

Comcast Cable Communications, Inc. (“Comcast”), by and through its attorneys, Ballard Spahr Andrews & Ingersoll, LLP, hereby submits this Motion For Immediate Relief And Declaratory Ruling (“Motion”) against PacifiCorp d/b/a Utah Power (“PacifiCorp”) in the above-captioned docket.

Specifically, PacifiCorp has denied Comcast its rights under 47 U.S.C. § 224 and Utah Code Ann. § 54-4-13 by refusing to process pole attachment permit applications. Comcast requests that this Commission convene a hearing at the earliest possible date, to compel PacifiCorp to honor Comcast’s rights of just and reasonable pole-attachment access under Utah Code Ann. § 54-4-13, Utah Administrative Code R746-345-1, and 47 U.S.C. § 224 which sets forth certain rights that this Commission has certified to enforce. As set forth more fully below, good cause exists for this Motion.

I. SUMMARY OF THE PARTIES AND THE CONFLICT

1. Comcast is seeking immediate relief from PacifiCorp’s unlawful state-wide freeze of Comcast’s access to PacifiCorp poles. This blanket denial of access presents a strict violation of Utah and federal law—the basics of which this Commission has certified to the FCC that it will enforce—and comes in retaliation for Comcast’s refusal to pay PacifiCorp’s continually escalating demands for fees, *and* for filing the above-captioned Request for Agency Action.

2. Comcast is a provider of broadband communications service which today includes “traditional” cable television service as well as information services and high-speed cable modem services for residential and business customers within the State. In addition to these services, Comcast is and/or will be offering state-of-the-art broadband services such as video on demand and Internet-Protocol (“IP”) enabled communications services, including Voice Over IP

telephone services. Comcast has been working hard to bring the full complement of broadband products and services to its service areas within the State.

3. PacifiCorp owns and controls the vast majority of poles in this State to which Comcast's facilities are attached. Many of Comcast's attachments date back several decades, prior to PacifiCorp acquiring Utah Power. Now, however, PacifiCorp has embarked on a program to use monopoly power to extract unreasonable fees for access to essential facilities.¹ PacifiCorp has hit virtually every communications company in the State with attachments on its poles with similar if not identical demands.²

4. In so doing, PacifiCorp ignores the highly regulated nature of pole attachments as well as its responsibilities as the public trustee of this critical corridor for broadband services. For example, the exact \$250 per-pole penalty fee that PacifiCorp is imposing on Comcast in Utah and gave rise to the above-captioned Request for Agency Action is *illegal in 32 states*, including in the neighboring states of Colorado, Nevada, New Mexico, Arizona, Texas, Oklahoma, Wyoming, Nebraska and Missouri. Moreover, it is more than ten times higher than what was found previously to be the standard.³ As PacifiCorp has forged ahead with its anti-

¹ See, e.g., *National Cable Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327, 122 S. Ct. 782, 784 (2002) (finding that cable companies have "found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. . . . Utilities, in turn, have found it convenient to charge monopoly rents."); *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987) (finding that Congress enacted the Pole Attachment Act "as a solution to a perceived danger of anticompetitive practices by utilities in connection with cable television service."); See also *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1362-63 (11th Cir. 2002) (noting "'essential facilities' doctrine" and detailing Section 224's mandatory access provision to enable use of utility pole networks needed by cable operators); *Southern Co. v. FCC*, 293 F.3d 1338, 1341 (11th Cir. 2002) (cable operators have "little choice but to" attach to utility poles); Common Carrier Bureau Cautions Owners of Utility Poles, 1995 FCC LEXIS 193, *1 (Jan. 11, 1995) ("Utility poles, ducts and conduits are regarded as essential facilities, access to which is vital for promoting the deployment of cable television systems.").

² See *In the Matter of an Investigation into Pole Attachments*, Request to Open an Investigative Docket, PSC of Utah Docket No. 04-999-03, filed Mar. 11, 2004.

