fair and efficient regulation,'"[19] and allows utility pole owners and attaching parties to resolve rate issues without FCC involvement. Even when there is an actual rate dispute, application of the FCC formula based on publicly filed data

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[17] Comcast Brief at pp. 11-14.

[18] Electric utilities annually file their information with the FERC (in the form of FERC Form 1 Reports). ILECs, file their annual financial data at the FCC (in the form of ARMIS Reports).

[19] *Alabama Cable Telecomm. Ass'n v. Alabama Power Co*., 15 FCC Rcd 17346 at ¶ 5 (2000) (hereinafter "Alabama Power") (citing legislative history of the Pole Attachment Act, mandating that the FCC institute a "simple and expeditious" formula).

helps avoid "a prolonged and expensive complaint process."[20] Permitting pole owners themselves to decide which costs should be booked to the rental rate "would contravene the [Congressional] mandate [to] provid[e] a simple and expeditious process rather than a full-blown rate case."[21]

For these reasons, Comcast urges the Commission to require pole owners to recover all their administrative and other general costs associated with making facilities available to attachers, including for processing pole attachment applications, through the annual rental rate. Comcast generally supports URTA's proposed language for Section 3.01, except that Comcast would delete the words "the application fee approved by the Commission and…"

2. Pre-Construction Survey Fees

Comcast agrees with the Division that "appropriately applied" pre-construction survey fees should be charged directly to the attacher.[22] Unlike applications processing, when an attacher seeks to attach to a particular pole or pole line, the pole owner typically dispatches its engineers to determine whether there is room to attach to those particular poles or whether make-ready will be necessary. As Comcast stated in its opening brief, "Comcast does not object to paying the actual, reasonable and necessary costs associated with this task" because those costs are easily assigned to a particular attacher and are not otherwise recovered in the rent.[23]

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[20] *Alabama Power* at ¶ 6. "Congress did not believe that special accounting measures or studies would be necessary [in determining pole and conduit rates] because most cost and expense items attributable to utility pole, duct and conduit plant were already established and reported to various regulatory bodies…" *Id.* at ¶ 5.

[21] S. Rep. No. 95-580, 98th Cong., 1st Sess. (1977).

[22] Division Brief at 5.

[23] In this regard, Comcast does not object to paying the "identification of make-ready work" component of Qwest's "Pole Verification Fee." All other aspects of that fee are typically recovered in the annual rent or are redundant of make-ready identification. For example, "analysis of request in conjunction with existing attachments" "determination of space availability" and "computation of make-ready charge and payments" are essentially the same tasks as "identification of make-ready work." *See* Qwest Brief at p. 2.

Nevertheless, as the Division correctly observes, PacifiCorp currently assesses inappropriate charges to attachers, such as the cost of "identify[ing] safety violations posed by other parties…"[24] A fundamental tenet of pole attachment law is that a pole owner may not charge an attacher any costs related to another party's safety violations.[25]

In addition, as Comcast and other attachers informed Division Staff during the collaborative sessions, and as Comcast detailed in its opening brief, PacifiCorp's current application process is so onerous that attachers are not only required to identify pre-existing violations of other attachers but are forced to perform their own comprehensive pre-construction survey in order to fill out the application.[26] Comcast emphasizes that it is inappropriate to allow PacifiCorp to recover any pre-construction survey fees in conjunction with its current application process, especially given the millions of dollars Comcast recently paid PacifiCorp to collect similar data in the 2003 audit.[27] PacifiCorp has offered nothing in its brief that justifies charging attachers for redundant, unnecessary engineering surveys.[28] PacifiCorp merely asserts that it is entitled to recover any fee it so desires, as long as that fee is contained on its fee schedule.[29]

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[24] Division Brief at 5.

[25] *See, e.g., Cavalier Telephone, LLC v. Virginia Electric & Power Company*, 15 FCC Rcd 9563, ¶ 16 (2000) (holding that the "[Pole owner] is prohibited from holding [attacher] responsible for costs arising from the correction of safety violations of attachers…[Pole owner] must reimburse [attacher] for any payments made to [pole owner] to correct other attachers [sic] safety violations. It is up to [pole owner] to require other attachers to reimburse [pole owner] or otherwise pay for corrections of safety violations."), *vacated by settlement, Cavalier Telephone Settlement Order*, 17 FCC Rcd 24414 (2002) (stating the vacatur did "not reflect any disagreement with or reconsideration of any of the findings or conclusions contained" in the original order issued in 2000).

[26] Comcast Brief at pp. 14-16.

[27] *Id*. at pp. 15-16.

[28] Moreover, as Comcast noted in its opening brief, although Comcast has received invoices for pre-construction surveys that have allegedly been performed, PacifiCorp has provided no back up data to demonstrate that these unnecessary pre-construction surveys have actually occurred. Comcast Brief at p. 16, note 44.

[29] PacifiCorp Brief at 8. As far as Comcast can determine, PacifiCorp's pre-construction survey fee is identified as the fee "to evaluate the suitability of the poles designated in the pole attachment permit application to receive attachments." *Id*.

Accordingly, Comcast reiterates its request that "the Commission should clarify in this Agreement that if an attacher performs its own pre-construction survey, the pole owner should be precluded from charging additional fees and must reimburse the attacher for any data that benefits the pole owner or another attacher."[30] Similarly, pole owners should be prohibited from charging for full-blown pole loading studies unless they can demonstrate that such studies are essential in a particular case, do not benefit another party, and are actually performed.[31]

3. Post-Construction Inspection Fees

In its opening brief, Comcast explained that because it performs its own post-construction surveys, it is unreasonable for the pole owner to charge for a redundant inspection. "To be precise, Comcast's contractors are required to build to the NESC and other applicable codes; and Comcast does not issue the check to its contractors until Comcast has performed a quality check. That is standard industry practice."[32] As Comcast noted, other certified state Commission's have recognized that attaching entities have vast construction experience and that if a pole owner wishes for its own "peace of mind" to conduct a post-construction inspection, the pole owner should incur the cost, unless a violation is discovered.[33] Indeed, attachers, like pole owners, rely

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30 Comcast Brief at p. 16.

31 *Id*.

32 *Id*. at p. 17.

33 *Id*. at note 48 (citing Docket No. 6553, *Investigation Into Tariff Filing of Verizon New England, Inc., d/b/a Verizon Vermont, re: Revisions to its Pole Attachment Tariff*, Recommended Decision of John P. Bentley, Esq. to Vermont Public Service Board at p. 21(issued May 19, 2003) ("It is unreasonable to expect the costs of post-construction inspection to be borne by the licensee. The entities performing the required work are established cable operators that have extensive experience in construction. Even newer entities are presumptively qualified to build networks. There is no reasonable justification for charging them with Verizon's costs [sic] should Verizon wish to buy peace of mind through a post-construction inspection."), *aff'd in part, Docket No. 6553, Investigation Into Tariff Filing of Verizon New England, Inc., d/b/a Verizon Vermont*, re: Revisions to its Pole Attachment Tariff, Order (Vt. PSB Oct. 22, 2003) (ruling that attachers should only be forced to incur the cost of post-construction inspections when violations are discovered).

on sound construction, without which they would be unable to deliver their services. Attachers have no incentive to build non-compliant plant.

