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Submitted: December 23, 2005

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of an Investigation into Pole Attachments	**DOCKET NO. 04-999-03** **SUPPLEMENTARY COMMENTS OF PACIFICORP TO THE DIVISION OF PUBLIC UTILITIES ON THE DIVISION'S STANDARD JOINT-USE AGREEMENT**

PacifiCorp submits the following comments in response to the Division of Public Utilities' ("Division's") memorandum to the Commission, dated December 9, 2005 (the "Memorandum"). The Division stated in the Memorandum that it was distributing its version of the standard contract with the intent of giving the parties "one final chance" to review and

submit revisions to the standard contract. The Division stated that the deadline for these revisions is December 23, 2005. Additionally, in an e-mail transmitting the Memorandum and the revised standard contract to the parties, the Division indicated that additional "comments" were due at the same time as any further revisions to the standard contract. Meanwhile, on December 15, 2005, the Commission's revised version of the Pole Attachment Rules was published in the Utah State Bulletin. It is undisputed that development of the contract is closely related to the development of the rules and vice versa. These processes are proceeding on parallel tracks, but slightly out of sync. Therefore, while the comments submitted by PacifiCorp today respond more directly to the Division's revised standard agreement rather than the pole attachment rules, PacifiCorp respectfully submits these comments to the Commission with the hope that the Commission will take them into account in the rulemaking phase of the proceeding. PacifiCorp anticipates providing additional comments to the Commission pertaining to the revised rules published on December 15, in accordance with the filing deadline published in the Bulletin.

I. Self-Build of Make-Ready Work

Trigger. In the Memorandum, the Division noted that PacifiCorp was "justifiably worried about the integrity of their network if others are completing the work," and viewed the self-build option as something that should occur infrequently. The Division recommended that the Commission adopt a "triggering mechanism" for the self-build option, indicating that this was a feasible way to accommodate the concerns of both PacifiCorp and the licensees.

One triggering mechanism proposed by the Division was the pole owner's inability to meet the standard make-ready construction timelines set forth in the proposed Pole Attachment

Rules. PacifiCorp views this trigger as the only appropriate trigger for the self-build option. The Commission's latest version of the Pole Attachment Rules was submitted for publication on December 1, 2005, so it is clear that the Commission developed this version of the rules without the benefit of reviewing the Division's Memorandum. PacifiCorp respectfully requests that the Commission consider the concerns expressed by the Division and PacifiCorp in regard to proposed Rule R746-345-3.C.8.

Coordination between the rule and the contract. In the December 1, 2005, Technical Conference, PacifiCorp proposed that the Division incorporate the whole of Rule R746-345.C into the standard agreement by reference, instead of attempting to paraphrase, explain or improve on the Commission's language. This portion of the rule establishes the deadlines for responding to permit applications and completion of make-ready work and has been in a state of flux throughout the rulemaking process. Incorporation by reference allows for immediate and obvious adoption of any revisions made by the Commission as time passes. The provisions in the rule are highly detailed—they span a complete single-spaced page. Any attempt to restate them in the agreement in anything but their original form is bound to create inconsistency and accordingly, disputes. This issue is one of the two issues that were contentious enough to bring the parties together again for the last Technical Conference. PacifiCorp respectfully reiterates its request that, in Section 3.02, the Division simply refer to the appropriate rule.[1]

[1] One licensee objected to this approach by indicating that its field crews had copies of the joint-use agreements in their vehicles and referred to the contracts in performing their work. The licensee's objection to the incorporation by reference approach was that it would be too burdensome to provide the field crews with a copy of the rules as well. Note that, at seven pages in length and as you might expect, the rules are considerably less voluminous than the contract. Licensees should be expected to provide their field crews appropriate information about the regulations governing the work they perform. The rules are at least as important as the contract. Therefore, PacifiCorp submits that this objection is without merit.

Self-help remedies for missing notices are dangerous. A key example of a deviation from the Commission's rule taken by the Division in Section 3.02 is the provision stating that, if a licensee fails to receive timely "notice," then the licensee can resort to the self-help measure of installing the attachment, apparently without the benefit of the pole owner's assessment of required make-ready work and without the pole owner's permission. It is not clear what "notice" means, but it appears to refer to a response to the permit application.

