JOINT USE OF FACILITIES AGREEMENT

BETWEEN

PACIFICORP, doing business as
PACIFIC POWER and UTAH POWER

AND

_____

This Joint Use of Facilities Agreement is made and entered into this _____ day of _____, 20____, between PACIFICORP, an Oregon Corporation, d.b.a. PACIFIC POWER and UTAH POWER, hereinafter "PacifiCorp," and _____, a _____ organized and existing under the laws of the State of _____, hereinafter "_____," (collectively "the Parties"). The Parties mutually agree that the terms and conditions of this Joint Use of Facilities Agreement, hereinafter "Agreement," and applicable law, shall govern the Parties' non-exclusive Joint Use of such poles owned by each Party and located in the State of Utah as each may, upon application, permit the other to use. Both parties to the Agreement may be referred to as Owner, Licensee, Party or Parties to this Agreement as defined below.

WITNESSETH

WHEREAS, PacifiCorp is engaged in the business of providing service to customers in certain areas within the state of Utah; and

WHEREAS, _____ conducts its business in a number of the same areas within the state of Utah; and

WHEREAS, The Parties sometimes place and maintain poles or pole lines upon or along the same highways, streets or alleys and other public or private places for the purpose of supporting the wires and facilities used in their respective businesses; and

WHEREAS, the Parties desire to cooperate in establishing Joint Use of their respective poles ~~when and where Joint Use of their poles shall be of mutual advantage~~; and

Mutual advantage should not be a criterion of joint use. Such a requirement gives pole owners a simple way to avoid allowing third party attachments by merely stating the opinion that such joint use would not be "mutually advantageous." Subjective measures such as this cannot be used to establish effective joint use practices.

WHEREAS, ~~the desirability of Joint Use of particular poles is dependent upon the service requirements of each Party and others authorized to use the particular poles, including considerations of safety and economy, and each Party should determine, in its sole judgment, whether or not such~~

~~service requirements can properly be met by the Joint Use of particular poles.~~ applicable federal and state law provide that a utility pole owner may only deny access to poles and rights-of –way where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes;

In accordance with the federal Pole Attachment Act, 47 U.S.C. 224, *et. seq.*, (hereinafter "the Act" or "Section 224"), an electric utility pole owner may only deny access where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes. *See* 224(f)(2)(enumerating the standards for access denials). Access decisions must be based on **objective** criteria, like the National Electrical Safety Code ("NESC"), and applied on a non-discriminatory basis in order to ensure that access denials are fair and reasonable. The application of objective criteria to access requests will also aid the Commission during any related dispute. No monopoly pole owning utility should have absolute discretion to deny access in its "sole judgment." Accordingly, Comcast requests that the language in this clause that deviates from these standards and adds subjective elements to the decision making process be deleted. Specifically, Comcast believes that this clause's use of the word "economy," is inappropriate in this context. That term cannot be applied objectively to pole access decisions. In addition, the word "economy" is inappropriate in this clause because there are no economic ramifications of joint use for pole owners since licensees seeking access must incur all the reasonable costs associated with joint use. The pole owner, therefore, incurs no costs in providing access. Indeed, in the event a licensee pays for a pole change-out, the pole owner is the beneficiary of any excess usable space created by the change-out and can either use that space for its own facilities or lease the space to another attacher. Based on these facts, there are no economic considerations for the pole owners.

This clause should also reflect the fact that Section 224 obligates utilities to provide access to the "right-of-way owned or controlled by" the utility. 47 U.S.C. § 224. According to the Federal Communications Commission ("FCC"), that means a utility must grant access to the utility's rights-of-way, including "private easements," at no "additional payment." *The Cable Television Ass'n of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333, 27 (rel. Aug. 8, 2003) (hereinafter "Georgia Power Decision").

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein, the Parties hereby agree as follows:

ARTICLE I. DEFINITIONS

"Agreement" means this Joint Use of Facilities Agreement entered into between PacifiCorp and _____.

"Attachment" means Pole Attachment as defined in R746-354-2.C of the Utah Administrative Rules.

"Business Days" means days other than a Saturday, Sunday, or state or federal holiday.

"Commission" means the State of Utah Public ~~Utility~~ Service Commission.

"Electronic Notification System" or "ENS" means the electronic system or combination of electronic systems, designated and consented to by the Parties, that the Parties will utilize to submit applications for permission to attach, relocate, or remove Equipment under the terms of this Agreement, and to respond to requests for work to be performed. Both Parties shall have input during the development and design process of any such alternate ENS.

"Equipment" means all devices, articles or structures necessary to operate the business of the Parties including by not limited to cables, wires, conductors, fiber optics, insulators, connectors, fasteners, transformers, capacitors, switches, batteries, amplifiers, materials, appurtenances, or apparatus of any sort, whether electrical or physical in nature, or otherwise, including without limitation all support equipment such as guy wires, anchors, anchor rods, grounds, and other accessories.

"Fee Schedule" means the fees set forth in Exhibit C attached hereto as may be amended by the Parties or by changes in applicable law, including federal, state and local statutes, rules regulations and decision of courts or administrative agencies with jurisdiction.

As a general matter, the Fee Schedule should expressly state that any fees imposed on an attacher will be cost-based, and not otherwise recovered in the utility's annual rental pole attachment rate, in accordance with the Commission's proposed rule, R746-345-5(B)(4). Indeed, a fundamental tenet of pole attachment cost recovery theory is that to the extent pole owners recover costs in pole and conduit rent, based on fully allocated costs (as both the FCC and Utah rental formulas provide), they are not permitted to recover those same costs again through inspection fees, make-ready or other costs. *See, e.g., Texas Cable and Telecom. Ass'n v. GTE*, 14 FCC Rcd 2975 (1999) ("A separate fee for recurring costs such as applications processing or periodic inspections is not justified, if the costs are included in a rate based upon fully allocated costs. We will look closely at make-ready and other charges to ensure that there is no double recovery for expenses which the utility has been reimbursed through the annual fee."). *See also Cable Television Association of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333, 18 (2003) ("Through the annual rate derived by the Commission's formula, an attacher pays a portion of the total plant administrative costs incurred by the utility. Included in the total plant administrative expenses is a panoply of accounts that covers a broad spectrum of expenses. A utility would doubly-recover if it were allowed to receive a proportionate share of these expenses based on the fully-allocated costs formula and additional amounts for administrative expenses."). For example, FERC Accounts 920-931 and 935, which are used to calculate the carrying charges for the annual pole rent, include such administrative costs as office supplies and expenses, travel, supervision fees, premiums payable to insurance companies, payment of certain employee pensions and life insurance premiums, to

name a few items. It is essential that expenses not be charged twice, once as reimbursement of expense, and again in the rent. Applications processing fees, inspection charges, make-ready and other costs must therefore be carefully examined to ensure there is no double-recovery. Comcast believes that any fees proposed by pole owners should be reviewed and approved by the Commission to ensure there is no double recovery, as it is extremely difficult for Licensees to make that determination without assistance from the regulator.

"Inspection" means Owner's examination of Owner's pole or poles occupied by Licensee and any of Licensee's Attachments or Equipment situated upon or in the vicinity of such poles for the purpose of i) verifying the location of all Attachments and any other pole-mounted Equipment of Licensee, or ii) determining whether Licensee is in compliance with the requirements and specifications of Section 3.04 or any other obligations of Licensee under the terms of this Agreement.

"Joint Use" means reciprocal terms and conditions associated with attachment(s) by one party to a pole owned by another party under the terms of this Agreement.

"Licensee" means the Party seeking permission to place Equipment upon the Owner's poles as provided in Article III, or the Party who has already obtained permission to place Equipment upon Owner's poles.

"Make-ready Work" means all engineering, inspection, design, planning, construction, or other work necessary, in Owner's reasonable judgment, to prepare Owner's poles for the installation of Licensee's Attachments, including without limitation, work related to transfers, rearrangements and replacements of existing poles or Equipment, and the addition of new poles or Equipment.

"Material Adverse Change" means disclosed information which would adversely impact the Party's ability to meet its obligations under the Agreement. Such an event would include, but not be limited to significant financial losses; inability to make scheduled debt payments; disclosure of a possible bankruptcy; foreclosure of assets or sale of assets by secured creditors to fulfill secured debt obligations, and material changes in applicable law.

"National Electrical Safety Code" or "NESC" means the current edition, and any supplements thereto and revisions or replacements thereof, of the publication, so named, published by the Institute of Electrical and Electronics Engineers, Inc., for the purpose of safeguarding persons and property during the installation, operation, or maintenance of electric supply and communication lines and associated equipment.

"Non-recurring Charges" means legally authorized and identifiable amounts payable by Licensee under this Agreement other than rental charges and includes without limitation: application fees, charges to correct nonconforming equipment, charges for Make-ready Work, costs of mitigating interference with Owner's equipment, pole replacements or installation for Licensee's benefit, anchors and guys, and removal or relocation of Attachments or other Equipment, liability for damage to Equipment, the cost of Inspections and Occupancy Surveys, certain tax liabilities, late payment charges, and any other costs incurred by Owner that are caused by or attributable to Licensee's Equipment.

