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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of an Investigation into Pole Attachments	)	**DOCKET NO. 04-999-03** **BRIEF OF PACIFICORP AS TO TERMS AND PROVISIONS OF THE STANDARD POLE ATTACHMENT AGREEMENT**

Pursuant to the Commission's Scheduling Order in the captioned proceeding, issued March 25, 2005, PacifiCorp, dba Utah Power, respectfully submits the following brief.

Introduction

PacifiCorp, the Division of Public Utilities and other interested parties have participated in a series of technical conferences to craft a standard Utah pole attachment contract ("Standard Contract") that would be available to govern the terms and conditions of pole attachments throughout the State of Utah. This process to develop Standard Contract is not expressly contemplated in the Utah Administrative Code § R746-345-3 that is proposed to go into effect sometime between April 15, 2005, and July 13, 2005. Instead, § R746-345-3 requires each individual pole owner to submit a tariff and a contract, or a Statement of Generally Available Terms (SGAT), to the Commission for approval. Each pole owner may petition the Commission for approval of proposed changes or modifications to that pole owner's tariff, standard contract or SGAT.

Pursuant to § R746-345-3.C, once the individual pole owner's tariff and contract, or SGAT, are approved by the Commission, these will govern by default the rates, terms and conditions of attachments to utility poles, unless and until the Commission approves an alternative provisions.

PacifiCorp does not believe that the Commission intends to modify the tariff and contract filing requirements in the proposed rule by entertaining the proposed Standard Contract in this docket. Rather, PacifiCorp believes that the Commission's intent is to provide a "safe harbor" with the Standard Contract by approving generic terms and conditions that are presumed fair and reasonable, but can be rebutted in particular cases. This approach is consistent with the Commission's approach in defining a rate-setting

methodology in this docket. The Commission has provided a default rate methodology that is presumed just and reasonable, but this can be supplanted by other Commission-approved methodologies if a compelling case is made in a rate filing. We believe this approach is sound because it would provide a wealth of guidance as to what the Commission believes is just and reasonable, but does not foreclose other appropriate arrangements going forward on a case-by-case basis.

The draft Standard Contract that resulted from the work of the parties, with redlined edits suggested by PacifiCorp in this Brief, is included as Attachment 1.

The draft Standard Contract embodies many understandings and compromises that were reached by the parties during the technical conferences. Nonetheless, several contract provisions remain unresolved, and the appropriate contract provision must be determined by the Commission. The purpose of this brief is to explain and support PacifiCorp's position with respect to each of these disputed provisions.

Disputed Provisions

We note at the outset that the Commission has elected to pre-empt the jurisdiction of the Federal Communications Commission ("FCC") over pole attachments as is its right granted in Section 224(c) of the Pole Attachments Act, 47 U.S.C. § 224(c).[1] The effect of this preemption is that the Commission may make its own determinations as to

[1] See also the Public Notice, DA 92-201, *States That Have Certified That They Regulate Pole Attachments*, issued by the FCC and available at http://www.fcc.gov/eb/mdrd/pacert.html. The Commission has previously noted the non-binding effect of FCC policy and precedent in its Order in the matter of the complaint of *Comcast Communications, Inc. v. PacifiCorp,* Docket No. 03-035-28, Utah Public Service

the just and reasonable rates, terms and conditions of pole attachment agreements, and FCC decisions are not binding authority on the Commission.

Indeed, in § R746-345, the Commission already has declined to follow the FCC's rate methodology to the extent that the FCC employs two formulas to determine the appropriate pole attachment rental rate. One FCC formula applies when the attaching entity provides pure cable television service; the other FCC formula applies when the attaching entity provides telecommunications service.[2] The difference between the formulas is that telecommunications carriers must pay for a share of the unusable space on a pole in addition to a share of the cost of the usable space, whereas cable television companies must pay only for a share of the usable space on the pole. The Commission has decided that in Utah all attachers will pay the same rental rate and the methodology to determine that rate, similar to the FCC's cable-only formula, captures only a share of the costs associated with the usable space on the pole. This results in an attachment rate that is substantially lower than the FCC's telecommunications formula.

While in the example discussed above PacifiCorp had argued that the Commission should follow the FCC and require the recovery of costs associated with unusable space on a pole, PacifiCorp nonetheless urges the Commission to continue to exercise its independent judgment as to what is best for Utah and to resist any suggestions in this proceeding that FCC decisions are the "law of the land" and the Commission is bound to follow them. PacifiCorp agrees, however, that FCC decisions

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Commission, issued December 21, 2004.

can, in some cases, provide useful assistance as the Commission determines the just and reasonable contract provisions for Utah. In this brief, PacifiCorp will at times discuss the FCC's policies and decisions, not as binding authority, but as useful information.

1. Fees

a. Fees Associated with Servicing Pole Attachments

This topic is not about the appropriate rental amount to be paid for occupying space on a pole. The rental amount is determined by the formula contained in § R746-345-5. Rather, this topic is about the recovery of costs incurred by the pole owner that would not have been incurred but for the obligation to grant access to the poles by attaching entities *and which are not otherwise recovered* by the pole owner.

In general, PacifiCorp believes that the pole owner should be reimbursed for out-of-pocket costs incurred to service pole attachments. These costs include the cost to process applications for pole attachment permits,[3] to evaluate poles and determine whether any make-ready construction is necessary in order to accommodate the proposed attachments[4] and to inspect the attachments for compliance with proper installation

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[2] *See* 47 C.F.R.§§ 1.1409(e)(1) and (2).

