

to identify the facilities as Applicant's facilities.

17.02 Removal of Untagged or Unauthorized Facilities. Subject to the provisions of subsections (a)-(d) of this section, SWBT may, without notice to any person or entity, remove from SWBT's poles or any part of SWBT's conduit system any untagged or unmarked facilities, including any such facilities owned or used by Applicant, if SWBT determines that such facilities are not the subject of any current license authorizing their continued attachment to SWBT's poles or occupancy of SWBT's conduit system.

- (a) Before removing any such untagged or unmarked facilities, SWBT shall first attempt to determine whether the facilities are operational or subject to a license issued under this Agreement or a prior licensing agreement.
- (b) SWBT shall not remove untagged or unmarked facilities which are thought to be operational without first making reasonable efforts to (1) determine the identity of the owner or other person or entity thought to be responsible for the facilities and (2) give advance written notice to such person or entity.
- (c) If the facilities appear to be facilities which are subject to a current license granted to Applicant under this Agreement, SWBT shall give written notice to Applicant requesting Applicant to tag or mark the facilities within 60 days and Applicant shall either tag the facilities within the 60-day period, advise SWBT in writing of its schedule for tagging the facilities, or notify SWBT in writing that it disclaims ownership of or responsibility for the facilities. If Applicant disclaims ownership of or responsibility for the facilities, Applicant shall disclose to SWBT the identity of the owner or other person or entity thought by Applicant to be responsible for the facilities.
- (d) If the facilities appear to be facilities used by Applicant but not subject to a current license granted under this Agreement, the provisions of Sections 17.04-17.12 shall apply.

17.03 Applicant's Verification That Presently Attached Facilities Are Subject to Existing Licenses. Applicant warrants and represents to SWBT that Applicant has verified or will, within six months after the effective date of this Agreement, verify that all facilities owned or used by Applicant and presently attached to SWBT's poles or occupying any part of SWBT's conduit system within this State have been disclosed to SWBT and are subject to existing licenses. If it is determined that any of Applicant's facilities are not the subject of existing licenses, such facilities will be made subject to licenses issued under this Agreement or promptly removed from SWBT's poles or conduits.

17.04 Updating of Plant Location Records. Applicant shall furnish SWBT, upon request, with such information as may from time to time be necessary for SWBT to correct and update SWBT's pole and conduit maps and records, cable plat maps, and other plant location records, if any, recording or logging assignments of pole, duct, and conduit space.

17.05 Notice to Applicant. If any of Applicant's facilities for which no license is presently in effect are found attached to SWBT's poles or anchors or within any part of SWBT's conduit system, SWBT, without prejudice to other rights or remedies available to SWBT under this Agreement, and without prejudice to any rights or remedies which may exist independent of this Agreement, shall send a written notice to Applicant advising Applicant that no license is presently in effect with respect to the facilities and that Applicant must, within 15 business days, respond to the notice as provided in Section 17.06 of this Agreement.

17.06 Applicant's Response. Within 15 business days after receiving a notice under Section 17.05 of this Agreement, Applicant shall acknowledge receipt of the notice and submit to SWBT, in writing, either:

- (a) a denial or disclaimer of ownership or other interest in the facilities, together with an explanation of the factual and claimed legal basis for such denial or disclaimer;
- (b) a statement that the facilities are the subject of a current license, together with an explanation of the factual and claimed legal basis for Applicant's assertion that the facilities are currently licensed; or
- (c) an application for a new or amended license with respect to such facilities, together with a full and complete explanation of the circumstances under which such facilities were attached to, placed within, or allowed to remain on or in SWBT's poles or any part of SWBT's conduit system. Such explanation shall include, at a minimum, the following:
 - (1) the date (or estimated date) when such facilities were attached to SWBT's poles or placed in SWBT's conduit system, and the factual basis supporting Applicant's selection of such date (or estimated date); and
 - (2) the factual basis for Applicant's assertion, if any, that decisions to attach, place or allow the facilities to remain on or in SWBT's poles or conduit system were made in good faith and without intent to circumvent SWBT's pole attachment or conduit occupancy licensing requirements.

17.07 Denial or Disclaimer of Ownership or Other Interest. Applicant's submission to SWBT of a denial or disclaimer of ownership or other interest in the facilities shall constitute Applicant's waiver of any objection Applicant may have to SWBT's removal of the facilities. Submission of such a denial or disclaimer shall not be construed as an agreement by Applicant to pay any charges associated with removal of the facilities; provided, however, that nothing contained in this section shall prohibit SWBT from invoking the dispute resolution process or filing suit, in a court of competent jurisdiction, to establish that Applicant is liable to SWBT for the costs of removal.

17.08 Review by SWBT of Licensing Status. Within 15 business days after receiving

Applicant's statement that the facilities are the subject of a current license, SWBT shall review Applicant's explanation of the factual and claimed legal basis for Applicant's assertion that the facilities are currently licensed and shall advise Applicant, in writing, whether it agrees or disagrees with Applicant's assertion. If SWBT agrees with Applicant's assertions, the parties may amend the applicable license and no further action shall be required of Applicant. If SWBT does not accept Applicant's position, Applicant shall, within 15 business days, apply for a new or amended license as provided by Section 17.06(c) of this Agreement.

17.09 Approval of License and Retroactive Charges. If SWBT approves the application for a new or amended license, Applicant shall be liable to SWBT for all fees and charges associated with the unauthorized attachments as specified in Section 17.10 of this Agreement. The issuance of a new or amended license as provided by this article shall not operate retroactively or constitute a waiver by SWBT of any of its rights or privileges under this Agreement or otherwise.

17.10 Fees and Charges. Applicant shall be liable to SWBT for all fees and charges associated with any unauthorized pole attachment or conduit occupancy for which it is responsible. License fees and charges shall continue to accrue until the unauthorized facilities are removed from SWBT's poles or conduit system and shall include, but not be limited to, all fees and charges which would have been due and payable if Applicant and its predecessors had continuously complied with all applicable SWBT licensing requirements. Such fees and charges shall be due and payable 30 days after the date of the bill or invoice stating such fees and charges and shall be determined as follows. The parties shall engage in good faith discussions to reach a mutually agreeable determination as to the amount due and owing in accordance with APPENDIX I. If the parties are unable to reach agreement on the amount due and owing, the amount owing with respect to each unauthorized attachment or occupancy shall be equal to three times the annual attachment and occupancy fees in effect on the date Applicant is notified by SWBT of the unauthorized attachment or occupancy pursuant to Section 17.05 of this Agreement.

17.11 Removal of Unauthorized Attachments. If Applicant does not apply for a new or amended pole attachment license with respect to unauthorized facilities within the specified period of time, or if such application is received and specifically disapproved, SWBT shall by written notice request to Applicant to remove its unauthorized facilities within 60 days from the date of notice and Applicant shall remove the facilities within such 60-day period; provided, however, that SWBT may request Applicant to remove such facilities at an earlier date if such earlier removal is necessary for reasons beyond SWBT's control. If the facilities have not been removed within the time specified in the notice, SWBT may, at SWBT's option, remove Applicant's facilities at Applicant's expense.

17.12 No Ratification of Unlicensed Attachments or Unauthorized Use of SWBT's Facilities. No act or failure to act by SWBT with regard to any unlicensed attachment or occupancy or unauthorized use of SWBT's facilities shall be deemed to constitute a ratification by SWBT of the unlicensed attachment or occupancy or unauthorized use.

ARTICLE 18: REMOVAL OF APPLICANT'S FACILITIES

18.01 Applicant Responsible for Removing Facilities. Applicant shall be responsible for removing its facilities from SWBT's poles, ducts, conduits, and rights-of-way and shall bear all expenses arising out of or in connection with the removal of its facilities from SWBT's poles, ducts, conduits, and rights-of-way in accordance with the provisions of this article.

