



JON HUNTSMAN Jr.
Governor
GARY HERBERT
Lieutenant Governor

State of Utah
Department of Commerce
Division of Public Utilities

FRANCINE GIANI
Executive Director

THAD LEVAR
Deputy Director

PHILIP J. POWLICK
Director, Division of Public Utilities

MEMORANDUM

To: Public Service Commission

From: Division of Public Utilities
Philip Powlick, Director
Artie Powell, Manager, Energy Section
Joni Zenger, Technical Consultant
Casey Coleman, Technical Consultant
Doug Wheelwright, Utility Analyst

Date: July 29, 2009

Re: Docket No. 09-035-52, Application for Approval of Pole Attachment Agreement between PacifiCorp and TCG Utah

RECOMMENDATION: Approve the Application and the negotiated contract between PacifiCorp and TCG Utah, including the proposed terms and conditions with the requirement that the Company report back to the Commission once internal processes for negotiated contracts have been put in place.

BACKGROUND

On June 29, 2009, Rocky Mountain Power filed an Application with the Commission for Approval of a Pole Attachment Agreement between PacifiCorp (the Company) and TCG Utah (collectively, the Parties). Accompanying the Application, the Company submitted a copy of the contract that was negotiated and agreed to by the Parties as well as a copy of the Company's Joint Use Distribution Construction Standards. Inasmuch as the pole attachment contract agreed to by the Parties differs from the Commission-approved contract, 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.

DISCUSSION

Rule 746-345 of the Commission's rules and regulations defines how, when, and where an entity can attach equipment to a pole owned by a public utility. According to the Commission rules, "a public utility must allow any attaching entity nondiscriminatory access to utility poles at rates, terms, and conditions that are just and reasonable."¹ This rule also requires the pole owner to submit a tariff and standard contract for Commission approval.

With respect to the tariff provision, the Company already has on file with the Commission, and also submitted with this Application, its Electric Service Schedule No. 4 Pole Attachments. However, rather than using the standard contract (also referred to as Standard Agreement or Safe Harbor) previously approved by the Commission in Docket No. 04-999-03, the Company in its Application filed a contract that was negotiated by the Parties and that differs from the Commission approved Standard Agreement. Rule R746-345-1(B) 2 requires parties to have Commission approval in the event that a negotiated contract is used:

The pole owner and attaching entity may voluntarily negotiate an alternative contract incorporating some, all, or none of the terms of the standard contract or SGAT. The parties shall submit the negotiated contract to the Commission for approval.²

TCG Utah and PacifiCorp jointly negotiated the terms and conditions of the proposed contract. The Agreement was signed by TCG Utah on September 12, 2008 and by PacifiCorp on October 22, 2008. The Application for approval of the contract was filed on June 29, 2009.

FINDINGS

¹ Rule R746-345-1 (B) 2.

² Rule R746-345-3 Section (B) (1).

The Division reviewed the Company's Application, the negotiated contract signed by the Parties, and the Commission rules as they pertain to pole attachments. The Division believes that the Company should have filed this agreement immediately after the Parties had signed the negotiated contract and not many months later. As described above, the contracts were signed eight months before this Application was filed with the Commission. The Division queried the Company to explain this apparent timing discrepancy. According to the Company's explanation, the TCG contract was the first non-standard joint use contract the Company had executed in Utah since the 2006 change to the pole attachment rule, R746-345. The Division understands that the Company was uncertain about what needed to be filed and whether the filing was required. The Division recommends that internal processes need to be put in place by the Company to ensure that future contracts are filed in a timely manner and that new applications are held until the contract receives Commission approval. The Division recommends that the Commission require the Company to file a memo reporting back to the Commission once the internal processes have been put in place to ensure that negotiated contracts are approved by the Commission in the future in a timely manner.

The remaining comments of the Division apply to the contract as filed with the Application. The Division found that there are both substantive and nonsubstantive differences between the two documents. The minor changes consist of consolidation of sections and clarification of the Company's administrative processes that were agreed to mutually by the Parties. These changes are described below:

- The proposed contract consolidates the standard contract provisions relating to wood decay (Section 4.04), tree trimming (Section 4.05), and brush cutting (Section 4.05) into a single vegetation management section (Section 3.11).
- Section 10.03 Bonding has been changed to Section 6.03 Bonding and contains a provision that requires TCG Utah to provide assurances of posting security, collateral or a cash deposit in the event TCG Utah's credit rating drops below a rating of CCC.

