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Submitted April 1, 2004

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of an Investigation into Pole)	Docket No. 04-999-03
Attachments)	
)	INITIAL COMMENTS
)	

AT&T Corp. ("AT&T") by and through its attorneys, Ballard Spahr Andrews & Ingersoll, LLP, hereby submits Initial Comments in response to the Notice of Further Agency Action issued by the Public Service Commission (the "Commission") on March 19, 2004, concerning the above-captioned investigation into pole attachments. AT&T's comments identify issues it believes the Commission should address in this proceeding.

I. INTRODUCTION

AT&T supports the Commission's consideration of pole attachment and conduit issues in this docket in response to the request of the Division of Public Utilities (the "Division") filed on March 11, 2004, and AT&T's statement of the issues submitted to the Division on February 5, 2004.¹ AT&T requests that the Commission enter into a rulemaking proceeding pursuant to the Utah Administrative Rulemaking Act, and adopt comprehensive rules and procedures that cover rates, terms and conditions of pole and conduit attachments. *See* Utah Code Ann. § 63-46a-4.

II. POLE ATTACHMENTS

AT&T generally supports the comments filed by Comcast Cable Communications, LLC ("Comcast"), as the comments apply to pole attachments by telecommunications carriers.²

AT&T, like Comcast, believes that the Commission's existing rules on pole attachments are inadequate and that the current rates are unreasonable.

First, the Commission's existing pole attachment rules do not provide adequate guidelines regarding rates, terms and conditions for pole attachments as required by Section 224 of the Communications Act of 1934, as amended, 47 U.S.C. § 224.³ Although the Commission has regulations for resolving complaints by cable system operators when parties have a dispute over pole attachment charges,⁴ it has not yet prescribed similar regulations for attachments by

¹ *See* Letter from Jerold G. Oldroyd on behalf of AT&T to Krystal Fishlock, attached hereto as Exhibit 1.

² AT&T incorporates by reference Comcast's Initial Comments filed in this proceeding on April 1, 2004. AT&T also supports, and incorporates by reference, Comcast's Statement of Issues filed on December 16, 2003, in Docket No. 03-035-T11, attached hereto as Exhibit 2.

³ "Pole attachment" is defined as "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." 47 U.S.C. § 224(a)(4).

⁴ Utah Code Ann. § 54-4-13; Utah Admin. Code Rule 746-345-3.

telecommunications carriers. AT&T suggests that the Commission adopt the Federal Communications Commission (the "FCC") cable formula in its entirety, for all parties, whether cable or telecommunications provider, thereby providing a single uniform rate for all attachments to poles.

Second, AT&T believes that the current annual pole attachment rates in Utah are unfair and unreasonable under Section 224. For example, AT&T was paying PacifiCorp an annual rate of \$4.65 per pole. PacifiCorp, without notice or a meaningful opportunity to negotiate, is now demanding an annual rate in excess of \$29 per pole. This 500% increase, if allowed by the Commission, would impose tremendous financial costs and would significantly impact the expansion of competitive networks by new telecommunications providers entering the Utah market. The unreasonable pole attachment rate increases represent a real economic barrier to entry and a barrier to accessing poles under Section 224.

III. CONDUIT REGULATION

A. Background on Conduit Issues

The conduit problem AT&T faces in Utah primarily concerns its relationship with Qwest, which owns the majority of the conduit AT&T occupies within the State and the fact that, while this Commission has certified that it regulates the rates, terms and conditions of pole attachments (which includes, poles, conduits and rights-of-way), there are no specific provisions in Utah law addressing the rates, terms and conditions of conduit.

Section 224 of the Communications Act, known as the Pole Attachment Act, 47 U.S.C. § 224, permits an individual state to certify to the FCC that it regulates the rates, terms and conditions of poles, conduits and rights-of-way, *if* the state has effective rules and procedures for doing so. In this proceeding the Commission currently is re-examining its regulation of pole

attachments, including conduits. With these comments, AT&T requests that the Commission adopt the FCC's conduit rate formula (as other states have done) and adopt the terms and conditions AT&T sets forth below. Because there is a question about the viability of the Commission's certification over pole attachments when it does not have procedures in place for conduits, this proceeding is an ideal opportunity to address that issue, as well as ensure that Utah continues to be hospitable to facilities-based competition.

This issue is particularly timely given that AT&T has tried unsuccessfully to secure from Qwest (both here in Utah and in Qwest's other states) the conduit rates that Qwest has represented to this Commission and to the FCC that it is charging for conduit access.⁵ Specifically, Qwest represents that it makes its conduit available at rates set forth in its Statement of Generally Available Terms ("SGAT"), which in Utah is \$.33 per foot. However, it continues to charge AT&T exorbitant attachment rates ranging from \$2.10 to \$2.98 per foot per year. This is six to nine times higher than the rate which Qwest claims to make its conduit available to all other parties. The problem is exacerbated by the fact that Qwest is a direct competitor of AT&T. Ultimately, this means that AT&T is subsidizing Qwest, its competitor, at the public's expense. The millions of dollars in excessive rent AT&T spends on an annual basis could otherwise be applied to upgrading systems and plant, and developing and providing new communications services to consumers.

