Stephen F. Mecham (4089)
Callister Nebeker & McCullough
10 East South Temple Suite 900
Salt Lake City, UT 84133
Telephone: 801-530-7300
Facsimile: 801-364-9127
Attorneys for Utah Rural Telecom Association

**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

| | |
|---|---|
| In the Matter of an Investigation into Pole Attachments | Docket No. 04-999-03<br><br>Utah Rural Telecom Association ("URTA") Reply Brief on Proposed Pole Attachment Standard Contract |

On April 15, 2005, the URTA filed its initial brief on the proposed pole attachment standard contract in compliance with the schedule established in this matter by order of the Public Service Commission dated March 25, 2005. The Division of Public Utilities ("Division"), PacifiCorp, Qwest, Comcast, T-Mobile, and UTOPIA also filed initial briefs in this case on April 15, 2005. In accordance with the March 25, 2005 scheduling order, the URTA submits this reply brief in response to the briefs of the other parties on the remaining 10 disputed issues in the standard contract.

## I. Introduction

This case erupted for the URTA when PacifiCorp unilaterally more than doubled the annual telecommunications pole attachment rate to over $27 per pole. The new rate was to become effective July 1, 2004. URTA members believed the rate was patently unjust and unreasonable and sought Commission intervention and review. To worsen matters, PacifiCorp performed a pole audit which URTA members knew was flawed and then imposed penalties for alleged unauthorized attachments. Those three events - the proposed rate, the flawed inventory, and the imposition of penalties turned pole attachment relationships upside down. The URTA

urges the Commission to restore certainty to the pole attachment relationship by resolving as many of the disputes between the parties as possible through this standard contract proceeding and the companion pole attachment rulemaking.

In PacifiCorp's introduction to its initial brief, PacifiCorp offered its interpretation of the meaning of the standard contract and the rate method established in the pending pole attachment rule. PacifiCorp suggested that the standard contract is simply a safe harbor that can be rebutted in particular cases, but URTA believes it means more than that. The standard contract should always be available to an attaching entity without any negotiations or wasted resources after the Commission approves it if the terms are sufficient for the attaching entity. The only exception occurs in R746-345-3 C. of the proposed rule if the pole owner and the attaching entity voluntarily and mutually agree to negotiate an alternative contract. If that is not true and one party can unilaterally seek changes that the other party opposes, the value of the standard contract and of this proceeding is significantly diminished. There will be no certainty in the contract and the parties to this proceeding will have expended time, effort, and resources for nothing.

The URTA also disagrees with PacifiCorp's interpretation of the rate method established in the proposed rule as nothing more than a default rate methodology that is presumed to be just and reasonable. PacifiCorp argued that any other method approved by the Commission could supplant the method in R746-345-5, but that contradicts R746-345-5 B. that states: "The following formula and presumptions **shall** be used to establish pole attachment rates." (*Emphasis added*.) There is no discretion in the rule to use a different formula unless the Commission amends the rule in a new rulemaking. To allow the formula to be altered on a case-by-case basis without any additional rulemaking would defeat the purpose of the rule to restore

certainty to the pole attachment relationship and to avoid future disputes between pole owners and attaching entities.

## II. Remaining Disputed Issues in the Standard Contract

### A. Fees

In the initial brief, URTA argued in favor of recovering as much of its pole attachment costs as possible through the annual pole attachment rental rate. URTA members do not have separate divisions to address pole attachment requests. Technicians do pole attachment field work while they are in the field pursuing other duties. Pre and post-construction inspections and removal verification are typically among an assortment of tasks the technicians perform in the ordinary course of their business. Cost recovery through the rental rate calculated under UAR R746-345-5 generally reflects the way URTA members operate and account for their costs.

#### 1. Application fees

The URTA enumerated three fees that could be charged separately from the rental payment: an application fee; charges for Make-ready Work; and a fee for unauthorized attachments. Comcast argued that an application fee is a recurring cost for pole owners recovered in the annual rate. While the URTA would like to recover application costs in the annual rate, and PacifiCorp may recover them that way, URTA does not. URTA members receive few pole attachment requests and those they do receive create an unaccounted for, unrecovered cost to process the application. The companies incur the expenses of the people in the office who process the applications whether or not an attaching entity submits an application. Processing applications is not something they absorb in their ordinary work. The cost does not recur, so if it is not recovered in the annual rental rate and there is no separate charge, the URTA members do not recover it.