[3] Although the Standard Contract covers the general terms and conditions of attachment, it is always necessary to individually evaluate proposed attachments to specific poles. This is accomplished through a permitting process, by which the attaching entity identifies the poles to which it seeks to attach and the pole owner reviews those poles for available capacity and for any necessary make-ready construction, resulting in either a grant or denial of permission to make some or all of the proposed attachments.

[4] Note, too, that PacifiCorp does not believe there is or can be any dispute that the out-of-pocket costs actually incurred by the pole owner to prepare the poles, when necessary to receive attachments, that is, the "make ready costs," are fully recoverable by the pole owner.

standards. The Standard Contract provisions that address these reimbursements are Sections 3.01 (Application for Permission to Install Attachment) and 3.25 (Inspections).

Because the FCC's pole attachment rental rate formula includes a cost factor related to administrative expenses, the FCC has always been careful not to permit double recovery by the pole owner; that is, additional compensation in the form of permit application processing fees, when those permit application processing costs are included in the administrative factor of the formula and, thus, recovered in the rental payments. However, the FCC does allow the pole owner to recover its permit processing costs when those costs are not recovered in the rent. The following language from the FCC's decision in *Texas Cable and Telecommunications Association v. GTE Southwest, Inc.* sets forth the FCC's position on double recovery:

> The general principle that a utility may not recover the same expenses twice, once as a make-ready charge and again as an allocated portion of an expense account included in the calculation of the annual pole attachment rental fee, is not a new concept being decided in this case for the first time. We thoroughly addressed this issue in *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*. In that Order, we concluded that a "separate charge or fee for items such as application processing or periodic inspections of the pole plant is not justified if the costs associated with these items are already included in the rate, based on fully allocated costs, which the utility charges the cable company since the statute does not permit utilities to recover in excess of fully allocated costs."

Significantly, the FCC has not ruled that fees for application processing or periodic inspections of the pole plant may not be charged. It has ruled that fees may not be charged *if* those charges are already recovered in a rental rate that is based on fully allocated costs. Thus, the permissibility of application fees and the like becomes a

question of fact as to whether the costs sought to be recovered by the fees have been booked to the accounts[5] that comprise the administrative element of the formula.

The Utah pole attachment rental methodology follows the FCC's rental formula for CATV attachments and PacifiCorp believes that the Commission should reach the same conclusion as the FCC on this question. That is, the Commission should rule that the fees are just and reasonable if it can be demonstrated by the pole owner that the fees its seeks to impose are for the purpose of recovering costs incurred in servicing pole attachment requests that, (a) are not otherwise recovered in the pole rental, and (b) would not have been incurred but for the obligation to accommodate and service pole attachment requests.

If these costs meet the two criteria above, but the Commission does not permit these costs to be recovered, the effect will be to require electric and telephone customers to subsidize other attacher's use of poles. The rental rate determined pursuant to the Commission-approved formula is considered to provide just and reasonable compensation to the pole owner for the use of its poles. If the pole owner is not permitted to recover additional costs associated with the presence of pole attachments, the effect is to reduce the rental compensation received by the pole owner to a level below just and reasonable and the burden of this under-recovery is shifted to electric and telephone customers.

[5] In the FCC cable formula, these would be FERC Accounts 920-935, General and Administrative.

Accordingly, the pole owner should be able to promulgate a fee schedule as an exhibit to the Standard Contract, which may be updated upon review and approval by the Commission. Typical fees would include:

- Fees to process applications for pole attachment permits;
- Fees to evaluate the suitability of the poles designated in the pole attachment permit application to receive attachments;
- Fees to estimate the cost of necessary make-ready construction work;
- Fees to determine whether attachments that have been installed pursuant to a granted pole attachment permit application have been installed in accordance with the granted permit application and in accordance with applicable construction standards;
- In the case where the attacher had informed the pole owner that attachments are to be removed, fees to determine by inspection whether pole restoration procedures (filling holes in the pole, for example) have been complied with; whether attachments have in fact been removed (if not, which happens frequently, the pole owner discontinues rental billings, but then later finds an attachment which usually results in unauthorized attachment fees and further disputes); and update asset records (e.g., with current photographs) to reflect current status and available space on pole for future users.

b. Fee for Unauthorized Attachments

Although the draft Standard Contract provides in Section 3.01 that the Licensee will not install its attachments without first obtaining the prior approval of the pole owner, attaching entities do not always comply with this requirement. For this reason, §5.02 contains a provision for the imposition of an unauthorized attachment fee.

The best recent illustration of instances of unauthorized attachments can be found in the recent case, *Comcast Cable Communications, Inc. v. PacifiCorp,* in Docket No.

03-035-28. In the order issued by the Commission on December 21, 2004, the Commission found that the attaching entity had made numerous unauthorized attachments. As a remedy, the Commission approved an unauthorized attachment charge of $60.00 plus all back rent per unauthorized attachment. While the Commission did not adopt this charge as a "one-size-fits-all" unauthorized attachment charge, the Commission nevertheless found the necessity for a meaningful deterrent to such conduct.

Many FCC cases also support the need for a meaningful deterrent to unauthorized attachments. The issue comes down to the dollar amount that will accomplish the purpose.