- The Agreement removes all references to joint use and benefit of poles, as there is no reciprocal relationship in this case. (Section 4.02, 4.03, Section 3.13, Section 3.14, and Section 3.15)
- Section 6.01 contained in the Commission-approved contract allows 30 days plus an additional 60 days for the party to cure a default in the agreement. The proposed Agreement replaces the standard contract with Section 7.02 that contains a bilateral provision allowing only 30 days to remedy a default.

In addition to the consolidated and clarified provisions identified above, the Agreement contains several changes that are substantive and differ from the Commission-approved standard contract. The Division finds that many of the substantive changes were made to reflect updated regulatory requirements and National Electric Safety code requirements. Other changes were made to accommodate standardized management of the joint use administrative functions, as this agreement applies strictly to Utah, and the Company has a six-state jurisdiction. The Division notes that the contract length itself has been reduced from the length of the standard contract from 21 pages to 18 pages in the Application agreement as a result of more specific language and the consolidation and clarification of specific items in the Application agreement. The Division reviewed each of the proposed changes. They appear to be an improvement in clarity and simplicity and are identified below:

- 1) The section describing the Application Procedure has been simplified and requires the Company to either approve or deny in writing an application for a pole attachment application within 45 days.
- 2) There is a provision that allows the Company to reject an application due to safety concerns on the infrastructure.

- 3) The parties agreed that TCG would pay rent sooner than under the standard contract, but in turn will be allowed 180 days instead of 90 days to complete its installations. In addition, TCG will have 45 days rather in 30 days to pay outstanding invoices.
- 4) TCG must maintain commercial general liability insurance at a higher limit (\$2 million instead of \$1 million), a \$5 million umbrella policy, and a \$1 million business interruption insurance policy.
- 5) The proposed contract Section 3.07 replaces the standard contract Section 3.12 language pertaining to Interference with PacifiCorp's Equipment. Under the proposed contract, in the event that an attachment interferes with PacifiCorp's equipment, licensee will be notified of the costs to cure the interference. The licensee then has 30 days to authorize the cure. If licensee does not accept this cost to accommodate its continued attachment, licensee must remove its attachments from the affected pole or poles within 30 days (rather than the 40 days allotted in the standard contract.)
- 6) Article IX of the proposed contract lists the mutually agreeable terms and conditions regarding indemnification, liability, and warranties. This wording replaces Article V contained in the Standard contract.
- 7) The proposed contract contains termination and default terms that allow each party the option to terminate the Agreement after (90) days of written notice. Should TCG terminate the Agreement, TCG must remove its equipment from poles within that 90-day period. The standard contract allowed 365 days for a party to remove its equipment.
- 8) Section 7.02 adds terms with respect to the event of a default, including insolvency, bankruptcy, or any material breach of the Agreement.

- 9) The proposed Agreement allows TCG to assign its contract without the consent of the Company for certain reasons, such as a merger, sale, or reorganization. However, the licensee must first notify the Company in writing prior to any assignment.

- 10) The proposed Agreement removes Section 3.11 of the contract, allowing TCG access to easements and rights of way and adds Section 3.12 requiring TCG to be solely responsible for obtaining and maintaining all consents, permits, licenses or grants. PacifiCorp may at any time require written documentation of compliance with Section 3.12.

- 11) The proposed agreement adds Section 8.01, which contains a mutual confidentiality provision to the terms of the Agreement.

All of the terms described above are reasonable and have been mutually agreed to by both Parties. Finally, 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), which provide engineering drawings covering joint use of poles. The Division reviewed both documents. First, it appears that the Company's Distribution Construction Standards (EU) are in conformance with the National Electrical Safety Code requirements. Second, the calculation of the rental rate uses the correct formula in accordance with Rule R746-345-5. The calculation per foot of space used comes to \$7.02 on an annual basis, which is consistent with Rocky Mountain Power's Electric Service Schedule No. 4 on file with the Commission.

CONCLUSION AND RECOMMENDATION

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

contract. Where differences occur, they have been mutually agreed to by the Parties. The proposed Agreement is clear, understandable, and provides benefits to both TCG and PacifiCorp.

As noted above, the Company should file these agreements immediately after they have been signed and not many months later. The Division recommends that the Commission require the Company to report to the Commission once internal control processes have been put in place that ensure future negotiated contracts are approved by the Commission in a timely manner and before any pole attachments are installed. Nevertheless, the Division recommends the Commission approve the Application of Rocky Mountain Power and the accompanying Agreement with TCG Utah. The mutually negotiated terms and conditions of the Agreement are reasonable and in the public interest. With this recommendation, the Division requests that the Commission accept the action request as being closed.

cc:

Michael Ginsberg

Patricia Schmid

Dave Taylor

Barbara Ishimatsu

Mark Moench