



State of Utah
Department of Commerce
Division of Public Utilities

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ACTION REQUEST RESPONSE

To: Public Service Commission

From: Chris Parker, Director
Artie Powell, Energy Section Manager
Joni Zenger, Technical Consultant
Sam Liu, Utility Analyst

Date: January 5, 2012

Re: Docket No. 11-035-198, Application for Approval of Pole Attachment Agreement between Rocky Mountain Power and First Digital Telecom LLC.

RECOMMENDATION (APPROVAL)

The Division of Public Utilities (Division) recommends that the Public Service Commission (Commission) approve the Agreement between Rocky Mountain Power and First Digital Telecom LLC.

ISSUE

On December 5, 2011, PacifiCorp (dba Rocky Mountain Power) filed an Application with the Commission for Approval of a Pole Attachment Agreement (Agreement) between Rocky Mountain Power (“Company”) and First Digital Telecom LLC (First Digital). First Digital and the Company are together referred to as the “Parties.” Along with the Application, the Company submitted a copy of the Agreement that was negotiated and agreed to by the Parties as well as a

copy of the Company's Joint Use Distribution Construction Standards and its Electric Service Schedule No. 4. Since the Agreement differs from the Commission-approved "safe harbor" pole attachment agreement in Docket No. 04-999-03 (also re-circulated in Docket No. 10-035-97), the Company requests that the Commission issue an order approving the Agreement and finding the terms and conditions of the Agreement to be just and reasonable and in the public interest. On December 6, 2011, the Commission issued an Action Request to the Division for a review of the Application for Approval of the Agreement. This memorandum is in response to the Commission's Action Request.

DISCUSSION

The Division reviewed the Company's Application, the negotiated Agreement, and the Commission rules as they pertain to pole attachments. In its Application, the Company states that, "The Agreement was voluntarily negotiated between Rocky Mountain Power and First Digital. The Agreement represents the parties' agreed-to terms and conditions for First Digital's attachments to Rocky Mountain Power's poles in Utah" (Application at 2). Utah Admin. § R746-345-1(B)(2) requires parties to have Commission approval in the event that a negotiated agreement is used. The Division notes that the Agreement negotiated between the Company and First Digital is nearly identical to the pole attachment agreement between the Company and CentraCom Interactive, approved by the Commission in Docket No. 11-035-05.¹ According to the Company's Application, "Minor differences exist, such as addition of a table of contents for convenience of the reader and the inclusion of definitions for Attachment Space, Cost Estimate, Credit Requirement, Estimated Attachments, Material Adverse Change, and Security." Definitions of Audit and Periodic Inspection were consolidated into the "Inspection" section of the Agreement (Application at 2-3).

The Company also notes that it "modified the sections governing the application process to match its existing business practices in exchange for certain benefits to Licensee" (Application at 3). For example, the Agreement modifies Section 2.03 Reservation of Rights to clearly explain under what conditions the Company may reject an applicant's request for attachment,

¹ Report and Order, Docket No. 11-035-05, April 5, 2011.

and Section 7.02 Default, details specific events of default. Additionally, while rents accrue earlier under the Agreement than under the Safe Harbor, the Agreement allows First Digital a longer period, 45 days as opposed to 30 days, to pay outstanding invoices (Section 4.04); a longer period to complete its installations, 180 days as opposed to 90 days (Section 3.03); and First Digital can extend this period without submitting a new application or incurring additional fees. An additional sentence is added to the audit section, stating “the inclusion of additional items in an Audit” may be requested by a Party, who will be solely responsible for the cost of the additional items (Section 3.14).

Other changes appear to be designed to allow the Company to manage pole attachments more efficiently. For example, in the event that First Digital does not accept the cost of continued attachment when requested to relocate, First Digital is required to remove the attachment 10 days sooner (Section 3.07) under the Agreement than under the Safe Harbor (Application at 3-4). Parties can terminate the Agreement upon 90 days written notice, during which time First Digital must remove its attachments (Application at 4). Finally, Section 3.10 provides for timely termination of the permit for any pole in the event that First Digital fails to provide evidence of necessary permits or licenses for access or use of land upon which the pole is situated (Application at 4).

Under the Agreement, third party overlashing is not permitted, and First Digital must submit an application for its own overlashing. The Company states that this will allow an opportunity for the Company to evaluate “pole loading” prior to the overlashing (Application at 4).

According to the Company’s Application, the Agreement contains the Company’s updated terms regarding indemnification, credit and insurance, as well as limitations of liability and warranties, which terms are reflected throughout the Agreement. First Digital must maintain commercial general liability insurance at a higher limit than provided in the Safe Harbor, maintain umbrella liability insurance to cover any shortfalls in other coverage, and maintain business interruption insurance. The Company claims that the increased credit and insurance requirements “reflect the changes to economic conditions since 2004” (Application at 4-5).

All of the terms described above are reasonable and have been mutually agreed to by both Parties. The Company's Application and request for Commission approval includes the computation of the annual pole attachment rental rate and the Company's Distribution Construction Standards (EU) that appear to be in conformance with the National Electrical Safety Code requirements. The pole attachment rental rate of \$7.02 per foot of space is taken directly from Rocky Mountain Power's Electric Service Schedule No. 4 on file with the Commission and also attached to this filing.

Finally, the Division notes that the contract rental rate was calculated using the Company's approved Electric Service Schedule No. 4, which the Company submitted with the Application and which is on file with the Commission. Per Electric Service Schedule No. 4, the annual rental rate is \$7.02 per foot of space used.

The First Digital Agreement is a non-reciprocal agreement as opposed to the reciprocal relationship contemplated in the Safe Harbor. Unlike previously approved pole attachment filings, First Digital is not an existing customer, and the Company states that it has not yet processed applications or allowed First Digital to attach to its poles, pursuant to Commission orders.

In Docket No. 09-035-52 (TCG Utah Agreement), the Commission ordered the Company to submit future negotiated attachment agreements to the Commission in a timely manner. The First Digital Agreement was signed by First Digital on August 30, 2011, and by the Company on October 24, 2011. The Application was filed for approval with the Commission on December 5, 2011. The Company provides no explanation for the delay in signing and filing the Agreement with the Commission for approval. The Division believes it is in the public interest of providing nondiscriminatory access to the Company's poles to file the application for approval with the Commission in a timelier manner. However and more importantly in this case, and also pursuant

to the Commission's Order in the TCG Utah docket, the Company has not permitted or processed pole attachment applications by First Digital as of the date of this filing.²

The Division has reviewed the Company's Application including comparing the Agreement to the Safe Harbor and the previously approved agreement with CentraCom Interactive in Docket No. 11-035-05. As stated previously, each of the terms and conditions of the Agreement, including the changes outlined above and in the Company's Application, were negotiated and agreed to by the Parties. The Division finds the terms and conditions in the Agreement itself to be reasonable and balanced, but believes that Application should have been filed in a timelier manner.

CONCLUSION

After reviewing the Company's filing and accompanying documents, the Division finds that the Agreement among the Parties is reasonable and should be approved. The terms and conditions of the Agreement are, for the most part, consistent with the Commission-approved Standard Agreement. Where differences occur, they have been mutually agreed to by the Parties and are similar to the changes approved by the Commission in Docket No. 11-035-05.

CC Dave Taylor, Rocky Mountain Power
Michele Beck, Office of Consumer Services
Barbara Ishimatsu, PacifiCorp

² "The Company shall ensure that no pole attachments are permitted prior to the execution and commission approval of a pole attachment contract . . .," Docket No. 09-035-52, Report and Order, October 5, 2009, p. 5.