- (a) Applicant shall give SWBT, when practicable, at least 30 days' advance notice in writing of its intent to remove facilities from any part of SWBT's conduit system and the proposed method of removal. The notice shall include the locations of the facilities to be removed, the name, telephone number of the manager responsible for the removal of the facilities, and the estimated dates when removal of the facilities will begin and end.
- (b) Applicant shall, if requested by SWBT to do so, place a pull mandrel (slug) through all or any specified part of the duct which was occupied by Applicant.
- (c) Except as otherwise agreed upon in writing by the parties, Applicant must, after removing its facilities, plug all previously occupied ducts at the entrances to SWBT's manholes (if SWBT would itself plug the ducts under the same circumstances) in accordance with the standards set by SWBT for its operations, provided that such standards have been communicated in writing to Applicant at least 10 days in advance of the removal of Applicant's facilities.
- (d) Applicant shall be solely responsible for the removal of its own facilities and for (1) paying all persons and entities which provide materials, labor, access to real or personal property, or other goods or services in connection with the removal of Applicant's facilities from SWBT's poles, ducts, conduits, or rights-of-way and (2) directing the activities of all such personnel while they are physically present on, within, or in the vicinity of SWBT's poles, ducts, conduits, or rights-of-way.
- (e) When Applicant no longer intends to occupy space on a pole or in a conduit, Applicant will provide written notification to SWBT that it wishes to terminate the license with respect to such space and will remove its facilities from the space described in the notice. Upon removal of Applicant's facilities, the license shall terminate and the space shall be available for reassignment.

18.02 Removal of Facilities Not in Active Use. At SWBT's request, Applicant shall remove from SWBT's poles, ducts, conduits, and rights-of-way any of Applicant's facilities which are no longer in active use; provided, however, that Applicant shall not be required to remove such facilities when due cause and justification exists for allowing them to remain in place. Applicant shall not abandon any of its facilities by leaving them on SWBT's poles, within SWBT's conduit system, at any location where they may block access to or obstruct SWBT's poles or any part of SWBT's conduit system, or on any public or private property in the vicinity of SWBT's

poles, ducts, conduits, or rights-of-way.

18.03 Removal Following Termination of License. Applicant shall remove its facilities from SWBT's poles within 60 days, or within such other period of time as shall be mutually agreeable to the parties, after termination of the license authorizing the attachment of such facilities to SWBT's poles or the placement of such facilities in SWBT's conduit system.

18.04 Removal Following Replacement of Facilities. Applicant shall remove facilities no longer in service from SWBT's poles or conduit system within 60 days, or within such other period of time as shall be mutually agreeable to the parties, after the date Applicant replaces existing facilities on a pole or in a conduit with substitute facilities on the same pole or in the same conduit; provided, however, that removal of facilities from the maintenance duct shall be governed by Sections 12.04, 13.03, and 15.02 of this Agreement and not by this subsection.

18.05 Removal to Avoid Forfeiture. If the presence of Applicant's facilities on SWBT's poles or in SWBT's ducts, conduits, or rights-of-way would cause a forfeiture of the rights of SWBT to occupy the property where such pole, duct, conduit, or right-of-way is located, SWBT will promptly notify Applicant in writing and Applicant shall not, without due cause and justification, refuse to remove its facilities within such time as may be required to prevent such forfeiture. SWBT will give Applicant not less than 60 days from the date of notice to remove Applicant's facilities unless prior removal is required to prevent the forfeiture of SWBT's rights. At Applicant's request, the parties will engage in good faith negotiations with each other, with joint users, and with third party property owners and cooperatively take such other steps as may be necessary to avoid the unnecessary removal of Applicant's facilities in the face of a threatened forfeiture.

18.06 Notice of Completion of Removal Activities. Applicant shall give written notice to SWBT stating the date on which the removal of its facilities from SWBT's poles, ducts, conduits, and rights-of-way has been completed. Charges shall continue to accrue with respect to such facilities until Applicant's facilities have been removed, pull mandrels (slugs) have been pulled if required by Section 18.01(b) of this Agreement, Applicant has plugged all previously occupied ducts at the entrances to SWBT's manholes as required by Section 18.01(c) of this Agreement, and the notice required by this section has been given.

18.07 Notice of SWBT's Intent to Remove Facilities. If Applicant fails to remove its facilities from SWBT's poles or conduit system in accordance with the provisions of Sections 18.01-18.06 of this Agreement, SWBT may remove such facilities 60 days after giving Applicant written notice of its intent to do so. The notice shall state:

- (a) the date when SWBT plans to commence removal of Applicant's facilities, and that Applicant may remove the facilities at Applicant's sole cost and expense at any time before the date specified;
- (b) SWBT's plans with respect to disposition of the facilities removed; and

- (c) that Applicant's failure to remove the facilities or make alternative arrangements with SWBT for removal and disposition of the facilities shall constitute an abandonment of the facilities and of any interest therein.

18.08 Removal of Facilities by SWBT. If SWBT removes any of Applicant's facilities pursuant to this article, Applicant shall reimburse SWBT for SWBT's costs in connection with the removal, storage, delivery, or other disposition of the removed facilities.

18.09 Reattachment or Subsequent Attachment Following Removal. After Applicant's facilities have been properly removed pursuant to the provisions of this article, neither the removed facilities nor replacement facilities shall be attached to SWBT's poles or placed in SWBT's conduit system until Applicant has first submitted new applications for the facilities and complied with the provisions of this Agreement.

ARTICLE 19: FEES, CHARGES, AND BILLING

19.01 One-time Contract Administration Fee. SWBT may charge Applicant a one-time contract administration fee as provided in APPENDIX I. Such fee shall be assessed for work performed in the initial processing of this Agreement, and Applicant agrees that such fee shall be non-refundable upon acceptance of this Agreement by SWBT. The one-time contract administration fee is not a fee assessed for individual license applications under this Agreement. SWBT may also charge Applicant contract administration fees in connection with renegotiations of this Agreement at Applicant's request.

19.02 Administrative Record-keeping Fees. SWBT may charge Applicant cost-based administrative record-keeping fees (e.g., fees associated with records and billing changes resulting from any sale, consolidation, or other transfer of Applicant's business or facilities, name changes, and the like) as provided in APPENDIX I.

19.03 Semiannual Attachment and Occupancy Fees. SWBT's semiannual fees for attachments to SWBT's poles and occupancy of SWBT's ducts and conduits are specified in APPENDIX I. For all attachments to SWBT's poles and occupancy of SWBT's ducts and conduits, Applicant will pay SWBT's semiannual charges as specified in APPENDIX I. These charges apply not only to pole attachments and conduit occupancy authorized pursuant to licenses subject to this Agreement but also to pole attachments and conduit occupancy, if any, commenced by Applicant or its predecessors without authorization by SWBT.

19.04 Billing for Attachment and Occupancy Fees. Semiannual attachment and occupancy fees under this Agreement and licenses issued hereunder shall be payable in advance. Fees for pole attachments shall be based on the number of pole attachments for which licenses have been issued as of the date of billing by SWBT, shall be determined in accordance with the schedule of charges set forth in APPENDIX I, and shall be payable semiannually in advance. Fees for conduit occupancy shall be based on the number of duct feet subject to occupancy by Applicant under licenses issued as of the date of billing by SWBT, shall be determined in accordance with the schedule of charges set forth in APPENDIX I, and shall be payable semiannually in advance. Pole

attachment and conduit occupancy space assigned to Applicant prior to the issuance of a license shall be billed in the same manner as if a license had been issued on the date of assignment.

