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Submitted: January 17, 2005

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of)	
)	Propose Rules R746-345-1 et seq.
Pole Attachments of Cable Television)	
Companies)	COMMENTS OF PACIFICORP TO THE
)	PROPOSED RULES
Notice of Proposed Rules)	

PacifiCorp submits the following comments in response to the Public Service Commission's Notice of Change in Proposed Rule, published in the Utah State Bulletin No. 24, on December 15, 2005. PacifiCorp incorporates, by this reference, all prior comments filed by it in Docket No. 04-999-03.

PacifiCorp's Comments address three major topics: (1) self-build of make-ready work, (2) general terms of access, and (3) safety requirements and access for wireless attachments.

I. SELF-BUILD OF MAKE-READY WORK

The self-build concept originated in Docket No. 04-999-03 as a proposed remedy for attachers, in the event the pole owner did not respond to an application within the prescribed response period. The concept subsequently evolved such that an attacher's right to self-build the make-ready work was triggered if the pole owner indicated that it could not complete the make-ready work within a certain time frame. PacifiCorp eventually conceded that, if the pole owner could not commit to completing or did not complete the make-ready work by the mandatory deadline, then a self-build make-ready option might be reasonable. Thus, the concept of "triggers" of make-ready work for self-builds was acknowledged and accepted by all the parties. The triggering timeframes were subsequently defined in the proposed rules.

Thereafter, certain attaching entities began leveraging this concession in an effort to obtain support for a provision that would allow attachers to self-build in the event the attacher obtained an estimate for the make-ready work that was lower than the pole owner's estimate. At the November 17, 2005, technical conference, the parties received their first hint that the Commission might not support the concept of triggers for self-build, when it was suggested that attachers should not face **any** restrictions on their right to self-build the make-ready work. Upon learning this, PacifiCorp proposed that extensive language be added to the Standard Contract in an effort to enhance the safeguards and mitigate the risks to its customers and its infrastructure. In its Supplementary Comments to the Division of Public Utilities on the Division's Standard Joint Use Agreement (December 23, 2005), PacifiCorp also urged the Commission to reconsider inclusion of a triggering mechanism that would limit the applicant's self-build rights to certain

possibly justifiable circumstances. The Division also indicated its support for having triggers for self-build make-ready work. Like PacifiCorp, the Division seemingly agreed that self-build make-ready work should be limited to rare occasions, such as the pole owner's inability to meet construction deadlines. *See* Memorandum from Division of Public Utilities, to the Public Service Commission 4 (Dec. 9, 2005). Notwithstanding the filed support for triggering mechanisms, the Commission's December 15, 2005, publication of the revised proposed rules indicates that the Commission intends for attaching entities to enjoy broad rights in determining when they may engage in self-build make-ready work. *See* Commission's proposed R746-345-3.C.8, indicating that the applicant may reject the pole-owner's make-ready estimate for "whatever reason" and engage in self-build make-ready work for their attachments.

After having further considered the impact and potential consequences related to self-build of make-ready work, PacifiCorp believes that the self-build issues are best addressed in the context of the rules and it respectfully renews its request to include triggering mechanisms that limit the attachers' self-build rights. In addition, PacifiCorp requests that the Commission give serious consideration to the additional proposals described in these Comments, regarding self-build of make-ready work. PacifiCorp's current proposals address the need for immediate remedies to protect the safety and reliability of electric facilities and to fairly apportion the burdens and benefits of attachment.

A. Self-build should only occur in the event the pole owner cannot timely complete make-ready work.

The electric utility owns the electric systems infrastructure and is responsible for the safety and operational integrity of the system. The Commission's proposed R746-345-3.C.8 fails to take into account the serious responsibilities involved in maintaining safe and reliable

operation of the electric system. It hands over control of certain aspects of this major responsibility to entities with absolutely no related prior experience or qualifications. And it does so without the support of substantial record evidence. *See* Utah Code § 63-46a-12.1(4)(a)(ii) (2005).

Proposed R746-345-3.C.8 in effect authorizes a private party to take possession, use, control and even dispose of private property belonging to the electric utility. The only justification for such an authorization might be to marginally lower the incremental cost of communications companies in deploying their infrastructure. But the record does not indicate, and it is not possible to infer, how this hypothetical private-party cost savings would benefit the public. Thus, there is no “public use” achieved by such a taking. *See, e.g.*, UTAH CONST. art. I, § 22.

A temporal trigger on the self-build right might implicate a public use, in that it would arguably expedite deployment of communications infrastructure on the occasions it was triggered. This would leave some form of control over the construction of make-ready work involving electric facilities in the hands of the electric utility. The electric utility has the expertise to properly manage electric system operations in order to ensure safety and reliability. Therefore, PacifiCorp respectfully proposes that the Commission remove the words “whatever reason” from the Commission’s proposed R746-345-3.C.8 and include the phrase “Pole Owner’s failure to commit to completing, or its failure to complete, the required make-ready work within the time frames specified in R746-345-3.C.1-4, as applicable.”

B. Self-build should not include electrical work.

As an alternative, the Commission should give consideration to not allowing attaching entities to undertake make-ready work that includes working on electric distribution or

transmission circuits. This type of work could include pole replacements, electric facility grounding, connections to the distribution neutral and other work that directly affects an electric utility's services from an operational standpoint. The FCC does not require electric utilities to allow communications companies to work on electric equipment or to change out poles belonging to the electric utility. PacifiCorp is not aware of any other state that allows these types of activities either.