³ *Mile Hi Cable Partners v. Pub. Serv. Co. of Colo.*, 15 FCC Rcd. 11450, ¶ 14 (2000), *aff'd Pub. Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003) (Affirming the unlawfulness of the \$250 unauthorized attachment

(continued...)

competitive agenda and with its blatant disregard for prevailing law and industry practices, it has become clear that PacifiCorp's program is a holistic attack on pole attachment regulation and long standing relationships with communications attachers.

5. To begin, PacifiCorp has attempted to extract tens of millions of dollars in penalties and survey costs from its pole occupants and has attempted to double "traditional" pole rental rates while increasing rental rates for certain kinds of "telecommunications" attachments by 533%.⁴

6. The program continues as PacifiCorp attempts to shift the costs of maintaining its pole facilities to third party communications attachers like Comcast. In order to remedy years of neglectful recordkeeping and plant maintenance, PacifiCorp is engaging in a comprehensive program to take a full inventory of its pole plant and to use the information it gathers to modernize its records with digital databases containing GPS data, and to clean up and refurbish distribution plant. However, the costs of this daunting project are falling squarely on the shoulders of Comcast and others seeking to gain access to PacifiCorp's poles.

7. That these efforts are part of PacifiCorp's master plan is beyond dispute. Abandoning all pretenses to treat its poles as a highly regulated essential facility,⁵ PacifiCorp has

(...continued)

penalty provision. "In its analysis, the FCC . . . showed that most utilities currently charge a one-time fee of \$15 to \$25 per pole....").

⁴ PacifiCorp is attempting to raise its pole attachment rates from \$4.65 per pole to \$29.40 per pole for "telecommunications" attachments in a separate proceeding currently pending before this Commission. *See In the Matter of Proposed Revisions of PacifiCorp, dba Utah Power & Light Co. to its Schedule 4-Pole Attachments-Cable Television Tariff by Advice Filing 03-09*, PSC of Utah Docket No. 03-035-T11.

⁵ JOINT WIRE AND POLE USAGE, BEST PRACTICES TO MAXIMIZE REVENUE OPPORTUNITIES AND MINIMIZE ATTACHMENT COSTS CONFERENCE held Dec. 8-9, 2002 Scottsdale, AZ, Presentation by Paul Brown, Managing Director of Distribution Support for PacifiCorp ("PacifiCorp Presentation"). *See Exhibit 1.*

openly admitted that its campaign to capture revenue is an aggressive approach but attempts to justify it by asserting that companies, such as Comcast, have grown accustomed to a free ride.⁶

8. PacifiCorp's attempts to use access to its essential pole facilities to generate revenue are only one purpose of the program. The second purpose is to inhibit the development of a competitive high-speed Internet market. PacifiCorp is looking to a future rollout of Broadband over Power Line services ("BPL") in direct competition with Comcast, and has more to gain than ever by weakening potential competition.⁷

9. PacifiCorp brings its program to this Commission's doorstep, as PacifiCorp has hand-picked Utah as its proving ground for its new revenue raising campaign, creating as hostile an environment for broadband and technology deployment as exists anywhere.

II. COMCAST NEEDS IMMEDIATE RELIEF FROM PACIFICORP'S ABUSIVE PRACTICES

10. Paragraphs 1-9 summarize the hostile environment in which Comcast (and others) are now forced to operate and that prompted Comcast to initiate this proceeding by filing on October 31, 2003, a Request for Agency Action. The most immediate result of this hostile environment is that PacifiCorp has demanded an additional \$4.3 million dollars from Comcast—

⁶ *Id.* PacifiCorp's assertions that attachers have had a free ride at the expense of utility rate payers and shareholders, goes to show just how far it will go to avoid recognizing state and federal laws governing pole attachments. The truth is that courts, including the United States Supreme Court, have concluded that the prevailing pole attachment rate formula, which includes very substantial element for plant maintenance, administration and other utility cost baskets, provides the utility with just compensation for use of its poles. *See, e.g., Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002), *cert. denied*, 124 S. Ct. 50 (2003) (holding that, in the context of pole attachments, where FCC regulations provide for pole owners to be paid at least their marginal costs through make ready payments and an annual pole rent, the requirement of just compensation is satisfied. For its part, the FCC "has concluded that its pole attachment formulas, together with the payment of make-ready expenses, provide compensation that exceeds just compensation." *Florida Cable Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 18 FCC Rcd. 9599, ¶ 15 (2003) (internal citations omitted)(emphasis added).