- (a) Bills shall be submitted to Applicant for two semiannual billing periods, the first period including charges for the months of January through June and the second including charges for the months of July through December.
- (b) Attachment and occupancy status shall be considered to have commenced as of January 1 for any pole attachment or conduit occupancy for which a license is issued between January 1 and June 30 of the same calendar year and as of July 1 for any pole attachment or conduit occupancy for which a license is issued between July 1 and December 31 of the same calendar year. Charges associated with newly licensed pole attachments and conduit occupancy shall not be prorated and shall be payable in advance; provided, however, that nothing herein shall preclude SWBT from billing such charges in arrears.
- (c) Charges shall not be adjusted or prorated retroactively in the event of the removal of Applicant's facilities.

19.05 Pre-license Survey Fees. With respect to pre-license surveys conducted by SWBT pursuant to Section 9.05 of this Agreement, SWBT may charge Applicant cost-based pre-license survey fees as provided in APPENDIX I.

19.06 Make-ready Charges. Applicant will pay make-ready charges, if any, as specified in this section and APPENDIX I. As provided in Section 10.04 of this Agreement, SWBT will furnish Applicant an estimate of the charges for make-ready work no later than 45 days after receipt by SWBT of Applicant's completed application or within such other period as may be mutually agreed upon in writing by the parties. The estimate will be stated on SWBT Form SW-9434 ("Authorization for Pre-license Survey or Make-Ready Work"), a copy of which is attached hereto as part of APPENDIX III. SWBT shall not be required to perform the make-ready work until Applicant has prepaid the estimated make-ready charges in full. After make-ready work has been completed by SWBT, Applicant shall pay SWBT the difference between the estimated make-ready charges and the actual charges, if the actual charges are greater than the estimate, or SWBT shall refund to Applicant the difference between the estimated make-ready charges and the actual charges, if the actual charges are less than the estimate.

19.07 Due Date for Payment. For fees and charges other than charges for make-ready work, each bill or invoice submitted by SWBT to Applicant shall state the date that payment is due, which date shall be not less than 60 days after the date of the bill or invoice. Applicant will pay each such bill or invoice on or before the stated due date. For make-ready work, the payment due date shall be not less than 30 days after the date of the bill or invoice.

19.08 Modification of Fees and Charges. Subject to applicable federal and state laws, regulations, and agency orders, SWBT shall have the right to modify all charges and fees set forth in this Agreement as provided in this section.

- (a) Upon at least 60 days' prior written notice to Applicant, SWBT may change the amounts of any fee or charge specified in APPENDIX I.
- (1) The notice shall state the effective date of the changes, which shall be no earlier than the 60th day after the notice is given.
 - (2) The changes shall be effective on the effective date stated in the notice unless stayed or prohibited by a court or agency of competent jurisdiction.
 - (3) The changes shall be reflected on the first semiannual bill issued on or after the effective date specified in the notice.
- (b) If the fees and charges set forth in the notice are not acceptable to Applicant, Applicant may, notwithstanding any other provisions of this Agreement, terminate this Agreement or seek relief before a court or agency of competent jurisdiction.

19.09 Disputes over Charges and Charging Methodologies. The parties acknowledge that the Pole Attachment Act grants the FCC regulatory authority over the rates, terms, and conditions of access to poles, ducts, conduits, and rights-of-way. The parties further acknowledge that, as of the date of this Agreement, this State has not elected to assume reverse preemptive regulatory authority over such rates, terms, and conditions by certifying to the FCC that it has made such election. Accordingly, further challenges to SWBT's charging methodologies shall be brought, in the first instance, before the FCC in accordance with FCC procedural rules unless this State elects to preempt the regulation of pole attachment rates, terms, and conditions of access; provided, however, that nothing contained in this section shall be construed as affecting the right of either party to seek relief from any court or agency of competent jurisdiction in connection with the negotiation, arbitration, and approval of interconnection agreements under 47 U.S.C. § 252.

19.10 Charges and Fees Subject to Applicable Laws, Regulations, Rules, and Commission Orders. All charges and fees set forth in this Agreement, including charges and fees set forth in this article and APPENDIX I, shall be subject to all applicable federal and state laws, regulations, and commission orders, including but not limited to the Pole Attachment Act, regulations, rules, and commission orders issued thereunder.

ARTICLE 20: PERFORMANCE AND PAYMENT BONDS

20.01 Bond May Be Required. SWBT may require Applicant, authorized contractors, and other persons acting on Applicant's behalf to execute performance and payment bonds (or provide other forms of security) in amounts and on terms sufficient to guarantee the performance of their respective obligations arising out of or in connection with this Agreement.

- (a) If Applicant elects to perform make-ready work or facilities modifications under Sections 10.02-10.05 of this Agreement, SWBT may require Applicant, authorized contractors, and other persons acting on Applicant's behalf to

execute bonds equivalent to those which would be required by SWBT if the work had been performed by contractors, subcontractors, or other persons selected directly by SWBT.

- (b) No other bond shall be required of Applicant to secure obligations arising under this Agreement in the absence of due cause and justification.
- (c) If a bond or similar form of assurance is required of Applicant, an authorized contractor, or other person acting on Applicant's behalf, Applicant shall promptly submit to SWBT, upon request, adequate proof that the bond remains in full force and effect and provide certification from the company issuing the bond that the bond will not be cancelled, changed or materially altered without first providing SWBT 60 days written notice.
- (d) SWBT may communicate directly with the issuer of any bond issued pursuant to this section to verify the terms of the bond, to confirm that the bond remains in force, and to make demand on the issuer for payment or performance of any obligations secured by the bond.

20.02 Payment and Performance Bonds in Favor of Contractors and Subcontractors.

Applicant shall be responsible for paying all employees, contractors, subcontractors, mechanics, materialmen and other persons or entities performing work or providing materials in connection with (a) the performance of make-ready work or facilities modifications by Applicant, authorized contractors, or other persons acting on Applicant's behalf under Sections 10.02-10.05 of this Agreement or (b) the construction, attachment, use, inspection, maintenance, repair, rearrangement, modification, and removal of any of Applicant's facilities attached or to be attached to SWBT's poles or placed or to be placed within SWBT's ducts, conduits, or rights-of-way. In the event any claim or demand is made on SWBT by any such employee, contractor, subcontractor, mechanic, materialman, or other person or entity providing such materials or performing such work, SWBT may require, in addition to any security provided under Section 20.01 of this Agreement, that Applicant execute payment or performance bonds, or provide such other security, as SWBT may deem reasonable or necessary to protect SWBT from any such claim or demand.

ARTICLE 21: APPLICANT'S LIABILITY AND DUTY TO INDEMNIFY SWBT

21.01 **Definitions.** The definitions in this section shall apply to all sections of this article.

- (a) The phrase "claims, demands, and causes of action" includes claims, demands, causes of action, damages, payments, costs, charges, attorneys' fees, expenses, and liabilities of every kind and character.
- (b) "Negligence" includes both negligent acts and omissions.
- (c) "Personal injury" includes but is not limited to bodily injury, physical injury,

mental injury, pain and suffering, mental anguish, and mental distress.

- (d) When used in the phrase “protect, defend, indemnify and save SWBT harmless from and against any and all claims, demands, and causes of action” and similar phrases, the term “SWBT” includes Southwestern Bell Telephone Company, its officers, directors, employees, agents, representatives, and attorneys; SWBT’s corporate parent, SBC Communications Inc., and its officers, directors, employees, agents, representatives, and attorneys; and all subsidiaries and affiliates of Southwestern Bell Telephone Company and SBC Communications Inc. and their respective officers, directors, employees, agents, representatives, and attorneys.
- (e) When used in the phrase “protect, defend, indemnify and save SWBT harmless from and against any and all claims, demands, and causes of action” and similar phrases, the term “SWBT” does not include contractors, subcontractors, and other vendors acting on SWBT’s behalf.

