

Barbara Ishimatsu (10945)  
Rocky Mountain Power  
201 South Main Street, Suite 2300  
Salt Lake City, Utah 84111  
Telephone No. (801) 220-4640  
Facsimile No. (801) 220-3299  
[barbara.ishimatsu@pacificorp.com](mailto:barbara.ishimatsu@pacificorp.com)

*Attorney for Rocky Mountain Power*

**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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In the Matter of the Application of  
ROCKY MOUNTAIN POWER for Approval  
of Pole Attachment  
Agreement between PacifiCorp  
and TCG Utah

DOCKET No. 09-035-52

**MOTION FOR REVIEW AND  
RECONSIDERATION**

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Rocky Mountain Power, a dba of PacifiCorp, an Oregon Corporation (“Rocky Mountain Power” or the “Company”), hereby requests limited Review and Reconsideration pursuant to Utah Code Annotated 54-7-15 (2008) of the Report and Order in this matter dated and issued August 11, 2009. This petition is limited to a request for clarification of only the paragraph requiring that the “Company shall ensure that any future negotiated attachment agreements shall be submitted to the Commission in a timely manner and before any pole attachments are installed” (the “Order”). Requiring the Company to cease processing all pole attachment requests from its joint use customers where there is a mutually beneficial, established relationship would be burdensome, cause needless interruption to both businesses, and offer no regulatory advantage. Rocky Mountain Power seeks clarification that the Order did not intend to require such an interruption. The grounds for this Petition are set forth below.

## **BACKGROUND**

After the 2006 amendment of the Pole Attachment Rules in Utah Administrative Rules, R746-345, Rocky Mountain Power found itself with a long to-do list. First to be completed was establishing an approved pole attachment rate, which was filed December 7, 2006 and approved as Electric Service Schedule No.4 on December 11, 2006. The Company modified its internal processes to incorporate the Commission's requirements found in the Safe Harbor Agreement and the Rules. Then, the Company set about revising its standard form contracts to incorporate the Commission's requirements found in the Safe Harbor Agreement and the Rules. The standard forms were not submitted for Commission approval based on a now discarded internal determination that submitting negotiated agreements for case by case approval, or use of the Commission's Safe Harbor Agreement in the event negotiations foundered, would be sufficient.

However, the Company did research its contractual relationships with its joint use customers to determine which existing joint use customers ("Existing Customer") had contracts, which contracts were not readily accessible by either party, and which had acquired another entity's assets and service territory. The Company determined, of its Existing Customers:

- Contracts with 13 entities (some are under common ownership and may or may not execute separate contracts) are missing or outdated. Some of these relationships date back to the 1950's; some contracts may only need updated pricing, others may need to be memorialized in writing.
- Contracts with approximately seven entities (some are affiliated with entities listed above) have not been properly assigned. These Existing Customers obtained assets and service territory from telecommunications, CATV, or broadband providers and

have requested an assignment of contract or an entirely new contract. Unfortunately, many of those seller's records of pole ownership and attachments on Rocky Mountain Power poles are missing or incorrect; as a result, Rocky Mountain Power and the Existing Customer assignee are unable to determine which poles are jointly used and affected by an assignment. In some instances, both parties have agreed upon an audit schedule whereby pole ownership and attachments can be determined prior to ratifying an assignment or executing a new contract.

The Company has prioritized for contract negotiation those Existing Customers in the two categories above where pole attachment records or past invoices are in greatest dispute, and where the Existing Customer has requested a new contract. Many of these prioritized Existing Customers serve rural areas of Utah. The Company is now preparing to submit its standard contract to the Commission for approval; however, negotiations currently underway with approximately five of the Existing Customers (and affiliated entities) may result in additional negotiated contracts being submitted for approval.

## **ARGUMENT**

### **The Commissions Order would cause needless interruption to both businesses, and offer no regulatory advantage**

The Commission, in item two, states “the Company shall ensure that any future negotiated attachment agreements shall be submitted to the Commission in a timely manner and before any pole attachments are installed.” Report and Order dated and issued August 11, 2009 (the “Order”). The Order is in response to the Company's admitted failure to submit the TCG Contract until eight months after execution and its error in permitting TCG attachments to poles prior to Commission approval of the TCG Contract. The Order, on its face, could be interpreted

as requiring the Company to cease permitting pole attachment requests from all Existing Customers who have not executed Commission-approved contracts or at least to cease permitting pole attachment requests from the time that contract negotiations are underway until the final negotiated attachment agreement is approved by the Commission. The Company believes such a restriction was unintended and seeks clarification that the Order does not require the interruption of business between the Company and its Existing Customers during the course of contract negotiations.

The applicable Rule, R746-345-3, governing pole attachment contracts requires that “The pole attachment relationship shall be established when the pole owner and the attaching entity have executed the approved standard contract, or SGAT, or other Commission-approved contract.” The rules provide an exception in 345-3.B(1), “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.”

In contrast to restrictions reasonably imposed on permitting attachments with companies like TCG, where no contractual relationship existed and no attachments had been placed prior to beginning negotiation, most of the Company’s contract negotiations currently involve its Existing Customers. For the majority of these Existing Customers, a pole attachment relationship was established prior to the 2006 enactment of R746-345-3. Ceasing to permit attachments from Existing Customers would create a new burden on the Company as every new attachment request would need to be screened. The Company would also be unable to comply with requests from municipalities, and the Utah Department of Transportation to relocate a pole

used jointly with an Existing Customer since the Company could not issue a permit for such relocated poles or additional poles required. This would cause needless interruption of community beautification and roadway improvement projects. It would also create difficulty in moving attachments when a Company pole needed to be replaced due to damage or decay.