The FCC has permitted electric utilities to require communications companies to train their own employees with respect to working in the proximity of electric lines and, once trained, the communications company may be allowed to use those workers to work on communications attachments near electric lines. The same applies with respect to contractors working for the communications company. However, the FCC does not require the electric utility to allow the communications company employees or contractors to perform work involving the actual electric conductors. The self-build right, under the FCC approach, only allows the communications company to work in the **vicinity of** electric facilities to perform make-ready work, not including pole change-outs. Nothing in FCC precedent indicates otherwise. Thus, it would be prudent, reasonable and consistent with the FCC's rules and approach to limit self-build make-ready work in Utah to work that can be performed in or below the communications space on the pole.

PacifiCorp's proposed revision to this rule takes this approach. *See* PacifiCorp's *proposed* R746-345-3.C.8, adding the qualifier, "with respect to work other than work affecting electric conductors." If the Commission accepts PacifiCorp's proposal to limit self-build make-ready to communications work only, as proposed in this Section I.B., then the self-build concerns of PacifiCorp expressed below in Section I.C. are substantially mitigated.

C. Self-build make-ready work involving electric facilities would require constraints applicable to electric utility construction work.

When PacifiCorp performs make-ready work to support an attaching entity's ability to attach, such projects often involve PacifiCorp's employees managing an outside contractor that actually performs the make-ready work. The relationship between PacifiCorp and the contractor is governed by construction contracts. These contracts are designed to ensure that the projects are done safely, on-time, on-budget, and to preserve the integrity of the electric system.

The Commission's proposed rules effectively substitute the self-building attacher for the pole owner in the contractual relationship with the electric contractor. In the absence of contractual privity with the electric contractor, the pole owner lacks the ability to impose certain terms and conditions and enforce compliance by the electric contractor with the pole owner's operating procedures, which are necessary for the setup of the electrical system. These include substation operations, customer notification and communications with others working on the electrical network. However, the pole owner remains ultimately responsible for the integrity of the electric system and the reliability of the service. The responsible self-building attacher will govern its relationship with the contractor through a detailed contractual arrangement. The only manner by which PacifiCorp can fulfill its obligations to its customers and the public, absent contractual privity with the contractor, is by way of appropriate terms and conditions governing the relationship between the pole owner and the attacher.

One way these terms and conditions could be imposed is through the use of a pole attachment agreement such as the Division's Standard Contract. PacifiCorp is hopeful that the Division will adopt PacifiCorp's detailed proposal governing self-build make-ready work in the version of the agreement finally submitted to the Commission by the Division. *See* Comments of

PacifiCorp to the Division of Public Utilities on the Division's Standard Joint Use Agreement (Dec. 7, 2005). However, the Commission's proposed rules could be interpreted to give the attacher self-build rights even in the absence of a pole attachment agreement that addresses those rights. For this reason, PacifiCorp proposes modifying R746-345-3.C.8 to make clear that the self-build right only arises "to the extent the applicant has a contract in place with the Pole Owner referencing its rights under this rule to self-build." See PacifiCorp's *proposed* R746-345-3.C.8. In the event the Division declines to accept PacifiCorp's proposal for detailed contractual provisions governing self-built make-ready work, and to the extent the Commission declines to adopt the modification limiting the self-build right to attachers with appropriate contracts in place, then the additional language proposed by PacifiCorp in R746-345-3.C.8.a through m, becomes critical. This may be the only remaining means to provide appropriate terms and conditions governing the relationship between the pole owner and the self-building attacher.

A section-by-section discussion of those provisions proposed by PacifiCorp follows. Generally, the provisions are designed to ensure that the make-ready work is properly engineered, constructed and placed in service. The provisions address responsibility for costs and any requisite corrective measures and apportion liability in a reasonable manner. They are distilled from more comprehensive language used by PacifiCorp in its relationships with its electric contractors. Therefore, the provisions are necessary and appropriate to govern the attacher who steps into the shoes of the pole owner or an electric contractor with respect to performing work on the pole owner's electric system.

Construction Specifications, proposed R746-345-3.C.8.a and -b. Every construction project requires development of plans that set the project objectives. Construction plans are always reviewed by the project owner to make sure the owner is satisfied with the objective of

the project before construction begins. Having well-developed, owner-approved plans identifies potential conflicts early and avoids misunderstandings. Project plans make clear what the contractor's responsibilities are by defining the required performance. Thus, PacifiCorp proposes two subsections addressing the development of construction specifications. PacifiCorp's proposal requires pole owner approval of the construction specifications developed by the attacher and it requires the construction specifications to conform to good utility practice and the pole owner's construction standards.

Third-party cost estimates, proposed R746-345-3.C.8.c. To the extent the Commission adopts a rule that triggers a self-build right based on cost savings to the attacher, the pole owner should be entitled to review third-party estimates and proposals obtained by the attacher for the make-ready work. This will allow the pole owner to be assured that a potential cost savings actually exists. Otherwise, the pole owner would have no way to verify whether the attacher was legitimately entitled to self-build under the rules. Thus, PacifiCorp's proposed revisions require the attacher to provide copies of third-party estimates and proposals.

Licenses and permissions, proposed R746-345-3.C.8.d. A self-building attacher should be required to obtain all necessary licenses and other permissions related to the self-built make-ready work. These could include construction permits and rights-of-way. As the contractor for the project, the attacher should be responsible for permitting the work. The Commission has confirmed that the pole-attachment relationship does not transfer any rights-of-way to the attacher. *See* Letter from the Commission to the Parties in Docket No. 04-999-03 of Sept. 6, 2005, at ¶ 3. Therefore, the attacher should be expressly required to obtain necessary rights-of-way in advance of construction. This requirement protects the rights of Utah land owners and the rights of the pole owner's customers who may erroneously believe a trespassing attacher to

be an agent of the pole owner and therefore lodge their grievances with the pole owner. This is a common occurrence, even without the self-build make-ready option. Thus, the provisions will also help protect the pole owner's reputation within the community.