Additionally, as URTA points out, "[w]hen a technician is in an area where attachment work is proposed, or where attachment or removal work has already occurred, the technician will inspect the poles and the work *in addition to performing other assignments while in the area*."[34] Because it is impossible to assign those costs properly to a particular attacher, "they should be treated as costs incurred in the course of doing business." According to URTA, whose members have never used poles as a profit-center, "it would be much simpler for the URTA to ensure that [post-construction] costs are recovered through the rental rate charged." [35]

By contrast, the Division concludes that PacifiCorp "justifiably, [sic] conducts inspections for new attachments," and should be able to charge attachers for appropriately applied post-inspection fees.[36] Neither the Division nor PacifiCorp, however, have provided any rationale basis for charging these costs directly, rather than in the pole rent, as a cost of doing business.[37] Nor has either party has explained how pole owners would avoid the cost-allocation problem described by URTA and ensure that attachers are not being charged additional costs that properly should be borne by the pole owner or another attacher.

Equally important, both the Division and PacifiCorp have failed to indicate when a post-construction inspection should occur following installation and whether or not an attacher's attachment would be deemed compliant for purposes of any follow-up, periodic inspection. Instead, Section 3.25, regarding inspections, is an open-ended invitation for pole owners to

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34 URTA Brief at p. 2 (emphasis added).

35 *Id*.

36 Division Brief at p. 4.

37 As far as Comcast can determine, Qwest has taken no specific position on post-construction inspections.

perform any kind of inspection, at any time, on the attacher's dime. Consequently, Comcast supports URTA's revisions to Section 3.25, which requires the pole owner to incur the costs of any discretionary inspection.

Whether or not the Commission ultimately allows pole owners to charge directly for post-construction inspections (which Comcast believes would likely lead to over-recovery), the Commission must ensure that post-construction inspections occur within 30 days of an attacher's notice that installation is complete so that attachers are not held responsible for any intervening conditions.[38] Once the time period has elapsed, all relevant attachments must be deemed compliant (*i.e.*, later corrections could not be charged to the attacher). As Comcast further argued in its opening brief, attachers should also be given notice of any planned post-construction inspection so that they have an opportunity to participate, in order to reduce the chance of a dispute. Additionally, following a timely post-construction inspection, the Commission must require the pole owner to provide attachers with a written copy of the inspection findings in order to verify that the inspection occurred (if the attacher did not choose to participate) and so the attacher can demonstrate that specific attachments have been deemed compliant.

Comcast suggests that any post-construction process adopted by the Commission should be incorporated in Section 3.08 (Time To Complete Construction).

4. Removal Verification Fees

The Division provided no legitimate basis for its conclusion that PacifiCorp should be permitted to charge attachers a direct fee for verifying that an attachment has been removed.

[38] Comcast Brief at pp. 17-18.

Rather, like PacifiCorp, the Division merely asserts that PacifiCorp is "justified" in conducting such inspections and imposing flat "removal verification fees."[39]

Comcast, on the other hand, offered several reasons in its opening brief demonstrating that such fees are unreasonable. To reiterate briefly: first, no other pole owner in the State of Utah charges such fees. Indeed, in Qwest's opening brief, the ILEC removed language from Section 3.20 requiring an attacher to provide applicable fees when notifying a pole owner of attachment removals.[40] Also, if an attacher fails to vacate a pole contained in its removal notice, that attachment will be picked up during the counting audit and assessed a back rent penalty. Also, there is no way for an attacher to verify that a removal verification inspection actually occurred. Additionally, given that PacifiCorp consistently takes months to process a permit, it would seem that PacifiCorp could direct its labor resource to better uses than verifying whether an attacher has removed its attachment.[41] Lastly, as URTA indicated, when its technicians inspect poles following removals, the technician performs other tasks while in the area.[42] Thus, according to URTA, because it performs utility work and attacher work at the same time, it would be difficult for its members to determine a proper cost allocation to an attacher in such instances. "[I]t would be much simpler…to ensure that costs are recovered through the rental rate charged."[43] Comcast believes that most utilities operate similarly.

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39 Division Brief at pp. 4-5.

40 *See* Qwest redline at Section 3.20.

41 Comcast Brief at pp. 18-19. It is also essential to note that PacifiCorp is the only beneficiary of its "removal verification fee." For example, PacifiCorp indicates that part of the fee would go towards updating "asset records (*e.g.*, with current photographs to reflect current status and available space on pole[s] for future users." Comcast finds it difficult to understand why an attacher should pay the costs for PacifiCorp to have a digital picture of a pole it has vacated so PacifiCorp can update its records.

42 URTA Brief at p. 2.

43 *Id*.

Comcast, therefore, requests that the Commission adopt URTA's suggested language for Section 3.20.

5. Unauthorized Attachment Fee

Comcast has no objection to including in the Agreement a reasonable unauthorized attachment fee for an attacher's failure to follow the permitting process. Comcast does not believe, however, that it should be necessary to hold a separate cost docket to determine that fee, as the Division suggests.[44] Because any unauthorized attachment fee, like all other rates, terms and conditions of pole attachments, must be just and reasonable under Utah law,[45] the fee must be based on an approximation of the actual costs that the pole owner would have received if the attacher had applied for a permit.[46] Indeed, the Commission itself has recognized that fees for unauthorized attachments should "bear [some] relation to the economic harm suffered by [the pole owner]."[47] After all, an unauthorized attachment fee that does not approximate the back rent

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[44] Division Brief at p. 5.

[45] Utah Code § 54-4-13; *Utah Cable Television Operators Ass'n v. Public Serv. Comm'n of Utah*, 656 P.2d 398, 403 (Utah 1982). The Commission is also bound by federal law to "consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services," when regulating pole attachments. 47 U.S.C. 224(c)(2)(B).

[46] *See e.g., Mile Hi Cable Partners v. Pub. Serv. Co. of Colo.*, 15 FCC Rcd 11450, ¶ 13 (2000) ("[The Pole Owner] suggests that the cost avoided by [the Attacher] for unauthorized attachments is the present value of fourteen years of annual fees plus some speculative amount related to supposed increased safety risks and administrative costs. First, it is unreasonable to infer that the alleged unauthorized attachments at issue have existed for fourteen years. Second, because [the Attacher] must always comply with safety concerns, there is no cost avoided by [the Attacher] related to safety issues. Third, because [the Attacher] is obligated to pay the maximum allowable rent, which is based upon fully allocated costs, any indirect administrative costs are recovered in the annual fee."). *See also The Cable Television Ass'n of Georgia v. Georgia Power Co*., 18 FCC Rcd 16333, ¶ 22 (2003) ("[A] hard-and-fast rule requiring back rent to the date of the last inspection could grossly overcompensate [the pole owner] if an unauthorized attachment was installed long after the last inspection. While providing for calculation based on the date of the last inspection might be a reasonable proxy where no other information is available, it precludes the use of more precise information regarding attachment, which would permit an accurate calculation of back rent. Alternatively, if the use of actual attachment dates is not practical, a reasonable maximum period could be included to ensure that he back rent assessment is not unreasonable.") (hereinafter "Georgia Power").

