

**RESOLUTION NO. 8-09**

**A RESOLUTION AUTHORIZING REVISION OF THE JOINT POLE USE AGREEMENT OF THE UTILITIES COMMISSION, CITY OF NEW SMYRNA BEACH, FLORIDA; RESCINDING ALL RESOLUTIONS, OR PORTIONS THEREOF, IN CONFLICT HEREWITH; AND PROVIDING FOR AN EFFECTIVE DATE.**

**WHEREAS**, the Utilities Commission, City of New Smyrna Beach, Florida, has the full and exclusive authority over the management, supply, operation and control of all the City's electric, water, wastewater, and reuse (reclaimed) water utilities and has the duty and authority to prescribe rules and regulations governing the use of such facilities, wherever such are provided by the Utilities Commission and to make such changes from time to time in the Rules, Rates, and Regulations as it deems necessary; and

**WHEREAS**, the Joint Pole Use Agreement has been reviewed by staff and legal counsel and it has been determined that it is necessary to revise, to include reciprocity and other minor revisions; and

**WHEREAS**, the Utilities Commission presented the revised Joint Pole Use Agreement to the customers of the Utilities Commission , and to other parties of interest, at two public hearings which were duly noticed and advertised; preliminary public hearing held on August 17, 2009, and final public hearing held September 21, 2009.

**NOW, THEREFORE, BE IT RESOLVED BY THE UTILITIES COMMISSION, CITY OF NEW SMYRNA BEACH, FLORIDA, AS FOLLOWS:**

**SECTION 1:** That the following Joint Pole Use Agreement is hereby adopted which is attached to and made a part of this resolution.

**SECTION 2:** If any section, subsection, sentence, clause, phrase, or portion of this Resolution is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions thereof.

**SECTION 3:** All Resolutions, or portions thereof, in conflict herewith are hereby rescinded and superseded.

**SECTION 4:** After adoption by the Utilities Commission, this Resolution shall take effect immediately upon passage.

THE ABOVE AND FOREGOING RESOLUTION was introduced at a regular meeting of the Utilities Commission, City of New Smyrna Beach, Florida, held on Sept. 21, 2009, by Commissioner Reynolds, who moved its adoption, which motion was seconded by Commissioner Zeller, and upon roll call vote of the Commission was as follows:

CHAIRMAN	<u>Walter Allen III</u>	<u>yes</u>
VICE CHAIRMAN	<u>William Hall</u>	<u>ABSENT</u>
SECY.-TREAS.	<u>William H Reynolds</u>	<u>WNR</u>
ASST. SECY.-TREAS.	<u>Walter Zeller</u>	<u>yes</u>
COMMISSIONER	<u>Jeanne H. Wesen</u>	<u>yes</u>

APPROVED:

Walter Allen III  
CHAIRMAN

ATTEST:

William H Reynolds  
SECRETARY-TREASURER

APPROVED AS TO FORM AND  
CORRECTNESS:

William H Reynolds  
Utilities Commission Attorney

S E A L

**JOINT POLE USE AGREEMENT  
BETWEEN  
UTILITIES COMMISSION  
City of New Smyrna Beach, Florida,  
and**

---

**THIS AGREEMENT** is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between the **UTILITIES COMMISSION, CITY OF NEW SMYRNA BEACH, FLORIDA**, existing under the laws of the State of Florida, hereinafter referred to as " \_\_\_\_\_ ", and \_\_\_\_\_, a corporation organized and existing under the laws of the State of \_\_\_\_\_, hereinafter referred to as " \_\_\_\_\_ ".

**WITNESSETH:**

**WHEREAS**, the parties hereto desire to cooperate in accordance with the terms and provisions set forth in this document, the National Electrical Code and the National Electric Safety Code in their present forms or as subsequently revised, amended or superseded; and

**WHEREAS**, the conditions determining the necessity or desirability of joint use depend upon the service requirements to be met by both parties, including considerations of safety and economy and each of them should be the judge of what the character of its circuits should be to meet its service requirements and as to whether or not these service requirements can be properly met by the joint use of poles.

**NOW, THEREFORE**, in consideration of the foregoing premises and of the mutual benefits to be obtained from the covenants herein set forth, the parties hereto, for themselves and for their successors and assigns, do hereby agree as follows:

**ARTICLE 1. DEFINITIONS**

**1.1** For the purpose of this Agreement, the following terms, when used herein, shall have the following meanings:

**1.1.1 Code** - The "National Electrical Safety Code" and/or the "National Electrical Code" in its present forms or as subsequently revised, amended or superseded.

**1.1.2 Attachments** - Materials or apparatus, excluding ground wires, now or hereafter used by either party in the construction, operation or maintenance of its plant carried on poles.

**1.1.3 Joint Use** - Maintaining or specifically reserving space for the attachments of both parties and others on the same pole at the same time.

**1.1.4 Joint Use Pole** - A pole upon which space is provided under this Agreement for the attachments of both parties and others, whether such space is actually occupied by attachments or reserved therefore upon specific request.

**1.1.5 Normal Joint Use Pole** - A Normal Joint Use Pole shall be a 40 foot Class 5 wood pole for all areas. For drop poles, a shorter pole that meets minimum Code requirements for the attachment of both parties' drops may be used.

**1.1.6 Special Poles** - Poles of special materials, such as steel, laminated wood or prestressed concrete. A "REQUEST FOR ATTACHMENT" will be required by \_\_\_\_\_ to attach to special poles installed subsequent to the date of this Agreement.

**1.1.7 Standard Space** - A joint use pole shall not be less than that required by the Code and shall be for the exclusive use of the parties, except as set forth in the Code. This standard space is specifically described as follows:

A. For the Utilities Commission, the uppermost eight (8) feet on a 40 foot pole, the uppermost thirteen (13) feet on a 45 foot pole, and the uppermost fourteen (14) feet on a 50 foot pole or greater.

