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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

AT&T CORP., a New York Corporation;
AT&T COMMUNICATIONS OF THE
MOUNTAIN STATES, INC., a Colorado
Corporation,

Complainants,

vs.

QWEST CORPORATION, a Colorado
Corporation,

Respondent.

Case No. ATT-T-04-1

COMPLAINT

AT&T Corp., and AT&T Communications of the Mountain States, Inc. (collectively “AT&T”), by and through its attorneys, Holland & Hart, hereby complains against Qwest Corporation (“Qwest”), as follows:

PARTIES

1. Claimant AT&T Corp. is a public utility that provides telecommunications services in the State of Idaho and other states by and through its affiliate AT&T Communications of the Mountain States, Inc. The Idaho Public Utilities Commission (“Commission”) has granted AT&T certification to provide long distance and local exchange telecommunication service in Idaho. AT&T’s principal place of business is One AT&T Way, Bedminster, New Jersey 07921.

2. Respondent Qwest is a public utility and a certified provider of long distance and local exchange telecommunications services in the State of Idaho and other states. Qwest’s principal place of business is 1801 California Street, Denver, Colorado 80202.

JURISDICTION AND VENUE

3. Jurisdiction over this dispute is properly held by the Commission pursuant to Idaho Code §§ 61-315, 61-501, 61-502, 61-503, 61-514, and 61-641, *et. seq.* The State of Idaho has certified to the Federal Communications Commission (“FCC”) that it regulates the rates, terms and conditions for pole attachments, which includes conduits. *See Public Notice, States That Have Certified That They Regulate Pole Attachments*, 7 FCC Rcd. 1498 (1992), attached hereto as Exhibit 1.

4. Qwest is a certified long distance and local exchange carrier that owns or controls conduit in the State of Idaho and elsewhere. Such conduits are used for purposes of wire communications.

5. AT&T owns communications facilities that occupy Qwest's conduit.

6. Qwest and AT&T are direct competitors in local and long distance telecommunications service.

7. AT&T has the right of access to Qwest conduit on just, reasonable and non-discriminatory rates, terms and conditions. *See* 47 U.S.C. § 224; Idaho Code §§ 61-301, 61-315.

8. AT&T occupies Qwest-owned conduit in Idaho pursuant to "General License Agreement for Conduit Occupancy Between The Mountain States Telephone and Telegraph Company and The American Telephone and Telegraph Company for the State of Idaho, dated May 28, 1988" ("Conduit License Agreement") and Licenses executed pursuant thereto. *See* Conduit License Agreement attached hereto as Exhibit 2; Licenses attached hereto as Exhibit 3.

9. AT&T also occupies Qwest-owned conduit pursuant to an "Agreement for Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services, and Resale of Telecommunication Services Between Qwest Corporation and AT&T Communications of the Mountain States, Inc. in the State of Idaho" ("Interconnection Agreement" or "Agreement") dated May 4, 2004 and approved by the Commission on June 22, 2004. *See* Interconnection Agreement attached hereto as Exhibit 4. *See also In the Matter of the Joint Application of Qwest Corporation and AT&T Communications of the Mountain States, Inc. for Approval of an*

Interconnection Agreement Pursuant to 47 U.S.C. § 252(e), Case No. QWE-T-04-9, Order No. 29530 (June 22, 2004). Prior to the adoption of this Agreement, the parties had operated under an alternative Interconnection Agreement adopted September 15, 1998. *See* Agreement for Local and Wireline Network Interconnection and Service Resale (“1998 Interconnection Agreement”), attached hereto as Exhibit 5. *See also In the Matter of AT&T Communications of the Mountain States, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 of the Rates, Terms and Conditions of Interconnection with U S West*, Case No. USW-T-96-15, ATT-T-96-2, Order No 27738 (Sept. 15, 1998).

GENERAL ALLEGATIONS

10. AT&T currently occupies approximately 138,607 feet of Qwest’s conduit in the State of Idaho. *See* Qwest Conduit Licenses, attached hereto as Exhibit 3; Qwest Conduit Invoices, attached hereto as Exhibit 6.