[47] *Comcast Cable Comm., Inc. v. PacifiCorp*, Report and Order, Docket No. 03-035-28, p. 37 (Issued Dec. 21, 2004 Pub. Serv. Comm'n Utah) (hereinafter "*Comcast v. PacifiCorp*"). In this regard, Comcast takes issue with PacifiCorp's claim that the Commission "approved" of the $60 plus back rent penalty imposed on Comcast in the audit penalty case. A more accurate representation of the facts is that because the pole attachment agreement at

(continued...)

actually owed, is "unenforceable on grounds of public policy as a penalty."[48] In addition, any unauthorized attachment fee should not only have a deterrent effect on the attacher, but also provide an incentive for the pole owner to perform timely counting audits, in order to avoid the kind of audit disputes that have arisen in Utah.[49]

One way to accomplish these various goals, as Comcast argued in its brief, is to structure a penalty that is tied to the frequency of audits.[50] According to the current language in the Agreement, pole owners may conduct audits every five years. Thus, Comcast suggests that the Commission adopt the 5 year back rent penalty from the FCC (Cable Bureau) case, *Mile Hi Cable Partners v. Pub. Serv. Co. of Colo.*, 15 FCC Rcd 11450 (2000). In upholding the FCC's decision, which was based on expert testimony of standard industry practices, the United States Court of Appeals for the D.C. Circuit, recognized that "under the FCC's unauthorized attachment rate, a violating cable company would face the same penalty, five times the rental rate plus interest, even for an unauthorized attachment that had only been in place for two weeks."[51] The *Mile Hi* five year back-rent penalty cap appears in numerous pole attachment agreements."[52]

(...continued)
issue included the $60 penalty (which Comcast's predecessor objected to), the Commission was simply interpreting contract language when it assessed the penalty on Comcast. *Id.* at pp. 5, 10, 15.

48 *Mile Hi Cable Partners, LP, et al v. Pub. Serv. Co. of Colorado*, 17 FCC Rcd 6268 (2002) (affirming decision by Cable Bureau and citing the *Restatement (Second) of Contracts* § 356). Similarly, the Utah Supreme Court "has long had a policy against the imposition of liquidated damages that constitute a penalty for breach of a contractual agreement." *Woodhaven Apartments v. Washington*, 942 P.2d 918, 920 (Utah 1997).

49 *See Mile Hi Cable Partners v. Pub. Serv. Co. of Colo.*, 15 FCC Rcd 11450, ¶ 14 (2000).

50 Comcast Brief at p.19.

51 *Pub. Serv. Co. of Colo. v. FCC*, 2003 U.S. App. LEXIS 9450, **14-15 (D.C. Cir. 2003) (affirming the FCC's decision and stating, "[i]n its analysis, the FCC…showed that most utilities currently charge a one-time fee of $15.00 to $25.00 per pole, or charges based on back rent for no more than three years. Finding no reason to doubt [the Complainant's] uncontested expert testimony regarding industry practices, the [FCC] correctly figured that an attachment rate based on the years of unpaid annual rent, on average $3.77 per pole plus interest, would put the charge right in the middle of the industry range… ").

52 Comcast Brief at p. 20.

Given that existing pole attachment precedent provides a reasonable remedy for unauthorized pole attachment, based on the "economic harm" suffered by the pole owner, it would be a waste of Commission resources to open a separate cost docket on this issue. Instead, Comcast urges the Commission to incorporate the widely-adopted *Mile Hi* standard, which would tie directly to the audit schedule contained in the Agreement.

6. Safety Violation Penalty

Comcast strenuously objects to the Division's suggestion that allowing a pole owner to assess a penalty for safety violations is "reasonable."[53] As a procedural matter, although PacifiCorp's original fee schedule contained a sanction for safety violations, the utility eventually withdrew its pursuit of such a penalty and the parties never fully addressed the issue during the collaborative sessions. Moreover, the Division never indicated that it would propose such a penalty and, accordingly, the parties did not brief the issue.

On a substantive level, penalties for safety violations, even if they are assessed only after an attacher has failed to correct a noticed violation, are wholly inappropriate in pole attachment agreements. First, utilities possess monopoly ownership of poles on which cable operators must rely to provide their services. Pole attachment law was developed to prevent abuse of the pole resource and ensure that communications attachers are able to install their facilities at just and reasonable rates, terms and conditions, despite the inherently superior bargaining position that monopoly pole owners have over attachers.[54] The United States Congress,[55] the Supreme

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53 Division brief, p. 5.

54 *TCA Management v. Southwestern Public Service Co.,* 10 FCC Rcd 11832, ¶ 15 (1995) (citing S. Rep. No. 95-580, 95th Cong. 1st Sess. at 13). *See also Selkirk Comm., Inc. v. Florida Power and Light Co.*, 8 FCC Rcd 387, ¶ 17 (1993) ("Due to the inherently superior bargaining position of the utility over the cable operator in negotiating the rates, terms and conditions for pole attachments, pole attachment rates cannot be held reasonable simply because they have been agreed to by a cable company.").

Court,[56] federal courts,[57] the Department of Justice[58] and the FCC,[59] have all recognized the status of poles and conduit as "essential facilities" and thus bottlenecks to facilities-based competition in telecommunications and cable television markets. Effective regulation of these facilities is thus crucial to ensure access at just and reasonable rates, terms and conditions,[60] as the Commission recognized when initiating this proceeding.[61] Rather than mitigate the monopoly power of pole owners, however, even the threat of safety sanctions serves to *strengthen* the monopoly power over attachers that effective pole regulation was intended to protect against.

Second, allowing a pole owner to recover any non-cost-based penalty for non-compliant attachments would lead to unreasonable over-recovery. Notwithstanding any intent by the Division to encourage safe pole installation and maintenance practices, the

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(...continued)

55 *See, e.g*., 123 Cong. Rec. H35008 (1977) (statement of Rep. Broyhill, co-sponsor of the Pole Attachments Act) ("The cable television industry has traditionally relied on telephone and power companies to provide space on poles for the attachment of CATV cables. Primarily because of environmental concerns, local governments have prohibited cable operators from constructing their own poles. Accordingly, the cable operators are virtually dependent on the telephone and power companies…").

56 *See Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 330 (2002) (stating that cable companies have "found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles…Utilities, in turn, have found it convenient to charge monopoly rents.").

57 *See, e.g., United States v. Western Elec. Co., Inc*. 673 F. Supp. 525, 564 (D.D.C. 1987) (stating that cable television companies "depend on permission from the Regional Companies for attachment of their cables to the telephone companies' poles and the sharing of their conduit space…In short, there does not exist any meaningful, large-scale alternative to the facilities of the local exchange networks…").

58 *See, e.g., United States v. AT&T*, No. 74-1698, Plaintiff's First Statement of Contentions and Proof, Appendix, Tab 8 (D.D.C. filed Nov. 1, 1978) (cataloguing by the Justice Department of Bell Operating Company dominance of pole and conduit facilities).

59 *See Common Carrier Bureau Cautions Owners of Utility Poles*, 1995 FCC LEXIS 193, *1 (Jan. 11, 1995) ("Utility poles, ducts and conduits are regarded as essential facilities, access to which is vital for promoting the deployment of cable television systems.")*.*

60 *See Alabama Cable Telecom. Ass'n v. Alabama Power*, 15 FCC Rcd 17346 at ¶ 6 (2000) ("By conferring jurisdiction on the Commission to regulate pole attachments, Congress sought to constrain the ability of telephone and electric utilities to extract monopoly profits from cable television systems operators in need of pole space.").

