

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

DOCKET NO. UM 1191

QWEST CORPORATION,	)	
	)	
Complainant,	)	<b>DEFENDANT CEC'S</b>
	)	<b>MOTION TO DISMISS COMPLAINT</b>
vs.	)	<b>and RESPONSE TO QWEST'S</b>
	)	<b>MOTION TO DISMISS</b>
	)	<b>CEC'S COUNTERCLAIM</b>
CENTRAL ELECTRIC COOPERATIVE,	)	
INC.,	)	
	)	
Defendant.	)	
_____	)	

**MOTION**

Respondent Central Electric Cooperative ("CEC") hereby moves the Public Utility Commission to dismiss Qwest Corporation's Complaint upon the grounds that it fails to state sufficient facts which would warrant or justify PUC intervention. ORS 757.279 does not entitle a party like Qwest to use PUC proceedings as either a substitute for good faith negotiation or as leverage in ongoing negotiations. Qwest's Complaint and Reply demonstrate that Qwest has filed this action without exhausting its efforts to negotiate in good faith with CEC, and in an attempt to improperly influence those ongoing negotiations.

This Motion to Dismiss also responds to Qwest's Rule 21 Motion against CEC's Counterclaim. Qwest's Motion to Dismiss must be denied because CEC's Counterclaim sets forth sufficient grounds for affirmative relief. In its Counterclaim and affirmative defense, CEC has alleged that Qwest has failed to negotiate in good faith with CEC, that Qwest is improperly invoking PUC rate-setting procedures to extort an unfair negotiating

advantage against CEC, that Qwest's Complaint should therefore be dismissed, and that Qwest should be required to make good faith efforts to negotiate a contract with CEC. The ultimate facts set forth in CEC's Counterclaim provide sufficient grounds for the PUC to exercise its regulatory power under ORS 757. 276.

The PUC also has grounds to dismiss Qwest's Complaint pursuant to this Motion under ORCP 21 because Qwest's failure to negotiate in good faith with CEC prior to filing its Complaint is also evident on the face of its Complaint and Reply. This Motion is supported by the attached Affidavit of Counsel, which includes a copy of CEC's most recent agreement proposed to Qwest, as well as record of CEC's concurrent ongoing pole-attachment negotiations with other parties.

### **POINTS AND AUTHORITIES REQUIRING DISMISSAL OF QWEST'S COMPLAINT**

1. **Qwest's Complaint Is Premature Because Qwest Has Not Exhausted Ongoing Negotiations With CEC.**

Qwest's Complaint to the PUC, its Motion to Dismiss, and its Reply to CEC's Answer grossly misrepresent the status of the ongoing joint pole agreement negotiations between CEC and Qwest. Qwest has attempted to invoke the Commission's power to determine rates under ORS 757.279 even though negotiation is ongoing and there is no agreement or any negotiated rates, terms or conditions for the Commission to review.

Qwest tries to invoke the Commission's review by claiming to have negotiated in good faith with CEC, and by exhausting those negotiations. In fact, Qwest filed a Complaint prematurely for the express purpose of using PUC procedures as leverage in its ongoing negotiations with CEC. It was Qwest who did not even respond to CEC's July 2004 proposal of a new Joint Pole Agreement. It was not until five months later that

### **2 - DEFENDANT CEC'S MOTION TO DISMISS COMPLAINT and RESPONSE TO QWEST'S MOTION TO DISMISS COUNTERCLAIM**

Qwest belatedly and hastily attempted to fabricate a record of negotiation with CEC over a joint use agreement.

Qwest maneuvered to file its PUC Complaint to gain leverage against CEC instead of entering good faith negotiations for its use of CEC's property. The Commission will notice that it was not until this last December 2004 that Qwest even bothered to submit a proposed counteroffer to a proposed agreement that CEC submitted to Qwest in good faith last July 7th 2004. Qwest admits in its Complaint that it received the proposed agreement, but offers no credible reason for not responding. After having delayed responding in any manner to CEC's proposed agreement for over five months (during which time Qwest continued to trespass to CEC property), Qwest then expected immediate capitulation from CEC to Qwest's December 2004 counter-offer, even though that offer did not even attempt to fairly meet the terms of CEC's July 2004 offer.

Just this February 13th 2005, as part of CEC's efforts to negotiate fair and appropriate joint use and pole attachment agreements with all its attachers, CEC has tendered yet another proposed joint use agreement to Qwest. This proposed agreement fairly incorporates the recent PUC orders that came out in the few days before Qwest filed its Complaint here. (Qwest used these Orders, too, as a pretext for this action). CEC's most recent offer further rebuts Qwest's claims that it has exhausted its negotiations with CEC prior to filing this action.

Qwest created its own emergency in this case by completely ignoring its obligation to have a contract with CEC for Qwest's hookups. Qwest's subsequent attempt to manipulate PUC procedures just weeks after submitting its first counter-offer does not constitute an emergency or a failure of negotiation sufficient to warrant PUC intervention.

### **3 - DEFENDANT CEC'S MOTION TO DISMISS COMPLAINT and RESPONSE TO QWEST'S MOTION TO DISMISS COUNTERCLAIM**

2. **Qwest's Cannot Use PUC Proceedings And Its Petition Against PUC Rules As An Excuse To Avoid Ongoing Negotiations With CEC.**

As demonstrated in Qwest's own Reply to CEC's Affirmative Defenses and Counterclaim, Qwest spent the month of December 2004 attempting to fabricate a record of negotiation with CEC in order to try to invoke PUC jurisdiction. By contrast, Qwest did not treat its trespass upon CEC's poles as any sort of emergency until CEC was forced to take action to protect its property after giving repeated notice to Qwest. Qwest appears before the Commission as a scofflaw. Knowing it had no justification for ignoring its trespass for so long, Qwest then attempted to use a recently-filed challenge that it filed to the PUC's own underlying pole-attachment rules as a excuse to further avoid negotiating with CEC.

Qwest's December 2004 counteroffer was made in bad faith because its terms were based on Qwest's dubious appellate challenge to the same PUC regulations that are meant to keep a pole-occupant like Qwest from trespassing in the first place. Qwest has taken the position with CEC that this Commission's regulations are void and improperly enacted. Qwest has attempted to use its challenge to the PUC regulations as a platform for its negotiation with CEC. Qwest's position has been that it is above the law when it comes to its attachments to CEC's poles.

To summarize, Qwest has attempted to avoid having to negotiate in good faith with CEC for Qwest's pole contacts by (1) neglecting the expiration date of its joint use agreement, (2) ignoring CEC's attempts to negotiate a new contract, (3) petitioning to the Court of Appeals to try to change the regulations which do not please Qwest, and (4) prematurely filing this action under the false pretext of having exhausted its negotiation

based on a single bad-faith counteroffer made just weeks earlier. Qwest's refusal to enter serious good faith negotiation with CEC is clear on the face of Qwest's Complaint and its Reply, which must therefore be dismissed.

**3. Qwest's Complaint Itself Reflects Qwest's Bad Faith In Negotiating With CEC.**

Qwest is very simply hoping to use its Complaint as a bargaining tactic before it enters negotiations with CEC for a new joint use agreement. Qwest's attempt to hold its negotiations captive is an improper manipulation of the PUC and its rules. ORS Chapter 757 and the PUC's regulations envision PUC intervention only after the parties have undertaken good faith negotiations and have failed. In this case, Qwest's Complaint and Reply demonstrate on its face that Qwest's action is unfounded and premature. Qwest admits that it did not respond to CEC's July 2004 proposed agreement until December 2004. Qwest's Complaint and Reply document how Qwest then attempted to create a record of negotiation and to pressure CEC into accepting its revisions due to Qwest's own "bootleg" emergency that Qwest made by neglecting for years its duty to negotiate with CEC. Qwest's PUC Complaint was made in bad faith and Qwest's claim that it had no recourse but to file this action is false. Without good faith negotiation on the part of Qwest, and in light of the repeated and continuing efforts by CEC to negotiate, there is nothing yet for the PUC to properly regulate under ORS 757.279.

**4. CEC's Counterclaim Sufficiently States Grounds For Relief.**

CEC's affirmative defense and counterclaim documents the same failure of good faith negotiation by Qwest that is evident in Qwest's Complaint. Under ORCP 18 a Counterclaim must state ultimate facts constituting a claim for relief, and must demand

**5 - DEFENDANT CEC'S MOTION TO DISMISS COMPLAINT and RESPONSE TO QWEST'S MOTION TO DISMISS COUNTERCLAIM**

specific relief. CEC's Counterclaim sufficiently states a claim for relief and specifically demands that relief, namely, for the PUC to exercise its regulatory authority (the same invoked by Qwest) to dismiss Qwest's Complaint and to require Qwest to return to the negotiations with CEC that Qwest has avoided. Qwest wants a "label" for CEC's counterclaim and asks the PUC to favor form over substance. However, Qwest's objections to form are disingenuous because it is clear that CEC's counterclaim relies upon the very same PUC regulatory authority that would be the source for the relief requested by Qwest. CEC's affirmative defense and counterclaim fairly meets the substance of Qwest's own allegations and provides grounds for affirmative relief for CEC.

### **CONCLUSION**

It is clear on the face of Qwest's Complaint and Reply that Qwest did not make a good faith effort to resolve these matters before coming to the Commission. Rather, Qwest was racing to initiate this action in order to influence its remaining negotiations with CEC. Qwest's gamesmanship should not be rewarded. Consistent with Qwest's attempts to avoid responsibility for its trespass upon CEC property, Qwest is attempting to manipulate this Commission to avoid coming to an agreement with CEC. Qwest's Complaint does not set forth grounds for relief, and it should therefore be dismissed.