11. The Conduit License Agreement does not establish rates. Rather, the individual Licenses issued pursuant to the Agreement set forth the rates. *See* Qwest Conduit Licenses (Exh. 3).

12. Similarly, the 1998 Interconnection Agreement between the parties does not set forth a specific rate for conduit rental. Instead, the Agreement requires Qwest to provide AT&T “equal and non-discriminatory access to poles, ducts, conduit and ROW and any other pathways on terms and conditions equal to that provided by [Qwest] to itself or to any other Person.” Interconnection Agreement at § 47.4.5 (Exh. 5).

13. Qwest makes its conduit rental rate publicly available in its Statement of Generally Available Terms and Conditions (“SGAT”) on file at the Idaho Public Utilities Commission. *See* Idaho SGAT § 10.7.12, attached hereto as Exhibit 7. *See also In the Matter of Determining*

Prices for Unbundled Network Elements (UNE) in Qwest Corporation's Statement of Generally Available Terms (SGAT), Case No. QWE-T-01-11, Order No. 29408 (Jan. 2, 2004).

14. Qwest's published SGAT conduit rate set forth below is "just, reasonable and nondiscriminatory" and consistent with 47 U.S.C. § 224 and Idaho Code § 61-301. *Id.*

15. The current Interconnection Agreement between the parties states that Qwest's conduit rental fees "are in accordance with Section 224 of the Act and FCC orders, rules and regulations promulgated thereunder, as well as the rates established by the Commission" The Agreement sets forth the conduit occupancy rate by attaching a copy of Qwest's January 2004 SGAT as an Exhibit to the Agreement. *See* Interconnection Agreement at 10.8.3 and Exhibit A (Exh. 4 attached hereto).

16. However, Qwest currently charges AT&T rates ranging from \$2.75 to \$3.25 per foot per year to occupy its conduit in Idaho. *See* Conduit Invoices attached hereto as Exhibit 6.

17. Qwest's publicly available SGAT identifies Qwest's conduit rental rate as \$0.31. *See* Idaho SGAT Spreadsheet § 10.7.12 (Exh. 7). Upon information and belief, this is a just and reasonable rate for conduit occupancy. Although this is the publicly filed rate and approximates levels that AT&T believes would be generated under the FCC's conduit formula, Qwest continues to charge AT&T the higher \$2.75 to \$3.25 per foot rates.

18. Beginning in February, 2000 and continuing through December, 2003, AT&T attempted to re-negotiate Qwest's conduit rental rates to be consistent with the rates that would be produced under the FCC's formula and/or the rates at which Qwest offers conduit to other telecommunications companies. AT&T's attempts have not been successful.

REQUEST FOR RELIEF

19. This Commission is charged with ensuring that the rates, terms and conditions of attachment are just and reasonable. *See* Idaho Code § 61-514; *see also* Idaho Code § 61-502. In addition, the Commission holds broad authority to supervise and regulate every public utility within the State. *See* Idaho Code § 61-501. Upon a finding that a public utility has charged unjust and discriminatory rates, the Commission is empowered to adjust the rates and award reparations, with interest, to the affected party from the date of the collection of the unlawful amount. *See* Idaho Code §§ 61-502, 61-503, 61-641.

20. The conduit occupancy rates that Qwest charges AT&T are eight to 10 times higher than the rates in Qwest's SGAT on file with the Commission. The rates that Qwest charges AT&T, therefore, are not just, reasonable, and non-discriminatory, in violation of Idaho Code §§ 61-502 and 61-514.

21. Qwest competes directly with AT&T in providing local exchange and long distance telecommunications service in the state of Idaho. Qwest has granted itself an undue preference and has subjected AT&T to undue and unreasonable prejudice and competitive disadvantage by forcing AT&T to pay conduit occupancy rates well above the SGAT rate on file with the Commission, in violation of Idaho Code §§ 61-301 and 61-315. *See also* Idaho Code §§ 61-502 and 61-514.

22. Furthermore, Qwest's practice of offering its facilities to other telecommunications carriers at the SGAT rate, while charging AT&T conduit rates in excess of the SGAT rate is discriminatory and prohibited by law. *See* Idaho Code § 61-315. *See also* Idaho Code §§

61-301, 61-502. It is also part of a pattern of the deceptive and anti-competitive practices that Qwest has engaged in across its multi-state service areas,¹ including, specifically, Idaho.

