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Submitted April 1, 2004

**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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

Comcast Cable Communications, LLC, formerly Comcast Cable Communications, Inc. ("Comcast"), by and through their attorneys, Ballard Spahr Andrews & Ingersoll, LLP, hereby submit these Initial Comments in response to the March 19, 2004 Notice of Further Agency Action and Scheduling issued by the Public Service Commission (the "Commission") requesting

initial comments identifying the issues the Commission should address in the above captioned proceeding.

## I. INTRODUCTION

Comcast supports the Commission's decision to open an investigative docket to consider issues relating to pole attachment and conduit regulation. The Division of Public Utilities' (the "Division") list of suggested topics is an excellent starting point for the Commission's investigation and Comcast suggests that there are a few additional issues directly related to those on the Division's list that the Commission should consider. These issues are set forth below. Before doing so, Comcast believes it would be useful to discuss Comcast's interest in this proceeding, as well as the history and current market conditions that form the backdrop for pole attachment regulation.

### A. Brief Overview of Comcast

Comcast, by and through its subsidiaries, is the nation's largest cable operator, with cable systems in 35 states, including Utah. In addition to providing traditional video services to its subscribers, Comcast is now or soon will be offering state-of-the-art broadband services such as video on demand, high-speed Internet and Internet-Protocol ("IP") enabled communications services, including Voice Over IP telephone services.

Comcast is attached to more than 5 million poles nationwide, including more than 175,000 poles here in Utah. As a result, Comcast has experience with state and federal regulators and the parties that own or control the poles, including investor-owned electric utilities, Incumbent Local Exchange Carriers ("ILECs") such as the former Bells, cooperatively-owned utilities and municipally-owned utilities.

### B. Comcast's Experiences with Pole Owners in Utah

Comcast comes to this Commission with serious concerns about the state of pole attachments in Utah today—after many years of comparative quiet.[1] These concerns mirror the problems communications attachers are experiencing nationwide. At the moment, however, these problems present a deeper problem for communications attachers here in Utah because there has not been any recent regulatory activity in the pole-attachment arena, and the dominant pole owner in the state, PacifiCorp, is engaged in a multi-faceted campaign to convert the pole resource into a profit center.

For example, PacifiCorp has made demands on telecommunications carriers for a greater than 500% increase in pole rates (from $4.65 to more than $29.00) for poles to which telecommunications facilities are attached.[2] In addition, PacifiCorp, which owns a significant proportion of the poles in this State, recently sought to double its pole attachment rates by increasing them from $4.65 per pole per year to $9.20 from poles that do not contain "telecommunications" attachments.[3] However, there is no basis in Utah law that would allow such increases and, therefore, they should be rejected by the Commission as unreasonable.

Pole rates are easy to quantify and provide good examples of the problems that Comcast has in its relationship with some infrastructure owners. However, pole owners engage in other, less easily quantified misconduct, that can be—and in Utah today are—extremely expensive for

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[1] As the Commission is aware, on October 31, 2003, Comcast has filed a Request for Agency Action concerning PacifiCorp's assessment of unauthorized attachment penalties and survey costs. *See Comcast Cable Communications, Inc. v. PacifiCorp, dba Utah Power*, Utah Pub. Serv. Comm'n, Docket No. 03-035-28.

[2] PacifiCorp appears to be trying to impose a telecommunications rate on par with that in federal jurisdictions. However, as set forth below, such an approach will impede competition and has been rejected by a number of other states that regulate pole attachments.

[3] PacifiCorp's request to increase its rate is the subject of a separate proceeding. *See In the Matter of the Proposed Revisions of PacifiCorp, dba Utah Power & Light Company, to its Schedule 4-Pole Attachments-Cable Television Tariff by Advice Filing 03-09*, Utah Pub. Serv. Comm'n, Docket No. 03-035-T11.

communications attachers like Comcast. With alarming regularity, utilities have been trying to roll additional fees into seemingly innocuous and lawful tasks to disguise their true nature. Often these include fees for conducting surveys and audits that the utility claims are to verify billing records or to inspect for safety hazards. For example, Comcast and PacifiCorp are currently involved in a contested proceeding with respect to "unauthorized attachment" and plant survey charges.[4]

Although it may appear reasonable, at first blush, for utilities to require reimbursement for such surveys and audits, the charges the utilities demand go far beyond reimbursement and do not bear a reasonable relationship to the costs the utilities incur or the benefit bestowed on attachers. Sometimes the bills include "loading" factors, including administrative overhead charges that the pole owner has already collected as a part of the rental rate. Other times, pole owners require attachers to undergo repetitive and inefficient engineering reviews and inspections prior to approving attachment applications. Often these inspections can be consolidated or coordinated more efficiently, however, the pole owners assess these unverifiable charges to the attachers and thus, have no incentive, absent regulation, to keep costs down.

Of serious concern are pole owners that conduct overly broad surveys and audits that actually do much, much more to benefit the utility than the attacher. For example, utilities use these audits and/or inspections to survey their electrical plant for the purposes of updating records and/or correcting the utility's own safety violations. Despite the fact that the utilities gain valuable information that they would otherwise expend significant amounts of money to gather, they force the attaching party to bear the costs of the inspection and/or audit. This is

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[4] *See supra* note 1, p.3.

exactly what is happening on PacifiCorp's poles in Utah (and elsewhere) today. And this is why Comcast supports the Commission's resolve to act now.

