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Submitted May 31, 2006

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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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	)	Docket No. 04-999-03
In the Matter of an Investigation into Pole	)	
Attachments	)	<b>COMCAST’S COMMENTS TO</b>
	)	<b>DRAFT STANDARD POLE</b>
	)	<b>ATTACHMENT AGREEMENT</b>
	)	

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Comcast Cable Communications, LLC, formerly Comcast Cable Communications, Inc. (“Comcast”), by and through its attorneys, Ballard Spahr Andrews & Ingersoll, LLP, hereby submits these comments to the draft Utah Pole Attachment Agreement (“Standard Contract”) submitted to the Utah Public Service Commission (“Commission”) by the Division of Public Utilities on February 10, 2006.

Comcast’s comments to the Standard Contract will address the following issues:

- (1) timeframes; (2) consistency with the Pole Attachment Rules; (3) internal consistency; and
- (4) typographical errors.

## I. Timeframes

Section 3.02 of the Standard Contract provides that “Pole Owner[s] shall process permit applications and provide estimates of the costs of make-ready work” according to the Pole Attachment Rules, which are located in Utah Admin. Code R746-345 (the “Rules”).

Specifically, Section 3.02 obligates pole owners to comply with R746-345-3(C), which gives pole owners between 45 and 90 days, depending on the number of poles included in each application, to process applications and notify applicants of approval or denial. Although Comcast believes these timeframes are longer than necessary, they do provide critical certainty and regulation to the processing of applications.

All prior drafts of this Standard Contract have also contained the following language:

If notice is not received from Pole Owner within the above mentioned time frames, Licensee may proceed with installing the Attachment, and such Attachment shall be deemed authorized, subject to all other terms and conditions of this Agreement.

*See* December 9, 2005 Draft Standard Contract.

This language is consistent with the federal pole attachment rules and guarantees that pole owners cannot abuse their control of the essential pole facility by denying timely access to attachers.<sup>1</sup> In contrast, the current draft provides:

If notice is not received from Pole Owner with the above mentioned time frames, Licensee must check back with the Pole Owner before proceeding with installing the Attachment and can appeal to the Commission for permission to proceed.

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<sup>1</sup> *See Cavalier Telephone, LLC v. Virginia Electric and Power Company*, 15 FCC Rcd 9563, ¶ 15 (2000) (“Our rules require [a utility] to grant or deny access within 45 days of receiving a complete application for a permit. We have previously stated that the Pole Attachment Act seeks to ensure that no party can use its control of facilities to impede the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields. We have interpreted the Commission’s rules, 47 C.F.R. § 1.1403 (b), to mean that a pole owner “must deny a request for access within 45 days of receiving such a request or it will otherwise be deemed granted.”) (internal citations omitted), *vacated by settlement, Cavalier Telephone Settlement Order*, 17 FCC Rcd 24414 (2002) (stating the vacatur did “not reflect any disagreement with or reconsideration of any of the findings or conclusions contained” in the original order issued in 2000).

This provision creates several problems. First, it destroys the certainty that the Rules and the Standard Contract were designed to provide. The Rules and the Standard Contract were drafted with the intention of making the rights and responsibilities of attachers and pole owners clear. They were constructed to pay particular attention to timeframes in an effort to create certainty that attachers can rely on in making representations to customers about when services will be available. If attachers have no idea when pole owners will choose to respond to requests for attachment, they cannot inform their customers as to when services will be available.

Second, the new provision provides no incentive for pole owners to process pole attachment applications in a timely manner. Essentially, this provision takes away any consequence for failure to process applications in a timely manner. In fact, it provides pole owners with the ability to create substantial delays in the attachment process. Attachers, in contrast, may now be forced to beg for permission to attach in order to be able to provide services to consumers. Attachers' abilities to provide services will then depend not on the attachers' resources, but on the whims of pole owners. Attachers cannot function in today's fiercely competitive communications environment if they cannot get prompt access to poles. Accordingly, attachers must have enforceable timetables to effectively compete in the market and cannot rely on a pole owner's discretionary timetables.

Third, the new provision is confusing. It is unclear what the terms "check back" and "appeal to the Commission" mean. Is "checking back" merely reminding the pole owner of the outstanding application? Does it involve renewing the application in some way or making a new application for attachment? What if the pole owner still fails to respond? Are there any reasonable timeframes that the pole owner should comply with after the "check back" occurs? If the pole owner does not respond at all, is the potential attacher's only remedy a formal request for agency action? Is there any expedited remedy?