In any case, this unmitigated self-help remedy is inconsistent with the approach taken in the limited instances in the agreement where one party can take unilateral action directly affecting property of the other. For example, absent an emergency, Section 3.12 allows the licensee an additional 10 days beyond the requisite 30-day response period to move its attachments in the event it has not timely complied with the rules. In the case of Section 3.02, the Division has not even proposed a notification requirement incumbent on the licensee in the event it utilizes self-help. The pole owner very well may never have received the application to begin with. Thus, the provision is certain to engender disputes, with the pole owner believing the application was never submitted, and the licensee claiming the pole owner is neglectful. Since the licensee may never indicate to the pole owner that it has attached, the issue may only surface during a five-year audit of the poles, leaving a potentially unsafe, unauthorized attachment in place all the while.

Of course, PacifiCorp takes the position that, in light of the fact these unsupervised attachments may create safety hazards endangering utility workers and the public, and may jeopardize utility infrastructure integrity and reliability, it is foolhardy to allow them at all—especially without requiring a good-faith effort by the licensee to even inquire with the pole owner about the status of the permit application or what make-ready work might be necessary.

Furthermore, this requirement is not addressed within the text of the Commission's proposed rules. If the Utah pole attachment regulatory scheme is to have such an ill-advised provision, PacifiCorp would prefer to have it in the form of a rule from the Commission, rather than a bilateral agreement between the parties.

Responsibility for self-built make-ready work. Generally, PacifiCorp appreciates the consideration the Division gave to its concerns about the need to protect the safety of the public and utility workers and the integrity of utility infrastructure. For example, in its proposed Section 3.09, the Division provides for pole-owner approval of the engineering design of self-built make-ready. The Division suggested it would require that this make-ready be self-built in accordance with the pole owner's construction standards by approved contractors. All of this is movement in the prudent direction. However, there remain several safeguards that need to be put in place to protect the pole owners and the public they serve.

In its December 7, 2005, Comments to the Division, PacifiCorp proposed provisions designed to put the licensee into the shoes of a licensed electrical contractor, or a general contractor employing a licensed electrical contractor, in an effort to fully ensure that any self-built make-ready is safely performed in accordance with standards. The provisions in the Division's proposed Section 3.09 provide a skeleton of that structure. However, they do not include express provisions requiring the licensee to back up its contractor's work with a warranty and repair obligation, and they do not include an acceptance process, lien waivers, post-completion insurance coverage requirements, a transfer of title to the pole owner, or a clear delineation of when the risk of loss passes.

A licensee performing self-built make-ready work should not be treated differently from any other utility contractor when working on pole plant. Perhaps it was the Division's hope

that the Commission would put in place "triggering" language in the rule that could limit the frequency of self-built make-ready that prompted the Division to fail to mention in the Memorandum any specific consideration of the comprehensive contract language PacifiCorp proposed in this regard. Unless the Commission chooses a course designed to eliminate or reduce the amount of self-built make-ready work taking place to an absolute minimum, failing to include this language raises the specter of rampant construction-defect litigation at best, and prolific and serious compromise of safety and reliability at worst. PacifiCorp urges the Division to give serious consideration to the language proposed in PacifiCorp's December 7 filing.

An alternative proposal. If the Commission continues to view some self-built make-ready work as necessary, PacifiCorp respectfully requests the Commission consider an alternative approach. That alternative would involve limiting the self-built option to projects directly involving only communications facilities. This approach would leave the licensee in charge of work that it may be better suited to manage. It could, for instance, preclude the licensee from changing out an electric pole, but might allow the licensee to move communications attachments to solve a clearance problem. Such an alternative might alleviate the need for more comprehensive contract provisions that would otherwise be necessary to ensure proper responsibility for construction activities. It has the potential to avoid the problems inherent in self-built make-ready directly involving electric infrastructure. PacifiCorp urges the Division to give this approach serious consideration and address it in its proposal to the Commission.