### 2. Make-ready Work and Unauthorized Attachment Fees

There is no dispute among parties that Make-ready Work should be paid for separately from the annual pole attachment rental payment. The only disputes with respect to Make-ready Work are the timeframes in which the work must be performed and whether or not an attaching entity should have to pre-pay the Make-ready Work estimate. Those issues are addressed below.

There is also no dispute that a fee for unauthorized attachments charged separately from the annual pole attachment rental rate is justified in order to encourage compliance. The disagreement is over how much the fee should be. URTA recommends that the Commission establish a uniform fee and not leave that to the imagination of the parties. Comcast suggested that the fee or penalty reflect five years of back rent in order for the penalty to bear some relation to the economic harm suffered by the pole owner. URTA believes that is a reasonable standard and urges the Commission to set the fee on that basis now rather than doing so in a cost docket as the Division suggested in its brief.

## B. Timeframes

URTA recommended that the timeframes to approve or deny pole attachment applications and to give notice if Make-ready Work is required should be shortened from 45 days currently in the contract to 30 days. The Division took the same position. In addition, both the URTA and the Division advocated a 30-day period in which to perform the Make-ready Work and a provision to allow an attaching entity to do the work or hire an independent contractor if a pole owner is unable to perform the work within the required time period. URTA can meet these timeframes and believes it would simplify the contract and the attachment process. If the Commission concludes that 45 days is more reasonable, the URTA recommends that the period

be fixed at 45 days and the other provisions for completing the work or hiring an outside contractor that the URTA has suggested be included as part of the contract.

URTA does not object to the prepayment of the estimated costs to perform Make-ready Work as long as the costs are trued up at the conclusion of the work. Prepayment, however, should reduce or eliminate the need for an attaching entity to post a bond as discussed below in the section on bonds.

**C. Service Drops**

URTA believes there is no reason to subject service drops to the application process. Additional service drops attached within the existing space of an attaching entity's attachment on a pole are not new attachments. URTA agrees that when a service drop is an attaching entity's first on a pole or is attached outside an attaching entity's one foot of space, the attachment is new and the attaching entity should pay pole owners annual rent for it. Rather than requiring an application for these attachments as PacifiCorp argued, the URTA believes that quarterly, after-the-fact notice to the pole owner should suffice. If the service drop attachment is not new there is no need for quarterly notice. The attaching entity's notice for the new service drops, however, must have enough information for the pole owner to be able to identify the pole and charge rent for the attachment. The URTA believes there is no reason for the Commission to require anything more for service drops. The last paragraph Section 3.02 of the contract should be amended as follows:

> Licensee shall have the right to install service drops without prior approval by Pole Owner. ~~unless~~If a ~~the~~ service drop is ~~the~~Licensee's first Attachment on a pole or is placed outside the space used by another Attachment of Licensee, it is a new Attachment and Licensee shall notify Pole Owner of these Attachments on a quarterly basis and pay Pole Owner the annual rental charge for each Attachment. ~~However, w~~When Licensee installs any service drops, Licensee must follow all other 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, no

notification shall 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. Required notifications of service drop installations shall contain information identifying the pole to which the service drop was added.

**D. Overlashing**

URTA does not believe it is necessary to require prior notice, an application, a permit, or a fee from a Licensee for overlashing so long as the overlash does not overburden the pole. URTA agrees with the Division's position that a licensee that overlashes should give after-the-fact notice to the pole owner. That would require additional language in URTA's proposed third paragraph of Section 3.01 of the contract. The URTA makes the following proposal:

> Section 3.01
> Licensee is not required to make written application to the Pole Owner prior to overlashing equipment to any existing Attachments or other equipment already attached to Pole Owner's poles. Licensee shall ensure that all overlashes conform with the construction and other standards and terms set forth in the Agreement and Licensee shall be responsible for any nonconformance whether made by Licensee or a third party. Licensee shall submit quarterly notice to pole owner of all of Licensee's new overlashes and of any third party's new overlashes attached to Licensee's equipment.

Such a requirement ensures that a pole owner is aware of the attachments on its poles and may help address the concern of poles becoming overburdened.