B. For \_\_\_\_\_, \_\_\_\_\_ feet of space at sufficient distance below the standard space of the Utilities Commission to comply with the specifications required by this Agreement and at sufficient height above ground to provide the proper vertical clearance above ground within the adjacent spans for the lowest horizontally run line, wires or cables attached in such space.

C. It is the intention of the parties that any pole space in excess of the aforementioned reservations and clearance requirements shall be between the standard space allocations of the parties. This excess space, if any, is thereby available for the use of either party without creating a necessity for rearranging the attachment of the other party.

**1.1.8 Make Ready Work** – Means all work, as reasonably determined to accommodate \_\_\_\_\_'s proposed facilities and/or to comply with all Applicable Standards. Such work includes, but is not limited to, Pre-Construction Survey, rearrangement and/or transfer of Facilities or existing Attachments, inspections, engineering work, permitting work, tree trimming (other than tree trimming performed for normal maintenance purposes), pole replacement and construction, or Conduit System clearing.

**1.1.9 Owner** - The party hereto owning the pole to which attachments are made.

**1.1.10 Licensee** - The party hereto, other than the Owner, who is making the joint use of a pole hereunder.

**1.1.11 Installed Cost** - The cost incurred in setting a new pole (either as a new installation or replacement) and includes the cost of materials, direct labor, construction and equipment charges, engineering and supervision, and standard overhead charges of the Owner as commonly and reasonably incurred in the joint use of poles. The installed cost does not include the cost of attaching or transfer costs.

**1.1.12 Value in Place** - The current in-plant pole cost less observed deterioration.

**1.1.13 Cost of Attaching** - The cost of making attachments to a new pole and includes the charge for hardware necessary to make the attachment.

**1.1.14 Transfer Cost** - The cost of transferring attachments from the replaced pole to the replacement pole. It does not include the material cost of replacing hardware.

**1.1.15 Vertical Ground Wire** - A #6 copper or equivalent copperweld conductor conforming to the requirements of the Code, attached vertically to the pole and extending to the base of the pole where it may be either butt wrapped on the pole or attached to a ground electrode. Owner shall adhere to grounding requirements as set forth by the Code.

**1.1.16 Multi-Grounded Neutral** - A conductor which is bonded to all vertical ground wires.

**1.1.17 Bonding Wire** - A suitable conductor conforming to the requirements of the Code connecting equipment to the vertical ground wire or to the multi-grounded neutral.

**1.1.18 Permit** - All attachments to joint use poles by a Licensee, except service drops, shall be recorded by use of an appropriate Permit.

**1.1.19 Post-Construction Inspection** - The inspection to determine and verify that the Attachments have been made in accordance with Applicable Standards and the Permit.

**1.1.20 Pre-Construction Survey** - Under this Agreement, this means all work or operations required by Applicable Standards and/or Owner to determine the potential Make-Ready Work necessary to accommodate Licensee's Facilities on a Pole. Such work includes, but is not limited to, field inspection, engineering calculations, storm hardening requirements and administrative processing.

**1.1.21 Tag** - To place distinct markers on wires and cables, coded by color or other means, that will readily identify the owner of the the Attachment. Licensee is only required to tag fiber attachments and will do so at every third pole to which an Attachment is made.

**1.1.22 Facilities** - All personal property and real property owned or controlled by the Owner, including Poles.

**1.1.23 Occupancy** - The use or specific reservation of Assigned Space on the same Pole.

**1.1.24 Overlash** - To place an additional wire or cable Facility onto an existing Attachment owned by Licensee.

## **ARTICLE 2. SCOPE OF AGREEMENT**

**2.1** This Agreement shall be in effect in those parts of Volusia County in the State of Florida now or hereafter served by both the Owner and the Licensee, and shall cover all Poles of each of the parties now existing in such service areas, or hereafter erected or acquired therein, when said Poles are brought hereunder as joint use poles in accordance with the procedures hereinafter provided.

**2.2** Each party reserves the right to exclude from joint use those facilities which have been installed for purposes other than, or in addition to, normal distribution of electric, telecommunications or cable service. Among those included in this category are poles not yet in joint use, which, in the judgment of the Owner, (a) are required for the sole use of the Owner; (b) would not readily lend themselves to joint use because of interference, safety hazards or similar impediments, present or future; or (c) have been installed primarily for the use of a third party. In the event one of the parties deems it desirable to attach to any such excluded poles, the party wishing to attach will proceed in the manner provided in Article 3. Where a third party use is involved, approval must be obtained from such third party as a prerequisite to processing under Article 3.

**2.3** Licensee shall not make initial or additional attachments to Owner's transmission line poles (above 35,000 volts phase-to-phase nominal rating) without the written approval of Owner as provided in Article 3 of this Agreement.

**2.4** Both parties agree that this agreement does not in any way limit Owner's right to locate, operate, maintain, or remove its Poles in the manner that will best enable it to fulfill its service requirement.

**2.5** Owner will take reasonable steps to accommodate existing Licensee's Attachments when expanding facilities. Notwithstanding the foregoing sentence, nothing in this Agreement shall be construed to require Owner to install, retain, extend or maintain any Pole for use when such Pole is not needed for Owner's service requirements.

### **ARTICLE 3. PERMIT APPLICATION PROCEDURES**

The following procedure is to be followed by each Licensee seeking to make new Attachments and/or Overlash new facilities to existing Licensee's facilities and/or Owner's facilities; provided, however, that permits are not required for service drops. No entity may make any Attachments to Owner's facilities without having first entered into a binding Joint Use Agreement.

**3.1** Licensee shall submit a written request to perform proposed attachment(s) to Owner's facilities. The request must include a proposed route description with proposed number of attachments. The request must include the proposed attachment height and Make Ready modifications that may be required to provide for the proposed attachments.