61 *See* Division Brief at 2 (discussing that the Commission initiated the instant proceeding because new rules were required in order to regulate pole attachments effectively in Utah.).

Commission is not authorized to provide a windfall to utilities and thus, violate its mandate to ensure just and reasonable rates in the process. More significantly, permitting a pole owner to collect non-compensatory sanctions would provide a perverse incentive to exploit the safety inspection processes for profit, creating suspicion, mistrust, deteriorating field relationships, and, ultimately, more disputes, contrary to one of the primary goals of this proceeding.[62]

Third, the constant threat of substantial sanctions would create a hostile market environment for all communications attachers in Utah. The more resources communications attachers are forced to spend on non-compensatory penalties, the less they have to invest in communications infrastructure and the development of advanced communications services for Utah residents. Any safety penalty would, thus, undermine facilities-based competition, contrary to the public interest.

Finally, the Division has offered no guidelines with its proposal. Nor, it appears, has it considered the practical effect of such a penalty. For example, how much time would an attacher have to correct a violation before the penalties kicked in? Would the time frame be based on the

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62 The State of Oregon serves as a cautionary tale in this regard. In 2001, the Oregon Public Utility Commission implemented various sanctions relating to pole attachments, including a $200 per pole or 20 times the annual rent fee, whichever is higher, penalty for each safety violation; a $500 per pole or 60 times the owner's rental fee per pole penalty, whichever is higher, if the occupant does not have a written contract with the pole owner and the higher of $250 per pole or 30 times the owner's rental fee per pole, if the occupant does not have a permit issued by the pole owner for each pole. Once pole owners began to enforce these sanctions, joint use in Oregon deteriorated, as Oregon PUC Staff recognized in a published White Paper released in December, 2003: "The current disputes before the PUC over the joint-use of poles, though not in the public eye, are significant in their potential impact. One current case could have a financial impact of over $60,000,000 in sanction fees alone. Pole attachment contracts are being called into question as to being fair, just and reasonable. Allegations of fraudulent charges and improperly withheld fees have been made. When thousands, or even hundreds of thousands of poles are involved, these amounts can be large." *The Battle for the Utility Pole and the End-Use Customer*, A PUC Staff Report, Executive Summary, at 1 (Dec. 15, 2003), available at: http://www.puc.state.or.us/safety/workgrp/staffrpt.pdf.

Qwest has challenged the Oregon penalty sanctions in the Court of Appeals of the State of Oregon. That appeal is pending. *See In the Matter of the Adoption of Rules to Implement House Bill 2271 Sanction and Rental Reduction Provisions Related to Utility and Pole Attachments, Qwest Corporation v. Public Utility Commission of Oregon*, filed January 12, 2004 (Or. Ct. App.). Oral arguments are scheduled for July 25, 2005.

number of violations? Or, would the attacher have the same time to fix one violation as it would have to fix 100 violations? What types of violations would be covered under the penalty? Would a 1 inch space violation be assessed the same penalty as a life-threatening situation? What if there was a dispute over who caused a particular violation? Parties are often unable to discern who caused a particular violation. In the absence of a penalty, one party or the other usually just accepts responsibility. In the presence of a penalty, the stakes are higher, and usually lead to protracted disputes.

For these significant reasons, the Commission should reject any penalty for safety violations. The current agreement already provides reasonable remedies in the event an attacher fails to correct bona fide safety violations, including: allowing the pole owner to correct the violation and charge the attacher[63] and default.[64]

B. Timeframes

Comcast was greatly encouraged to see the Division's support for expeditious applications processing and make-ready timeframes. As Comcast explained in its brief, "[t]he timely performance of applications processing (which includes the pre-construction survey and issuing the make-ready estimate) and make-ready performance is essential to ensure expeditious pole access. In turn, expeditious pole access is the key to ensuring the delivery of advanced communications services and robust competition, all for the benefit of Utah's residents."[65]

1. Applications Processing Timeframes

Comcast fully supports the 30 day proposals advocated by the Division and URTA. Nevertheless, as a compromise between PacifiCorp's argument for flexible and indefinite

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63 *See* Section 3.07 (Non-Conforming Equipment).

64 *See* Section 6.01 (Remedies for Default)

65 Comcast Brief at p. 21.

timeframes (*i.e.*, the current language in the second paragraph of Section 3.02) and the 30 day period, Comcast would agree to an enforceable 45 day application turn around timeframe, for all jobs (i.e., the current language in the first paragraph of Section 3.02). [66]

Open-ended provisions, like the second paragraph of Section 3.02, invite abuse and thwart the deployment and provision of communications services. For example, as Comcast fully described in its opening brief, "since PacifiCorp began requiring permits for overlashing in 2003, it has taken PacifiCorp between 5-8 months to process applications, whether they contain 1 or 50 poles," even though Comcast performed all the pre-construction engineering (due to PacifiCorp's onerous applications requirements). Therefore, if the Commission were to retain the existing, open-ended language contained in Section 3.02, as PacifiCorp proposes, that would effectively support PacifiCorp's abysmal applications processing practices. [67]

For these reasons, Comcast fully supports URTA's proposed Section 3.02, but would also be agreeable to the current language set forth in the first paragraph of Section 3.02. In any event, the second paragraph of Section 3.02 must be stricken to ensure effective joint-use.

2. Make-Ready Timetables

Enforceable make-ready timetables are equally critical to the deployment of attachers' services. Therefore, Comcast fully supports the 30 day make-ready performance timetables recommended by the Division, URTA and Utopia, including allowing an attacher to hire an

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66 *Id*. at p. 23.

67 Qwest also seems to support the current agreement language, although Qwest has offered no reasoning in this regard. *See* Qwest Brief at p. 3.

approved contractor if the pole owner is unable to meet the timeframe.[68] These proposals should help alleviate PacifiCorp's concern over its own labor shortages.[69]

Comcast also reiterates its request that Section 3.09 include language requiring the pole owner to coordinate make-ready work and payments between the parties residing on its poles. As Comcast urged in its opening brief, "[s]uch a requirement would [further] facilitate make-ready work for all parties."

Consequently, Comcast supports the contract language for Section 3.09 offered by both URTA and Utopia, but requests that the following language be added to the end of URTA's proposal, incorporating the important "coordination function."

> *In any case, Pole Owner shall work in good faith with the Licensee to cause any necessary third party make-ready so that applicable deadlines may be met and coordinate payments between the parties.*

C. Service Drops

Every party to the proceeding, except PacifiCorp, agrees that service drops should not be subject to the same application process as regular attachments. Indeed, reporting services drops *after* they are made is standard industry practice. Even PacifiCorp currently allows quarterly reporting, rather than prior permitting. It is, therefore, not surprising that the Division rejected PacifiCorp's last-minute claim that permitting for service drops is necessary in order to avoid "surprises" in the event two attachers seek to make simultaneous drops—a circumstance that

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[68] *See* Division Brief at p. 7; URTA Brief at pp. 3-4; Brief of Utopia, filed April 15, 2005, pp. 3-4. *See also*, Comcast Brief at pp. 24-29 (discussing make-ready timetables and the right of attachers to use outside contractors).