Fourteen-day turn-around for engineering approvals. PacifiCorp appreciates the Division's recognition that the two-day time period proposed by one licensee is grossly

inadequate. The Division's 14-day proposal may work in many instances. However, the provision should address large-scale projects and provide some flexibility in that regard. The Commission's rules expressly contemplate permit applications involving thousands of poles. Therefore, PacifiCorp proposes a turn-around time that cues from the same response time criteria used for the application response deadlines and the owner-built make-ready provisions found in R746-345.C. The timelines for turn-around of self-built make-ready engineering design evaluations should correspond to the R746-345.C.1 to .4 classes respectively as follows: 14 days, 30 days, 60 days, and "as-agreed." Naturally, the 14-day period would apply to applications of up to 20 poles, and the "as agreed" provision would apply to the greater-than-5%-or-3000-pole category, and so forth.

II. Creditworthiness

PacifiCorp continues to be concerned that the creditworthiness provisions in the Division's proposed agreement are not adequate to protect the customers and shareholders of the pole-owning utility. The Division offers up the Qwest proposal as the alternative to its own view that ad hoc bonding is adequate. The key flaw in both the bonding provision in Section 10.03 and the Qwest proposal is that credit assurances are available to the pole owner only *after* the licensee is in financial trouble. The Qwest proposal is otherwise generally sound. However, in the case of an unrated licensee, the credit assurances are not available until either a payment default occurs or a bankruptcy occurs. The licensee will most likely be unable to obtain the requisite credit assurances after a bankruptcy filing is made, and the automatic stay may apply to preclude collection by the pole owner in any manner other than as an unsecured creditor in the bankruptcy proceeding, which is one of the key problems these provisions

should be mitigating. Similarly, the bonding provision is activated only once the pole owner has completed a Commission proceeding of undefined scope and duration.

The provisions proposed by PacifiCorp are typical of best practices in commercial arrangements. The Division can look to other proceedings before the Commission to confirm this. For example, in QF cases involving Spring Canyon and PacifiCorp in Docket No. 05-035-08 and previously in regard to Desert Power and PacifiCorp in Docket No. 04-035-04, the Commission has approved clauses nearly identical to the clauses proposed by PacifiCorp in this docket. Those QF arrangements are similar to the relationship between the pole owner and the licensee—in both cases the utility cannot elect to avoid the transaction as a means to forgo credit exposure. The provisions give the utility at least a modicum of control over the financial viability of the relationship.

In answer to the unfounded complaints of "unfettered discretion" lodged in the comments provided by Comcast, PacifiCorp points out the creditworthiness standards applicable to PacifiCorp transmission system customers, which are highly structured and available for all to see on the PacifiCorp OASIS, at:

http://www.oasis.pacificorp.com/oasis/ppw/CreditPolicyTransmission.doc.

Comcast's asserts that "Whether or not an attaching entity has an 'S&P credit rating' that 'drops below BBB-,' is irrelevant if the attacher continues to make timely payments." Literally, that is true. *If* the licensee continues to make timely payments, then and only then is it irrelevant, perhaps fortuitous. Conversely, if the licensee ends up not continuing to make timely payments, knowledge of the licensee's credit rating beforehand may very well have been good predictive information. If that information is allowed to be properly acted upon, it can allow the pole owner to continue to collect amounts owed, as well as keep the licensee out of

default. This is far superior to after-the-fact credit assurance provisions that require the licensee to default prior to allowing the pole owner to obtain relief.

The Division can look to State of Utah procurement law to find similarly pro-active credit protections. See Utah Code Ann. § 63-56-504 (2005), pertaining to bonding required of private contractors in their dealings with the State. In those cases, the State has the discretion not to require bonding, but bonding is the default. While competitive bidding requirements do dictate which entities the State can award a contract to, the State enjoys at least some latitude in whether to engage in the transaction. And yet the State naturally maintains the discretion to determine appropriate credit assurances.

