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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 UTOPIA

The Utah Telecommunication Open Infrastructure Agency (“UTOPIA”) respectfully submits this Brief pursuant to the Order of March 25, 2005, issued by the Utah Public Service Commission (“Commission”) in the above-referenced proceeding.

INTRODUCTION

On March 11, 2004, the Division of Public Utilities (“DPU”) submitted to the Commission a Request to Open an Investigative Docket allowing the DPU and parties to investigate establishing new and revised regulations pertaining to the joint use of properties by

utilities. The DPU also requested that the docket provide a forum to investigate the general terms and conditions for contracts used to execute pole attachment and other issues. Pursuant to the DPU's request, on March 19, 2004, the Commission issued its order opening the docket and set forth an initial schedule soliciting comments from interested participants.

Over the course of the next several months, several participants filed comments on proposed changes to the pole attachment regulations and general terms and conditions to be used in the standard pole attachment agreement. While agreement was reached on many issues, a list prepared by the DPU shows that there remain ten categories of issues on the pole attachment standard contract. Therefore, on March 25, 2005, the Commission issued its Scheduling Order requesting that on April 15, 2005, "Parties file briefs on unresolved terms and provisions of the standard pole attachment contract." Accordingly, UTOPIA respectfully submits the following in response to the Commission's Order.

MAKE-READY WORK SHOULD BE REQUIRED TO BE PERFORMED WITHIN A SPECIFIC TIME PERIOD.

The Make-ready Work¹ provision of the standard contract should contain a provision requiring the Pole Owner to perform Make-ready Work within a specific period of time, and should also provide an alternative allowing the Licensee to have the work performed by a qualified contractor. Currently the proposed standard contract has a provision that provides, in part:

Pole Owner will provide Licensee an estimated completion date for any Make-ready Work, taking into account the overall scope of the Licensee's project, the volume of applications received from other licensees, as well as the availability of crews to perform the

¹ Capitalized terms not defined herein have the meaning as defined by the standard Utah Pole Attachment Agreement drafted in this docket.

work. The Licensee and the Pole Owner shall negotiate solutions in good faith when the estimated time to perform the Make-ready Work does not meet the Licensee's project requirements.

Utah Pole Attachment Agreement § 3.09. This language reflects only the interests of the Pole Owner and ignores the reality of the situation from the Licensees' perspective. Pole Attachment Agreements are necessary because Licensees have a real business need to attach to utility poles. Because federal law requires the Pole Owner to allow other utilities to attach to its poles under rates, terms, and conditions that are just and reasonable, 47 U.S.C. § 224, the standard contract should fairly recognize the needs of both parties. If this language is adopted, a Licensee will be unable to plan for the timely implementation of its service, which is often subject to service level agreements, and which in turn may have penalties associated with untimely performance. Substantial delays are inevitable with the proposed language and the Licensee will have no position from which to negotiate. Without including mutual obligations in the standard contract, the Pole Owner has no incentive to respond and perform in a timely fashion. Therefore, UTOPIA proposes the following:

Once the Licensee has provided the required written or Electronic Notice System ("ENS") notice indicating that it is willing to bear the reasonable cost of the Make-ready Work from the estimate provided by the Pole Owner, the Pole Owner should be required to complete the Make-ready Work within thirty calendar days of the notice. This includes relocating any third-party attachments if necessary. Within seven calendar days of the notice to proceed provided by the Licensee, the Pole Owner should be required to inform the Licensee whether it will be able to perform the Make-ready Work within the required time limit, and if not, the date by which the work could be done. If the Pole Owner fails to provide notice that it cannot

perform the Make-ready Work within seven calendar days, and it fails to perform the Make-ready Work within thirty calendar days, the Pole Owner must pay to the Licensee a penalty of \$1000 per pole. If the Pole Owner notifies the Licensee that it cannot perform the Make-ready Work within the thirty-calendar-day required time limit, the Licensee should have the option of choosing a contractor² that meets the objective engineering qualifications and criteria established by the Pole Owner to perform the Make-ready Work on behalf of the Licensee.