21.02 INDEMNIFICATION FOR CERTAIN CLAIMS RELATED TO THE PERSONAL INJURY OR DEATH OF PERSONS ACTING ON APPLICANT’S BEHALF. APPLICANT SPECIFICALLY AGREES TO PROTECT, DEFEND, INDEMNIFY AND SAVE SWBT HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, AND CAUSES OF ACTION ARISING OUT OF OR IN CONNECTION WITH THE PERSONAL INJURY OR DEATH OF ANY PERSON ACTING ON APPLICANT’S BEHALF AND RESULTING FROM ANY INCIDENT OCCURRING ON, WITHIN, OR IN THE VICINITY OF SWBT’S POLES, DUCTS, CONDUITS, OR RIGHTS-OF-WAY WHILE SUCH PERSON WAS ON THE PREMISES FOR THE OSTENSIBLE PURPOSE OF PERFORMING WORK ON BEHALF OF APPLICANT. THIS SECTION EXPRESSLY REQUIRES APPLICANT TO PROTECT, DEFEND, INDEMNIFY AND SAVE SWBT HARMLESS FROM AND AGAINST ANY SUCH CLAIMS, DEMANDS, AND CAUSES OF ACTION ARISING OUT OF OR IN CONNECTION WITH NEGLIGENT AND ALLEGEDLY NEGLIGENT ACTS AND OMISSIONS OF SWBT AND PERSONS ACTING ON SWBT’S BEHALF. NOTHING CONTAINED IN THIS SECTION SHALL BE CONSTRUED AS REQUIRING APPLICANT TO (a) INDEMNIFY SWBT FROM ANY LIABILITY ARISING OUT OF OR IN CONNECTION WITH SWBT’S WILLFUL OR INTENTIONAL MISCONDUCT OR FOR ANY ACTS OR OMISSIONS CONSTITUTING GROSS NEGLIGENCE BY SWBT, (b) FOREGO ANY CLAIMS APPLICANT MAY HAVE AGAINST CONTRACTORS, SUBCONTRACTORS, AND OTHER VENDORS ACTING ON SWBT’S BEHALF, (c) INDEMNIFY SWBT’S CONTRACTORS, SUBCONTRACTORS, OR OTHER VENDORS ACTING ON SWBT’S BEHALF, OR (d) INDEMNIFY SWBT OR ANY PERSONS ACTING ON SWBT’S BEHALF IN CONTRAVENTION OF FEDERAL LAW OR IN CONTRAVENTION OF THE LAWS OF THIS STATE.

21.03 Indemnification for Applicant’s Acts. Applicant agrees to protect, defend, indemnify and save SWBT harmless from and against any and all claims, demands, and causes of action arising out of, in connection with, or as a result of:

- (a) Applicant's performance of this Agreement;
- (b) the performance by Applicant of any act authorized, or permitted under this Agreement or any license subject to this Agreement; or
- (c) the failure by Applicant, or any person or entity acting on Applicant's behalf, to comply with any of the terms or conditions of this Agreement.

21.04 Personal Injury, Death, and Property Damage Claims Arising Out of Applicant's Acts or Omissions. Applicant agrees to protect, defend, indemnify and save SWBT harmless from and against any and all claims, demands, and causes of action, of every kind and character, arising out of or in connection with personal injury, death, or property damage suffered by any person or entity and arising, in whole or in part, out of or in connection with any act or omission of Applicant (or any person acting on Applicant's behalf) related to the planned or actual construction, attachment, use, inspection, maintenance, repair, rearrangement, modification, or removal of facilities attached or to be attached to SWBT's poles or facilities or placed or to be placed in SWBT's ducts, conduits, or rights-of-way.

21.05 Personal Injury, Death, and Property Damage Claims Arising Out of the Presence of Applicant's Facilities on, Within, or in the Vicinity of SWBT's Poles, Ducts, Conduits, or Rights-of-Way. Applicant agrees to protect, defend, indemnify and save SWBT harmless from and against any and all claims, demands, and causes of action, of every kind and character, arising out of or in connection with personal injury, death, or property damage suffered by any person or entity and arising, in whole or in part, out of or in connection with the presence of Applicant's facilities on, within, or in the vicinity of SWBT's poles, ducts, conduits, or rights-of-way.

21.06 Personal Injury, Death, and Property Damage Claims Relating to Nuisances and Hazardous Conditions Created by Applicant. Applicant agrees to protect, defend, indemnify and save SWBT harmless from and against any and all claims, demands, and causes of action, of every kind and character, arising out of or in connection with personal injury, death, or property damage suffered by any person or entity and arising, in whole or in part, out of or in connection with the existence of (or failure to abate) any nuisance or hazardous condition created by Applicant (or any person acting on Applicant's behalf) or otherwise resulting from the presence of Applicant's facilities on, within, or in the vicinity of SWBT's poles, ducts, conduits, or rights-of-way, including but not limited to any such nuisance or hazardous condition resulting from any improper attachment or any failure of Applicant's facilities to remain attached to or properly suspended from SWBT's poles or any other facilities to which Applicant's facilities may be attached.

21.07 Damage to Facilities. Applicant shall exercise due care to avoid damaging the facilities of SWBT, joint users, and other persons or entities whose facilities are attached to SWBT's poles or located within SWBT's ducts, conduits, and rights-of-way and shall assume full responsibility and liability for any and all direct and indirect loss arising out of or in connection with any such damage caused by the acts or omissions of Applicant and any persons or entities acting on Applicant's behalf, including but not limited to failures to follow any specifications or comply with any other obligations set forth in this Agreement.

- (a) Applicant shall develop and implement sufficient safeguards and controls to insure that Applicant and all persons acting on Applicant's behalf avoid damaging any such facilities.
- (b) In the event such damage occurs, Applicant shall make an immediate report to the owner of any facilities damaged by Applicant or by any persons acting on Applicant's behalf and shall also report the damage to SWBT.
- (c) Applicant shall be liable to SWBT for any damage to SWBT's facilities caused by Applicant or by any person acting on Applicant's behalf and shall protect, defend, indemnify, and hold SWBT harmless from any and all claims, demands, and causes of action directly or indirectly arising out of or in connection with such damages to SWBT's facilities, including but not limited to any and all claims, demands, and causes of action resulting from service outages or failures experienced by SWBT's customers.
- (d) Applicant shall protect, defend, indemnify, and hold SWBT harmless from any and all claims, demands, and causes of action, directly or indirectly arising out of or in connection with any damage caused by Applicant or by any person acting on Applicant's behalf to the facilities of any joint user or other person or entity whose facilities are attached to SWBT's poles or placed within SWBT's ducts, conduits, or rights-of-way, including but not limited to any and all claims, demands, and causes or action resulting from service outages or failures experienced by customers of such joint user or other person or entity.
- (e) Compliance with the specifications provided in this Agreement shall not be a defense to liability or to any indemnity obligation arising under this section.

21.08 Damage to Property and Loss of Rights to Use Property. Applicant shall exercise due care to avoid damage to real or personal property located on, within, or in the vicinity of SWBT's poles, ducts, conduits, or rights-of-way and shall protect, indemnify, defend and hold SWBT harmless from any and all claims, demands, or causes or action resulting, in whole or in part, from any acts or omissions by Applicant or other persons acting on Applicant's behalf which cause damage to any such real or personal property. In addition, Applicant shall exercise due care to avoid taking any action which may result in the loss by SWBT, or by any joint user, of any rights-of-way or third-party property owner consents and shall protect, defend, indemnify, and hold SWBT harmless from and against any such loss and any costs of defending against any threatened loss of such rights-of-way or third-party property owner consents based in whole or in part on the acts or omissions of Applicant or any persons acting on Applicant's behalf.