Subcontractors and vendors, proposed R746-345-3.C.8.e. Under the self-build make-ready work scheme proposed by the Commission, the attacher takes responsibility for getting the make-ready work done. The attacher will do this by utilizing utility contractors and vendors that also perform work for and supply materials to the pole owner. Governing provisions are necessary to confirm that, when those suppliers and vendors are engaged in self-built make-ready work for the attacher, they are contractually responsible to the attacher, not to the pole owner. Further, by undertaking the project, the self-building attacher assumes responsibility for the performance of those contractors and vendors. PacifiCorp's proposal adds clarity to these relationships that should help avoid disputes.

Insurance coverage, proposed R746-345-3.C.8.f. Insurance coverage is required of contractors in every significant construction contract. The protection afforded the covered contractor means risk reduction for the owner. Insurance proceeds can make the difference between the contractor's completing the project and the owner's having to pick up the pieces of an abandoned project. In the absence of insurance, the contractor may be made financially insolvent and unable to complete the project. The insolvent contractor may leave the project undone, which in the case of self-build make-ready work, could affect the safety and reliability of the electric system.

A typical construction contract contains provisions requiring that the owner be an additional named insured. This can protect the owner in the event the contractor is insolvent, because of a claim or otherwise. Comprehensive insurance provisions typically found in

construction contracts require commercial general liability, builder's all-risk, design defect, automobile, worker's compensation and other forms of insurance. The contracts typically impose requirements on the amounts of coverage that relate to the potential risks inherent in the project and the size of the project. For the purposes of these rules, PacifiCorp proposes simply that the self-building attacher be required to maintain reasonably satisfactory coverage during construction and throughout the warranty period.

Construction coordination, proposed R746-345-3.C.8.g. PacifiCorp's experience is that managing utility construction projects requires deft balancing of project requirements with the needs of customers who may be affected by line outages, as well as the operating parameters of the electric system. There are frequently times when particular lines cannot be taken out of service due to high loading and the effects an outage would have on other lines. Notification requirements may apply prior to the outage so customers can plan ahead. Under the self-build make-ready work provisions in the Commission's proposed rules, it is as yet unstated, but quite clear as a practical matter, that PacifiCorp will retain the role as coordinator of all of these competing interests. PacifiCorp's proposal makes this role clear in the rules and makes clear the appropriately subordinate role of the self-building attaching entity in this regard.

Acceptance and transfer, proposed R746-345-3.C.8.h through -j. The most satisfying point in a construction project is when the owner and the contractor can look back on the finished work and agree that it was a job well done. There is one critical step immediately prior to that point—acceptance and transfer. Large construction projects with correspondingly large construction contracts may require multiple iterations of a process designed to ensure that all the work is complete and meets the requirements of the construction specifications. Achieving final completion and transferring the completed project to the owner is important for several reasons

in the case of the proposed self-built make-ready work provisions. First, the risk of loss and the maintenance responsibilities shift from the contractor to the owner upon final completion. Second, the warranty period begins at final completion.

PacifiCorp's proposal puts in place a simple process whereby the self-building attacher gives notice that it considers the work to be complete. The pole owner determines whether the work is complete, and if, the pole owner does not agree with the attacher, the parties work out their differences. Once both parties are in agreement, the pole owner memorializes this agreement in the certificate of final completion. The attaching entities' responsibilities are largely complete once the attaching entity provides the pole owner a bill of sale for the equipment that will belong to the pole owner. This provides a record of title that the pole owner can use to update its asset inventory and prove a claim of ownership.

As-built drawings, proposed R746-345-3.C.8.l. Invariably, during the course of construction, even the best-laid plans will not anticipate every obstacle or available economy. The parties will agree to deviations from the plans in order to overcome obstacles or take advantage of economic alternatives. Thus, in the course of every significant construction project, drawings and other project documents are updated to reflect those deviations. Therefore, PacifiCorp's proposal requires that as-built drawings be delivered to the pole owner by the self-building attaching entity. This will ensure that the pole owner has accurate records of its facilities.

Warranty obligations, proposed R746-345-3.C.8.m. The acceptance process discussed above is intended to determine general compliance with the project specifications. However, in every construction project there is the possibility of latent or overlooked patent defects in the work that will become apparent after acceptance. Reasonable warranty provisions protect both

the contractor and the owner in relation to these defects. The owner gets an express assurance that the contractor will return to repair defects in materials or workmanship, and the contractor gets a clear definition of its responsibilities in this regard. Typically, the contractor guarantees the work for a fixed period of time, after which responsibility for repairs due to defects generally shifts to the owner. This allows the contractor to budget for warranty work. Otherwise, the contractor would have to manage an ever-expanding liability for potential defect repair claims from prior work.

PacifiCorp's proposal requires the self-building attacher to warrant that its work conforms to the express construction specifications and, because construction specifications never include every design detail or construction practice, that the work conforms generally to the standards and practices applicable to utility work in Utah. The proposal limits the warranty period to two years, which is typical of electric utility distribution line construction contracts. The proposal lets the owner require an assignment of third-party warranties to the pole owner and allows the pole owner to step in and take over repairs in the event the attaching entity does not.

II. THE RULES SHOULD EXPRESSLY INCLUDE THE ACCESS PROVISIONS OF THE POLE ATTACHMENT ACT AND DEFINE THE POLE OWNER'S RIGHTS WITH RESPECT TO NON-CONFORMING ATTACHMENTS.

