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.
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Ave., N.W.
Second Floor
Washington, D.C. 20006
Telephone: (202) 828-9873

Attorneys for Comcast Cable Communications, LLC

Submitted April 14, 2005

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of an Investigation into Pole Attachments	)	Docket No. 04-999-03 **COMMENTS TO CHANGE IN PROPOSED RULE**

Comcast Cable Communications, LLC, formerly Comcast Cable Communications, Inc. ("Comcast"), by and through its attorneys, Ballard Spahr Andrews & Ingersoll, LLP, hereby submits these comments to the proposed pole attachment rules, published on March 15, 2005.

I. Introduction.

While Comcast has generally expressed support for the Commission's prior proposals, with some exceptions,[1] Comcast has important concerns regarding certain new revisions contained in the current proposal. Although Comcast appreciates that the Commission has included several of Comcast's proposals, Comcast still has concerns with certain rule provisions and believes the rules can benefit from further clarifications and revisions.

First, the proposed definition of "Pole Attachment" should be clarified to prevent pole owners from assessing additional rental charges for equipment placed in unusable space and for non-compliant attachments within the allocated space. Second, the rules should be modified to reflect that permitting and applicable processing charges are recurring charges, which pole owners recover in the pole rent charges. Third, the basis for rental rates should be clarified. Finally, to avoid confusion, the rules should expressly identify any modifications from applicable federal rules and regulations.

II. The Definition of "Pole Attachment" Should Be Modified and Clarified.

R746-345-2(C) provides the following definition:

> "Pole Attachment" -- [~~The bolt, bracket, hook, or other~~]All equipment, and the devices used to attach the equipment, of an attaching entity within that attaching entity's allocated attachment space.[~~ secure an attaching entity's equipment to a utility pole of a public utility.~~] A new or existing service wire drop pole attachment that is attached to the same pole as an existing attachment of the attaching entity is considered a component of the existing attachment for purposes of this rule. Additional equipment that meets all applicable code and contractual requirements that is placed within an attaching entity's existing attachment space is not an additional attachment for rental rate purposes.

Id.

[1] *See* Comments of Comcast filed October 1, 2004, December 1, 2004, and February 10, 2005.

Although Comcast recognizes that the definition of "Pole Attachment" has been slightly modified from the last version, which Comcast believed was problematic, Comcast continues to have concerns with this rule. First and foremost, the current definition of "Pole Attachment" excludes any equipment attached outside an attaching entity's "Attachment Space," (*i.e.*, the one foot of allocated *usable* space).[2] The only equipment covered by this definition must be "within that attaching entity's allocated attachment space." As a result, the revised language could be interpreted to mean that equipment typically installed in the *unusable space*, (*i.e.*, outside the allocated "Attachment Space") like risers and power supplies, is not covered under the rule and, therefore, could be subject to unreasonable access denials, monopoly pricing, and unjust and unreasonable terms and conditions. In other words, equipment attached outside the allocated space could be considered unregulated. Comcast is certain that this is not the Commission's intent. Unfortunately, regardless of intent, as written, this provision will invite disputes, contrary to the overall objective of these rules. Accordingly, this definition should be revised.

Comcast suggests that the Commission look to the federal Pole Attachment Act where Congress has defined a "pole attachment" to mean "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."[3] This broad definition ensures that all equipment necessary for cable and competitive telecommunications carriers to provide their services is covered under the rules. Alternatively, the Commission could simply delete the words: "within that attaching entity's allocated attachment space." That revision would have the same effect.

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[2] Under the proposed rule, "Attachment Space" is defined as "[t]he amount of *usable space* on a pole occupied by a pole attachment as provided for in R746-345-5(B)(3)(d)." *Id.* at R746-345-2(D) (emphasis added).

[3] 47 U.S.C. § 224(a)(1)(4).

Redefining the term "Pole Attachment" will not only ensure just and reasonable rates, terms and conditions for all attacher equipment, but it is also consistent with the other aspects of the proposed rules. For example, in the context of wireless attachments, the rules specify that a utility may not include the space occupied by "vertically placed cable . . . or other facilit[ies]" in unusable space when determining the total amount of space used by a wireless carrier. *See* R746-345-5(B)(3)(e).[4]

Unless this rule is revised as Comcast suggests, Comcast believes pole owners will attempt to impose rent, unjust and unreasonable terms and conditions and access denials on equipment attached in unusable space.

Comcast similarly requests that the Commission either clarify or revise the last sentence of the "Pole Attachment" definition. The current language could be interpreted to mean that any "additional" equipment that is non-compliant could be subject to additional rent. As a result, this provision, as written, will result in numerous disputes over whether the Commission intended to allow rental assessments for non-compliant, additional attachments that occupy existing allocated space. Again, Comcast does not believe this is the Commission's intent since allowing pole owners to assess two or more rental rates for attachments existing in the same foot of space would clearly lead to over-recovery.

