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Submitted August 1, 2006

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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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	)	Docket No. 04-999-03
In the Matter of an Investigation into Pole	)	
Attachments	)	<b>COMCAST’S COMMENTS TO</b>
	)	<b>DRAFT POLE ATTACHMENT RULES</b>
	)	
	)	

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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 draft Utah Pole Attachment Rules (“the Rules”), published July 1, 2006. Comcast’s comments will address two issues: (1) timeframes for make-ready work; and (2) clarification of the self-build option.

**I. Timeframes.**

The Rules are specifically designed to provide pole attachers with “nondiscriminatory access to utility poles at rates, terms and conditions that are just and reasonable.” *See* Utah

Admin. Code, R746-345-1(B)(2). In deciding what terms are “just and reasonable,” the Utah Public Service Commission (“Commission”) adopted certain timeframes for applications processing and completion of make-ready work. These specific timeframes provide critical certainty and necessary regulation, which attachers rely on. The July 1, 2006, draft of the Rules contains these specific timeframes but also provides as follows:

As an alternative to all of the time periods allowed for construction below, a pole owner may provide the applicant with an estimated time by which the work could be completed that is different than the standard time periods contained in this rule with an explanation for the anticipated delay.

*See Utah Admin. Code, R746-345-3(C).*

This provision creates several problems. First, it destroys the certainty that the state and federal pole attachment rules were designed to provide. Second, this provision provides pole owners with the ability to circumvent entirely the timeframes set forth in the Rules. Third, such open-ended provisions invite abuse and thwart the deployment and provision of advanced services. Fourth, this provision creates an administrative burden, which slows the pole attachment process further.

**A. The Open-Ended Make-Ready Provision Cited Above Prevents the Certainty That the Timeframes in the Rules Otherwise Provide.**

The Rules were drafted with the intention of making the rights and responsibilities of attachers and pole owners clear. They were constructed to pay particular attention to timeframes in an effort to create certainty that attachers can rely on in making representations to customers about when services will be available. If attachers have no idea when pole owners will choose to respond to requests for attachment or complete necessary make-ready work, they cannot inform their customers as to when services will be available. Attachers cannot function in today’s fiercely competitive communications environment if they cannot get prompt access to poles.

Attachers must have enforceable timetables to effectively compete in the market and cannot rely on a pole owner's discretionary timetables.

Currently, cable operators are competing with direct broadcast satellite (“DBS”) providers, whose access to subscribers does not depend on the unilateral discretion of pole owners. Although cable operators once held a dominant position in multi-channel video distribution, DBS has changed the landscape by gaining a large portion of the core video market. As the FCC has recognized, “[t]oday, almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers.”<sup>1</sup> DBS providers, such as DirecTV, have become formidable competitors and have succeeded in luring away significant numbers of viewers, as well as market share. In fact, DBS has seen nearly double-digit rates of growth in past years, while cable's share of the market is declining.<sup>2</sup> Moreover, it is Comcast's understanding that DBS providers in Utah promise to provide customers service within just 48 hours. If Comcast is unable to gain access to poles necessary to serve a particular customer in a timely manner, it runs a high risk of losing the customer to DBS.

Of equal concern to Comcast is the emergence of broadband over power lines (“BPL”). This technology is touted to provide access to broadband services using electric power lines. BPL offers the potential for the establishment of a significant new medium for extending broadband access to homes and businesses. In fact, the FCC has recognized that because power lines reach virtually every residence and business in every community and geographic area in this country, BPL service could be made available nearly everywhere.<sup>3</sup> Accordingly, it is

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<sup>1</sup> 11<sup>th</sup> Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 20 FCC Rcd. 2775, ¶ 4 (2005).

<sup>2</sup> *See id.* at ¶ 5.

<sup>3</sup> *Amendment of Part 15 regarding new requirements and measurement guidelines for Access Broadband over Power Line Systems/Carrier Current Systems, Including Broadband Over Power Line Systems*, 19 FCC Rcd (continued...)

essential that this Commission assure that utilities do not use their pole ownership to disadvantage their competitors through unreasonable terms and conditions of attachment.<sup>4</sup>

While energy companies are in the process of developing BPL, ILECs now have standards for fiber to the home and plan to offer services that compete directly with cable, such as video-on-demand. In this highly competitive environment, as a non-pole owning attacher, Comcast is concerned that structural opportunities exist for pole owners to use their control over bottleneck pole facilities to delay access. For example, if a pole owner takes advantage of the open-ended provision for the completion of make-ready, Comcast could be delayed for months or years in its ability to provide services to customers that DBS and other service providers can provide within a few days of such request.

The Commission must act with these important competitive considerations in mind. Accordingly, the open-ended make-ready provision, which allows pole owners unlimited time to complete make-ready, should be deleted.

**B. The Open-Ended Make-Ready Provision Gives Pole Owners the Ability to Ignore the Other Timeframes Set Forth in the Rules.**

Utah Admin. Code, R746-345-3(C) provides pole owners with the ability to create substantial delays in the attachment process. Attachers' abilities to provide services will then

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(...continued)

21265, (2005) (for the purpose of adopting rules for broadband over power lines to increase competition and promote broadband service to all Americans).