DATED this 24th day of February, 2005.

FRANCIS HANSEN & MARTIN, LLP

/s Martin E. Hansen  
Martin E. Hansen, OSB #80052  
Of Attorneys for Plaintiff

**CERTIFICATE OF TRUE COPY**

I hereby certify that the foregoing **CEC'S MOTION TO DISMISS COMPLAINT AND RESPONSE TO QWEST'S MOTION TO DISMISS** is a true, exact and full copy of the original thereof.

DATED: February 24, 2005

/s Martin E. Hansen  
Martin E. Hansen, OSB #80052  
Of Attorneys for Defendant CEC

---

**CERTIFICATE OF MAILING**

I certify that I served the foregoing document(s) by email and by depositing a true, full and exact copy thereof in the United States Post Office at Bend, Oregon, on February 24, 2005, enclosed in a sealed envelope with postage thereon, addressed to:

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DATED: February 24, 2005

/s Martin E. Hansen  
Martin E. Hansen, OSB #80052  
Of Attorneys for Defendant CEC

**7 - DEFENDANT CEC'S MOTION TO DISMISS COMPLAINT and RESPONSE TO QWEST'S MOTION TO DISMISS COUNTERCLAIM**

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

DOCKET NO. UM 1191

QWEST CORPORATION,	)	
	)	
Complainant,	)	<b>AFFIDAVIT OF MARTIN E. HANSEN</b>
	)	<b>IN SUPPORT OF CEC'S MOTION</b>
	)	<b>TO DISMISS COMPLAINT</b>
	)	
	)	
vs.	)	
	)	
CENTRAL ELECTRIC COOPERATIVE,	)	
INC.,	)	
	)	
Defendant.	)	
_____	)	

STATE OF OREGON     )  
  ) ss.  
County of Deschutes     )

I, Martin E. Hansen, am the attorney for Central Electric Cooperative ("CEC").

1.

In 1949, Qwest and CEC entered into a written joint pole agreement whereby CEC allowed Qwest to attach to CEC's poles conditioned upon Qwest notification, obtaining a permit, and payment for such attachments.

2.

In the late 1990's when CEC performed an audit of its entire pole system, hundreds of bootleg contacts made by Qwest were discovered. When Qwest refused to pay for



those bootleg contacts as required by the 1949 agreement, suit was instituted against Qwest for that payment. CEC's lawsuit against Qwest was resolved by a temporary Settlement Agreement (attached hereto as Exhibit 1) that did the following:

- (a) forever terminated the 1949 agreement as of May 10, 2001, and
- (b) gave Qwest until December 31st, 2003 to negotiate a new joint use agreement for its use of CEC's property.

3.

Qwest therefore had from at least the settlement of CEC's lawsuit in May 2001 until the expiration of the temporary Settlement Agreement on December 31st 2003 to negotiate a new joint use agreement for Qwest's attachments to CEC poles. Despite the requirement to negotiate and to have a contract in place to cover Qwest's use of CEC's property, Qwest did not even submit an offer to CEC before the Settlement Agreement expired.

4.

After Qwest made no effort at all to negotiate a new joint use agreement for Qwest's attachments, CEC finally took the matter upon itself by submitting a new joint use agreement to Qwest in July 2004. Qwest ignored CEC's offer until December 6, 2004 and made no response to it whatsoever.

5.

On December 6th 2004, Qwest sent a proposed agreement to CEC that was significantly different than the July 2004 offer from CEC that Qwest did not respond to.

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///

6.

CEC informed Qwest by letter on December 7th 2004 that CEC would require sufficient time to respond to Qwest's proposed agreement, and likely would not have a response or counteroffer prior to the end of the year. (CEC's December 7 2004 letter is attached hereto as Exhibit 2). CEC specifically assured Qwest that CEC would continue to negotiate with Qwest in good faith and on a reasonable time frame. Qwest continued to try to pressure CEC and announced its intent to file this action approximately one month after sending its first proposed agreement to CEC.

7.

After Qwest sent its proposed agreement back to CEC in December 2004, and several weeks after Qwest filed this action, CEC finished drafting another proposed joint pole agreement and delivered it to Qwest February 11th 2005. That agreement is attached hereto as Exhibit 3. This agreement is drafted in view of CEC's original July 2004 offer, Qwest's December 2004 proposal, input from other companies using CEC's property, and several PUC orders that were published in January 2004. Qwest has not yet responded to CEC's proposed agreement.

8.

On the same date sent its draft agreement to Qwest, CEC sent out agreements that incorporate the same changes to other occupants of CEC's poles. The correspondence accompanying those proposed agreements are attached hereto as Exhibits 4-11. CEC wishes in fairness to reach the same joint pole agreement with all of the companies utilizing their facilities. We are striving to take into account not only the comments of the

various participants in our joint pole system but also the PUC rulings that have come out in mid-January.

9.

Given the fact that negotiation between CEC and Qwest is still proceeding, and since Qwest just recently sent CEC a counteroffer after neglecting for so long its obligations to negotiate and have an agreement in place, Qwest's Complaint should be dismissed by the PUC as it is without basis and obviously on its face filed in bad faith. The PUC should not tolerate this abuse of the PUC system.

DATED this 14th day of February, 2005.

FRANCIS HANSEN & MARTIN, LLP

---

Martin E. Hansen, OSB #80052  
Of Attorneys for Plaintiff

SUBSCRIBED and sworn to before me this \_\_\_\_ day of February, 2005.

---

Notary Public for Oregon  
My Commission Expires: \_\_\_\_\_

**CERTIFICATE OF TRUE COPY**

I hereby certify that the foregoing **AFFIDAVIT OF MARTIN E. HANSEN** is a true, exact and full copy of the original thereof.

DATED: February 14, 2005

---

Martin E. Hansen, OSB #80052  
Of Attorneys for Defendant  
Central Electric Cooperative, Inc.

---

**CERTIFICATE OF MAILING**

I certify that I served the foregoing document(s) by depositing a true, full and exact copy thereof in the United States Post Office at Bend, Oregon, on February 14, 2005, enclosed in a sealed envelope with postage thereon, addressed to:

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Leslie Kelly  
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303-896-9206

Bend Cable Communications, Inc.  
Attention: Amy Tykeson  
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Bend, OR 97701  
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**5 – AFFIDAVIT OF MARTIN E. HANSEN IN SUPPORT OF CEC's MOTION TO DISMISS**

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Attorneys for Intervenors  
Bend Cable & Crestview Cable

---

Martin E. Hansen, OSB #80052  
Of Attorneys for Defendant  
Central Electric Cooperative, Inc.

# SETTLEMENT AND JOINT USE AGREEMENT

## I. PARTIES

The parties to this Settlement and Joint Use Agreement ("Agreement") are Central Electric Cooperative, Inc. ("CEC"), and Qwest Corporation, formerly known as U.S. WEST Communications, Inc. ("Qwest").

## II. RECITALS

A. In April 1999, CEC filed an action against Qwest for breach of the parties' amended 1949 joint use agreement (the "1949 Agreement"), and for unjust enrichment. That action was removed by Qwest to the United States District Court for the District of Oregon where it was captioned *Central Electric Cooperative, Inc. v. U.S. WEST Communications, Inc.*, Case No. 99-840-HO (the "First Action").

B. In October 2000, CEC sent Qwest a letter stating that CEC was suspending Qwest's right under the 1949 Agreement to future joint use and that the 1949 Agreement would be terminated as to future joint use in November 2000.

C. In November 2000, Qwest filed an action against CEC in *Qwest Corporation v. Central Electric Cooperative, Inc.*, Case No. 00-6363-HO (the "Second Action") to enjoin CEC from terminating the 1949 Agreement.

D. CEC has hired OSMOSE to conduct a survey of its poles to determine which of the poles have Qwest attachments. Qwest has hired Pole Maintenance Company to conduct a similar study.

E. On December 22, 2000, the parties attended a settlement conference before United States Magistrate Judge Thomas M. Coffin. On that date and in consideration of the costs and uncertainties of proceeding with litigation in the First Action and the Second Action, the parties settled their disputes relating to joint use of one another's poles. As part of that settlement, the parties contemplated that this written Agreement would be prepared to memorialize their agreement.

F. The parties have jointly drafted this Agreement. Accordingly, no provision of this Agreement shall be construed against the drafter solely by reason of any canon of construction.

## III. AGREEMENT

In consideration for the foregoing recitals and the promises contained in this Agreement, the parties agree as follows:

1. Qwest agrees to pay CEC Nine Hundred Thousand Dollars (\$900,000). This sum represents back rent for Qwest's attachments to poles owned by CEC plus interest, as well as pole audit expenses incurred by CEC. This payment shall be by check, which shall be payable to Central Electric Cooperative, Inc. and shall be transmitted to arrive at the following address on or before April 6, 2001: Karnopp Petersen et al., 1201 NW Wall Street, Suite 300, Bend, Oregon 97701, attention Martin Hansen.

2. The parties will direct their attorneys to dismiss the First Action and the Second Action, including any counterclaims, with prejudice, without costs, and without attorney fees or allow the Court to dismiss those claims. The parties are forever precluded from raising the same claims asserted in the First Action and the Second Action that existed as of December 22, 2000.