**3.2** The Owner will perform Pre-Construction Survey to review the Licensee's Make Ready recommendations and assure compliance with Code and Storm Hardening requirements. All Licensee's Make Ready recommendations will be reviewed with the Licensee and if Licensee decides to move forward with the Attachment, charges (if applicable) will be invoiced to the attention of the corresponding Licensee Representative.

**3.3** Upon receipt of Licensee's payment, the Make Ready Work will be scheduled. Licensee will be sent the executed request as a completion notification of Make Ready Work.

**3.4** After receiving notification, Licensee may start installing proposed attachment(s) to Owner's facilities. Licensee will be responsible to secure required permits from all corresponding Permitting Authorities for the installation of proposed attachments. Installation must be in compliance with applicable standards, Code and all Permitting Authorities requirements.

**3.5** (Reserved)

**3.6** The Owner may, at its option and expense, perform a Post-Construction Inspection to assure compliance. Should non-compliance issues be discovered the Licensee must correct them within thirty (30) calendar days unless in the reasonable judgment of the Owner they are deemed safety hazards. Safety hazards must be corrected immediately.

### **ARTICLE 4. PLACING, TRANSFERRING OR REARRANGING ATTACHMENTS AND BONDING ATTACHMENTS**

**4.1** Whenever either party desires to reserve space on any pole of the other, for any attachments requiring space thereon not then specifically reserved by application hereunder for its use, it shall make written application to the other party specifying in such application the location of the pole in question; provided, however, that permits are not required for service

drops. Within ten (10) days after the receipt of such application, the Owner shall notify the applicant in writing, advising whether or not said pole is one of those excluded. After the Owner completes any Make Ready work which may be required in respect to attachments on said poles, the applicant shall have the right as Licensee to use said space in accordance with the terms of this Agreement.

**4.2** The provisions of Section 4.1 do not apply to the poles of either party being used jointly by the other party as of the effective date of this Agreement; therefore, the Licensee shall have the right to use space on these poles for attachments in accordance with the terms of this Agreement.

**4.3** Except as herein otherwise expressly provided, each party shall place, maintain, rearrange, transfer and remove its own attachments at its own expense, and shall at all times perform such work promptly and in such manner as not to interfere with the service of the other party.

**4.4** Each party, regardless of pole ownership, shall be responsible for determining the proper pole strength, wind loading requirements and arranging for any necessary guying of a joint pole where a requirement therefore is created by the addition or alteration of attachments thereon by such party.

**4.5** The Owner shall give sixty (60) days written notice to Licensee advising it of any initial attachments or conversions of any existing attachments that will result in joint use with any of the following conditions:

A. The absence of a multiple grounded neutral line conductor.

B. Voltage in excess of 15,000 volts phase to ground.

C. If the parties agree to joint use with any special change, the joint use of such poles shall be continued with such changes in construction as may be required to meet the requirements of Code to be borne by the Owner. If Licensee fails within thirty (30) days to agree in writing to such change, then both parties shall cooperate and determine the most practical and economical method of effectively providing for separate lines. The parties shall determine what circuits shall be removed from the joint use poles involved, and the net cost of establishing a new location as may be necessary shall be determined and equitably apportioned between the parties.

D. The ownership of any new line constructed in a new location under the foregoing provision shall be vested in the party who owned the original pole.

**4.6** On joint use poles, either party may, at its own expense, bond its attachments.

**4.7** Both parties agree to not break, cut, sever or otherwise damage the ground wire.

**4.8** On joint use poles, the appropriate party shall, at its own expense, bond its street light brackets, conduit and other attachments to the vertical ground wire where the same exists.

**4.9** Licensee shall not install steps of any type on new joint use poles. Licensee will endeavor to remove pole steps that are not necessary when doing work on existing joint use poles.

**4.10** Licensee's attachments on Owner's Poles including metal attachment clamps and bolts, metal cross-arm supports, bolts and other equipment, must be attached so as to maintain the minimum separations specified in the Code.

## **ARTICLE 5. ERECTING, REPLACING OR RELOCATING POLES**

**5.1** Whenever, for whatever reason, the Owner shall deem it necessary to change the location of a jointly used pole, the Owner shall, before making such change in location, give timely notice thereof to the Licensee in writing (except in cases of emergency when verbal notice will be given, and subsequently confirmed in writing), specifying in such notice the time of such proposed relocation, and the Licensee shall, within thirty (30) days, transfer its attachments to the pole at the new location. Reasonable extensions of time shall be granted if no material prejudice to Owner will result and Licensee is using due diligence to complete work.

**5.2** Whenever either party hereto is about to erect new poles within the territory covered by this Agreement, either as a new pole line, an extension of an existing pole line, or as the reconstruction of an existing pole line being jointly used hereunder, such party shall promptly notify the other party hereto, in writing, prior to completion of engineering plans for such erection in order that any necessary joint planning may be coordinated and so that compliance may be had with the provisions hereof.

**5.3** The Make Ready Work associated with new and replacement poles, and such other changes in the existing pole line as new conditions may require, are to be outlined in Section 5.4

**5.4** The Make Ready cost of erecting joint use poles coming under this Agreement shall be borne as provided in one or more of the following subsections:

**5.4.1** For any new pole that is taller and/or stronger than the existing pole, the cost of the extra height and/or strength shall be apportioned as follows:

A. If the extra height and/or strength are due wholly to the Owner's requirements, the entire cost of the pole shall be borne by the Owner.

B. If the extra height and/or strength are due wholly to the Licensee's requirements, the Licensee shall pay the Owner a sum equal to the difference between the Make Ready cost of the required pole and the installed cost of a Normal Joint Use Pole.

**5.4.2** For a new pole to which no existing facilities of either party are to be attached (e.g., new pole lines), the pole shall be the obligation of the Owner. If a pole taller and/or stronger than a Normal Joint Use Pole is required, the obligation of the parties for such extra cost shall be in accordance with Subsection 5.4.1.