A. The Pole Attachment Act access provisions.

PacifiCorp's proposed revisions include a provision incorporating the access provisions of the Pole Attachments Act. *See proposed R746-345-1.B.2.* stating, "A utility may deny access on a nondiscriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." Under the federal regulatory structure, nondiscriminatory access to utility poles for CATV providers and ILECs is mandated

by statute. Utah statutes give the Commission certain latitude in determining appropriate use of utility facilities. For example, Utah Code Ann. § 54-4-13 gives the Commission authority to prescribe reasonable compensation and reasonable terms and conditions for joint use in certain cases. However, the statute does not delve into the specifics of when access to a public utility's poles by another public utility is required. The statute merely states that the Commission can determine that access is required in the name of public convenience and necessity, and, in the event that two public utilities cannot agree on the terms and conditions and compensation for such use, the Commission can specify these. In contrast, federal law mandates certain nondiscriminatory access, but also specifies instances where such access is not mandated. Specifically, the Pole Attachments Act allows that, "a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is **insufficient capacity** and for reasons of **safety, reliability** and generally applicable **engineering purposes.**" 47 U.S.C. § 224(f)(1) (emphasis supplied). The FCC regulations incorporate this language verbatim. *See* 47 C.F.R. § 1.1403(a).

The Commission's proposed rules provide substantial guidance on the various terms and conditions of attachment. The proposed rules allow the pole owner to reject an application for permission to attach. *See* Commission's proposed R746-345-3C(5). And the proposed rules allow the attaching entity to appeal such a rejection to the Commission. However, the proposed rules do not supply a standard by which the rejection or the appeal may be judged. Thus, the broad reasonable terms and conditions and public interest and necessity statutory standards appear to be the only express standards applicable.

PacifiCorp submits that additional guidance to both the utility and the attaching entity is warranted in this area. The most reasonable approach under the circumstances appears to be incorporation of the federal standards, as is indicated in PacifiCorp's proposed revisions.

B. Remedies for non-conforming attachments.

The Commission's proposed rules provide a number of provisions designed to assure the attaching entity access to poles on an expedited timeline, at a very low rate. At least one key provision is missing on the other side of that equation: a provision giving the pole owner express rights to address pole attachments that do not conform to safety and construction standards. That is why PacifiCorp has proposed a new R746-345-3.D.

PacifiCorp proposes that the pole owner be expressly authorized to bring pole attachments into compliance if the attaching entity fails to do so. In the event an imminent safety or reliability problem arises, PacifiCorp proposes that the pole owner be able to take corrective action without first notifying the attaching entity. PacifiCorp's proposal requires the attaching entity to bear the costs of this work and apportions liability for this work reasonably. The proposal is designed to ensure the safety of utility workers and the public and, the reliable operation of the electric system.

III. WIRELESS ATTACHMENT SAFETY AND ACCESS

A. Radio frequency radiation exposure must be limited in accordance with safety standards.

In the course of preparing to implement the wireless attachment access provisions contained in the Commission's proposed rules, PacifiCorp's engineering and operations staff have pointed out the serious safety hazards raised by attaching radio transmitters and antenna structures to utility poles. These hazards stem from the effects on biological tissue of non-

ionizing radiation emitted by such devices. A body of science and safety regulation exists to address these hazards. PacifiCorp's proposed revisions to the rules are intended to facilitate implementation of that regulation under Utah law in a manner that mitigates potential hazards to utility workers. *See PacifiCorp's proposed R746-345-3.F.*

Radio frequency transmitters emit non-ionizing radiation. That radiation affects biological tissue through heating. Organs particularly susceptible to exposure include the eyes and the testes. The extent of the hazard relates to the amount of radio frequency energy emitted, the frequency of the emission, and the proximity of the person exposed in relation to the antenna, among other things.

The FCC has adopted regulations governing exposure to radio frequency radiation. These rules are based on standards developed by the American National Standards Institute (ANSI) and are codified at 47 C.F.R. § 1.1310. These rules and the health effects of radio frequency radiation are discussed in detail in the report of the FCC's Office of Engineering and Technology, attached to the Comments as Exhibit B.

The FCC rules set forth two exposure limits. One is titled, "Limits for Occupational/Controlled Exposure." These limits apply "in situations in which persons are exposed as a consequence of their employment . . . [and] those persons are fully aware of the potential for exposure and can exercise control over their exposure." The other limits are titled, "General Population/Uncontrolled Exposures." These "limits apply in situations in which the general public may be exposed, or in which persons that are exposed as a consequence of their employment may not be fully aware of the potential for exposure or can not exercise control over their exposure." 47 C.F.R. § 1.1310.

PacifiCorp's proposed addition to the rules incorporates the FCC requirements. Specifically, PacifiCorp's proposed addition uses the General Population/Uncontrolled Exposures limits as a standard to dictate whether a power supply disconnect must be provided adjacent to the base of the pole. If the wireless transmitter is capable of emitting more radio frequency radiation than allowed under the General Population/Uncontrolled Exposures standard, then the utility worker must be able to disconnect the device before ascending the pole.

The pole owner's employees may have to work in the proximity of the antenna structure in the event of emergencies. Therefore, where a safety disconnect is required due to the potential level of radio frequency radiation, the pole owner must be able to disconnect power to the transmitter without notice to the wireless attacher, should the situation warrant immediate action. Thus, PacifiCorp's addition to the proposed rules requires that the wireless attacher provide the pole owner with a key to the locking disconnect and ensures that the pole owner, its employees and its contractors would be shielded from liability for disconnecting the device.

The General Population/Uncontrolled Exposures standards are the appropriate standards by which to require a disconnect. The FCC indicates that these exposure levels are safe for the general population. The alternative of requiring a disconnect only in the case of transmitters with output capability exceeding the higher Controlled Exposure standards instead of the General Population/Uncontrolled Exposure standards, would necessitate training all utility linemen in radio frequency radiation exposure hazard avoidance methods. This is because those higher Controlled Exposure standards apply only where the worker is "fully aware of the potential for exposure and can exercise control over their exposure." 47 C.F.R. § 1.1310. This would require considerable expense and would restrict the performance of critical operations activities in the vicinity of these higher output transmitters.

