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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of ROCKY MOUNTAIN POWER for Approval of Standard Non-reciprocal Pole Attachment Agreement	DOCKET No. 10-035-43 **REPLY COMMENTS OF ROCKY MOUNTAIN POWER**

Pursuant to the Commission's August 3, 2010 Amended Scheduling Order in this docket, PacifiCorp, doing business in Utah as Rocky Mountain Power ("Rocky Mountain Power" or "Company") respectfully submits these Reply Comments to the following parties' comments filed with the Commission on or before June 15, 2010: Frontier Communications Corporation ("Frontier"), Utah Rural Telecom Association ("URTA"), Comcast Phone of Utah, LLC ("Comcast"), and NextG Networks of California, Inc. ("NextG").

INTRODUCTION

The Company filed its Application in this case under Commission Rule R.746-345-3(A), which provides, "A pole owner shall submit a tariff and standard contract, or a Statement of Generally Available Terms (SGAT), specifying the rates, terms and conditions for any pole attachment, to the Commission for approval." While the Company has an approved tariff on file with the Commission (Electric Service Schedule No. 4), Rocky Mountain Power had not

previously filed a standard contract or SGAT pursuant to R746-345-3. A filing by the Company of terms and conditions for pole attachments was required by that Rule, which nowhere refers to what has been called the "Safe Harbor" agreement ("Safe Harbor") adopted by correspondence from the Commission in Docket No. 04-999-03. As contemplated by the Rule, the Company has filed a proposed standard contract, not proposed changes to the Safe Harbor, as claimed by other parties.

At the outset, the Company's posture in this matter should be noted. The Company is not a competitor of the cable and telecommunications companies that are parties in this case. Rather, a regulated electric utility has an obligation to operate and maintain a safe and reliable electric system for its customers, as well as an obligation to accommodate pole attachments by cable and telecommunications companies. Certainly, the Company has obligations with respect to the reasonableness of the expenses it incurs in operating and maintaining its system, as well as obligations to its shareholders. In the context of pole attachments by other parties, the Company seeks to avoid unreasonable exposure to safety and reliability risks and costs, but also to have the costs related to those pole attachments borne by the pole attachers, not the Company's electric utility customers. The Company believes that there are aspects of the Safe Harbor that in practice diminish the Company's ability to operate a safe and reliable electric system, are inconsistent with Commission Rules, or are inconsistent with the Company's centralized business practices. It is within that framework that the Company makes these reply comments.

Other parties' comments focus largely on differences between the proposed agreement filed by the Company (the "Agreement") and the Safe Harbor. Before turning to specific comments by other parties, the Company will briefly describe in general terms various differences between the Agreement and the Safe Harbor. Some provisions of the Safe Harbor

have been relocated in the Agreement, consolidated or otherwise clarified. Another difference that is reflected throughout the Agreement is that the Safe Harbor is written to provide for reciprocal attachments, while the Agreement provides for non-reciprocal pole attachments (i.e., only for attachments by the licensee to the Company's poles). The Agreement also addresses deficiencies that have come to light in the several years since development of the Safe Harbor. Minor differences between the Agreement and the Safe Harbor agreement are simply non-substantive wording changes.

Further, several provisions of the Agreement are written to accommodate standardized, and thus more efficient, management of the joint use administrative functions from one office for the six states served by Rocky Mountain Power and Pacific Power. These changes allow the Company to reduce the cost of administering pole attachment contracts (compared to having to administer a multitude of vastly different contracts); a benefit shared by all attaching companies, and in addition, centralized contract administration is a benefit to both parties when the licensee has pole attachments with PacifiCorp in one or more of its other operating areas. One particular area of change was that Rocky Mountain Power clarified its attachment application process (Section 2.03)[1]. To reduce uncertainty for attaching entities, Rocky Mountain Power enumerated the grounds upon which it may reject an application for attachment as allowed under the Rules — those reasons are mainly to protect its infrastructure and for the safety of both Rocky Mountain Power and licensees. Another area of differences is concerning the rent payment provisions. The Agreement provides for rental charges to commence as of the date of the Company's approval of an application (Section 3.01), while the Safe Harbor appears to trigger rent based on the date of installation of attachments (SH Section 5.01). The Company has

[1] References to Section numbers are with respect to the Agreement, while references to "SH Section" numbers are with respect to the Safe Harbor.

specified the approval date because it is from that date that space for the licensee is effectively reserved on the pole in relation to other licensees that may submit applications for attachments. This provision is also necessary because the Company finds that Licensees often fail to notify the Company when their equipment has been installed. On the other hand, licensees are allowed a longer period under the Agreement to pay rental charges and other payments for invoices, from 30 days under the Safe Harbor (SH Section 5.03), to 45 days under the Agreement (Section 4.05).

