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Submitted February 10, 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, Inc., formerly Comcast Cable Communications, LLC ("Comcast"), by and through its attorney, Ballard Spahr Andrews & Ingersoll, LLP, hereby submits these comments to the proposed pole attachment rules, distributed on January 24, 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. First, the restrictive language of R746-345-2A, which defines, and thus limits, the types of services that an attaching entity can provide, should be removed. Second, the proposed definition of "Pole Attachment" should be clarified. Third, "Attachment Space" should be defined not just as an amount of space, but as an amount of *usable* space. Fourth, proposed R746-345-5A should be revised to eliminate ambiguity. Fifth, the Commission should slightly modify the definition used for the rental rate formula to resolve any uncertainty as to the application of that formula.

II. The Restrictive Language of R746-345-2A Should be Removed.

R746-345-2A provides the following definition:

> "Attaching Entity" -- A public utility, wireless provider, cable television company or other entity that[, for the purposes of providing cable television service or telecommunications service to the public,] attaches to a pole owned or controlled by a public utility.

Id.

The addition of language defining the types of services that attaching entities are entitled to provide under these rules creates several problems. First and foremost, by revising the definition of "Attaching Entity" from a simple description of the kinds of entities that are covered by the rule to one that limits the services those entities may provide under the rule, the Utah Public Service Commission ("Commission") has proposed a definition that is contrary to

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

state law and the intent of this proceeding. Additionally, this definition undermines facilities-based communications competition and will likely soon be obsolete.

Pursuant to "Utah Code Annotated 54-3-1, 54-4-1, 54-4-4 and 54-4-13, the Public Service Commission [has] the power to regulate the rates, terms, and conditions by which a public utility . . . can permit attachments to its poles by *any* other public utility, wireless provider, cable television company, or other attaching entity."[2] Nothing in that "Authorization" permits the Commission to dictate or restrict the kinds of services an "Attaching Entity" may provide. Accordingly, by defining the term "Attaching Entity" as "[a] public utility, wireless provider, cable television company or other entity that *for the purposes of providing cable television service or telecommunications service to the public,* attaches to a pole," the Commission has exceeded its authority under state law.

More significantly, if the Commission's newly proposed language is retained (assuming the Commission has the requisite authority to include such language), any cable television company attachment that carries advanced services like high-speed Internet (*i.e.*, cable modem service), and/or Voice over Internet Protocol ("VoIP") will be exempt from the Commission's jurisdiction under these rules. Indeed, while the regulatory status of both high-speed Internet and VoIP services is uncertain, neither service is currently considered a "cable television service" or "telecommunications service."[3] Consequently, under the Commission's

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[2] Proposed Pole Attachments Rule, R746-345-1 (emphasis added).

[3] On March 15, 2002, the Federal Communications Commission ("FCC") issued an order declaring cable modem service to be an interstate information service that does not involve a separate offering of a telecommunications service. *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities: Internet Over Cable Declaratory Ruling*, FCC 02-77, GN Docket No. 00-185 (2002) ("Declaratory Ruling"). As a result, third-party Internet Service Providers ("ISPs") could not demand "interconnection" rights to the cable modem platform. In the Declaratory Ruling the FCC also resolved an important local franchise issue, holding that internet access service provided by cable operators was not subject to franchise fees assessed by local franchising authorities. Consequently, a number of ISPs and (continued...)

revised language, virtually every cable television company attachment in the State of Utah could become exempt from these rules in the near future. These service providers would then be subject to utility monopoly pricing and unjust and unreasonable terms and conditions, contrary to the precise intent of this rule and accompanying pole attachment investigation, simply because they offer other services in addition to tradition cable television services.