B. Access to wireless attachments above the electric space may be intermittent.

Wireless attachments are often proposed to be situated above the electric space on utility poles. A taller pole is exchanged for the existing pole and the antenna structure is situated above the electric conductors. Equipment other than the antenna, such as transmitters and power supplies, may be situated below the electric conductors and may be connected to the distribution supply lines. The pole change-out required to install the antenna most often requires an electrical outage. Maintenance work, including repair or realignment of the antenna, can also require de-energizing distribution and transmission conductors in order to safely access the wireless equipment. Therefore, PacifiCorp's proposed addition to the proposed rules specifies that electrical line outages for such access shall be limited to prescheduled times acceptable to the electric utility and such access shall be provided at the attaching entity's sole risk and expense. *See PacifiCorp's proposed R746-345-3.F.*

Transmission lines are often heavily loaded and cannot be taken out of service for periods of three months or more. Distribution and transmission circuits can be heavily used by electric customers with critical needs. Wireless attachers do have access to alternative sites. Wireless attachers will pay only a fraction of the market price for siting under the proposed rules. Therefore, the practicalities of operating the electric system, fairness to electric customers who are subsidizing the wireless siting and critical electric customer operations all dictate that outage scheduling for the benefit of wireless attachers be secondary to utility system operations and electric customer requirements. PacifiCorp's proposed addition to the rules would allow the utility flexibility to balance these competing interests.

IV. CONCLUSION

For the reasons stated in these comments, PacifiCorp respectfully urges the Commission to revise its rules in the manner proposed in these Comments, as specifically set forth in the proposed revisions to the rules attached as Exhibit A. The revisions are marked against the version published by the Commission on December 15, 2005.

Respectfully submitted this 17th Day of January, 2006.

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Exhibit A

PacifiCorp's Proposed Revisions to the Commission Proposed Rules R746-345-1 *et seq.*

Exhibit B

Federal Communications Commission, Office of Engineering and Technology, *Questions and Answers about Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields*, OET BULLETIN No. 56, 4th ed., Aug. 1999.

Certificate of Service

I certify that I have served a copy of the foregoing **COMMENTS OF PACIFICORP TO THE PROPOSED RULES** by first-class mail or by e-mail attachment the following participants in the captioned proceeding, this 17th day of January, 2006.

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**Exhibit A to Comments of
PacifiCorp, filed January 17, 2006**

**PacifiCorp's proposed revisions to
R746-345**

**R746. Public Service Commission,
Administration.**

R746-345. Pole Attachments.

R746-345-1. Authorization.

A. Authorization of Rules -- Consistent with the Pole Attachment Act, 47 U.S.C. 224(c), and 54-3-1, 54-4-1, and 54-4-13, the Public Service Commission shall have the power to regulate the rates, terms and conditions by which a public utility, as defined in 54-2-1(15)(a) including telephone corporations as defined in 54-2-23(a), can permit attachments to its poles by an attaching entity.

B. Application of Rules -- These rules shall apply to each public utility that permits pole attachments to utility's poles by an attaching entity.

1. Although specifically excluded from regulation by the Commission in 54-2-1(23)(b), solely for the purpose of any pole attachment, these rules apply to any wireless provider.

2. Pursuant to these rules, a public utility must allow any attaching entity nondiscriminatory access to utility poles at rates, terms and conditions that are just and reasonable. [A utility may deny access on a nondiscriminatory basis where there is insufficient capacity and for reasons of](#)

[safety, reliability and generally applicable engineering purposes.](#)

C. Application of Rate Methodology -- The rate methodology described in Section R746-345-5 shall be used to determine rates that a public utility may charge an attaching entity to attach to its poles for compensation.

R746-345-2. General Definitions.

A. "Attaching Entity" -- A public utility, wireless provider, cable television company, communications company, or other entity that provides information or telecommunications services that attaches to a pole owned or controlled by a public utility.

B. "Distribution Pole" -- A utility pole, excluding towers, used by a pole owner to support mainly overhead distribution wires or cables.

C. "Pole Attachment" -- All equipment, and the devices used to attach the equipment, of an attaching entity within that attaching entity's allocated attachment space. A new or existing service wire drop pole attachment that is attached to the same pole as an existing attachment of the attaching entity is considered a component of the existing attachment for purposes of this rule. Additional equipment that is placed within an attaching entity's existing attachment space, and equipment placed in the unuseable space which is used in conjunction with the attachments, is not an additional pole attachment for rental rate purposes. All equipment and devices shall meet applicable code and contractual requirements. Pole attachments do not include items used

for decorations, signage, barriers, lighting, sports equipment, or cameras.

D. "Attachment Space" -- The amount of usable space on a pole occupied by a pole attachment as provided for in Subsection R746-345-5(B)(3)(d).

E. "Pole Owner"-- A public utility having ownership or control of poles used, in whole or in part, for any electric or telecommunications services.

F. "Secondary Pole" -- A pole used solely to provide service wire drops, the aerial wires or cables connecting to a customer premise.

G. "Secondary Pole Attachment" -- A pole attachment to a secondary pole.

H. "Wireless Provider" -- A corporation, partnership, or firm that provides cellular, Personal Communications Systems (PCS), or other commercial mobile radio service as defined in 47 U.S.C. 332 that has been issued a covering license by the Federal Communications Commission.

R746-345-3. Tariffs and Contracts.

A. Tariff Filings and Standard Contracts -- A pole owner shall submit a tariff and standard contract, or a Statement of Generally Available Terms (SGAT), specifying the rates, terms and conditions for any pole attachment, to the Commission for approval.