21.09 Other Claims Arising In Connection with the Construction and Operation of Applicant's Facilities. Applicant shall protect, defend, indemnify, and hold SWBT harmless from any and all claims, demands, and causes of action which arise directly or indirectly from the planned or actual construction, attachment, use, inspection, maintenance, repair, rearrangement, modification, presence, failure, or removal of Applicant's facilities attached (or to be attached) by

Applicant to SWBT's poles or placed in SWBT's ducts, conduits, or rights-of-way, or from any failure by Applicant to remove its facilities, including but not limited to:

- (a) claims arising out of or in connection with the failure by Applicant to meet any obligations (including but not limited to contract and service obligations) to Applicant's customers, suppliers, and other persons and entities dealing with Applicant;
- (b) claims for taxes, franchise fees, right-to-use fees, and other special charges assessed on Applicant or assessed on SWBT due to the placement or presence of Applicant's facilities on or within SWBT's poles, ducts, conduits, or rights-of-way;
- (c) tort claims of every kind and character, including but not limited to claims and demands for damages or losses for negligence, trespass, invasion of privacy, defamation (including but not limited to libel and slander), and infliction of mental anguish or distress;
- (d) claims for the violation of any intellectual property rights, including but not limited to claims for copyright infringement, patent infringement, or unauthorized use or transmission of television or radio broadcast programs or other program material; and
- (e) claims arising out of or in connection with the violation or alleged violation by Applicant of any statute, ordinance, regulation, or other law.

21.10 Notice of Claims. If any personal injury, death, or property damage claim is asserted against Applicant in connection with any incident occurring on, within, or in the vicinity of SWBT's poles, ducts, conduits, or rights-of-way, or if any incident occurs which may give rise to such a claim, Applicant shall promptly notify SWBT of such claim or incident.

21.11 Accident Reports and Statements. Applicant will promptly provide SWBT, at no cost to SWBT, with copies of all accident reports and statements made to Applicant's insurer (or to insurers of any person or entity acting on Applicant's behalf) by Applicant or others in connection with any claims, including but not limited to personal injury, death, and property damage claims, arising or alleged to have arisen in any manner, directly or indirectly, out of or in connection with the construction, maintenance, repair, replacement, presence, use or removal of Applicant's facilities placed on or in SWBT's poles, ducts, conduits, or rights-of-way.

ARTICLE 22: SWBT'S LIABILITY AND LIMITATIONS OF SWBT'S LIABILITY

22.01 LIMITATIONS OF SWBT'S LIABILITY IN GENERAL. THIS ARTICLE AND ARTICLE 21 CONTAIN PROVISIONS EXPRESSLY LIMITING SWBT'S LIABILITY WITH RESPECT TO CERTAIN CLAIMS, DEMANDS, AND CAUSES OF ACTION ARISING OUT

OF OR IN CONNECTION WITH SWBT'S ACTS AND OMISSIONS (INCLUDING NEGLIGENT ACTS AND OMISSIONS). NOTHING CONTAINED IN THIS ARTICLE SHALL BE CONSTRUED AS LIMITING SWBT'S LIABILITY FOR ANY ACTS OR OMISSIONS CONSTITUTING WILLFUL OR INTENTIONAL MISCONDUCT OR GROSS NEGLIGENCE BY SWBT OR AS REQUIRING APPLICANT TO FOREGO ANY CLAIMS APPLICANT MAY HAVE AGAINST CONTRACTORS, SUBCONTRACTORS, AND OTHER VENDORS ACTING ON SWBT'S BEHALF. NOTHING CONTAINED IN THIS ARTICLE SHALL BE CONSTRUED AS EXEMPTING SWBT FROM ANY LIABILITY IN CONTRAVENTION OF FEDERAL LAW OR IN CONTRAVENTION OF THE LAWS OF THIS STATE. EXCEPT AS OTHERWISE SPECIFICALLY PROVIDED IN THIS ARTICLE:

- (a) SWBT'S LIABILITY TO APPLICANT FOR DAMAGES RELATING TO THIS AGREEMENT (INCLUDING DAMAGES ARISING OUT OF OCCURRENCES ON, WITHIN, OR IN THE VICINITY OF SWBT'S POLES, DUCTS, CONDUITS, OR RIGHTS-OF-WAY) SHALL NOT, REGARDLESS OF THE BASIS OF APPLICANT'S DAMAGES CLAIMS, DURING ANY CALENDAR YEAR EXCEED THE GREATER OF \$250,000 OR THREE TIMES THE AGGREGATE AMOUNT OF POLE ATTACHMENT AND CONDUIT OCCUPANCY FEES PAID BY APPLICANT TO SWBT UNDER THIS AGREEMENT DURING THE CALENDAR YEARS WHEN THE ACTS OR OMISSIONS GIVING RISE TO LIABILITY OCCURRED.
- (b) FOR DAMAGES RELATING TO THIS AGREEMENT (INCLUDING DAMAGES ARISING OUT OF OCCURRENCES ON, WITHIN, OR IN THE VICINITY OF SWBT'S POLES, DUCTS, CONDUITS, OR RIGHTS-OF-WAY), SWBT SHALL NOT BE LIABLE TO APPLICANT FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, RELIANCE, OR SPECIAL DAMAGES SUFFERED BY APPLICANT (INCLUDING WITHOUT LIMITATION DAMAGES FOR HARM TO BUSINESS, LOST REVENUES, LOST SAVINGS, OR LOST PROFITS SUFFERED BY APPLICANT), REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, WARRANTY, STRICT LIABILITY, OR TORT, INCLUDING NEGLIGENCE.
- (c) SWBT SHALL NOT BE LIABLE TO APPLICANT FOR THIRD-PARTY CLAIMS AGAINST APPLICANT FOR LOSSES OR DAMAGES RELATING TO THIS AGREEMENT (INCLUDING DAMAGES ARISING OUT OF OCCURRENCES ON, WITHIN, OR IN THE VICINITY OF SWBT'S POLES, DUCTS, CONDUITS, OR RIGHTS-OF-WAY).

22.02 SWBT NOT GENERALLY LIABLE FOR DAMAGES TO APPLICANT'S FACILITIES. BY LICENSING APPLICANT TO ATTACH FACILITIES TO SWBT'S POLES OR PLACE FACILITIES WITHIN SWBT'S DUCTS, CONDUITS, OR RIGHTS-OF-WAY, SWBT DOES NOT WARRANT THE UNINTERRUPTED USE OF SUCH

FACILITIES BY APPLICANT OR UNDERTAKE TO PROTECT SUCH FACILITIES OR ANY PERSONNEL INVOLVED IN THE CONSTRUCTION, PLACEMENT, USE, INSPECTION, MAINTENANCE, REPAIR, REARRANGEMENT, MODIFICATION, OR REMOVAL OF SUCH FACILITIES. EXCEPT AS OTHERWISE PROVIDED IN SECTION 22.03 OF THIS AGREEMENT, SWBT SHALL NOT BE LIABLE TO APPLICANT FOR ANY DAMAGES TO APPLICANT'S FACILITIES OR FOR ANY INJURIES SUFFERED BY ANY PERSONNEL INVOLVED IN THE CONSTRUCTION, ATTACHMENT, USE, INSPECTION, MAINTENANCE, REPAIR, MODIFICATION, REARRANGEMENT, OR REMOVAL OF APPLICANT'S FACILITIES.

22.03 Damage to Applicant's Facilities. SWBT and persons acting on SWBT's behalf shall exercise due care to avoid damaging any of Applicant's facilities attached or to be attached to SWBT's poles or placed or to be placed within SWBT's ducts, conduits, or rights-of-way.

