State of Utah
Department of Commerce
Division of Public Utilities

FRANCINE GIANI
Executive Director

JASON PERRY
Deputy Director

CONSTANCE B. WHITE
Director, Division of Public Utilities

JON HUNTSMAN Jr.
Governor
GARY HERBERT
Lieutenant Governor

December 9, 2005

TO: **PUBLIC SERVICE COMMISSION**

FROM: **DIVISION OF PUBLIC UTILITIES**
Constance B. White, Director
Wes Huntsman, Manager, Telecommunications
Casey J. Coleman, Technical Consultant

RE: **In the Matter of: an Investigation into Pole Attachments Docket No. 04-999-03**

RECOMMENDATION:

The Division recommends that the Commission exclude section 10.4 from the Standard Contract. If the Commission adopts language for Section 10.4, the Division recommends using language proposed by Qwest.

The Division also recommends that the Commission include some method to trigger when the self-build of make-ready work would apply.

BACKGROUND:

On December 1, 2005 the Division held a technical conference with all interested parties. The technical conference was to develop a standard contract that could function as a "safe harbor" for parties wanting to enter into a Pole Attachment Agreement. Representatives from Utah Rural Telecom Association ("URTA"), PacifiCorp, Comcast, Qwest, Utopia, UBTA-UBET Communications, T-Mobile, Electric Lightwave Inc., and Utah Rural Electric Association participated in the proceedings. The main objective of the meeting was to draft language that would mirror the Commission Direction Concerning Ten Issues Regarding the Pole Attachment Standard Contract dated September 6, 2005. The parties were able to draft language that was acceptable to all concerned parties at that meeting, except for two issues which were: Credit Assurances and Self-Build provision for Make-Ready work.

Credit Assurances

In the Direction given by the Commission on September 6, 2005 rulings were made that dictated how language should be drafted in the Standard Contract. Issue 10 dealt with Insurance and Bond. The Commission had given instructions to adopt language submitted by PacifiCorp with some modification to section 10.3. In the Commission's Direction no mention is made of Section 10.4. The parties involved were unable to reach agreement regarding whether the Commission intended to have section 10.4 included in the Standard Contract or eliminated.

The course of action agreed to by all the parties involved was to get clarification from the Commission on this section. On December 1, 2005 Commission staff advised the Division that the Commission had not decided if Section 10.4 should be included or excluded from the Contract. All parties agreed to submit comments to the Division regarding their position on this topic.

On December 7, 2005 PacifiCorp filed their comments regarding Section 10.4 with the Commission, while Qwest, URTA, and Comcast submitted comments directly to the Division. (The Division has included Comcast's comments as Attachment A.) The crux of the differences between parties seems to be whether additional safeguards are warranted, which section 10.4 would provide.

The Division does not believe that the section 10.4 dealing with Credit Assurances is necessary for the Standard Contract. Initially the Credit Assurances language was contemplated when costs and fees were not going to be paid in advance. The Division feels that a large portion of the risk for Pole Owners will be negated by the requirement the Commission has instituted that 50% of estimated make ready fees have to be paid in advance of construction.

Additionally, if Pole Owners have concerns over the credit worthiness of an attaching entity, Section 10.3 of the Contract provides an option for Pole Owners to seek Commission approval for a bond.

With the prepayment of a large portion of the costs and the ability for Pole Owners to file with the Commission a request for a bond, the Division recommends excluding section 10.4 completely from the Standard Contract.

In the alternative, if the Commission determines that it would be appropriate to have some additional protections for Pole Owners and includes section 10.4 in the Standard Contract, the Division recommends using the following language proposed by Qwest.

> Section 10.04 Credit Assurances
>
> Upon the occurrence of Licensee's failure to timely make any undisputed payments due under this Agreements after 30 days written notice from Pole Owner or, if Licensee has

an S&P credit rating, upon the Licensee's credit rating dropping below BBB-, or if Licensee is deemed bankrupt or files a petition for bankruptcy protection, Pole Owner may require Licensee to provide to Pole Owner, at Licensee's option (but subject to Pole Owner's acceptance based upon reasonably exercised discretion), performance assurances in the form of either (a) the posting of a letter of credit, (b) a cash deposit, (c) the posting of other acceptable collateral or security by the Licensee, (d) a guarantee agreement executed by a creditworthy entity; or (e) some other mutually agreeable method of satisfying Owner. The magnitude of Licensee's obligations under this Section 10.04 shall be limited to a reasonable estimate of the sum of the rental charges and non-recurring charges expected to be due Pole Owner for the next twelve-month period. If the Licensee fails to provide such reasonably satisfactory assurances of its ability to perform hereunder within three (3) Business Days of demand therefore, that failure will be an event of default under this Agreement and Pole Owner shall have the right to exercise any of the remedies available under this Agreement or otherwise.