1. A pole owner must petition the Commission for any changes or modifications to the rates, terms, or conditions of its tariff, standard

contract or SGAT. A petition for change or modification must include a showing why the rate, term or condition is no longer just and reasonable. A change in rates, terms or conditions of an approved tariff, standard contract or SGAT will not become effective unless and until it has been approved by the Commission.

2. The tariff, standard contract or SGAT shall identify all rates, fees, and charges applicable to any pole attachment. The tariff, standard contract, and SGAT shall also include:

a. a description of the permitting process, the inspection process, the joint audit process, including shared scheduling and costs, and any non-recurring fee or charge applicable thereto;

b. emergency access provisions; and

c. any back rent recovery or unauthorized pole attachment fee and any applicable procedures for determining the liability of an attaching entity to pay back rent or any non-recurring fee or charge applicable thereto.

B. Establishing the Pole Attachment Relationship -- The pole attachment relationship shall be established when the pole owner and the attaching entity have executed the approved standard contract, or SGAT, or other Commission-approved contract.

1. Exception -- The pole owner and attaching entity may voluntarily negotiate an alternative contract incorporating some, all, or none of the terms of the standard contract or SGAT. The parties shall submit the negotiated

contract to the Commission for approval. In situations in which the pole owner and attaching entity are unable to agree following good faith negotiations, the pole owner or attaching entity may petition the Commission for resolution as provided in Section R746-345-6. Pending resolution by the Commission, the parties shall use the standard contract or SGAT.

C. Make-Ready Work, Timeline and Cost Methodology -- As a part of the application process, the pole owner shall provide the applicant with an estimate of the cost of the make-ready work required and the expected time to complete the make-ready work as provided for in this sub-section. All applications by a potential attacher within a given calendar month shall be counted as a single application for the purposes of calculating the response time to complete the make-ready estimate for the pole owner. The due date for a response to all applications within the calendar month shall be calculated from the date of the last application during that month. As an alternative to all of the time periods allowed for construction below, a pole owner may provide the applicant with an estimated time by which the work could be completed that is different than the standard time periods contained in this rule with an explanation for the anticipated delay. Pole owners must provide this alternative estimate within the estimate timelines provided below.

1. For applications up to 20 poles, the pole owner shall respond with either an approval or a rejection within 45 days. At the same time as an approval is given, a completed make-

ready estimate must be provided to the applicant explaining what make-ready work must be done, the cost of that work, and the time by which the work would be finished, that is no later than 120 days from receiving an initial deposit payment for the make-ready work.

2. For applications that represent greater than 20 poles, but equal to or less than .5% of the pole owner's poles in Utah, or 300 poles, whichever is lower, the time for the pole owner's approval and make-ready estimate shall be extended to 60 days, and the time for construction will remain at a maximum of 120 days.

3. For applications that represent greater than the number of poles calculated in section 3(2)(C)(2) above, but equal to or less than 5% of the pole owner's poles in Utah, or 3,000 poles, whichever is lower, the time for the approval and make-ready estimate shall be extended to 90 days, and the time for construction will be extended to 180 days.

4. For applications that represent greater than 5% of the pole owner's poles in Utah, or 3,000 poles, whichever is lower, the times for the above activities will be negotiated in good faith. The pole owner shall, within 20 days of the application, inform the applicant of the date by which the pole owner will have the make-ready estimate and make-ready construction time lines prepared for the applicant. If the applicant believes the pole owner is not acting in good faith, it may appeal to the Commission to either resolve the issue of when the make-ready estimate and construction

period information should be delivered or to arbitrate the negotiations.

5. If the pole owner rejects any application, the pole owner must state the specific reasons for doing so. Applicants may appeal to the Commission if they do not agree that the pole owner's stated reasons are sufficient grounds for rejection.

6. For all approved applications, the applicant will either accept or reject the make-ready estimate. If it accepts the make-ready estimate and make-ready construction time line, the work must be done by the pole owner on schedule and for the estimated make-ready amount, or less, and the applicant will be billed for actual charges up to the bid amount.

7. Applicants must pay 50% of the make-ready estimate in advance of construction, and pay the remainder in two subsequent installment payments: an additional 25 percent payment when half of the work is done and the balance after the work is completed. Applicants may elect to pay the entire amount up front.

8. If the applicant rejects the make-ready estimate for an approved application for Pole Owner's failure to commit to completing, or failure to complete, the required make-ready work within the time frames specified in R746-345-3.C.1-4, as applicable~~whatever reason, and only to the extent the applicant has a contract in place with the Pole Owner referencing its rights under this rule to self-build,~~ the applicant may, with respect to work other than work affecting electric conductors, at its own expense, use approved contractors to self-build the required make-ready work (the "Work") subject to the pole owner's

inspection. All such Work shall be performed at Applicant's sole risk and expense, and in accordance with all of the terms and conditions of the contract between the parties and the following requirements:

- (a) applicant shall prepare Construction Specifications for the necessary Work identified by the Pole Owner, in accordance with good utility practice and Pole Owner's construction standards. The Construction Specifications shall include, without limitation, design drawings, construction practices, and material specifications, and all other documentation necessary to properly construct the Work identified in the Pole Owner's response to applicant's application.
- (b) applicant shall obtain Pole Owner's written acceptance of the Construction Specifications prior to beginning construction of the Work; and such acceptance shall not be unreasonably withheld.
- (c) applicant shall provide Pole Owner with copies of estimates and proposals for the Work that applicant has received from third-parties.