## II. THE HISTORY OF POLE REGULATION AND THE POLE ATTACHMENT ACT

Comcast's problems with pole owners are not isolated to Utah and did not just begin. In fact, these types of problems have existed for decades and are what prompted Congress to enact the Pole Attachment Act of 1978. Comcast believes that a brief overview of the history of this pole attachment regulation will provide an appropriate context in which the Commission may consider the scope of this Investigative Docket.

### A. Utilities Have Monopoly Control Over Poles And Conduit

The Pole Attachment Act[5] was the legislative response to substantial evidence of abuses experienced by cable operators at the mercy of telephone and electric utilities, including "exorbitant rental fees and other unfair terms."[6] The United States Congress,[7] the Supreme Court,[8] federal district and circuit courts,[9] the Department of Justice[10] and the Federal

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[5] Pub. L. No. 95-234, 92 Stat. 35 (1978), codified at 47 U.S.C. § 224.

[6] *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, 16 FCC Rcd. 12103 ¶ 21 (2001), *aff'd sub nom Southern Co. Servs. v. FCC,* 313 F.3d 574 (D.C. Cir. 2002).

[7] *See, e.g.,* 123 Cong. Rec. H35008 (1977) (statement of Rep. Broyhill, co-sponsor of the Pole Attachments 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, the cable operators are virtually dependent on the telephone and power companies. . . .").

[8] *See, e.g., National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 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.").

[9] *See, e.g., United States v. Western Elec. Co., Inc.* 673 F. Supp. 525, 564 (D.D.C. 1987)(stating that cable television companies "depend on permission from the Regional Companies for attachment of their cables to the telephone companies' poles and the sharing of their conduit space. . . . In short, there does not exist any meaningful, large-scale alternative to the facilities of the local exchange networks. . . .").

Communications Commission ("FCC"),[11] have all recognized the status of poles and conduit as "essential facilities" and thus, bottlenecks to facilities-based competition in telecommunications and cable television markets. In deliberations preceding passage of the 1978 Pole Attachment Act, Congress observed that "public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents from cable TV systems in the form of unreasonably high pole attachment rates."[12] Some pole and conduit owners have also maximized their leverage control over pole and conduit resources in order to protect their stranglehold over their core voice telephony business, and to facilitate their entry into the cable television and broadband communications markets.[13]

(...continued)

[10] *See Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 F.C.C. 2d 307, ¶ 23 (1970).

[11] *See 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."); *see also, Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 F.C.C. 2d 307 ¶ 46 (1970) (recognizing that the telephone company has a monopoly and "effective control of the pole lines (and conduit space) required for the construction and operation of CATV systems.").

[12] H.R. Rep. No. *94-1-1630, at 5 (1976).*

[13] *See, e.g.,* Letter from Richard Firestone, Chief of the Common Carrier Bureau to Mr. Butler, 5 FCC Rcd. 4547, 4548 (July 6, 1990) (discussing cross-ownership restrictions and stating that "[t]he restriction on telephone company provision of video programming originated with a determination by the Commission that the monopoly position of the local telephone company might enable it to engage in anticompetitive conduct toward independent cable operators, by denying access to pole and conduit controlled by it and/or subsidizing its cable television service from its regulated rate base. The Commission was concerned with the potential extension of the local telephone company's monopoly power to cable television and other services that could be provided by cable facilities. The Commission therefore barred telephone common carriers from providing 'cable television service' within their telephone service areas.'"); *see also Telephone Company Cable Television Cross-Ownership Rules,* Sections 63.54—63.58, 3 FCC Rcd. 5849 (1988) (finding that "continued regulatory oversight is required to ensure that carriers do not abuse their power to control access to poles and conduit or to engage in improper cost-shifting."); *In re: General Telephone Co. of Calif.*, 13 F.C.C. 2d 448, 463 (1968) (opining that by virtue of its control over poles, the telephone company is in a position to preclude an unaffiliated cable television system from commencing service).

### B. Utility Abuse of Poles And Conduits Led To The Pole Attachment Act

Reacting to this type of monopoly abuse, Congress passed the Pole Attachment Act in 1978,[14] and mandated that the FCC regulate pole and conduit attachments so that monopoly-owned facilities were available to cable operators at just and reasonable rates, terms and conditions,[15] and in order to promote competition.[16] The Commission is also authorized to adopt procedures necessary to hear and to resolve complaints concerning rates, terms and conditions.[17]

> [T]he predominant legislative goal for Congress in enacting the Pole Attachment Act was "to establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust and unreasonable pole attachment practices on the wider development of cable television service to the public."[18]

The Pole Attachment Act also sets forth a cost-based, rate-setting formula to determine whether the pole and conduit rates charged by utilities are just and reasonable.[19] States are

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[14] Pub. L. No. 95-234, 92 Stat. 35 (1978), codified at 47 U.S.C. § 224.

[15] *See* 47 U.S.C. § 224(b)(1); *Alabama Cable Telecomm Ass'n v. Alabama Power*, 15 FCC Rcd. 17346, ¶ 6 n.27 (2000) ("By conferring jurisdiction on the Commission to regulate pole attachments, Congress sought to constrain the ability of telephone and electric utilities to extract monopoly profits from cable television systems operators in need of pole space," citing *FCC v. Florida Power Corp.* 480 U.S. 245 (1987)), *aff'd sub nom Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002).

