

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

Formal Complaint of Rulon Crosby against PacifiCorp, dba Rocky Mountain Power	<u>DOCKET NO. 17-035-42</u> <u>ORDER ON MOTION TO DISMISS</u>
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ISSUED: September 6, 2017

I. Procedural Background.

On July 7, 2017, Rulon Crosby filed a formal complaint against PacifiCorp, a public utility, which does business in Utah as Rocky Mountain Power (RMP).

On August 7, 2017, RMP answered the complaint and filed a motion to dismiss it. The parties have fully briefed the motion to dismiss.

II. Relevant Facts.¹

1. Mr. Crosby owns property in Garden City, Utah.
2. RMP owns utility poles that are located on Mr. Crosby's property.
3. At all relevant times, Mr. Crosby has been a customer of RMP.
4. To obtain electric power at the west end of his property, Mr. Crosby attached a 240-volt insulated extension cord to two of RMP's poles. Mr. Crosby placed an aluminum ladder against one of the poles during the attachment process.

¹ Facts that are set forth in the filings, but that are irrelevant to the PSC's jurisdiction and authority, are not recited in this Order. For example, Mr. Crosby complains that RMP's agent threatened one of his tenants. Such a complaint is a police matter and may not be resolved or considered by the PSC. Similarly, it appears that Mr. Crosby and RMP dispute whether Mr. Crosby's method of accessing RMP's utility poles violated rules set forth by the Occupational Safety and Health Administration (OSHA). Issues involving OSHA are the purview of the Utah Labor Commission. Therefore, the PSC does not address the parties' dispute on this matter. Finally, Mr. Crosby complains generally about the attitude and behavior of RMP's agents. The PSC has no mechanism to address such issues and, therefore, do not consider them.

5. On July 5, 2017, RMP informed Mr. Crosby that his use of RMP's poles was prohibited.

With a sheriff present, RMP's agent removed Mr. Crosby's extension cord from the poles.

In doing so, RMP's agent drove a truck onto Mr. Crosby's property.

III. Parties' Positions.

A. Right to attach.

Mr. Crosby argues that, as a property owner, he has the inherent right to attach personal property to RMP poles that are located on his property. He has provided no legal authority to establish the right he claims.

RMP disputes that Mr. Crosby is entitled to make private use of utility-owned facilities.

RMP bases its argument on two PSC rules:

- Utah Admin. Code R746-345-1(B)(2) provides that "a public utility must allow any attaching entity nondiscriminatory access to utility poles at rates, terms and conditions that are just and reasonable."
- Utah Admin. Code R746-345-2(a) defines "attaching entity" as a "public utility, wireless provider, cable television company, communications company, or other entity that provides information or telecommunications services[.]"

RMP argues that Mr. Crosby does not meet the definition of "attaching entity" and, therefore, has no recourse under R746-345-1(B)(2).

B. Lawful access.

Mr. Crosby argues that RMP cannot demonstrate that its utility poles are within a utility easement.

Mr. Crosby also argues that RMP does not have an easement that allows it to send a truck or an agent onto his property to access the utility's poles. Mr. Crosby believes RMP lacks lawful

access because (a) he has never affirmatively granted an easement to RMP; and (b) he has found no public record of an easement in favor of RMP.

RMP asserts that the PSC does not have jurisdiction over the question of whether a utility easement was properly established when the utility poles were initially placed on the land that Mr. Crosby now owns.

RMP claims access to the poles under its tariff. Specifically, RMP Electric Service Regulation No. 1, Section 5 provides:

As a condition of service the customer shall, either explicitly or implicitly, grant the utility necessary permission to enable the utility to install and maintain service on the premises. The customer shall grant the utility permission to enter upon the customer's premises at reasonable times without prior arrangements, for the purpose of reading, inspecting, repairing or removing utility property.

IV. Analysis and Conclusions of Law.

A motion to dismiss "should be granted ... only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim."²

A. Right to attach.

Mr. Crosby does not dispute the fact that RMP enjoys exclusive ownership of the utility poles at issue in this matter. Nevertheless, Mr. Crosby asserts that, as a property owner, he has an inherent right to make use of anything that is located on his property.

Mr. Crosby has provided no statute, court decision, or other authority to support his position. In reality, utilities are permitted to retain sole ownership of facilities that are located on

² *Am. W. Bank Members, L.C., v. State*, 342 P.3d 224, 230 (Utah 2014) (quoting *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990)).

private property, and RMP has done so through its tariff.³ Where RMP enjoys exclusive ownership of the poles, it also has the right to deny others' use of the poles, except insofar as such use is expressly authorized by the PSC.

The PSC has expressly authorized use of RMP poles by "attaching entities" only, and has defined "attaching entity" as a "public utility, wireless provider, cable television company, communications company, or other entity that provides information or telecommunications services." Mr. Crosby has not argued that he meets the definition of an "attaching entity," and there is nothing in the record to indicate that he could meet that definition. Therefore, he has no legal basis from which to require RMP to enter into a pole attachment agreement with him. Absent such an agreement, he has no right to make use of RMP's property.⁴

B. Lawful Access.

RMP is correct that the PSC lacks jurisdiction to determine whether RMP's poles are located within a properly-established utility easement. This issue involves complicated questions of property law, title, and land use, and must be addressed through a civil action. *See Taylor v. PSC*, Case No. 20030694-CA (UT Ct. App.) March 17, 2005: "Finally, we agree with the PSC that a decision regarding the existence of an easement over [private] property is not within the jurisdiction of the PSC." The PSC notes, however, that if RMP establishes in a court proceeding that its utility poles are located within a utility easement—whether prescriptive or otherwise—

³ *See* RMP Regulation 6, Section 2(a): "All materials furnished and installed by the Company on the Customer's premises, shall be, and remain, the property of the Company."

⁴ Mr. Crosby asserts that, having had professional experience in the field of electricity, he is qualified to attach to RMP's poles without undue risk. This might be true. However, the PSC rule does not provide an exception for individual property owners who have the knowledge and skills to safely execute a pole attachment agreement, and RMP is entitled to operate by the rule.

then RMP would also have a right of ingress and egress for access to its equipment. *See* RMP Regulation No. 1, Section 5, as set forth above.

In sum:

1. There is no state of facts that would establish Mr. Crosby as an "attaching entity" under PSC rule. Therefore, Mr. Crosby cannot require RMP to enter into a pole attachment agreement with him, and RMP has properly prohibited Mr. Crosby from making private use of utility-owned property.
2. If Mr. Crosby wishes to resolve the question of whether the utility poles located on his property are sited within a valid utility easement, he must do so in a court of law.

ORDER

Given the foregoing, the PSC grants RMP's motion to dismiss the July 7, 2017 complaint of Rulon Crosby. Dismissal is with prejudice.

DATED at Salt Lake City, Utah, September 6, 2017.

/s/ Jennie T. Jonsson
Administrative Law Judge

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Approved and confirmed September 6, 2017 as the Order of the Public Service
Commission of Utah.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg
Commission Secretary
DW#296510

Notice of Opportunity for Agency Review or Rehearing

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, a party may seek agency review or rehearing of this order by filing a request for review or rehearing with the PSC within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the PSC fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the PSC's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I CERTIFY that on September 6, 2017, a true and correct copy of the foregoing was served upon the following as indicated below:

By U.S. Mail:

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