

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

Martin J. Arias, Esq.
Comcast Cable Communications, LLC
1500 Market Street
Philadelphia, Pennsylvania 19102
Telephone: (215) 320-7316

J. Davidson Thomas, Esq.
Jill M. Valenstein, Esq.
Genevieve D. Sapir, Esq.
Hogan & Hartson, LLP
555 Thirteenth Street, NW
Washington, DC 20004
Telephone: (202) 637-5447

Attorneys for Comcast Cable Communications, LLC

Submitted November 9, 2005

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

)	
)	Docket No. 04-999-03
In the Matter of an Investigation into Pole)	
Attachments)	REPLY TO OPPOSITION TO
)	MOTION FOR CLARIFICATION
)	
)	

Comcast Cable Communications, LLC, formerly Comcast Cable Communications, Inc. (“Comcast”), by and through its attorneys, Ballard Spahr Andrews & Ingersoll, LLP, hereby replies to PacifiCorp’s opposition to Comcast’s Motion for Clarification of the Public Service

Commission's ("Commission") September 6, 2005 letter providing "Commission Direction Concerning Ten Issues Regarding the Pole Attachment Standard Contract" (hereinafter "Commission Directive" or "Directive").

I. INTRODUCTION.

In opposing Comcast's Motion, PacifiCorp fails entirely to address Comcast's concern that a separate line item charge for audit costs will create endless disputes between attachers and pole owners requiring continuous Commission monitoring over the audit process. Instead, PacifiCorp's opposition to Comcast's Motion for Clarification rests largely on its overreaching assumption that the Commission has already directed that the costs of future audits should be recovered as a separate line item on the invoices for pole attachment rent. PacifiCorp's assumption is mistaken. The Commission's Directive merely provides as follows:

Since it is necessary for audits to be conducted, it is a known and anticipated expense. The Commission directs that the estimated cost of the audits be included in the rental rate. The Commission further directs that pole owners work with the DPU and all licensed attaching entities to develop an agreed upon plan as to the type of activities that will be included in the audit shall [sic], the estimated cost of the audit, and appropriate means of converting the expected cost into a rental charge prior to either the inclusion of the audit costs in the rental rate, or the actual implementation of an audit.

See Commission Directive, p. 3.

The Commission's Directive does not, as PacifiCorp suggests, permit pole owners to include a separate line item to the rental invoice to cover audit costs. In fact, the above language from the Commission's Directive specifically states that the "appropriate means of converting the expected cost into a rental charge" is yet to be determined. *Id.* The timing of the "conversion" of the costs into the rental rate is also undetermined. *Id.* In any event, Comcast does not believe the Commission intended to allow pole owners to tack on a line item to the

annual invoice for audit charges. Permitting pole owners to recover audit costs in this manner would not only lead to double-recovery but also continuous disputes over this line item charge.

PacifiCorp further alleges that without a separate line item charge for audits, the cost of such audits will be subsidized by electric rate payers. As set forth below, this allegation is also false.

II. AVOIDING THE NEED FOR FURTHER COMMISSION INTERVENTION.

It is no secret that PacifiCorp's comprehensive 2002/2003 audit was controversial and engendered disputes between PacifiCorp and virtually every one of its attachers in the State of Utah. Contrary to PacifiCorp's claims that "double recovery is not a valid concern," PacifiCorp's over-collection of the costs of that audit, in order to generate revenue, led several attachers to complain to the Commission about PacifiCorp's tactics. The Commission has already expended a great deal of time and resources resolving the protracted disputes resulting from that audit, not the least of which was between Comcast and PacifiCorp. Disputes between PacifiCorp and other attachers are ongoing.

The best way to avoid a similar outcome in the future is to ensure that pole owners are required to recover for activities like audits that benefit all attachers, including pole owners, as a cost of doing business (*i.e.*, booked to the appropriate FERC account that factor into the annual rental formula). For this reason, the Commission has proposed rules that demand that the "rental rate shall be based on publicly filed data and must conform to the Federal Communications Commission's rules and regulations governing pole attachments..." *See* Proposed Rule 746-345-5.A., issued November 1, 2005. Allowing pole owners to include an additional charge on top of the annual rate would provide a clear incentive for abuse and would inevitably lead to

even more disputes. Likewise, it would not conform to the proposed pole attachment rule because it would not be based on publicly available and verifiable information.¹

III. RECOVERING AUDIT COSTS THROUGH CARRYING CHARGES IS THE ONLY REASONABLE WAY TO ALLOCATE THOSE COSTS TO ATTACHERS.

The new rate formula included in the proposed pole attachment rules provides pole owners with a mechanism to recover fully allocated costs of pole attachment. As Comcast explained in its briefing to the Commission and in its Motion for Clarification, the Federal Communications Commission (“FCC”) has consistently held that pole owners that charge the fully allocated rental rate recover the “costs attendant to routine inspections of poles, which benefit all attachers,” in the carrying charges and “allocate[such costs] to each attacher in accordance with the Commission.” *The Cable Television Ass’n of Georgia v. Georgia Power Co.*, 18 FCC Rcd 16333, ¶ 16 (2003). Accordingly, any argument that including the cost of future audits in the carrying charge that gets factored into the annual rental rate would cause the utility ratepayers to subsidize communications attachers may readily be dismissed.