If utilities are free to impose any rate, term or condition on cable television companies offering these advanced services, resources will be diverted towards paying excessive monopoly rates rather than the further development and deployment of important new services and technologies, to the detriment of communications competition and, ultimately, Utah's consumers. That is the very outcome avoided at the federal level as a result of the broad definition of "pole attachment" contained in the federal Pole Attachment Act.[4]

(...continued)

local franchising authorities sought review of the FCC's Declaratory Ruling in different federal circuit courts of appeal and multiple parties intervened on both sides. These challenges were consolidated in the Ninth Circuit and on October 6, 2003, a three-judge panel of the Ninth Circuit issued a "per curiam" opinion affirming the FCC's determination that cable modem service was not a "cable service," but vacating the FCC's conclusion that cable modem service was entirely an "information service." The cable industry and the government asked the Ninth Circuit to rehear the case en banc, but those petitions were denied. After obtaining a stay of the mandate, which effectively delayed the effect of the Ninth Circuit's decision, the FCC along with the Solicitor General separately petitioned for certiorari in the Supreme Court. The Supreme Court granted cert in December, 2004. Argument in the case is expected at the end of March.

The regulatory status of VoIP is similarly uncertain and, at this point, the FCC has yet to classify the service, except as to its *interstate* character and is in the process of holding a rulemaking on the issue. *See Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order (2004) ("Our decision today will permit the industry participants and our colleagues at the state commissions to direct their resources toward helping us answer the questions that remain after today's Order – questions regarding the regulatory obligations of providers of IP-enabled services. We plan to address these questions in our *IP-Enabled Services Proceeding* in a manner that fulfills Congress's directions 'to promote the continued development of the Internet' and to 'encourage the deployment' of advanced telecommunications capabilities. Meanwhile, this Order clears the way for increased investment and innovation in services like Vonage's to the benefit of American consumers.") (internal citations omitted).

[4] Pub. L. No. 95-234, § 6, 92 Stat. 33, 35 (codified at 47 U.S.C. § 224).

Specifically, under the 1978 federal Pole Attachment Act, Congress gave the Federal Communications Commission ("FCC") the authority to regulate "*any* attachment by a cable television system. . . ."[5] When confronted with a challenge over whether it had jurisdiction to regulate pole attachments that provided traditional cable television, commingled with high-speed Internet service, the FCC ruled that "in light of the fact that Section 224 includes no language limiting the nature of the services of a cable operator to which it applies, Section 224 is most reasonably read to provide that a cable operator may seek Commission-regulated rates for all pole attachments within its system, regardless of the type of services provided over the equipment attached to the poles."[6] Following passage of the Telecommunications Act of 196, § 703, 110 Stat. 150, which expanded the Pole Attachment Act to include "any attachment *by* a . . . provider of telecommunications service,"[7] the FCC reemphasized this broad interpretation to cover, not only commingled services, but also wireless telecommunications attachments.[8]

Ultimately, the FCC's interpretation in its 1998 Order was confirmed by the Supreme Court finding the broad language in the Pole Attachment Act "unambiguous."[9] Recognizing the significance of the outcome of that case, FCC Chairman Michael Powell issued

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5 47 U.S.C. §224(a)(4) (emphasis added).

6 *Heritage Cablevision Assoc. of Dallas, L.. v. Texas Util. Elec. Co*., 6 FCC Rcd 7099, ¶ 12 (1991), *aff'd, Texas Util. Elec. Co v. FCC*, 997 F.2d 925, (D.C. Cir. 1993).

7 47 U.S.C. § 224(a)(4).

8 Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Rules and Policies Governing Pole Attachments, 13 FCC Rcd, 30-39, (1998) (hereinafter "1998 Order").

9 *National Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co*., 534 U.S. 327 (2002) ("No one disputes that a cable attached by a cable television company, which provides only cable television service, is an attachment 'by a cable television system.' If one day its cable provides high-speed Internet access, in addition to cable television service, the cable does not cease, at that instant, to be an attachment 'by a cable television system.' The addition of a service does not change the character of the attaching entity—the entity the attachment is 'by.' And that is what matters under the statute.").

a statement hailing the decision: "It is important that the Court rejected an interpretation of the Communications Act that could have raised rates that consumers pay for high-speed Internet access services and derailed the broadband revolution."[10]

Clearly, the Commission does not intend to cause consumers to pay higher rates for high-speed internet service or to "derail the broadband revolution." Unfortunately, unless the Commission removes this restrictive language, which effectively leaves cable television company attachments that carry anything other than "cable television service" or "telecommunications service" subject to monopoly rates, terms and conditions, this proceeding will prove meaningless and communications competition will suffer, as will Utah's consumers.