**5.4.3** For a new pole to which existing facilities of either party must be attached (e.g., adding pole in existing line) and the existing pole has Licensee's facilities, the new pole will accommodate the existing facilities attached to the pole and shall be set at the Owner's expense. If a pole taller and/or stronger is required, the obligation of the parties for such extra cost shall be that of the party necessitating the extra cost, or proportionately if both. Each party shall bear its own cost of attaching.

**5.4.4** Where an existing joint use pole is inadequate and said pole is replaced, the party requiring such replacement shall be obligated for the Make Ready cost as follows:

A. If such party is the Owner of both the existing and replacement poles, the Owner shall bear the cost of the pole and the cost of transferring the Licensee's attachments.

B. If such party is the Licensee of both the existing and replacement poles, that party shall pay the Owner a sum equal to (1) the difference between the installed cost of the required pole and the installed cost of the removed pole, plus (2) the then value in place of the removed pole, plus (3) the removal cost of the pole removed, plus (4) the Owner's transfer cost, less (5) the salvage value of the removed pole.

C. If such party is the Owner of the existing pole and the Licensee of the replacement pole, such party shall pay the new Owner's Make Ready cost less salvage of existing pole, plus any cost for a pole taller and/or stronger, and shall remove the existing pole.

D. If such party is the Licensee of the existing pole and the Owner of the replacement pole, such party shall bear the cost of the pole and pay the former Owner a sum equal (1) the then value in place of the removed pole, plus (2) the removal cost of the pole removed, plus (3) the former Owner's transfer cost, less (4) the salvage value of the removed pole.

**5.4.5** Where an existing joint use pole is replaced due to deterioration or damage, each party shall pay its own transfer costs. If the required pole is taller and/or stronger than the existing joint use pole, the provisions of Subsection 5.4.1 apply.

**5.5** Any payments made by the Licensee under the foregoing provisions of this Article shall not in any affect the ownership of said poles.

5.6 When replacing a joint use pole carrying terminals of aerial cable, underground connections or transformer equipment, the replacement pole shall be set in such a location that existing facilities may be transferred at a minimum of cost and inconvenience.

5.7 Whenever, in any emergency, the Licensee replaces a pole of the Owner, the Owner shall reimburse the Licensee all reasonable costs and expenses that would otherwise not have been incurred by the Licensee if the Owner had made the replacement. Licensee shall notify Owner of the replacement in writing within five (5) days of the pole replacement.

5.8 Licensee will be permitted to attach to special poles if this is done in a manner acceptable to the Owner.

#### **ARTICLE 6. PERMISSION OF JOINT USE**

6.1 Each party hereto hereby permits joint use by the other party of any of its poles, except transmission poles, when brought under this Agreement, as herein provided, subject to the terms and conditions herein set forth.

#### **ARTICLE 7. SPECIFICATIONS**

7.1 Joint use of poles covered by this Agreement shall at all times be in conformity with all applicable provisions of law and the terms and provisions of the Code in its present form or as subsequently revised, amended or superseded. Said Code, by this reference, is hereby incorporated herein and made a part of this Agreement.

#### **ARTICLE 8. RIGHT-OF-WAY FOR LICENSEE'S ATTACHMENTS**

8.1 While the Owner and the Licensee will cooperate as far as may be practicable in obtaining rights-of-way for both parties on joint use poles, no guarantee is given by the Owner of permission from property owners, municipalities or others for use of poles and right-of-way easement by the Licensee, and if objection is made thereto and the Licensee is unable to satisfactorily adjust the matter within a reasonable time, the Owner may, at any time upon sixty (60) days notice in writing to the Licensee, require the Licensee to remove its attachments from the poles involved and its appurtenances from the right-of-way easement involved and the Licensee shall, within sixty (60) days after the receipt of said notice, remove its attachments from said poles and its appurtenances from the right-of-way easement at its sole expense. Reasonable extensions of time may be granted if no material prejudice would result to Owner. Should the Licensee fail to remove its attachments and appurtenances as herein provided, the Owner may escalate the matter in accordance with the provisions found herein.

**8.2** Each party shall be responsible for its own circuits where tree trimming or cutting (e.g., shade trees, side clearances, etc.) is required. Where benefits are mutual and the need for the work is agreed upon beforehand, costs shall be apportioned on an equitable basis.

## **ARTICLE 9. MAINTENANCE OF POLES AND ATTACHMENTS**

**9.1** The Owner shall, at its own expense, maintain its joint use poles in a safe and serviceable condition, and in accordance with this Agreement, shall replace, subject to the provisions of this Agreement, such of said poles as become defective. Each party shall, at its own expense and at all times, maintain all of its attachments in accordance with the specifications contained in the Code and keep said attachments in safe condition and in thorough repair.

**9.2** Both parties shall, in writing, report to each other all hazardous conditions found to exist in any joint use construction hereunder, promptly upon discovery, and the responsible party shall proceed forthwith to alter such construction so as to remove the hazard. Any existing joint use construction hereunder which does not conform to the specifications set forth in this Agreement shall be brought into conformity with said specifications at the earliest possible date.

**9.3** The cost of removing hazards and of bringing existing joint use construction into conformity with said specifications shall be borne by the parties hereto in the manner provided herein.

## **ARTICLE 10. ABANDONMENT OF JOINTLY USED POLES**

**10.1** If the Owner desires at any time to abandon any jointly used pole, it shall give the Licensee notice in writing to that effect at least sixty (60) days prior to the date on which it intends to abandon such pole. If, at the expiration of said period, Owner shall have no attachments on such pole but the Licensee shall not have removed all of its attachments therefrom and such failure to remove the attachments is not the result of a third party failing to remove its attachments in a timely manner, such pole thereupon becomes the property of the Licensee, and the Licensee (a) shall indemnify and save harmless the former Owner of such pole from all obligation, liability, damages, cost, expenses or charges incurred thereafter and arising out of the presence or condition of such pole or any attachments thereon, whether or not such liability is due to or caused by in whole or in part by the negligence of the former Owner, and (b) shall pay said former Owner a sum equal to the then value in place of such abandoned pole, less credit on a depreciated basis for any payments which the Licensee furnishes proof he has made under provisions of this Agreement when the pole was originally set, or shall pay such other equitable sum as may be agreed upon between the parties.