3. Each party has an ongoing duty to obtain prior written approval in the form of joint pole notifications (JPNs) before making new pole attachments to the other party's poles. If the pole owner does not disapprove such JPNs before the expiration of thirty (30) days following receipt of such JPNs, the JPNs shall be deemed approved and the pole attachments described therein shall be deemed authorized. However, the pole user may install a service drop to a pole owned by the pole owner without obtaining prior written approval as long as the pole user submits a JPN within seven (7) days of installation of the service drop. Each party also has an ongoing duty to notify the other in writing when it removes its attachments from the other's poles.

4. The parties agree the 1949 agreement is terminated as of the date of this Agreement, provided, except as inconsistent with this Agreement or the PUC regulations referred to herein the parties incorporate the following provisions attached as Exhibit 1, including any amendments that modify these provisions with the exception of any of the pricing and rates contained in those amendments.

5. Subject to paragraph 6, the parties agree that the annual rental fee for the year ending May 31, 2001, shall be based upon 11,743 attachments. The rental rate for the year ending May 31, 2001, shall be calculated based on the PUC's methodology, except that no penalties or sanctions shall apply. Except as specifically provided in this Agreement, all PUC regulations relating to joint use shall apply with respect to the billing year ending May 31, 2001, except that no penalties or sanctions shall apply.

6. The parties will have until the end of 2001 to reconcile the actual number of attachments based on the surveys that the parties are independently conducting. The parties agree to work in good faith to reconcile the surveys and determine the actual number of attachments, including, as necessary, enlisting the assistance of the parties' respective surveyors. To the extent that the reconciled number of attachments varies from the number of attachments on which rent was paid for the year ending May 31, 2001 (see paragraph 5, above), a refund or additional payment shall be made that is consistent with the reconciliation. The reconciled number shall be deemed to be the number of authorized attachments as of December 31, 2001.

No penalties or sanctions shall apply to these 2001 attachments.

7. The parties agree to convert to calendar year billing cycle commencing January 1, 2002. Transition to this new billing year will be accomplished by pro-rating the rental period from June 1, 2001, through December 31, 2001. The rental rate for this pro-rated period shall be determined using the PUC's methodology, except that no penalties or sanctions shall apply. The number of attachments on which rent shall be paid for this period shall be the reconciled number of attachments. Except as specifically provided in this Agreement, all PUC regulations relating to joint use shall apply with respect to the pro-rated period from June 1, 2001, through December 31, 2001, except that no penalties or sanctions shall apply.

8. For the time period beginning January 1, 2002, and ending December 31, 2003, the parties agree to follow all PUC regulations relating to joint use, including but not limited to the rate structure set forth in the PUC's rules, except as follows (the "2002 - 2003 Agreement"):

(a) The rent payable for any unauthorized attachment shall be 10-times the pole owner's annual rental fee per pole for each year of unauthorized use after January 1, 2002. Payment of the entire year's penalty shall be paid within 90 days of the initial notice of the unauthorized attachment.

(b) The penalty multiplier shall be reduced from 10-times to 5-times the pole owner's annual rental fee per pole for each year of unauthorized use provided that the pole user who has made the unauthorized attachment does one or more of the following within 60 days of being notified of the unauthorized attachment:

(1) Obtains authorization for the unauthorized attachment and pays the entire 5-times penalty for each year of unauthorized use after January 1, 2002 (Example: if the annual rate is \$13 per pole and CEC notifies Qwest of an unauthorized attachment on February 1, 2002, Qwest could avoid having to pay CEC the \$130 penalty by obtaining authorization for the attachment and paying CEC \$65 on or before April 1, 2002); or

(2) Removes the unauthorized attachment and pays the entire 5-times penalty for each year of unauthorized use after January 1, 2002 (Example: if the annual rate is \$13 per pole and CEC notifies Qwest of an unauthorized attachment on February 1, 2002, Qwest could avoid having to pay CEC the \$130 penalty by removing the attachment and paying CEC \$65 on or before April 1, 2002).

9. CEC will hire a qualified consultant with Qwest's cooperation and approval to conduct a new survey of those poles owned by CEC to be completed by December 31, 2003. The parties shall share equally the expense of that survey. If, however, the survey



shows that Qwest has failed to obtain proper authorization from CEC for more than 5 percent of Qwest's new attachments to CEC's poles since January 1, 2002, then Qwest will reimburse CEC for the entire cost of the survey within 90 days after completion of the survey.

10. The parties agree to exercise good faith in negotiating a joint use agreement to cover that period beginning January 1, 2004. If no agreement can be reached prior to January 1, 2004, despite the good faith of both parties, then this Agreement will terminate and any future joint use of the parties' poles will continue without a contract solely pursuant to the PUC's then-existing regulations. It is understood by both parties that their good faith performance of the terms of settlement will likely be a factor in the negotiation of any future agreement beginning January 1, 2004. It is further understood by both parties that if no agreement has been reached by January 1, 2004, then:

(1) all attachments that have been made consistent with this Agreement prior to that date may be kept in place provided that the appropriate rental rate (as determined under the PUC's then-existing regulations without any reference to penalties) continues to be timely paid and there shall be no penalties owed for any such attachments;

(2) any penalties for attachments not authorized prior to the date shall be determined by the PUC's then-existing regulations; and

(3) no new attachments may be made after January 1, 2004, except as may be permitted by the PUC's then-existing regulations or agreement by both parties.

11. The parties agree that the United States District Court for the District of Oregon shall retain jurisdiction to enforce the terms of this Agreement and the parties consent that Magistrate Judge Coffin shall preside over any dispute pertaining to this Agreement.

12. Neither this Agreement, nor any instrument envisioned by it, nor any payment, nor any release constitutes an admission of any liability or responsibility with respect to the First Action or the Second Action whatsoever on the part of any party to this Agreement, it being agreed that each party specifically denies any such liability or responsibility and specifically denies all such allegations made against the parties.

13. This Agreement shall be binding on, and inure to the benefit of, the parties and their officers, directors, shareholders, members, agents, employees, heirs, representatives, successors, predecessors, related entities, and assigns.

14. This Agreement, together with the instruments envisioned by it and the PUC's regulations referenced by it, constitutes a full and complete integration of the parties' agreement. There are no separate, independent, written, verbal, or side agreements, promises, covenants, or representations concerning the subject of this Agreement not contained in this Agreement. This Agreement may not be modified in any manner except by an instrument in writing signed by the parties.

15. The signatories to this Agreement represent and warrant that they have read this Agreement, that they understand the terms of this Agreement, and that they have been advised of their legal rights by the attorneys of their selection. The parties acknowledge that they execute this Agreement voluntarily and upon their best judgment and solely for the consideration as described in this Agreement.

16. This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original. In addition, a copy of an executed counterpart agreement shall be deemed to be the same as an original.

IN WITNESS WHEREOF, the parties have executed this Agreement to be effective December 22, 2000.

QWEST CORPORATION

By: *Griffin Goad*  
Name: Griffin Goad  
Title: St. Director  
Date: 4-17-2001

CENTRAL ELECTRIC COOPERATIVE, INC.

By: *Al Gonzalez*  
Name: Al Gonzalez  
Title: Chief Executive Officer  
Date: 5/10/01

**FRANCIS HANSEN & MARTIN, LLP**

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Martin E. Hansen\*  
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December 7, 2004

**VIA FACSIMILE & REGULAR MAIL**

Jay Nusbaum  
Perkins Coie LLP  
1120 NW Couch 10<sup>th</sup> Floor  
Portland, OR 97209

**Re: CEC vs. Qwest – 2004 Unauthorized Contacts**

Dear Jay:

I am writing this letter concerning your client's contact with CEC in the last couple of days.

After I notified Qwest through your office that they owed CEC for the 2004 unauthorized contacts, Qwest representatives on Monday, December 6, 2004, contacted CEC and sent a proposed revision draft of the pole licensing agreement back to CEC. CEC has sent that proposed pole license agreement to Qwest many, many, many months ago. We never received any response from Qwest until yesterday. Obviously Qwest acknowledged that their unauthorized attachments without an existing licensing agreement has created a substantial PUC penalty.

I am pointing this out in case you were unaware of your client's recent contact with CEC. We are going to review the proposed license agreement now that we have finally received it back from Qwest. That process is entirely separate and distinct from the penalties that Qwest owes to CEC.

Please notify your client that CEC will work through its counsel on both of these issues and not directly. My client had received an e-mail from Jeff Langston at Qwest asking how to proceed on the negotiations for the license agreement. Tell Mr. Langston that whoever is in charge must work through my office on a license agreement.

Mr. Langston now appears concerned that there are only a few days left in 2004 to negotiate this license agreement. We cannot promise that these negotiations will be

Jay Nusbaum

Re: CEC vs. Qwest – 2004 Unauthorized Contacts

December 7, 2004

Page Two

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concluded in 2004 given the months and months of delay caused solely by Qwest's failure to respond to our proposed license agreement when they first received it.

Call me if you have any questions.

Sincerely,



MARTIN E. HANSEN

MEH/iko

cc: Al Gonzalez  
Dave Markham

Final  
2/11/05

**POLE ATTACHMENT LICENSE AGREEMENT**

This pole license Agreement made and entered into the \_\_\_ day of \_\_\_\_\_, 20\_\_\_, by and between Central Electric Cooperative, an Oregon Cooperative Corporation, with its principal place of business at \_\_\_\_\_ (hereinafter called "Licensor"), and \_\_\_\_\_, with its principal place of business at \_\_\_\_\_ (hereinafter called "Licensee").