Furthermore, licensees are granted a much longer time under the Agreement to complete installation of Attachments – 180 days instead of 90 days (Section 3.03; SH Section 3.08). In addition, while like the Safe Harbor, the Agreement allows each Party to terminate the Agreement upon ninety (90) days written notice to the other (Section 7.01; SH Section 8), the Agreement requires the licensee to remove its attachments within that time frame, rather than the 365-day period allowed under the Safe Harbor. The Company believes 365 days is an unreasonably long time for licensee equipment removal, particularly in light of the provision in the same Section of the Safe Harbor that on the date of termination, all rights and privileges of both parties under the agreement shall cease. Thus, a licensee could argue that under the Safe Harbor, if it terminated 5 days prior to the rental due date, the licensee would have 360 days past that date to remove the attachments, and rent would not be due because the agreement was terminated prior to the rental due date.

The Agreement provides that Rocky Mountain Power may require licensees to provide written documentation of compliance with third party consents, permits, licenses or grants necessary for the lawful exercise of the permission granted under the Agreement to make pole

attachments based on instances where licensees attached without securing proper permission. (Section 3.10; SH Section 3.11).

Several provisions in the Agreement reflect regulatory requirements, industry practice, or National Electrical Safety code requirements. For example, a provision in the Safe Harbor regarding unused equipment (SH Section 3.21) is not included in the Agreement; the provision simply mirrored NESC requirements, and the Agreement requires compliance with NESC standards. A provision is included in the Agreement requiring the licensee to have an NESC-required facility inspection program in place in order to highlight a known compliance problem.

The Company's Agreement also delineates specific events of default, including the insolvency of Licensee (Section 7.02), whereas the Safe Harbor refers generally to default in any obligations under the agreement (SH Section 6.01). The Company's Agreement also includes provisions in the Force Majeure paragraph to allow abatement of rental charges if a Force Majeure event continues for more than one month, and for termination of a permit if the licensee does not reinstall attachments within six months of the occurrence of a Force Majeure event (Section 8.07; SH Section 11).

REPLIES TO PARTIES' SPECIFIC COMMENTS

The Agreement differs from the Safe Harbor. Other parties complain that the Agreement differs from the Safe Harbor. Indeed, the Agreement does differ from the Safe Harbor, as discussed above, and in more detail below, and for good reasons. Differences from the Safe Harbor are needed to recognize the Company's six-state consolidated construction and business standards, as well as the varying circumstances of the entities seeking to attach. Over the last two years, the Company has submitted, and the Commission has approved, five pole attachment agreements substantially similar to the Agreement, and not modeled after the Safe Harbor. In

none of the negotiations of those agreements did the other parties to the agreements request, let alone insist upon, use of the Safe Harbor (those negotiations include members of URTA). URTA takes issue with the Company's statement in its application in this docket that "[t]he proposed Agreement is substantially similar to the pole attachment agreements with TCG Utah and Leavitt Group Enterprises, approved by the Commission in Docket Nos. 09-035-52 and 10-035-01, respectively."[2] Arguing that "[t]his is not the correct standard," URTA misses the point—the Agreement is substantially the same as agreements that have been executed by other sophisticated parties (which include members of URTA). In practice, as opposed to the confines of this docket, parties have not been holding up the Safe Harbor as the agreement they want to sign.

Section 2.02—permitted purpose. Frontier objects to the Agreement's specification of the licensees' "permitted purpose." Inclusion of the permitted purpose is not intended to *limit* any entity, but rather to *identify* the entity's particular communications business sector. It is not unreasonable, and certainly not burdensome for the licensee to inform the utility of the types of facilities that will be placed on the utility's poles, whether they are telecommunication lines, cable TV lines, or both. For example, the information facilitates field inspections. If there is a safety violation on a pole with both a telephone line and a CATV line attached without adequate labeling (which is not uncommon), knowing which licensee operating in the area has which type of facilities will facilitate the Company's ability to resolve the safety violation. Similarly if a pole has telecommunications and CATV facilities attached, with the CATV line lacking ownership information, and the telephone company (properly labeled) has listed telecommunications as the only permitted purpose in its pole attachment agreement, the

[2] Comcast also notes the TCG and Leavitt Group contracts, incorrectly asserting that the Agreement is based upon those agreements. Rather, those agreements were based upon an earlier draft of the Agreement, although as reflected in the comment above, that is beside the point.