- (a) In the event such damage occurs, SWBT shall make an immediate report to Applicant of any facilities damaged by SWBT or by persons acting on SWBT's behalf.**
- (b) SWBT shall reimburse Applicant for actual costs incurred by the Applicant for the physical repair of facilities damaged by affirmative acts of negligence committed by SWBT or by SWBT's employees.**
- (c) SWBT shall reimburse Applicant for actual costs incurred by the Applicant for the physical repair of facilities damaged by affirmative acts of negligence committed by SWBT's non-employee agents, representatives, contractors, subcontractors, and other non-employees acting on SWBT's behalf; provided, however, that SWBT shall not be liable to Applicant under this subsection until Applicant's claims against such non-employee agents, representatives, contractors, subcontractors, or other persons, and their respective insurers, have been adjudicated or settled; provided further that SWBT's liability shall not exceed the difference between the actual costs incurred by Applicant and the amounts recovered by Applicant directly from such non-employee agents, representatives, contractors, subcontractors, other persons, and their respective insurers; and provided further that any settlement with any such non-employee agent, contractor, representative, subcontractor, or other person for less than the full amount of Applicant's claim shall operate as a full and complete release of any liability of SWBT under this section unless SWBT is a party to and approves such settlement.**
- (d) EXCEPT AS OTHERWISE PROVIDED IN THIS AGREEMENT, SWBT SHALL NOT BE LIABLE TO APPLICANT, OR HAVE ANY OBLIGATION TO INDEMNIFY APPLICANT, FOR ANY LIABILITY OF APPLICANT TO ITS CUSTOMERS WITH RESPECT TO:
 - (1) ANY INTERRUPTION OF ANY SERVICE PROVIDED BY APPLICANT****

RESULTING FROM DAMAGE TO OR INTERFERENCE WITH THE OPERATION OF APPLICANT'S FACILITIES ATTACHED TO SWBT'S POLES OR PLACED WITHIN SWBT'S DUCTS, CONDUITS, OR RIGHTS-OF-WAY AND CAUSED BY NEGLIGENT ACTS OR OMISSIONS OF ANY PERSON, INCLUDING SWBT OR PERSONS ACTING ON SWBT'S BEHALF; OR

- (2) ANY SPECIAL, INDIRECT, OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR IN ANY MANNER RELATED TO THE USE BY APPLICANT OR ITS CUSTOMERS OF FACILITIES ATTACHED TO OR PLACED WITHIN SWBT'S POLES, DUCTS, CONDUITS, OR RIGHTS-OF-WAY, INCLUDING ANY SUCH SPECIAL, INDIRECT, OR CONSEQUENTIAL DAMAGES ARISING, IN WHOLE OR IN PART, AS A RESULT OF NEGLIGENT ACTS OR OMISSIONS OF ANY PERSON, INCLUDING SWBT OR PERSONS ACTING ON SWBT'S BEHALF.

ARTICLE 23: INSURANCE

23.01 Insurance Required. Licenses issued pursuant to this Agreement shall be conditioned on Applicant's compliance with the insurance requirements specified in this section. Unless Applicant has provided proof of self-insurance as permitted in Section 23.02 below:

- (a) Applicant shall obtain and maintain in full force and effect, for so long as this Agreement remains in effect, insurance policies specified in APPENDIX IV of this Agreement. Each policy shall name SWBT as an additional insured and shall include provisions requiring the insurer to give SWBT notice of any lapse, cancellation, or termination of the policy or any modification to the policy affecting SWBT's rights under the policy, including but not limited to any decrease in coverage or increase in deductibles.
- (b) Exclusions from coverage or deductibles, other than those expressly permitted in APPENDIX IV, must be approved in writing by SWBT.
- (c) Authorized contractors and other contractors performing work on, within, or in the vicinity of SWBT's poles, ducts, conduits, or rights-of-way on Applicant's behalf shall be required to meet the same insurance requirements applicable to contractors performing similar work on SWBT's behalf. Applicant shall be responsible for securing compliance by its contractors with this requirement and shall be liable to SWBT for any damages resulting from its failure to do so.
- (d) Self-insurance shall be permitted for entities meeting the self-insurance requirements set forth in Section 23.02 of this Agreement.

23.02 Proof of Insurance or Self-insurance. Applicant shall submit to SWBT adequate proof (as determined by SWBT) that the companies insuring Applicant are providing all

coverages required by this Agreement. Applicant's insurers shall provide SWBT with certifications that required coverages will not be cancelled, changed or materially altered (e.g., by increasing deductibles or altering exclusions from coverage) except after 30 days written notice to SWBT. SWBT will accept certified proof of Applicant's qualification as a self-insurer for Workers' Compensation and Employers Liability, where self-insurance is permitted, only upon receipt of a current copy of a Certificate of Authority to Self-insure issued by the Workers' Compensation Commission of this State. SWBT will accept self-insurance by Applicant in lieu of other Commercial General Liability and Automobile Liability Coverage if Applicant warrants that its net worth, as shown by its most recent audited financial statement with no negative notes, is at least 10 times the minimum liability limits set forth in APPENDIX IV and SWBT is satisfied that Applicant will be able to meet its liability obligations under this Agreement.

23.03 Licensing Contingent on Proof of Insurance. All insurance required in accordance with APPENDIX IV, or self-insurance as permitted in Section 23.02, must be in effect before SWBT will issue pole attachment or conduit occupancy licenses under this Agreement and shall remain in force until all of Applicant's facilities have been removed from SWBT's poles, ducts, conduits, and rights-of-way.

23.04 Default. Failure to obtain and maintain the required levels and types of insurance coverage required under this Agreement may be grounds for termination of licenses granted under Agreement. If an insurance carrier shall at any time notify Applicant or SWBT that any policy or policies of insurance required under this Agreement will be cancelled or changed in any manner which will result in Applicant's failure to meet the requirements of this Agreement, this Agreement shall terminate upon the effective date of such cancellation or change unless Applicant has made arrangements to obtain the required coverage from another source or SWBT, in its sole discretion, elects to take such action as may be necessary to keep the policy in effect with the required coverages.

ARTICLE 24: ASSIGNMENT OF RIGHTS

24.01 Assignment Permitted. Neither Applicant nor SWBT may assign or otherwise transfer its rights or obligations under this Agreement except as provided in this section.

- (a) SWBT may assign its rights, delegate its benefits, and delegate its duties and obligations under this Agreement, without Applicant's consent, to any subsidiary or affiliate which is 100% owned, directly or indirectly, by SWBT or by its corporate parent, SBC Communications Inc.
- (b) Either party may assign or transfer rights or obligations under this Agreement on such terms and conditions as are mutually acceptable to the other party and with such party's prior written consent, which consent may be withheld only for due cause and justification. In this regard, the parties contemplate that Applicant may, from time to time, desire to assign its rights under this Agreement to an affiliate, to an entity under common control with Applicant, to an entity which controls Applicant or is controlled by Applicant, or to an entity acquiring all or

substantially all of the assets of Applicant, and that consent to any such assignment should, in the absence of exceptional circumstances, be promptly given upon Applicant's request.

- (c) No assignment or transfer by Applicant of rights under this Agreement, licenses issued pursuant to this Agreement, or authorizations granted under this Agreement shall be effective unless Applicant, its successors, and assigns have complied with the provisions of this article and secured SWBT's prior written consent to the assignment or transfer.
- (d) Neither this Agreement, nor any licenses or authorizations granted under this Agreement, shall inure to the benefit of Applicant's successors or assigns without SWBT's prior written consent.

24.02 Incorporations, Mergers, Acquisitions, and Other Changes in Applicant's Legal Identity. When the legal identity or status of Applicant changes, whether by incorporation, reincorporation, merger, acquisition, or otherwise, such change shall be treated as an assignment subject to the provisions of this article.