<sup>4</sup> Congress amended the Pole Attachment Act in 1996 to mandate nondiscriminatory access to ensure that "no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order*, 11 FCC Rcd 15499, 1123 (1996). Indeed, part of the rationale for requiring access was the recognition that utilities could enter competitive lines of business such that there would be additional incentives to deny access to attachers. *Alabama Power*, 311 F.3d 1357, 1358 (11<sup>th</sup> Cir. 2002) ("Perhaps fearing that electricity companies would now have a perverse incentive to deny potential rivals the pole attachments they need, Congress made access mandatory."); *cert. denied*, 124 S.Ct. 50 (U.S. Oct 06, 2003) (No. 02-1474).

depend not on the attachers' resources, but on the whims of the pole owners. The Rules give poles owners up to 180 days to complete make-ready work. Utah Admin. Code R745-346-3(C). These timeframes already substantially slow the attachers' ability to get services to customers in a timely manner, as set forth above. The above provision then gives pole owners an open-ended extension to those timetables as long as the pole owner has an "explanation" for its failure to comply with the timetables.

This could impede an attacher's ability to get service to many customers. For example, if Comcast needs to attach to five poles in order to serve a new subdivision of several hundred potential customers, it could be prevented from ever serving those customers. Pole owners already have 45 days to respond to the application and 120 days to complete the make-ready work. However, as long as PacifiCorp gives an "explanation" for not completing the make-ready within 120 days, as set forth in Utah Admin. Code. R746-345-3(C)(1), it is entitled to push off construction ostensibly indefinitely. In contrast, other service providers can meet customer needs within 48 hours. Comcast, and other attachers, are already at a significant competitive disadvantage without the open-ended make-ready provision that allows pole owners an infinite amount of time to respond to attachment requests. That provision gives the pole owner no reason to meet the specific timeframes set forth in the Rules, and gives the attachers no recourse if the pole owner invokes the open-ended provision. By the time the pole owners get around to finishing the make-ready work, the potential customers in the new subdivision will likely have chosen a DBS or other service provider.

**C. Specific Make-Ready Timeframes Aid in the Deployment of Advanced Services.**

Timely make-ready performance is essential to ensure expeditious pole access. In turn, expeditious access is the key to ensuring the delivery of advanced communications services and

robust competition, all for the benefit of Utah’s residents. To that end, the Rules must contain enforceable timetables for make-ready. Enforceable timetables are consistent with the federal pole attachment rules that were adopted pursuant to the 1996 Telecommunications Act and guarantee that monopoly pole owners cannot abuse their control of the essential pole facility to deny timely access to attachers.<sup>5</sup> Indeed, if pole owners do not complete make-ready work within a reasonable amount of time, the delay jeopardizes Comcast’s ability to provide communications services on a timely and cost competitive basis. Comcast, therefore, urges the Commission to remove the open-ended language in R745-345-2(C).

**D. This Provision May Result in Constant Requests for Agency Action.**

This open-ended make-ready provision creates an administrative burden, which slows the process of pole attachment further. The attachers’ only recourse if a pole owner gives itself an open-ended extension to complete make-ready is to petition the Commission for agency action. The Commission will be placed in the middle of the pole attachment process constantly. This is precisely what the Rules attempt to avoid by eliminating uncertainty between the pole owners and attachers. Under the new provision, a pole owner could literally force an attacher to bring a request for agency action every time that attacher sought to install a new pole attachment. Such conduct could result in an administrative burden for the Commission.

While Comcast understands that on very rare occasions it might be difficult to process applications and perform make-ready work for extremely large projects within the timeframes set

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<sup>5</sup> See *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, 15 FCC Rcd 9563, ¶ 15 (2000) (“Our rules require [a utility] to grant or deny access within 45 days of receiving a complete application for a permit. We have previously stated that the Pole Attachment Act seeks to ensure that no party can use its control of facilities to impede the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields. We have interpreted the Commission’s rules, 47 C.F.R. § 1.1403 (b), to mean that a pole owner “must deny a request for access within 45 days of receiving such a request or it will otherwise be deemed granted.”) (internal citations omitted), *vacated by settlement, Cavalier Telephone Settlement Order*, 17 FCC Rcd 24414 (2002) (stating the vacatur did “not reflect any disagreement with or reconsideration of any of the findings or conclusions contained” in the original order issued in 2000) (hereinafter “*Cavalier*”).

forth in the Rules, Comcast urges the Commission to retain establish specific and reasonable timeframes for all projects and delete the open-ended language that gives pole owners the unilateral right to perform make-ready on their own schedules. If pole owners are unable to complete make-ready work on specific projects, they can work with attachers to negotiate appropriate timeframes that are project specific. If the parties are unable to agree to timeframes, they can then petition the Commission for action. This will result in far fewer requests for agency action and will minimize the Commission's involvement in the attachment process. Accordingly, the Commission should delete the open-ended make-ready provision cited above.

## **II. Clarification of the Self-Build Option.**

The new language for the self-build option should be amended in order to clarify when the Rules refer to an existing attacher versus a potential attacher. Accordingly, the last sentences of Utah Admin. Code. R746-345-2(C) should be amended to provide as follows:

In the first alternative, the pole owner and existing attaching entities would be responsible for all necessary make-ready work. For the second alternative, the pole owner and the existing attaching entities will identify what make-ready work they will perform, if any, with an associated cost estimate, and also identify what make-ready work, if any, the owner of the existing attachment is agreeable to have performed through a self-build option and the conditions, if any, for such self-build option.

## **III. Conclusion.**

For the foregoing reasons, the Rules should be amended as noted above.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of August, 2006.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 1<sup>st</sup> day of August, 2006, an original, five (5) true and correct copies, and an electronic copy of the foregoing **COMCAST'S COMMENTS TO DRAFT POLE ATTACHMENT RULES** were hand-delivered to:

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