The most lenient – and least effective – deterrent would be payment only of back rent for some number of years.[6] This approach only encourages a "catch me if you can" mentality because the recovery in most cases would equate to what the attaching entity would have paid anyway in rent.

A meaningful deterrent involves a dollar amount in addition to back rent, as the Commission ordered in the *Comcast* case. The Commission has already ruled that a significant deterrent fee or penalty was appropriate under the facts and circumstances of the *Comcast* case. Although the $60 plus back rent charge was not adopted for universal application, the present proceeding does seek the institution of a universal charge.

[6] As an incentive the pole owner to be vigilant about attachments to its poles, the maximum number of years is often limited to no more than three.

PacifiCorp believes that, as developed in an actual case, the $60 per-pole fee plus the applicable back-rent charge is right for Utah.

Accordingly, PacifiCorp urges that the schedule of fees appended to the Standard Contract should also include the following fee:

- For pole attachments made without a valid pole attachment permit issued by the pole owner, a fee of $60 per pole plus back rent for no more than the number of years between the date of discovery and the previous attachment audit. The back rent component of the fee shall be based on the number of years that the attachment has been on the pole without benefit of a permit, with the default being the maximum and the burden of proof to show otherwise on the attacher.

c. Pre-payment of Make Ready Estimate

Although this is not a fee within the present context, PacifiCorp must raise the question of pre-payment of the estimated cost of make ready-work. PacifiCorp's position is that, after the estimate for make ready-work has been quoted to the attaching entity, the attaching entity must pay the entire amount of the estimate before the work can begin. Differences between the estimate and the actual cost incurred will, of course, be trued-up at the conclusion of the construction.

This procedure is absolutely essential to protect the pole owner's customers from absorbing the out-of-pocket expenditures in the event of the attaching entity's bankruptcy or refusal to pay for the work. In the technical conferences, PacifiCorp agreed to relax its requirements for financial security and assurances, based on the contract requirement of the attaching entity to pre-pay the make ready estimate. However, the Standard Contract as presently drafted does not include the pre-payment

requirement. Accordingly, PacifiCorp recommends that § 3.09 of the draft Standard Contract be amended as shown.

2. Timeframes

There is no dispute that a licensee who files a pole attachment permit application should get an answer from the pole owner within 45 days either granting or denying the application (and, in the case of denial, stating the grounds for the denial). This follows the federal standard for responsiveness and this requirement is stated in Section 3.02 of the Standard Contract.

Within that 45-day time period, the pole owner must determine whether it is necessary to perform make-ready construction before the poles can accommodate the requested attachments.[7] This obligation is reflected in Section 3.09 of the Standard Contract. No timeframe for the completion of the make-ready work is stated in the Standard Contract. Since make-ready construction is customarily performed by the pole owner, the question has arisen as to how long the pole owner may take to complete the make-ready work.

PacifiCorp supports the timeframe provisions of Sections 3.02 and 3.09 as presently contained in the draft Standard Contract.

a. Permit Processing

PacifiCorp believes that is not possible to define, to the satisfaction of both pole owners and attaching entities, various types of pole attachment applications and to attach

[7] Such construction might include, for example, installation of additional guys and anchors or replacement of the pole with a taller pole.

special processing timeframes to each type. The inability of the parties in the technical conferences to come to agreement is proof of this.

Fortunately, the second paragraph of Section 3.02 deals with this problem in a rational way: it gives examples of the types of circumstances that can crop up and it requires the parties to work together in good faith to come up with suitable and reasonable timelines and special handling procedures when the normal 45-day period is not going to be suitable.

This process works both ways and is available to provide relief to either the pole owner or the attaching entity. Using this procedure, an attaching entity with an urgent need to connect an important customer can get its permit application approved in a very short time. Similarly, a pole owner that is facing large projects from more than one attaching entity can prioritize some applications and take longer to process others, without fear of triggering a complaint to the Commission. This is a flexible and practical solution to a real-world problem that cannot be solved by hard-and-fast definitions made in a theoretical discussion.

b. Make-Ready Work

A pole owner has available only so many field crews and sub-contractors to perform make-ready work. When the capacity of these crews and sub-contractors to perform make-ready work is reached, the timeframes for completion of the make-ready construction must necessarily stretch out. In the face of large projects, these timeframes may reach levels that are not satisfactory to either the pole owner or the attaching entity.

Section 3.09 of the draft Standard Contract attempts to deal with this situation again by requiring the parties to negotiate a solution in good faith. The Section suggests possible solutions which would be at the option of the attaching entity to accept or reject. There is no better way to address the situation. Specifying definite timeframes for every conceivable make-ready project is not realistic. Nor would it be fair to create the threat of a complaint against the pole owner arising from conditions that are beyond the pole owner's control.

For these reasons, PacifiCorp urges the Commission to approve § 3.02 and 3.09 of the draft Standard Contract as is, and without additional hard-and-fast timeframes.

3. Customer Service Drops

If most linear pole attachments are thought of as running parallel to the line of poles, customer service drops can be thought of as running perpendicular to the line of poles. A customer service drop connects the service "flowing" in the attaching entity's lines to a specific customer. While PacifiCorp agrees that the vast majority of customer service drops can be added to the poles without prior application, evaluation and approval and merely reported quarterly to the pole owner, PacifiCorp believes that some limited circumstances require prior application, evaluation and approval before customer service drops can be installed.