As currently written, Section 5.04 of the proposed contract requires that compensation from third parties who overlash Licensees' equipment be paid to the pole owner. Comcast maintains that that provision is anticompetitive. It is unclear how frequently third parties overlash, but if a licensee is allowed to charge a third party overlasher without remitting any compensation to the pole owner, the licensee has an economic incentive to have as many third parties as possible overlash its equipment. At some point, the pole will become cluttered and overburdened. Pole owners forgo any revenues from third party overlashes even though their poles are the foundation of the original attachment and overlashes. In an attempt to eliminate the

incentive to clutter poles and to mitigate the concern of double recovery by the pole owner, the URTA concurs in Comcast's alternative recommendation that the licensee and the third party overlasher each pay half the attachment rental rate to the pole owner. If the overlash burdens the pole, the third-party overlasher should bear the cost of remediation. This recommendation balances the interests of the parties with the public interest.

### E. Audit Costs

In the initial brief, the URTA recommended that costs of audits be recovered through the rental rate and, to the extent that does not happen, the parties who request or who participate in an audit bear their own costs of participation. The most recent PacifiCorp audit created controversy and discord that is far from settled. URTA continues to question the accuracy of the audit and has examples of cases where some URTA members were charged for attaching to their own poles. PacifiCorp's concern that small attachers will subsidize larger attachers if costs are recovered through the rental rate pales in comparison to the difficulty caused by PacifiCorp's audit. Following resolution of this proceeding, URTA members will still have to sort through and untangle that audit to verify the pole count to ensure they are not being charged for use of their own poles.

Audit procedures need serious review and improvement, but even if the audits are improved, URTA maintains that cost recovery for audits should be through the rental rate. If those costs are not recovered in the annual rental payment, participants should bear their own costs of participation. Accordingly, Section 3.24 should be modified as the URTA has recommended.

## F. Easements

Nothing other parties argued in their initial briefs has changed URTA's position on Section 3.11 concerning easements. Licensees must obtain the underlying required authority to accompany their pole attachments, but they need not produce documented proof to the pole owner as part of the application process. Eliminating the first sentence of the section does not shift the burden from the licensee. URTA has retained the changes to Section 3.11 that it made in the initial brief but proposes rearranging the section as follows:

> Section 3.11
> ~~The right of access to Pole Owner's poles granted by this Agreement does not include any right of access to the land upon which the pole is situated nor does it include any right to cross the land from pole to pole with Licensee's Equipment and such access rights are specifically disclaimed.~~ Licensee is solely responsible for obtaining from public authorities and private owners of real property and maintaining in effect any and all consents, permits, licenses, easements, rights-of-way or grants that are necessary for the lawful exercise by Licensee of the permission granted by Pole Owner in response to any application approved hereunder. Licensee's Application is Licensee's representation to Pole Owner that Licensee has, for the poles specified in its application, obtained easements or licenses from public authorities and private owners of real property affected by the Application to place and maintain its Attachments at the location of the poles. Licensee agrees to indemnify, defend and hold harmless Pole Owner against and from any and all third party claims, demands, law-suits, losses, costs and damages, including attorney's fees, to the extent arising from Licensee failure, or alleged failure to have the requisite authority.

The Division contended that the first sentence of Section 3.11 merely clarifies that the contract does not grant an easement, but the sentence is unnecessary. The second sentence is clear that the licensee is solely responsible to obtain the required permits. URTA's new language states that a licensee's application is its representation that it has the requisite underlying authority to cross the land beneath the poles. There is no need for the licensee to produce documents as a prerequisite to execute a pole attachment contract. Licensee's indemnification should protect pole owners against private landowners' claims if the licensee fails to acquire the

requisite authority. URTA's proposed language in Section 3.11 strikes the appropriate balance between the two parties.

If the Commission believes additional compromise language is necessary, the URTA would consider amending PacifiCorp's proposal on page 25 of its initial brief to allow a pole owner to request evidence of requisite authority if an affected property owner complains that a licensee has failed to obtain it. Under that circumstance, the URTA would propose the following sentence to be inserted at the end of URTA's new language in the section: "In the event an affected property owner complains to Pole Owner that an attaching entity does not have a required easement, license, or other permit, Licensee must provide evidence of the requisite authority upon request by Pole Owner." This language addresses an immediate concern without complicating or prolonging the application process.