"Occupancy Survey" means an Inspection by Owner of all or any number of poles occupied by Licensee in the area covered by this Agreement.

"Owner" means the Party which owns the relevant pole or poles.

"Parties" means PacifiCorp and _____.

"Party" means PacifiCorp or _____, as the context requires.

~~"Unusable Equipment" means Equipment that is unsafe, imprudent, impracticable, or uneconomic to use in place because of damage, wear and tear, obsolescence, change of circumstances, or otherwise.~~

Comcast requests that this definition be deleted from the Standard Contract. As written, the definition of "Unusable Equipment" allows the pole owner unreasonable discretion in determining the Equipment that may be attached. Again, a pole owner can only deny access when there is insufficient capacity and for reasons related to safety, reliability and generally applicable engineering standards. Consequently, licensees must be permitted to install any type of Equipment that is safe in accordance with industry standards based on objective and nondiscriminatory criteria, like the NESC rules. Moreover, this definition and accompanying Section 3.19 seem arbitrary, unnecessary and redundant of Sections 3.04 and 3.05.

"Unused Equipment" means any Equipment situated on Owner's poles, other than Unusable Equipment, that Licensee has ceased operating or utilizing in the normal course of furthering the purposes of its business.

"UAR" means Utah Administrative Rules.

ARTICLE II. SCOPE OF AGREEMENT

Section 2.01 Poles; Geographic Scope

This Agreement shall apply to all areas served by the Parties in the State of Utah and shall cover all poles of each of the Parties within Utah which are presently jointly used, as well as poles which are now existing or which shall hereafter be erected in areas mutually served when such poles are included within the scope of this Agreement in accordance with its terms.

This Agreement applies to the use of the Parties' distribution poles only. Any requests for permission to use PacifiCorp's transmission towers, conduits, and other structures, will be considered individually and, if granted, shall be covered by a separate agreement.

Attachments may be permitted by Owner on Owner's transmission poles only after obtaining written authorization from Owner as provided in this Agreement, with the understanding that, should the characteristics of the Owner's facilities change resulting in either Owner or Licensee reasonably determining that Joint Use is no longer feasible due to insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes, Licensee shall remove its Equipment with no cost or obligation to Owner.

Section 2.02 Attachments; Purpose

Each Party's use of the other Party's poles shall be confined to the Attachments which Owner may give Licensee written permission to install: provided, however, that (i) Equipment currently attached to poles in accordance with past industry practice or by approvals granted by the Owner under prior agreements and applications in progress for permits, shall continue in effect under the terms and conditions of this Agreement; (ii) nothing herein shall relieve either Party from obligations and liabilities that arose or were incurred under prior agreements; and (iii) any rental obligations of the Parties currently in arrears under any prior agreement shall be recalculated according to the terms of this Agreement as of the effective date hereof. Licensee shall not sublet, assign or otherwise transfer, for any purpose, all or any part of its Attachments while situated upon Owner's poles, to any other person or persons other than an affiliate upon prior written notice, as provided in Section 7.05, without the prior written consent of Owner, which consent shall not be unreasonably withheld, conditioned, or denied.

Section 2.03 Reservation of Rights

Each Party reserves the right to reject applications for the Joint Use of poles where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes. Notwithstanding the foregoing, Owner may reserve space on its poles if such reservation is consisted with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service. Owner shall permit use of its reserved space until such time as Owner has an actual need for that space. At that time, Owner may recover the reserved space for its own use. Owner shall give the displaced Licensee the opportunity to pay for any reasonably modifications needed to accommodate its displaced Attachments. ~~which, in its reasonable judgment as the Owner thereof, are necessary for its own core utility use or are considered to be unsafe for Joint Use.~~

Again, it is essential that access decisions (*i.e.* the granting or rejecting of applications) be based on objective criteria relating to capacity, safety and reliability, not the utility's service requirements, or some other subjective measure. Comcast's revisions here are consistent with the Division's draft language in Section 3.02 requiring that access denials be in writing and describe how the denial relates to lack of capacity, safety, reliability and generally applicable engineering standards.

Additionally, a utility should not be permitted to reserve space unless the utility has a planned need for that space pursuant to a "bona fide development plan." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd. 15499, ¶1169 (1996) (hereinafter "*Local Competition Order*)", *aff'd Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002). Otherwise, a utility could deny access by simply alleging a need for the space. "Allowing space to go unused when a cable operator or telecommunications carrier could make use of it is directly contrary to the goals of Congress." *Local Competition Order* at ¶ 1168.

Nothing in this Agreement shall be construed to obligate either Party to grant the other Party permission to use any particular pole or poles, subject to the applicable Federal or State Law, rule, or regulation, including but not limited to the 1996 Telecommunications Act as amended, and the Utah Administrative Rules. ~~However, before such exclusions, careful consideration shall be given to the present requirements, possible alternates, and future plans of the other party.~~

Comcast believes the last sentence in this Section, relating to "present requirements" and "future plans" is probably not necessary and, more importantly, could be interpreted to conflict with the plain access language contained in Section 224(f)(2). If the Commission seeks to ensure that access decisions based on insufficient capacity, safety, reliability and generally applicable engineering standards will be carefully considered in good faith prior to a denial, it should express that intent clearly.

ARTICLE III. JOINT USE OF POLES

Section 3.01 Application for Permission to Install Attachment

With~~out~~ the exception of customer service drops, before Licensee places any Equipment upon any of Owner's poles, ~~,~~ Licensee shall request permission from Owner to do so via the Electronic Notification System (ENS) and submit payment for all applicable fees pursuant to the Fee Schedule and the Rental Rate Schedule upon receipt of an invoice from Owner. Rental Fees shall not apply until the attachment identified on the application is physically in place.

Licensees should not have to permit every piece of "Equipment," as that term is defined in the foregoing provisions. Most of the items listed under the definition of "Equipment" are incidental to an Attachment.

On a related note, some pole owners require Licensees to provide information on an application that is unrelated to or unnecessary for the request to attach. For example, some applications require detailed load information about all other Equipment attached to the pole (*i.e.* that of other licensees and the owner), information that the owner should already have in is its possession and can subsequently be used for its own benefit rather than to assist in determining if access should be granted. Applications can also include other burdensome requirements that a utility does not impose on itself or other Joint Users. It is, therefore, essential that the Commission approve a standard application form during this proceeding. Additionally, routine maintenance and modification activities are often frustrated by permitting requirements, and, in accordance with long-standing industry practices, must be expressly exempt. With regard to "applicable fees," again, the Commission must ensure that any fees imposed for the performance of administrative tasks like applications processing, and other activities, are cost-based and not otherwise recovered in the rent.

Section 3.?? Overlashing

Licensee shall provide written notice to the Owner at least ten (~~30~~10) Business D~~d~~ays prior to overlashing its Equipment to any existing Attachments or other Equipment already attached to Owner's poles, including third-party Equipment. Notice to Owner of Licensee's intent to overlash shall contain maps detailing the route(s) involved. Licensee shall not be required to obtain approval from Owner prior to overlashing and may overlash after the ten (10) day notice period has elapsed.

"[O]verlashing is important to implementing the 1996 Act as it facilitates and expedites installing infrastructure essential to providing cable and telecommunications services to American communities. Overlashing promotes competition by accommodating additional telecommunications providers and minimizes installing and financing infrastructure facilities…[O]verlashing is an important element in promoting the policies of Sections 224…to provide diversity of services over existing facilities, fostering the availability of telecommunications services to communities, and increasing opportunities for competition in the marketplace." *Implementation of Section 703(E) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and

Order, 13 FCC Rcd 6777, 6807, ¶ 62 (1998). Given the importance of overlashing to the deployment and upgrade of advanced facilities-based services and competition, Comcast believes that the overlashing process in this Standard Contract must be readily distinguishable from the "Application" process and should be contained in a separate section with distinct requirements. As to those specific requirements, the FCC encourages unrestricted overlashing and has declared that attachers need not "obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment." *Amendment of Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103, ¶ 75 (2001) (hereinafter "2001 Pole Order"), *aff'd Southern Company Services, Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002)("Overlashers are not required to give prior notice to utilities before overlashing. However, FCC rules do not preclude owners from negotiating with pole users to require notice before overlashing."). *See also Cable Television Association of Georgia v. Georgia Power Co.*, 18 FCC Rcd 16333, ¶ 13 (2003) ("The New Contract provision challenged by Cable Operators requires Georgia Power's written consent to overlashing, which the utility may take up to 30 days to grant or deny. This new provision is unjust and unreasonable on its face. The Commission has expressly articulated a policy promoting overlashing, and stated [that approval from the utility is not required]. Georgia Power is therefore ordered to negotiate in good faith a reasonable provision consistent with Commission precedent."). Thus, to ensure that unrestricted overlashing continues as envisioned by the FCC, while giving pole owners prior notice of overlashing (although not required by the FCC), Comcast believes a shorter, 10 Business Day notice period is more appropriate.