[69] Although Comcast proposed a 60 day deadline, it did so as a compromise position, as an alternative to the open-ended language contained in the draft agreement. Additionally, Comcast has no objection to paying a reasonable make-ready estimate up front, as PacifiCorp suggests, as long as there is a true-up following completion of the make-ready.

even PacifiCorp acknowledges would be a "limited, special case[]."[70] Instead, the Division correctly found, based on discussions at the technical conferences, that the normal permitting process would prevent attachers from "install[ing] service drops in a timely fashion to meet customer service expectations and [government] rules" and that "service drops do not normally require engineering or load bearing assessments…"[71] For these reasons, the Division concluded that post-installation notification of those service drops that are subject to rent (*i.e.*, "[w]here the service drop is installed in a new attachment space or to a pole that did not previously have attachments") is all that should be required.[72] Drops installed in an attacher's existing space or mid-span drops off of the attacher's strand would, therefore, not be subject to notice or rental requirements.

If Comcast is forced to wait for PacifiCorp to process applications for a service drops, residents in Utah will be waiting 5-8 months for their cable television and modem service![73] Moreover, as Comcast explained in its opening brief, government requirements mandate that customers receive services within a very brief time from the date of request. Additionally, service drops have different physical characteristics than attachments to distribution poles and, therefore, should not be held to the same permitting requirement.[74]

Comcast also reiterates its request that the Commission adopt a quarterly notice requirement for rental assessment purposes, as PacifiCorp currently requires, and as the language

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[70] PacifiCorp Brief, at p. 14. *See also* Comcast Brief at p. 30 and Exhibit 2. Because there is no legitimate basis for PacifiCorp's current position on service drops, which drastically deviates from industry norms, Comcast has come to the conclusion that PacifiCorp merely wants an excuse for charging additional, non-compensatory application and inspection fees.

[71] Division Brief at p. 7.

[72] *Id*.

[73] Or, more likely, customers will seek services from a competitor, like DBS. *See* Comcast Brief at pp. 30-31.

[74] Comcast Brief at p. 29.

in Section 3.02 currently provides. Comcast suggests the following revisions to Section 3.02 (which also concerns service drops but was not identified on the issues list) that incorporate Comcast's opening brief proposals (new language is in italics, deleted language is bracketed).

> Licensee shall have the right to install service drops without prior approval by Pole Owner [unless the service drop is the first Attachment on a pole or is placed outside the space used by an another Attachment of Licensee]. However, when Licensee installs service drops, Licensee must follow all procedures applicable to Attachments generally, except for filing applications and payment of fees, and shall submit notification to Pole Owner on a quarterly basis. [Notwithstanding the above, notification] *Notification* shall *only* be required for service drops that are [self-supporting wire or wires that do not require the use of messenger strand and a lashed cable] *the first Attachment on a pole or placed outside the space used by an another Attachment of Licensee*. Required notifications of service drop installations shall contain information identifying the pole to which the service drop was added.

D. Overlashing

1. Overlashing by the Primary Attacher

Comcast also supports the Division's finding, based on the technical discussions, "that overlashing should not typically present a loading problem and notification [*vs*. permitting] of overlashing should be sufficient so long as the notification contains enough information to meet the pole owner's needs."[75] URTA, which consists of both pole owners and attachers, also concurs that attachers should not be required to make written application prior to overlashing.[76] Even PacifiCorp allowed unrestricted overlashing until recently.[77] Indeed, requiring permits for

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[75] Division Brief at p. 8.

[76] URTA Brief at p. 5.

[77] Coincidentally, PacifiCorp's permitting requirements for overlashing coincided with its imposition of its application and inspection fee regime. Comcast Brief at p. 33, and note 86. Comcast has been receiving invoices for overlash permit processing and inspections that are expected to total approximately $400,000. On top of that, PacifiCorp wants Comcast to help pay to upgrade its plant. For example, as Comcast established during the *Comcast v. PacifiCorp* case, it is no secret that PacifiCorp is in the midst of a $200,000,000 state-wide upgrade of its Utah outside plant (known as project Quantum Leap), including its distribution facilities. *Id*. at note 92.

overlashing is contrary to long-standing industry practice.[78] Because fiber overlashing is key to the delivery of advanced communications services, adds no appreciable burden to the pole and is an expeditious, non-invasive construction technique, the FCC has consistently rejected utility arguments, identical to those made by PacifiCorp in this case, that overlashing should be subject to permitting requirements.[79]

Similarly, following a comprehensive collaboration on pole attachments in New York, including extensive briefings, the New York Public Service Commission ("New York PSC") rejected efforts by utilities to impose a permitting requirement on overlashing and instead adopted a process that allows parties to overlash upon notice.[80] Specifically, "[a]n Attacher, whose facility has a pre-existing NESC calculated span tension of no more than 1,750 lbs., shall be allowed to overlash a pre-determined maximum load of not more than 20% to the existing communications facility. Existing facilities with an NESC calculated span tension of less than 1,000 lbs. shall be allowed a pre-determined overlash of up to 40% of such pre-existing facilities."[81] Only if "the analysis determines that the addition of equipment and loading is greater than the pre-determined limits, further assessment of the overlashed facility for its impact

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[78] *See Amendment of Rules and Policies Governing Pole Attachments, In the Matter of Implementation of Section 703(e) of The Telecommunications Act of 1996,* 16 FCC Rcd 12103, Consolidated Partial Order on Reconsideration, ¶ 73 (2001) ("Cable companies have, through overlashing, been able for decades to replace deteriorated cables or expand capacity of existing communications facilities, by tying communications conductors to existing, supportive strands of cable on poles. The 1996 Act was designed to accelerate rapid deployment of telecommunications and other services, and to increase competition among providers of these services. Overlashing existing cables reduces construction disruption and associated expense.") (hereinafter "2001 Pole Order").

[79] *Id*. at ¶75 ("[N]either the host attaching entity nor the third party overlasher must obtain additional approval or consent of the utility for overlashing other than the approval obtained for the host attachment.").

[80] *See Proceeding on Motion of the Commission Concerning Certain Poles Attachment Issues,* Order Adopting Policy Statement on Pole Attachments, Case 03-M-0432, Appendix A, pp. 8-10, (NY Pub. Serv. Comm'n August 6, 2004) (hereinafter "New York Order").

[81] *Id*. at p. 9.

on the overall pole is required…"[82] According to Comcast's engineers, virtually all of Comcast's overlashes are well-within the New York standard.

To accomplish that "further assessment," the New York PSC merely requires that the "Attacher shall provide the pole owner with a 'worst case' pole analyses from the area to be overlashed, to be sure the additional facilities will not excessively burden the pole structures…and for future attachment applications and engineering."[83] In no case is a permit ever required.

Comcast has always been willing to compromise on this issue and provide some minimal prior notice of its overlashing to PacifiCorp, so the utility has the opportunity to check any overlashing for non-compliance if it so desires.[84] Moreover, consistent with the overlash standard developed by the New York PSC, Comcast further agrees that if Comcast's overlashing exceeds a particular load (*i.e.*, the maximum load standard developed by the New York PSC) that it would also provide a pole analysis of the worst-case poles to be overlashed so PacifiCorp could use that information to ensure that its poles were not overloaded and for future reference.

Although during the collaborative sessions PacifiCorp never explained why the New York standard was insufficient, and instead insisted that permitting was necessary, the utility nevertheless favorably cites to the this standard in its brief.[85] Comcast is thus hopeful that the parties can still reach a compromise. Comcast cannot emphasis strongly enough, however, that it cannot continue to submit to PacifiCorp's unreasonable delays and costly overlash permitting

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82 *Id*.

