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- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of an Investigation into Pole Attachments	))))))	DOCKET NO. 04-999-03 Utah Rural Telecom Association's ("URTA") Comments and Proposed Changes to the Division of Public Utilities' ("Division") Draft Pole Attachment Contract issued October 15, 2004

URTA, pursuant to the Commission's September 23, 2004 Scheduling Order in this docket, makes the following comments, corrections, and proposes the following changes to the Division's Draft Pole Attachment Contract issued October 15, 2004:

1. **Recitals**:

Amendment: The fourth "Whereas" clause of the contract should be amended to state: "WHEREAS, the Parties desire to cooperate in establishing Joint Use of their respective poles and the Public Service Commission generally encourages Joint Use of public utility poles pursuant to Utah Code Ann. §54-3-13;

Amendment: Delete the fifth "Whereas" clause. Whether or not a pole should be jointly used will no longer be left to the sole judgment of a Party once a standard contract and the pole attachment rule are in place. If there is a dispute

between the Parties over Joint Use, the Commission will decide the issue in accordance with Utah Code Ann. §54-4-13.

2. **Definitions**:

In Article I the definitions are capitalized, but the defined words are not capitalized each time they are used in the contract.

Issue: If the defined words are not capitalized in the text of the contract, do they have a different meaning? Examples:

First, "Equipment" is defined on page 1, but equipment starts with a lowercase "e" in the definition of "National Electrical Safety Code" and in "Non-recurring Charges;"

Second, "Inspection" is defined on page 1, but "Inspection" starts with a lowercase "i" in the definition of "Make-ready Work."

a. **Correction**: The definition of "Commission" should be "Public Service Commission of Utah," not the "State of Utah Public Utility Commission."

b. **Amendment**: The definition of "Electronic Notification System" should be amended as follows: At the second-to-the-last sentence insert "The ENS shall be the National Joint Utility Notification System ("NJUNS"). Both Parties shall have input in selecting any alternative ENS." The amendment assumes that the NJUNS is available and functioning in Utah.

Issue: Is the NJUNS or some other ENS available in the state?

Issue: What costs are there for the Parties in requiring that information be exchanged electronically?

c. **Correction**: The definition of "Equipment" should be corrected on the second line so that it says, "including but not" rather than "including by."

d. **Correction**: The definition of "Fee Schedule" refers to Exhibit C even thought Exhibit C has been eliminated. That reference should be removed.

Correction: The word "decision" on the last line of the definition should be changed to "decisions."

Issue: Will there be a fee schedule attached to the contract and if so, what fees will be included and how will the fees be amended by the parties?

e. **Correction**: The term "Material Adverse Change" is defined but it is no longer used anywhere in the document and, therefore, should be eliminated.

f. **Amendment**: The definition of "Unusable Equipment" concludes with the clause, "or otherwise." It is an ill-defined phrase and should be eliminated.

> **Issue**: Defining the term "Unusable Equipment" using terms like uneconomic or impracticable could cause unnecessary disputes between the Parties over the type of equipment that can be attached to poles.

3. **Section 2.01**:

Correction: Section 2.01 refers to "PacifiCorp" in the second paragraph. "PacifiCorp" should be changed to "Parties."

Issue: This section indicates that the contract only applies to distribution poles. What is the process for reaching separate agreement to access other parts of the network? Will there be a separate standard contract or should this proposed contract address that issue?

4. **Section 2.02**:

Amendment: Section 2.02 should be amended to state: "(iii) any rental obligations of the Parties in arrears at the effective date of this Agreement shall be recalculated in accordance with UAR R746-345 and paid in accordance with the terms of this Agreement."

5. **Section 2.03**:

Amendment: The second paragraph of Section 2.03 should be amended to state: "subject to the applicable federal laws and regulations and state laws and rules. In determining the poles available for Attachment, consideration shall be given to current requirements, alternatives, and future plans of both Parties."

6. **Section 3.01**:

Correction: The first word in the first sentence of the first paragraph of Section 3.01 should be changed from "Without" to "With."

Correction: The first sentence of the second paragraph in should be eliminated if the definition of ENS is changed to include the NJUNS. This assumes that NJUNS or some form of ENS is available in Utah.

Correction: The word "party's" which appears twice in the second paragraph should be amended to "parties'."

Correction: The word "additionally" in the second paragraph should be changed to "additional."

Issue: Is a separate permit required when a Licensee overlashes its equipment already attached to Owner's poles? If so, what is the justification?