Alternatively, once the Pole Owner indicates to the Licensee that Make-ready Work will be necessary and the reasonable estimated cost thereof, the Licensee should have the option to choose a qualified contractor to perform the Make-ready Work on behalf of the Licensee. This alternative ensures that the Pole Owner's costs are just, reasonable, and competitive.

UTOPIA's recommendation recognizes the limitations placed on the Pole Owner's resources to fulfill pole attachment requests while addressing its safety concerns by having only qualified contractors perform the Make-ready Work. At the same time, having specific time limitations ensures that attachments are completed within a reasonable time period so that Licensees can properly plan their projects and not incur any unnecessary penalties under service level agreements.

Accordingly, UTOPIA proposes that § 3.09 of the proposed standard contract read as follows:

If in the reasonable judgment of Pole Owner the accommodation of any of Licensee's Attachments necessitates Make-ready Work, in the response to Licensee's application Pole Owner will indicate the Make-ready Work that will be necessary to accommodate the Attachments requested and the reasonable estimated cost thereof

² This could be from a list of contractors approved by the Pole Owner, if the Pole Owner is willing to make available such a list.

within the application processing time period identified in Section 3.02. If Licensee is willing to bear the reasonable cost of all Make-ready Work necessary, as determined by Pole Owner, Licensee shall so indicate via ENS or in writing within thirty (30) days of the date of Pole Owner's response to Licensee's initial application. If Licensee notifies Pole Owner that it is willing to bear the reasonable costs of the Make-ready Work, Pole Owner shall have thirty (30) calendar days from receiving this notice to perform the Make-Ready Work, including relocation of any third-party attachments if necessary. Within seven (7) calendar days from receiving this notice from Licensee, Pole Owner shall inform Licensee whether Pole Owner will be able to perform the Make-ready Work within the thirty (30) calendar day time limit, and if not, the date by which the work could be done. If the Pole Owner notifies the Licensee that it cannot perform the Make-ready Work within the thirty (30) calendar day time limit, the Licensee shall have the option of choosing a contractor that meets the objective engineering qualifications and criteria established by the Pole Owner to perform the Make-ready Work on behalf of Licensee. If the Pole Owner fails to provide notice that it cannot perform the Make-ready Work within the seven (7) calendar day limit, and the Pole Owner fails to perform the Make-ready Work within the thirty (30) calendar day limit, the Pole Owner must pay to Licensee a penalty of \$1000 per pole. Notwithstanding the preceding, once the Pole Owner indicates to the Licensee the Make-ready Work that will be necessary and the reasonable estimated cost thereof, at its option, the Licensee may choose a contractor, which meets the objective engineering qualifications and criteria established by the Pole Owner to perform the Make-ready Work.~~Pole Owner will provide Licensee an estimated completion date for any Make-ready Work, taking into account the overall scope of the Licensee's project, the volume of applications received from other licensees, as well as the availability of crews to perform the work. The Licensee and the Pole Owner shall negotiate solutions in good faith when the estimated time to perform the Make-ready Work does not meet the Licensee's project requirements. At Licensee's option, Licensee may request either assistance with the work by Licensee or by qualified contractors hired by the Licensee, payment of premium rates for Pole Owner's employees to be dedicated to perform work solely on Licensee's project, or similar measures designed to augment the Pole Owner's capabilities.~~

CONCLUSION

UTOPIA respectfully requests that the Commission order that the standard pole attachment contract contain a provision requiring the Pole Owner to complete Make-ready Work within thirty calendar days of receiving notice to proceed from the Licensee, and allowing the Licensee the option of choosing a qualified contractor to perform the Make-ready Work.

DATED this _____ day of April, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of April, 2005, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing **BRIEF OF UTOPIA**, to:

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