

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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In the Matter of the Application of Rocky Mountain Power for Authority to Increase its Retail Electric Utility Service Rates in Utah and for Approval of its Proposed Electric Service Schedules and Electric Service Regulations) DOCKET NO. 10-035-124
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In the Matter of the Consolidated Application of Rocky Mountain Power for Approval of Standard Reciprocal and Non-Reciprocal Pole Attachment Agreements) DOCKET NO. 10-035-97
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In the Matter of an Investigation into Pole Attachments) DOCKET NO. 04-999-03
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) ORDER ON URTA MOTION TO
) DISMISS POLE ATTACHMENT ISSUES
) OR FOR ALTERNATIVE RELIEF
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ISSUED: June 1, 2011

By The Commission:

On May 3, 2011, the Utah Rural Telecom Association (“URTA”) filed a motion to dismiss the pole attachment issues from this proceeding and to strike the pertinent testimony of Jeffrey M. Kent and Steven R. McDougal, filed on behalf of PacifiCorp (“Company”), doing business in Utah as Rocky Mountain Power. Alternatively, URTA’s motion seeks a transfer of the pole attachment issues from this docket to a rulemaking docket or to Docket No. 10-035-97. URTA requested oral argument on its motion on five days written notice, but no later than May 12, 2011, citing Utah Administrative Code § R746-100-3H. URTA requested a decision on its motion before May 16, 2011, so that, if successful, it would not have to file the direct testimony on pole attachment issues due that date.

Pursuant to the Commission's order of May 4, 2011, several parties filed responses to the motion on or before May 10, 2011, namely: the Company; the Division of Public Utilities ("Division"); Comcast Cable Communications Management, LLC ("Comcast"); and Qwest Corporation ("Qwest"). A Commission hearing officer heard oral arguments on May 12, 2011. At the conclusion of the oral arguments, the hearing officer took the matter under advisement and stated a written decision would not be issued before the May 16, 2011, testimony due date.

At issue is whether the Company should be allowed to present in this general rate case docket testimony proposing changes to the formula by which the Company's Schedule 4 pole attachment rental rate is determined. The challenged testimony also advocates adding to Schedule 4 a fee schedule of non-recurring charges.

POSITIONS OF THE PARTIES

URTA argues in support of its motion that the Commission has already resolved the rental rate formula and non-recurring charge issues in Docket No. 04-999-03, which, over the course of two years, resulted in an administrative rule governing pole attachments (Utah Administrative Code R746-345) and a "safe harbor" pole attachment agreement. Among other things, the rule establishes a pole attachment rental rate formula for uniform application, unless a pole owner or attaching entity petitions for Commission review and demonstrates the formula is unjust, unreasonable, or otherwise inconsistent with the public interest. URTA asserts it would be a waste of the Commission's and parties' limited resources to re-examine the pole attachment rules at this time.

As an alternative to dismissal, URTA believes the Company's testimony should be examined in a rulemaking docket or in an existing pole attachment proceeding, Docket No. 10-035-97. That docket was opened to examine Company applications for Commission acceptance of two proposed "standard" pole attachment agreements. URTA and other supporters of the motion to dismiss urge the proposed agreements embodied the same types of deviations from R746-345 as the Company now advocates in this case. Docket No. 10-035-97 was suspended on October 5, 2010, at the Company's request, prior to any Commission decision on the proposed agreements. URTA asserts if the Company's dissatisfaction with the pole attachment rental rate formula and related rate levels is to be heard at all, it should be heard in the docket that was left open for that specific purpose.

Comcast argues in favor of the motion. It asserts the Company has failed to show it provided proper notice of its rate case application to parties with interest in its pole attachment rates. Comcast also maintains the Company's testimony, while describing the pole attachment rate changes it desires, presents no facts to support the changes. In particular, Comcast alleges the Company does not support its claim that electric ratepayers currently subsidize the Company's pole attachment rates, i.e., that the current rates are contrary to the public interest.

Qwest also supports URTA's motion. Qwest notes similarities between the Company's arguments for changing the formula presented in its rate case testimony and arguments the Company asserted in Docket No. 04-999-03. Thus, Qwest underscores URTA's argument that the Commission has already addressed the Company's pole attachment rate claims, and doing so again now would waste Commission resources. Qwest also joins Comcast

in alleging the Company did not provide a factual basis for relief from the rate formula established by rule.

The Division opposes the motion to dismiss. The Division's primary concern is for the orderly adjudication of the Company's authorized revenues and expenses. If the pole attachment issue is dismissed, parties in future rate cases may seek to avoid rate changes they oppose using a similar tactic. The Division is also concerned about the timing of the motion in relation to the due date for URTA's testimony. Filing a motion to dismiss an applicant's testimony a few days before opposing testimony on the issue is due, in the Division's view does not justify extending the testimony due date and disrupting a complex rate case schedule. The Division does not oppose the opening of a rulemaking docket, so long as the pole attachment revenue and rate requests remain part of the general rate case.

The Company also opposes the motion to dismiss. It equates URTA's pleading to a motion to dismiss under Rule 12(b)(6) of the Utah Rules of Civil Procedure, for failure to state a claim upon which relief can be granted. The Company maintains in acting on URTA's motion, the Commission should accept the factual allegations in the Company's testimony as true and consider all reasonable inferences to be drawn from those facts in the light most favorable to the Company. The Company asserts URTA has not even tried to establish that the Company's testimony fails to demonstrate its need for the requested rate relief.