**RECIPROCAL AGREEMENT**

Any occupancy by the Cooperative on the facilities of the Licensee shall be governed by the terms and conditions of this Agreement as though the Cooperative was the Licensee and the Licensee was the Cooperative.

**Witnesseth**

Whereas, Licensor owns, operates and maintains lines of poles extending in Deschutes, Crook, Jefferson, Grant, Lake, Wasco and Linn Counties, in the state of Oregon; and

Whereas, Licensee desires to place certain lines, attachments and apparatus, hereinafter called "Attachments" on certain poles of Licensor, for the limited purpose of furnishing lawful telecommunications or electrical services in compliance with any and all local, state or federal regulations; provided, that Licensor may only deny access to poles where there is insufficient capacity or for the reasons of safety, reliability and generally applicable engineering purposes.

Whereas, Licensor is willing to permit Licensee, to the extent it may lawfully do so, to place Attachments on said poles, on a non-exclusive basis, in the area shown on Exhibit "A" attached hereto and made a part hereof;

Now, therefore, in consideration of the mutual covenants, terms and conditions herein contained the parties hereto, for themselves, their successors and assigns, do hereby covenant and agree as follows:

**1. Definitions:**

- (a) **Agreement:** This Pole Attachment License Agreement entered into between Licensor and Licensee is for the area specified in Exhibit A1 and in any area where Licensee attaches its equipment to poles owned by Licensor.
- (b) **Application:** A written and/or electronic request by Licensee for a permit to attach to Licensor's pole.
- (c) **Basic Pole:** A Basic Pole shall be defined as the average height of all of Licensor's poles as calculated by Licensor on January 1 of each year.

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- (d) **Equipment**: The wires and facilities that the Licensor may give Licensee written and/or electronic permission to install on a pole.
- (e) **Inspection**: The examination by Licensor of Licensor's pole or poles occupied by Licensee and any of Licensee's Attachments or equipment situated upon or in the vicinity of such poles for the purpose of i) verifying the number and location of all Attachments and any other pole-mounted equipment of Licensee, or ii) determining whether Licensee is in compliance with the requirements and specifications of Section 3 or any other obligations of Licensee under the terms of this Agreement.
- (f) **Joint Use Pole**: A pole owned and maintained by the Licensor and used jointly by the Licensee.
- (g) **National Joint Utility Notification System ("NJUNS")**: NJUNS is the electronic system used by Licensor that Licensee will utilize to submit applications for permission to affix, relocate, or remove equipment or Attachments under the terms of this Agreement, and to respond to Licensor upon a request for work to be performed by Licensee. It is also the system that Licensor will utilize to initiate pole transfers, and to respond to Licensee's applications.
- (h) **Party**: The Licensor or Licensee as the context requires. "Parties" means the Licensor and Licensee
- (i) **Permit**: Licensor's written and/or electronic approval of a pole attachment application as set forth in Section 4.
- (j) **Pole**: A utility pole owned and maintained solely by Licensor.
- (k) **Pole Attachment**: An Attachment by the Licensee to Licensor's pole.

The type of Attachments requiring an application and permit include but are not limited to the following:

- Initial bolt Attachment inside the telecommunication space
  - Additional bolt Attachments or other facilities attached to the pole
- (l) **Pole Attachment Survey**: The Inspection by Licensor of all or any number of Licensor's poles in the area covered by this Agreement.
- (m) **Sanction**: A financial penalty as set forth by the then existing Oregon Public Utilities Commission ("OPUC") regulations.
- (n) **Telecommunication Space**: Space on the pole between 20 and 23 feet on the pole unless otherwise agreed upon by Licensor and Licensee.

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**2. Term of Agreement:**

This Agreement shall remain in full force and effect for a term of five (5) years, unless and until either Licensor or Licensee terminates it upon one hundred eighty (180) days' notice to the other party. Notice shall be in writing and mailed by certified mail, return receipt requested, postage prepaid, or delivered by a reputable overnight courier with tracking capabilities, addressed to the parties as indicated in Section 24 of this Agreement. If this Agreement is terminated, Licensee shall remove all of its Equipment from the Licensor's poles within one (1) year after termination of this Agreement. During the one (1) year removal period, all of the applicable provisions of this Agreement, specifically including the payment of rent for joint use poles, shall remain in full force and effect with respect to any and all Equipment of Licensee remaining upon Licensor poles until such time as all such Equipment has been removed. Any attachments that remain after the one (1) year removal period expires shall be deemed to be attachments without a pole attachment agreement and shall be subject to the sanctions provided in the then existing OPUC regulations.

**3. Specifications:**

- (a) The specifications of the Licensor and Licensee for the construction, operation, and maintenance of its poles and other facilities that are jointly used, or involved in joint use, shall be in accordance with accepted modern practices and shall be no less stringent than the requirements of the National Electric Safety Code (NESC), provided that in the event a lawful requirement of any governmental authority or agency having jurisdiction may be more stringent, the latter will govern. Modification of or additions to the construction practices supplementing the requirements of the NESC, set out in Exhibit "B" attached hereto and made a part of, will also govern the joint use of poles. .
- (b) In the event that the above-referenced specifications should change, Licensee agrees to make such changes or alterations in its new facility installations or during maintenance of its existing facilities as may be required in order to fully comply with the provisions of such notice. Licensee agrees to make all required changes or alterations on new installations, and existing attachments shall be brought into conformity at the time of their normal replacement, rearrangement, rebuilding, or reconstruction unless otherwise specified by a lawful requirement.
- (c) Licensee's attachments on a Licensor-owned pole shall be made and maintained in accordance with a reasonable aesthetic criteria mutually agreed to by both parties. Such aesthetic criteria shall apply without being limited to the type and design of the Attachment, Equipment, conductor or cable sags, and service drop arrangements within the provisions of Section 3 (a).

- (d) No tag, brand or other device showing Licensee's name or insignia shall be placed on, or attached to, any pole of Licensor, except such tag or insignia which shows Licensee to be the Licensee or lessee of such pole and not the owner thereof, and then only after obtaining the written consent of Licensor. Where required by the Licensor, the Licensee agrees to attach information identifying its facilities on the pole, in a format specified by the Oregon Joint Use Association (OJUA).
- (e) The strength of poles covered by this Agreement shall be sufficient to withstand the transverse, vertical and longitudinal loads imposed upon them under the storm loading requirements of the NESC assumed for the area in which they are located.
- (f) Any unbalanced loading of Licensor's pole caused by the placement of Licensee's Equipment shall be properly guyed and anchored by Licensee, at no expense to Licensor. Licensee shall attach its guys only to its own anchors unless otherwise agreed to by Licensor.
- (g) When, in the opinion of Licensor and Licensee, existing anchors are adequate in size and strength to support the equipment of both Parties the Licensee may attach its guys thereto at no additional cost. To prevent galvanic corrosion of anchor rods, all down guys should be insulated. All guys attached to a Licensor anchor shall be insulated. When anchors are not of adequate size and strength, the Licensee shall at its own expense place additional anchors or replace existing anchors with anchors adequate in size and strength.

#### 4. Application for Attachment

##### (a) Permit Application

Licensee shall not attach or modify any of its pole Attachments (except for service drops) to Licensor's poles or joint use poles without first having made written and/or electronic application to Licensor and having received written and/or electronic permission from Licensor, or had the application deemed approved by Licensor's failure to respond to Licensee's application as set forth in Subparagraph

(b). Permission to make pole Attachments described in the application may be granted or denied by Licensor. Licensee must apply for a permit within seven (7) days of the attachment of a service drop and install the service drop in compliance with the OPUC Safety Rules.

##### (b) Application Procedure

Until further notice, whenever Licensee desires to attach to any Licensor pole, Licensee shall submit to Licensor a "Pole Attachment Ticket" electronically via the NJUNS and/or written permit application and shall specify the location and identifying number for the pole(s) on which attachment is requested, the amount of vertical space required, and the number of Attachments for each pole. Licensor

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shall have the authority to deny applications for attachment to its poles where there is insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes. Notwithstanding the foregoing, Licensor may reserve space on its poles if it projects a need for that space for its own use in the future. Licensor shall permit use of its reserved space until such time as it has an actual need for that space. At that time, Licensor may recover the reserved space for its own use, upon giving Licensee 180 days notice, and Licensee shall be required to remove its attachments at Licensee's cost. Licensor shall give Licensee the opportunity to pay for the cost of any reasonable modifications necessary to accommodate Licensee's displaced attachments. Licensor shall respond to Licensee's application within thirty (30) days of receipt. Licensor shall notify the Licensee in writing and/or electronically via NJUN's of its decision on the application. If the application is approved, the Licensee shall have the right hereunder to affix such Attachments in accordance with the application, as approved, and in compliance with the specifications, terms and conditions of this Agreement. If notice is not received from the Licensor within thirty (30) days, the application shall be deemed approved and Licensee may proceed with the Attachment(s). If Licensor is reserving space for future use then it may grant Licensee a conditional approval subject to Licensor's right to recover the space for its own use in the future. If the application is denied then Licensor shall provide Licensee with a written denial describing with specificity all relevant evidence and information supporting the denial and how such evidence and information relates to the lack of capacity, safety, reliability, or generally applicable engineering standards.