83 *Id*.

84 *See* Comcast Brief at p. 37 ("Comcast has no objection to compromising on this issue and incorporating the New York standard into the final Agreement. Like attachers in New York, Comcast is an established company with vast construction experience and is perfectly capable of ensuring the integrity of PacifiCorp's plant, without which Comcast would be unable to serve its own customers.").

85 PacifiCorp Brief at p. 15.

regime. Due to these delays, Comcast constantly risks losing customers and has strained its franchise relationships.[86]

Comcast also objects to the essentially identical proposals offered by PacifiCorp and Qwest, introduced for the first time in their redlines. Specifically, both parties included language in Section 3.01 that only "temporary overlashing" would be allowed without a permit. "Temporary overlashing" is defined as "new cable that is overlashed to an existing strand and cable until the services can be transferred from the existing cable to the new cable. After the transfer of services is complete the pre-existing cable shall be stripped from the strand."[87] This proposal should be rejected for several reasons.

First, Comcast's overlashed fiber does not substitute for its coax cable. Comcast uses both. Second, Comcast does not see how allowing "temporary overlashing," prior to permitting, would be any different than allowing permanent overlashing without a permit. The attacher would still need to ensure that the temporary overlash did not put the pole out of safety compliance. Third, when a third party overlashes to a host cable, the host cable could never be wrecked out. Finally, neither PacifiCorp nor Qwest have provided any basis for this additional language or even addressed the "temporary overlash" proposal.

PacifiCorp's reliance on other certified state decisions is similarly misplaced.[88] For example, when adopting its rule that "[n]o party may attach to the right of way or support structure of another utility without the express written authorization from the utility," the California Public Utilities Commission ("California PUC") did not specifically address

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86 Comcast Brief at pp. 22-23.

87 *See, e.g.*, Qwest Redline at Section 3.01.

88 As Comcast explained, Comcast has no objection to the New York Order. Similarly, the Michigan decision relied on by PacifiCorp, does not require permitting, only notice, and allows the attacher to perform the engineering. *See* PacifiCorp Brief at p. 16.

overlashing.[89] Similarly, on rehearing, although the California PUC rejected the cable association's argument that the rule illegally precluded overlashing because it involved "policy," not "legal error," the California PUC nevertheless recognized that "parties were free to negotiate terms of agreement which differ."[90] In other words, the California PUC did not forbid utilities from allowing unpermitted overlashing.

In light of the New York Order, the Louisiana Public Service Commission ("Louisiana PUC") opened a rulemaking docket on pole attachments in January to review the 1999 Order cited by PacifiCorp.[91] One of the substantive issues on which the Louisiana PUC sought comment was New York's overlashing rule.[92] Moreover, the Louisiana PUC adopted its overlash rule in 1999, prior to the FCC's explicit ruling in the 2001 Pole Order that utilities may not require approval for overlashing.[93]

As to the Illinois Interconnection Agreement Arbitration case cited by PacifiCorp, it is important to point out the overlash provision at issue involved third, not first, party overlashing.[94] Additionally, it appears that the utility involved in that case did not fully inform the Illinois Communications Commission ("Illinois CC") that the FCC had ruled in the 2001

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89 *Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Services*, R.95-04-043, I.95-04-044, Decision 98-10-058, at 20 (Cal. Pub. Util. Comm'n Oct. 22, 1998) (jointly decided).

90 *Order Modifying Decision 98-10-058 and Denying Rehearing*, 2000 Cal. PUC LEXIS 228, **47-49 (Cal. Pub. Util. Comm'n Mar. 16, 2000).

91 *See* Docket No. R-26968 – Louisiana Public Service Comm'n, ex parte. In re: Review of Order Dated March 12, 1999 (Pole Attachment Rates) ("Staff has opened this docket to review the [rate] formula…Additionally, Staff seeks specific comment on, but not limited to…overlashing [and] [c]onsideration of the [New York Order].").

92 *Id*.

93 *See* note 79, *supra*.

94 *See McLeod USA Telecomm. Serv., Inc. Petition for Arbitration of Interconnection Rates Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company (Ameritech Illinois) pursuant to Section 252(b) of the Telecommunications Act of 1996*, 2002 Ill. PUC LEXIS 4, *75 (ICC Jan. 16, 2002).

Pole Order that a utility may not require approval for overlashing, and the Illinois CC apparently relied on this misrepresentation.[95]

Finally, PacifiCorp has misinterpreted the FCC's 1998 Telecom Order. The FCC does *not* state, as PacifiCorp suggests, "that if an engineering study demonstrates that a significant burden on the poles would be created by overlashing, the pole owner may deny access to the poles."[96] Rather, it is clear from the 1998 Order, and subsequent Orders, that the FCC envisions a process like the one adopted in New York, whereby the attacher would itself identify any engineering issues. Then, if the attacher believed that make-ready was required on any particular pole to which the attacher sought to overlash, the attacher would contact the utility in order to have any necessary work performed. If the overlash was impossible due to insufficient capacity, safety, reliability or generally applicable engineering standards, arguably, the utility could deny access to a particular pole.[97] For these reasons, Comcast supports URTA's proposal, but is willing to incorporate the New York standard as a comprise.

2. Third Party Overlashing

The purpose of third party overlashing is to facilitate competition at lower costs.[98] Despite this clear policy, the Division appears to believe that a third party overlasher would have

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95 *See id*. at *77. For example, it appears from the decision that Ameritech only cited to one part of paragraph 75 in the 2001 Pole Order. The cited provision states: "[T]hird party overlashing is subject to the same safety, reliability, and engineering constraints that apply to overlashing the host attachment." The very next sentence, however, go on to say: "We affirm our policy that neither the host attaching entity nor third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment." 2001 Pole Order at ¶ 75. Ameritech does not appear to have cited to that part of paragraph 75.

96 PacifiCorp Brief at p. 17.

97 *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, Report and Order, ¶¶ 62-64 (1998) ("To the extent that the overlashing does create an additional burden on the pole, any concerns should be satisfied by compliance with generally accepted engineering practices.").

98 *Id*. at ¶ 68 ("The record does not indicate that third party overlashing adds any more burden to the pole than overlashing one's own pole attachment. We do not believe that third party overlashing disadvantages pole owners in either receiving fair compensation or in being able to ensure the integrity of the pole. Facilitating access (continued...)

some advantage over competitors because it is not required to bear the burden of any fee. The Division's position, however, is mistaken.[99] The third party overlasher typically shares costs with the host.[100] That is why the practice promotes cost-effective competition and is supported by regulators concerned with communications competition.

Indeed, because a third party overlash occupies no more space than the host attachment, allowing a pole owner to charge rent to the third party overlasher, would result in over-recovery; and neither the Division, nor PacifiCorp has addressed how double-recovery would be avoided if third party overlashers were required to pay rent. PacifiCorp's histrionic description of an attacher going into the pole access business and denying utility customers their due, is beyond the pale. Utility customers would incur no costs for third party overlashing, just as they incur no costs for first party overlashing. In addition, allowing third-party overlashing without additional rent would possibly lower rates for communications services and Utah consumers.