**10.2** The Licensee may at any time abandon the joint use of a pole by giving due notice thereof in writing to the Owner and by removing from said pole any and all attachments the Licensee may have thereon.

## **ARTICLE 11. ADJUSTMENT PAYMENT**

**11.1** The parties contemplate that the use of space on poles by each party, as Licensee under this Agreement, shall be based on the equitable sharing of the costs and economies of joint use.

**11.2** On or about January 1 of each year, each party, acting in cooperation with the other and subject to the provisions of this Agreement, shall ascertain and tabulate the total number of poles in use by each party as Licensee, which tabulation shall indicate the number of poles in use by each party as Licensee for which an adjustment payment by one of the parties to the other is to be determined as hereinafter provided.

**11.3** The parties agree that an attachment count also includes any pole for which a permit application was submitted, approved and completed (including completion of any required Make Ready work), but which Licensee may not have yet attached.

**11.4** The party owning the smaller number of joint use poles to which the other party is attached shall pay to the party owning the greater number of joint use poles an annual adjustment payment in the amount of \$22.96 per excess pole, or amended amount as provided herein, calculated as follows:

The respective numbers of joint use poles owned by the two parties will be used and the smaller number will be subtracted from the larger to obtain the total excess poles. This number of excess poles will be multiplied by \$22.96 to derive the total adjustment payment due for that year by the party owning the smaller number to the party owning the greater number of joint use poles.

**11.5** Upon the execution of this Agreement and every four (4) years thereafter, or as may be mutually agreed upon, the parties hereto shall make a joint field check to verify the accuracy of the joint use records hereunder. If the parties mutually agreed to postpone the first joint field check hereunder, the parties shall use their existing records as changed from time-to-time to determine the number of jointly used poles owned by each party until the first joint field check is made hereunder. The said joint inventory shall be a one hundred (100%) percent field inventory unless the parties voluntarily and mutually agree to some other method. Upon completion of such inventories, the office records will be adjusted accordingly and subsequent billing will be based on the adjusted number of attachments. Any difference in the number of attachments shall be deemed to have been made to equally over the years elapsed since the preceding inventory and the adjustment rate shall be the rate then in effect in each of those years. Unless otherwise agreed upon, retroactive billing for the prorated adjustment will be added to the normal billing for the year following completion of the field inventory.

**11.6** Rental or other charges paid to the Owner by a third party will in no way affect the rental or charges paid between the parties of this Agreement.

11.7 Payment of all other amounts, provision for which is made in this Agreement, shall be made currently or as mutually agreed thereto.

## **ARTICLE 12. PERIODIC REVISION OF ADJUSTMENT PAYMENT RATE**

12.1 Article 11 of this Agreement covering Rental and Procedures for Payment shall remain in effect for a minimum term of four (4) years. The adjustment payment rate shall then become subject to change at the request of either party thereafter upon not less than six (6) months prior notice.

12.2 In the event the parties cannot agree upon rental payments within six (6) months after a request under Section 12.1 is made, either party may terminate this Agreement by giving written notice via certified mail to the operational addresses referenced herein. All other terms and provisions of this Agreement shall remain in full force and effect solely and only for the purpose of governing and controlling the rights and obligations of the parties herein with respect to existing joint use; except that upon termination under this Article 12 the party owning less joint use poles shall pay an adjusted annual fee using the adjustment rate in effect at the time notice is given.

## **ARTICLE 13. DEFAULT**

13.1 If either party shall default in any of its obligations (other than meet money payment obligations) under this Agreement, and such default shall continue for sixty (60) days after notice thereof in writing from the other party, all rights of the party in default hereunder, insofar as such rights may relate to the further granting of joint use poles hereunder, shall be suspended; and such suspension shall continue until the cause of each default is rectified by the party in default or until the other party shall waive such default in writing.

13.2 If either party shall default in the performance of any work which it is obligated to do under this Agreement at its sole expense, the other party may elect to do such work and the party in default shall reimburse the other party for the total cost thereof. Failure on the part of the defaulting party to make such payment within sixty (60) days after presentation of bills therefore shall constitute a default.

13.3 If the default giving rise to a suspension of rights involves the failure to meet a money payment obligation hereunder, and such suspension shall continue for a period of sixty (60) days, then the party not in default may forthwith terminate the rights of the other party to attach to the poles involved in the default.

## **ARTICLE 14. LIABILITY AND DAMAGES**

**14.1** Owner reserves to itself the right to maintain and operate its Poles in such manner a will best enable it to fulfill its service requirements. Licensee agrees to use Owner's Poles at Licensee's sole risk. Notwithstanding the foregoing, Owner exercise reasonable precaution to avoid damaging Licensee's Facilities and shall report to Licensee the occurrence of any such damage caused by its employees, agents or contractors. Owner agrees to reimburse Licensee for all reasonable costs incurred by Licensee for the physical repair of such facilities damaged by the negligence or willful misconduct of Owner, not including the aggregate liability of Owner, to Licensee, for any other fines, penalties, claims or damages stemming from interruption of Licensee's service or interference with the operation of Licensee's Facilities (including special, indirect, punitive or consequential damages).

