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STATE OF WASH.  
UTIL. AND TRANSP.  
COMMISSION

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January 14, 1998

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## OVERNIGHT MAIL

Mr. Steve McLellan  
Executive Secretary  
Washington Utilities and  
Transportation Commission  
1300 S Evergreen Park Drive  
Olympia, WA 98504-7250

**Re: Docket No. UT-970723**

Dear Mr. McLellan:

Enclosed for filing are the original and 19 copies of PacifiCorp's additional comments in this docket.

Very truly yours,



James C. Paine

JCP:jlf  
Enclosures

98 JAN 15 AM 10:00

## BEFORE THE

## WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

OF WASH.  
UTIL. AND TRANSP.  
COMMISSION

In the Matter of the Petition for Rulemaking  
by TCI Cablevision of Washington, Inc., to  
Adopt Rules, Regulations and Procedures  
Regarding Attachments to Transmission  
Facilities

Docket No. UT-970723

ADDITIONAL COMMENTS OF  
PACIFICORP

PacifiCorp, an interested party in Docket No. UT-970723 welcomes the opportunity to file Supplemental Comments in this proceeding, augmenting and clarifying its original comments filed on or about November 10, 1997. The Washington Utilities and Transportation Commission's ("WUTC" or "Commission") Notice of Preproposal Statement of Inquiry (CR-101) ("Notice of PSI") issued December 15, 1997, invited interested persons to file additional comments and asked those submitting comments to focus on aspects of the December 3, 1997 workshop discussion not contemplated nor addressed in earlier comments, to respond to TCI Cablevision of Washington, Inc's ("TCI") "White paper" filed on December 3, 1997, and to distinguish those portions of earlier comments which may not be relevant given the workshop discussion.

**1. Scope of Rulemaking.**

The Commission's Notice of PSI clarified the nature and scope of the potential rulemaking indicating that the Commission intends to address the current lack of prescribed rate methodology for attachments to transmission facilities; to confirm the Commission has jurisdiction over attachment rates and is not preempted by the Federal Communications Commission ("FCC"); and to relieve the burden of uncertainty in rate methodology when contractual negotiations between parties are unsuccessful.

**2. Use of Nonuseable Space in Rental Formula.**

The TCI Briefing Paper for the December 3, 1997 workshop, or White Paper, addresses the issue of incorporating space other than usable space into any adopted pole rental formula in the following manner:

1           “PacifiCorp and GTE suggest that the formula to be applied  
2 *today* should be the telecommunications rate which under federal law  
3 would be phased in for telecommunications attachments from 2001-  
4 2006. The current FCC formula is applied today to both cable  
5 operators and to telecommunications carriers. It allocates the cost of  
6 both the useable and nonuseable space in proportion to the amount of  
7 useable space which cable occupies. Electric utilities had asked  
8 Congress to allocate costs of the nonuseable space equally among  
9 attaching parties. The Congress compromised in 1996, and requires the  
10 FCC to develop a use ratio which assigns the costs of useable space  
11 proportionately as under the current formula, but which apportioned two-  
12 thirds of the cost of nonuseable space equally among attaching parties  
13 when the attachment is used *for services other than cable television.*”

8           “Even under the federal model, the telecommunications rate  
9 does not govern until 2006. For five years, the current formula applies  
10 to all attachments. The rate produced by the new formula is to be  
11 phased in in equal annual increments from 2001 through 2006.  
12 Applying that formula to cable television today would defeat two key  
13 elements of the federal formula.”

11           “First, the 1996 Federal Telecommunications Association  
12 deliberately postponed the rate until 2006. The FTA provides a 5 year  
13 window for the deployment of telecommunication facilities at the rents  
14 computed under the FCC formula, and then a phase in thereafter, in  
15 order to avoid the drag on innovation and deployment which high pole  
16 rents would cause in the interim. The phase in was in anticipation that  
17 cable operators or CLECs attempting to compete with ILECs would  
18 need a significant period of time to gain a market footing and pay the  
19 additional rents. No party offers any basis for shortening the phase  
20 in.”

17           “Second, the telecommunications pole rent is intended to apply  
18 only to telecommunications vendors. The 1996 FTA model assures  
19 nondiscrimination by setting telecommunication pole rents at the lower  
20 cable rate, in order to provide nondiscriminatory deployment of both  
21 cable and CLEC lines during the next 5 years.” TCI White Paper, pp  
22 8-9.

21           First, the Commission should require proof in this rulemaking that incorporation of a  
22 portion of nonuseable space costs in a rental formula would create a “drag on innovation and  
23 deployment.” No party has offered any basis for assuming that a deployment drag would  
24 result.