- (d) applicant is solely responsible for obtaining, prior to construction, from public authorities and private owners of real property and maintaining in effect any and all consents, permits, licenses, easements, rights-of-way or grants that are necessary for the lawful exercise by applicant of the permission granted by Pole Owner in response to any approved application.
- (e) applicant shall be responsible for the performance of its contractor and the contractor's subcontractors and vendors of every tier to the same extent as if performed by applicant on a direct basis; all Work shall conform to and be performed in accordance with prudent utility practices.
- (f) applicant shall maintain insurance coverage in form and amounts reasonably acceptable to Pole Owner during the construction of the Work and for a period of two (2) years after Final Completion and shall provide Pole Owner evidence thereof upon request.
- (g) applicant shall ensure that construction of the Work is coordinated with

the Pole Owner in a manner that minimizes effects on the Pole Owner's ability to provide service to Pole Owner's customers and maintains the safety of utility workers and the public; Pole Owner shall determine appropriate times for service outages to Pole Owner's customers if these are required in the course of the Work.

- (h) All Work must be satisfactory to Pole Owner. When applicant considers that the Work is finally complete, applicant shall notify Pole Owner, in writing, requesting a Certificate of Final Completion.
- (i) Pole Owner shall have the final decision as to whether applicant has achieved Final Completion. When Pole Owner agrees that the Work is finally complete, Pole Owner shall prepare and issue a "Certificate of Final Completion," which shall set forth the date of Final Completion.
- (j) Upon receipt of the Certificate of Final Completion, applicant shall execute and deliver a bill of sale to the pole owner for all items to be conveyed to Pole Owner, which shall include all replacement poles, and

all appurtenances to the pole related to the provision of the Pole Owner's services.

Applicant shall bear the risk of loss of such items until the bill of sale is properly conveyed to Pole Owner.

(k) Upon request, either prior to or after issuance of the Certificate of Final Completion, applicant shall provide any lien waivers, including lien waivers from contractors, subcontractors, and vendors, that Pole Owner shall request with respect to the Work.

(l) applicant shall provide Pole Owner with two complete sets of as-built drawings upon completion of the Work, including at least one printed set with Contractor's stamp and certification statement on such drawing indicating that, as submitted, such as-built drawings are true and correct.

(m) In exercising its option to perform the Work, applicant shall be bound to the following warranty obligation: applicant warrants that the Work subject to the bill of sale conveyed to pole owner shall be free from all defects in workmanship and of sufficient quality to meet the requirements of the Construction

Specifications and to conform with all of the standards for construction practices and quality applicable to projects associated with electric utility construction in the State of Utah. Applicant shall promptly repair or replace any such Work not meeting the requirements of the foregoing, at applicant's sole risk and expense, provided that Pole Owner identifies such Work within a period of two-years following issuance of the Certificate of Final Completion, or Pole Owner may repair or replace such work at applicant's risk and expense. Applicant, shall upon request, assign to Pole Owner any third-party warranties in applicant's possession with respect to such Work.

D. Remedies for Non-conforming Attachments – Pole Owner shall have the right to perform or authorize work necessary to bring applicant's Attachments into compliance upon applicant's failure to timely do so. If Pole Owner determines such conditions pose an immediate threat to the safety of utility workers or the public, interfere with the performance of Pole Owner's or other attachers' service obligations, or pose an immediate threat to the integrity of Pole Owner's or other pole attachers' poles or equipment, Pole Owner may perform or

authorize such work and/or take such action that it deems necessary without first giving written or electronic notice to applicant and without subjecting itself to any liability, except to the extent of Pole Owner's gross negligence or intentional misconduct. As soon as practicable thereafter, Pole Owner will advise applicant in writing of the work performed or the action taken and will endeavor to arrange for the accommodation of any affected Attachments. Applicant shall be responsible for paying Pole Owner or other pole attachers, if applicable, upon demand, for all costs incurred by Pole Owner or other pole attachers for all work, action, and accommodation performed by Pole Owner or other pole attachers under this rule.

D[E.]. Pole Attachment Placement -- All new copper cable attachments shall be placed at the lowest level permitted by applicable safety codes. In cases where an existing copper attachment has been placed in a location higher than the minimum height the safety codes require, the pole owner shall determine if the proposed attachment may be safely attached either above or below the existing copper attachment taking account of midspan clearances and potential crossovers. If these attachment locations, above or below the copper cable, comply with the applicable safety code, the attacher may attach to the pole without paying to move the copper cable. The owner of the copper cable may elect to pay the costs of having the cable moved to the lowest position as part of the attachment process, or it may elect to move the cable themselves prior to the attaching entity's attachment. If the copper cable must be moved in order for the attacher

to be able to safely make its attachment, the attacher shall pay the costs associated with moving the existing copper cable.

[F. Wireless Attachments – Except in the case of wireless attachments that emit radio frequency energy at levels not exceeding the FCC's Limits for General Population/Uncontrolled Exposure, 47 C.F.R. § 1.1310 as amended or replaced from time to time, when measured at the point of greatest concentration at the antenna, the wireless Attaching Entity shall install a locking power supply visible disconnect on Attaching Entities' facilities adjacent to the base of the pole and shall provide the Pole Owner with standardized duplicate keys for all such devices deployed on Pole Owner's poles. Pole Owner shall be entitled to disconnect power to the transmitter at any time; Pole Owner shall make a reasonable effort to notify the wireless Attaching Entity prior to disconnection but shall not be liable to wireless Attaching Entity as a result of disconnection except to the extent of Pole Owner's gross negligence or intentional misconduct. Wireless Attaching Entity's access to wireless attachments requiring an electrical line outage for such access shall be limited to prescheduled times acceptable to the electric utility and such access shall be provided at the Attaching Entity's sole risk and expense].

R746-345-4. Pole Labeling.

A. Pole Labeling -- A pole owner must label poles to indicate ownership. A pole owner shall label any new pole installed, after the

effective date of this rule, immediately upon installation. Poles installed prior to the effective date of this rule, shall be labeled at the time of routine maintenance, normal replacement, change-out, or relocation, and whenever practicable. Labels shall be based on a good faith assertion of ownership.