7. **Section 3.02**:

Comment and Amendment: Section 3.02 gives a pole Owner 45 days to approve or deny applications. That seems too long and could jeopardize service delivery timeframes. Fifteen business days may be more reasonable. The section should be rewritten as follows: "Owner will either approve or deny applications or give notice if Make-ready Work is required within fifteen (15) business days of receipt of the application. Owner will perform Make-ready Work within fifteen (15) business days of giving notice of it to Licensee." The new language that begins "time required to process" should be eliminated because the time period to act could extend beyond the time allowed by the statute without any standard or criteria for that to occur.

Correction: In the last sentence of Section 3.02, the word "of" between "nonconformance" and "violations" should be eliminated.

8. **Section 3.03**:

Correction: In the last sentence of the first paragraph of Section 3.03 the word "be" should be inserted between the words "shall" and "marked."

Amendment: The rest of the sentence in that paragraph should be changed to "at the time of their normal replacement or reconstruction, and whenever practicable."

Amendment: The last sentence of the last paragraph should be amended to state: "Owner shall also provide to Licensee a detailed list of poles sold which shall include pole numbers, addresses, maps, and pole descriptions to help Licensee identify the specific poles sold."

9. **Section 3.04**:

Correction: In the final paragraph of Section 3.04 "Licensee's" at the beginning of the paragraph should be changed to "Licensee."

Correction: Change "employee's" to "employees'."

Amendment: The 30-day period given PacifiCorp to install grounding should be shortened to 15 days.

10. **Section 3.05**:

Issue: Under Section 3.05, how long does a Licensee have to correct any noncompliant attachment? Is the section governed by the time periods in Section 6.01?

Correction: "Utah Public Service Commission" in the first paragraph should be shortened to "Commission" since it is a defined term.

11. **Section 3.06**:

Amendment: The last sentence of Section 3.06 should be amended to allow for the extension provided as follows: "In the event Licensee should fail to complete

the installation of its Attachments within the prescribed time limit or within any extension, ..." The rest of the sentence would remain the same.

12. **Section 3.07**:

Issue: Section 3.07 gives a pole Owner 45 days to inform a Licensee of any Make-ready Work necessary and costs associated with it. Does that mean that the Owner approves the attachment at the same time under Section 3.02 as it informs the Licensee of any Make-ready Work? As in Section 3.02, the 45-day period is too long and may affect service timeframes. This section should be changed to conform with URTA's proposal in paragraph 7 of these comments.

Correction: "Willingness" in the last sentence should be corrected to "willing."

Correction: The word "via" needs to be restored before ENS in the second-to-the-last sentence.

13. **Section 3.08**:

Issue and Amendment: Section 3.08 does not define "emergency." Without a definition the likelihood of disagreement increases. Emergency could be defined as "an immediate threat of danger to life or serious damage to property requiring immediate action."

14. **Section 3.09**:

Amendment: Section 3.09 should be amended as follows: "Where an existing pole is replaced solely for the Owner's benefit, the Owner will bear all costs of the replacement, including the labor costs for removing and transporting the pole. After the Owner has completed the removal, the Owner shall notify Licensee via ENS or in writing. Within thirty (30) days from the time of the notice, Licensee

shall transfer its Equipment to the new pole. The thirty (30) day period shall not begin until after the attaching entities with Attachments above Licensee's on the pole have removed or moved them."

15. **Section 3.11**:

Issue: In Section 3.11 is the 40-foot pole the standard?

Correction: The word "previously" needs to be corrected.

Amendment: The second-to-the-last sentence should be changed to state: "Owner shall notify Licensee via ENS or in writing," The rest of the sentence would remain the same.

16. **Section 3.13**:

Issue: What is the justification in Section 3.13 for requiring a Licensee to pay for mid-span poles that are then owned by the Owner of the poles on either side and requiring pole rental payments as well on the mid-span pole?

17. **Section 3.17**:

Comment and Amendment: Section 3.17 allows Owner to move or replace Licensee's attachments at Licensee's expense in case of emergency without defining emergency. As stated before, emergency should be defined "as an imminent threat of danger to life or serious damage to property requiring immediate action."

Amendment: The words "for purposes of reimbursement." should be added to the end of the last sentence of Section 3.17.

Correction: The word "it's" in the final sentence should be corrected to "its."

18. **Section 3.18**:

Issue: Why is there a fee for removing attachments under Section 3.18 and what has PacifiCorp's removal fee been? If a fee can be justified, will it be included in a fee schedule attached to the contract?

19. **Section 3.20**:

Amendment: The first sentence of Section 3.20 should be changed to state, "subject to the UAR and applicable laws." There is no reason to include the word "statutes."