PacifiCorp is concerned about two instances: one, where the customer service drop would be the attaching entity's first attachment on that pole; and, two, where the customer service drop would be outside of the space already used by another attachment of that attaching entity. In each case, it must be true that there is a vacant space on the

pole that the attaching entity wants to use for a customer service drop and that space could otherwise be used for a customary, “parallel” linear attachment. The problem is that, unbeknownst to the attaching entity, the pole owner may have received an application from another attaching entity to use that very same vacant space for a customary linear attachment. So, unless there is a prior application process applicable in these limited, special cases, a permit to use that space may be granted in error by the pole owner to another attaching entity; or another attaching entity's build-out pursuant to a permit that was correct when it was granted could be impacted by a surprise customer service drop attachment that has been made in the space that has been permitted.

For these reasons, PacifiCorp requests the Commission to modify the text of Section 3.02 of the draft Standard Contract to take into account these limited circumstances. PacifiCorp’s suggested revisions are shown in redline edits to the text of the draft Standard Contract attached hereto as Attachment 1.

4. Overlashing

Overlashing is the process by which a new cable is physically lashed to an old cable that is already on the pole. In the case of a cable television company, for example, metallic, coaxial cable may have been installed on the poles many years ago to enable the company to deliver television programming. In recent years, cable television companies have been adding additional cables, usually containing dozens of strands of optical fiber, to the existing coaxial cable by means of overlashing. The optical fiber is used by the cable company for various purposes, including upgrading its television programming to

digital technology, provision of cable modem Internet access and, more recently, provision of telephone service.

This process is sometimes repeated more than once for various reasons, and the diameter of the bundle of cables can increase significantly. Although the original cable may no longer be in use, it is usually not removed.

The FCC has ruled that pole owners may not require cable companies to submit an application for a permit and to receive approval before they may overlash their existing cable. Mere after-the-fact notice to the pole owner is sufficient, although even this step is often ignored. Nor does the FCC permit the pole owners to charge additional rent for the overlashed attachment.

States like Utah that have pre-empted the FCC's jurisdiction over pole attachments have not always followed the FCC. For example, New York State does not allow a separate rental charge for overlashed attachments, but it allows only a limited amount of overlashing, depending on span tension calculations in accordance with the National Electrical Safety Code.[8] When the calculation exceeds the pre-determined limits, the attaching entity must perform and provide to the pole owner a "worst case" pole analysis demonstrating that the poles will not be excessively burdened. The attaching entity is responsible to pay for any make-ready work that may be required to prepare the poles for overlashing.

[8] See, *Order Adopting Policy Statement on Pole Attachments*, Case 03-M-0432, issued by the New York State Public Service Commission on August 6, 2004. This is the same Policy Statement that Comcast entered into evidence for the Commission's favorable consideration in the recent *Comcast v. PacifiCorp* case.

California has ruled that it is permissible for a pole owner to require prior written authorization for all attachments, including overlashing. *Order Modifying Decision 98-10-058 and Denying Rehearing,* Decision No. 00-03-055 of the California Public Utilities Commission, 2000 Cal. PUC Lexis 228 (March 16, 2000).

Louisiana has ruled that:

> Any party wishing to attach or overlash facilities must file a written request with the pole owner identifying what facilities are to be attached and/or overlashed, where such facilities will be attached and/or overlashed, and when such facilities will be attached and/or overlashed. *General Order of the Louisiana Public Service Commission in Docket No. U-22833*, 1999 La. PUC Lexis 13, March 12, 1999.

Michigan has allowed an arrangement whereby the overlashing entity must give at least a week's prior notice of overlashing to the attaching entity and can avoid the cost of a processing fee if the attaching entity performs the assessment of necessary make ready work itself. *Michigan Cable Telecommunications Association et al. v. The Detroit Edison Company*, Case No. U-11964, Michigan Public Service Commission, 1999 Mich. PSC Lexis 261 (September 28, 1999).

Finally, Illinois has concluded that:

> It is apparent that overlashing presents public safety issues as well as issues relating to the protection of other facilities attached to a pole. For these reasons, overlashing onto an original facility may require additional work, such as replacing or reinforcing poles, or rearranging the facilities on a pole.
>
> The Commission finds that if work, such as the replacement of poles or the rearrangement of facilities (i.e., make ready work), is required to make an overlash safe, that work should be performed before the overlash is constructed. Because public safety, as well as the integrity of the other attachments on the pole, are at stake, it is essential that a make ready survey and any necessary make ready work be performed *before* a facility is overlashed. (Emphasis in the original.) *McLeodUSA Telecommunications Services, Inc., Petition for*

Arbitration of Interconnections Rates Terms and Conditions, Decision 01-0623, Illinois Commerce Commission, 2002 Ill. PUC Lexis 4, January 16, 2002.

a. Overlashing by an Existing Licensee

PacifiCorp is not seeking an additional rental charge for attachments that a licensee overlashes to existing attachments within its attachment space. However, PacifiCorp is seeking a requirement for a prior-approval process for overlashed attachments. PacifiCorp's suggested contract language appears in Attachment 1 at the "placeholder" for Overlashing in § 3.01 of the draft Standard Contract.

The basis for PacifiCorp's position is that overlashing adds to the weight of an existing attachment and increases the diameter of the bundle of cables. The effect of the added weight is compounded by the forces resulting from wind loading and ice loading, which increase according to the square of the diameter of the bundle. These effects can be calculated based the size of the bundle, the fiber optic cable manufacturer's published data, and published tables containing regional averages for wind and ice loading.