[16] *See FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987) (finding that Congress enacted this legislation "as a solution to a perceived danger of anticompetitive practices by utilities in connection with cable television service."); *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, 1998* FCC LEXIS 140, **31 (Jan. 13, 1998)("Wireline video and telecommunications competition is heavily dependent on the ability of market participants to obtain access to utility poles, conduits and rights of way at reasonable rates.").

[17] 47 U.S.C. § 224(b)(1).

[18] *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, 16 FCC Rcd. 12103, ¶ 21 (2001), *aff'd sub nom Southern Co. Servs. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002).

[19] 47 U.S.C. § 224(d)(1)("[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, or the percentage of the total duct or conduit capacity, 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, duct, conduit, or right-of-way.").

allowed to opt out of the FCC's regulatory regime if they "certify" to the FCC that they effectively regulate "the rates, terms and conditions for pole attachments."[20] Utah has certified to the FCC that it regulates the rates, terms and conditions of pole attachments.[21]

The Telecommunications Act of 1996 ("1996 Act") expanded the FCC's jurisdiction over poles and conduit to cover telecommunications, in addition to cable, attachments, so that providers of telecommunications services as well as cable operators would be entitled to "nondiscriminatory access" to utility poles and conduit at "just and reasonable" rates terms and conditions.[22] In passing the 1996 Act, Congress hoped "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . ."[23]

### C. Utility Pole Attachments Today

Despite passage of the Pole Attachment Act, including the amendments pursuant to the Telecommunications Act, utility pole and conduit owners continue to resist state and federal attempts to curb their unreasonable pole-related conduct. Utility transgressions range from efforts to set rates at unlawful levels[24] and restrict the deployment of fiber-optic cable,[25] to access

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[20] 47 U.S.C. § 224(c). Eighteen states and the District of Columbia have provided the required certification. *See States That Have Certified That They Regulate Pole Attachments*, 7 FCC Rcd. 1498 (1992).

[21] *See* Utah Code Ann. § 54-4-13; Utah Admin. Code § R746-345-1; *Utah Cable Television Operators Ass'n v. Public Serv. Comm'n of Utah*, 656 P.2d 398, 403 (Utah 1982).

[22] 47 U.S.C. § 224 (a)(1)(4).

[23] Conf. Rep. on S. 652, 142 Cong. Rec. H. 1078 (Jan. 31, 1996).

[24] *See RCN Telecom Serv. of Philadelphia, Inc. v. PECO Energy Co. and Exelon Infrastructure Serv., Inc.* 17 FCC Rcd. 25238 (Enf. Bur. 2002) (rejecting PECO's attempt to charge a "market rate" of $47.25 per pole); *see also Alabama Power Co., v. FCC*, 311 F.3d 1357 (11th Cir. 2002) (affirming the FCC's decision to "reject the [$38.81 per pole] price demanded by" Alabama Power).

[25] *See Heritage Cablevision Assocs. of Dallas, L.P. et al. v. Texas Util. Elec. Co.*, 6 FCC Rcd. 7099 (1991), *recon. dismissed*, 7 FCC Rcd. 4192 (1992) (finding that utilities may not limit the types of services offered by a cable operator), *aff'd sub nom Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

denials[26] and illegal (nonrecurring) cost impositions.[27] Nevertheless, application of the Pole Attachment Act in each of these cases not only protected those operators that brought the complaint, but also communications competition overall. In the absence of effective pole attachment regulations, these communications attachers would have been at the mercy of the pole owners to the detriment of facilities-based competition and choice for consumers.

## III. POLE ATTACHMENT REGULATIONS ARE ESSENTIAL TO FOSTERING COMPETITION

Currently in Utah, there is very little in the way of pole attachment regulation. The unfortunate consequence has been that communications companies like Comcast, not to mention other competitors, have found themselves at the mercy of the pole owners when pole owners choose to exploit their ownership and control of these essential facilities. As competition in communications services becomes an increasingly important goal,[28] implementation of pole attachment rules and regulations is more important than ever. A comprehensive pole attachment

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[26] *See Cavalier Tel., LLC v. Virginia Electric & Power Co.*, 15 FCC Rcd. 9563 (2000), (mandating that the utility facilitate CLEC's access to poles), *vacated by settlement* 17 FCC Rcd. 24414 (2002). In issuing the *vacatur*, the Commission specifically stated that its decision did not "reflect any disagreement with or reconsideration of any of the findings or conclusions contained in" *Cavalier Tel. LLC v. Virginia Elec. & Power Co.* Indeed, many FCC and other decisions issued subsequent to the original *Cavalier* order embraced and applied the same principles set forth in *Cavalier*. Consequently, *Cavalier Telephone* continues to reflect the standards of justness and reasonableness to which the FCC holds utility pole owners.

[27] *See Texas Cable & Telecom. Ass'n v. Entergy Services, Inc.*, 14 FCC Rcd. 9138, ¶ 10 (1999) (finding that attaching parties are required to pay "for the actual cost of necessary engineering survey expenses."); *Newport News Cablevision v. Virginia Elec. & Power Co.*, 7 FCC Rcd. 2610, ¶ 8 (1992) ("An underlying principle of Commission regulation of pole attachments . . . is that costs incurred in regard to poles and their attachments which result in a benefit should be borne by the beneficiary.").