25           Second, neither TCI’s White Paper, the Telecommunications Act of 1996, nor the  
26 Act’s history, provide any legitimate justification for charging telecommunication carriers

1 (albeit over a phased-in period) for a portion of nonuseable space, while not requiring the  
2 same treatment for other licensees, e.g., cable television operators. TCI describes Congress'  
3 phase-in of charging for nonuseable space as a "compromise," but the White Paper sets forth  
4 no justification for differentiating between cable television operator and telecommunication  
5 carrier licensees. The compromise may be nothing more than a reflection of the influence  
6 possessed by the cable television industry lobby. The compromise is not based on any  
7 finding that cable television operator licensee's do not, while telecommunication carriers do  
8 benefit from nonuseable space. Nonuseable space, as well as useable space, benefits all that  
9 use a utility's pole. If the WUTC, based upon a showing in this rulemaking proceeding,  
10 finds that fostering and promoting viable competition in the telecommunications industry  
11 requires a phasing in of the incorporation of nonuseable space in any adopted rental formula,  
12 then the Commission should uniformly apply the phase-in to both telecommunication  
13 providers and cable television operators. Clearly, Congress, by requiring the inclusion of  
14 nonuseable space into a rental formula (albeit in a phased-in manner, allegedly to overcome  
15 initial high deployment costs) has found that nonuseable space is of benefit to users of utility  
16 poles.

17 PacifiCorp maintains that such benefits are afforded to all that place attachments on a  
18 utility pole, regardless of whether the licensee is a telecommunications carrier, a cable  
19 television operator, or both. PacifiCorp has no objection to basing a Washington rental  
20 formula on the FCC methodology but, in order to fully compensate the pole owner,  
21 nonuseable space costs should be incorporated into any rental formula adopted by the  
22 WUTC.

23 **3. Access to Private Rights-of-Way.**

24 Under the Telco Act of 1996, utilities are to provide cable television system operators  
25 and telecommunications carriers with nondiscriminatory access to any pole, duct, conduit, or  
26 right-of-way owned or controlled by it. In its December 3, 1997 comments, PacifiCorp

1 noted that in the FCC's "Interconnection Order,"<sup>1</sup> the FCC concluded that the access  
2 obligations of § 224(f) will depend on whether state law permits such access. TCI's White  
3 Paper sheds no light on Washington law on the issue.

4 First, the White Paper states that Congressional intent underlying the Telco Act  
5 requires a "utility to exercise its eminent domain authority to expand an existing right-of-way  
6 over private property in order to accommodate a request for access, just as it would be  
7 required to modify its poles or conduits to permit attachments."<sup>2</sup> (citing 11 FCC Rcd. 15499,  
8 ¶¶ 11181 (1996)). That does not describe Washington law on whether a cable television  
9 operator or telecommunications carrier licensee can "piggyback" onto any private easement  
10 held by an electric utility which specifies that the utility has the right to construct and  
11 maintain electric facilities.

12 Second, the White Paper refers to the "expanded technology" concept. This concept  
13 may allow new facilities (developed by advances in technology) that essentially perform the  
14 same function as was described in an easement (e.g., replace fiber-optic cable for telephone  
15 conductors) to be installed under the old easement language. However, the concept does not  
16 stand for the proposition that technology has evolved to where "telecommunication facilities"  
17 now perform the same function as "electric facilities" or "electric lines."

18 The White Paper's reference to "third party use of a preexisting easement" describes  
19 the issue, but does not indicate whether Washington law would consider such to be a taking  
20 of the landowner's estate rights, or of the utility's easement rights. The White Paper's  
21 citations are to jurisdictions that have ruled on the issue in favor of the TCI position, but  
22 PacifiCorp submits that the question is not settled in State of Washington.

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24 <sup>1</sup>*Implementation of the Local Competition Provisions in the Telecommunications Act of*  
25 *1996, First Report and Order, CC Docket No. 96-98.*

26


26 <sup>2</sup>*Interconnection Order, ¶¶ 11181 (1996).*

1           In these Additional Comments PacifiCorp attempts to address the Company's principal  
2 areas of interest discussed in TCI's White Paper, distributed at the December 3, 1998  
3 conference. PacifiCorp reserves the right to address these and additional issues in the  
4 rulemaking process.

5           DATED: January 13, 1998.

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Respectfully submitted,

  
Robert S. Coates  
PacifiCorp

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served the foregoing **Additional Comments of PacifiCorp** on  
3 the following named person(s) on the date indicated below by:

4  mailing with postage prepaid;  
5  hand delivery;  
6  facsimile transmission;  
7  overnight delivery

8 to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said  
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