**14.2** Licensee shall defend, indemnify and hold harmless Owner and its officials, officers, board members, council members, commissioners, representatives, employees, agents, and contractors against any and all liability, costs, damages, fines, taxes, special charges by others, penalties, payments (including payments made by Owner under any Workers' Compensation Laws or under any plan for employees' disability and death benefits; and expenses (including reasonable attorney's fees and all other costs and expenses of litigation) ("Covered Claims") arising in any way, including any act, omission, failure, negligence or willful misconduct, in connection with the construction, maintenance, repair, presence, use, relocation, transfer, removal or operation by Licensee, or by Licensee's officers, directors, employees, agents or contractors, of Licensee's Facilities, except to the extent of Owner negligence or willful misconduct giving rise to such Covered Claims. Such Covered Claims include, but are not limited to, the following:

**14.2.1** Intellectual property infringement, libel and slander, trespass, unauthorized use of television or radio broadcast programs and other program material, and infringement of patents;

**14.2.2** Cost of work performed by Owner that was necessitated by Licensee's failure, or the failure of Licensee's officers, directors, employees, agents or contractors, to install, maintain, use, transfer or remove Licensee's Facilities in accordance with the requirements and specifications of this Agreement, or from any other work this Agreement authorizes Owner to perform on Licensee's behalf;

**14.2.3** Damage to property, injury to or death of any person arising out of the performance or nonperformance of any work or obligation undertaken by Licensee, or Licensee's officers, directors, employees, agents or contractors, pursuant to this Agreement;

**14.2.4** Liabilities incurred as a result of Licensee's violation, or a violation by Licensee's officers, directors, employees, agents or contractors, of any law, rule, or regulation of the United States, State of Florida or any other governmental entity or administrative agency.

**14.3 Procedure for Indemnification.**

**14.3.1** Owner shall give prompt notice to Licensee of any claim or threatened claim, specifying the factual basis for such claim and the amount of the claim. If the claim relates to an action, suit or proceeding filed by a third party against Owner, Owner shall give the notice to Licensee no later than ten (10) calendar days after Owner receives written notice of the action, suit or proceeding.

**14.3.2** Owner failure to give the required notice will not relieve Licensee from its obligation to indemnify Owner unless Licensee is materially prejudiced by such failure.

**14.3.3** Licensee will have the right at any time, by notice to Owner, to participate in or assume control of the defense of the claim with counsel of its choice, which counsel must be reasonably acceptable to Owner. Owner agrees to cooperate fully with Licensee. If Licensee so assumes control of the defense of any third-party claim, Owner shall have the right to participate in the defense at its own expense. If, after receiving notice of the claim pursuant to Section 14.3.1, Licensee does not so assume control or otherwise participate in the defense of any third-party claim, Licensee shall be bound by the results obtained by Owner with respect to the claim.

**14.3.4** If Licensee assumes the defense of a third-party claim as described above, then in no event will Owner admit any liability with respect to, or settle, compromise or discharge, any third-party claim without Licensee's prior written consent, and Owner will agree to any settlement, compromise or discharge of any third-party claim which Licensee may recommend which releases Owner completely from such claim.

**14.4** Licensee represents and warrants that its use of Owner's Poles will not generate any Hazardous Substances, that it will not store or dispose on or about Owner's Poles or transport to Owner's Poles any hazardous substances and that Licensee's Facilities will not constitute or contain and will not generate any hazardous substance in violation of federal, state or local law now or hereafter in effect including any amendments. "Hazardous Substance" shall be interpreted broadly to mean any substance or material designated or defined as hazardous or toxic waste, hazardous or toxic material, hazardous or toxic or radioactive substance, dangerous radio frequency radiation, or other similar terms by any federal, state, or local laws, regulations or rules now or hereafter in effect including any amendments. Licensee further represents and warrants that in the event of breakage, leakage, incineration or other disaster, its Facilities would

not release any Hazardous Substances. Licensee and its agents, contractors and subcontractors shall defend, indemnify and hold harmless Owner and its respective officials, officers, board members, council members, commissioners, representatives, employees, agents and contractors against any and all liability, costs, damages, fines, taxes, special charges by others, penalties, punitive damages, expenses (including reasonable attorney's fees and all other costs and expenses of litigation) arising from or due to the release, threatened release, storage or discovery of any Hazardous Substances on, under or adjacent to Owner's Poles attributable to Licensee's use of Owner's Poles.

Should Owner's Poles be declared to contain Hazardous Substances, Owner, Licensee and all Attaching Entities shall share proportionately in the cost of disposal of the affected Poles based on each entity's individual percentage use of same plus its share of the Common Space. Provided, however, if the source or presence of the Hazardous Substance is solely attributable to particular parties, such costs shall be borne solely by those parties.

**14.5** No provision of this Agreement is intended, or shall be construed, to be a waiver for any purpose by Owner of any applicable State limits on municipal liability.

**14.6** The successful party in an action in a court of competent jurisdiction to enforce this Agreement shall recover reasonable attorney's fees and costs incurred.

## **ARTICLE 15. DUTIES, RESPONSIBILITIES OF OTHER PARTIES**

**15.1** Licensee acknowledges and agrees that Owner does not warrant the condition or safety of Owner's Facilities, or the premises surrounding the Facilities.

**15.2** By executing this Agreement, Licensee warrants that it has acquainted, or will fully acquaint, itself and its employees with the conditions relating to the work that Licensee will undertake under this Agreement and that it fully understands or will acquaint itself with the facilities, difficulties and restrictions attending the execution of such work.

**15.3** The parties further understand and agree that in the performance of work under this Agreement, Licensee and its agents, employees, contractors and subcontractors will work near electrically energized lines, transformers or other Owner Facilities, and it is the intention that energy therein will not be interrupted during the continuance of this Agreement, except in an emergency endangering life, grave personal injury or property. Licensee shall ensure that its employees have the necessary qualifications, skill, knowledge, training and experience to protect themselves, their fellow employees, employees of Owner and the general public, from harm or injury while performing work permitted pursuant to this Agreement. In addition, Licensee shall

furnish its employees competent supervision and sufficient and adequate tools and equipment for their work to be performed in a safe manner. Licensee agrees that in emergency situations in which it may be necessary to de-energize any part of Owner's equipment, Licensee shall ensure that work is suspended until the equipment has been de-energized and that no such work is conducted unless and until the equipment is made safe.