[28] *See Powell's Comments on President's Call for Universal, Affordable Broadband*, Comments of FCC Chairman Michael K. Powell, Mar. 26, 2004 ("Universal and affordable access to broadband is vital to the health and future growth of our economy."); 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 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"); *see also The State of The Telecommunications Industry in Utah*, 6th Annual Report, October 2003.

regulatory scheme is critical to achieving the goal of promoting facilities-based competition in Utah, just as the Pole Attachment Act has done nationally for more than 25 years. Below, Comcast briefly discusses regulations that other certified states have implemented and the important policy concerns underlying the decisions they made.

### A. Overview of Other Certified States

Eighteen states, including Utah, have elected to preempt federal regulation of pole attachments. Nonetheless, most of these preempting states generally follow the FCC's approach to pole attachment regulation. This makes sense. With over 25 years experience adjudicating and resolving disputes in 32 states and Puerto Rico, the FCC has been able to refine and adjust its regulatory scheme to effectuate the purpose and intent of the Pole Attachment Act: fair and reasonable access to essential facilities.

It should come as no surprise then that since passage of the 1996 Act, four state PSCs (California, Michigan, New York and Massachusetts) have re-examined their pole attachment rules, and each adopted the FCC approach.[29] They have recognized that the breakdown of locally protected telephone monopolies under the 1996 Telecommunications Act created a need for "cooperative federalism," in which investment decisions can be made seamlessly across state lines without unnecessary regulatory differences.

New York provides one interesting example. New York had certified and followed its own pole formula for 15 years. After the 1996 Act, it studied extensive testimony suggesting alternative formulas, and adopted in total the federal approach. In reaching this decision in 1997, the New York Public Service Commission stated:

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[29] In 2001, the Vermont Public Service Board issued new rules, essentially adopting the FCC formula for cable attachments, but with a more favorable presumption concerning usable space to reflect the taller poles typically in use today. *See* VT. PUB. SER. BD. R. § 3.706(D)(2)(c).

> [we] will use the federal approach as our model for setting pole attachment rates and regulating pole attachment operations in New York. Since the enactment of the Telecommunications Act of 1996, there has emerged a clear need for cooperative federalism in this and other areas of telecommunications so as to provide consumers the full benefits available from the development of competitive markets. * * * By embarking on this course, we hope to make it easier for service providers to do business by eliminating unnecessary variation in regulatory requirements. Also, by exercising our authority in this manner, we make it possible for firms operating nationally to compare favorably New York's practices and those followed elsewhere.[30]

The overall trend is clear: States have opted to piggyback on the FCC's expertise and have adopted the federal rules for pricing and facilitating attachments.

### B. Public Policy Concerns

As discussed above, Comcast is encouraged that the Commission has chosen to open this Investigative Docket, particularly since both parties are facing adverse conditions in the State. Now, especially, is a critical time to implement these regulations as facilities-based providers are poised to roll out high speed Internet, Voice Over Internet Protocol and other advanced broadband technologies. For consumers and businesses to reap the benefits of facilities-based competition, this Commission must ensure that utility pole owners do not use their control over the essential pole facilities to restrict or inflate the costs of access.

The increased costs such as doubled pole rents, exorbitant penalties, and improperly allocated survey and audit fees create a burden on market entrants and threaten to have a devastating effect on Utah's ability to attract investment in advanced technologies. For example, doubled pole rents mean that the parties' fixed costs double automatically without providing any corresponding benefit to either the attachers or their subscribers. This means that the cost of

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[30] *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, N.Y. Pub. Serv. Comm'n. Case No. 95-C-0341 at 6 (issued and effective June 17, 1997).

building out to reach a new customer immediately jumps up. This will have a disproportionate effect on rural areas—of which there are many in Utah—where it takes more poles to reach a single customer. As the density of subscribers decreases, the more it costs Comcast to provide its services. If poles rents are artificially high, build outs become too costly and there is little economic incentive to serve less densely populated areas. Where, as here, pole rents are only one piece of the puzzle and the dominant pole owner is generating revenue from a variety of non-rental schemes, the situation is obviously more severe.

### C. The Commission's Continued Jurisdiction Over Pole Attachments Requires it to Adopt and Enforce Regulations

In addition to the important policy considerations discussed above, federal law ***requires*** the regulation of poles and conduits. Under the Pole Attachment Act, states are allowed to opt out of the FCC's regulatory regime if they "certify" to the FCC that they effectively regulate "the rates, terms, and conditions for pole attachments."[31] Over 20 years ago, Utah certified to the FCC that it regulates utility pole attachments. This proceeding provides the Commission with an important opportunity to reexamine and update the underpinnings of this certification as well as confront the vital and contentious issues facing it now.

## IV. THE COMMISSION'S REGULATORY SCHEME SHOULD BE COMPREHENSIVE AND COVER RATES, TERMS AND CONDITIONS OF ATTACHMENT

Comcast believes that the Division's list of suggested topics to cover is an excellent start. Below, Comcast suggests modifications to the Division's list and provide additional topics Comcast believes are crucial to a comprehensive regulatory scheme.

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[31] 47 U.S.C. § 224(c).

### A. The Division's Request

Comcast believes the Division's list contains very important topics to consider. Comcast will address those topics in sequence.