E. Audit Costs

Comcast believes that the Division should be required to explain why it would be difficult for a pole owner to recover audit costs[101] through the annual rent. Indeed, URTA members consider audit costs a cost of doing business and, therefore, support recovering their costs through the annual rent. For URTA, recovering costs that cannot be specifically allocated

(...continued)
to the pole is a tangible demonstration of enhancing competitive opportunities in communications."); *see also* 2001 Pole Order at ¶ 75 ("Allowing third party overlashing reduces construction disruption and associated expenses which would otherwise be incurred by third parties installing new poles and separate attachments.").

99 *Id*.

100 2001 Pole Order at ¶ 76.

101 *E.g.*, costs incurred for determining compliance with applicable safety codes and permitting processes.

to an individual attacher through the annual rent, simplifies the process and ensures that it recovers its costs.[102]

Additionally, as set forth above, the FCC requires that costs incurred for all attachers, and not for a particular attacher, be booked to the appropriate FERC and ARMIS Accounts to avoid over-recovery. Allowing pole owners to charge attachers directly for audits often engenders protracted disputes because costs are often allocated unfairly, as the Commission has experienced first-hand. Worse, the pole owner often charges each attacher for the entire cost of the audit, thereby making a profit.

The Agreement defines "audits," as a "*periodic* examination of the Pole Owner's poles…for the purposes of…i) verifying the presence or location of all Attachments…or ii) determining whether Licensee is in compliance with [safety] requirements and specifications…" Audits are the equivalent of periodic, routine inspections, the costs of which the Division argues "should be included in the annual pole attachment rate."[103] Consequently, Comcast does not understand how the Division reconciles these two positions.

Additionally, given that Comcast was forced to file a request for agency action following PacifiCorp's last audit, for which Comcast was overcharged more than $3 million, Comcast is particularly skeptical of PacifiCorp's claim that attachers would be better off if audit costs were charged directly, rather than through the rent.[104] For these reasons, Comcast supports URTA's amendments to Section 3.24, but would delete all references to disputed amounts, in the third to last sentence.

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102 URTA Brief at p. 5.

103 Division Brief at 5.

104 PacifiCorp Brief at p. 21.

F. Easements

As Comcast discussed in its opening brief, the current language in Section 3.11, does not, as the Division suggests, "merely clarif[y] that the contract itself does not give a legal easement or right-[of]-way and that such right must exist regardless of a pole attachment agreement."[105] Rather, it specifically claims and represents that a right of entry to the land does not exist. Such language is overreaching and improperly presumes to determine and interpret existing law regarding easements and land use. PacifiCorp's recitation of Utah law notwithstanding, the remaining language will satisfy the parties' needs to clarify that the licensee is responsible to secure permission to enter upon certain land. Accordingly, Comcast reiterates its request that the first sentence of Section 3.11 be removed, in accordance with URTA's proposal.

URTA's amendment to Section 3.11 provides that the attacher's application is a representation that the attacher has the requisite authority.[106] URTA's proposal effectively addresses the concerns of the Division and some pole owners by clarifying that the attaching party is responsible to acquire any necessary authority to access land and indemnifies the pole owner for any failure to do so. Therefore, Comcast urges the Commission to adopt URTA's amended language for Section 3.11.[107]

G. Relocation Costs

Contrary to the Division's misunderstanding that attachers object to incurring costs resulting from a pole owner's reclamation of "reserved space," Comcast agrees to pay to maintain its attachments when the pole owner has allowed Comcast to use reserved space, pursuant to a bona fide plan, in accordance with the current language in Section 2.03

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105 Division Brief at p. 8.

106 URTA Brief at p. 6.

107 *Id*.

(Reservation of Rights).[108] The actual dispute is whether attachers should be required to pay to upgrade pole owner plant in order to serve pole owner customers, when the attacher *does not occupy reserved space* pursuant to a bona fide plan. The current language in Section 3.12 confuses the issue. Moreover, Section 3.12 does not prohibit the pole owner from charging the attacher the costs to correct safety violations or other "interference" caused by the pole owner. Instead, Section 3.12, (along with Sections 3.13-3.17) is contrary to existing law, redundant and rife with inconsistencies.[109]

The Division is also mistaken that attachers merely pay the 'incremental cost' associated with pole attachments. *On the contrary, the rental rate charged by pole owners in Utah is* ***fully allocated and pole owners recoup all their costs associated with pole attachments****, including any costs incurred to transfer an existing attacher's attachments, plus a return on their investment.* It is, therefore, unreasonable to force attachers to pay these costs directly when they are incurred for the sole benefit of the pole owner. Forcing attachers to pay fully allocated costs and the cost to transfer their own attachments, so that the utility may serve its own customers (including a competing entity), is contrary to the federal Pole Attachment Act, which, arguably, the Commission is obliged to comply with.[110]

The Commission must also reject PacifiCorp's attempted rewrite of Section 2.03, so that it may reclaim *unreserved* space, contrary to federal law and the parties' understanding. Indeed,

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[108] Comcast supports T-Mobile's request that any reservation of space be limited to one year. *See* Comments of Voicestream PCS II Corporation DBA T-Mobile To Standard Pole Attachment Contract, filed April 15, 2005, pp. 2-3, and the Agreement language attached thereto.

[109] *See generally*, Comcast Brief at pp. 41-45, and Exhibit 3.

[110] *See* 47 U.S.C. § 224(i) ("An entity that obtains an attachment to a pole…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..."). Nothing in section 224 indicates that certified states are allowed to opt out of the Congressionally mandated sections of the Pole Attachment Act, like 224(f)(mandating access) or 224(i).

that issue was resolved early on in the process and that language was not teed up for briefing. Furthermore, PacifiCorp is mistaken that attachers believe that Section 3.12 creates a "perpetual reservation of space." Section 3.17, which gives the pole owner the absolute right to kick the attacher off the pole "at any time" is the provision that "essentially undermines the purpose of allowing a pole owner to reclaim space *only in the event it is reserved pursuant to a bona fide plan"*[111] in Sections 2.03 and 3.12. Those are just some of the internal inconsistencies that makes the current language in Sections 3.12-3.17 problematic and in need of drastic revision.

Comcast has, therefore, offered a comprehensive rewrite of these sections that balances the interests of the parties and comports with Congressionally-mandated, non-discriminatory access principles.[112] In the alternative, Comcast would accept URTA's amendments to Sections 3.13 through 3.17, as long as the Commission clarifies that (1) under no circumstances are pole owners allowed to charge attachers to correct safety violations caused by the pole owner or other attachers and (2) pole owners must always pay their fair share for any work from which they benefit.

H. Disputed Bills

Despite PacifiCorp's claim that a pole attachment agreement is like "any commercial agreement,"[113] it is well-settled that utilities maintain a superior bargaining position when negotiating pole attachment agreements.[114] Therefore, while Comcast does not object to paying

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111 Comcast Brief at p. 45.

112 *Id*. at Exhibit 3.

113 PacifiCorp Brief at p. 30.

114 *See* note 54, *supra*. Indeed, PacifiCorp contradicts itself in the next section, regarding indemnity, by reminding the Commission "that a pole attachment agreement is not a relationship sought by the pole owner. PacifiCorp Brief at 31. Typically, both parties to a commercial agreement are willing participants. That is why pole attachments, including the agreements, are subject to regulation—because one party is not willing and has the upper hand in bargaining.

amounts that are reasonably due, Comcast does object to paying disputed amounts. In light of PacifiCorp's recent attempts to collect millions of dollars in disputed fees from Comcast,[115] the Commission should reject any proposal that forces a licensee to pay disputed amounts.