B. Pole Attachment Labeling -- An attaching entity must label its pole attachments to indicate ownership. Pole attachment labels may not be placed in a manner that could be interpreted to indicate an ownership of the utility pole. An attaching entity shall label any new pole attachment installed, after the effective date of this rule, immediately upon installation. Pole Attachments installed prior to the effective date of this rule shall be labeled at the time of routine maintenance, normal replacement, rearrangement, rebuilding, or reconstruction, and whenever practicable.

C. Exception -- Electrical power pole attachments do not need to be labeled.

R746-345-5. Rental Rate Formula and Method.

A. Rate Formula -- Any rate based on the rate formula in this Subsection shall be considered just and reasonable unless determined otherwise by the Commission. A pole attachment rental rate shall be based on publicly filed data and must conform to the Federal Communications Commission's rules and regulations governing pole attachments, except as modified by this Section. A pole attachment rental rate shall be calculated and charged as an

annual per attachment rental rate for each attachment space used by an attaching entity. The following formula and presumptions shall be used to establish pole attachment rates:

1. Formula:

Rate per attachment space =
(Space Used x (1/Usable Space) x Cost of Bare Pole x Carrying Charge Rate)

2. Definitions:

a. "Carrying Charge Rate" means the percentage of a pole owner's depreciation expense, administrative and general expenses, maintenance expenses, taxes, rate of return, pro-rated annualized costs for pole audits or other expenses that are attributable to the pole owner's investment and management of poles.

b. "Cost of Bare Pole" can be defined as either "net cost" or "gross cost." "Gross cost" means the original investment, purchase price, of poles and fixtures, excluding crossarms and appurtenances, divided by the number of poles represented in the investment amount. "Net cost" means the original investment, purchase price, of poles and fixtures, excluding crossarms and appurtenances, less depreciation reserve and deferred federal income taxes associated with the pole investment, divided by the number of poles represented in the investment amount. A pole owner may use gross cost only when its net cost is a negative balance. If using the net or gross cost results in an unfair or unreasonable outcome, a pole owner or attaching entity can seek relief from the Commission under R746-345-5 C.

c. "Unusable Space" means the space on a utility pole below the usable space including the amount required to set the depth of the pole.

d. "Usable Space" means the space on a utility pole above the minimum grade level to the top of the pole, which includes the space occupied by the pole owner.

3. Rebuttable presumptions:

a. Average pole height equals 37.5 feet.

b. Usable space per pole equals 13.5 feet.

c. Unusable space per pole equals 24 feet.

d. Space used by an attaching entity:

(i) An electric pole attachment equals 7.5 feet;

(ii) A telecommunications pole attachment equals 1.0 foot;

(iii) A cable television pole attachment equals 1.0 foot; and

(iv) An electric, cable, or telecommunications secondary pole attachment equals 1.0 foot.

(v) A wireless provider's pole attachment equals not less than 1.0 foot and shall be determined by the amount of space on the pole that is rendered unusable for other uses, as a result of the attachment or the associated equipment. The space used by a wireless provider may be established as an average and included in the pole owner's tariff and standard contract, or

SGAT, pursuant to Section R746-345-3 of this Rule.

e. The space used by a wireless provider:

(i) may not include any of the length of a vertically placed cable, wire, conduit, antenna, or other facility unless the vertically placed cable, wire, conduit, antenna, or other facility prevents another attaching entity from placing a pole attachment in the usable space of the pole;

(ii) may not exceed the average pole height established in Subsection R746-345-5(A)(3)(a).

(iii) In situations in which the pole owner and wireless provider are unable to agree, following good faith negotiations, on the space used by the wireless provider as determined in Subsection R746-345-5(A)(3)(d)(v), the pole owner or wireless provider may petition the Commission to determine the footage of space used by the wireless provider as provided in Subsection R746-345-3(C).

f. The Commission shall recalculate the rental rate only when it deems necessary. Pole owners or attaching entities may petition the Commission to reexamine the rental rate.

4. A pole owner may not assess a fee or charge in addition to an annual pole attachment rental rate, including any non-recurring fee or charge described in Subsection R746-345-3(A)(2), for any cost included in the calculation of its annual pole attachment rental rate.

B. Commission Relief -- A pole owner or attaching entity may petition the Commission to review a pole attachment rental rate, rate formula, or rebuttable presumption as provided for in this rule. The petition must include a factual showing that a rental rate, rate formula or rebuttable presumption is unjust, unreasonable or otherwise inconsistent with the public interest.

R746-345-6. Dispute Resolution.

A. Mediation -- Except as otherwise precluded by law, a resolution of any dispute concerning any pole attachment agreement, negotiation, permit, audit, or billing may be pursued through mediation while reserving to the parties all rights to an adjudicative process before the Commission.

1. The parties may file their action with the Commission and request leave to pursue mediation any time before a hearing.

2. The choice of mediator and the apportionment of costs shall be determined by agreement of the parties. However, the parties may jointly request a mediator from the Commission or the Division of Public Utilities.

3. A party need not pay the portion of a bill that is disputed if it has started a dispute proceeding within 60 days of the due date of the disputed amount. The party shall notify the Commission if the dispute process is not before the Commission.

B. Settlement -- If the parties reach a mediated agreement or

settlement, they will prepare and sign a written agreement and submit it to the Commission. Unless the agreement or settlement is contrary to law and this rule, R746-345, the Commission will approve the agreement or settlement and dismiss or cancel proceedings concerning the matters settled.

1. If the agreement or settlement does not resolve all of the issues, the parties shall prepare a stipulation that identifies the issues resolved and the issues that remain in dispute.

2. If any issues remain unresolved, the matter will be scheduled for a hearing before the Commission.