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Submitted June 22, 2004

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

)	
)	Docket No. 04-999-03
In the Matter of an Investigation into Pole)	
Attachments)	COMMENTS OF AT&T CORP. TO
)	THE PROPOSED RULE FILED BY
)	DIVISION OF PUBLIC UTILITIES
)	

AT&T Corp. (“AT&T”) by and through its attorneys, Ballard Spahr Andrews & Ingersoll, LLP, hereby submits its Comments in response to the proposal from the Division of Public Utilities (the “Division”), dated June 3, 2004, setting forth proposed rules governing pole attachment in Utah by the Public Service Commission (the “Commission”).

I.
INTRODUCTION

The Division's proposed formula for determining pole attachment rates incorporates the formula used by the Federal Communications Commission ("FCC") for attachments to poles by cable operators for cable services, 47 C.F.R. § 1.1409 (the "FCC Cable Formula"), with one exception. The Division's proposal uses 1.5 feet as the effective space occupied by the attachment, instead of the 1.0 foot presumption in the FCC Cable Formula. AT&T urges the Commission to adopt the FCC Cable Formula in its entirety.

In addition, AT&T urges the Commission to consider adopting the FCC's conduit rate formula (the "FCC Conduit Formula"). There currently is no specific conduit rate formula in place in Utah, although Qwest Corporation ("Qwest") is obliged under the competitive checklist requirements of 47 U.S.C. § 251 to charge conduit rates consistent with the FCC Conduit Formula adopted under 47 U.S.C. § 224. While it has claimed to do this, it in fact is not charging such rates to AT&T.¹ In addition, there is no conduit rate formula applicable to the conduit of other utilities such as PacifiCorp. As set forth in greater detail in prior submissions in this docket, and below, AT&T continues to believe that adoption of a conduit rate formula is necessary for the Commission to perfect its jurisdiction to regulate the rates, terms and conditions of pole attachments (which include conduits) and remain consistent with its FCC certification in this regard.

¹ This fact has become the subject of a Request for Agency Action filed June 14, 2004. *See AT&T Corp. and AT&T Communications of the Mountain States, Inc. v. Qwest Corporation*, Utah Pub. Serv. Comm'n, Docket No. 04-087-73.

II. **POLE ATTACHMENTS**

AT&T generally supports the comments to the proposed rule filed by Comcast Cable Communications, LLC (“Comcast”) on June 21, 2004, as the comments apply to pole attachments by telecommunications carriers.

The Division’s proposed rate formula, with one exception, appears to adhere to the FCC Cable Formula, which was developed by the FCC to calculate the maximum allowable pole attachment rate that a utility may charge a cable operator providing cable services. The formula proposed by the Division assumes that 1.5 feet is the effective space occupied by the attachment when calculating the maximum allowable rate. In the FCC Cable Formula, the amount of space occupied by the attachment is presumed to be 1.0 foot. The U.S. Supreme Court has repeatedly held that the FCC Cable Formula, including the 1.0 foot presumption, is fully compensatory to the pole owners. *See National Cable & Telecommunication Ass’n v. Gulf Power Co.*, 534 U.S. 327 (2002); *FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987). The impact of the proposed modification would significantly increase compensation to pole owners.

By way of background, the FCC has two formulas to ensure “just and reasonable” rates for pole attachments. *See* 47 U.S.C. § 224(d) and (e); 47 C.F.R. § 1.1409. One formula, the FCC Cable Formula, applies to attachments to poles by cable operators for cable services. The other formula applies to telecommunications attachers (the “FCC Telecom Formula”).² Although similar to the FCC Cable Formula, the FCC Telecom Formula uses a slightly different methodology for determining the proportion of pole space that is attributable to the attachment.