As a final matter with regard to this issue, "[s]ignificant technological advances are rapidly changing the telecommunications and media industries." [11] For these and other reasons, chances are that "Congress will begin to overhaul the Telecommunications Act of 1996," this year.[12] Consequently, the terms "cable television service" and "telecommunications service" may become obsolete. Ensuring that the definition of "Attaching Entity" is broad and flexible to meet the "rapidly changing" communications environment is, therefore, the best course.

III. The Proposed Definition of Pole Attachment Should be Clarified.

The newest revision of R746-345-2C provides:

> "Pole Attachment" -- ~~The~~ [All equipment, and the]~~bolt, bracket, hook, or other~~ device[s] used to [attach such equipment, of an

[10] FCC News Release, Statement of FCC Chairman Michael K. Powell, Regarding Today's Supreme Court Decision On Pole Attachment Regulation (Jan. 16, 2002).

[11] Stephen Labaton, *After the Voting, What May Lie Ahead for Business in America*, N.Y. Times, Nov. 4, 2004, § C; at 8.

[12] *Id*.

> attaching entity]~~secure an attaching entity's equipment~~ [within that attaching entity's allocated attachment space.]~~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.]

Id.

This revised definition of "Pole Attachment" is too limited. Specifically, the new language in the first sentence excludes any equipment attached outside an attaching entity's "attachment space" from the definition of "Pole Attachment." Although equipment in unusable space is not legally subject to rent,[13] this revised language could be interpreted to mean that any equipment that an attaching entity installs in the unusable space, like risers and power supplies, is not covered under the rule and would thus be subject to unreasonable access denials, monopoly pricing and unjust and unreasonable terms and conditions.

Additionally, if the Commission's revision in the last sentence of this Section is intended to prevent a utility from imposing rent on multiple attachments within the same "attachment space," perhaps the following language (in italics) could be added to the end of the last sentence: ". . . is not an additional attachment *for rental rate purposes*."

Also, while Comcast agrees that all equipment must meet generally applicable safety codes, like the National Electrical Safety Code ("NESC"), Comcast does not understand the revised language in the last sentence indicating that non-compliant attachments (*i.e.*, those

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[13] *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.").

attachments that do not meet applicable code requirements) would be subject to different treatment than compliant attachments (*e.g.*, be subject to rent) and seeks clarification with respect to the intent of that revision. Moreover, Comcast is concerned with the revised language in the last sentence which requires equipment to meet "all applicable code[s] *and contractual requirements*." Whether or not a pole owner should be permitted to impose standards (*i.e.*, in the contract) that are stricter than the NESC and other generally applicable engineering standards, is an open issue that is being addressed by the parties in the technical conferences and/or will be briefed to the Commission.[14]

IV. Proposed R746-345-2D Should be Clarified.

Proposed R746-345-2D provides as follows:

> "Attachment Space" – The amount of space on a pole occupied by a pole attachment as provided for in Rule R746-345-5(B)(3)(d).

Id.

This new section should be clarified to define "Attachment Space" as the "amount of *usable* space on a pole occupied by a pole attachment. . . ." That revision is consistent with R746-345-5(B)(3)(d).

V. Proposed R746-345-5A Should be Revised to Eliminate Ambiguity.

Comcast shares the Division of Public Utilities' ("DPU") concerns with the revised language in Section R746-345-5A,[15] which provides:

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[14] Indeed, "the rules of the NESC give the basic requirements of construction that are necessary for safety. If the responsible party wishes to exceed these requirements for any reason, he may do so for his own purpose, *but need not do so for safety purposes*." NESC Handbook, 5th Edition, Purpose 010 (emphasis added). *See also* 47 U.S.C. § 224(f)(2) ("[A] utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles . . on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.").

[15] *See* Division of Public Utilities Comments, Modified Proposed Rule R746-345. Pole Attachments of Public Utilities (filed February 1, 2005).