Unless Licensee provides prior written notice to Owner, Licensee shall not allow any other person to overlash Equipment upon an existing Attachment owned by Licensee. Licensee shall ensure that all overlashes conform with the construction and other standards and terms set forth in their Agreement and be liable for any nonconformance of violations.

This paragraph was located in Section 3.02 but seems more appropriately contained in the same section as the above overlashing language.

Section 3.?? Electronic Notification

Until further notice, the Parties hereby designate the National Joint Utility Notification System ("NJUNS") as the ENS. Licensee shall direct the application to the Owner's Member Code and the application shall contain all required information including: the Owner's facility identification number, specific equipment to be installed, the map number (to the extent that it is part of the pole number), both party's pole numbers to the extent that the pole numbers are on the pole and identifiable as the party's pole number, and street address of nearest physical location identifier of the poles in question and the space desired on each pole and any additionally information reasonably requested by Owner as necessary to properly review the request for attachment. Owner shall return the application to all Licensees' Member Codes via ENS.

Comcast requests the addition of a definition for "facility identification number" as used in the preceding paragraph.

In the event the Parties designate an ENS other than NJUNS, the Parties will follow all procedures required by such alternate ENS when submitting applications and using the ENS as required by this Agreement.

Licensee may also make written application, containing the same information required by the ENS, to Owner at the address set forth in Article XI. A copy of the written application can be found in Exhibit E, and may be revised from time to time by the Parties, in Owner's reasonable discretion. A written application fee will be assessed for processing each application Owner receives from Licensee not via ENS, in accordance with Exhibit C-1 and C-2.

Owners should not be permitted to charge an application fee for written applications processing if those costs are already recovered in the annual pole attachment rent. All fees assessed pursuant to the Standard Contract must be shown to be cost-based and not otherwise recovered in the fully allocated annual rent.

Section 3.02 Licensee's Right to Install Equipment

Owner will either approve or deny applications within forty-five (45) days of receipt of the application~~; time required to process applications will vary depending on the number of poles requested per application~~. Licensee shall have the right, subject to the terms of this Agreement, to install, maintain, and use the Equipment described in the application, upon the pole(s) identified therein, subsequent to approval of Licensee's application by Owner. If notice is not received from Owner within forty-five (45) days, the application shall be deemed approved and Licensee may proceed with the attachment. Any denial of an application must be in writing and describe with specificity all relevant evidence and information supporting the denial and how such evidence and information relates to lack of capacity, safety, reliability or generally applicable engineering standards.

~~With the exception of service drops, Licensee shall not have the right to place, nor shall it place, any Equipment in addition to that initially authorized upon Owner's poles without first making application and receiving permission to do so; nor shall Licensee change the position of any Attachment upon any of Owner's poles without first making application and receiving permission to do so.~~

Comcast requests that the preceding paragraph be deleted. The first part of this paragraph seems redundant of the first paragraph in Section 3.01. Additionally, as Comcast discussed above, licensees must be able to perform routine maintenance and modify existing attachments without being required to obtain a permit. The term "change the position of any Attachment" could be construed to limit licensees' activities in those respects. That term should therefore be deleted or clarified.

Licensee shall have the right to install service drops without prior approval by Owner. However, when Licensee installs service drops, Licensee must follow all procedures applicable to Attachments generally, and shall submit notification to Owner no later than five Business Days after installation. Notification of service drop installations shall contain information identifying the pole in which the service drop was added.

~~Unless Licensee provides prior written notice to Owner, Licensee shall not allow any other person to overlash Equipment upon an existing Attachment owned by Licensee. Licensee shall ensure that all overlashes conform with the construction and other standards and terms set forth in their Agreement and be liable for any nonconformance of violations.~~

Comcast requests that the above paragraph be relocated as indicated above.

Section 3.03 Identification of Equipment

Parties will clearly mark each pole with suitable identification as determined and agreed to in advance by the Parties. Licensee's identification must be visible from the ground and not interfere with other facility identification. Owner and Licensee shall conform to applicable Utah Administrative Rules pertaining to facilities identification. Licensee shall mark any ~~applicable~~ pole ~~with new~~ attachments installed after the effective date of this Agreement immediately upon installation. Attachments installed prior to the effective date of this Agreement, shall be marked at the time of ~~their~~ routine maintenance, normal replacement, rearrangement, rebuilding, or reconstruction, and whenever practicable.

When Owner renumbers a pole, ~~they~~ it shall provide written notice of the new pole number and cross-reference to the old pole number and location to Licensee within thirty (30) days. When the Owner sells a pole or poles to a third party, the Licensee shall be provided with the name and contact information for the new pole owner within thirty (30) days of the sale. Owner shall also provide to Licensee a detailed list of poles sold which includes pole numbers, addresses maps, pole description, and any other information which will assist Licensee in identifying the specific poles sold.

Section 3.04 Conformance to Requirements and Specifications

Licensee shall, at its own sole risk and expense, place and maintain its Equipment upon the poles in conformity with the requirements and specifications of the NESC, the Commission's "Safety Provisions for Joint-use of Poles" and "Line Inspection Requirements for Utility Operators." In the event there are changes in any such requirements or specifications, including but not limited to changes in required clearances, Licensee shall modify its Equipment, as soon as reasonable and practicable, to comply with such changes at its sole risk and expense. Each Party shall have in place a facility inspection program that meets or exceeds the requirements of the Commission's "Line Inspection Requirements for Utility Operators," and each Party shall provide the other Party with comprehensive documentation of its program upon executing this Agreement.

Comcast seeks clarification of this requirement. Does the Division intend for licensees to retroactively modify their currently compliant Equipment to conform to new standards that may be adopted by the NESC or Commission? Such retroactive requirements are extremely costly and burdensome and may divert resources intended for upgrades and the deployment of advanced services, towards modifying plant that was otherwise compliant when installed. Additionally, as Division staff is aware, NESC Section 013.B.2 provides that "[e]xisting installations, including maintenance replacements, that currently comply with prior editions of the Code, need not be modified to comply with these rules except as may be required for safety reasons by the administrative authority." Therefore, under the applicable provision of the NESC and industry standard, such modification of previously compliant Equipment is unnecessary.

Licensee's employees shall not enter the electric utility space for any purpose including making connections to the PacifiCorp neutral. If Licensee requires grounding on an existing pole where a grounding conductor does not exist, Licensee shall request PacifiCorp to install grounding at the sole expense of Licensee. If PacifiCorp is unable to install said grounding within 30 days of the date requested, License has the option of hiring qualified electrical contractors to perform this work. Licensee, its employees and its contractors, shall at all times exercise Licensee's rights and perform Licensee's responsibilities under the terms of this Agreement in a manner that treats all electric facilities of PacifiCorp as energized at all times. Licensee shall assume complete responsibility for its

employee's conduct and Licensee shall determine and provide the appropriate training and safety precautions to be taken by Licensee's employees and contractors. Licensee shall indemnify, defend, and hold PacifiCorp harmless from any liability of any sort derived from Licensee or Licensee's employees' or contractors' failure to abide by the terms of this paragraph except to the extent of Owner's negligence or willful misconduct.

Section 3.05 Nonconforming Equipment

~~If any Attachment is not placed and maintained in accordance with the Requirements and Specifications of Section 3.04, sanctions consistent with UAR may apply.~~ Upon notice by Owner, Licensee shall perform all work necessary to correct conditions of Licensee's noncompliance with Section 3.04. In the event that Licensee does not bring its facilities into compliance, Owner reserves the right to notify the Utah Public Service Commission. Owner reserves the right to perform work necessary to bring Licensee's Attachments into compliance upon Licensee's failure to timely do so. Any such work will be performed at Licensee's sole risk~~, and expense~~ except to the extent of Owner's negligence or willful misconduct. Owner shall be entitled to the reasonable and actual costs incurred for correcting the noncompliance. Owner will ~~attempt to~~ notify ~~Telco~~ Licensee electronically or in writing prior to performing such work whenever practical.

Comcast believes that there should not be "sanctions" for noncompliance with the Requirements and Specifications of Section 3.04. Such "sanctions" are contrary to standard industry practices and provide an incentive for pole owners to abuse the safety inspection process and create a hostile pole attachment environment. It is often difficult to determine which Party, including the pole owner, is responsible for a particular violation. If pole owners are able to profit from safety violations through the imposition of sanctions, the pole owner will have incentive to find violations and hold licensees responsible for any questionable or non-compliant circumstances without regard to determining which Party is responsible for specific violations. Indeed, a pole owner would even have incentive to create non-compliant conditions for which it could then assess sanctions to attachers. For these reasons, pole owners should not be entitled to receive sanctions for safety violations. Rather, the Parties should have a mechanism for determining who is responsible for a specific problem and that Party should be responsible to correct the violation. Since the network integrity is equally important to both the pole owners and third party attachers, sanctions are not necessary to deter attachers from installing non-compliant attachments. By the same token, the rule is one-sided in providing for sanctions that only licensees would have to pay in the event of installing non-compliant attachments. Although pole owners are also guilty of these infractions, which ultimately compromise the integrity of a network that the licensees depend upon, pole owners are not subject to these "sanctions." Accordingly, sanctions should not be imposed on licensees.