**G. Relocation Costs**

URTA stated that insofar as relocation of attachments is concerned, the guiding principle should be that cost causers pay. The party requiring that attachments be relocated should be responsible for all relocation costs, including those of other attaching entities, unless the relocation occurs at the request of a property owner or public agency controlling the right-of-way. That principle is reflected in the URTA's proposed changes to Sections 3.12 – 3.17 of the contract and the URTA urges the Commission to adopt those changes.

PacifiCorp is concerned that Sections 3.12 and 2.03 of the proposed contract will prevent it from reclaiming space on its poles to serve its core utility customers unless reclaiming the space was included in PacifiCorp's bona fide development plan decades before the need to reclaim the space arises. If that is true, the URTA concurs in PacifiCorp's changes to those two sections. If, however, pole owners are able to update their development plan periodically as

growth in their respective territories develops, PacifiCorp's proposed amendments are not necessary. A utility pole owner must be able to serve its customers without interference and without incurring unnecessary costs, but pole owners should not be able to act arbitrarily.

Comcast and PacifiCorp each oppose the last sentence of Section 3.14 for opposite reasons: Comcast because pole owners pay nothing for a pole change-out and PacifiCorp because they do. Given that under this section a pole is changed for the sole benefit of the licensee, the language should be clear that the pole owner bears no cost for the change, even if there is a benefit to the pole owner. No cost should be imposed on the owner that the owner did not cause.

URTA made no change to Section 3.15 and simply rearranged Section 3.16. In Section 3.17, URTA proposed eliminating the first sentence to ensure that there is some standard when attachments are relocated. If the Commission determines that the sentence should not be deleted, it will need to be amended to be consistent with the rest of the contract. PacifiCorp argued that the sentence requires relocation only when that is reasonably necessary, but that is not correct. The reference to reasonable is directed at the notice a pole owner must give to a licensee. URTA is concerned that the pole owner has too much discretion to require relocation and could act arbitrarily under the authority of the first sentence.

### H. Disputed Bills

URTA does not believe amounts in dispute on a bill should be paid until after the dispute is resolved. This position has been influenced by the URTA's experience in this proceeding. As stated above, PacifiCorp unilaterally increased its annual pole attachment rate to more than $27 and used a flawed pole inventory that astronomically inflated the URTA members' bills. The URTA members have withheld payment to PacifiCorp to await the outcome of this proceeding.

The Division's proposed compromise of withholding funds for 60 days pending settlement would not have helped in this case. Imposing the burden on the URTA to pay first and then prove that PacifiCorp's pole inventory is flawed violates principles of fundamental fairness. PacifiCorp commissioned the inventory; it is PacifiCorp's burden to prove the inventory is correct before it is paid based on that pole count.

The URTA members do not dispute that they owe something to PacifiCorp for pole attachments. They want to be certain, however, that they do not overpay and then be forced to spend resources to recover the overpayment. The position the URTA is advocating puts PacifiCorp in no worse of a position than PacifiCorp is recommending for the URTA. It just leaves the onus on PacifiCorp to prove the accuracy and reasonableness of its own actions. For these reasons, the URTA urges the Commission to adopt the changes the URTA proposed to Section 5.03 of the contract.

## I. Indemnity, Liability, and Damages

URTA proposed in the initial brief that the indemnification provisions of the standard contract be reciprocal. The proposal is based on the language the Division submitted to the Commission in its brief and is intended to ensure that parties indemnify each other except when they have been grossly negligent or have engaged in intentional misconduct. The Division, on the other hand, retained the two exceptions but eliminated reciprocity so that only licensees indemnify pole owners. That is PacifiCorp's compromise as well based on the fact that the pole attachment relationship is a government mandate and, therefore, not voluntary. Qwest proposed to use its SGAT indemnification provision which appears to require that only licensee indemnify pole owner.

None of the other parties' arguments is persuasive. In most commercial contracts indemnification is reciprocal and it is not clear how a government mandate changes that. As both pole owners and attaching entities, PacifiCorp, Qwest, and the URTA stand to benefit from an indemnification provision with mutual applicability.