Self-Build Provision for Make-Ready Work

As expressed in the Comments filed with the Commission by PacifiCorp on December 7, 2005, there are still differences among parties regarding the self-build provision in the Standard Contract. PacifiCorp is concerned that parties might choose the self-build option as the default method to get attachments on the pole. The parties involved in the technical conference discussed this topic. Although it would be overly optimistic to allege that all parties were "thrilled" with the timeframes proposed by the Commission, all parties realized that those timelines were basically established.

The source of misunderstanding between parties resulted from the process, if any, that would be used when outside contractors complete the make-ready work. Essentially, as a Pole Owner, PacifiCorp is justifiably worried about the integrity of their network if others are completing the work. Ensuring that engineering designs and plans meet Pole Owners network standards was a concern. Additionally, the timing of when the Make-Ready work would be started was another issue.

The parties were unclear whether or not an attaching entity will be able to begin the Make-Ready work as soon as it gets an estimate from Pole Owners regarding either timeframes or cost that is unacceptable to the attaching party. When would an attaching entity be allowed to begin the process of make-ready work? What would constitute unacceptable? Those were questions that were contemplated.

The Division's recollection of the meeting is that all the parties agreed that the timeframes were established by the Commission for a reason. Because of this belief, it seemed logical to the parties that those timeframes could be used as a starting point for a trigger if attachers were rejecting an estimate because of time. If a Pole Owner was unable to complete the Make-Ready work in the Commission ordered time frames, then attachers could pursue a self-build option.

PacifiCorp argues that the use of the self-build option should be infrequent. The Division agrees with this position that the self-build option for make ready work should occur on an infrequent basis. The Division does not believe that every application will need to have a self-build option and quite frankly hopes that the use of the provision to self-build seldom surfaces.

Recognizing the position that a self-build option should not be the default, the Division also recognizes that the market is rapidly changing and converging. It is plausible that a Pole Owner could easily be a competitor of the attaching entity. Because this market reality exists, options for make-ready work are needed to allow a competitive market to thrive.

Because both of these points have merit, the Division recommends that the Commission adopt language that adds a trigger element for when the self-build projects could commence. Allowing some option for attachers to complete the make-ready work but on a limited basis and under specific conditions is the most feasible way to balance both reasonable concerns.

Another area the Commission must consider is ensuring the make-ready work is completed in a manner that is satisfactory to Pole Owners. PacifiCorp aptly expressed concern over the work of the contractors that would be hired by Attachers to complete the make ready work. This worry was discussed in the technical conference and the following remedy was suggested. Attachers would be required to use approved contractors to complete the make-ready work and provide detailed engineering plans for approval to the Pole Owners.

Comcast, Utopia, and other companies who primarily attach to poles were in favor of providing engineering plans for Pole Owner review. The common concern was the "turnaround" time from the Pole Owner for approval. Conceivably the Pole Owner could have the engineering plans for weeks without providing the necessary approval if this method was adopted for the self-build of make-ready work. A reasonable time frame that is workable was never reached in the technical conference but the range of days was from two days to thirty days.

The Division's hope is that both the attacher and Pole Owner will be able to complete the review of plans in an expeditious time frame. The business reality is that reviewing the plans will take some time. Because time is needed the Division does not feel a two day turn around would be prudent but allowing as much as 30 days to review plans seems to be lengthy and unnecessary.

In comments sent to the Division, Qwest provided sample language for the make-ready work section which suggested that a reasonable timeframe for approval or rejection of the plans would be 14 days. The Division feels that 14 days would be a reasonable time frame for the approval of the engineering plans. Fourteen days would be broad enough to cover most unforeseen issues that might arise from the Pole Owner while still providing a definite date when the review must be completed. Therefore, the Division recommends adopting the language included below because it captures the need for triggers while still allowing the self build option in specific instances.