It should also be noted that any costs imposed in the pole attachment context, including unauthorized attachment fees must be cost-based. (Please refer to more detailed discussion by Comcast of these sanctions in Section 5.02, "Sanctions.")

However, if Owner determines such conditions pose an immediate threat to the safety of utility workers or the public, interfere with the performance of Owner's service obligations, or pose an immediate threat to the integrity of Owner's poles or Equipment, Owner may perform such work and/or take such action that it deems necessary without first giving written notice to ~~Telco~~ Licensee and without subjecting itself to any liability, except to the extent of Owner's gross negligence or willful misconduct. As soon as practicable thereafter, Owner will advise Licensee in writing of the work

performed or the action taken and will endeavor to arrange for the accommodation of any affected Attachments. Licensee shall be responsible for paying Owner, upon demand, for all reasonable and actual costs incurred by Owner for all work, action, and accommodation performed by Owner under this Section 3.05.

Pole owners should not be exempt from any liability.

Section 3.06 Time to Complete Installation

Licensee shall complete the installation of its Attachments upon the pole(s) covered by each approved application within ninety (90) days of approval by Owner. Licensee may request in writing, an extension of time for installation of large projects subject to written approval by Owner. Owner shall approve such requests for extension of time unless Owner identifies a reasonable justification for denial of such request. In the event Licensee should fail to complete the installation of its Attachments within the prescribed time limit, the permission granted by Owner to place Attachments upon Owner's pole or poles shall terminate and Licensee shall not have the right to place Attachments upon the pole or poles without first reapplying for and receiving permission to do so, all as prescribed in Section 3.01 as applicable to the initial application.

Section 3.07 Make-ready Work

If in the reasonable judgment of Owner, consistent with generally applicable engineering standards, the accommodation of any of Licensee's Attachments necessitates Make-ready Work, in the response to Licensee's application Owner will indicate the Make-ready Work necessary to accommodate the Attachments requested and the estimated cost thereof and forward its response to Licensee within forty-five (45) days from the date of application. If Licensee is willing~~ness~~ to bear the reasonable and actual cost of all Make-ready Work necessary, as determined by Owner, Licensee shall so indicate via ENS or in writing within thirty (30) days of the date of Owner's response to Licensee's initial application. If Licensee has a *bona fide* dispute with Owner's Make-ready Work determination or estimate, Licensee shall specify in writing the reasons for the disagreement. The Parties shall thereafter work in good faith to resolve the dispute. Owner will provide Licensee an estimated completion date for any Make ready work.

The Division should consider including enforceable timeframes for the performance of Make-ready Work. Licensees are often faced with substantial delays when seeking access due to the nonperformance of timely make-ready on the part of the pole owner, even at times when the pole owner is able to satisfy its own service requirements. Licensees cannot function in today's competitive environment if they are forced to beg for prompt access to poles. If the Owner is unable to meet the deadline, the Licensee should have the option of hiring an approved, third party electrical contractor to perform the work, consistent with the second paragraph of Section 3.04 and FCC rules. *See, e.g., Local Competition Order* at ¶ 1182 ("Allowing a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications provides and cable operators and would inevitably lead to disputes."). Other certified state Public Utility Commissions have adopted similar rules. *See, e.g.*, VT. PUB. SERV. BD. R. 3.708(G) (requiring Vermont utilities to hire contractors when make-ready and other tasks cannot be performed in a "timely" manner).

In the alternative, Make-ready should be performed on timetables depending on the number of poles involved in a particular access request. *Id*. at R. 3.708(E)(1)-(2) (setting forth the timetables for the

performance of make-ready "depend[ing] on the number of poles owned or attachments involved, as a percentage of the total number of poles owned.") At the very least, this provision should specify that "Make-ready Work will in any event be performed in a timely and cooperative manner." *Cavalier Tele., LLC v. Virginia Elec. and Power Co.*, 15 FCC Rcd 9563, ¶ 18 (2000), *vacated by settlement, Cavalier Tele. Settlement Order*, 17 FCC Rcd 24412 (2002) (stating the vacatuer did "not reflect any disagreement with or reconsideration of any of the findings or conclusions contained" in the original order issued in 2000.")

Owner will perform such Make-ready Work as may be required, but only to the extent allowed by applicable safety regulations, and Licensee will reimburse, upon demand, Owner for the ~~entire~~ reasonable expense thereby actually incurred~~. Licensee shall pay the costs of all Make-ready Work undertaken by Owner where such work is initiated as a result of the proposed installation of Attachments on any poles, including third-party-owned poles,~~ without regard to whether Licensee elects not to use the pole or poles after Make-ready Work has commenced. An itemized statement detailing the actual material, hours, labor and equipment costs, and any other associated costs will be provided to Licensee for payment of Make-ready Work.

This statement is redundant.

Section 3.08 Interference with Owner's Equipment

If, in Owner's reasonable judgment, Licensee's existing Attachments on any pole interfere with Owner's existing Equipment or prevent the placing of any additional Equipment by Owner, Owner will notify Licensee via ENS of the rearrangements or transfers of Equipment or pole replacements or other changes required in order to continue to accommodate Licensee's Attachments. If Licensee desires to continue to maintain its Attachments on the pole, and its Attachments were made subsequent to Owner's, and so notifies Owner via ENS or in writing within thirty (30) days, Licensee may perform the necessary work (subject to Owner's approval based on safety issues), or Licensee shall authorize Owner to perform the work. Should Licensee authorize Owner to perform the work, Owner shall make such changes as may be required, and Licensee, upon demand, will reimburse Owner for the entire expense thereby actually incurred, provided that Licensee's existing Attachments were made subsequent to Owner's existing Attachments and no other attachments have been made since the installation of Licensee's Attachments. If Licensee does not so notify Owner of its intent to perform the necessary work or authorize Owner to perform the work, Licensee shall remove its Attachments from the affected pole or poles within an additional ten (10) days from such original notification by Owner for a total of forty (40) days; provided, however, that Owner in any emergency may require Licensee to remove its Attachments within the time required by the emergency. If Licensee has not removed its Attachments at the end of the forty (40) day period, or in the case of emergencies, within the period specified by Owner, Owner may remove Licensee's Equipment at Licensee's sole risk and expense, and Licensee will pay Owner, upon demand, for all costs thereby incurred by Owner. If Owner is seeking to place additional Equipment on the pole and Licensee must rearrange or transfer its existing Attachments to accommodate Owner, Owner shall be responsible for all the reasonable and actual costs incurred by Licensee to perform such work.

See 47 U.S.C. §224(i)("An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of

an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way.").

Section 3.09 Pole Replacement for the Owner's Benefit

Where an existing pole is changed out solely for the Owner's benefit, the Owner will bear the total cost of the pole replacement including the labor for the lower and haul of the old pole. After Owner has completed its work it shall notify Licensee, via ENS or paper, and Licensee shall transfer its attachments to the new pole within thirty (30) days after the time specified in the notice given by the Owner indicating that the pole is ready for Licensee to transfer its equipment (which time shall not begin until after the parties located above the Licensee on the pole have removed or moved their facilities). **[DPU Question: Should there be a ramification if Licensee does not move its facilities in the time allowed (for example, sanctions)?]**

Rather than imposing sanctions on the licensees and creating a hostile environment that would inevitably lead to disputes, perhaps the pole owners and licensees can agree to a process whereby Owners perform simple transfers for the Licensee, at the Licensee's option.

Section 3.10 Pole Replacement for Licensee's Benefit

Where an existing pole is prematurely replaced (for reasons other than normal or abnormal decay) by a new pole for the benefit of the Licensee, the Licensee shall reimburse the Owner for all costs, including, but not limited to the cost in place of the new pole, the remaining life value of the existing pole, lower and haul of the existing pole (to the extent that this is performed by the Owner), and topping of the existing pole when performed either as an accommodation to Licensee or as required by NESC. Owner shall credit the Licensee for salvage value of the existing pole if it is not topped and it is less than ten years old. Owner shall remove and may retain or dispose of such pole as the sole owner thereof. Any payments for poles made or work performed by the Licensee shall not entitle Licensee to ownership of any part of said poles.

Section 3.11 Pole Placement or Replacement for Joint Benefit of Owner and Licensee

Where Owner requires a new pole and Licensee requires extra height or strength exceeding a basic 40 foot Class 5 pole to accommodate its new or existing attachments, Licensee shall pay a sum equal to the difference between the total cost of installing a new pole adequate to accommodate Licensee's new and existing attachments and the total cost of a basic 40 foot Class 5 pole. The balance of the cost of installing the pole actually installed shall be borne by Owner. When Owner is setting a new pole in Licensee's service territory where no pole preciously exists, Owner shall notify Licensee via ENS or paper of such work to allow for coordination of the required pole height and class if joint use is desired. Licensee shall respond to Owner within ten (10) Business Days if joint use is desired.