If the Commission determines that there are particular aspects of the pole attachment relationship or contract for which pole owners should not indemnify licensees, the URTA recommends that the Commission make exceptions with precision rather than establishing a blanket one-way standard.

### J. Insurance and Bonds

An insurance provision is a common part of a standard pole attachment agreement. Although part of the insurance section can be boilerplate language, the requirements for insurance should be tailored to the circumstances and conditions of each licensee. A $1,000,000 liability policy, for example, may not always be appropriate for every contract.

The proposed standard contract allows a pole owner to require a licensee to post a bond to ensure that licensee performs in accordance with the terms of the contract. The need to post bond can be offset significantly by the Commission requiring that licensees pay the estimated costs of Make-ready Work and the annual pole rental payment in advance. During a technical conference in this proceeding, all the parties agreed to make payments in advance for Make-ready Work as long as they were trued-up after the work was completed. Traditionally, the annual rental payment has been paid in advance. PacifiCorp argued that it has exposure as the year for which licensee has prepaid its annual rent comes to an end, but there really is virtually no exposure there.

Another issue that could minimize or eliminate the need for a bond is the credit worthiness of a licensee. If a licensee has a sound credit rating there should be no requirement for a bond. The Commission must ensure that a bond requirement or credit assurances not be used as a barrier to executing a pole attachment agreement.

## III Conclusion

A fair and balanced standard contract that is available for parties to use is essential if the Commission wants to promote the joint use of facilities. It is also important in order to settle the disputes that have arisen between PacifiCorp, the URTA, and other licensees over the issue of pole attachments. The URTA has made recommendations that strike the appropriate balance between pole owners and licensees and would urge the Commission to adopt its recommended changes to the Division's filed standard contract.

Respectfully submitted this 13th day of May, 2005.

Callister Nebeker & McCullough

_____

Stephen F. Mecham
Attorneys for the URTA

**Certificate of Service**

I hereby certify that on the 13th day of May, 2005, I electronically mailed, or sent through the U.S Mail postage prepaid, a true and correct copy of the foregoing URTA Reply Brief on the Proposed Pole Attachment Standard Contract to the following:

Michael Ginsberg
Assistant Attorney General
160 East 300 South, 5th Floor
Salt Lake City, Utah 84111
mginsberg@utah.gov

Reed Warnick
Assistant Attorney General
160 East 300 South, 5th Floor
Salt Lake City, Utah 84111
rwarnick@utah.gov

Krystal Fishlock
Division of Public Utilities
Heber M. Wells Bldg.
160 East 300 South
Salt Lake City, Utah 84111
kfishlock@utah.gov

Brad Cahoon
Snell & Wilmer L.L.P.
15 West South Temple Suite 1200
Salt Lake City, Utah 84101
bcahoon@swlaw.com

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

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

Davidson Thomas
Jill Valenstein
Hogan & Hartson L.L.P.
555 Thirteenth Street, NW
Washington, DC 20004
dthomas@hhlaw.com
jvalenstein@hhlaw.com

Jerry Oldroyd
Ballard Spahr Andrews & Ingersoll
201 South Main Street Suite 600
Salt Lake City, Utah 84111
oldroydj@ballardspahr.com

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

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

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

Robert Brown
Theresa Atkins
Qwest Services Corporation
1801 California Street, 10th Floor
Denver, Colorado 80202
robert.brown@qwest.com
Theresa.atkins@qwest.com

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

Charles Best
Electric Lightwave, LLC
4400 N.E. 77th Avenue
Vancouver, Washington 98662
charles_best@eli.net

Danny Eyre
Bridger Valley Electric Association, Inc.
P.O. Box 399
Mountain View, Wyoming 82939

Carl Albrecht
Garkane Energy Cooperative, Inc.
120 West 300 South
P.O. Box 465
Loa, Utah 84747
calbrecht@garkaneenergy.com

LaDel Laub
Dixie Escalante Rural Electric Association
71 East Highway 56
HC 76 Box 95
Beryl, Utah 84714-5197
michael_woods@cable.comcast.com

William J. Evans
Vicki M. Baldwin
Parsons Behle & Latimer
One Utah Center
201 South Main Street, Suite 1800
Salt Lake City, Utah 84145-0898
BEvans@PBLWest.com

David J. Shaw
UTOPIA
1385 West 2200 South #302
West Valley City, Utah 84119