Section 224(f)(2) of the Pole Attachments Act reserves to the pole owner the right to deny access to poles for reasons of sound engineering practice. Congress adopted this precaution to protect the basic electric distribution infrastructure. The FCC has acknowledged that if an engineering study demonstrates that a significant burden on the poles would be created by overlashing, the pole owner may deny access to the poles.[9] While it is not clear how "denial," which implies a prior request, squares with the FCC's prohibition on prior notice or applications, the Commission need not solve that

conundrum. The better course of prudent infrastructure management practice is to permit the pole owner to require an advance determination of whether a line of poles can bear added attachments, just as it is prudent to make that determination when the original attachment is sought to be placed on the poles. PacifiCorp urges the Commission to take this more logical approach.

b. Overlashing by Third Parties

Occasionally an attaching entity will permit third parties to overlash its existing attachments. Reasoning that such attachments are physically no different than attachments overlashed by the original attaching entity, the FCC has ruled that no prior notice or application is required of third-party overlashers, but that access can be "denied" for engineering reasons.[10]

For the reasons set forth above, PacifiCorp disagrees with this approach and requests a prior approval process for third-party attachers as well as host attachers. Furthermore, PacifiCorp seeks a prohibition on third-party attachments without prior pole-owner approval. Without this safeguard, it is entirely possible that the host attacher could go into the pole access business, leasing out overlashing rights – and collecting rent – again and again, with no remuneration to the pole owner and its utility customers for the use of the space by these overlashing entities. Without this safeguard, the host attacher's existing attachment becomes all-expenses-paid inventory, to be resold as often

[9] *See* the FCC *Telecom Order*, 13 FCC Rcd 6777, 1998 at ¶ 64.
[10] *Id.* at ¶ 68.

as the market will bear. Such an abuse of the basic access right should not be countenanced by the Commission.

In the 1999 decision cited above, Louisiana has prevented this abuse, ruling, "Where facilities are overlashed for use by a third party or for use by an affiliate of the attached party, such overlashed facilities will be considered a new attachment and be charged the applicable rate, unless, prior to overlashing the facilities, the parties agree in writing to a different rate for the overlashed facilities."

5. Audit Costs

After much discussion in the technical conferences, the language in Section 3.24 of the draft Standard Contract was worked out. The audit process refers to the pole owner's project to physically visit each distribution pole in order to assess and record the number and condition of attachments on those poles. This project is usually performed by a subcontractor. In the case of PacifiCorp, this project has been completely separate and distinct from other audits of PacifiCorp's own electric distribution facilities on the poles. The audit work in question here would not be performed were it not for the presence of other parties' attachments on the pole. This audit work is absolutely necessary to assure that unauthorized attachments are detected, to identify unsafe or unsound attachment techniques, and to assure the accuracy of the pole owner's data used in connection with processing pole attachment permit applications.

Section 3.24 of the draft Standard Contract:

- limits audits to no more than once every five years;
- gives attaching entities a voice in selecting the subcontractor that will perform the audit;

- requires the audit data to be shared with the attaching entities;
- gives attaching entities a right and a process to dispute the results of the audit; and
- apportions the cost of the audit among all attachers, based on the number of poles that bear their attachments.

Cost sharing is the sticking point. Some parties insist that the cost of the audit should be recovered by the pole owner through the rental rate since the rental rate formula includes an element for "maintenance." This position seems to stem from a lower-level FCC Enforcement Bureau decision (as contrasted with a decision adopted by the FCC Commissioners) in *The Cable Television Association of Georgia v. Georgia Power Company*, 18 FCC Rcd 1633 (Enforcement Bureau, 2003) ("*CTAG*"), which blurred the distinction between periodic audits of attachments and routine inspections of attachments. In that case, audits could be conducted each year according to the pole attachment contract under review. The FCC Enforcement Bureau said that costs attendant to routine inspections of poles which benefit all attachers should be included in the maintenance costs account and allocated to each attaching entity in their rent.

The fact that the draft Standard Contract allows audits no more frequently than once every five years distinguishes the situation in Utah from the facts that were before the FCC in the *CTAG* case. Maintenance accounts capture costs as they are incurred annually. Thus, while those accounts might capture all the costs of the audit if one were done each year, as could have been the case in *CTAG*, here those accounts would capture the audit costs only once every five years (if, in fact, audit costs are properly booked to accounts that are used in the rental formula, which is not at all clear). Thus

there would be a spike in the rental rate for the following year, which would not likely sit well with attaching entities.

Moreover, recovering audit costs through the rent disproportionately affects smaller attaching entities because the pole owner must charge the same rental rate to all attaching entities. This has the effect of making small attaching entities subsidize the large attaching entities. It is much more equitable to require each attaching entity to share in the cost in proportion to the number of poles to which they are attached.

Accordingly, PacifiCorp supports the language of § 3.24 of the draft Standard Contract and urges the Commission to adopt it.

6. Easements

In Utah, cable television easement rights are governed by statute. Utah Code Ann. § 54-4-13 (2004) provides that a "right-of-way easement or interest granted to a public utility is apportionable to the cable television company" subject to several limitations and conditions. A "public utility easement" provides a public utility with "the right to install, maintain, operate, repair, remove, replace, or relocate public utility facilities and the rights of ingress and egress within the public utility easement for public utility employees, contractors, and agents." Utah Code Ann. § 54-3-27(2)(a)(i) and (ii).