Section 3.9 Make-ready Work

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 estimated cost and construction time line thereof within the application processing time period identified in Section 3.02. Licensee shall indicate via ENS or in writing within thirty (30) days of the date of Pole Owner's response to Licensee's initial application whether Licensee accepts or rejects the Make-ready estimate. If Licensee rejects the Make-ready estimate due to Pole Ower's estimated cost or if Pole Owner's estimated construction time line that exceeds the construction completion timeframes set forth in Section 3.02, Licensee may elect to self-build the required Make-ready Work upon notice to Pole Owner provided that all work (i) shall be performed by contractors pre-approved by Pole Owner, (ii) comply with Pole Owner's construction standards and procedures, and (iii) is based on engineering design and specifications ("Engineering Designs") pre-approved by Pole Owner prior to commencement. Pole Owner shall approve or reject such Engineering Designs within 14 days after receipt from Licensee, or such other period as agreed to by the Parties.

The Division distributed a clean copy of the Standard Contract to all the parties involved in this Docket with the intention of allowing those parties one final chance to review the language in the contract. Parties will be reviewing that contract and submitting any additional revisions to the Division. Those revisions are due by December 23, 2005. Once all revisions are submitted the Division will file the Standard Contract with the Commission which will be the template that can be used for Pole Attachment Agreements in the future. The Division hopes to file the Standard Contract in January 2006.

CONCLUSION:

The Division feels that the Standard Contract already provides enough protection to the Pole Owners that adding the additional requirement as suggested in section 10.4 is unnecessary.

The Division recommends that the Commission adopt the language provided for the self-build provision. The language provided establishes triggers at which point completing the make-ready work could be accomplished by the attachers. The proposed language also gives further direction on the process that would happen if an attacher is considering completing the work.

Comments of Comcast Cable Communications, LLC

The Division of Public Utilities Staff ("Division Staff") has asked the Parties in the above-referenced proceeding to provide comments on a provision inadvertently included in the Division's latest version of the Standard Utah Pole Attachment Agreement ("Agreement"), dated November 23, 2005.

The provision at issue, Section 10.4, specifically provides:

Section 10.4 Credit Assurances

Upon the occurrence of a Material Adverse Change, or, if Licensee has an S&P credit rating, upon the Licensee's credit rating dropping below BBB-, Pole Owner may require Licensee to provide to Pole Owner, at Licensee's option (but subject to Pole Owner's acceptance based upon reasonably exercised discretion), performance assurances in the form of either (a) the posting of a letter of credit, (b) a cash deposit, (c) the posting of other acceptable collateral or security by the Licensee, (d) a guarantee agreement executed by a creditworthy entity; or (e) some other mutually agreeable method of satisfying Owner. The magnitude of Licensee's obligations under this Section 10.04 shall be limited to a reasonable estimate of the sum of the rental charges and non-recurring charges expected to be due Pole Owner for the next twelve-month period. If the Licensee fails to provide such reasonably satisfactory assurances of its ability to perform hereunder within three (3) Business Days of demand therefore, that failure will be an event of default under this Agreement and Pole Owner shall have the right to exercise any of the remedies available under this Agreement or otherwise.

This provision was proposed by PacifiCorp in an attachment to PacifiCorp's opening Brief On The Terms and Provisions of The Standard Pole Attachment Agreement, filed April 15, 2005.[1] *See* Attachment to Opening Brief of PacifiCorp, proposed Insurance and Bond Article X. Although the Commission approved PacifiCorp's proposed Insurance language (Section 10.1-10.2) and a revised version of its proposed Bond language (Section 10.3), the Commission apparently did not consider or approve PacifiCorp's proposed Section 10.4 (Credit Assurances). *See* Letter from Public Service Commission dated September 6, 2005 ("Commission Directive"), ¶ 10.

[1] A similar provision was submitted by PacifiCorp in its original proposal, but was rejected by Division Staff in its first redlined version of the Agreement. *See* DPU Redline Version of Standard Agreement dated October 15, 2004, at p. 15. Although during the early technical conferences PacifiCorp requested that Division Staff reinsert the provision, the general consensus was that because attachers pay most pole related costs up front (including annual rent), the provision was unnecessary. Despite this general agreement PacifiCorp nevertheless tacked the provision on to the Insurance and Bond language proposed in its Opening Brief.

Comcast urges the Commission to reject Section 10.4 in its entirety. PacifiCorp's "Credit Assurances" language is not only unnecessary in light of the various other protections contained in the Agreement and the proposed Pole Attachment Rules, but is anti-competitive and unreasonable on its face.