⁷ *See* note 5, *supra*.

over and above the \$5.4 million Comcast already paid—and will not allow Comcast any further access to PacifiCorp poles until it is paid. This brings the total amount of contested fees in this case, so far, to \$9.7 million.

11. PacifiCorp continues to conduct surveys and, most recently has begun to demand that Comcast clean up pole plant. It is anticipated that the \$9.7 million PacifiCorp is presently demanding represents only a small fraction of the total that will be demanded. Comcast therefore comes to this Commission seeking immediate relief from PacifiCorp's access denial and escalating demands for fees until the Commission reaches a final decision on the above-captioned proceeding. Comcast's filing of the above-captioned Request for Agency Action appears to have made PacifiCorp's resolve even stronger and is proving to be insufficient to protect Comcast and its customers from PacifiCorp's unlawful and abusive practices.

A. PacifiCorp's Immediate Denial of Access

12. Beginning in approximately 2002, PacifiCorp commenced an audit of its pole facilities and determined that Comcast made a number of unauthorized attachments to PacifiCorp's poles and demanded a \$250 per pole penalty for each alleged unauthorized attachment. *See* Request for Agency Action ¶¶ 13-15. Comcast had (and continues to have) serious concerns regarding the basic reasonableness (and lawfulness) of the way PacifiCorp designed and conducted the audit, particularly the way in which PacifiCorp assigns costs and penalties to Comcast. Regardless, in 2003, PacifiCorp proclaimed that unless Comcast paid the entirety of the disputed penalty amounts, Comcast would not be allowed to access PacifiCorp poles.

13. Denying access to the poles would have crippled Comcast's operations. Comcast was (and still is) in the process of upgrading its network—attaching its network facilities to

existing pole lines is essential to Comcast's ability to conduct business.⁸ With no viable alternatives, Comcast paid PacifiCorp \$3,828,000 under protest and signed a letter "agreement" documenting the terms of payment. See Request for Agency Action ¶¶ 19-22; Letter from Corey Fitz Gerald to Patrick O'Hare, dated Sept. 8, 2003, Exh. N to Request for Agency Action. After making this payment, and signing the "agreement," PacifiCorp permitted Comcast to proceed with its upgrade—temporarily.

14. Soon thereafter, on October 31, 2003, Comcast commenced this action against PacifiCorp seeking, *inter alia*, relief declaring that the \$250 per pole penalty for any verified unauthorized attachments is not "fair and reasonable," and ordering PacifiCorp to refund the \$3,828,000 in such fees Comcast already paid. See Request for Agency Action.

15. This did not deter PacifiCorp. It continued to survey its pole plant and assess unauthorized attachment penalties using the exact same methods to which Comcast objected and that are the subject of the above-captioned Request for Agency Action. These surveys produced another \$1.6 million in charges that Comcast also paid under protest in December, 2003. See Letter from JoAnne Nadalin to Laura Raypush, dated Dec. 8, 2003, attached hereto as Exhibit 2.

⁸ Utility company pole owners control "virtually the only practical physical medium for the installation of television cables." *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987); *General Tel. Co. of Southwest v. United States*, 449 F.2d 846, 851 (5th Cir. 1971) (construction of systems outside of utility poles and ducts is "generally unfeasible"). See, e.g., 123 Cong. Rec. H35008 (1977) (statement of Rep. Broyhill, co-sponsor of Pole Attachment Act) ("The cable television industry has traditionally relied on telephone and power companies to provide space on poles for the attachment of CATV cables. Primarily because of environmental concerns, local governments have prohibited cable operators from constructing their own poles. Accordingly, cable operators are virtually dependent on the telephone and power companies. . . ."); 123 Cong. Rec. H5097 (daily ed. May 25, 1977) (statement of Rep. Wirth) ("Cable television operators are generally prohibited by local governments from constructing their own poles to bring cable service to consumers. This means they must rely on the excess space on poles owned by the power and telephone utilities."); S. REP. NO. 580, 95th Cong., 1st Sess. 13 (1977) ("Owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles."); H.R. REP. NO. 721, 95th Cong., 1st Sess. 2 (1977) ("Use is made of existing poles rather than newly placed poles due to the reluctance of most communities, based on environmental considerations, to allow an additional duplicate set of poles to be placed").