If "[a]dditional equipment…placed within an attaching entity's existing attachment space," is non-compliant there are other, more appropriate remedies. For example, undisputed provisions of the draft Utah Pole Attachment Agreement ("Agreement") require attachers to

[4] It is well-settled that equipment attached in unusable space is not subject to additional rent. *See, e.g., Texas Cablevision Co., et al. v. Southwestern Elec. Power Co.*, 1985 FCC LEXIS 3818, ¶ 6 (Feb. 26, 1985) ("[I]n adopting a standard one foot for space deemed occupied by CATV, the Commission not only included the space occupied by the cable itself, but also the space associated with any equipment normally required by the presence of the cable television attachment. . . . Moreover, to the extent that this ancillary equipment may occupy the 18-28 feet designated as 'ground clearance,' which by definition is excluded from usable space, it is to be omitted from any measurements.").

conform with "specifications of the NESC and other applicable law as well as any other construction standards approved by the Commission…" *See* proposed Agreement at Section 3.04. Additionally, Section 3.07 of that Agreement requires attachers to correct any "noncompliance." Further, Section 6.01 allows a pole owner to terminate the agreement, among other remedies, for any default. These provisions give pole owners ample ability to ensure compliance with applicable safety standards.

To avoid confusion over this provision, Comcast suggests that the Commission issue two, separate provisions to capture the two, distinct concepts.

The first should read:

> Additional equipment that is placed within an attaching entity's existing Attachment Space is not an additional attachment for rental rate purposes.

The second should read:

> Pole Attachments shall meet all applicable code and contractual requirements.

These provisions would require attachers to meet applicable safety requirements, but would ensure that they would not be subject to separate rent charges for additional equipment within the same foot of space.

III. "Permitting" and "Applicable Processing" Fees Are Recurring and, Thus, Are Recovered in Rental Charges.

Proposed R746-345-3(A)(2) provides:

> The tariff, standard contract or SGAT shall identify all rates, fees, and charges applicable to any pole attachment. The tariff, standard contract or SGAT shall set forth all non-recurring, standard charges for pole attachment work, including permitting, pre-construction surveys, inspections, and applicable processing. Other pole attachment work such as engineering, make-ready, and pole change-out shall also be identified in the tariff, standard contract or SGAT and billed on a time-and-materials basis for costs actually incurred and at rates or charges consistent with

> tariffs, standard contracts, or SGATs on file with the Commission. The tariff, standard contract, and SGAT shall also include but not be limited to:
>
> a. permitting process, inspection process, joint audit process, including shared scheduling and costs, and any non-recurring fee or charge applicable thereto . . . .

Id.

With regard to this section, Comcast believes that the Commission has improperly referred to "permitting" and "applicable processing" charges as "non-recurring" charges. However, any administrative or other costs associated with permitting and applications processing have long been considered "recurring" charges (*i.e.*, a cost of doing business). Periodic inspection and audit charges are also considered recurring costs. These costs are recurring charges that are accounted for in the rental rate formula.[5] In contrast, "[n]on-recurring incremental costs [like pre-construction survey and make-ready charges] are directly reimbursable to the utility and are excluded from the incremental [rental] rate."[6]

Accordingly, Comcast urges the Commission to rectify this error and clarify that recurring costs, such as for applications processing and periodic inspections and audits are "by definition" included in the fully allocated rental rate.[7]

Additionally, with regard to this section, Qwest Corporation filed Comments on April 13, 2005, seeking an additional provision in this Section stating:

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5 *See, e.g., Texas Cable & Telecom. Ass'n v. Entergy Serv., Inc.*, 14 FCC Rcd 9138, ¶ 5 (1999) ("A separate fee for recurring costs such as applications processing or periodic inspections is not justified, if the costs are included in a rate based upon fully allocated costs.") (citing *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Second Report and Order*, 2 FCC Rcd 15, ¶ 44 (1987)).

6 *Id.*

7 Whether or not certain fees may be directly recovered from attachers or must be recovered as part of the rental charge, is one of the disputed Agreement issues. *See* Final Issues List, distributed by Krystal Fishlock on April 1, 2005 (Issue 1).

> The tariff, standard contract and SGAT shall also include but not be limited to . . . d. safety and construction requirements consistent with industry practice and standards, including, at a minimum the National Electrical Safety Code ("NESC"), and a requirement that twisted pair copper cable be the lowest attachment on the pole.

Comcast has no real objection to allowing "twisted pair copper cable [to] be the lowest attachment on the pole." As Qwest represents, the parties agreed to add similar language in the draft Agreement. If the Commission allows this additional language in the rule, however, Comcast requests that any new language also include a requirement that: "On a going forward basis, the party attaching twisted pair copper shall endeavor to attach twisted pair copper cable at the lowest point available to meet applicable standards in order to mitigate unnecessary costs by other attachers." That language is also included in the draft Agreement and was agreed to by the parties. *See* Section 3.04.