(c) **Application Planning**

Each application shall involve sufficient engineering and planning by the Licensee to ensure compliance with standards identified in Section 3(a) of this Agreement during construction and upon completion. The Licensee is responsible for conducting engineering studies of Licensee's facilities to ensure proper spacing, equipment bonding and clearances. The Licensor shall be responsible for engineering studies of pole and down guy strength requirements for horizontal and vertical loading. The Licensor may elect in writing to allow the Licensee to conduct pole, down guy and strength studies.

The application shall include sufficient design drawings and specifications so that qualified personnel can safely make the Attachments in compliance with the NESC and this Agreement. It is the responsibility of the Licensee to ensure that only trained, qualified persons work on Licensor's facilities. Qualified persons shall be knowledgeable in applicable NESC rules and must be able to demonstrate competence as required by the NESC. They shall also be trained to recognize and prevent NESC violations and conflicts, and to maintain safe working clearances from energized lines and equipment. Upon completion of the installation, the

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Licensee shall give written or electronic notification to the Licensor that the facilities are complete.

(d) **Installation Time Limits**

Licensee shall complete the installation of its Attachment(s) upon the pole(s) covered by each approved individual application within ninety (90) days of such approval. Licensee may request, in writing, an extension of time for installation of large projects subject to written approval by Licensor. Licensor shall approve such requests unless it identifies a reasonable justification for denial of such requests. In the event Licensee should fail to complete the installation of the Attachment(s) within the prescribed time limit, including any extensions which were granted, the permission granted by Licensor to place the Attachment(s) upon the pole(s) shall thereupon be automatically revoked and Licensee shall not have the right to place the Attachment(s) upon the pole(s) without first reapplying for and receiving written and/or electronic permission to do so.

(e) **Make-ready Pole Replacements**

Whenever any pole to which Licensee seeks attachment must be modified or replaced to accommodate Licensee's Attachments and Licensor's existing Facilities, as well as the Attachments of other occupants, Licensor will provide Licensee with a detailed cost estimate of make-ready work it believes to be necessary to prepare the pole for Licensee's facilities. Licensor will provide Licensee with such estimate within sixty (60) days of receiving Licensee's application for Attachment. After receiving this estimate, if Licensee still desires to make such Attachments, Licensee shall notify Licensor within ninety (90) days of receiving such estimate of such continuing desire to attach, and shall pay to Licensor any required advance payment for such make-ready work, which may include engineering, materials (including poles and associated hardware), cost of removal (less any salvage value), and the expense of transferring Licensor's facilities from the existing to the new pole(s). Where the advance payment of estimated expenses made to Licensor by Licensee for both non-replacement make-ready or pole replacement work is less than the actual cost of work described above, Licensee agrees to pay Licensor all sums due in excess of the amount of the advanced payment within thirty (30) days from receipt of the invoice. Where the advanced payment of estimated expenses made to Licensor by Licensee exceeds such actual costs, Licensor agrees to refund the difference to Licensee within sixty (60) days of completion of the make ready work. The Licensee shall also make satisfactory arrangements with the owner or owners of other facilities attached to said pole(s) for the transfer or rearrangement of such other facilities.

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(f) **Cost Allocation Among Multiple Users**

When applications to occupy the same pole(s) have been received from two or more prospective occupants, including Licensee, before a permit is granted, and, if to accommodate their respective Attachments on the pole it would be necessary to rearrange existing Attachments or replace the pole, the applicable costs of rearrangement or replacement incurred in conjunction with such simultaneous applications shall be pro-rated equitably among such simultaneously attaching parties. In this context, "simultaneous" refers to all pending applications.

(g) **Non-Interference with Licensor Facilities**

Licensee at all times shall insure that its agents, servants, employees, and contractors or contractors' employees neither take, nor attempt to take any action whatsoever to Licensor's facilities attached to or supported by poles covered by this Agreement. Each party shall exercise reasonable precautions to avoid damage to the facilities of the other. Licensor at all times reserves the right to maintain and operate its own equipment in such a manner as will best enable it to fulfill its own service requirements and such requirements shall have priority over all pole occupants.

(h) **Right-of-way Clearing and Tree Trimming**

Licensor has established a regular and routine procedure for trimming trees or removing trees with inadequate clearance to conductors, poles and equipment. Licensee shall be responsible for tree trimming, right-of-way clearing and debris removal necessary for installation and safe clearance from its cable, Equipment or conductors as mandated by the NESC and OPUC. In the event that Licensee is unable or fails to perform the necessary clearing and tree trimming in the communication space and Licensee has obtained all necessary easements, permits and rights-of-way to attach to Licensor's poles, Licensor will perform the necessary right-of-way clearing and tree trimming. In such case, Licensee agrees to pay Licensor 100% of the tree trimming and debris removal costs necessary in the communication space for each pole and the wire in its backspan on which Licensee attaches its facilities plus administrative costs. The costs for tree trimming, debris removal and administrative costs conducted on behalf of Licensee by Licensor shall be paid by Licensee within thirty (30) days from receipt of the invoice. In the event there is more than one Licensee attaching to a specific pole, then the tree trimming costs for that pole shall be divided equally among the number of Licensees attaching to that pole.

(i) **Pole Ownership**

All poles on which Attachments are made under this Agreement shall remain the property of the Licensor, and any payments made by the Licensee for changes in

pole lines under this Agreement shall not entitle the Licensee to ownership of any of said poles except for those poles abandoned by Licensor as outlined in Section 13.

## 5. Inspections and Pole Attachment Survey

### (a) Inspections

Licensor shall have the right to perform an Inspection of each installation of Licensee's Attachments and other Equipment, upon and in the vicinity of, Licensor's poles at any time. The Licensor may charge Licensee for the pro-rata expense of any non-routine Inspections during or after installation, in connection with Attachments that do not comply with the terms of this Agreement. The Licensor shall recover the costs for all periodic, routine Inspections that benefit Licensee in the annual rent. Such inspections, whether made or not, shall in no manner relieve the Licensee of any responsibility, obligation, or liability assumed under this Agreement or arising otherwise.

### (b) Pole Attachment Survey

Licensor may conduct a Pole Attachment Survey at any time after the effective date of this Agreement and not more often than once every third year subsequent to each such Pole Attachment Survey. Licensor shall give Licensee at least thirty (30) days prior written notice of such Pole Attachment Survey. Licensee shall advise Licensor if Licensee desires to be present during the survey within thirty (30) days of such notice. The Licensor and Licensee shall jointly select an independent contractor for conducting the inventory and agree on the scope and extent of the Pole Attachment Survey that is reimbursable by Licensee. The cost of the Pole Attachment survey shall be recovered by Licensor in the annual rent. The Contractor shall provide Licensor and Licensee with a report of such Pole Attachment Survey within a reasonable time after its completion. The survey data from Licensor's Pole Attachment Survey shall be used to update Licensor's Attachment billing records where applicable. Licensee shall make any objections to the inventory data within sixty (60) days of mailing of the Pole Attachment Survey report or such objections shall be waived. Objections raised to inventory data from a Pole Attachment Survey shall not relieve Licensee of the obligation to pay undisputed amounts when due, as set forth in this Agreement. The Licensor and Licensee agree to cooperate in good faith to resolve any disputed amounts.

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6. Safety

(a) Licensee Practices

Licensee shall have written practices that address construction standards to be followed in attaching facilities to Licensor's poles. The standards should specify any obligations that exceed NESC regulations. These standards shall be made readily available to Licensor.

(b) Conflicts with Electric Lines

Licensor shall provide Licensee written notice of any NESC or safety violations it discovers. NESC violations and conflicts to electric lines shall be corrected by Licensee within the time frame required by the OPUC, if Licensee created the violation. In some instances, the NESC requires that qualified electrical workers perform the work. In that event, Licensee shall either have qualified contractors perform the work or pay Licensor to perform the work. Licensee may also be subject to OPUC sanctions for failure to comply with OPUC safety rules. Failure by Licensee to act in a prompt and responsible manner may result in the Licensor taking appropriate measures to correct the safety violations involved and Licensee shall be responsible for the cost thereof. In such cases, the inspection, design, repair, and coordination charges shall be borne by Licensee if it failed to perform necessary duties required by OPUC and shall pay the cost within thirty (30) days from receipt of the invoice.

7. No Warranty:

The Licensor does not warrant or assure to Licensee any right-of-way privilege or easements or that Licensor owns a property right that permits attachment, and if the Licensee shall at any time be prevented from placing or maintaining its Attachment on Licensor's poles or joint poles, no liability shall attach to Licensor. Each party shall be responsible for obtaining its own permits, easements and right-of-way.

8. Maintenance of Poles, Attachments and Right-of-Way:

(a) The Licensor shall, at its own expense, inspect and maintain the poles in accordance with industry practices and the specifications outlined in Section 3, and shall replace, reinforce or repair such poles as are determined to be defective.

(b) Except as otherwise provided in subparagraph (c) of this Section, Licensee shall at all times maintain all of its Attachments in accordance with the specifications outlined in Section 3 and shall keep them in good repair. All necessary right-of-way maintenance, including tree trimming or cutting, shall be borne by the parties as provided in Section 4(h).

