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Submitted October 3, 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 September 1, 2005.

I. Introduction.

Comcast recommends the following changes in the proposed rules. First, the proposed definition of "Pole Attachment" should be clarified to prevent pole owners from denying access or imposing unreasonable rates, terms and conditions on equipment placed in unusable space and assessing rent on "additional equipment" within the allocated space that does not meet applicable code and contractual requirements. Second, the rules should be amended to reflect the fees allowed by the Public Service Commission's ("Commission") September 6, 2005, determination letter regarding the pole attachment standard contract. Third, the basis for rental rates should be clarified.

II. The Definition of "Pole Attachment" Should Be Amended.

Proposed R746-345-2(C) provides the following definition for pole attachment.

> All equipment, and the devices used to attach the equipment, of an attaching entity within that attaching entity's allocated attachment space. 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.

The only equipment that appears to be covered by this definition is the equipment "within that attaching entity's allocated attachment space." As a result, this 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, thus subject to arbitrary access denials and unjust and unreasonable rates, terms and conditions. Equipment attached outside an attaching entity's "allocated attachment space" must be accorded

the same protections as an attacher's equipment in allocated space.[1] Accordingly, this definition should be revised by simply deleting the words: "within that attaching entity's allocated attachment space." Without this slight revision, pole owners may attempt deny access or impose unreasonable rates, terms and conditions on essential equipment installed in unusable space.

Similarly, the Commission should revise the last sentence of the "Pole Attachment" definition. The current language could be interpreted to mean that any "additional" equipment that is not compliant with applicable codes or a contract would be subject to additional rent. Allowing pole owners to assess two or more rental rates for attachments existing in the same foot of space would lead to over-recovery whether or not the "additional attachment" is compliant. Accordingly, in order to clarify that all equipment within the attachment space is considered one attachment for the purpose of assessing the rental charges, while ensuring compliance with applicable safety codes and contract requirements, the Commission should create two sentences in place of the last sentence in this definition. 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.

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[1] 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" for rental purposes).

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

III. The "Tariffs and Contracts" Section Should be Amended to Reflect the Findings of the Commission.

The Commission's September 6, 2005 letter provides:

> Pole owners may charge an application fee, actual cost for make ready work (after accepted), and unauthorized attachment fees. Application fees should cover the expected cost of doing the survey and engineering work required to determine what make ready work must be done to accommodate the application. It may be a per pole fee, or it may be charged according to groups of quantities contained in the application. The unauthorized attachment fee shall be the back rent to the last audit plus $25 per pole. The proposed post construction and removal verification inspection fees cover activities the costs of which the commission believes are to be recovered through the pole attachment rental charge.

Proposed R746-345-3(A)(2) should be revised to reflect the Commission's ruling. It currently provides, in part, that "[t]he 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." *Id.*

The above language in the Commissions letter clarifies that the only "permitting" or "processing" fee allowed is an application fee, which "should cover the expected cost of doing the survey and engineering work required to determine what make ready work must be done to accommodate the application." Proposed R746-345-3(A)(2) should be amended to reflect this holding by the Commission. The phrase "permitting, pre-construction surveys, inspections, and applicable processing" should be deleted. The sentence should then be amended to read:

> The tariff, standard contract or SGAT shall set forth all non-recurring, standard charges for pole attachment work, including application fees, which cover the cost of doing the survey and

> engineering work required to determine what make ready work must be done to accommodate the application.

The Commission's letter also provides that "the estimated cost of the audits [should] be included in the rental rate." Contrary to that directive, proposed R746-345-3(A)(2)(a) provides that the standard contracts shall include the "joint audit process, including shared scheduling and costs, and any non-recurring fee or charge applicable thereto…" References to "shared…costs" of audits and "any non-recurring fee or charge applicable thereto" should be deleted based on the Commission's directive that all such audit related expenses be recovered in the rental rate. Accordingly, R746-345-3(A)(2)(a) should be amended by deleting the phrase "including shared scheduling and costs, and any non-recurring fee or charge applicable thereto."

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

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

> Basis -- The rental rate for pole attachments, on average, must be sufficient to cover the recurring costs experienced by the pole owner as a result of the attachments. 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 attaching entities 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.

This definition is confusing and could be misapplied. 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, an easy, unambiguous way to do so is to 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. . . .”[2]

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

V. Conclusion.

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

[2] 47 U.S.C. § 224(d)(1) (emphasis added).

RESPECTFULLY SUBMITTED this 3rd day of October, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 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:

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