**15.4** In the event that Licensee causes an interruption of service by damaging or interfering with any equipment of Owner, Licensee at its expense shall immediately do all things reasonable to avoid injury or damages, direct and incidental, resulting therefrom and shall notify Owner promptly.

**15.5** Licensee further warrants that it understands the imminent dangers (INCLUDING SERIOUS BODILY INJURY OR DEATH FROM ELECTROCUTION) inherent in the work necessary to make installations on Owner's Poles by Licensee's employees, agents, contractors or subcontractors, and accepts as its duty and sole responsibility to notify and inform Licensee's employees of such dangers, and to keep them informed regarding same.

#### **ARTICLE 16. ASSIGNMENT OF RIGHTS AND EXISTING RIGHTS OF OTHER PARTIES**

**16.1** Except as otherwise provided in this Agreement, neither party hereto shall assign or otherwise dispose of this Agreement or any of its rights or interests hereunder, or in any of the jointly used poles, or the attachments or rights-of-way covered by this Agreement, to any firm, corporation, or individual, without written notification to the other party; provided, however, that nothing herein contained shall prevent or limit the right of either party to mortgage any or all of its property, rights, privileges and franchises, or lease or transfer any of them to another corporation organized for the purpose of conducting a business of the same general character as that of such party, or of such mortgage, or in case of such lease, transfer merger, or consolidation, its rights and obligations hereunder shall pass to and acquired and assumed by the purchaser on foreclosure, the lessee, transferee, merging or consolidating company, as the case may be.

**16.2** If either of the parties hereto has, as Owner, conferred upon others, not parties to this Agreement, by contract or otherwise, rights or privileges to use any poles covered by this Agreement, nothing herein contained shall be construed as affecting said rights or privileges, and either party hereto shall have the right, by contract or otherwise, to continue and extend such existing rights or privileges; it being expressly understood however that for the purposes of this Agreement all attachments of any such third party shall be treated as attachments belonging to the Owner, and except as modified by Section 14.3, the rights, obligations and liabilities hereunder of said Owner in respect to such attachments shall be the same as if it were the actual Owner thereof.

16.3 In the event that attachments to be made by a third party require rearrangements or transfer of the Licensee's attachments to maintain standard space (as defined in Subsection 1.1.7) and standard clearance (as outlined by the Code), the Licensee shall have the right to collect from said third party all costs to be incurred by the Licensee to make such required rearrangements or transfers prior to doing the work.

16.4 Each Owner reserves the right to use or permit to be used by other third parties such attachments on poles owned by it which would not interfere with the rights of the Licensee with respect to use of such poles.

16.5 To the extent allowed by law, third party space requirements must be accommodated without permanent encroachment into the standard space allocation of the Licensee; therefore, neither party hereto shall, as Owner, lease to any third party, space on a joint use pole within the allocated standard space of the Licensee without adequate provision for subsequent use of such standard space by Licensee without cost to the Licensee.

16.6 Where either party allows the use of its poles for fire alarm, multicolor low level lighting, traffic signal, police or other like signal system, or where such systems are presently or hereafter permitted by the Owner to occupy its poles, such use shall be permitted under and in accordance with the terms of this Article 14.

**ARTICLE 17. SERVICE OF NOTICES**

17.1 Whenever in this Agreement notice is provided to be given by either party hereto to the other, such notice shall be in writing and given by letter mailed, or by personal delivery, unless notice is required by certified mail pursuant to the Agreement, to the following addresses, or to such other address as either party may, from time to time, designate in writing for that purpose:

**Utilities Commission, City of New Smyrna Beach, Florida**  
Attention Director of Engineering  
200 Canal Street  
New Smyrna Beach, Florida 32168

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**ARTICLE 18. TERM OF AGREEMENT**

18.1 Subject to Articles 12 and 13 herein, the provisions of this Agreement insofar as the same may relate to the further granting of joint use of additional poles hereunder, may be terminated by either party after the first day of January, 20\_\_\_, upon six (6) months notice in writing to the other party to the addresses specified herein. Following termination, this Agreement shall remain in force and effect with respect to all poles jointly used by the parties at the time of such termination.

**ARTICLE 19. WAIVER OF TERMS OR CONDITIONS**

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

**ARTICLE 20. EXISTING CONTRACTS**

20.1 All existing Agreement between the parties hereto for the joint use of poles upon a rental basis within the territory covered by this Agreement are, by mutual consent, hereby abrogated and annulled.

**ARTICLE 21. DISPUTE RESOLUTION**

21.1 Prior to the initiation of litigation, the parties shall in good faith attempt to settle any dispute arising out of or relating to this Agreement. including escalating issues not resolved at the local level to upper management. All negotiations pursuant to this Article shall be confidential unless limited by Public Records Law, and such negotiations shall be treated as compromise and settlement negotiations for purposes of any court's Rules of Evidence.

**ARTICLE 22. GOVERNING LAW**

22.1 This Agreement is made and shall be interpreted, construed, governed, and enforced in accordance with the laws of the State of Florida.

**ARTICLE 23. HEADINGS**

23.1 Paragraph headings are for the convenience of the parties only and are not to be construed as part of this Agreement.

**ARTICLE 24. SEVERABILITY**

24.1 In the event any portion of part of this Agreement is deemed invalid, against public policy, void, or otherwise unenforceable by a court of competent jurisdiction, the parties shall negotiate an equitable adjustment in the affected provision of this Agreement. The validity and enforceability of the remaining parts thereof shall otherwise be fully enforceable.

**ARTICLE 25. ENTIRE AGREEMENT**

25.1 This Agreement constitutes the entire agreement between Owner and Licensee with respect to the services specified and all previous representations relative thereto, either written or oral, are hereby annulled and superseded.