24.03 Notice of Assignment. Applicant shall provide SWBT with 60 days advance notice in writing of any assignment.

24.04 Assignment Shall Not Relieve Applicant of Prior Obligations. Except as otherwise expressly agreed by SWBT in writing, no assignment permitted by SWBT under this Agreement shall relieve Applicant of any obligations arising under or in connection with this Agreement, including but not limited to indemnity obligations under Article 21 of this Agreement or the Interconnection Agreement.

24.05 Consent to Assignment Conditioned on Satisfaction of Existing Obligations and Assumption of Contingent Liabilities. SWBT may condition approval of any requested assignment or transfer on the assignee's or successor's payment or satisfaction of all outstanding obligations of Applicant under this Agreement and the assignee's or successor's assumption of any liabilities, or contingent liabilities, of Applicant arising out of or in connection with this Agreement.

24.06 Consent to Assignment Conditioned on Satisfaction of All Other Licensing Requirements. SWBT may condition approval of any requested assignment or transfer on the assignee's or successor's providing proof satisfactory to SWBT that such assignee or successor has complied or will comply with all licensing requirements established under this Agreement, including but not limited to requirements that such assignee or successor verify that all facilities owned or used by such assignee or successor and presently attached to SWBT's poles or placed within any portion of SWBT's conduit system within this State have been disclosed to SWBT and are subject to existing licenses as provided in Section 17.03, that such assignee or successor has complied with the bonding requirements under Article 20, and that such assignee or successor has complied with the insurance requirements under Article 23 of this Agreement.

24.07 Consent. If SWBT consents to any assignment or transfer requested by Applicant, Applicant's assignee or successor shall:

- (a) sign this Agreement as an assignee or successor expressly agreeing to be bound by all provisions of this Agreement and licenses issued hereunder;
- (b) provide proof, satisfactory to SWBT, of such assignee's assumption of the obligations of this Agreement; and
- (c) pay an administrative record-keeping fee as provided in APPENDIX I of this Agreement.

24.08 Sublicenses Prohibited. Nothing contained in this Agreement shall be construed as granting Applicant the right to sublicense any rights under this Agreement or licenses granted hereunder to any person or entity other than Applicant. Applicant shall not allow any person or entity other than Applicant to attach or place facilities to or in pole or conduit space occupied by or assigned to Applicant or to utilize such space.

ARTICLE 25: TERMINATION

25.01 Termination of Agreement Due to Non-Use of Facilities. Applicant shall, by written notice to SWBT, terminate this Agreement if Applicant ceases to do business in this State or ceases to make active use of SWBT's poles, ducts, conduits, and rights-of-way in this State.

25.02 Limitation, Termination, or Refusal of Access for Certain Material Breaches. Applicant's access to SWBT's poles, ducts, conduits, and rights-of-way will not materially interfere with or impair service over any facilities of SWBT or any joint user, cause material damage to SWBT's plant or the plant of any joint user, impair the privacy of communications carried over the facilities of SWBT or any joint user, or create serious hazards to health or safety of any persons working on, within, or in the vicinity of SWBT's poles, ducts, rights-of-way or to the public. Upon reasonable notice and opportunity to cure, SWBT may limit, terminate or refuse access if Applicant violates this provision; provided, however, that such limitation, termination or refusal will be limited to Applicant's access to poles, ducts, conduits, and rights-of-way located in the SWBT engineering or construction district in which the violation occurs, shall be as narrowly limited in time and geographic scope as may be necessary to enable Applicant to adopt suitable controls to prevent further violations, and shall be subject to review, at Applicant's request, pursuant to the dispute resolution procedures set forth in this Agreement or the parties' Interconnection Agreement or, as permitted by law, before any court, agency, or other tribunal having jurisdiction over the subject matter. In the event Applicant invokes dispute resolution procedures or seeks review before a court, agency, or other tribunal having jurisdiction of the subject matter, the limitation, termination, or refusal of access may be stayed or suspended by agreement of the parties or by order of the tribunal having jurisdiction over the parties' dispute.

25.03 Notice and Opportunity to Cure Breach. SWBT may, at any time after determining that Applicant is in breach of this Agreement, give notice to Applicant of the breach.

(a) The notice shall:

- (1) describe the breach and SWBT's basis for concluding that Applicant has committed a breach;
- (2) state the curative steps, if any, which Applicant may take to cure the breach;
- (3) state the deadline, if any, for completing the corrective actions required;
- (4) state the manner in which Applicant shall demonstrate to SWBT that the corrective actions required have been performed; and
- (5) state SWBT's anticipated response if the breach is not cured.

(b) If the notice provides that Applicant shall be given an opportunity to cure the breach, Applicant shall take the corrective actions required and notify SWBT in writing when the corrective actions have been completed. If Applicant fails to take corrective action or give the required confirmation within the time prescribed in the declaration and notice, SWBT may immediately limit, terminate, or refuse access under Section 25.02 of this Agreement, if applicable, or seek such other relief against Applicant as is authorized under the terms of this Agreement, other provisions of the Interconnection Agreement, or applicable law.

ARTICLE 26: FAILURE TO ENFORCE

26.01 **No Waiver.** The failure by SWBT to take action to enforce compliance with any of the terms or conditions of this Agreement, to give notice of any breach, or to terminate this Agreement or any license or authorization granted hereunder shall not constitute a waiver or relinquishment of any term or condition of this Agreement, a waiver or relinquishment of the right to give notice of breach, or waiver or relinquishment of any right to terminate this Agreement. Notwithstanding any such failure, all terms and conditions of this Agreement and all rights of SWBT hereunder shall be and remain at all times in full force and effect.

ARTICLE 27: EFFECTIVE DATE AND TERM OF AGREEMENT

27.01 **Effective Date.** This Agreement shall be effective as of the ___ day of _____, 199_, or the date of approval of the Interconnection Agreement, whichever date first occurs.

27.02 **Initial Term.** Unless sooner terminated as herein provided, the initial term of this Agreement shall run from the effective date until the end of the calendar year which includes the effective date.

27.03 **Automatic Renewal.** Unless sooner terminated as herein provided, this Agreement shall be automatically renewed for successive one-year terms beginning on the first day of each

calendar year after the effective date.

27.04 Elective Termination. Either party may terminate this Agreement by giving the other party at least six months prior written notice as provided in this section. Applicant may terminate with or without cause. SWBT may terminate for cause only during the first five years following the effective date and may thereafter terminate this Agreement with or without cause. SWBT's termination shall be subject to the provisions of Section 27.05 below. The notice of termination shall state the effective date of termination, which date shall be no earlier than the last to occur of the following dates: the last day of the initial term of this Agreement or six months after the date the notice is given.

27.05 Effect of Elective Termination. Elective termination of this Agreement, as permitted under Section 27.04 of this Agreement, shall not affect Applicant's liabilities and obligations incurred under this Agreement prior to the effective date of termination and shall not entitle Applicant to the refund of any advance payment made to SWBT under this Agreement. Elective termination of this Agreement by SWBT shall not affect SWBT's obligations to afford access to SWBT's poles, ducts, conduits, and rights-of-way as required by the Pole Attachment Act and other applicable laws and regulations.

ARTICLE 28: AMENDMENTS

28.01 Amendments Shall Be in Writing. Notwithstanding other provisions of this Agreement, the terms and conditions of this Agreement shall not be amended, changed or altered except in writing and with approval by authorized representatives of both parties.

ARTICLE 29: NOTICES

29.01 Notices to Applicant. All written notices required to be given to Applicant shall be delivered or mailed to Applicant's duly authorized agent or attorney, as designated in this section.