Section 3.12 Expense of Situating Pole Attachments

Licensee shall place, maintain, rearrange, transfer, and remove its own Attachments at its own expense except as otherwise expressly provided hereunder.

Section 3.13 Mid-span Poles

Any poles erected by Licensee shall not interfere with or be in-line with Owner's poles and shall not create a structure conflict as defined in the NESC. If either Party requires placement of a pole in-line with any two existing poles owned by the other party ("i.e., a mid-span pole"), the Party requiring the mid-span pole shall pay the cost of setting the pole, including the cost of the pole itself. The owner of

the poles on either side of the mid-span pole will have sole ownership of the mid-span pole and the Party requesting the pole will pay pole rental fees to the pole owner in accordance with Article V. **[DPU Questions: This doesn't seem fair. Are there any alternatives?]**

Section 3.14 Owner's Rights to Use Poles

Owner reserves to itself the right to maintain the poles and to operate its Equipment thereon in such manner as will best enable it to fulfill its own core service requirements, and Owner shall not be liable to Licensee for any interruption to Licensee's service or for any interference with the operation of Licensee's Equipment arising in any manner, except to the extent of Owner's negligence or willful misconduct, from the use, maintenance, and repair of the poles and the Equipment thereon by Owner or any other owners of Equipment upon Owner's poles, or from the removal of Attachments or other Equipment from the poles by Owner in accordance with the provisions of this Agreement. Owner will, however, except in cases of emergency, use reasonable efforts to contact Licensee prior to making changes that will affect Licensee's Attachments, but, in any event, will contact Licensee as soon as practicable thereafter.

Section 3.15 Tree Trimming and Brush Cutting

All tree trimming and brush cutting in connection with the initial placement of wires or other Equipment shall be borne entirely by the party placing the wires or other Equipment. Unless agreed to otherwise, each party shall be responsible for any and all additional tree trimming and brush cutting related to the wires or Equipment it owns.

Section 3.16 Third-party Consents, Permits, Licenses, or Grants

Licensee will be solely responsible for obtaining from public authorities and private owners of real property and maintaining in effect any and all consents, permits, licenses or grants necessary for the lawful exercise by Licensee of the permission granted by Owner in response to any application approved hereunder.

Section 3.17 Relocation of Attachments at Owner's Option

Licensee shall ~~at any time~~, at its own sole reasonable risk and expense, upon notice from Owner, relocate, replace or repair Licensee's Attachments or transfer them to substituted poles. Provided, however, that in cases of emergency, Owner may, without incurring any liability except ~~for~~ to the extent of Owner's negligence or willful misconduct, relocate or replace Licensee's Attachments or Equipment, transfer them to substituted poles, or perform any other work in connection with the Licensee's Attachments or Equipment that may be required, and Licensee will, upon demand, reimburse Owner for the entire expense thereby incurred.

To the extent that the Licensee is required to relocate it's facilities for the sole benefit of Owner or to accommodate a third party ~~attaching to the pole~~, the benefiting party shall reimburse Licensee for the reasonable and actual cost incurred by the Licensee to relocate its facilities. Owner shall disclose the third party's name and contact information to the Licensee at the time the relocation or rearrangement is required so that Licensee can seek reimbursement.

See comments in Section 3.08.

Section 3.18 Removal of Attachments by Licensee

Licensee may at any time remove its Attachments from any of the poles and, in each case, Licensee shall immediately give Owner electronic notice via ENS of such removal and submit payment of all applicable fees upon receipt of an invoice from Owner. An additional written notification fee will apply to all written notifications. Removal of all Attachments from any pole shall constitute a termination of Licensee's right to use such pole. Licensee will not be entitled to a refund of any rental on account of any such voluntary removal. When Licensee removes Attachments, rental charges payable by Licensee will be prospectively reduced in the annual billing cycle following Licensee's proper notice to Owner of the removal.

Owners should have to demonstrate that any costs associated with being notified about an Attachment removal are not otherwise recovered in the rent. Again, utilities typically recover these types of administrative costs in the fully allocated rent. Accordingly, additional fees for notification would allow the utility double recovery.

When Licensee performs maintenance to or removes or replaces its Equipment on Owner's pole, Licensee must chemically treat all field drilled holes and plug any unused holes caused by Licensee, including those resulting from removal of Equipment; if Licensee fails to adequately plug and treat such holes, Owner may do so at Licensee's sole risk and expense.

Section 3.19 Unused ~~and Unusable~~ Equipment

~~Except for seasonally used equipment, whenever Licensee has ceased using for a period of sixty (60) days any Equipment situated upon Owner's poles, Licensee will notify Owner via ENS, if practicable, or in writing otherwise. Licensee will repair or remove any Unusable Equipment from Owner's poles within 180 days of the date of last use, or upon such shorter time as required pursuant to Section 3.05 or Section 3.08 or otherwise under the terms of this Agreement. Additionally,~~ Licensee will remove any Unused Equipment from Owner's poles within 365 days of the date of last use unless Licensee demonstrates to Owner's reasonable satisfaction all of the following: (a) that it is more likely than not that Licensee will resume using the Unused Equipment in the same location within a period of three-years from the date of last use, (b) leaving Licensee's Unused Equipment in place will not preclude Owner or a third party from using the pole space occupied by Licensee's Unused Equipment for Owner's own purposes or the purposes of another pole user, where Owner's needs or the needs the other pole user cannot be satisfied by utilizing other existing, usable and available pole space, and (c) leaving Licensee's Unused Equipment in place does not contravene any other obligation of Licensee under this Agreement, including without limitation Section 3.04 and Section 3.08. In all cases, Licensee will incur rental charges under this Agreement for the pole space occupied or once-occupied by the Unused Equipment ~~or Unusable Equipment~~ until the billing cycle following the date upon which Licensee's Unused Equipment or Unusable Equipment is properly removed and notice of the removal is properly given to Owner under the terms of this Agreement.

Comcast believes that the first two sentences of this section should be deleted, along with all references to "Unusable Equipment." As discussed above, Licensees should be able to install any type of Equipment that is safe based on objective and nondiscriminatory criteria like the NESC rules.

Section 3.20 Limitations on Licensee's Rights to Use Poles; Termination

No use, of any sort or duration, of any poles under this Agreement shall create or vest in Licensee any ownership or property rights therein; nor shall any such use constitute the dedication of the Owner's

poles or Equipment to the public or to Licensee, subject to the UAR and other applicable laws and statutes. Nothing contained herein shall be construed to compel Owner to maintain any particular pole or poles for a period longer than demanded by Owner's own service requirements.

Section 3.21 Damage to Equipment

The Parties shall exercise all necessary precautions to avoid causing damage to the other Party's poles and Equipment and other pole users' Equipment; Each Party shall assume responsibility to third parties for any and all loss from any such damage and shall reimburse the Owner of the damaged poles or Equipment for the entire expense incurred in making repairs.

Section 3.22 Inspections and Occupancy Survey

Inspections. Owner shall have the right to perform an Inspection of each of Licensee's Attachments and other Equipment upon and in the vicinity of Owner's poles at any time. Owner may charge Licensee for the pro-rata expense of any non-routine Inspections during or after installation in connection with Attachments that ~~are non-compliant to~~do not comply with the terms of this Agreement. Owner shall notify Licensee of any performance concerns that trigger inspections at least two (2) ~~business~~ Business ~~days~~ Days prior to activating such inspection during installation and 30 days after completion and provide Licensee an opportunity to participate in such Inspections. Owner shall recover the costs for all periodic, routine Inspections that benefit all Licensees, in the annual rent. Such Inspections, whether made or not, shall in no manner relieve Licensee of any responsibility, obligation, or liability assumed under this Agreement or arising otherwise.

See Georgia Power Decision, ¶ 16 ("Regardless of frequency…costs attendant to routine inspection of poles, which benefit all attachers, should be included in the maintenance costs account and allocated to each attacher in accordance with the Commission's formula.").

Occupancy Survey. Owner may conduct an Occupancy Survey anytime after the effective date of this Agreement and not more often than every fifth year subsequent to each such Occupancy Survey. Owner shall give Licensee at least thirty (30) days prior notice of such Occupancy Survey. Licensee shall advise Owner if Licensee desires to participate in the inventory with Owner not less than ninety (90) days prior to the scheduled date of such Occupancy Survey. The Parties shall jointly select an independent contractor for conducting the inventory and agree on the scope and extent of the Occupancy Survey that is reimbursable by Licensee. The cost of the inventory shall be divided ~~amount~~ among all ~~parties~~ Parties attached to the poles based on the number of poles occupied by each party. The Contractor shall provide the Parties with a detailed report of such Occupancy Survey including both Owner's and Licensee's pole numbers (to the extent that Licensee's pole numbers are on the pole and clearly identified as Licensee's pole tag at time of the survey) within a reasonable time after its completion. The inventory data from Owner's Occupancy Survey shall be used to update Owner's attachment billing records where applicable. Licensee shall make any objections to the inventory data within sixty (60) days of receipt of the Occupancy Survey report or such objections shall be waived. Objections raised to inventory data from an Occupancy Survey shall not relieve Licensee of the obligation to pay undisputed amounts when due, as set forth in Section 5.03 below. The Parties agree to cooperate in good faith to resolve any disputed amounts.