#### 1. Pole rental fee formula

Regarding a pole rental rate formula, the Division has recommended that the Commission:

- Consider whether there should be an adoption of a statewide methodology for calculating pole attachment rates;
- Determine what costs should be allowed to be recovered in the pole attachment rate;
- Evaluate who should bear the burden of pole costs (fully allocated or incremental costs);
- Assess the use of the FCC formula for pole attachment rates, including allocation of usable space and unusable space;
- Evaluate rebuttable presumptions in FCC's formula: amount of space used, pole height, number of attachers; and

Cost recovery, application of fully allocated or incremental costs, allocation of usable and unusable space, and rebuttable presumptions are all integral parts of the FCC's formula that complement each other to provide for a fair and reasonable rate. Rather than considering them as separate topics, Comcast urges the Commission to consolidate them by considering adoption of the FCC's cable formula in its entirety. Comcast strongly advises against considering the individual components without considering the FCC's formula as a whole.

Pole attachment regulation in Utah's sister states provides strong support for this approach. Thirty-two states (and Puerto Rico) fall under the FCC's jurisdiction and therefore use this formula. In addition, of the eighteen states (plus the District of Columbia) that have certified to regulate pole attachments, and only nine of those states deviate from the FCC formula.

Furthermore, every state to consider the FCC formula since 1996 has endorsed the cable formula for application to ***all*** attaching entities.

For example, in April 1998, the Massachusetts Department of Telecommunications and Energy ("DTE") decided to model its approach to pole attachment rates on the FCC formula "in order to promote the goal of resolving pole attachment complaints by a simple and expeditious procedure based on public records so that all of the parties can calculate pole attachment rates as prescribed by the [DTE] without the need for our intervention."[32] The DTE found that "[w]hile no approach is without administrative difficulties . . . the FCC method simplifies the regulation of pole attachment rates as much as possible by adopting standards that rely on publicly available . . . data.[33]

California's pole rate statute is also modeled after the federal statute and, in 1998, California expressly extended the cable rate to telecommunications attachments.[34]

In 2001, the Vermont Public Service Board issued new rules, essentially adopting the FCC formula for cable attachments, but with a more favorable presumption concerning usable space to reflect the taller poles typically in use today.[35] The Board believed that the reduction in pole

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[32] *A Complaint and Request for Hearing of Cablevision of Boston Co., et al, pursuant to G.L. Chapter 166 § 25A and 220 C.M.R. § 45.04 of the Department's Procedural Rules seeking relief from alleged unlawful and unreasonable pole attachment fees, terms and conditions imposed on Complainants by Boston Edison Co.*, D.P.U./D.T.E. 97-82, p. 19 (Apr. 15, 1998).

[33] *Id.* The DTE recognized that the FCC approach "meets Massachusetts statutory standards as it adequately assures that [the utility] recovers any additional costs caused by the attachment of [] cables . . . while assuring that the [cable operators] are required to pay no more than the fully allocated costs for the pole space occupied by them." *Id.* at 18.

[34] *Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service*, 1998 Cal. PUC LEXIS 879 (Oct. 22, 1998) at 53-55 (finding "no convincing rationale justifying the adoption of different pole attachment rates" and further stating that "[t]he use of the existing cable pole attachment rates for all CLCs will also avoid the need for further protracted proceedings to prepare costs studies and to adjudicate default rates. . . . The use of the [existing statutory] formula constrains the default amount that may be charged for pole and conduit attachments, and, to that extent, promotes the emergence of a competitive local exchange market.").

[35] VT. PUB. SER. BD. R. § 3.706(D)(2)(c).

attachment costs to cable companies, resulting from application of the formula, would "lead to cable services becoming available in some additional low-density rural areas. . . . [Thus creating] even more value for Vermonters as cable TV companies are increasingly offering high-speed Internet service to new customers."[36] This "rural rationale" certainly resonates here in Utah.

In another rural state, the Regulatory Commission of Alaska in 2002 issued new pole regulations adopting the FCC cable formula for both cable and telecommunications attachments. In adopting the FCC's cable formula, the Alaska Commission concluded that "the CATV formula . . . provides the right balance given the significant power and control of the pole owner over its facilities;" and "that changing the formula to increase the revenues to the pole owner may inadvertently increase overall costs to consumers."[37]

Finally, the District of Columbia instructs its PSC to regulate the rates, terms and conditions for cable television use of utility poles and underground conduits in accordance with federal law and FCC rules and regulations, and requires that all rates, terms and conditions be just and reasonable. In 2003, the D.C. PSC approved a settlement of a pole rate dispute, based on the FCC formula.[38]

In sum, the FCC formula is a straight-forward, self-executing and economic approach for determining just and reasonable pole attachment rates that works in 41 states plus Puerto Rico and the District of Columbia. Comcast urges this Commission to take advantage of the FCC's quarter century of experience in administering and fine-tuning this formula. Rather than

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[36] Policy Paper and Comment Summary on PSB Rule 3.700, at 6, available at http://www.state.vt.us/psb/rules/proposed/3700/PolicyComments3700.pdf.

[37] *In the Matter of the Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint Use Regulations Adopted under 3 AAC 52.900 – 2 AAC 52.940*, Order Adopting Regulations, at p. 5 (Oct. 2, 2002).

[38] *See Formal Case No. 815, In the Matter of Investigation Into The Conditions For Cable Television Use of Utility Poles In The District of Columbia*, Order 815-T-52, (July 25, 2003).

evaluating the individual components of the rate, Comcast requests that the Commission consider adoption of the FCC formula as a whole.