Section 271 of the Communications Act, 47 U.S.C. § 271, requires Qwest to charge rates that are consistent with Section 224 pole attachment rates. But in Utah, the formula that

⁵ Indeed, AT&T and Qwest are involved in litigation before the FCC concerning Qwest's conduit rates in the nine states in Qwest's service territory where that agency regulates conduit rates. *AT&T Communications of the Midwest; AT&T Communications of the Mountain States v. Qwest Corporation*, FCC Docket No. EB-03-MD-020 (filed Dec. 2, 2003).

produces these rates is not in place, and ensuring that the rates actually charged are consistent with this methodology is problematic. Adoption of that formula will (1) allow AT&T and other facilities-based competitors who must rely on essential conduit facilities to enforce fair and reasonable conduit rates as to both Qwest and other owners of these essential support structures; and (2) allow this Commission to shore up its regulation of pole attachments, including the rates, terms and conditions of conduit occupancy.

B. The Commission Should Adopt Specific Regulations Applicable to Conduit

AT&T urges this Commission to follow the FCC's regulations governing rates, terms and conditions of conduit occupancy.⁶ As with poles, the FCC has had over 25 years' worth of experience in regulating these matters, allowing it to develop and refine its regulations. AT&T suggests the following specific areas of regulation.

1. Conduit Rates

AT&T urges the Commission in the strongest possible terms to adopt the FCC's conduit rate formula.⁷ The FCC has had extensive experience, both developing and administering the formula,⁸ and the Commission is in an excellent position to reap the benefits of the FCC's expertise. Furthermore, adoption of this formula would not be disruptive to the way rates are already calculated in Utah. The SGAT rates at which Qwest claims to make its conduit available

⁶ As indicated, AT&T expressly agrees with Comcast that this Commission should adopt the FCC's approach to pole rates, terms and conditions, except that there should not be a separate telecommunications "penalty" rate.

⁷ The conduit rate is the same for cable television systems and telecommunications providers because there is no unusable space in a duct or conduit. See *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453, ¶ 90, n. 290 (2000) ("[W]e now believe there is no unusable capacity in a conduit system. For whatever reason space may be reserved or designated for special uses and regardless of who may benefit from those uses, the space is capable of being used, and it remains part of the total capacity of the duct or conduit.").

⁸ See, e.g., *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd. 6453, ¶¶ 77-114 (2000).

to other users are at or near the rates that the FCC's formula produces.⁹ Indeed, New Jersey, which examined the conduit issue, adopted the FCC approach in its entirety.¹⁰

2. Terms and Conditions

As with pole attachments, it is critical that this Commission implement regulations governing the terms and conditions of occupancy and access, both to retain jurisdiction over conduit and to ensure that the utilities do not leverage their control over conduit to squeeze out competition. In addition to the suggestions it submitted in the Initial Joint Comments that apply equally to pole and conduit access, AT&T believes that any regulatory scheme must address, at a minimum, the following conduit-specific issues:

- a. Notification of upcoming attacher plans and the plans themselves shall be kept confidential and segregated from the pole owner's business divisions.

The same principles driving the need for confidentiality in Comcast's Comments on pole attachments apply equally to conduit.¹¹ Construction plans often contain proprietary data such as route information. Because of the competitive relationship that exists between the conduit occupants and the owners, the owners must be required to treat these plans confidentially. AT&T proposes that information provided by conduit occupants to the utilities' construction divisions not be shared with business divisions.

- b. Utilities should allow conduit occupants in-house access to its conduit records, subject to redaction of confidential data.

⁹ See Exhibit 1. (Qwest is apparently making its conduit available to other occupants at the SGAT rates, but not to AT&T).

¹⁰ See, 35 N.J. Register 5299 (Nov. 17, 2003); N.J. Admin. Code, Title 14, Ch. 18.

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The records to which conduit occupants should have access shall include documents necessary to distinguish between occupied and available conduit. This is important because market entrants, or even established competitive providers, cannot feasibly plan their routes or extensions without locating available conduit. It has been AT&T's experience that conduit owners are reluctant to share this information and instead force AT&T to submit applications without understanding the exact location of the available conduit. This is inefficient, expensive and ultimately hinders the development of competition.

- c. Utilities must verify the availability of requested routes, conduct safety inspections and perform make-ready work within a reasonable period of time.

It is imperative that utilities respond with information concerning safety and availability so that competitive providers are not delayed in gaining access. Similarly, it is very important for conduit owners to perform any necessary make-ready work without unreasonable delay. Otherwise, the conduit owner has the ability to prevent potential competitors from entering the market.

- d. When an occupant installs conduit, the utility may have the right to have an inspector present, but at its own expense.

As with pole attachments, it has been AT&T's experience that utilities seek to drive up costs (and revenue) by requiring attachers to bear the costs of unnecessary inspections. To remedy this potential for abuse, AT&T requests the Commission set specific rules limiting the conduit occupants' exposure to unreasonable fees.

IV. **CONCLUSION**

For the foregoing reasons, the Commission should adopt conduit principles consistent with these Initial Comments, including the same conduit rate formula adopted by the FCC.

RESPECTFULLY SUBMITTED this 1st day of April, 2004.

AT&T CORP.



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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April, 2004, an original, fifteen (15) true and correct copies, and an electronic copy of the foregoing **Initial Comments** were hand-delivered

to:

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