Licensees should not be forced to pay disputed amounts and then await a refund.

Additionally, Comcast proposes that rather than allowing Owners to conduct a survey "anytime after the effective date of this Agreement," the Commission should order all Owners and licensees in Utah to conduct a state-wide audit, at each Parties' expense, in order to establish a common baseline for future audits, after which Owners would then be allowed to impose unauthorized attachment penalties. The Parties also could, in the alternative, jointly stipulate to a number. Given the record-keeping inadequacies of many Owners and licensees in the state, it would unfair to penalize only licensees. The performance of a baseline audit or stipulation, at this time, is an effective and equitable solution that will also serve to promote cooperation between the Parties and limit disputes before the Commission. Indeed, following a year-long Generic Pole Proceeding before the New York Public Service Commission ("NYPSC"), the NYPSC was convinced that record-keeping was problematic on both sides and therefore ruled: "Both Attachers and Pole Owners arguably have some inaccuracies in their records of what attachments are on the poles. In order to provide a common base line for all future pole audits, all pole Owners and Attachers shall either stipulate as to what attachments are on the poles or conduct an audit to determine what attachments are on the poles to be completed within three years of the date this [Order] is adopted. Owners and Attachers may choose to simply agree that their current records will be the baseline. Parties are encouraged to compare current records before choosing whether to stipulate or to conduit audits. If a joint audit is conducted it will be done at each parties' own expense." *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Case 03-M-0432, Order Adopting Policy Statement on Pole Attachments, at p.7 (Aug. 6, 2001). This Order is pending Rehearing and Clarification, but Comcast understands that the base line audit ruling is not at issue. Please refer to Section 5.02 for Comcast's discussion on unauthorized attachment penalties.

Section 3.23 Tax Liability

Licensee shall promptly pay any tax, fee, or charge that may be levied or assessed against Owner's poles or property solely because of their use by Licensee. If Licensee should fail to pay any such tax or assessment on or before the date such tax or assessment becomes delinquent, Owner, at its own option, may pay such tax on account of Licensee and Licensee shall, upon demand, reimburse Owner for the full amount of tax and any penalties so paid. Nothing in this provision in any way limits either party's rights to challenge such tax assessments.

ARTICLE IV. MAINTENANCE OF POLES

Section 4.01 Expense of Maintenance

The expense of maintaining jointly used poles shall be borne by the Owner thereof, and the pole Owner shall maintain its jointly used poles in a safe and serviceable condition, and shall replace, reinforce, or repair such of those poles as become defective. The pole Owner shall be solely responsible for collection of costs of damages for poles broken or damaged by third parties. The Licensee shall be responsible for collecting damages to its own Equipment. If a pole owned by one Party is replaced by the other Party because of auto damage or storm damage, the pole Owner shall pay the other Party for the actual costs of such pole replacement.

Section 4.02 Relocation of Joint Poles

Whenever it is necessary to replace, move, reset, or relocate a jointly used pole, for maintenance purposes, the Owner thereof shall, before making such replacement, move, or relocation, give sixty (60) days written notice thereof to Licensee (except in case of emergency, when oral notice shall be

given and subsequently confirmed in writing), specifying in such notice the work to be performed and the approximate time of such proposed replacement or relocation. Licensee may request that a pole be reset in the same location and Owner shall attempt to do so when feasible. The Licensee shall promptly arrange to transfer its Equipment to the new pole and shall notify the pole Owner when such transfer has been completed. In the event such transfer is not completed within thirty (30) days after the time specified in the notice given by the pole Owner indicating that the pole is ready for Licensee to transfer its Equipment (which time shall not begin until after the parties located above the Licensee on the pole have removed or moved their facilities), the other Party shall assume ownership of the original pole for all purposes at the conclusion of such thirty (30) day period, shall indemnify and hold harmless the former Owner of such pole from all obligations, liabilities, damages, costs, expenses, or charges incurred in connection with such pole thereafter, and shall pay to the former pole Owner the salvage value of the pole, if any, less the cost of lower & haul upon delivery of a bill of sale. Should the pole Owner perform any work for the Licensee, or the Licensee perform any work for the pole Owner to facilitate completion of the above work or in cases of emergency work, including without limitation transferring equipment, setting or lowering poles, digging holes, or hauling poles, the Party for whom work was performed shall pay to the other Party, upon receipt of an invoice, the cost of such work.

Owner may, with permission of Licensee, transfer Licensee's Equipment from the replaced pole to the replacement pole in a reasonable manner consistent with industry practices upon Licensee's failure to transfer its Equipment within the above mentioned thirty (30) days notice, and Licensee will reimburse PacifiCorp for all actual costs incurred.

Section 4.03 Abandonment Of Jointly Used Poles

If the Owner of a jointly used pole desires at any time to abandon the use thereof, Owner shall give Licensee notice in writing to that effect at least thirty (30) days prior to the date upon which it intends to abandon such pole. In the event that Licensee has not removed all of its attachments from such pole by the date specified in the notice, Licensee shall become the owner of the pole upon the date specified, and shall indemnify and hold harmless the former Owner of such pole from all obligation, liability, damages, costs, expenses, or charges incurred in connection with such pole thereafter, and upon receipt of an invoice and bill of sale therefor, Licensee shall pay to the former pole Owner the value, in place, at that time, of such abandoned pole, less cost of removal, but in no event less than fifty-dollars.

Section 4.04 Wood Decay and NESC Violations

Owner may, as an accommodation and by prior written approval by Licensee, by its own personnel or by a contractor selected by Owner and agreed to by Licensee, inspect and/or treat for wood decay on poles it does not own, but that support Owner's facilities concurrently with inspection and/or treatment of Owner's poles located in same geographic area; however, any such re-inspection and/or treatment shall not be repeated more frequently than every ten (10) years. Licensee shall reimburse Owner the cost of inspection and/or treatment in accordance with the mutually agreed to charges.

ARTICLE V. RENTAL PAYMENTS

Section 5.01 Rental Amount

For authorized Attachments covered under this Agreement, Licensee shall pay to Owner, in advance, on an annual basis, a per pole rental amount computed in accordance with UAR R746-345-5.B, on a billing cycle beginning **July 1 [DPU Questions: Why July versus October?]** of each year. The rental amount for each year shall be based on: (a) Owner's tabulation of Licensee's Attachments

situated upon Owner's poles as of the Owner's last Occupancy Survey, with additions for Attachments added during the previous year, and subtractions for Attachments removed during the previous year where notice of removal is properly given under Section 3.17.

Consistent with the terms of this provision, the components of the rental rates, and the methodology employed to determine the rental rates are subject to UAR R746-345-5.~~b~~ B and may not be changed, modified or replaced except as allowed by and in accordance with UAR R746-345-3.A.1

Section 5.02 Sanctions

Consistent with state laws, rules and regulations, only to the extent such laws, rules and regulations exist, Owner may impose sanctions in the event Licensee should at any time: ~~(a) fail to have a written contract with Owner that specifies general conditions for Attachments on the poles of Owner;~~ (~~b~~a) fail to have a permit issued by Owner ~~permitting each piece of~~ for each pole on which Licensee's Equipment is situated ~~upon each of Owner's poles~~ as required hereunder; or (~~c~~b) fail to install and maintain Equipment in compliance with this Agreement, any permits issued hereunder, or Commission safety rules.

Owner may impose sanctions without prejudice to Owner's right to utilize other remedies, including but not limited to the remedies available for default under Article **VI** of this Agreement and any remedies available under Commission rules, or otherwise.

Comcast strongly opposes any imposition of "sanctions" for failure to have a contract or for noncompliant attachments. As the Division may know, the certified State of Oregon adopted similar sanctions a few years ago and the pole attachment environment in that state has been in turmoil ever since. There are currently several sanctions-related proceedings in the state. *See, e.g., Central Lincoln People's Utility District v. Verizon Northwest*, UM 1087, Petition for Removal of Attachments (Pub. Util. Comm'n Or.) (seeking an order for Verizon to pay $1,248 per pole in sanctions for "no contract" and the removal of Verizon's attachments) (hereinafter "*CLPUD v. Verizon*"). Portland General Electric is involved in another sanctions case with Verizon; and Qwest has filed a petition in the Oregon Court of Appeals to overturn the sanctions. Oregon PUC Staff even initiated its own mini-proceeding this year to re-examine the sanctions, in recognition of the array of problems the sanctions have created.