The Company also argues the Commission's prior extensive consideration of pole attachment rental rates does not bar the Company from seeking rate relief in this case. The Company argues that, as costs treated in the pole attachment rental rate formula change over time, it is entirely appropriate for the Company to seek a new annual charge through a rate case.

The Company maintains it is not requesting rulemaking, i.e., a change to Utah Administrative Code R746-345. Rather, it is seeking a change in rates. Although the rate change it proposes necessitates a deviation from the rental rate formula prescribed in R746-345-5, in the Company's view such a deviation is permissible under R746-345-5.B, if properly justified.

Finally, the Company asserts URТА's motion is untimely. The Company reads Utah Administrative Code R746-100-4.D as requiring a party seeking to dismiss a request for agency action, like this rate increase application, to file its motion within 30 days of the request. Under this interpretation, URТА's opportunity to file its motion expired in February, 2011.

DISCUSSION, FINDINGS AND CONCLUSIONS

We conclude URТА and the other proponents of the motion have not established grounds for dismissal of the testimony. It is true the Commission extensively considered the pole attachment rental rate formula the Company now questions, in a rulemaking docket that concluded about five years ago. This fact, however, does not preclude the Company from now seeking rate relief available under the adopted rules. We recognize the Company's testimony supporting the changes to Schedule 4 and the pole attachment rental rate formula is largely a recitation of conclusions and is only supported by a one page pole attachment rate calculation. Nevertheless, evaluating the testimony and reasonable inferences in the light most favorable to the Company, we do not find the testimony deficient as a matter of law.

We also recognize, however, the Company's brief testimony supporting higher pole attachment rates raises issues of great import to a business segment that is not typically represented in the Company's general rate cases. This is to be expected because the issues

businesses that rent pole space have with the Company are inherently different than the issues the Company's electric customers have regarding its electric rates. For joint pole users like URTA, Comcast and Qwest, the rules and rates governing their access to poles can be a substantial, even dominant, component of their cost structures and business plans. Moreover, their access to poles to provide broadband, telecommunications and video has important implications for competition in communications and increased availability of advanced communication services.

Given the core issues typically addressed in general rate cases, the statutory time constraints for reaching a rate case decision, the relatively small revenue requirement impacts of the pole attachment issues raised in the challenged testimony, and the great import of these same issues for businesses that jointly use the Company's poles, we find the Company's testimony should be examined in a separate docket. The transfer of this testimony will enable a more orderly and thorough consideration of the Company's rate-related pole attachment evidence, in a docket dedicated to that purpose, not to mention the increased opportunity, in this general rate case, to focus on the numerous other issues presented. The transfer will also better assure all interested parties have knowledge of the Company's rate-related pole attachment proposals and a fair opportunity to present relevant evidence for our consideration.

Accordingly, we hereby transfer consideration of the Company's rate-related pole attachment testimony to Docket No. 10-035-97. This transfer does not apply to testimony and exhibits relevant to determining the Company's test period costs associated with pole attachment activities. Testimony and exhibits addressing cost levels will be examined in this docket, consistent with historical practice. The extent of recovery of these costs from the Company's

joint pole users will be addressed in Docket No. 10-035-97, subject to the requirements of Utah Administrative Code R746-345-5.B. Should the Company desire relief beyond that available under R746-345-5.B, it should attempt to initiate rulemaking.

To facilitate the transfer of the rate-related pole attachment issues, we authorize the Company to file in Docket No. 10-035-97 the direct testimony currently filed in this docket addressing pole attachment rental rates and recovery of non-recurring costs, together with additional relevant material if it so elects. The Company may make this filing at a time of its choosing. We direct the Company to serve its testimony on all parties of record in Docket Nos. 10-035-97 and 04-999-03. We also direct the Company to re-file in this docket those portions of its previously-filed pole attachment testimony and exhibits that address the test period costs (i.e., revenue requirement) associated with pole attachment activities. This process will ensure all parties will know what pole attachment evidence remains to be examined in this case.

We will cause a copy of this order to be placed in Docket Nos. 10-035-97 and 04-999-03. Shortly after the Company files its testimony in Docket No. 10-035-97, we will notice and convene a conference to set the schedule for other parties to file testimony, and for a hearing. Based upon the schedule adopted at that time, parties other than the Company who filed pole attachment testimony in this docket will have the opportunity to have that testimony considered in Docket No. 10-035-97. Accordingly, the direct testimony these parties filed in this docket will not be considered here.

ORDER

1. The Company shall withdraw from this docket all testimony and exhibits supporting changes to its rental rates for pole attachments and related non-

DOCKET NOS. 10-035-124, 10-035-97, AND 04-999-03

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recurring charges, except to the extent, if any, such testimony is relevant to establishing the test period costs of pole attachment activities. The Company may file the withdrawn testimony in Docket No. 10-035-97. If and when it does so, the Company shall serve its testimony on all parties of record in Docket Nos. 10-035-97 and 04-999-03.

2. On or before June 9, 2011, the Company shall re-file in this docket those portions of its previously-filed pole attachment testimony and exhibits that address the test period revenue requirement associated with pole attachment activities.

DATED at Salt Lake City, Utah this 1st day of June, 2011.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

G#72995 Docket No. 10-035-124
G#72996 Docket No. 10-035-97
G#72997 Docket No. 04-999-03
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