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February 4, 2004

**VIA HAND DELIVERY
AND ELECTRONIC MAIL**

Ms. Krystal Fishlock
State of Utah
Department Of Commerce
Division of Public Utilities
Heber M. Wells Building, Fourth Floor
160 East 300 South
Salt Lake City, Utah 84111

Re: Response to Request For Input Regarding Pole Attachments:
The Commission Should Adopt Rules Ensuring That The Rates, Terms
and Conditions of Utility And ILEC-Owned Conduit And Poles Are Just,
Reasonable and Non-Discriminatory

Dear Ms. Fishlock:

AT&T is pleased to submit this letter in response to the Division's January 29, 2004 request for input in connection with the Utah Public Service Commission's (the "Commission") pole-attachment rulemaking process, and the upcoming February 13, 2004 technical conference. In this letter, AT&T wishes to focus principally on addressing what it believes to be a gap in the Commission's regulation of pole attachments.

Currently, the Commission's regulations do not address conduit and AT&T believes that this upcoming proceeding presents an ideal opportunity for the Commission to address the very important need to include conduit regulation in the Commission's pole attachment regulatory scheme. Because the term "pole attachment" is not limited only to poles used for communications, but also—at a minimum—includes conduit owned by electric utilities and Incumbent Local Exchange Carriers ("ILECs"),¹ AT&T not only believes that conduit

¹ 47 U.S.C. § 224(a)(4).

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regulation is appropriate, but that it is also required. As a result, the Commission should adopt regulations that establish that the rates, terms and conditions under which incumbent telephone and electric power companies provide conduit to competitive telecommunications carriers and similar entities must be just and reasonable.

AT&T believes that there are two immediately identifiable problems with the Commission's lack of regulation in this area. First, unregulated monopoly occupancy rental rates and other charges mean that conduit owners are able to hinder facilities-based competition in two ways: 1) by demanding and receiving monopoly rents, that 2) inflict economic damage on the conduit occupants (such as AT&T), who are generally the direct competitors of the conduit owners—particularly where the conduit owner is the ILEC. This, of course harms both competition and consumers by hampering efforts to develop and deploy the technologies needed for tomorrow's growth.

Second, and from a pure legal standpoint, because the Commission does not have regulations governing the rates, terms and conditions of access to conduit in place, this Commission does not comply with the requirements of Section 224 of the Communications Act of 1934. States are permitted to either opt in to the Federal Communications Commission's ("FCC") pole attachment regulatory scheme or design their own scheme and certify to the FCC that they regulate poles (and conduits). Utah is one of 18 states that has done so.² This certification may not be effective, however, "unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments." Again, by definition, the term "pole attachments" includes conduit.³

Although Utah has certified to the FCC that it regulates the rates, terms and conditions of cable television pole attachments, and adopted a pole rate formula similar to the FCC's,⁴ it has neither adopted a rate formula nor rules and regulations applicable to conduit occupancy. Furthermore, although the Commission has regulations in place governing *cable television* attachments, it has not updated its regulations to provide for just and reasonable rates,

² *Id.* at § 224(c). Eighteen states and the District of Columbia have provided the required certification. See Public Notice, *States That Have Certified That They Regulate Pole Attachments*, 7 FCC Rcd 1498 (1992).

³ *Id.* at § 224(a)(4).

⁴ Utah Code § 54-4-13; Utah Admin. Code Rule R746-345-3.

terms and conditions applicable to *telecommunications* attachments in accordance with the 1996 revisions to Section 224. Correcting this flaw is necessary to perfect Utah's pole-attachment certification.

Moreover, incumbent carriers have represented to this Commission and to the FCC that they charge conduit rates that comply with Section 224 when in reality they do not. One carrier has stated that the maximum rate that it may charge for conduits in the state of Utah, according to its Statement of Generally Available Terms ("SGAT"), is \$0.33 per foot. AT&T reasonably believes that the FCC's formula was used to arrive at these rates. Nonetheless, AT&T's most recent invoices reflect rates between \$2.00 and \$3.00 per foot (nearly six to 10 times the amount that this carrier claims is the maximum). This disparity highlights the need to develop a regulatory scheme that will ensure that a) conduit owners actually charge the rates that they say they will; b) the rates reflect the conduit owners' actual costs; and c) conduit owners are otherwise making their conduit available on non-discriminatory and reasonable terms and conditions. AT&T respectfully submits that the best and most efficient way for accomplishing these important objectives is by expressly extending the just, reasonable and non-discriminatory protections for poles to conduits, and adopting the FCC conduit rate formula.

The necessity of adopting regulations that ensure that the rates, terms and conditions of conduits are just and reasonable are at least as compelling now as when pole attachment regulation was first introduced more than 25 years ago. Recognizing the potential danger associated with pole and conduit owners' monopoly control over essential infrastructure facilities, Congress passed the Pole Attachment Act in 1978,⁵ mandating that the FCC regulate pole and conduit attachments so that monopoly-owned facilities are available to cable television systems at just and reasonable rates, terms and conditions,⁶ and in order to promote competition.⁷ The Act set forth a cost-based, rate-setting formula currently used to determine whether the pole

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

⁶ See 47 U.S.C. § 224(b)(1); *Alabama Cable Telecomm Ass'n v. Alabama Power*, 15 FCC Rcd 17346 at ¶ 6 (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.")

⁷ 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.").

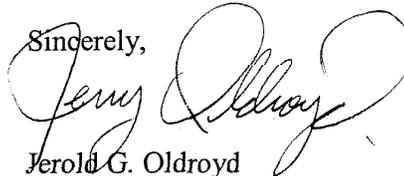
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and conduit rates charged by utilities are just and reasonable.⁸ The federal Telecommunications Act of 1996 ("1996 Act") then expanded the FCC's jurisdiction over poles and conduit to cover telecommunications, in addition to cable, attachments, so that communications companies, like AT&T, would be entitled to "nondiscriminatory access" to utility poles and conduit at "just and reasonable" rates terms and conditions.⁹

Today the 32 states that have adopted the FCC's approach (including the neighboring states of Colorado, Nevada, Arizona, Wyoming, New Mexico, Texas and Oklahoma) follow this approach. Other states with a vibrant competitive climate that have certified to the FCC such as California, New Jersey and New York follow this approach to conduit that AT&T recommends here. Most recently, the New Jersey Board of Public Utilities confronted much the same regulatory and certification quandary that this Commission now faces and decided both to adopt the FCC's conduit formula, and to extend its pole and conduit regulations to telecommunications companies like AT&T.¹⁰

For these reasons, AT&T respectfully submits that the Commission should consider conduit regulation in the upcoming pole-attachment proceeding and should adopt the regulatory approach AT&T suggests here. AT&T looks forward to discussing this recommendation in greater detail with the Commission staff and other parties at the January 13, 2004 technical conference.

Sincerely,



Jerold G. Oldroyd

⁸ 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.").

⁹ 47 U.S.C. § 224 (a)(1)(4).

¹⁰ N.J. Admin Code 14:18-2.11.