**2. Two rate system**

The Division has recommended that the Commission:

- Explore application of methodology to all providers/attachers;
- Determine whether differences for rural versus urban attachments should be considered;

These recommendations indicate that the Division may be requesting that the Commission consider implementing two pole attachment rates: one for cable attachments and one for "telecommunications" attachments. Comcast opposes this approach. The federal "telecommunications" rate in place today has failed to achieve the objectives Congress envisioned and has instead turned into a telecommunications penalty. Comcast strongly urges this Commission to implement a single rate based on the FCC's cable formula and not implement a separate telecommunications rate.

The fundamental premise underlying Congress' implementation of a two-tiered rate structure was that there would be a flood of facilities-based telecommunications competitors attaching to poles in the first five years after the passage of the 1996 Act. As such, Congress reasoned that it would be appropriate to start allocating costs across the growing number of entities, rather than to set a fixed cost for all. Congress assumed that it would take 10 years to achieve the economies of scale it envisioned and so it provided that the new rate would be phased in over Years 5-10.

Congress' predictions have not played out. Competitive telecommunications service providers have not been deployed as successfully or as ubiquitously as expected. Development of competitive telecommunications services in Utah has been modest, and Qwest still holds the

dominant share of the market.[39] Under these conditions, implementing a dual rate system simply does not make sense. It would penalize communications providers for branching into new technologies and would deter continued investment and growth. This is the exact effect the policy goals espoused in the Sixth Annual Report on the State of the Telecommunications Agency, and in the 1995 Utah Telecommunications Act seek to prevent.[40]

### 3. Rural Electric Cooperatives

The Division has suggested that the Commission consider exempting rural electric cooperatives from pole attachment regulation. However, if the Commission exempts them from regulation, their poles are ***completely*** free from regulation. It has been Comcast's experience that cooperatives have used their non-regulated status as leverage to force communications attachers to acquiesce to unreasonable rates, terms and conditions. Considering that rural electric cooperatives, by definition, serve rural areas, and that there is a public interest in bringing advanced communications services to rural areas, exempting cooperatives from pole regulation appears to be directly contrary to stated Commission policy goals.[41] For these reasons, Comcast requests that the Commission consider ***not*** exempting rural electric cooperatives from regulation.

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[39] *See The State of The Telecommunications Industry in Utah*, 6th Annual Report, October 2003.

[40] *Id.*; *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 telecommunications industry...". In addition to these considerations, certain difficulties would arise in implementing the rate and determining which poles a telecom rate would apply to.

[41] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd. 15499, ¶ 1150 (1996) (requiring utilities "to justify any conditions they place on access"), *aff'd In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996,* Order on Reconsideration, 14 FCC Rcd. 18049 (1999).

### 4. General Terms and Conditions

Finally, the Division has suggested that the Commission investigate General Terms and Conditions included in contracts and specifically that the Commission:

- Consider audit issues, including:
    - Burden of costs, who should pay, and
    - Access to records;
- Discuss additional fees and charges; and
- Explore unauthorized pole attachment charges.

Comcast agrees that these are important topics for the Commission to include in its investigation and discuss the specifics of these broad topics in the following Section.

## V. ADDITIONAL ISSUES RELATING TO TERMS AND CONDITIONS OF ATTACHMENT THAT COMCAST REQUESTS THE COMMISSION INVESTIGATE

In addition to the topics addressed above, Comcast requests that the Commission address general terms and conditions of attachment. The additional areas of regulation set forth below are based on the federal body of pole attachment regulations that has evolved since 1978. Comcast strongly believes that the Commission should tap into the FCC's extensive experience and expertise in this area as it moves forward with this Investigative Docket. This Commission should incorporate and adopt, at a minimum, the following principles of pole attachment regulation into its investigation:

### 1. Utility pole owners must provide nondiscriminatory access to any pole, duct, conduit, or right-of-way, including transmission poles, electrical manholes, and bare rights of way.[42]

The Commission must implement and make effective rules governing access as a condition of its reverse preemption of pole attachment regulation.[43] Moreover, the Commission must ensure nondiscriminatory access to all poles in order to promote competition in accordance with the State's policy objectives. One way to do this is to require the pole owner to file the terms and conditions of pole contracts with the Commission and made available for public inspection and for adoption, much like an interconnection agreement.

### 2. All poles, ducts, conduits and rights of way should be presumed suitable and available for attachment or use.[44]

The utility should be assigned the burden of demonstrating why any facility is not available for joint use under standard make-ready practices and the widely accepted National Electrical Safety Code ("NESC"). A presumption in favor of access makes it more difficult for utility pole owners to restrict access to essential facilities for anti-competitive reasons.

### 3. ILECs and electric utilities may not favor themselves (or their affiliates) over cable and other competitors.[45]

Neither an ILEC nor an electric utility should be permitted to "reserve" space for communications use. To do so would be to favor itself over other communications attacher seeking to attach. However, an electric utility should be permitted to reserve space for core

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[42] *See* 47 U.S.C. § 224(f).

[43] *See* 47 U.S.C. § 224(c); Section III.C. above.

[44] *See supra* note 44, p.17.

[45] *See* 47 U.S.C. § 224(g); *Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, 15 FCC Rcd. 9563, ¶¶ 18, 19; *see Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd. 15499, ¶ 1170 (1996).

electric services if the utility has a bona fide development plan that reasonably and specifically projects a need for that space for core electric service within one year.

### 4. The Commission should impose deadlines for pole owners a) to grant or deny attachment applications and b) perform makeready work.[46]

The FCC and a number of certified states have adopted deadlines in order to assure timely access to poles.[47] Pole owners should be required to grant or deny attachment applications in writing within 30 days and should be required to perform all required make-ready within a reasonable period of time, not to exceed 60 days from the date of request. Otherwise, there is no incentive for pole owners to process permit applications, particularly when the applicants are competitors.