> Basis -- The rental rate for ~~any~~ pole attachment[s] must be [sufficient to cover any additional cost incurred 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.

As the DPU notes, the revised language refers to additional "costs" that are similarly referred to in R746-345-3A(2), but that "are subject to Commission approval with each Pole Owner's tariff/contract or SGAT filing." The DPU believes that the two Sections are, therefore, in "conflict" and "the new wording in Section R746-345-5.A is ambiguous and may be misunderstood and require clarification."[16]

This conflict and resulting ambiguity may stem from a different understanding of the basis of the FCC's pole attachment formula and cost recovery rules. Under the federal Pole Attachment Act, 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. . . ."[17] In other words, the FCC formula is actually a range of compensation, the low end of which is the "incremental costs [or] those costs the utility would not have incurred 'but for' the pole attachments in question," and the high end of which is an allocation of the fully-loaded "operating expenses and capital costs [including a return on investment] that a utility

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16 *Id*.

17 47 U.S.C. § 224(d)(1) (emphasis added).

incurs in owning and maintaining poles that are associated with the space occupied by the pole attachments."[18] Although most utilities recover their incremental costs (*i.e.*, the statutory minimum) in advance of any pole attachment through the imposition of "make-ready" and other direct charges, the FCC has long interpreted the rate formula statute to provide that when application of the formula reduces a contractual pole rental rate, the FCC will only reduce the rate to the statutory maximum.[19]

Rather than creating a range between "incremental" and "fully-allocated" costs, revised R746-345-5A seems to conflate the two, by suggesting that using "the portion of the pole owner's costs and expenses for the pole plant investment that is jointly used by the attaching entity," (*i.e.*, the statutory maximum) is a "proxy for the incremental costs," (*i.e.*, the statutory minimum). As a result, the revised language is not only confusing, but erroneous. In order to rectify this error and resolve the conflict, the Commission must either remove the proposed new language in Section R746-345-5A or clarify that it intends to create a range of compensation, the low end of which is incremental costs and the high-end, fully-allocated.

Finally, Comcast takes issue with one aspect of DPU's Comments. Specifically, the DPU refers to certain "direct costs associated with supplying space for pole attachments such as make-ready, *inspections, and application fees*."[20] Comcast notes for the record that whether or not pole owners should be permitted to recover both "fully-allocated" rental rates and certain other fees, such as certain inspection and application fees, which already may be included in the fully-allocated rate, is an open issue to be addressed in the technical conferences and/or briefed

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[18] 1998 Order at ¶ 96 n. 303.

[19] *FCC v. Florida Power*, 480 U.S. 245, 254 (1987). *See also* 47 C.F.R. § 1.1409(e)(1) (setting forth the statutory maximum as the "formula").

[20] DPU Comments (emphasis added).

for the Commission. Indeed, the FCC has repeatedly held "[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."[21] The FCC therefore "look[s] closely at make-ready and other charges to ensure that there is no double recovery for expenses for which the utility has been reimbursed through the annual fee."[22]

VI. The Commission Should Revise the Definition Used for the Rental Rate Formula.

> Revised R746-345-5(B)1.
>
> Formula: Rate per attachment space = Space Used x (1)Usable Space) x Cost of Bare Pole x Carrying Charge Rate.

Id.

The first component of the formula, "Space Used," is redundant and will lead to an unreasonable rate if the "Space Used" is more than 1 foot. Instead, the formula should read: "Space Occupied/Usable Space (the Space Factor) x Cost of Bare Pole x Carrying Charge Rate."[23]

VII. Conclusion.

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

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21 *Texas Cable & Telecomm. Ass'n v. Entergy Serv., Inc.*, 14 FCC Rcd 9138, ¶ 10 (1999).

22 *Id*.

23 *See, e.g.*, 47 C.F.R. § 1.1409 (e)(1) (setting forth the FCC's pole attachment formula as: "Maximum Rate = Space Factor x Net Cost of a Bare Pole x Carrying Charge Rate.")

RESPECTFULLY SUBMITTED this 10th day of February, 2005.

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I hereby certify that on the 10th day of February, 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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