The new provision states that attachers can “appeal to the Commission for permission to proceed.” This remedy is impractical. The Rules give poles owners between 45 and 90 days to approve or reject pole attachment applications. Utah Admin. Code R745-346-3(C). These timeframes already substantially slow the attachers’ ability to get services to customers in a timely manner. If attachers are also forced to petition the Commission every time a pole owner decides to ignore an attachment application, attachers will have no ability to serve customers.

Once a request for agency action is filed, a pole owner would have 30 days to respond. R746-100-4(D). Even if the parties agreed to skip discovery and have a hearing immediately, it would take a minimum of 30 days to schedule a hearing and a minimum of 30 additional days for the Commission to issue a ruling regarding the proposed attachment. All total, this process would result in a **minimum** delay of 90 days above and beyond the time allowed by the Rules. At its shortest, then, the attacher would be waiting five months or more for a response to an application for pole attachment. Realistically, they would be waiting much longer because requests for agency action are not often resolved this quickly. Attachers cannot afford to put off customers for more than five months to await this determination.<sup>2</sup> Comcast will be unable to compete in the market because instead of waiting five months or more for Comcast service, customers will simply order a satellite dish.

Fourth, this provision creates an administrative burden, which slows the process further. The Commission will be placed in the middle of the pole attachment process. This is precisely what the Rules and the Standard Contract attempt to avoid by eliminating uncertainty between the pole owners and attachers. Under the new provision, a pole owner could literally force an

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<sup>2</sup> In the past, pole attachment contracts have provided attachers with a process to put up new attachments immediately. Previous versions have provided that attachers simply have to apply for attachment, wait 48 hours, and then install the attachment. Because the Standard Contract provides that attachers must now wait for written permission before attaching, the process will already be slowed substantially.

attacher to bring a request for agency action every time that attacher sought to install a new pole attachment. The Standard Contract permits the pole owner to ignore applications for attachment with no consequence. Accordingly, a pole owner could simply ignore all such requests and force agency action for attachment. Such conduct could result in an administrative burden for the Commission.

The original provision, in contrast, would limit the requests for agency action because attachers could put up attachments after giving pole owners an opportunity to inspect the poles and approve or deny applications. Because the prior provision is a workable solution to the dispute between attachers and pole owners regarding applications processing, it should replace the new provision which gives pole owners an incentive to ignore pole attachment applications.

## **II. Consistency With Pole Attachment Rules**

Section 5.02 of the Standard Contract provides that a “Pole Owner may charge Licensee [sic] the amounts contained in the Fee Schedule attached hereto as Exhibit \_\_\_ upon the discovery of unauthorized Attachments belonging to Licensee.” This language should be replaced with language conforming to the Commission’s September 6, 2005 Letter, which ruled on this matter. The Commission’s Letter provides that “[t]he unauthorized attachment fee shall be the back rent to the last audit plus \$25 per pole.” This Commission directive should be reflected in the Standard Contract in place of the current language.

## **III. Internal Consistency**

Sections 3.19 and 4.03 contradict one another. The first provides that if an attacher requires a mid-span pole, it will pay the cost of setting that pole, which will then be considered the property of the pole owner. In contrast, Section 4.03 provides that if a pole owner abandons any pole, the pole attacher can decide to stay on that pole and take title to it. In the first section, an attacher *cannot* own poles that are in line with those of the pole owner. In the other section,

an attacher *can* own poles that are in line with those of the pole owner, as long as the pole owner abandons those poles. For the purposes of clarity, and because Section 4.03 is confusing in its own right, Section 4.03 should be deleted from the Standard Contract.

#### **IV. Typographical Errors**

The second paragraph of Section 3.01 references “Article XI.” This reference should actually be “Article XII.”

The third paragraph of Section 3.01 is missing the final period.

The second sentence of the first paragraph of Section 3.17 should be edited as follows:

“Provided, however, that in cases of emergency or if Licensee fails to relocate as required by a Pole Owner’s notice, Pole Owner may, without incurring any liability except for negligence or willful misconduct, relocate or replace Licensee’s Attachments or Equipment...”

In Section 5.02, line 2, the word “License” should be changed to “Licensee.”

Section 5.03, line 4, the word “obligations” should be deleted.

Section 5.03, line 5, references “Section 8.03,” which no longer appears in the Standard Contract. This should be amended.

#### **V. Conclusion**

For the foregoing reasons, the Standard Contract should be amended as noted above.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of May, 2006.

**COMCAST CABLE COMMUNICATIONS, LLC**

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 31<sup>st</sup> day of May, 2006, an original, five (5) true and correct copies, and an electronic copy of the foregoing **COMCAST'S COMMENTS TO DRAFT STANDARD POLE ATTACHMENT AGREEMENT** were hand-delivered to:

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