Pole Owners Are Adequately Protected Without Section 10.4

In accordance with the Agreement and the proposed Pole Attachment Rules, attaching parties are required to make the vast majority of pole-related payments up front. For example, along with every application for pole attachments, attachers are required to submit application fees "to cover the expected costs of doing the [pre-construction] survey and engineering work required to determine what make ready work must be done to accommodate the application." Commission Directive, ¶ 1; *see also* Agreement, Section 3.01. Similarly, in accordance with the proposed Pole Attachment Rules, Attachers must also pay 50% of the estimated make ready fees "in advance of construction." *See* Proposed UAR, published September 1, 2005, R.746-345-3(C)(7). Although 25% of the remaining balance is due when construction is half complete and the final 25% of the balance is paid after the work is completed, this payment allows for any necessary true up and will help ensure that the pole owner has an incentive to complete make ready in a timely manner. Pole owners also have the option to allow attachers to use approved contractors to perform make ready work, thus alleviating the pole owner of any cost responsibility. Attachers are also required to pay their annual pole attachment rental fees in advance at the beginning of every year and as attachments are made. *See* Agreement, Section 5.01.

In the event an attacher fails to pay an invoice when due, the pole owner has various remedies under the Agreement's "Remedies for Default" provision. *See* Agreement, Section 6.01. Those remedies include: "refusal to grant any additional permission for Attachments;" "termination of [the] Agreement;" and "injunctive relief." *Id*.

The Agreement further provides that, "[u]pon application and approval by the Commission, Pole Owner may require Licensee to furnish a bond or other form of financial security instrument to cover the faithful performance by Licensee of its obligations hereunder." Agreement, Section 10.3.[2] Thus, if Licensee's financial health is questionable, a pole owner may seek approval to request a bond under Section 10.3.

In sum, given the numerous other ways that pole owners are protected under the Agreement and proposed Rules, Section 10.4 is unwarranted.

Section 10.4 Is Anti-Competitive and Unreasonable On Its Face

Attaching entities are entitled to "nondiscriminatory access to utility poles at rates, terms and conditions that are just and reasonable." *See* Proposed UAR, published September 1, 2005, R.746-345-1(B)(2) To ensure nondiscriminatory access under the Agreement, access decisions must be based on objective criteria, specifically "upon considerations of safety, reliability, capacity and generally applicable engineering standards." *See* Agreement, Fourth WHEREAS Clause. A pole owner may also deny access when an attacher actually defaults under the Agreement. *Id*. at Section 6.01. Whether or not an attaching entity has an "S&P credit rating" that "drop[s] below BBB-," is irrelevant if the attacher continues to make timely payments. *See* Agreement, Section 10.4. In addition, if the attacher fails to make timely payments, pole owners have adequate remedies, as discussed above.

Moreover, although "Material Adverse Change" is not a defined term in the Agreement and PacifiCorp did not propose any definition of the term in its Opening Brief, the term was defined in PacifiCorp's first proposal. *See* note 1. In that proposal, "Material Adverse Change" was defined to include events such as "bankruptcy," "significant financial losses," "inability to make scheduled debt payments"—events that may never affect an attacher's obligations under the Agreement. In any event, the pole owner is adequately protected and may seek approval for a bond request under Section 10.3 in such circumstances.

A monopoly pole owner, (especially in today's highly competitive environment) cannot have unfettered discretion to determine when an attacher is worthy of access. Indeed, the FCC has rejected similar "credit worthy" provisions as anti-competitive:

> To be sure, Georgia Power has an interest in ensuring that Cable Operators actually pay the amounts owed to Georgia Power. The "creditworthiness matrix" . . . however, gives Georgia Power unfettered access to sensitive financial information and unilateral authority to determine whether an attacher is creditworthy. Based on this determination, Georgia Power, by itself, assesses whether posting a bond is appropriate and, if so, in what amount. These types of

[2] Indeed, this bond provision, although revised to include a provision requiring Commission approval, was inserted at the express request of PacifiCorp.

> open-ended provisions invite arbitrary and anticompetitive conduct that is antithetical to the principles underlying section 224 [of the Pole Attachment Act]. Moreover, Georgia Power fails to explain why provision of the parties' prior pole attachment agreements (e.g., requiring the Cable Operators to provide evidence of insurance coverage or to post a bond in a definite amount) afforded the utility insufficient protection.[3]

The Commission should similarly reject PacifiCorp's unnecessary and anti-competitive "Credit Assurance" language.

Finally, requiring a Licensee "to provide such reasonably satisfactory assurances of its ability to perform hereunder within three (3) Business Days of demand therefore," or default under the Agreement, is an unreasonable term and condition of attachment on its face and should be rejected on those grounds alone.

[3] *The Cable Television Ass'n of Georgia v. Georgia Power Co*., 18 FCC Rcd 16333, ¶ 29 (Aug. 8, 2003), recon. Denied, 18 FCC Rcd 22287 (Oct. 29, 2003).