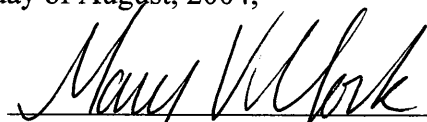
23. Finally, Qwest's authority to provide long-distance telecommunications service in Idaho is conditioned on Qwest affording competitors non-discriminatory access to Qwest's network, including non-discriminatory access to its "poles, ducts, conduits and rights-of-way." 47 U.S.C. § 271(c)(2)(B)(iii). By refusing to provide AT&T with conduit at the publicly available SGAT rates, Qwest is not providing non-discriminatory access to its "poles, ducts, conduits and rights-of-way," in violation of federal law. *See, e.g.*, 47 U.S.C. §§ 224 and 271(c).

¹ *See, e.g., In re Qwest Corp Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, FCC 04-57, File No. EB-03-IH-0263 (Mar. 12, 2004) (imposing \$9 million forfeiture and finding that "Qwest's cavalier attitude toward the Act's filing requirements shows a disregard for Congress's goals of opening local markets to competition and permitting interconnection on just, reasonable, and nondiscriminatory terms"); Letter from Hillary S. DeNigro, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau to Melissa Newman, Vice President-Federal Regulatory, Qwest Communications International, Inc. re: Section 271 Compliance Review Program for Arizona (dated Mar. 26, 2004) (establishing Section 271 compliance monitoring program for Qwest and reserving Commission's authority to investigate and monitor other subjects not expressly noted in prior orders or correspondence); Letter from William Davenport, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau to Melissa Newman, Vice President-Federal Regulatory, Qwest Communications International, Inc. re: Section 271 Compliance Review Program for Minnesota (dated July 23, 2003) (same); Letter from William Davenport, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau to Melissa Newman, Vice President-Federal Regulatory, Qwest Communications International, Inc. re: Section 271 Compliance Review Program for New Mexico, Oregon and South Dakota (dated June 4, 2003) (same). *See also* State Telecom Activities, Communications Daily (Apr. 23, 2004) (announcing Arizona Corporation Commission's assessment of nearly \$21 million in penalties on Qwest for its "willful and intentional" violations of state and federal laws for failing to file interconnection agreements); *In the Matter of the Investigation into Unfiled Agreements Executed by Qwest Corporation*, Docket No. 02I-572T, Colo. PUC (Feb. 27, 2004) (Colorado PUC staff recommending a hearing regarding willful and intentional violations of state and federal law by Qwest); *Order Assessing Penalties*, Docket No. P-421/C-02-197, Minn. PUC, (Feb. 28, 2003) (Minnesota agency ordering Qwest to pay \$26 million fine and engage in steps toward compliance), *Order after Reconsideration on Own Motion*, Minn. Docket No. P-421/C-02-197 (Apr. 30, 2003) and *Order Adopting ALJ's Report and Establishing Comment Period Regarding Remedies*, Minnesota Docket No. P-421/C-02-197, at 5 (Nov. 1, 2002), *Qwest Corporation v. Minnesota Public Utilities Commission, et al.*, *Complaint for Declaratory Judgment and Injunctive Relief to Prevent Enforcement of Public Utilities Commission Orders*, Civ. File No. 03-3476, D. Minn. (filed June 19, 2003) (Qwest complaint challenging PUC's authority to impose penalty); *AT&T Corp. v. Qwest Corp.*, *Order Making Tentative Findings, Giving Notice for Purposes of Civil Penalties, and Granting Opportunity to Request Hearing*, Iowa Utils. Bd. Docket No. FCU-02-2 (June 18, 2002) (finding that Qwest's failure to file interconnection agreements at issue violated Section 252 of the Act).