### 5. Pole owners should be required to keep competitively sensitive information confidential.[48]

Construction plans often contain proprietary data such as route information. Because of the competitive relationship that exists between attachers and pole owners, pole owners must be required to treat these plans confidentially. Attachers propose that information provided by attachers to pole owner construction divisions not be shared with business divisions. When submitting pole attachment applications, communications companies necessarily have to disclose their facilities routes, including areas targeted for new business or upgrades. This information should be kept confidential so that the pole owners are unable to use this information to their

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[46] *See* 47 C.F.R. § 1.1403(b); *See Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, 15 FCC Rcd. 9563, ¶ 15; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd. 15499, ¶ 1123 (1996).

[47] *See id.*; *Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service*; 1998 Cal. PUC LEXIS 879 (Cal. PUC Oct. 22, 1998); 220 Code Mass. Reg. § 45.03.

[48] *See Marcus Cable Assoc., L.P. v. Texas Util. Elec. Co.*, 12 FCC Rcd. 10362, ¶ 23 (Cab. Serv. Bur. 1997), *aff'd* FCC 03-173, File No. PA 96-002 (rel. Jul. 28, 2003).

competitive advantage. The danger is that the pole owners will race to install their networks first, causing delays and pushing make-ready expenses to the applicant.

### 6. Make-ready, inspection, and rearrangement costs must be reimbursed based on actual, reasonable expenses incurred, preferably on a unit cost basis.[49]

The applicant should pay for necessary makeready, but not for correcting preexisting violations. Costs of remedying preexisting conditions should always be the responsibility of the party causing the violation. If several parties make specific use of the additional space created through make-ready, the modification costs should be apportioned among all parties making specific use of the additional space, including the pole owner.

### 7. A utility may not specify that only utility crews may perform the necessary work, such as the installation and maintenance of attachments.[50]

Cable and other competitors should be allowed to use their own personnel or independent contractors to work on utility facilities if they are qualified under non-discriminatory, reasonable and objective standards (e.g. OSHA). Otherwise, the utility's own crews or their "preferred" contractors become a new bottleneck and threaten communications attachers to build and/or upgrade networks.

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[49] *See Knology Inc. v. Georgia Power Co.*, FCC 03-292, File No. PA 01-006, ¶¶ 25-26 (Nov. 20, 2003) ("Utilities are entitled to recover their costs from attachers for reasonable make-ready work necessitated by requests for attachment. Utilities are not entitled to collect money from attachers for unnecessary, duplicative, or defective make-ready work.").

[50] *Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, 15 FCC Rcd. 9563, ¶ 18.

### 8. Communications attachers should be able to overlash their facilities with notice to the pole owners and without incurring additional application, permitting, engineering, survey or rental fees.[51]

Overlashing does not use more pole space, but it allows cable operators to expand their channel capacity, eliminate points of unreliability, and improve their signal quality by lashing new or replacement conductors and amplifiers to the messenger cable attached to the pole. In many cases, the quickest and most effective means of bring new upgraded services to a community is to upgrade facilities by overlashing. The FCC has found overlashing to be a critical aspect of implementing the 1996 Act because promotes competition, increases opportunities for competition in the marketplace, and does not require any advance permission, notification or payment.

### 9. All attachers that benefit from make-ready, including the pole owner and/or manager, should share in the costs.[52]

Any entity that adds to or modifies its existing attachment should bear a proportionate share of the costs incurred in making the pole, conduit or right-of-way accessible. A party with pre-existing attachments that brings its facilities into compliance with applicable safety codes and requirements during such modifications should be responsible for a share of the modification costs. Otherwise, a new entrant could be forced to bear the costs of cleaning poles that have remained unchanged and in violation for years. This raises the costs of market entry, unfairly, and is detrimental to competition.

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[51] *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, 16 FCC Rcd. 12103 ¶¶ 73-86 (2001), *aff'd Southern Co. Servs. v. FCC,* 313 F.3d 574 (D.C. Cir. 2002).

[52] *Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, 15 FCC Rcd. 9563, ¶¶ 12, 16.

### 10. Pole owners should not be permitted to conduct additional inspections of attachers' facilities at attachers' expense.[53]

Utilities already have an obligation to maintain plant and recover related expenses in the pole rent, and thus, should not also be reimbursed for periodic inspections.[54] The Kentucky Public Service Commission also prohibits charging for inspections unless substandard installations are actually found, in which case the charges are limited to the cost of correction.[55]

In the event that the pole owner conducts periodic inspections, regardless of whether they are conducted at the attacher's expense, the owner must provide the attacher advance notice, project scope and schedule, the right to participate, and a copy of the findings. This is an important part of ensuring that attachers are not held responsible for the cost of correcting pole owners' or other parties' violations.

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[53] *See Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd. 11450,¶ 8 (Cab. Serv. Bur. 2000) ("a separate charge or fee for periodic inspections of the pole plant, including a pole count survey, is not justified if the costs associated with the inspection are already included in the rate, based on fully allocated costs"), *aff'd sub nom Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

[54] See *Investigation Into Tariff Filing of Verizon New England, d/b/a Verizon Vermont, re: Revisions to its Pole Attachment Tariff*, Order, Docket No. 6553, pp. 29-30 (Vt. Pub. Serv. Bd. Oct. 22, 2003). ("Verizon ought to be allowed to inspect the poles to assure compliance with construction standards, and to charge the attaching entity for the inspection where violations are discovered. Subsequent inspections, on the other hand, are more likely to be for the benefit of Verizon and all the attachers generally, and the cost of inspections ought to be folded into the pole attachment rental charge.")