Where a particular easement has not been granted as a dedicated public utility strip, § 54-4-13 provides that the easement is apportionable to a cable television operator only if consent is obtained from the private property owner and the right-of-way easement is not restricted to the sole use of the public utility. Utah Code Ann. §§ 54-4-13(2)(a) and (c).

If the easement is a dedicated utility strip, three conditions must first be met in order for the utility easement to be apportionable to a cable television operator. First, the Public Service Commission must determine that "under the terms and conditions of the pole attachment contract the use of the utilities' facilities by the cable television company will not interfere with the primary utility function or render its facilities unsafe, and that the contract is in the public interest." Utah Code Ann. § 54-4-13(2)(b). Second, the use contemplated by the cable operator must be the "same or similar to that granted the public utility" and such use may not impose additional burdens on the servient tenement. Utah Code Ann. § 54-4-13(2)(d). Third, dedicated utility easements are only apportionable to a cable operator if the operator's use will not cause irreparable injury or damage to the grantor's property. Utah Code Ann. § 54-4-13(2)(e).

Section 3.11 of the draft Standard Contract is intended to protect the pole owner from claims of property owners stemming from the presence of the attaching entity's facilities in an easement or right-of-way. This section puts the attaching entity on notice that the pole owner's grant of access *to the poles* does not also convey a right of access *to the land* occupied by the poles nor to the property crossed by the attaching entity's lines. The section places the burden on the attaching entity to obtain whatever property rights may be necessary and obligates the attaching entity to indemnify the pole owner against any claims arising from the attaching entity's failure to obtain the necessary property rights.

This approach is entirely consistent with federal law, specifically § 224(f)(1) of the Pole Attachments Act, which states with respect to rights-of-way that the pole

owner's obligation to provide access extends only to those rights-of-way that are "owned or controlled by it." Thus, in practical application of the draft Standard Contract, if the right-of-way were owned or controlled by the pole owner, it might not be necessary to obtain additional authorization. Conversely, if the right-of-way were not owned or controlled by the pole owner, it would be necessary for the attaching entity to secure the appropriate property rights. Either way, the burden to make the determination lies with the attaching entity.

Originally PacifiCorp had sought to require the attaching entity to produce assurances in every instance and demonstrate to PacifiCorp's reasonable satisfaction that the applicable property rights had been perfected. As a compromise, PacifiCorp has generally agreed to the draft language of Section 3.11 (with one modification, discussed below). Cable television parties, however, have insisted that, under federal law, there is no requirement to obtain private property rights—and one cable provider has stated that it has not obtained any private easements in the State of Utah. This position is clearly contrary to Utah law as discussed at the beginning of this section. It is also contrary to federal law. And it would likely offend every real estate-owning individual in the State of Utah.

The language of the Cable Communications Policy Act of 1984, (47 U.S.C. §§ 521-559 (the "Cable Act"), is limited to granting mandatory access to easements to those easements that have been dedicated for general utility use, and the Act does not operate to supersede state law governing access to private property. Section 621(a)(2) of the Cable Act provides that franchises granted by local governments "shall be construed

to authorize the construction of a cable system over public rights-of-way, and through easements . . . which have been *dedicated* for compatible uses" (Emphasis added.)

In *Cable Holdings of Georgia v. McNeil Real Estate Fund*, 953 F.2d 600 (11th Cir. 1992), *reh'g denied*, 988 F.2d 1071 (11th Cir. 1993), the Court of Appeals for the Eleventh Circuit considered the extent and the nature of the easement rights granted to cable operators in the Cable Act. Specifically, the Eleventh Circuit rejected outright the lower court's holding that the provisions of 47 U.S.C. § 541(a)(2) (Section 621 of the Cable Act) allowed cable operators access to *any* easements. Instead, the court held that the rights granted in the Cable Act are limited to allowing access to an easement when the property owner has dedicated the easement "for general utility use." *Id*. at 606.

In other words, where a particular easement has not been dedicated for general use by public utilities, the Cable Act does not mandate access to an easement for cable operators, and property owners have the right to selectively choose which utilities may gain access to the easement and retain the right to exclude others.

The *McNeil* court concluded that "an easement is legally 'dedicated' only when the private property owner entirely relinquishes his rights of exclusion regarding the easements so that the general public may use the property." *Id*.

In interpreting § 541(a)(2), other courts have come to similar conclusions. In *TCI v. Schriock*, 11 F.3d 812 (8th Cir. 1993), the Eighth Circuit rejected the cable operator's requests for an expansive definition of the word "dedicated" as it is used in § 541(a)(2). Citing constitutional concerns, the court instead elected to employ the legal definition of "dedicated" which distinguishes between private easements and easements set aside for

public use. The Third and Fourth Circuits likewise have rejected an overly broad interpretation of the term "dedicated" advocated by cable operators.[11]

In short, there is no federal law that gives attaching entities in general or cable operators in particular a blanket exemption from obtaining easements or rights-of-way in order to deploy their facilities. If there were, it would likely be an unconstitutional taking without just compensation for the underlying land owner. The draft Standard Contract contemplates that there may be instances where no additional property rights are necessary but also that there may be instances where obtaining additional property rights is necessary. The burden is on the attaching entity to determine what the requirements are and to protect the pole owner in case its determination is in error.