WHEREFORE, in accordance with the Commission's broad authority to regulate public utilities and protect the public interest, as well as its authority over conduit under state and federal law, AT&T respectfully request this Commission to enter an Order:

- a. declaring unlawful Qwest's Idaho conduit rates of \$2.75 to \$3.25 per foot innerduct per year, and terminate the \$2.75 to \$3.25 rates;
- b. ordering Qwest to charge AT&T an annual conduit rental rate equal to the SGAT rate of \$0.31 per foot of duct;
- c. ordering Qwest to refund to AT&T all amounts paid in excess of rates charged to other telecommunications carriers dating back to September 15, 1998, when Qwest committed to providing AT&T with non-discriminatory rates;
- d. awarding attorneys fees to AT&T dating back to February 2000, when AT&T notified Qwest of the discrepancy between the rates that Qwest is currently charging AT&T and the rates Qwest charges other telecommunications carriers, to the extent authorized under applicable law;
- e. granting AT&T such other relief the Commission deems just, reasonable and proper.

Respectfully submitted, this 6th day of August, 2004,



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**Attorneys for AT&T Corp. and AT&T
Communications of the Mountain States, Inc.**

CERTIFICATE OF SERVICE

1. I hereby certify that on this 6th day of August 2004, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Donald L. Howell II, Director
Idaho Public Utilities Commission
472 West Washington Street
Boise, Idaho 83720-0074
Facsimile: (208) 334-3762

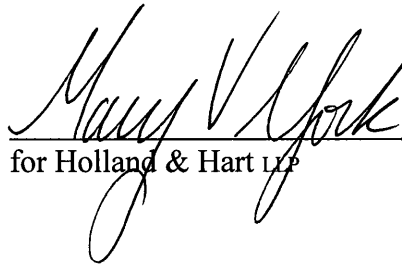
U.S. Mail
 Hand Delivered
 Overnight Mail
 Telecopy (Fax)

Jim Schmit
Vice President,
QWest Corporation
999 Main Street
Boise, Idaho 83702

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Mary Hobson, Esq.
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for Holland & Hart LLP

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EXHIBIT 1

Before the
Federal Communications Commission
Washington, DC 20554

PUBLIC NOTICE

Released: February 21, 1992

This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC. 515 F 2d 385 (D.C. Circ 1974).

STATES THAT HAVE CERTIFIED THAT THEY REGULATE POLE ATTACHMENTS

Pursuant to Section 1.1414(b) of the Commission's Rules on cable pole attachments, the following states* have certified that they regulate rates, terms, and conditions for pole attachments, and, in so regulating, have the authority to consider and do consider the interests of subscribers of cable television services, as well as the interests of the consumers of utility services. Moreover, these states have certified that they have issued and made effective rules and regulations implementing their regulatory authority over pole attachments, including a specific methodology for such regulation which has been made publicly available in the state.

Certification by a state preempts the FCC from accepting pole attachment complaints under Subpart J of Part 1 of the Rules.

Alaska	Massachusetts
California	Michigan
Connecticut	New Jersey
Delaware	New York
District of Columbia	Ohio
Idaho	Oregon
Illinois	Utah
Kentucky	Vermont
Louisiana	Washington
Maine	

* "state" by Section 1.1402(g) of the Rules, means any state, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

This Public Notice supersedes the Public Notice of December 30, 1987, DA No. 87-1862.

FEDERAL COMMUNICATIONS COMMISSION

Exhibit 1
Case # ATT-T-04-1
AT&T Complaint, Page 1 of 1

EXHIBIT 2

ID COND 22862600

Agreement No. I-001C.
04/87 Issue 1

GENERAL LICENSE AGREEMENT

FOR

CONDUIT OCCUPANCY

BETWEEN

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY

AND

THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY

for the State of Idaho

Dated

May 28, 1988

Exhibit 2
Case # ATT-T-04-1
AT&T Complaint, Page 1 of 16

NOTICE

The information contained herein should not be disclosed to unauthorized persons. It is meant for use only by authorized representatives of the parties hereto.

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PREAMBLE

THIS AGREEMENT, executed this 28th day of May, 1988, between THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a corporation organized and existing under the laws of the State of Colorado, having its principal office in the City and County of Denver (hereinafter called "Licensor"), and THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY, a corporation, organized and existing under the laws of the State of New York, having its principal office in the city of New York (hereinafter called "Licensee").