16. PacifiCorp's surveys continued on and the charges continued to accumulate. By letter dated February 20, 2004, PacifiCorp informed Comcast that unless Comcast paid *all* outstanding current and past due unauthorized attachment penalties totaling \$2,018,850 by March 1, 2004, PacifiCorp would suspend processing of *all* pole attachment permit applications and take "other lawful remedial action."⁹ See Letter from Corey Fitz Gerald to Patrick O'Hare, dated Feb. 20, 2004, attached hereto as Exhibit 3.

17. It became very clear to Comcast that PacifiCorp would continue to generate these disputed charges for as long as possible. However, Comcast, having already paid \$5.4 million in unlawful fees, could not justify paying another \$2 million to PacifiCorp, bringing the grand total to *\$7.4 million*. As a result, PacifiCorp informed Comcast that PacifiCorp would no longer process any pole attachment permit applications in Comcast's service areas throughout the *entire* state of Utah, effective immediately. See Letter from Corey Fitz Gerald to Patrick O'Hare, dated Mar. 3, 2004, attached hereto as Exhibit 4.

18. PacifiCorp now has made good on the first part of its threat and is no longer processing Comcast's permit applications. That notwithstanding, Comcast continues to receive additional invoices. Since receiving the March 3, 2004 letter demanding approximately \$2 million, Comcast has received additional invoices for approximately \$2.3 million. As of the date of this filing, the grand total of invoices is \$9.7 million.

⁹ This reference to "other remedial action" obviously is a clear threat of additional litigation, potentially spilling over into the State's civil courts with the purpose and effect of unlawfully leveraging PacifiCorp's pole facilities.

B. PacifiCorp's Permitting Freeze Is a Denial of Access In Violation of State and Federal Law

19. Industry standard practice, as initially articulated by the FCC, is that a utility pole owner may only deny a cable television operator access to its poles for insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes. 47 U.S.C. § 224(f). In certifying to the FCC that it regulates pole attachments, Utah must reaffirm that this is the practice and the law in Utah today. *See* 47 U.S.C. § 224(c); *see generally* Utah Code Ann. § 54-4-13; *Utah Cable Television Operators Ass'n v. Public Serv. Comm'n of Utah*, 656 P.2d 398, 403 (Utah 1982).

20. PacifiCorp's refusal to process attachment permits unless Comcast pays \$2 million¹⁰ in unrelated and unverified charges, is unrelated to capacity, safety, reliability or engineering and is an outright denial of access, in strict violation of state and federal law. *See* 47 U.S.C. § 224(f); Utah Code Ann. § 54-4-13. PacifiCorp concedes this fact, by basing its denial of access solely on Comcast's refusal to make payments in the millions of dollars.

21. Having failed to allege any justifications for its denials based on or related to capacity, safety, reliability or engineering, PacifiCorp's outright denial of access challenges the very core of this Commission's pole attachment regulation.