**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the date first written above.

**COMMISSION:**

UTILITIES COMMISSION, CITY OF  
NEW SMYRNA BEACH, FLORIDA

By: \_\_\_\_\_  
ROBERT RODI  
General Manager/CEO

By: \_\_\_\_\_

Its: \_\_\_\_\_

ATTEST: \_\_\_\_\_

ATTEST: \_\_\_\_\_

APPROVED AS TO FORM AND  
CORRECTNESS:

Its:

\_\_\_\_\_  
Utilities Commission Attorney

(CORPORATE SEAL)

## Utilities Commission, City of New Smyrna Beach

### Summary of Assumptions Used in Calculations

**1. Allocation Method:**

Costs have been allocated to attachments on a fully-allocated basis.

**2. Treatment of Support Space:**

Support space is shared equally among all attaching entities (including utility).

**3. Accounting for Cross-Arm Cost:**

For utilities without detailed property records, cross-arm costs must be taken-out of pole costs to arrive at bare pole cost. There is a presumption that 15% of the cost of a pole is due to the cross-arm.

**4. Basis for Determining Pole Costs**

Pole cost is determined based on historical cost records.

**5. Rate of Return**

Rate of return percentage entered is for net pole investment.

**6. Treatment of Safety Clearance Space:**

Forty (40) inches of safety space shared equally between the utility and attaching entities.

Utilities Commission, City of New Smyrna Beach

Summary of the Computation of Pole Attachment Rates

Calculations Were:

Performed by: Laurie Klinkenberg  
Performed on the date: May 31, 2007  
Based on historical data for the year ended: September 30, 2006

Method Used: Fully Allocated

Pole Attachment Rate: \$ 22.96

Summary of Key Demographics Used:

Estimated average bare pole cost (based on historical costs) \$ 454.10  
Carrying charge percentage 25.47%  
Average number of attaching entities (includes utility as one) 3.00

**Utilities Commission, City of New Smyrna Beach**

**Computation of Carrying Charge Rate**

Prepared on May 31, 2007

**Administrative and General Expense Percentage**

Total administrative and general expenses 169,179.00

Divide by: Plant in Service, CIP and Supplies

Plant @ 9/30/2006

Plant in service	82,674,321.00
Construction work in progress	2,993,379.00
Materials and supplies	<u>2,195,791.00</u>

Plant in Service, Less Accumulated Depr	<u>39,207,847.00</u>
---	----------------------

**Administrative and General Expense Percentage**

0.43%

**Operating and Maintenance Expense Percentage**

Allocation of Supervision/Engineering to Poles:

Distribution supervision/engineering expense 1,322,050.00

Multiply by: Allocation percentage

Poles and overhead line expenses 800,436.00

Divided by: Total distribution expenses

(net of supervision costs of \$1,322,050) 482,793.00

165.79%

Supervision/Engineering expense 2,191,853.62

Add: Poles and overhead line expense 800,436.00

Add: Other directly attributable expenses

Subtotal	<u>800,436.00</u>
----------	-------------------

Divide by: Overhead-related items

Poles, towers and fixtures (FERC Account # 364) 12,878,815.00

Overhead cond. and devices (FERC Account # 365) 6,800,380.00

Services (FERC Account # 369) 3,956,445.00

23,635,640.00

**Operating and Maintenance Expense Percentage**

3.39%

**Depreciation Rate for Utility Poles**

5.59%

**Tax Equivalent Rate**

6.00%

**Return on Investment for Utility**

10.06%

**TOTAL ANNUAL CARRYING CHARGE RATE**

25.47%

Utilities Commission, City of New Smyrna Beach

Computation of Estimated Cost of a Bare Pole

Prepared on May 31, 2007

*Gross Investment in Poles:*

Total cost of poles, towers and fixtures (FERC Account 364)	\$	12,878,815.00
Subtract: Accumulated Depreciation in Poles		7,449,861.00
Multiply by: Percent of costs allocable to bare poles		<u>85%</u>
<b><i>Net Investment in Poles</i></b>	<b>\$</b>	<b><u>4,614,610.90</u></b>

*Divide by: Number of Poles Owned* 10,162

**ESTIMATED COST OF A BARE POLE** **\$ 454.10**

Utilities Commission, City of New Smyrna Beach  
 Computation of Pole Attachment Fee - Fully Allocated Method  
 Prepared on May 31, 2007

<i>Support Space Factor</i>			
Cost of the bare pole		\$ 454.10	Computed
Multiply by: Percentage of unusable space on the pole			
Support space	24.00		Given
Divide by: Average pole height	<u>37.50</u>		Given
Support space percentage		64.00%	
Multiply by: Carrying charge rate		<u>25.47%</u>	Computed
Multiply by: Statutory Limit on Attaching Entities		66.67%	
Total Support Carrying Charge per pole		49.35	
Divide by: Average number of attachers		<u>3.00</u>	Entered
Total Support Space Factor		<u>\$ 16.45</u>	

<i>Usable Space Factor</i>			
Cost of a bare pole		454.10	Computed
Multiply by: Percentage of usable space on the pole			
Usable feet of pole space (presumed to be 13.5 feet)	13.50		Given
Divide by: Average pole height	<u>37.50</u>		Given
Usable space percentage		35.00%	
Multiply by: Percent of usable space used by the cable attachment			
Total space occupied by cable attachment			
Directly attributable to cable attachment (presumed to be 1ft)	1.00		Given
Allocation of 40" safety space to non-utility attaching entities	<u>1.11</u>		Given
Usable space allocated to the cable attachment	2.11		
Usable feet of pole space (presumed to be 13.5 feet)	<u>13.50</u>		Given
Space used by cable attachment		15.64%	
Multiply by: Carrying charge rate		<u>25.47%</u>	Computed
Total Usable Space Factor		<u>\$ 6.51</u>	
<b>POLE ATTACHMENT FEE - FULLY-ALLOCATED METHOD</b>		<u><b>\$ 22.96</b></u>	