Indeed, utility assertions that the fully allocated rental formula does not provide adequate compensation to pole owners and, accordingly, acts as a subsidy to attaching parties is entirely without merit and has been rejected by the Supreme Court. *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. 245, 253-54 (1987) (finding that it could not be “seriously argued, that a rate providing for the recovery of fully allocated cost, including the cost of capital, is confiscatory.”). *See also Alabama Power Co. v. Federal Communications*

¹ Additionally, the Commission’s directive does not account for inaccuracy in audit cost estimation. What happens if the pole owner’s estimated costs of the audit are grossly inaccurate? What if the pole owner ends up profiting from the audit as a result? On the flip side, how will pole owners recover their added costs when their estimates are low? The possibility of under-recovery will motivate pole owners to over estimate audit costs and, therefore, overcharge attachers and profit from the audits.

Commission, 311 F.3d 1357 (11th Cir. 2002) (finding that the FCC formula provides just compensation).

Certified states have also found that the fully allocated rate does not result in a subsidy. According to the California PUC, for example, which codified the FCC cable formula in California, at Cal. Pub. Util. Code § 767.5:

[T]he formula does not result in a subsidy since the formula is based upon the costs of the utility. A subsidy would require that the rate be set below cost. The fact that the rate is below the maximum amount that the utility could extract for its pole attachment through market power absent Commission intervention does not constitute a subsidy. The embedded cost formula prescribed in § 767.5 applies to capital costs, net of accumulated depreciation, and also allows for recovery of the annual operating expenses of the utility's poles and support structures. This formula will therefore reasonably compensate incumbent Utilities for their ongoing operating expenses related to providing access to their support structures.

Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service, R.95-04-043, I.95-04-044, Decision 98-10-058, at 55-56 (Cal. Pub. Util. Comm'n Oct. 22, 1998) (jointly decided) (specifying the costs that pole owners can recover directly, in addition to a standardized annual rental rate, as (1) make-ready and (2) other actual costs incurred for responding to a request for attachment). The Vermont Public Service Board has also addressed this issue. *See* 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, p. 21 (Vt. PSB Oct. 22, 2003) ("Verizon ought to be allowed to inspect the poles [after installation] to assure compliance with construction standards, and to charge the attaching entity for the inspections where violations are discovered. Subsequent inspections, on the other hand, are more likely to be for the benefit of Verizon and all attachers generally, and the cost of those inspections ought to be folded into the pole-attachment rental charge.")

Because the formula adopted by the Commission will allow pole owners to recover the fully allocated costs of pole attachments, recovering the costs of the audit in the carrying charges will not result in a subsidy to attachers.

IV. CONCLUSION.

For the reasons set forth above, Comcast requests that the Commission grant its Motion for Clarification and determine that audit costs should be booked to the appropriate FERC and ARMIS accounts and recovered through the maintenance carrying charge that factors into the rental formula, rather than as a line-item to be tacked on to each annual pole attachment rental invoice. This will allow pole owners to be fully compensated for audit expenditures without the risk of double recovery for attachers.

RESPECTFULLY SUBMITTED this 9th day of November, 2005.

COMCAST CABLE COMMUNICATIONS, LLC

Jerold G. Oldroyd, Esq.
Angela W. Adams, Esq.
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
One Utah Center, Suite 600
201 South Main Street
Salt Lake City, Utah 84111-2221

Martin J. Arias, Esq.
COMCAST CABLE COMMUNICATIONS, LLC
1500 Market Street
Philadelphia, Pennsylvania 19102

J. Davidson Thomas, Esq.
Jill M. Valenstein, Esq.
Genevieve D. Sapir, Esq.
HOGAN & HARTSON, LLP
555 Thirteenth Street, NW
Washington, DC 20004
Telephone: (202) 637-5447

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2005, an original, five (5) true and correct copies, and an electronic copy of the foregoing REPLY TO OPPOSITION TO MOTION FOR CLARIFICATION were hand-delivered to:

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

and a true and correct copy, hand-delivered and electronically mailed to:

Michael L. Ginsberg, Esq.
Patricia E. Schmid, Esq.
Assistant Attorney General
Office of the Utah Attorney General
Heber M. Wells Building, Fourth Floor
160 East 300 South
Salt Lake City, Utah 84114
mginsberg@utah.gov
pschmid@utah.gov

Marlin Barrow
Casey J. Coleman, Utility Analyst
State of Utah
Division of Public Utilities
Heber M. Wells Building, Fourth Floor
160 East 300 South
Salt Lake City, Utah 84114
mbarrow@utah.gov
ccoleman@utah.gov

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