III. Other Provisions

Overlashing. The Division's proposed standard contract terms generally implement the Commission's Direction No. 4 fairly. However, they do seem to address more specifically what the licensee *can* do and miss discussing what the licensee *cannot* do. For instance, third parties are required to submit applications through the regular application process prior to overlashing on licensee's attachments. Conversely, the licensee should be expressly required to obtain approved permits before overlashing on third-party attachments. The licensee's obligations with respect to third-party overlashing should be made more clear as well. The licensee should be required to memorialize the third-party overlash permitting obligation in any agreements it has with such third parties. Finally, the licensee should be reminded of its joint and several responsibility for maintaining third-party overlashes on its equipment.

Service drops. The Division's language leaves out one key part of the Commission's language in Direction No. 3, which defines the service drops for which no application is

necessary as those "originating from the attaching entity's existing pole attachment." This critical language must be reinstated. The corrected sentence would then read, "Licensee shall have the right to install service drops originating from the attaching entity's existing pole attachment without prior approval by Pole Owner."

Property rights. The pole owner is often responsible for the placement of poles on private property and is therefore responsible for obtaining property rights in support of its own facilities. The Commission's proposed rule takes into account Utah law which requires licensee's to obtain their own property rights authorizing placement of their facilities. The Division's contract in large part adequately implements the rule. However, there is one additional provision that is necessary in order to help the pole owner respect the property owner's interests. The pole owner needs to be able to request evidence from the licensee reasonably demonstrating that the licensee has property rights allowing it to access and be on the poles.

Frequently, PacifiCorp receives telephone calls from irate residential customers, who describe their experience with cable television employees in their back yards. Often the homeowner has asked the cable television employee to leave. The response is typically to the effect that, "We can go anywhere the power company can go." Then the homeowner calls the power company, asking, "What right does the power company have to allow the cable company in my backyard." In Utah, the power company does *not* have this right. Therefore, at a minimum, the Division's agreement ought to contain a provision allowing the pole owner to request evidence showing of adequate property rights in the event of customer complaints.

Core business requirements. In the December 1 Technical Conference, PacifiCorp noted that the Commission's Direction No. 7 does not restrict core business requirements to a

"*bona fide* plan." The limitation in Section 2.03, requiring such a plan, is inappropriate, as it does not take into account the flexibility required to adequately serve electric utility customers. Every possible future use of the system cannot possibly be envisioned in advance and certainly cannot be mapped out in a prospective plan. Thus, this *bona fide* plan requirement threatens to eviscerate the sensible guidance the Commission provided in Direction No. 7. Therefore, PacifiCorp reiterates its request that the Division strike the *bona fide* plan requirement in Section 2.03.

Billing issues. The Division's language proposed for Section 5.03 should make clear that "consistent with UAR 746-345-6A.3," means the dispute proceeding must be commenced within the 60-day period. This would provide a helpful guide post to the licensee and encourage timely payment.

Miscellaneous. In Section 3.17, the word "reasonable" and the pair of words "risk and" seem to be transposed, such that the sentence should refer to "sole risk and reasonable expense," rather than "own sole reasonable risk and expense." With respect to the reference to "R746-345-5.B" in Section 5.01, that reference should be to R746-345-5.A.

IV. Conclusion

For the reasons stated in these comments, PacifiCorp respectfully urges the Division to revise its Standard Agreement in the manner proposed herein and in accordance with PacifiCorp's attached proposed revisions to the standard contract, attached hereto as Exhibit A. The revisions are marked against the version circulated by the Division on December 9, 2005.

Respectfully submitted this _____ day of December 2005.

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EXHIBIT A TO SUPPLEMENTARY COMMENTS OF PACIFICORP

FILED DECEMBER 23, 2005

Certificate of Service

I certify that I have served a copy of the foregoing **SUPPLEMENTARY COMMENTS OF PACIFICORP TO THE DIVISION OF PUBLIC UTILITIES ON THE DIVISION'S STANDARD JOINT-USE AGREEMENT** by first-class mail or by e-mail attachment the following participants in the captioned proceeding, this 23th day of December 2005.

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