- (c) Any existing joint use construction that does not conform to the specifications outlined in Section 3 shall be brought into conformity as outlined in Section 3 except for identified NESC or OPUC violations which must be corrected in the time frame specified by the OPUC. When such existing construction shall have been brought into conformity with said specifications, it shall at all times thereafter be maintained as provided in (a) and (b) of this Section. Should Licensee fail to comply, the Licensor may elect to do such work and the Licensee shall pay the Licensor the cost within thirty (30) days from receipt of the invoice.
- (d) Licensee expressly assumes responsibility for determining the condition of all poles to be climbed by its employees, contractors, or employees of contractors. Licensor disclaims any warranty or representation regarding the condition and safety of the poles of the Licensor. Licensor agrees that, upon written notification, it will replace any pole deemed to be unserviceable within a reasonable time or as specified in OPUC requirements.

**9. Recovery, Rearranging or Relocation of Facilities:**

- (a) Once Licensee has an approved permit to attach to Licensor's pole, any pole replacement costs due to additional space requirements will be borne by the requesting party, not the Licensee.
- (b) In any case where facilities of Licensor are required to be rearranged on the poles of the Licensor to accommodate the Attachments of Licensee, Licensee shall pay to Licensor the total costs incurred by Licensor in rearranging such facilities in advance of construction. The Licensee shall also reimburse other users of the poles of Licensor for their costs of rearrangement to provide space or clearance for the facilities of Licensee.
- (c) Whenever it is necessary to replace or relocate a jointly used pole, the Licensor shall give notice in writing and/or electronic means except in the case of an emergency, when prior notice may not be possible (but will subsequently be confirmed as reasonable). Licensee shall, at the time so specified by the Licensor, transfer its Attachments to the new or relocated joint pole at the time specified for such transfer of Attachments, the Licensor may elect to do such work, and the Licensee shall pay the Licensor the cost within thirty (30) days from receipt of the invoice. In the event the Licensee fails to transfer its Attachments and the Licensor does such work, the Licensor shall not be liable for any loss or damage to the Licensee's facilities that may result and Licensee shall become liable for any abandoned poles as per Section 13.

**10. Indemnification and Insurance:**

- (a) Licensee agrees to indemnify and hold harmless Licensor, its directors, officers, employees and agents against and from any and all claims, demands, suits, losses,

costs and damages, including attorneys' fees, for or on account of bodily or personal injury to, or death of, any persons(s), including without limitation Licensor's employees, agents, representatives and subcontractors of any tier, or loss of or damage to any property of Licensor, or any third party, to the extent resulting from any negligent act, omission, or fault of Licensor, its employees, agents, representatives, or subcontractors of any tier, their employees, agents, or representatives, in the exercise, performance or nonperformance of Licensor's rights or obligations under this Agreement. Except for liability caused by the negligence of Licensee, the Licensor shall also indemnify and hold harmless Licensee from and against any and all claims, demands, suits, losses, costs, and damages, including attorneys' fees, arising from any interruption, discontinuance, or interference with the Licensor's service to its customers which may be caused, or which may be claimed to have been caused, by any action of Licensee pursuant to or consistent with this Agreement.

(b) The indemnifying Party shall have the right, but not the obligation, to defend the other regarding any claims, demands or causes of action indemnified against. Each Party shall give the other prompt notice of any claims, demands or causes of actions for which the other may be required under this Agreement. Each Party shall fully cooperate with the other in the defense of any such claim, demand or cause of action. Neither shall settle any claim, demand or cause of action relating to a matter for which such Party is indemnified without the written consent of the indemnitor.

(c) Licensee shall carry and keep in force, while this Agreement is in effect, insurance contracts, policies and protection in company or companies in amounts and for coverage deemed necessary for its protection by Licensee, but in no event for amounts or coverage less than the following minimum requirements:

1. Licensee shall also carry and keep in force, while the Agreement is in effect, workers' compensation insurance in compliance with the laws of the state of Oregon and employers' liability insurance with minimum limits of \$10,000,000 per accident.

2. Licensee shall furnish Licensor with certificates of insurance showing that such insurance is in force and will not be canceled or materially modified without thirty (30) days prior written notice to the Licensor. Neither acceptance nor knowledge (by and of Licensor) or the procurement of Licensee of insurance protection of lesser scope than that required to be procured by them under this Agreement shall in any manner or for any purpose constitute or be deemed a waiver by Licensor of the requirements imposed respecting insurance protection, nor shall any such acceptance or knowledge of insurance protection of lesser scope in any manner or for any purpose lessen or modify or constitute a limiting interpretation of the scope of the matters covered by and obligations of Licensee under this Agreement.

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## 11. Breach and Remedies

- (a) If Licensee shall default in any of its obligations under this Agreement and such default continues thirty (30) days after notice thereof has been provided to the Licensee, the Licensor may exercise any of the remedies available to it. The remedies available to Licensor shall include, without limitation: (i) refusal to grant any additional joint use to Licensee until the default is cured; (ii) termination, without further notice, of this Agreement as far as concerns the further granting of joint use; (iii) litigation for injunctive relief; (iv) litigation for damages and costs; (v) substitute performance as provided in Section 11 (b); termination of the entire agreement upon 180 days notice as provided in Paragraph 2 with removal of all contracts; and (vi) litigation to recover sums due.
- (b) If Licensee shall default in the performance of any work that it is obligated to do under this Agreement, Licensor may elect to do such work, and the Licensee shall reimburse the other Party for the cost thereof within thirty (30) days from receipt of the invoice.
- (c) In the event Licensor is required to bring suit for the collection of amounts due or the enforcement of any right hereunder, the Licensor shall be entitled to recover its reasonable attorney's fees and costs, including attorney's fees and costs at trial, on appeal, arbitration, mediation or any appearances before the OPUC.
- (d) Notwithstanding the aforementioned remedies, appropriate representatives of the Parties shall meet promptly upon request and attempt in good faith to resolve disputes that arise concerning this Agreement. If the Parties are unable to reach a resolution themselves, a Party may, by written notice, request the other Party to agree to an alternative dispute resolution procedure (e.g. non-binding mediation, binding arbitration) for the dispute, and the other Party shall respond in writing within ten (10) working days.

## 12. Licensee's Pole Attachment Removal

- (a) Licensee may at any time remove its Attachments from any of Licensor's poles and, in each case Licensee shall immediately notify Licensor through electronic notification via NJUNS of such removal. Removal of the Attachments from any pole shall constitute a termination of Licensee's right to use such pole. Licensee will not be entitled to a refund of any rental on account of any such removal. When Licensee performs maintenance to or removes or replaces its equipment on Licensor's pole, Licensee must chemically treat all field drilled holes and plug any unused holes, including those resulting from removal of equipment. If Licensee fails to adequately plug and treat such holes, Licensor may do so at Licensee's sole risk and expense and Licensee shall pay the cost to Licensor within thirty (30) days from receipt of the invoice.

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- (b) In the event that Licensee shall fail to make any change in its plant required by Licensor or shall fail to remove any Attachments upon cancellation of any specific permit or upon termination of this Agreement, Licensor shall have the right to make such changes or effect such removals and shall pay the cost to Licensor within thirty (30) days from receipt of the invoice.
- (c) If Licensee shall make default in the performance of any work which it is obligated to do under this Agreement, Licensor may elect to do such work, and Licensee shall reimburse Licensor for the actual cost thereof within thirty (30) days from receipt of the invoice.

**13. Abandonment of Joint Use Poles:**

If Licensor desires at any time to abandon any joint use pole, it shall give Licensee notice to that effect. If, after said notice, Licensor shall have no Equipment on such pole but Licensee shall not have removed all of its Attachments, such pole shall immediately become the property of Licensee, and Licensee shall hold harmless the Licensor from every obligation, liability, or cost, and from all damages, expenses or charges incurred thereafter, arising out of, or because of, the presence of or the condition of such pole or any Attachments.

If the Licensor abandons the pole and relocates facilities underground, the Licensor shall request that the Licensee also relocate facilities underground or shall abandon the vacated pole to the Licensee. This Agreement would be negotiated on a case-by-case basis.

**14. Rental Charges and Rates:**

- (a) On or about January 1 of each year, the Licensor shall make a tabulation of the total number of its jointly occupied poles, or on which Licensee has specifically reserved space, as of December 31 of the prior year. For the purpose of the tabulation, any Licensor-owned pole which is used by Licensee for the purpose of attaching Equipment thereto, shall be considered a joint pole and subject to rental fees. ~~Rental fees will not be prorated for Equipment which occupies a pole for less than the full one-year period.~~
- (b) Within sixty (60) days after completion of the tabulations referred to in Section 14 (a), the Licensor shall invoice the Licensee for the rental amount owing, as calculated in accordance with the then existing OPUC Administrative Rules. Payment of the invoiced amount shall be made within thirty (30) days from receipt of the invoice and shall constitute payment for rental for the prior twelve (12) month period beginning January 1. Past due rental amounts shall bear interest at the lesser of the maximum rate permitted by applicable law or 18 percent per annum compounded daily.

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- (c) Compensation payable by third parties for the joint use of poles shall be collected and retained by the Licensor.
- (d) If Licensee attaches Equipment to a pole without obtaining prior authorization from Licensor in accordance with this Agreement, Licensor may levy sanctions against the Licensee as specified in OPUC Administrative Rules then in effect including but not limited to those then existing OPUC regulations. The unauthorized attachment charge shall be payable to the Licensor within thirty (30) days from receipt of the invoice for that charge. Past due unauthorized attachment charges shall bear interest at the lesser of the maximum rate permitted by applicable law or 18 percent per annum compounded daily.
- (e) In the event that Licensee requires a source of electrical energy for power supply to its equipment which constitutes a part of the licensed pole Attachment and apparatus, such energy will be supplied by Licensor in accordance with the provisions of its standard service extension policies and approved rates and tariffs.