Similarly, the Division has offered nothing in its brief that supports retention of the current language in Section 5.03. In fact, retaining that language and forcing attachers to pay disputed amounts would undermine effective pole attachment regulation by giving pole owners untoward leverage over attachers, contrary to the very purpose of this proceeding. For example, it is not uncommon for pole owners to shut down attacher projects in order to pressure the attacher into paying an unrelated, disputed invoice.[116]

Accordingly, Comcast fully supports the revisions to Section 5.02 proposed by URTA. URTA's language provides that the parties should settle any disputed charge prior to payment, providing for a balanced remedy that levels the playing field between the parties.

I. Indemnity, Liability and Damages

Comcast was extremely disappointed to see that the Division offered an indemnity proposal that exempts pole owners from liability caused by a pole owner's negligence. The Division's proposal holds pole owners responsible *only* for their "gross negligence" or "intentional conduct."[117] The Division's proposed language for Section 9.01 not only contradicts the position taken by the Division in the technical sessions and as described in its brief, but, exempting a public company from negligence also seems contrary to public policy. Moreover,

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115 *See Comcast v. PacifiCorp*.

116 Consider the dispute between Comcast and PacifiCorp. In 2003, PacifiCorp shut down Comcast's upgrade, not because of safety issues, but because Comcast and PacifiCorp were in an unrelated dispute over unauthorized attachment invoices. Eventually, after a three month suspension of its upgrade, mainly to the detriment of Utah's consumers, Comcast was forced to pay certain disputed amounts in order to continue the upgrade, even though much of those costs were later refunded.

117 Division Brief at p. 12.

the Commission is obligated to ensure that all the rates, terms and conditions in a pole attachment agreement are just and reasonable. Non-reciprocal indemnities that unfairly hold one party responsible for another party's negligence are neither just nor reasonable.[118]

By the same token, PacifiCorp's proposal, which is a broad, non-reciprocal indemnity clause that holds attachers responsible for everything but the pole owner's gross negligence and intentional misconduct, is also unreasonable and must be rejected. Although PacifiCorp asserts that attachers are "uninvited tenants" with absolutely no rights, attachers pay fully allocated rents and are customers of the pole owners.[119] Attachers should be treated accordingly.[120]

Finally, any language that allows a pole owner to recover "attorneys' fees" must also be stricken. Pole owners already recover their attorneys' fees and other legal costs in the annual pole rent and may not recover them again, in the event of a lawsuit.[121] Accordingly, Comcast urges the Commission to adopt the reciprocal indemnity language in Comcast's opening brief.[122]

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[118] *See Georgia Power*, ¶ 31 (rejecting Georgia Power's attempt to include a non-reciprocal indemnity in a pole attachment agreement and stating "[a] reciprocal indemnification provision…simply would result in each party assuming responsibility for losses occasioned by its own conduct. Consequently, if Georgia Power is correct that the Cable Operators more frequently are the 'bad actors,' then the Cable Operators more frequently would be called upon to indemnify.").

[119] Remarkably, PacifiCorp characterizes its agreement to exempt attachers from PacifiCorp's gross negligence and intentional misconduct, as a "concession." PacifiCorp Brief at p. 32. It is Comcast's understanding, however, that parties to a contract may not exempt themselves from their own gross negligence or intentional misconduct.

[120] In the alternative, Comcast does not necessarily object to Qwest's proposal, which at least holds the attacher responsible only for its own actions. See Qwest redline at Section 9.1. Comcast does, however, object to paying attorneys fees, as those costs are recovered in the annual rent. *See* note 121, *infra*.

[121] *See Georgia Power* at ¶ 18 (finding unreasonable a provision in a pole attachment agreement allowing the utility to recover for the "reasonable costs and expenses in the enforcement of this agreement;" and stating that "[t]hrough the annual rate derived by the Commission's formula, an attacher pays a portion of the total plant administrative costs incurred by the utility. Included in the total plant administrative expenses is a panoply of accounts that covers a broad spectrum of expenses. A utility would doubly recover if it were allowed to receive a proportionate share of these expenses based on the fully-allocated costs formula and additional amounts for administrative expenses. The allocated portion of the administrative expense covers any routine administrative costs associated with pole attachments, such as billing and legal costs associated with administering the agreement.").

[122] *See* Comcast Brief at pp. 47-48.

J. Insurance and Bond

1. Insurance

With regard to Qwest's insurance language, the 5 million dollar limits are too high. Moreover, Comcast objects to PacifiCorp's proposed Section 10.6, requiring a separate Railroad Protective Liability Insurance Policy. While Comcast does not believe it is possible to incorporate a single insurance provision that suits all pole owner or attacher needs, Comcast has no objections to the language offered by URTA, which appears to be a redline of PacifiCorp's original insurance language.[123]

2. Bond

Comcast does not believe a bond is necessarily appropriate. Most payments in this Agreement, including rent, are required to be made up front. Moreover, Comcast has no objection to making up front make-ready payments, as long as there is a true-up following the work. Therefore, rather than include a provision allowing the pole owner to require a bond at any time, the agreement should instead allow a pole owner to require some type of security in the event a particular attacher fails to make a required reimbursement. Please refer to the language suggested by Comcast in its opening brief.

Article X Bond Requirement

> After a failure by Licensee to reimburse Licensor for costs incurred as required hereunder, Licensor may require a bond assurance or other financial security in a form satisfactory to Licensor in such amount as Licensor may reasonably require (not to exceed twice the unpaid amount), to guarantee the performance of Licensee's obligations under this Agreement. Licensee's provision of the bond or financial security shall not operate as a limitation upon the obligations of Licensee hereunder. Notwithstanding the foregoing, to the extent Licensee has made reimbursements as required hereunder for a period of one year after any delinquency, Licensor

[123] *See* URTA Brief at pp.11-12.

> shall promptly return and/or remove any requirement for a bond, assurance or other financial security as specified under this section. The Bond shall not be used for disputed fees.

To the extent the Commission does require a bond, Comcast supports URTA's bond language.[124] While Comcast has no real problems with the language offered by PacifiCorp for Section 10.3, Comcast does object to the "credit worthiness" language included in PacifiCorp's redline. Division Staff specifically rejected similar language early on and PacifiCorp has nevertheless improperly used its brief as an opportunity to attempt to resuscitate it.

III. CONCLUSION

Comcast's recommendations in its initial brief and herein, are designed to implement the kind of effective pole attachment regulation the Commission sought when initiating this process. Comcast's proposals are reasonable, balanced and will serve the public interest by making advanced communications services available at lower prices, and, at the same time, promote a cooperative joint-use environment, thereby reducing disputes.

[124] *Id*. at pp. 13-14.

RESPECTFULLY SUBMITTED this 13th day of May, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of May, 2005, an original, five (5) true and correct copies, and an electronic copy of the foregoing **REPLY BRIEF OF COMCAST ON UNRESOLVED TERMS AND PROVISIONS OF THE STANDARD POLE ATTACHMENT AGREEMENT** were hand-delivered to:

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