PacifiCorp supports this mechanism and urges the Commission to approve Section 3.11 of the draft Standard Contract, with one modification—the inclusion of the following sentence: "In the event Pole Owner has reason to believe that Licensee does not have such requisite authority, such as in the case of a complaint from a property owner, Pole Owner may request, and Licensee shall provide, evidence of such requisite authority.". PacifiCorp does not intend to become the "gatekeeper" of private property rights. However, PacifiCorp does need to be able to respond intelligently when attachers are accessing PacifiCorp poles on private property.

[11] *See Cable Inv., Inc. v. Woolley*, 867 F.2d 151 (3rd Cir. 1989); *Media Gen. Cable v. Sequoyah Condominium*, 991 F.2d 1169, 1173 (4th Cir. 1993).

7. Relocation Costs (Sections 3.12 through 3.16)

These unresolved contract provisions deal with the draft Standard Contract's attempts to allocate to the appropriate entity the costs associated with rearranging attached facilities or modifying the size or location of poles.

Section 2.03 of the draft Standard Agreement tracks the federal model. It says that the pole owner can designate, in a bona fide development plan, space on poles for its own future use in connection with its core utility service, but that the space must be made available for use by attaching entities until the pole owner needs the space. The section contains a provision for making arrangements that would permit the attaching entities to continue to meet their needs when the space is reclaimed by the pole owner.

a. Section 3.12 – Reclamation of Space by the Pole Owner

Section 3.12 refers to § 2.03 and goes into detail as to the timing of the required notice and the performance of the work. when it becomes necessary for the pole owner to reclaim the space on the pole. Although some parties in the technical conferences claimed that § 3.12 creates a "perpetual reservation of space" by the pole owner, this is not the case. By the terms of the section, an attaching entity can only be ousted from its space by the pole owner when the space has been properly reserved in a bona fide development plan.

PacifiCorp disagrees with this approach and contends that the pole owner should have the absolute ability to reclaim space on its poles at any time that its core business requires it. A landlord in any other setting could do as much, if not at will, then certainly at the end of a lease. Under the proposed Standard Contract, however, in the absence of

a bona fide development plan, entry by the pole owner into a pole attachment agreement creates a perpetual lease of space on a pole that can only be recovered by the pole owner when the attaching entity relinquishes it. This gives the lessee greater rights in the space than the owner of the pole and has the effect of shifting to the pole owner (and its rate payers) the cost of modifying the pole in order to meets its core business needs.

This result turns upside down the concept that excess and unused space on the poles should be put to productive use to support the deployment of cable and telecommunications services and, at the same time, serve as a source of income to the pole owner. When the space is no longer surplus, the pole owner should be able to use it for the purpose for which it was installed in the first place, namely, to support the pole owner's operations. This should not depend on whether the pole owner had the foresight decades earlier to envision the development of commercial and residential demand and to commit that foresight to a written plan.

For this reason PacifiCorp urges the Commission to allow the pole owner to reclaim space on its poles when its core business so requires. The practical effect would not be to remove the attaching entity from the pole, but to shift the cost of making alternate accommodations to the party that should rightfully bear them. Accordingly, Sections 2.03 and 3.12 of the draft Standard Contract should be modified as shown in PacifiCorp's redline edits to Attachment 1.

b. Section 3.13 – Pole Replacement for the Benefit of the Pole Owner

This section of the draft Standard Contract covers the situation where pole replacement is prompted by the needs of the pole owner. The section says that the pole

owner will bear all of the costs associated with the pole replacement and that attaching entities will bear their own costs to transfer their attachments to the new pole. PacifiCorp supports this section.

c. Section 3.14 – Pole Replacement for Licensee's Benefit

This section of the draft Standard Contract covers the situation where a perfectly good pole must be replaced in order to accommodate the needs of an attaching entity. The section says that the attaching entity must pay all of the costs associated with the pole replacement, although if the pole has salvage value, the attaching entity will receive a credit for that amount. Although paid for by the attaching entity, the pole becomes the property of the pole owner.

PacifiCorp has only a minor quibble with this section. The last sentence states that if others, including the pole owner, benefit from the pole replacement, they must share pro-rata in the costs. However, if the pole replacement resulted in additional space for other attachments as well, the pole owner would "benefit" from the additional rental from that space. The FCC has specifically rejected this approach[12] and PacifiCorp urges the Commission to do so as well. The draft Standard Contract should be modified as shown in the redline edits contained in Attachment 1.

d. Section 3.15 – Pole Replacement for the Joint Benefit of the Owner and Attaching Entity

[12] See the Order on Reconsideration of the Local Competition Order, 14 FCC Rcd 18049 (1999), paragraphs 103 and 104.