WITNESSETH:

WHEREAS, Licensor proposes to provide access to its conduit system in certain areas of Idaho; and

WHEREAS, Licensee desires to place and maintain underground communications facilities within the area described above and desires to place such communications facilities in the conduit system of Licensor; and

WHEREAS, Licensor is willing to permit, under certain conditions on a nonexclusive license basis, the placement of said communications facilities on or within Licensor's facilities where reasonably available in the area described above and where such use will not interfere with Licensor's service requirements or the use of its facilities by others;

NOW THEREFORE, in consideration of the mutual covenants, terms and conditions herein contained, the parties do hereby mutually covenant and agree as follows:

Article 1
DEFINITIONS

As used in this Agreement:

A) Conduit Occupancy

Occupancy of a conduit system by any item of Licensee's communications facilities.

B) Conduit System

Any combination of ducts, manholes, handholes, and vaults joined to form an integrated whole, which is owned solely or in part by the Licensor.

C) Duct

A single enclosed raceway for wire conductors, cables or innerducts.

D) Innerduct

One of the single enclosed raceways located within a duct, the interior diameter of which raceway shall in no event be less than one inch.

E) Joint User

A party which may occupy a duct either solely or partially owned by the Licensor, in return for granting the Licensor equivalent rights of occupancy of duct which it owns, either solely or partially.

F) Licensee's Communications Facilities

All facilities, including but not limited to cables, equipment and associated hardware, owned and utilized by the Licensee which occupy a conduit system.

G) Make-Ready Work

All work, including but not limited to rearrangement or transfer of existing facilities or other changes required to accommodate the Licensee's communications facilities in a conduit system.

H) Manhole

A subsurface enclosure which personnel may enter and use for the purpose of installing, operating and maintaining communications facilities.

I) Prelicense Survey

All work required, including field inspection and administrative processing, to determine the make-ready work necessary to accommodate Licensee's communications facilities in Licensor's conduit system.

Article 2
SCOPE OF AGREEMENT

- A) Subject to the provisions of this Agreement, Licensor agrees to issue to Licensee for any lawful communications purpose, nonexclusive, revocable license(s) authorizing the placement of Licensee's communications facilities in those portions of Licensor's conduit system within the State of Idaho, which Licensee elects to use.
- B) Nothing contained in this Agreement shall be construed to compel Licensor to construct, extend, or place any duct or other facility for use by the Licensee.
- C) Nothing contained in this Agreement shall be construed as a limitation, restriction, or prohibition against Licensor with respect to any agreement or arrangement which Licensor has heretofore entered into, with others not parties to this Agreement regarding the conduit systems covered by this Agreement. The rights of Licensee shall at all times be subject to any such existing agreement or arrangement.

Article 3
FEES AND CHARGES

- A) Licensee shall pay all applicable fees and charges specified in the license(s) granted hereunder within forty-five (45) days after receipt of the bill. Failure to pay all fees and charges on the specified payment date, shall constitute a default of this Agreement, unless the parties hereto agree that unusual circumstances prevented receipt of payment by Licensor. In event that such unusual circumstances occurred, the parties hereto shall mutually agree on a new payment date. In addition, all fees not paid on the specified payment date shall result in a late payment charge of one and one-half (1+1/2) percent per month of the unpaid balance or the highest lawful rate, whichever is less, to Licensor.
- B) Fees and charges for each conduit system occupancy shall be computed on an individual case basis.
- C) Licensor reserves the right to revise the fees and charges specified in any or all license(s) granted hereunder by providing written notice to Licensee sixty (60) days prior to the end of any term of such license(s).

Article 4
TERM OF AGREEMENT AND LICENSE(S)

- A) This Agreement shall continue during such time Licensor is providing conduit system occupancy under any one or more licenses pursuant to this Agreement. In the event that all licenses granted hereunder expire or are terminated, then this Agreement may be terminated by either party with thirty (30) days prior written notice to the other party.
- B) Any license(s) issued hereunder shall continue in effect for an initial term of five (5) years from the date such license(s) is issued unless otherwise specified in such license.