Qwest further requests that the Commission add a requirement that parties must comply with the NESC "at a minimum." Comcast objects to the addition of such language. While the NESC is the minimum standard, it is not necessary to exceed those requirements for sound construction.[8] Comcast is concerned that adding this language could give pole owners license to impose stricter standards without justification. Instead, Comcast would be agreeable to language requiring that construction conform to the requirements of the NESC and any other applicable construction standards that are approved by the Commission, consistent with the draft Agreement. *See* Section 3.04.

IV. The Provision Defining the "Basis" for Rental Rates Must Be Clarified.

Proposed R746-345-5(A) provides as follows:

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[8] *See* NESC Handbook, 5th Edition, Purpose 010 (stating that the rules of the "NESC give the basic requirements of construction that are necessary for safety. If the responsible party wishes to exceed those requirements for any reason, he may do so for his own purpose, *but need not do so for safety purposes*.") (emphasis added).

> Basis -- The rental rate for[~~ any~~] pole attachments must, on average, be sufficient to cover the recurring costs experienced by the pole owner as a result of the attachments. A[~~based on a~~] fair and reasonable method that will accomplish this objective is to use the portion of the pole owner's costs and expenses for the pole plant investment that is jointly used by the [~~an~~] attaching entit[~~y~~]ies as a proxy for the incremental costs. The rental rate for any pole attachment shall be based on the pole owner's investment in distribution poles. Any rate based on the rate formula in Subsection R746-345-5(B) shall be considered just and reasonable unless determined otherwise by the Commission.

Although the Commission significantly revised the "Basis" of the rental rate formula in this version of the rule, Comcast continues to find this provision confusing. If the Commission intended to provide that a just and reasonable rate may be equal to the incremental costs experienced by pole owners to make pole attachments available (*i.e.*, the low end of the scale), but that a pole owner may charge fully allocated costs (*i.e.*, the high end of the scale), the Commission should make that plain. As currently written, the Commission's intent is unclear.

If the Commission intends to allow for a reasonable range of recovery, Comcast suggests that an easier, unambiguous way to do so: use the language from the federal Pole Attachment Act. Specifically, the Pole Attachment Act states, in relevant part:

> [A] rate is just and reasonable if it assures a utility the recovery of *not less than* the additional costs of providing pole attachments, *nor more than* an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole. . . ."[9]

Using the language from the Pole Attachment Act would provide clarity in this provision and, in turn, reduce the incidence of rate disputes.

V. The Rules Should Expressly State Any Modifications From Applicable Federal Communications Commission Rules and Regulations.

[9] 47 U.S.C. § 224(d)(1) (emphasis added).

Proposed R746-345-5(B) states:

> Rate Formula -- A pole attachment rental rate shall be based on publicly filed data and must conform to the Federal Communications Commission's rules and regulations governing pole attachments, except as modified by this Section. A pole attachment rental rate shall be calculated and charged as an annual per attachment rental rate for each attachment space used by an attaching entity. The following formula and presumptions shall be used to establish pole attachment rates…

This provision should be clarified to provide precisely how this Section "modifies" the Federal Communications Commission's rules and regulations. Presently, deviations from the FCC's rules and regulations are not entirely evident to Comcast. Comcast does understand that the Commission does not intend to allow pole owners to charge the "telecommunications rate" surcharge allowed under the federal formula,[10] but any other intended deviations are unclear.

VI. Conclusion.

For the foregoing reasons, the Commission should adopt the minor changes discussed in these Comments.

[10] See 47 U.S.C. § 224(e).

RESPECTFULLY SUBMITTED this 14th day of April, 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.
COLE, RAYWID & BRAVERMAN, LLP
1919 Pennsylvania Avenue, NW
Second Floor
Washington, D.C. 20006

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 2005, an original, five (5) true and correct copies, and an electronic copy of the foregoing **COMMENTS TO CHANGE IN PROPOSED RULE** 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.
Assistant Attorney Generals
Office of the Utah Attorney General
Heber M. Wells Building, Fourth Floor
160 East 300 South
Salt Lake City, Utah 84114
mginsberg@utah.gov

Marlin Barrow, 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

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

Krystal Fishlock, Technical Consultant
State of Utah
Division of Public Utilities
Heber M. Wells Building, Fourth Floor
160 East 300 South
Salt Lake City, Utah 84114
kfishlock@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

J. Davidson Thomas, Esq.
Jill M. Valenstein, Esq.
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Avenue, N.W., 2d Floor
Washington, D.C. 20006
dthomas@crblaw.com

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

Genevieve D. Sapir, Esq.
Cole, Raywid & Braverman, LLP
2381 Rosecrans Avenue, Suite 110
El Segundo, California 90245
gsapir@crblaw.com

Curt Huttsell, Ph.D.
Manager, State Government Affairs
ELECTRIC LIGHTWAVE, LLC
4 Triad Center, Suite 200
Salt Lake City, Utah 84180
chuttsel@czn.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.
Qwest Services Corporation
1801 California Street, 49th Floor
Denver, Colorado 80202
Robert.brown@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.
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101
bcahoon@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