1. The \$250 penalty bears no relation to Comcast's attachment applications.

22. The penalties PacifiCorp is requiring Comcast to pay are completely unrelated to the fees and charges that are associated with permit processing. However, PacifiCorp, as the

¹⁰ Apparently the amount PacifiCorp requires Comcast to pay has just increased to \$4.3 million, to include the invoices Comcast received since the shutdown began.

owner of monopoly essential facilities¹¹ knows that Comcast has no choice but to attach to PacifiCorp's poles in order both to build new plant to serve new customers and to upgrade existing customers. By literally holding Comcast's plant and services deployment hostage, PacifiCorp is leveraging its monopoly ownership of the poles to force Comcast to pay millions of dollars in penalties *even as the legality of those penalties are the subject of this open and pending Commission proceeding.*

23. PacifiCorp's conduct is particularly egregious considering that (a) Comcast is not past due on any charges related to permit processing; (b) Comcast has been unable to verify the results of PacifiCorp's audit due to PacifiCorp's own obstructionist tactics and (c) PacifiCorp has refused to process *all* of Comcast's applications throughout *all* of Comcast's Utah service territory, not just in the areas where the disputed amounts are supposedly due.

24. More important, PacifiCorp has not alleged that Comcast failed to follow permit application procedures or that Comcast's new attachments pose any kind of health or safety risk, as justification for the shutdown. *See* 47 U.S.C. § 224(c); Utah Code Ann. § 54-4-13; *Utah Cable Television Operators Ass'n v. Public Serv. Comm'n of Utah*, 656 P.2d 398, 403 (Utah 1982).

25. Nor could it make such allegations. PacifiCorp generates an exhaustive compliance checklist and conducts a multi-tiered inspection process prior to permitting Comcast to make any new attachments or even overlash to existing ones.¹² Comcast is not permitted to attach or overlash to any pole until PacifiCorp is satisfied that Comcast has remedied all

¹¹ *See, e.g.,* notes 1, 8.

¹² Comcast believes that PacifiCorp is using the survey and permitting process to remedy defects to plant records at Comcast's expense. PacifiCorp's extreme brand of this process itself is unlawful and Comcast shall prove this to be the case elsewhere in this proceeding.

irregularities on the poles, even those that do not pose safety risks. *See* Makeready worksheet, attached hereto as Exhibit 5.

26. In other words, at least before this shut down, Comcast was only allowed on PacifiCorp poles if it paid permit processing fees and paid for all PacifiCorp's make-ready demands. But once again, and in spite of the fact that the lawfulness of these charges is now hotly contested in this formal proceeding, PacifiCorp has blocked Comcast from access to PacifiCorp poles. This is an outrageous abuse of PacifiCorp's monopoly ownership and control of essential pole facilities.

27. PacifiCorp has never alleged that the integrity of the poles or the safety of its workers or the public is in jeopardy if it cannot collect the unauthorized attachment penalties.¹³ Penalties or no penalties, Comcast has a vested interest in ensuring the safety of all workers and the public. Unsafe conditions present just as serious of a risk to Comcast's facilities, employees and customers as they do to PacifiCorp's. The mere fact that PacifiCorp does not have a particular piece of paper on file documenting Comcast's attachment in no way lessens or alters Comcast's responsibility for safety in the field.¹⁴

28. Considering that there is no rational relationship between the shutdown and the penalties, and that this proceeding is currently pending and scheduled for trial in July,

¹³ At the last minute, PacifiCorp is suddenly alleging that it has discovered numerous safety violations. However, that does not change the fact that PacifiCorp's permitting shutdown has never been conditioned on anything but Comcast making multi-million dollar payments. *See* Letter from Charles Zdebski to Michael Woods, dated March 19, 2004, attached hereto as Exhibit 6.

¹⁴ An undocumented attachment provides no benefit to the attaching party—it is under the same obligation to make its attachment safely and incurs the same liability for any safety violations for unauthorized attachments as it does for authorized ones. *See e.g., Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd. 11450 (Cab. Serv. Bur. 2000), *aff'd Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

PacifiCorp's objective is clearly to drain resources that Comcast needs both to deploy technology in the State, and to pursue and recover what PacifiCorp already has extorted.

2. PacifiCorp's tactics are anti-competitive

29. Comcast is now unable to access any attachments at all. In practical terms this means that Comcast cannot do any of the following tasks that are critical to operating a cable system, *anywhere within the borders of this State*:

- engage in routine, scheduled plant maintenance;
- respond to service outage calls;
- respond to unscheduled customer maintenance calls;
- upgrade facilities to carry advanced broadband services such as high speed Internet, Video on Demand, Voice over IP telephone services;
- build out facilities to serve new areas; or
- bring new customers on the network.