**15. Defaults:**

- (a) If Licensee shall fail to comply with any of the provisions of this Agreement or should default in any of its obligations under this Agreement, and shall fail within thirty (30) days after written notice from Licensor to correct such noncompliance or default, Licensor may, at its option, and without further notice, declare this Agreement to be terminated in its entirety, or may terminate the permit covering the pole or poles in respect to which such default or noncompliance shall have occurred. In case of such termination, no refund of accrued rental shall be made.
- (b) If Licensee shall make default in the performance of any work which it is obligated to do under this Agreement, the Licensor may elect to do such work, and the Licensee shall pay to the Licensor for the cost within thirty (30) days from receipt of the invoice.

**16. Sanctions:**

The Licensor may levy sanctions against the Licensee for unauthorized Attachments or for other violations of the duties of pole occupants as specified in OPUC Administrative Rules including but not limited to those then existing OPUC regulations.

**17. Rights of Other Parties:**

Nothing herein shall be construed to limit the right of Licensor, by contract or otherwise, to confer upon others, not parties to this Agreement, rights or privileges to use the joint use poles covered by this Agreement.

**18. Survival of Certain Obligations:**

Any termination of this Agreement in whole or in part shall not release Licensee from any liability or obligations hereunder, whether of indemnity or otherwise, which may have accrued or which may be accruing or which arises out of any claim that may have accrued or be accruing at the time of or prior to termination. However, the survival of certain obligations after this Agreement is terminated shall not relieve Licensee from OPUC sanctions for attachments without a pole attachment agreement.

**19. Waiver of Terms or Conditions:**

The failure of either party to enforce or insist upon compliance with any of the terms or conditions of this Agreement shall not constitute a general waiver or relinquishment of any such terms or conditions, but such conditions and terms shall be and remain at all times in full force and effect.

**20. Supplemental Agreements:**

This Agreement may be amended or supplemented at any time upon written Agreement by the parties hereto. Should an amendment or supplement become necessary, the party desiring such amendment or supplement shall give thirty (30) days written notice to the other party setting out in detail the changes or additions desired.

**21. Payment of Taxes:**

Each party shall pay all taxes and assessments lawfully levied on its own property upon said jointly used poles, and the taxes and the assessments which are levied on said joint use poles shall be paid by the Licensor thereof, but any tax, fee or charge levied on Licensor's poles solely because of their use by the Licensee shall be paid by Licensee.

**22. Interest and Payments:**

Past due amounts shall bear interest at the lesser of the maximum rate permitted by applicable law or 18 percent per annum compounded daily.

**23. License Only:**

No use, however extended, of any of the facilities under the Agreement shall create or vest in Licensee any ownership or property rights therein, but Licensee's rights therein shall be and remain a mere license.

24. Notices:

Any notice, request, consent, demand or statement which is contemplated to be made upon either party by the other party under any of the provisions of this Agreement, shall be in writing and shall be treated as duly delivered when it is either (a) personally delivered to the office of Licensor in the case of a notice to be given to Licensor, or personally delivered to the office of Licensee in the case of a notice to be given to Licensee, or (b) deposited in the United States mail, postage prepaid and properly addressed to the party to be served as follows:

- (i) If notice is to Licensor,  
Central Electric Cooperative, Inc.  
P.O. Box 846 or 2098 N. Hwy 97  
Redmond, Oregon 97756

If a provision of this agreement allows notice by electronic means then notice may be given to Licensor, only for purposes of the provision allowing electronic notice, at:

\_\_\_\_\_  
email or electronic address

- (ii) If notice is to Licensee,  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If a provision of this agreement allows notice by electronic means then notice may be given to Licensee, only for purposes of the provision allowing electronic notice, at:

\_\_\_\_\_  
email or electronic address

25. Construction of Agreement:

This Agreement is deemed executed in the state of Oregon and shall be construed under the laws of the state of Oregon. In the event that a suit or action is instituted to enforce or interpret any of the terms of this Agreement, the parties agree that the proper venue for said suit or action shall be in the Circuit Court for Deschutes County, Oregon.

EXHIBIT 3

**26. Prior Agreements Superseded:**

This Agreement supersedes and replaces any and all previous Agreements entered into by and between Licensor and Licensee with respect to the subject matter of the Agreement.

**27. Assignment of Agreement:**

Neither party shall assign or otherwise transfer this Agreement or any of its rights and interests to any firm, corporation or individual, without the prior written consent of the other party, except to an affiliate.

**28. Entire Agreement:**

This agreement constitutes the entire agreement between the parties pertaining to the subject matter contained in it and supersedes all prior and contemporaneous agreements, representations, and understandings of the parties. No supplement, modification, or amendment of this agreement will be binding unless executed in writing by all the parties. No waiver of any of the provisions of this agreement will constitute a waiver of any other provision, whether or not similar, nor will any waiver constitute a continuing waiver. No waiver will be binding unless executed in writing by the party making the waiver.

**29. Savings Clause:**

If any provision of this agreement is held invalid or unenforceable by any court of final jurisdiction, it is the intent of the parties that all other provisions of this agreement be construed to remain fully valid, enforceable, and binding on the parties.

In witness whereof, the parties have caused this Agreement to be duly executed.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

(Licensor) \_\_\_\_\_,  
Central Electric Cooperative, Inc.,  
an Oregon cooperative corporation

(Licensee) \_\_\_\_\_

By \_\_\_\_\_

By \_\_\_\_\_

Date \_\_\_\_\_

Date \_\_\_\_\_

Its President/CEO

Its \_\_\_\_\_

EXHIBIT 3

**POLE ATTACHMENT LICENSE AGREEMENT EXHIBITS**

**Exhibit A:** Map of Licensor service area

**Exhibit A1:** Map of Licensee service area

**Exhibit B:** Rules and Practices for Telecommunication Attachments

**Exhibit B1:** Standard Clearance Drawings

- 40 Foot Pole – Space Allocation, Dwg. #JU1
- Clearance between Power Neutral and CATV or Phone Attachment, Dwg. #JU2
- Clearance from Overhead Service Wire to CATV or Phone Attachment, Dwg. #JU3
- Clearance from Transformer and Overhead or Underground Service Wire to CATV or Phone Attachment, Dwg. #JU4
- Clearance from 7.2/12.5 kV Primary Underground Riser to CATV or Phone Attachment, Dwg. #JU5
- Clearance from Lights to CATV or Phone Attachments, Dwg. #JU6

**Exhibit A: Map of Licensor service area**

EXHIBIT 3  
19 OF 22

**Exhibit A1: Map of Licensee service area**

**(Supplied by Licensee)**



## EXHIBIT "B"

### RULES AND PRACTICES FOR TELECOMMUNICATION ATTACHMENTS

1. All Licensee facilities attached to Licensor's poles shall be installed in a manner to ensure compliance with the requirements of the National Electrical Safety Code (NESC) in effect at the time of installation.
2. The location of Licensee's Attachments on Licensor's poles shall be approved in writing by the Licensor. Except for services, no Attachments shall be made without prior approval of Licensor.
3. All Licensee Attachments shall be located on the same side of each pole as any existing Attachment, or as designated by the Licensor.
4. On jointly used poles where Licensor has secondary conductors, all Licensee Attachments shall be located to maintain adequate climbing space as per the NESC.
5. No bolt used by Licensee to attach its facilities to a pole shall extend or project more than one (1) inch beyond its nut.
6. Licensee shall install and maintain any and all of its facilities in a neat and workmanlike manner consistent with the overall appearance of the jointly used pole and Licensee shall be solely responsible for compliance with the specifications referred to in Section 3 of this License Agreement.
7. All down guys, head guys or messenger dead ends installed by Licensee shall be attached to jointly used poles by the use of "thru" bolts. Such bolts placed in a "bucking" position shall have at least three inches vertical clearance. Under no circumstances shall Licensee install down guys, head guys or messenger dead ends by means of encircling jointly used poles with such Attachments. All guys and anchors shall be installed prior to installation of any messenger wire or cables.
8. The following steps and conditions shall be followed when Licensee removes old poles from the field. The entire butt of the old pole shall be removed. DO NOT partially pull the butt, cut it off and/or leave a remaining portion in the ground. Fully remove all associated hardware, including anchors and ground rods, with the old pole. Fill and compact the pole hole to eliminate future settling. Restore landscaping, ditches, streets and sidewalks to the specifications required by the governing authority having jurisdiction over said infrastructure.

EXHIBIT 3

21 OF 22

**Exhibit B1: Standard Clearance Drawings**

**FRANCIS HANSEN & MARTIN, LLP**

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Martin E. Hansen\*  
Gerald A. Martin

Attorneys at Law  
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Bend, Oregon 97701-1914

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† Admitted in Oregon and California

---

February 11, 2005

Jay Nusbaum  
Perkins Coie LLP  
1120 NW Couch 10<sup>th</sup> Floor  
Portland, OR 97209

**Re: CEC vs. Qwest – Revised Joint Pole Agreement**

Dear Jay:

I'm enclosing with this letter a copy of CEC's revised joint pole agreement. As we discussed previously, CEC has revised its joint pole agreement to take into account our discussions with the PUC and our review of the PUC recent rulings in the CLPUD v. Verizon case.