The reason the sanctions have led to numerous disputes in Oregon is because the sanctions undermine the very purpose of pole regulation. The "failure to have a contract" sanction presents a particularly striking example. Allowing a pole owner to sanction a third party attacher for failure to have a contract motivates pole owners not to negotiate or contract with third parties, whom the owners can then sanction for failing to have a contract. The pole owners already have superior bargaining strength because they own essential facilities. A "failure to have a contract" sanction exacerbates this inequality in bargaining power by giving pole owners a motivation not to negotiate provisions of a contract.

"[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.'" 2001 Order at ¶ 21 (citing S. Rep. No. 95-580, 95th Cong., 1st Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 109). By contrast, the Oregon "failure to have a contract" sanction penalty, coupled with the essential nature of monopoly-owned poles, gives pole

owners an overwhelming advantage when negotiating the required "written contract," which is one of the very abuses pole regulation was intended to prevent. "[T]he relevant Senate report [associated with the Pole Attachment Act] refers to testimony received in committee concerning: 'the local monopoly in ownership or control over of poles' by the utilities; the 'superior bargaining position' enjoyed by utilities over cable operators in negotiating rates terms and conditions for pole attachments; and allegations of 'exorbitant rental fees and other unfair terms' demanded by the utilities in return for the right to lease pole space. As the Senate report and the case law bear out, Congress clearly acted to protect cable operators from anticompetitive conduct by utilities." *Heritage Cablevision Associates of Dallas v. Texas Util. Elec. Co.*, 6 FCC Rcd 7099, ¶ 14 (1991) (internal citations omitted). Indeed, in the *CLPUD v. Verizon* case, CLPUD allegedly attempted to force Verizon to execute what Verizon (itself a pole owner with some "bargaining power") believed to be an unreasonable pole attachment agreement. When Verizon refused to sign, CLPUD filed its Petition to Remove Attachments and for sanctions. Cable operators (which do not own poles) have similarly been forced, under threat of sanctions, to accept extremely unreasonable pole attachment agreements. Contract terms forcing attachers to pay sanctions for not having a valid contract will only make such problems more prevalent.

Another reason sanctions for "failure to have a contract" and noncompliant attachments are improper is because such sanctions would be non-compensatory penalties. Owners already have the right to recover any actual costs incurred to make poles available for attachment. *See, e.g.*, R746-345-3.A.2. And Utah courts have explained that "[w]here . . . the amount of liquidated damages bears no relationship to the actual damage or is so grossly excessive that it shocks the conscience, the stipulation will not be enforced." *Woodhaven Apartments v. Washington*, 942 P.2d at 921 (quoting *Allen v. Kingdon*, 723 P.2d 394 (Utah 1986). While Comcast does not object to a "reasonable" unauthorized attachment penalty for unpermitted attachments, that penalty must bear "a reasonable relationship to the actual damage[s]." The FCC agrees. In deciding to cap unauthorized attachment fees at five years back rent, the FCC determined that "[a]lthough an unauthorized attachment penalty may exceed the annual pole attachment rent, the amount of the penalty and the circumstances under which it is imposed must be just and reasonable…[The Pole Owner] suggests that the cost avoided by [the Attacher] for unauthorized attachments is the present value of fourteen years of annual fees plus some speculative amount related to supposed increased safety risks and administrative costs. First, it is unreasonable to infer that the alleged unauthorized attachments at issue have existed for fourteen years. Second, because [the Attacher] must always comply with safety concerns, there is no cost avoided by [the Attacher] related to safety issues. Third, because [the Attacher] is obligated to pay the maximum allowable rent, which is based upon fully allocated costs, any indirect administrative costs are recovered in the annual fee." *Mile Hi Cable Partners v. Pub. Serv. Co. of Colo.*, 15 FCC Rcd 11450, ¶¶ 10-13 (2000), *aff'd, Pub. Serv. Co. of Colo. v. FCC*, 356 U.S. App. D.C. 137, **14-15 (2003). The FCC further determined that its "penalty will provide incentive for [the attacher] to comply with a reasonable application process while encouraging utilities not to delay audits of unauthorized attachments." 15 FCC Rcd at ¶ 14. A similar penalty is appropriate here for the same reasons. Indeed, the proposed Standard Contract allows Occupancy Surveys to occur at five year intervals. That provision, coupled with a 5 year limitation on back rent penalties provides the "incentives" for Owners in Utah not to delay audits and for licensees to follow permitting requirements.

Finally, the constant threat of sanctions in Oregon has also created a hostile market environment for all communications attachers in Oregon. If Utah adopts similar sanctions, attachers in Utah, as in Oregon, will be forced to spend resources on non-compensatory penalties, rather than investing in

communications infrastructure and the deployment of advanced communications services for Utah residents.

Section 5.03 Billing and Payments

Owner shall send invoices to Licensee via regular U.S. Mail, Return Receipt Requested, at the address specified below, or at such other address as Licensee may designate from time to time. Invoices for rental charges will be sent annually. Invoices for all Non-recurring Charges, sanctions, and other obligations under this Agreement will be sent at Owner's discretion. Invoices for Non-recurring Charges will provide specific, verifiable information pertaining to each charge. Invoices for rental charges will provide summary information only. Invoices will conform generally to the invoice template attached hereto as Exhibit F, subject to change by Owner, in Owner's reasonable discretion. Licensee may obtain additional information pertaining to charges upon written request to Owner.

Licensee shall pay all charges within thirty (30) days of the invoice date. Licensee shall pay any undisputed amounts within thirty (30) days of the invoice date. ~~Upon resolution of any such dispute, Owner will refund any amounts owed, with interest accruing at the rate specified in Section 8.03 from the later of the date Licensee paid the disputed portion, or the date upon which Licensee provided Owner notice of the amount in dispute.~~ Late charges and interest shall be imposed on any delinquent amounts, as provided in Section 7.03. All bills shall be paid to the address designated from time to time in writing by Owner.

PacifiCorp's billing address:

T&D Infrastructure Management
650 NE Holladay, Suite 700
Portland, OR 97232

Licensee's billing address:

_____

_____

_____

Licensee's account for wire transfers:

Bank _____

Account Number _____

Section 5.04 Third-Party Compensation

Compensation payable by third parties for the use of poles shall be collected and retained by the Owner.

ARTICLE VI. BREACH AND REMEDIES

Section 6.01 Remedies for Default

If either Party shall default in any of its obligations under this Agreement and such default continues thirty (30) days after written notice thereof has been provided to the defaulting Party, the Party not in default may exercise any of the remedies available to it. Provided however, in such cases where a default cannot be cured within the thirty (30) day period by the exercise of diligent, commercially reasonable effort, the defaulting Party shall have an additional sixty (60) days to cure the default for a total of ninety (90) days after the Party not in default provides its notice of default. Subject to Section **7.01.** the remedies available to each Party shall include, without limitation: (i) refusal to grant any additional Joint Use to the other Party until the default is cured; (ii) termination, without further notice, of this Agreement as far as concerns the further granting of Joint Use; and (iii) injunctive relief.

Section 6.02 Reimbursement for Work Performed

If either Party shall default in the performance of any work that it is obligated to do under this Agreement, the other Party may elect to do such work, and the party in default shall reimburse the other Party for the cost thereof within thirty (30) days after receipt of an invoice therefor.

ARTICLE VII. GENERAL PROVISIONS

Section 7.01 Dispute Resolution

Any dispute arising out of, or relating to, this Agreement shall be settled in accordance with UAR R746-345-6.

Section 7.02 Failure to Enforce Rights

The failure of either Party to enforce or insist upon compliance with any of the terms or conditions of this Agreement in any instance shall not constitute a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain, at all times, in full force and effect.

Section 7.03 Interest

All amounts payable under the provisions of this Agreement shall, unless otherwise specified, be payable within thirty (30) days of the invoice date. An interest charge at the rate of one and one-half percent (1.5%) per month or the maximum rate permitted by law, whichever is less, shall be assessed against all late payments.

Section 7.04 Relationship to Third-Parties

Nothing herein contained shall be construed as affecting any rights or privileges previously conferred by Owner, by contract or otherwise, to others not parties to this Agreement to use any poles covered by this Agreement and Owner shall have the right to continue, modify, amend, or extend such rights or privileges. The privileges herein granted to Licensee shall, at all times, be subject to the limitations imposed by all such existing third-party contracts and arrangements. Further, nothing herein contained shall be construed as conferring or granting to Licensee the exclusive privilege or right to use any of the poles or other facilities of the Owner. Nothing in this Agreement is intended to confer rights on any third-party, as a third-party beneficiary or otherwise.

Section 7.05 Assignment of Rights

Neither Party shall sublet, assign, transfer, or otherwise dispose of this Agreement or any of its rights, benefits or interests under this Agreement without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned or delayed; but otherwise, the provisions of this Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective successors and assigns. No assignment of this Agreement shall operate to discharge the assignor of any duty or obligation hereunder without the written consent of the other Party. Each Party may assign all its rights and obligations under this Agreement to its parent corporation, to its subsidiary corporation, to a subsidiary of its parent corporation, to its survivor in connection with a corporate reorganization, to any corporation acquiring all or substantially all of its property or to any corporation into which it is merged or consolidated upon prior written notice to the other Party.