30. In other words, it brings Comcast's operations to a standstill, putting Comcast's ability to bring new customers online, throughout its service area, in jeopardy.

31. Comcast cannot do business in this environment. Comcast has obligations under federal law¹⁵ and under its contracts with local franchising authorities to provide its services within specified time frames. For example, both as a cable television operator and as a holder of a telecommunications CPCN, Comcast is subject to federal, state and local quality of service requirements. If it cannot provide the services it is obligated to provide, or if it cannot meet set

¹⁵ See e.g., Title VI, Communications Act of 1934, as amended, 47. U.S.C. § 521 *et seq.*

time schedules to provide these services, Comcast could suffer additional penalties from parties other than PacifiCorp, including this Commission.

32. Other, less tangible harm will result as well. If Comcast is unable to meet its commitments, or to be responsive to existing or potential consumers, it will suffer significant harm to reputation and good will. Comcast faces real video competition from satellite dish providers; real broadband competition from telecommunications companies' DSL offerings; future bundled broadband services from the Utah Telecommunication Open Infrastructure Agency (UTOPIA); and future Broadband Over Power Line services *from PacifiCorp itself*, making its inability to upgrade and even maintain its network extremely harmful. Every ounce of goodwill in this environment is precious and the loss of good will means loss of customers.

3. PacifiCorp's conduct threatens the development of a competitive communications market

33. Comcast is not, however, the only party that stands to suffer from PacifiCorp's revenue raising program. Consumers will suffer—and indeed have already suffered—delayed or denied access to Comcast's products, including high-speed Internet services.

34. This is manifestly unfair to consumers. PacifiCorp's shutdown means that Comcast subscribers may be delayed or denied access to advanced broadband services because of the dispute over penalties in completely different geographic areas of the State.

35. Moreover, promoting competition and developing advanced communications services is in the public interest and is a very important goal of federal, state and local governments.¹⁶ PacifiCorp's shut down works directly against these important goals by causing

¹⁶ See Utah Code Ann. § 54-8b-1.1 ("The Legislature declares it is the policy of the state to: ... (2) facilitate access to high quality, affordable public telecommunications services to all residents and businesses in the state... (8) encourage new technologies and modify regulatory policy to allow greater competition in the

(continued...)

delays in new build outs and upgrades. This is exactly the effect Congress sought to prevent in enacting, and amending, 47 U.S.C. § 224.¹⁷

36. There is no legitimate justification for PacifiCorp's refusal to process permit applications. And no clearer case could be presented for the importance of regulating pole attachment to prevent monopolistic abuses like those on display here and to protect broadband consumers.¹⁸

III. THE COMMISSION'S AUTHORITY OVER DENIALS OF ACCESS

37. This Commission is charged with ensuring that terms and conditions of attachment, including those applicable to access, are just and reasonable. Utah Code Ann. § 54-4-13; *Utah Cable Television Operators Ass'n v. Public Serv. Comm'n of Utah*, 656 P.2d 398, 403 (Utah 1982). In addition, the Commission has broad authority to supervise and regulate every public utility within the state. Utah Code Ann. § 54-4-1; *see also* Utah Code Ann.

(...continued)

telecommunications industry..."; *see also* Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble (purpose of the Telecommunications Act of 1996 is "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies").

¹⁷ *See In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments ("Telecom Order")*, 13 FCC Rcd. 6777, ¶ 2 (1998) ("The purpose of Section 224 of the Communications Act is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers."); *see also* Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble (purpose of the Telecommunications Act of 1996 is "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies").

¹⁸ *See, e.g.*, 47 C.F.R. § 224(f); Utah Code Ann. § 54-4-13; *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments, In the Matter of the Implementation of 703(e) of the Telecommunications Act of 1996, Consolidated Partial Order on Reconsideration ("Consolidated Partial Order on Reconsideration")*, 16 FCC Rcd. 12103 ¶ 13 (2001), *aff'd* *Southern Co. Servs. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002) (original purpose of the Pole Attachment Act was to prevent utilities from charging monopoly rents to attach to their bottleneck facilities and this monopoly has not changed—the market for pole attachments is not fully competitive and utilities continue to have incentive to discriminate against attaching entities).