We believe this agreement is in total compliance with the PUC rules and regulations and is a very fair reciprocal agreement. We would ask that you review this with your client and have your client execute this agreement and return it to me.

Call if you have any questions.

Sincerely,

MARTIN E. HANSEN  
MEH:ph  
cc:

Dave Markham

EXHIBIT 4

1 OF 1

**FRANCIS HANSEN & MARTIN, LLP**

Attorneys at Law  
1148 NW Hill Street  
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---

February 11, 2005

Brooks E Harlow  
Miller Nash LLP  
601 Union St Ste 4400  
Seattle WA 98101

**Re: CEC - Bend Cable Revised Joint Pole Agreement**

Dear Mr. Harlow:

As promised, I am submitting with this letter CEC's revised joint pole agreement. By "revised" I'm referring to the changes made in light of the recent PUC orders that we've discussed previously.

Please review this contract with your client and call me with any questions. We will need this agreement signed soon. Remember your permit is expiring.

Sincerely,

MARTIN E. HANSEN

MEH:ph

enclosure

cc: Dave Markam

EXHIBIT 5  
1 OF 1

**FRANCIS HANSEN & MARTIN, LLP**

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February 11, 2005

**HAND DELIVERED**

Gail Stone  
Jefferson County School District  
Business Department  
Jefferson County School District #509J  
445 SE Buff Street  
Madras, OR 97741

**RE: CEC – JOINT POLE AGREEMENT**

Dear Ms. Stone:

Our office represents Central Electric Cooperative. As you know, your company has been placing attachments on Central Electric Cooperative poles pursuant to a joint pole agreement dated November 3, 1998.

New PUC rules and regulations make the existing joint pole contact agreement with your company outdated and impractical. We have spent considerable time redrafting our joint pole agreement for use with your company and all other companies that place pole attachments on CEC's poles. I'm enclosing a copy of that joint pole agreement with this letter.

~~We need to have new joint pole agreements signed by all companies such as yours. I would ask that you review this agreement, have it executed and return an executed copy to my office. If you or your attorney have any questions about the agreement, feel free to contact me directly.~~

Pursuant to the original agreement, we are exercising our right to terminate that agreement. We are hereby notifying you that the old agreement of February 9, 1961 is being terminated by this letter. With this agreement terminated, we would ask that you expedite your review and execution of the new joint pole agreement.

EXHIBIT 6  
1 OF 2

Gail Stone  
Jefferson County School District  
February 11, 2005  
Page 2

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Again , call if you have any questions.

Sincerely,

MARTIN E. HANSEN

MEH:ph  
enclosure

cc: Dave Markham

**FRANCIS HANSEN & MARTIN, LLP**

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February 11, 2005

Kathy Moisan  
CenturyTel Contract Communications  
Building A  
1151 CenturyTel Drive  
Wentzville, MO 963385

**RE: CEC -- JOINT POLE AGREEMENT**

Dear Ms. Moisan:

Our office represents Central Electric Cooperative. As you know, your company has been placing attachments on Central Electric Cooperative poles pursuant to a joint pole agreement dated February 9, 1961.

New PUC rules and regulations make the existing joint pole agreement with your company outdated and impractical. We have spent considerable time redrafting our joint pole agreement for use with your company and all other companies that place pole attachments on CEC's poles. I'm enclosing a copy of that joint pole agreement with this letter.

We need to have new joint pole agreements signed by all companies such as yours. I would ask that you review this agreement, have it executed and return an executed copy to my office. If you or your attorney have any questions about the agreement, feel free to contact me directly.

Pursuant to the original agreement, we are exercising our right to terminate that agreement. We are hereby notifying you that the old agreement of February 9, 1961 is being terminated by this letter. With this agreement terminated, we would ask that you expedite your review and execution of the new joint pole agreement.

EXHIBIT 7  
1 OF 2

Again , call if you have any questions.

Sincerely,

MARTIN E. HANSEN

MEH:ph  
enclosure

cc: Dave Markham



**FRANCIS HANSEN & MARTIN, LLP**

C. E. "Win" Francis  
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February 11, 2005

Tony Ashcraft, Manager  
Crestview Cable Communications  
350 NE Durham Street  
Prineville, OR 97754

**RE: CEC – JOINT POLE AGREEMENT**

Dear Mr. Ashcraft:

Our office represents Central Electric Cooperative. As you know, your company has been placing attachments on Central Electric Cooperative poles pursuant to a joint pole agreement dated December 14, 1970.

New PUC rules and regulations make the existing joint pole agreement with your company outdated and impractical. We have spent considerable time redrafting our joint pole agreement for use with your company and all other companies that place pole attachments on CEC's poles. I'm enclosing a copy of that joint pole agreement with this letter.

We need to have new joint pole agreements signed by all companies such as yours. I would ask that you review this agreement, have it executed and return an executed copy to my office. If you or your attorney have any questions about the agreement, feel free to contact me directly.

Pursuant to the original agreement, we are exercising our right to terminate that agreement. We are hereby notifying you that the old agreement of December 14, 1970 is being terminated by this letter. With this agreement terminated, we would ask that you expedite your review and execution of the new joint pole agreement.

EXHIBIT 8  
1 OF 2

Again , call if you have any questions.

Sincerely,

MARTIN E. HANSEN

MEH:ph  
enclosure

cc: Dave Markham

**FRANCIS HANSEN & MARTIN, LLP**

C. E. "Win" Francis  
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February 11, 2005

Laura Raypush  
PacifiCorp  
650 NE Holladay, Ste. 700  
Portland, OR 97232

**RE: CEC – JOINT POLE AGREEMENT**

Dear Ms. Raypush:

Our office represents Central Electric Cooperative. As you know, your company has been placing attachments on Central Electric Cooperative poles pursuant to a joint use agreement dated June 19, 1981.

New PUC rules and regulations make the existing joint use agreement with your company outdated and impractical. We have spent considerable time redrafting our joint pole agreement for use with your company and all other companies that place pole attachments on CEC's poles. I'm enclosing a copy of that joint pole agreement with this letter.

We need to have new joint pole agreements signed by all companies such as yours. I would ask that you review this agreement, have it executed and return an executed copy to my office. If you or your attorney have any questions about the agreement, feel free to contact me directly.

Pursuant to the original agreement, we are exercising our right to terminate that agreement. We are hereby notifying you that the old agreement of June 19, 1981 is being terminated by this letter. With this agreement terminated, we would ask that you expedite your review and execution of the new joint pole agreement.

EXHIBIT 9  
1 OF 2

Laura Raypush  
PacifiCorp  
February 11, 2005  
Page 2

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Again , call if you have any questions.

Sincerely,

MARTIN E. HANSEN

MEH:ph  
enclosure

cc: Dave Markham

**FRANCIS HANSEN & MARTIN, LLP**

C. E. "Win" Francis  
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February 11, 2005

Kelli Alexander  
SPRINT  
6360 Sprint Parkway Carver A  
Overland Park, KS 66251

**RE: CEC – JOINT POLE AGREEMENT**

Dear Ms. Alexander:

Our office represents Central Electric Cooperative. As you know, your company has been placing attachments on Central Electric Cooperative poles pursuant to a joint use permit. The termination of your joint use permit is effective sixty (60) days from the date of this notice.

New PUC rules and regulations make the existing joint use permit with your company outdated and impractical. We have spent considerable time redrafting our joint pole agreement for use with your company and all other companies that place pole attachments on CEC's poles. I'm enclosing a copy of that joint pole agreement with this letter.

We need to have new joint pole agreements signed by all companies such as yours. I would ask that you review this agreement, have it executed and return an executed copy to my office. If you or your attorney have any questions about the agreement, feel free to contact me directly.

Pursuant to the original joint use permit, we are exercising our right to terminate that permit. We are hereby notifying you that the old permit is being terminated by this letter. With this permit terminated, we would ask that you expedite your review and execution of the new joint pole agreement.

EXHIBIT 10  
1 OF 2

Again , call if you have any questions.

Sincerely,

MARTIN E. HANSEN

MEH:ph  
enclosure

cc: Dave Markham

**FRANCIS HANSEN & MARTIN, LLP**

C. E. "Win" Francis  
Martin E. Hansen\*  
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February 11, 2005

Tumalo State Park  
High Desert Management Unit  
62976 OB Riley Road  
Bend, OR 97701

**RE: CEC – JOINT POLE AGREEMENT**

Dear Sir or Madam:

Our office represents Central Electric Cooperative. As you know, your company has been placing attachments on Central Electric Cooperative poles pursuant to a joint pole permit. The termination of your joint pole permit is effective sixty (60) days from the date of this notice.

New PUC rules and regulations make the existing joint pole permit with your company outdated and impractical. We have spent considerable time redrafting our joint pole agreement for use with your company and all other companies that place pole attachments on CEC's poles. I'm enclosing a copy of that joint pole agreement with this letter.

We need to have new joint pole agreements signed by all companies such as yours. I would ask that you review this agreement, have it executed and return an executed copy to my office. If you or your attorney have any questions about the agreement, feel free to contact me directly.

Pursuant to the original permit, we are exercising our right to terminate that permit. We are hereby notifying you that the old permit is being terminated by this letter. With this permit terminated, we would ask that you expedite your review and execution of the new joint pole agreement.

EXHIBIT 11  
1 OF 2

Again , call if you have any questions.

Sincerely,

MARTIN E. HANSEN

MEH:ph  
enclosure

cc: Dave Markham