There would be little regulatory benefit gained by requiring the Company to cease permitting pole attachment requests from its Existing Customers who have not executed a “Commission-approved contract.” On those contracts where the rental rate exceeded the current tariff rate, the Company has reduced its pole attachment rental rate to the tariff rate as required by the Rules. Further regulatory restrictions on existing contracts, other than as to the rates charged, could be construed as an unconstitutional interference with contracts. *U.S. Smelting v. Utah Power & Light, et al.*, 58 Utah 168, 197 P. 902, 906 (1921)(“The [public utility] commission is therefore given the power to so regulate existing contracts . . . [but] only so far as may be necessary to prevent preferential rates from being enforced on the one hand and from working an injustice upon the other.”)

The Order could actually increase the burden on the Commission. If the Company were to cease permitting new attachments from its Existing Customers who have not executed a “Commission-approved contract,” the result could be a flood of consumer complaints to the Commission over the stoppage of new cable, broadband, and telephone service by the Existing Customers. It could also result in hastily negotiated pole attachment contracts being submitted for expedited approval to the Commission.

The company respectfully suggests a solution implemented by the Oregon Public Utility Commission as part of Oregon Administrative Rules, Division 28, Pole and Conduit Attachments. Under Rule 860-028-0130, Sanctions for lack of a contract do not apply to:

(b) A pole occupant operating under an expired or terminated contract and participating in good faith efforts to negotiate a contract or engaged in formal dispute resolution, arbitration, or mediation regarding the contract; or

(c) A pole occupant operating under a contract that is expired if both pole owner and occupant are unaware that the contract expired and both carry on business relations as if the contract terms are mutually-agreeable and still applicable.

The Company also suggests making an exception for the group of Existing Customers where a contract may not have been reduced to writing or the written contract is unavailable, but the relationship is working well. Applying such an exception to these Existing Customers would maximize resources of both the regulated community and the Commission, and cause the least disruption to business and community relations, while providing assurance that pole attachment services are being provided in compliance with the rules.

### **CONCLUSION**

The Company respectfully suggests item two of the Order be amended to read as follows (and the existing paragraph numbered “3” be renumbered as “4”):

2. the Company shall submit any future negotiated attachment agreements to the Commission in a timely manner;
3. the Company shall ensure that no pole attachments are permitted prior to the execution and commission approval of a pole attachment contract, with the exception of the following classes of Existing Customers:

- a) those operating under a missing, expired or terminated contract and participating in good faith efforts to negotiate a contract or engaged in formal dispute resolution, arbitration, or mediation regarding the contract;
- b) those operating under a contract that is expired or unwritten if both pole owner and occupant are unaware that the contract is expired, and both carry on business relations as if the contract terms are mutually-agreeable and still applicable;
- c) those operating under a contract that is unwritten or missing if both pole owner and occupant carry on business relations as if the contract terms are mutually-agreeable and applicable;

In sum, Rocky Mountain Power seeks clarification that the Order does not require the interruption of good business relationships between the Company and its Existing Customers, especially during the course of good faith contract negotiations.

Respectfully submitted,

ROCKY MOUNTAIN POWER

By \_\_\_\_\_

Barbara Ishimatsu  
Attorney for Rocky Mountain Power

## CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September, 2009, I caused to be emailed a true and correct copy of the foregoing **MOTION OF ROCKY MOUNTAIN POWER FOR REVIEW AND RECONSIDERATION** in Docket No. 09-035-52, to the following:

<p>Paul Proctor Office of Consumer Services Heber M. Wells Bldg., Fifth Floor 160 East 300 South Salt Lake City, UT 84111 <a href="mailto:pproctor@utah.gov">pproctor@utah.gov</a></p>	<p>Cheryl Murray Dan Gimble Michele Beck Office of Consumer Services 160 East 300 South, 2<sup>nd</sup> Floor Salt Lake City, UT 84111 <a href="mailto:cmurray@utah.gov">cmurray@utah.gov</a> <a href="mailto:dgimble@utah.gov">dgimble@utah.gov</a> <a href="mailto:mbeck@utah.gov">mbeck@utah.gov</a></p>
<p>Dennis Miller William Powell Philip Powlick Division of Public Utilities Heber M. Wells Building 160 East 300 South, 4<sup>th</sup> Floor Salt Lake City, UT 84111 <a href="mailto:dennismiller@utah.gov">dennismiller@utah.gov</a> <a href="mailto:wpowell@utah.gov">wpowell@utah.gov</a> <a href="mailto:philippowlick@utah.gov">philippowlick@utah.gov</a></p>	<p>Michael Ginsberg Patricia Schmid Assistant Attorney General Utah Division of Public Utilities Heber M. Wells Bldg., Fifth Floor 160 East 300 South Salt Lake City, UT 84111 <a href="mailto:mginberg@utah.gov">mginberg@utah.gov</a> <a href="mailto:pschmid@utah.gov">pschmid@utah.gov</a></p>
<p>Kira Slawson Blackburn &amp; Stoll, LC 257 East 200 South, Ste 800 Salt Lake City, UT 84111-2048 KiraM@blackburn-stoll.com</p>	<p>Stephen F. Mecham 10 East South Temple, Suite 900 Salt Lake City, UT 84133-1115 sfmecham@cnmlaw.com</p>