Company will have an indication that it should be looking for another licensee to rectify the labeling violation. Further, identifying the purpose may give an up-front indication whether a different rental rate may be applicable, such as for wireless facilities, under the rental rate formula. For example, if a regulated telecommunications company expands into providing cable TV service, it typically provides such service through a separate, unregulated business entity. In such cases, Rocky Mountain Power needs such separate entity to be contractually bound through a new or amended contract.

Sections 2.03, 3.02 *et. al*—sole judgment. Frontier, Comcast and URTA object to the Agreement allowing for the Company's use of its sole judgment in making certain determinations, such as whether an applicant has satisfied the requirements for an application to make pole attachments, or whether proposed attachments will necessitate make-ready work. (Sections 2.03, 3.02) However, this change is allowed by the Rule, is consistent with the Safe Harbor, and benefits licensees by giving the Company less latitude in its reason for denial. Rule R746-345-3(C)(5) requires a pole owner rejecting an application to state the specific reasons for doing so; the Rule does not restrict the pole owner from making determinations regarding its system by utilizing its sole discretion. As URTA points out, Section 3.02 of the [Safe Harbor] requires Rocky Mountain to explain its rationale for rejecting an application and permits an applicant to challenge the rejection at the Commission." URTA Comments, p. 3. Rocky Mountain Power is simply explaining its rationale up front. The denial of an application or requirement of make ready work is based upon Rocky Mountain Power's ability to safely deliver reliable power at a reasonable cost, determinations which are reasonably within the Company's discretion. . The Agreement is not inconsistent with Rule R746-345-3, which allows for an appeal to the Commission of determinations made in the Company's sole judgment. "

Section 3.01—permission to overlash. Frontier takes issue with Section 3.01 of the Agreement requiring that a licensee obtain prior *permission* from, not just to provide *notice* to, the Company to overlash additional attachments or equipment to those already attached to the Company's poles. A requirement for evaluation and approval by the pole owner is by no means unreasonable. To the contrary, not allowing for the Company's prior approval will likely result in overloaded poles. A licensee intending to overlash has no ability to determine the pole is already at (or in excess of) its maximum loading (which can occur especially if prior unapproved overlashings exist). The additional weight of an overlashing can cause the pole to break or result in dangerous sagging of the power lines. The Company should not be denied the opportunity to take reasonable measures to protect its system and *avoid* unsafe conditions, as opposed to having to repair unsafe conditions. Nor should the Commission condone an end-run around the make-ready requirements.

Section 3.01—full payment of annual rental charge. URTA objects to the provision in the last paragraph of Section 3.01 of the Agreement, requiring payment of the full annual rental charge, "no matter when during the year the attachment occurs." URTA Comments, p. 4. URTA states that the Safe Harbor has no such requirement to pay the full year, but on the other hand—the Safe Harbor has no provision for pro rating. The Company's Electric Service Regulation No. 4 likewise has no provision for pro rating the annual rental charge. The administrative costs that would be incurred in pro rating the current annual charge of $7.02 for each individual attachment installed during a year would be an unreasonable burden,[3] which would ultimately be passed on in rates, shifting the cost of new attachments onto all licensees.

Section 3.02---self-build. Frontier objects to the Agreement's provisions regarding

[3] If pro rating were done on a monthly basis, the current rental charge would result in a bill for one month's pole attachment of $0.59.

applicants' self-build requests, claiming that the Agreement "does not establish a time limit for [the Company] to provide its approval." Frontier Comments, para. 5. Frontier is simply mistaken. The Agreement incorporates the time limits set forth in the Commission's Rule: "Rocky Mountain Power shall provide the Cost Estimate for the Make-ready Work in its response to Licensee's Application within the applicable Application processing time period identified in UAR R746-345-3", "Rocky Mountain Power shall provide Licensee an estimated completion date for any Make-ready Work, taking into account the timeframes set by UAR 746-345-3." Rule R746-345-3 establishes different periods for approvals or denials of requests for self-build, with such periods *beginning* at 45 days, and extending to 90 days. Contrary to the Rule, the Safe Harbor requires, "a 14 day turnaround time to approve or disapprove the plans." As the Company believes the Rule recognizes, a 14-day turnaround for approval or denial of an application that could apply to thousands of poles is unreasonable.