- C) Any license issued hereunder shall be extended for successive terms of five (5) years unless otherwise specified in such license and unless either party provides written notice sixty (60) days prior to the expiration date of such term of its election to terminate such license.
- D) Termination of this Agreement or any license(s) issued hereunder shall not affect Licensee's liabilities and obligations incurred hereunder prior to the effective date of such termination.

Article 5

TERMINATION OF AGREEMENT AND LICENSE(S)

- A) Licensor shall have the right to terminate this entire Agreement or any license issued hereunder with thirty (30) days prior written notice to Licensee whenever Licensee is in default of any term of this Agreement. Default shall include, but not be limited to, the following conditions:
 - (1) If Licensee knowingly uses its communications facilities or maintains same in violation of any law or in aid of any unlawful act or undertaking; or
 - (2) If Licensee occupies any portion of a conduit system owned by Licensor without having first been issued a license therefore; or
 - (3) If any authorization which may be required of the Licensee by any governmental or private authority for the construction, operations, and maintenance of the Licensee's communications facilities within Licensor's conduit system is permanently denied or revoked; or
 - (4) If the insurance carrier shall at any time notify Licensor or Licensee that the policy or policies of insurance, required under Article 14 hereof, will be cancelled or changed and if in the sole reasonable judgment of Licensor the requirements of Article 14 will no longer be satisfied by policies with other insurance carriers, this Agreement shall terminate upon the effective date of such cancellation or change.
 - (5) Nonpayment as described in Article 3 herein.
- B) Licensor will promptly notify the Licensee in writing of any condition(s) of default by Licensee including those set forth in A) above. Licensee shall take immediate corrective action to eliminate any such condition(s) and shall confirm in writing to Licensor within thirty (30) days following receipt of such written notice that the cited condition(s) has ceased or been corrected. If Licensee fails to discontinue or correct such condition(s) and fails to give the required confirmation, Licensor may immediately terminate any or all license(s) granted hereunder and this Agreement. Licensee shall then have sixty (60) days to remove its facilities from Licensor's conduit system.

- C) In the event of early termination by Licensee or default of this Agreement or any license(s) issued hereunder, the Licensee shall be liable to pay to Licensor a termination liability amount whether or not Licensee has placed its communication facilities in Licensor's facilities. Such early termination charges shall be in accordance with the following schedule:

<u>Years Remaining in License(s)</u>	<u>Percent of Total Fees and Charges Remaining in License(s)</u>
16+	100%
11-15	75%
6-10	50%
1-5	25%
0	0%

- D) If this Agreement or any license(s) granted hereunder is terminated for reasons other than default or early termination, then Licensee shall remove its communications facilities from Licensor's conduit system within twelve months (12) from the date of termination; provided, however, that Licensee shall be liable for and pay all fees and charges provided for in this Agreement to Licensor until Licensee's communication facilities are physically removed.
- E) If Licensee does not remove its communications facilities from Licensor's conduit system within the applicable time periods specified in this Agreement, Licensor shall have the option to; (i) remove such facilities at the expense of Licensee and without any liability on the part of Licensor to Licensee therefore; or (ii) assess a charge not to exceed forty percent (40%) of the fees and charges specified in the license(s) so terminated. Such charge is in addition to the fees and charges specified in the terminated license(s) and shall be calculated on a daily basis for each day that Licensee's communication facilities remain in Licensor's conduit system.

Article 6
SPECIFICATIONS

- A) Licensee's communications facilities shall be placed and maintained in accordance with the requirements and specifications of current applicable Mountain Bell Practices and the current editions of the National Electrical Code (NEC) and the National Electrical Safety Code (NESC) and the rules and regulations of the Occupational Safety and Health Act (OSHA), all of which are incorporated by reference in this Agreement, and any governing authority having jurisdiction over the subject matter. Where a difference in specifications exists, the more stringent shall apply.
- B) If any part of Licensee's communications facilities is not placed and maintained in accordance with A) preceding, and Licensee has not corrected the violation within thirty (30) days from receipt of written notice thereof from Licensor, Licensor may at its option correct said condition. Licensor will attempt to notify Licensee in writing prior to performing such work whenever practicable. However, when such conditions pose an immediate threat to the safety of the Licensor's employees or the public, interfere with the performance of the Licensor's service obligations, or