Section 7.06 Applicability of Utah Administrative Rules

To the extent that the terms of this Agreement, other than rates and sanctions, conflict with provisions of the Utah Administrative Rules (UAR) governing attachments to utility poles and the terms of the UAR permit the Parties to agree to terms differing from those specified in the UAR, then the terms of this Agreement will govern. Otherwise, Licensee's use of Owner's utility poles will be governed by applicable provisions of the UAR, as may be amended and the terms of this Agreement not inconsistent with applicable UAR provision, as amended. Applicable provisions include without limitation the provisions of UAR R746-345-1 through UAR R746-345-6. Notwithstanding, in the event that after execution of this Agreement a change in law occurs that affects a material term of this Agreement, either Party may request an amendment to this Agreement consistent with the terms of such change in law. In the event the Parties cannot reach agreement on an amendment within 30 days of the effective date of the change in law, the provisions of **Section 7.01** will govern.

Section 7.07 Applicable Law; Venue

In the event that legal action is required to enforce this Agreement or to obtain any remedy available hereunder, the Parties agree that this Agreement shall be interpreted according to the laws of the State of Utah without consideration of the choice of law rules thereof. Any action at law, arbitration or judicial proceeding instituted pertaining to this Agreement shall be instituted only in the state or federal courts located in the State of Utah.

Section 7.08 Survival of Liability or Obligations Upon Termination

Any termination of this Agreement shall not release ~~Licensee~~ either Party from any liability or obligations hereunder, whether of indemnity or otherwise, which may have accrued or may be accruing at the time of termination.

Section 7.09 Interpretation

References to Articles and Sections are references to the relevant portion of this Agreement. Headings are for convenience and shall not affect the construction of this Agreement. Exhibits A through F are attached hereto and made a part hereof.

Section 7.10 Severability

In the event that any of the terms, covenants or conditions of this Agreement, or the application of any such term, covenant or condition, shall be held invalid as to any person or circumstance by any court, regulatory agency, or other regulatory body having jurisdiction, all other terms, covenants or conditions of this Agreement and their application shall not be affected thereby, but shall remain in full force and

effect; provided, in any such case, the Parties shall negotiate in good faith to reform this Agreement in order to give effect to the original intention of the Parties.

Section 7.11 Prior Agreements; Amendments

This Agreement shall supersede all prior negotiations, agreements and representations, whether oral or written, between the Parties relating to the installation and maintenance of Licensee's Equipment on Owner's poles within the geographic area covered by this Agreement, as specified in Section 2.01. Any Equipment of Licensee attached to Owner's poles within the locality covered by this Agreement shall be subject to the terms and conditions and rental rates of this Agreement. This Agreement, including any exhibits attached and referenced herein, constitutes the entire agreement between the Parties, and may not be amended or altered except by an amendment in writing executed by the Parties, or as specifically provided for herein.

Section 7.12 Additional Representations and Warranties

Each Party warrants and represents to the other that it possesses the necessary corporate, governmental and legal authority, right and power to enter into this Agreement and to perform each and every duty imposed. Each Party also warrants and represents to the other that each of its representatives executing this Agreement, or submitting or approving an application made hereunder, is authorized to act on its behalf.

Each Party further warrants and represents that entering into and performing under this Agreement does not violate or conflict with its charter, by-laws or comparable constituent document, any law applicable to it, any order or judgment of any court or other agency of government applicable to it or any agreement to which it is a party and that this Agreement and any application approved hereunder, constitute valid, legal, and binding obligations enforceable against such Party in accordance with their terms.

Each Party also represents that it is solvent on the date of this Agreement. Notice to the contrary shall be given in writing to the other Party.

Section 7.13 Relationship of the Parties

Nothing contained herein shall be construed to create an association, joint venture, trust, or partnership, or impose a trust or partnership covenant, obligation, or liability on or with regard to either Party. Each Party shall be individually responsible for its own covenants, obligations, and liabilities under this Agreement and otherwise.

ARTICLE VIII. CONTRACT TERM

Unless terminated sooner as provided herein, this Agreement shall remain in full force and effect unless and until it is terminated by either Party upon ninety (90) days notice to the other Party. Each Party shall remove its Equipment from Owner's poles within three-hundred sixty-five (365) days of receipt of said notice. Should either Party fail to remove its Equipment within said three-hundred sixty-five (365) day period, Owner may remove and dispose of Licensee's Equipment at Licensee's sole risk and expense. On the date of termination specified in such notice, all rights and privileges of both Parties hereunder shall cease.

ARTICLE IX. LIABILITY AND DAMAGES; INDEMNIFICATION; WARRANTIES

Section 9.01 ~~PacifiCorp's Limited Liability to and~~ Indemnification ~~of Telco~~

Except to the extent expressly stated herein, each Party's liability to the other Party for any action arising out of a Party's activities relating to this Agreement shall be limited to repair or replacement of any defective poles. Provided, each Party agrees to indemnify and hold harmless the other Party, its directors, officers, employees, and agents against and from any and all claims, demands, suits, losses, costs, and damages, including attorneys' fees, on account of loss or damage to any property of the other Party, or any third party, to the extent directly resulting from any negligence, omission, or actual or alleged fault of the indemnifying Party, its employees, agents, representatives, or subcontractors of any tier, their employees, agents, or representatives, in the exercise, performance or nonperformance of such Party's rights or obligations under this Agreement, except that no Party shall indemnify or otherwise be liable to the other Party for economic losses, costs or damages, including but not limited to special, indirect, incidental, punitive, exemplary or consequential damages sustained by the other Party or any third parties. Provided further, each party agrees to indemnify and hold harmless the other Party, its directors, officers, employees, and agents against and from any and all claims, demands, suits, losses, costs, and damages, including attorneys' fees, brought against the other Party by an injured party or the estate or surviving family of a deceased on account of bodily or personal injury to, or death of, any such injured or deceased party, to the extent directly resulting from any negligence, omission, or actual or alleged fault of a Party, its employees, agents, representatives, or subcontractors of any tier, their employees, agents, or representatives, in the exercise, performance or nonperformance of the Party's rights or obligations under this Agreement.

Comcast suggests a standard reciprocal indemnification clause replace the current language, which in the first instance limits each party's liability to repair or replacement of "defective poles" (which licensees do not typically own) and only later refers to bodily injury claims.

Section 9.02 Notice, Defense, Cooperation, and Settlement

The indemnifying Party shall have the right, but not the obligation, to defend the other regarding any claims, demands or causes of action indemnified against. Each Party shall give the other prompt notice of any claims, demands or causes of actions for which the other may be required to indemnify under this Agreement. Each Party shall fully cooperate with the other in the defense of any such claim, demand or cause of action. Neither shall settle any claim, demand or cause of action relating to a matter for which such party is indemnified without the written consent of the indemnitor.

Section 9.03 Warranties

Each Party warrants to the other that its exercise of its rights and performance of its obligations under this Agreement shall be consistent with prudent utility practices. **EACH PARTY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE WARRANTY OF MERCHANTABILITY, FITNESS FOR PARTICULAR PURPOSE, AND SIMILAR WARRANTIES.**

ARTICLE X. FORCE MAJEURE

Neither Party shall be subject to any liability or damages for inability to perform its obligations under this Agreement, except for any obligation to pay amounts when due, to the extent that such failure shall

be due to causes beyond the control of either Party, including but not limited to the following: (a) the operation and effect of any rules, regulations and orders promulgated by any commission, municipality, or governmental agency of the United States, or subdivision thereof (so long as the claimant party has not applied for or assisted in the application for, and has opposed where and to the extent reasonable, such government action); (b) restraining order, injunction or similar decree of any court; (c) war or act of terrorism; (d) flood; (e) earthquake; (f) act of God; (g) civil disturbance; or (h) strikes of boycotts. Provided, the party claiming Force Majeure shall make every reasonable attempt to remedy the cause thereof as diligently and expeditiously as possible. Time periods for performance obligations of parties herein shall be extended for the period during which Force Majeure was in effect.

ARTICLE XI. NOTICE

Except as otherwise provided herein, any notice required, permitted or contemplated hereunder shall be in writing, shall be addressed to the Party to be notified at the address set forth below or at such other address as a Party may designate for itself from time to time by notice hereunder, and shall be transmitted by United States mail, by regularly scheduled overnight delivery, or by personal delivery:

To PacifiCorp: PacifiCorp
Joint Use of Facilities
650 NE Holladay, Suite 700
Portland, Oregon 97232 **[DPU Question: Should this be a local office?]**

To ____: _____
_____
_____
_____

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized officers as of the date first herein written.

TELCO	PACIFICORP, doing business as PACIFIC POWER and UTAH POWER
By: _____	By: _____
Title: _____	Title: _____
Date: _____	Date: _____

Exhibit E

Written Application for Permission to Install, Modify, or Remove Attachments

Exhibit F

Form of Invoice (PacifiCorp and Telco)