20. **Section 3.21**:

Amendment: Section 3.21 should be amended as follows: "Each Party shall assume responsibility to third parties for any and all loss from any damage it causes and shall reimburse the Owner of the damaged poles or Equipment for the entire expense incurred in making repairs if the Party caused the damages."

21. **Section 3.22**:

Correction: In the second sentence of Section 3.22, "to" should be changed to "with" so that the sentence says "non-compliant with this Agreement."

Amendment: The third sentence should be changed to "Owner shall notify Licensee of any performance concerns that require an Inspection during installation at least two (2) business days prior to any such Inspection, and following installation, Owner shall give Licensee thirty (30) days notice of any Inspection. Licensee may participate in any such Inspection."

Comment and Amendment: In the Occupancy Survey portion of the section, the notice periods do not work. If Owner only has to give Licensee 30 days notice of

the survey, then Licensee cannot have 90 days to inform Owner that Licensee wants to participate. The section should be amended as follows: "Owner shall give Licensee at least sixty (60) days prior notice of such Occupancy Survey. Licensee shall advise Owner if Licensee desires to participate in the inventory with Owner no less than thirty (30) days before the scheduled date of the Occupancy Survey. The Parties may jointly perform the inventory if they mutually agree, or they may select an independent contractor to conduct the inventory. Whether the Parties perform the inventory themselves or use an independent contractor, they shall agree on the scope and extent of the inventory. The cost of the inventory shall be divided among the Parties and all attaching entities with Attachments on the poles that are inventoried, proportionate to the number of Attachments they each have on the inventoried poles. If an independent contractor performs the inventory, the contractor shall provide the Parties with a detailed report of the inventory, including Owner's and Licensee's pole numbers, within a reasonable time after its completion."

22. **Section 4.02**:

    Correction: In Section 4.02 in the second paragraph, "PacifiCorp" should be changed to "Owner."

23. **Section 4.04**:

    Amendment: Section 4.04 should be amended as follows: "Owner may, with prior written approval from Licensee, using its own personnel or a contractor that Owner selects and Licensee approves, inspect for and/or treat wood decay on Licensee's poles or on poles jointly owned with Licensee that support Owner's

facilities during Owner's Inspection and/or treatment of its poles in the same geographic area."

Issue and Amendment: In the last line of the section, how and when will the Parties mutually agree to charges for this work? The contract should include the following language to address this question: "The Parties shall mutually agree to the charges for the work before the work is begun."

24. **Section 5.02**:

Issue: Section 5.02 on Sanctions gives too much discretion to impose sanctions. Is there a limit on the sanctions the Owner can impose? Will it be $250 for each unauthorized attachment or other violation? Will the amount be established in this Agreement, by the Commission on a case-by-case basis, or in new rule R746-345? It should not be left to any Party to decide.

Amendment: The following provision should be added in this section: "Owner shall give Licensee thirty (30) days written notice of any unauthorized Attachment or other violation before Owner may impose sanctions. If Licensee corrects the violation during the thirty-day (30) period, no sanctions shall be imposed."

25. **Section 5.03**:

Correction: In Section 5.03 the reference to Exhibit F should be changed to Exhibit B if there are only two exhibits to the contract.

Correction: If the reference to Section 8.03 is retained in this section, it should be changed to Section 7.03.

Issue: In the second paragraph of Section 5.03, there should not be a requirement to pay amounts in dispute. The interest requirement could be imposed on the Party withholding the funds in dispute if it loses in arbitration.

26. **Section 7.02**:

Issue: Should there be some right of set off in Article VI? The original Section 7.02 has been eliminated.

27. **Section 7.06**:

Correction: The title to Section 7.06 should be changed to "Applicability of UAR." "Utah Administrative Rules" in the text should be amended to UAR since UAR has already been defined in the Agreement.

28. **Section 9.01**:

Correction: The title to Section 9.01 should be changed to "Parties' Limited Liability to and Indemnification of One Another."

29. **Article X**:

Issue: In Article X. Force Majeure, if the failure to pay when due is the result of the list of things beyond the control of the Parties, why is the Party held responsible for the payment when due when that may not be possible under the circumstances of a force majeure? Time periods for payment should simply be extended pursuant to the article until the force majeure subsides. Payment would not be excused. In (h) of Article X, "of" should be changed to "or" so (h) would read "strikes or boycotts."

Respectfully submitted this 29th day of October, 2004

Callister Nebeker & McCullough

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Stephen F. Mecham

Certificate of Service

I hereby certify that on October 29, 2004, I emailed the foregoing **Utah Rural Telecom Association's ("URTA") Comments and Proposed Changes to the Division of Public Utilities' ("Division") Draft Pole Attachment Contract issued October 15, 2004** to the following:

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