[55] *See Re: Cable Television Pole Attachments*, 49 PUR4th 128 at 4 (Ky. Pub. Serv. Comm'n 1982) ("The Commission recognizes the necessity for periodic inspection of utility plant for safety and other reasons, and commission regulations . . . require them, without any provision for additional payment by customers. Of course, when substandard installations are found which are not created by the utility, but by the CATV operator, the utility should charge the CATV operator for the cost of correcting them, plus some contribution toward administrative costs and labor and materials costs for making such corrections.").

### 11. Costs of audits and surveys that benefit more than one attacher, including the pole owner and/or manager, should be borne by all beneficiaries.[56]

Fairness dictates that if a pole owner conducts an audit or a survey and collects information about or useful to more than one entity, each entity should pay its proportionate share of the costs. Otherwise, the entity forced to bear the expenses subsidizes the others, who are often competitors.[57]

### 12. The Commission should require pole owners to provide details of all incremental charges in excess of the pole rate.[58]

Communications attachers are customers of the pole owners, and like all customers, are entitled to bills that allow verification of the charges. To that end, and to ensure accountability, make-ready bills should be itemized so that attaching parties can determine the precise nature and reasonableness of the charges. In numerous instances, pole owners have double charged attachers for overhead loaders and other incremental non-recurring fees that are already included in the rental fees.[59] Unless the pole owners identify all charges with specificity, it is nearly impossible to track these double charges. Make-ready bills should therefore include, at a minimum: (1) date of work; (2) description of work; (3) location of work; (4) unit cost or labor

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[56] *See Knology Inc. v. Georgia Power Co.*, FCC 03-292, File No. PA 01-006 (Nov. 20, 2003); *First Commonwealth Communications v. Virginia Elec. & Power Co.*, 7 FCC Rcd. 2614, ¶ 11 (Comm. Car. Bur. 1992)("we find that VEPCO's detailed, physical measurements of clearances between attachments is unreasonable. These detailed, physical measurements determine more than cable safety violations. VEPCO's own submissions demonstrate that such detailed measurements yield information concerning safety problems of other pole users. This is a benefit to non-cable pole users because they can learn about their own safety problems at cable's expense."); *Newport News Cablevision, Ltd. Communications, Inc. v. Virginia Elec. & Power Co.*, 7 FCC Rcd. 2610 (Comm. Car. Bur. 1992).

[57] *See Marcus Cable Assoc., L.P. v. Texas Util. Elec. Co.*, 12 FCC Rcd. 10362, ¶ 23 (Cab. Serv. Bur. 1997), *aff'd* FCC 03-173, File No. PA 96-002 (rel. Jul. 28, 2003).

[58] *Knology Inc. v. Georgia Power Co.*, FCC 03-292, File No. PA 01-006, ¶¶ 59-62; *See Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, 15 FCC Rcd. 9563, ¶ 5.

[59] *Id.*

cost per hour; (5) costs of itemized materials and; (6) any miscellaneous charges. Upon request, the pole owner shall furnish a breakdown of the basic engineering rate, load and other factors.

### 13. Attachers should not be required to obtain a permit prior to attaching to service drop poles.[60]

Generally, drop poles are treated differently than regular mainline attachments because franchise customer service requirements and federal regulations mandate that cable operators provide service to new customers within a very brief time from the date of request, often just 7 days, and because there are key physical differences between distribution and drop poles. As a result, it is usually impossible to obtain advance authorization to attach to drop poles and maintain compliance with applicable service standards.

### 14. Pole owners should only be able to collect unauthorized attachment fees in the form of back rent dating back to the date of the last audit or 5 years, which ever is less.[61]

The purpose of unauthorized attachment fees should be to make the pole owner whole for revenue lost, and should not constitute a windfall for the pole owner. Unauthorized attachments provide no benefits to the attachers—they are under the same obligations to comply with the NESC and other applicable safety codes as with authorized attachments.[62]

### 15. The Commission should establish expedited dispute resolution procedures.

Denied or delay access and/or unreasonable costs associated with access can make market entry prohibitive for potential competitors. The Commission should ensure that it has a

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[60] *See Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd. 11450, ¶ 19 (attacher need only notify pole owner of attachment to drop pole).

[61] *Id.* ¶ 8.

[62] *Id.* ¶ 12 ("Any unauthorized attachment provides no benefit to [attacher] with regard to safety. [An attacher] is under the same obligation to make its attachments safely and incurs the same liability for any safety violations for unauthorized attachments as it does for authorized ones. Any compromise to the integrity of the pole jeopardizes [attacher's] installation and service as it does that of [pole owner]").

mechanism for resolving complaints so that the incumbents do not squeeze out potential competitors.[63]

## VI. CONCLUSION

For the foregoing reasons, Comcast supports the Commission's inquiry into this area and urges the Commission to adopt principals of pole attachment regulation consistent with these comments. The Commission should conduct a broad investigation into pole attachment regulation.

RESPECTFULLY SUBMITTED this 1st day of April, 2004.

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[63] *See, e.g., Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service*; 1998 Cal. PUC LEXIS 879 (Oct. 22, 1998).

## 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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