- (a) Such notice may be delivered to Applicant's duly authorized agent or attorney in person or by agent or courier receipted delivery.
- (b) Such notice may be mailed to Applicant's duly authorized agent or attorney by registered or certified mail, return receipt requested. When notice is given by mail, such notice shall be complete upon deposit of the notice, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and control of the United States Postal Service and shall be deemed to have been given three days after the date of deposit.
- (c) Applicant may authorize delivery of the notice by telephonic document transfer to the Applicant's duly authorized agent or attorney. Notice by telephonic document transfer after 5:00 p.m. local time of the recipient shall be deemed given on the following day.

(d) Notices to Applicant shall be sent to the authorized agent or attorney designated below:

Name: _____

Title: _____

Firm: _____

Address: _____

City/State/Zip: _____

29.02 Notices to SWBT. Except as otherwise specified in APPENDIX VI ("Notices to SWBT"), all written notices required to be given to SWBT shall be delivered or mailed to SWBT's duly authorized agent or attorney, as designated in this section.

- (a) Such notice may be delivered to SWBT's duly authorized agent or attorney in person or by agent or courier receipted delivery.
- (b) Such notice may be mailed to SWBT's duly authorized agent or attorney by registered or certified mail, return receipt requested. When notice is given by mail, such notice shall be complete upon deposit of the notice, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and control of the United States Postal Service and shall be deemed to have been given three days after the date of deposit.
- (c) SWBT may authorize delivery of the notice by telephonic document transfer to SWBT's duly authorized agent or attorney. Notice by telephonic document transfer after 5:00 p.m. local time of the recipient shall be deemed given on the following day.

(d) Notices to SWBT shall be sent to the authorized agent or attorney designated below:

Name: Terrence Brennan

Title: Utility Liaison Supervisor

Firm: Southwestern Bell Telephone Company

Address: 5305 E. 71st. Floor 1

City/State/Zip: Tulsa, Oklahoma 74136

29.03 Changes in Notice Requirements. Either party may, from time to time, change notice addressees and addresses by giving written notice of such change to the other party. Such notice shall state, at a minimum, the name, title, firm, and full address of the new addressee.

ARTICLE 30: DISPUTE RESOLUTION

30.01 Purpose. The parties desire to resolve disputes arising out of this Agreement without litigation. The provisions of this article are intended to minimize litigation between the parties with respect to disputes arising in connection with this Agreement and shall be construed accordingly.

30.02 Exclusive Remedy. Except for actions seeking injunctive relief related to the purposes of this Agreement or suits to compel compliance with the dispute resolution processes set forth in this article, the parties agree to use the dispute resolution processes set forth in this Agreement as their sole remedy with respect to any controversy or claim of \$25,000 or less which arises out of or in connection with this Agreement.

30.03 Prerequisite to Litigation. The provisions of this article shall also apply to all disputes, without regard to the amount in controversy, in which Applicant contests charges billed by SWBT to Applicant under the terms of this agreement. No suit, except for actions seeking injunctive relief related to the purposes of this Agreement or suits to compel compliance with the dispute resolution processes set forth in this article, shall be filed by either party against the other with respect to such contested charges until the parties have exhausted their remedies under this article.

30.04 Good Faith Negotiation. Good faith negotiation as provided in this section shall be the first step in the dispute resolution process.

- (a) With respect to any dispute subject to the provisions of this article, either party may initiate negotiation proceedings by writing a certified or registered letter to the other party setting forth the particulars of the dispute, the terms of the Agreement that are involved, and a suggested resolution of the problem.
- (b) The recipient of the letter shall respond within 21 days to the proposed solution. The recipient shall either agree to the proposed solution or explain its disagreement.
- (c) If the correspondence does not resolve the dispute, each party, at the request of either party, will appoint a knowledgeable, responsible representative to meet and negotiate in good faith to resolve the dispute. The location, form, frequency, duration, and conclusion of these discussions shall be left to the discretion of the representatives. Upon agreement, the representatives may utilize other alternative dispute resolution procedures such as mediation to assist

in the negotiations.

- (d) Discussions and correspondence among the representatives as provided by this section are for purposes of settlement, are exempt from discovery and production, and shall not be admissible in arbitration, judicial, regulatory, or other proceedings in any forum.

30.05 Mediation. If the parties agree to mediation, the mediation may be conducted as provided in this section or in such other manner as may be mutually agreeable to the parties.

- (a) If agreed to by the parties, the dispute shall be referred to the nearest office of the American Arbitration Association, or such other mediator as may be selected by agreement of the parties, for mediation, that is, an informal, nonbinding conference or conferences between the parties in which a mediator will seek to guide the parties to a resolution of the dispute.
- (b) If the dispute is referred to the American Arbitration Association, the parties are free to select any mutually acceptable panel member from the list of mediators at the American Arbitration Association. If the parties cannot agree or have no particular choice of a mediator and simply request that the American Arbitration Association assign a mediator to the dispute, then a list and resumes of available mediators, numbering one more than there are parties, will be sent to the parties, each of whom may strike one name leaving the remaining name as the mediator. If more than one name remains, the designated mediator shall be selected by the Administrator of the American Arbitration Association from the remaining names.
- (c) Mediation sessions shall be private.
- (d) All records, reports or other documents considered by the mediator shall be confidential.
- (e) The parties agree that the mediator shall not be compelled to divulge confidential materials or to testify about the mediation in arbitration, regulatory, judicial, or other proceedings in any forum.
- (f) The parties agree to maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitration, judicial, or other proceeding:
 - (1) views expressed or suggestions made by the other party with respect to a possible settlement of the dispute;
 - (2) admissions made by the other party during the mediation proceedings;
 - (3) proposals made or views expressed by the mediator; or

- (4) the fact that the other party had or had not indicated willingness to accept a proposal for settlement made by the mediator.
- (g) Subsections (e) and (f) of this section shall apply to anything said, done or occurring in the course of the mediation, including any private caucus or discussions between the mediator and any party or counsel before or after the joint mediation session. There shall be no stenographic record of the mediation process, except to memorialize a settlement record.
- (h) The mediation process shall be considered settlement negotiation for the purpose of all state and federal rules protecting disclosures made during such conferences from later discovery or use in evidence. All conduct, statements, promises, offers, views, and opinions, oral or written, made during the mediation by any party or a party's agent, employee, or attorney are confidential and, where appropriate, are to be considered work product and privileged. Such conduct, statements, promises, offers, views, and opinions shall not be subject to discovery or admissible for any purpose, including impeachment, in any litigation or other proceeding involving the parties; provided, however, that evidence otherwise subject to discovery or admissible is not excluded from discovery or admission in evidence simply as a result of its having been used in connection with this settlement process.

30.06 Arbitration. If negotiations and mediations do not resolve the dispute within 90 days after the initiation of dispute resolution proceedings as provided in subsection (a) of Section 30.05 of this Agreement, the dispute shall be submitted to binding arbitration by a single arbitrator pursuant to the Commercial Arbitration Rules of the American Arbitration Association if the dispute involves any controversy or claim of \$25,000 or less which arises out of or in connection with this Agreement. The parties may voluntarily elect to arbitrate disputes in which the amount in controversy exceeds \$25,000, but they shall not be required by this Agreement to do so.

- (a) Either party may demand such arbitration in accordance with the procedures set out in the Commercial Arbitration Rules.
- (b) Discovery shall be controlled by the arbitrator and shall be permitted to the extent set out in this subsection.
 - (1) Each party may submit in writing to any other party, and such other party shall so respond, to a maximum of any combination of 35 of the following: interrogatories, document production requests, and requests for admissions. The interrogatories, document production requests, and requests for admissions shall not have subparts.
 - (2) Additional discovery may be permitted upon mutual agreement of the parties.
- (c) The arbitrator shall control the scheduling so as to process the matter