§ 54-4-2. In accordance with this authority, this Commission is empowered to grant the immediate relief Comcast requests.

38. In enacting Section 224, Congress intended that utility pole owners not impede cable television operators' access to essential infrastructure facilities and provided that utilities must grant cable television operators non-discriminatory access to its poles, ducts, conduits or rights-of-way. 47 U.S.C. § 224(f). The Telecommunications Act of 1996 ("1996 Act") amended Section 224 to further protect cable television operators by providing that States, such as Utah, that regulate pole attachments must implement and make effective rules and regulations ensuring non-discriminatory access in order to preempt the FCC's jurisdiction.¹⁹

39. Although the federal 1996 Act does not require States to certify to the FCC that they regulate access, the State must nonetheless have processes and procedures for resolving access complaints in order to preempt FCC jurisdiction.²⁰

40. This Commission has certified that it regulates the rates, terms and conditions of pole attachments, and that it has the authority to consider the interests of cable television consumers in regulating pole attachments. Although, it has not certified to the FCC that it regulates access in accordance with the federal 1996 Act and does not have specific regulations in place addressing access denial *per se*, this Commission has broad authority to supervise and regulate every public utility within the state. See Utah Code Ann. § 54-4-1. In accordance with this authority, this Commission may make determinations as to what is just and reasonable, even

¹⁹ See 47 U.S.C. § 224(c); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 1238 (1996) ("Local Competition Order"), *aff'd In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996, Order on Reconsideration*, 14 FCC Rcd. 18049, ¶¶ 115, 116 (1999) ("Local Competition Reconsideration Order").

²⁰ See note 19, *supra*.

in the absence of explicit statutory direction. *See* Utah Code Ann. § 54-4-2; *Utah Power & Light Co. v. Public Serv. Comm'n*, 107 Utah 155, 191 (1944).

41. Therefore, in accordance with the Commission's broad authority to regulate public utilities and protect the public interest, as well as its authority over pole attachments under state and federal law, Comcast respectfully requests this Commission to order PacifiCorp to resume processing pole attachment application permits and allowing Comcast access to PacifiCorp's poles during the pendency of this proceeding, and not otherwise interfere with Comcast's deployment of its services.

IV. RELIEF REQUESTED

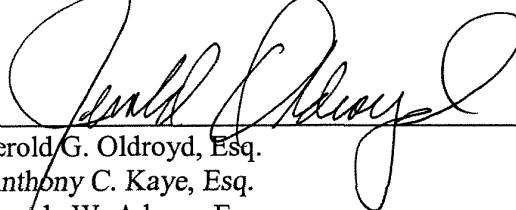
WHEREFORE, Comcast respectfully requests that the Commission enter an Order immediately:

1. directing PacifiCorp to continue processing Comcast's permit applications until the final resolution of this proceeding and otherwise provide Comcast with prompt, reasonable access to its poles;
2. directing PacifiCorp to refrain from imposing additional "unauthorized attachment" penalties and related charges, including but not limited the charges related to the survey itself, until the Commission renders a decision on Comcast's Request for Agency Action;
3. declaring that PacifiCorp's refusal to process permit applications unless Comcast pays *all* contested unauthorized attachment penalties is an unlawful denial of access and an unjust and unreasonable term and conduit of attachment in violation of Utah Code Ann. § 54-4-13 and 47 U.S.C. § 224;
4. ordering the parties to appear at a hearing on this matter on the earliest available date; and

5. awarding to Comcast such other and further relief as the Commission deems just, reasonable and equitable.

RESPECTFULLY SUBMITTED this 23rd day of March, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of March, 2004, an original, eight (8) true and correct copies, and an electronic copy of **Motion For Immediate Relief And Declaratory Ruling (Hearing Requested)** were hand-delivered to:

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