² The Telecommunications Act of 1996 (the “1996 Act”) expanded access to utility poles and conduit under Section 224 of the Communications Act, 47 U.S.C. § 224(a), to cover telecommunications, so that providers of telecommunications services as well as cable operators would be entitled to “nondiscriminatory access” to utility poles and conduit at “just and reasonable” rates, terms and conditions. For purposes of this Section, the term “telecommunications carrier” does not include incumbent local exchange carriers. *See* 47 U.S.C. § 224(a)(5).

The FCC Telecom Formula allocates the cost of the unusable portion of the pole based on the total number of attachers rather than on the portion of space occupied by the attachment.

The Division's formula suggests that the 1.5 foot measure is a blending of the 1.0 foot presumption in the FCC Cable Formula and the methodology used in the FCC Telecom Formula. However, the principle behind Congress' implementation of the two-tiered rate structure was its assumption that there would be a flood of facilities-based telecommunications competitors attaching to poles in the first five years after the passage of the 1996 Act. Congress reasoned that it would be appropriate to start allocating costs across the growing number of entities, rather than to set a fixed cost for all. Unfortunately, Congress' predictions never came to fruition. Competitive telecommunications service providers have not flooded the market as expected. In fact, development of competitive telecommunications services in Utah has been modest, and Qwest still holds the dominant share of the market.³

Because the assumptions of Congress in proposing the two-tiered rate structure were ultimately incorrect, the FCC Telecom Formula has become a telecommunications penalty rather than a means to appropriately allocate costs. Just because Congress made a mistake in assuming the outcome of telecommunications competition, the Commission should not continue to penalize the competitive telecommunications providers by adopting a rule that incorporates the 1.5 foot measure, thereby forcing providers to pay pole attachment fees that are higher than necessary to reasonably compensate pole owners. We believe that the appropriate solution is for the Commission to adopt a single uniform rate, the FCC Cable Formula without modification, for all attachers, whether providing cable services or telecommunications services.

³ See *State of the Telecommunications Industry in Utah*, Sixth Annual Report, October 2003.

III. **CONDUIT**

There are no specific provisions in Utah law which address the rates for conduit. AT&T requests that the Commission adopt the FCC Conduit Formula, as other states have done. The Commission should also adopt regulations governing conduit terms and conditions of occupancy and access. AT&T has attempted unsuccessfully to secure from Qwest the conduit rates that it has represented to the Commission and the FCC, and that it is charging for conduit access. On June 14, 2004, AT&T was forced to file a Request for Agency Action with the Commission concerning Qwest's conduit rates.⁴

Adoption of the FCC Conduit Formula would allow AT&T and other facilities-based competitors who must rely on conduit facilities to enforce fair and reasonable conduit rates as to owners of these essential support structures, as well as to perfect this Commission's jurisdiction to regulate the rates, terms and conditions of pole attachments. The FCC has had over 25 years' worth of experience in regulating pole attachments and conduit and the Commission should reap the benefits of the FCC's expertise.

IV. **CONCLUSION**

For the foregoing reasons, the Commission should adopt the FCC Cable Formula for all pole attachments, including cable services providers and telecommunications services providers. The Commission should also adopt the FCC Conduit Formula for providers using conduit.

⁴ See *AT&T Corp. and AT&T Communications of the Mountain States, Inc. v. Qwest Corporation*, Utah Pub. Serv. Comm'n, Docket No. 04-087-73 (filed June 14, 2004). AT&T and Qwest are also involved in litigation before the FCC. *AT&T Communications of the Midwest, Inc. and AT&T Communications of the Mountain States, Inc. v. Qwest Corporation*, FCC Docket No. EB-03-MD-020 (filed Dec. 2, 2003).

RESPECTFULLY SUBMITTED this 22nd day of June, 2004.

AT&T CORP.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of June, 2004, an original, eight (8) true and correct copies, and an electronic copy of the foregoing **COMMENTS OF AT&T CORP. TO THE PROPOSED RULE FILED BY THE DIVISION OF PUBLIC UTILITIES** were hand-delivered to:

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