When both parties need to install or replace a pole, the draft Standard Contract provides that the pole owner will bear the cost of the pole, but the attaching entity will bear the incremental cost to install a taller or stronger pole than the pole owner required. PacifiCorp supports this section.

e. Section 3.16 – Expense of Situating Pole Attachments

This section of the draft Standard Contract states that attaching entities bear their own costs to install, maintain, rearrange, transfer or remove their attachments. PacifiCorp supports this section.

f. Section 3.17 – Relocation of Licensee's Attachments

This section of the draft Standard Contract states that, when reasonably necessary, the attaching entity will rearrange, replace, repair or transfer their attachments. The section gives the pole owner the right to perform this work in an emergency or if the attaching entity is not reasonably responsive and to bill the attaching entity for doing so. When, however, rearrangement is required in order to provide a place for another attaching entity to place facilities on the pole, the pole owner is required to disclose the identity of the other attaching entity to enable the original attaching entity to seek reimbursement for the cost of the rearrangement. PacifiCorp generally supports this section, but suggests the revisions in the attachment to clarify that this section does not expressly grant a right of reimbursement from other attachers. We are not sure where that right would arise. Alternatively, language clarifying the reimbursement right could be added. The possibility is that an attacher refuses to move to make room for another

attacher, claiming a right to reimbursement that the new attacher disputes. Clear statement of rights (or the lack of rights) could preclude disputes.

g. Section 3.18 – Relocation of Joint Poles at Request of Land Owner

This section of the draft Standard Contract covers the situation where neither the pole owner nor the attaching entity wants to replace or relocate a pole to which their facilities are attached, but it becomes necessary to do so at the request of the owner of the land upon which the pole is situated. The section imposes a duty on the pole owner to coordinate the activities of all entities attached to the pole. The section establishes a general, top-first, bottom-last rearrangement order and gives the pole owner the right to perform a rearrangement, at the expense of the attaching entity, in an emergency or in the event that an attaching entity has not responded to reasonable notice to rearrange its facilities. Conversely, if an attaching entity performs work that would normally be done by the pole owner in removing the original pole, the attaching entity is entitled to reimbursement from the pole owner. PacifiCorp supports this section.

8. Disputed Bills

In any commercial agreement, it is axiomatic that there must be a provision requiring the purchasing party to pay amounts that are invoiced by the selling party. Section 5.03 of the draft Standard Contract sets forth the billing standards for the pole owner and requires the attaching entity to pay the invoice within 30 days, including any disputed amounts. Should the dispute be resolved in favor of the attaching entity, the pole owner must promptly refund the money with interest. PacifiCorp considers this

section to be nothing more than a statement of ordinary commercial practice and supports this section.

Similarly, Article XI of the draft Standard Contract, the Force Majeure article, states that the obligation to pay amounts when due is not excused by the occurrence of a Force Majeure event. The payment of money is clearly distinct from the performance of work in the field, such as climbing poles to rearrange facilities, and is not usually affected by typical Force Majeure events. Such payment is ordinarily not excused in commercial contracts and there is no reason to do so here. PacifiCorp supports Article XI as drafted.

9. Indemnity, Liability and Damages

It must always be borne in mind that a pole attachment agreement is not a relationship that has been sought by the pole owner. It is an arrangement, borne of mandatory government obligation, which is intended to make use of surplus space on the poles. Under such circumstances the pole owner does not guarantee the suitability of the poles to the purposes of the attaching entity; the pole owner's only duty under such circumstances, is to maintain the poles in a sound condition in accordance with utility industry standards. The unsought presence of the attaching entity on the poles may interfere with the operations of the pole owner and its service to its customers and for that the pole owners and its customers must be protected and compensated. The pole owner, on the other hand, should not have the same duty to an uninvited tenant on its property.

Accordingly, the language that PacifiCorp suggests be inserted into the draft Standard Contract at the "placeholder" for Section 9.01 is not reciprocal, as it might be in a normal, commercial, landlord-tenant agreement. In the technical conferences, PacifiCorp has given ground on the question of indemnity for PacifiCorp's gross negligence or willful misconduct, and this concession is contained in PacifiCorp's suggested draft of this section. However, reciprocity must end there. PacifiCorp urges the Commission to adopt the language proposed in Attachment 1.

10. Insurance and Bond

Prudent commercial contracting requires provisions to protect the party who must bear risks associated with accommodating the other party. This is especially true where, as here, losses ultimately fall upon public rate payers. Accordingly, PacifiCorp has proposed at the placeholder for Article X of the draft Standard Contract, language to cover insurance and bonding to assure performance of the attaching entity's financial obligations. Additionally, PacifiCorp proposes credit-assurance language to cover, at minimum, attachment rentals, which, while paid in advance at the beginning of the contract year, leave exposure to the pole owner as the prepaid year ends. In light of the unlikely remedy of removing the attachments from the pole, the pole owner needs credit assurances at least with regard to rental payments.

Further credit assurances must be available if the Commission rejects the pre-payment of make-ready work provisions PacifiCorp has recommended above. A suitable provision has been added to the Standard Contract in the event pre-payment of the make-ready work estimate is disallowed.

Summary and Conclusion

The draft Standard Contract developed by the Division of Public Utilities represents the participation of a cross-section of pole attachment interests – both pole owners and attaching entities – from across Utah. With the exception of original language proposed for vacant spaces in the Attachment, PacifiCorp has offered only limited modifications to this work product. While the draft Standard Contract is not likely to be completely satisfactory to all parties, it does for the most part achieve a balanced outcome. For this reason PacifiCorp requests the Commission to adopt the draft Standard Contract with the refinements offered in this brief.

SUBMITTED this 15th day of April 2005.

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Certificate of Service

I certify that I have served a copy of the foregoing Brief **OF PACIFICORP AS TO TERMS AND PROVISIONS OF THE STANDARD POLE ATTACHMENT AGREEMENT** by first-class mail or by e-mail attachment the following participants in the captioned proceeding, on April 15, 2005.

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