Section 3.03[4]—service drops. URTA objects to the Agreement's requirement that a licensee must submit and pay for an application for attachments of service drops, as opposed to Section 3.02 of the Safe Harbor, under which a licensee need not file or pay for an application. URTA pp. 3-4. However, the Agreement is consistent with Rule R746-345, and the Safe Harbor is inconsistent in this regard. There is no general exception from the application process for attachments to "secondary poles" as defined by the Rule, except that, as specified in the Rule's definition of "Pole Attachment," "A new or existing service wire drop pole attachment that is attached to the same pole as an existing attachment of the attaching entity is considered a component of the existing attachment for purposes of this rule." R746-345-2(E). The Agreement, by adopting the Rule's definition of Pole Attachment (see Agreement's definition of

[4] Comcast also notes that Section 3.03 of the Agreement is different from the Safe Harbor, but does not specify anything unreasonable or objectionable about the provision.

"Attachment"), likewise has this exception. Thus, it is the Safe Harbor, not the Agreement that is inconsistent with the Rule by exempting all attachments of service drops from the application process. More importantly, the Company's experience is that a very large percentage of safety clearance violations are due to improper service drop installations.

Section 3.12—removal of attachments. Another difference between the Agreement and the Safe Harbor identified by URTA and Comcast, again without explaining what is objectionable or unreasonable about the Agreement's provision, is the requirement in Section 3.12 that a licensee pay an application fee and remove an attachment within five days of the licensee's notice of removal. Keeping track of the changing inventory resulting from removals certainly imposes costs on the Company, which the Company intends to recover through the Application fee. That is not unreasonable. Nor is requiring a licensee to remove its equipment within a specified time after the licensee notifies the Company of the anticipated removal. Proper notification from a licensee to the Company allows the Company to keep the attachment counts accurate, thereby preventing the licensee from being invoiced for rent and receiving operational notices for poles they no longer use. Without a time requirement, the Company might reasonably commence approval of another licensee's application, only to find out the space is still occupied. Among other things, that could result in unnecessary delay for the second licensee.

Section 4.02—attachment space. Although NextG claims that Section 4.02 of the Agreement precludes an attachment of equipment below the communication space, contrary to R746-345-2(B), NextG appears to be mistaken. Nevertheless, there may be circumstances that would appropriately result in the denial of an application to install equipment on a pole below the communication space such as when large equipment interferes with climbing the pole.

Sections 5.01, 5.02—indemnification, limitation of liability. NextG voices objection to the Agreement's indemnification and limitation of liability provisions. While the terms of those provisions are worded slightly differently than those in the Safe Harbor for additional clarity, the substance of the provisions is the same, and is reasonable in the context of the Agreement. NextG's argument that it is restricted "by internal policy and insurance requirements" from agreeing to the Agreement's indemnification and insurance provisions carries no more weight than would an argument by the Company that it is similarly prohibited from agreeing to terms different than those proposed by the Company.

Section 6.01—insurance. URTA and Comcast point out that the Agreement's insurance requirements are higher than those in the Safe Harbor are—not that they are unreasonable, only that they are different. Indeed, the Agreement's insurance requirements are different from those contained in the Safe Harbor, as they are consistent with the insurance provisions the Company experiences in the market for commercial transactions presenting levels of risk similar to those that might be experienced under the Agreement.

Sections 6.03, 6.04—security and credit. URTA and Comcast note, and apparently object to, the differences between the Agreement and the Safe Harbor with respect to security and credit requirements. The Company's credit and security provisions in the Agreement have been specifically designed by the Company's credit department to be consistent with the credit and security requirements the Company seeks in other commercial transactions, yet tailored to the particular circumstances of pole attachment agreements. The Company believes the requirements are not unduly burdensome and that they provide a reasonable and appropriate level of protection for the Company and its customers from the risk of licensees' inability to meet their financial obligations under the Agreement. Under the Agreement, licensees are able

to avoid security requirements entirely by meeting reasonable credit requirements. The Company has experienced examples of non-payment of rent by licensees, bankruptcy, and sales of full or partial systems to parties who were not creditworthy. Some of these situations have resulted in abandoned plant remaining on PacifiCorp's poles, safety violations with no party taking responsibility, and confusion over the ownership of attachments. Certainly, in the current economic climate, the Company can reasonably expect more licensees to have financial difficulties. It is reasonable for the Company to take steps to protect it and its customers from the risks associated with the potential of increased licensee defaults.

FCC proceedings. Both NextG and Comcast point to FCC proceedings (which are far from concluded) regarding pole attachments. However, this Commission has already decided that *it*, not the FCC will regulate pole attachments in Utah. As such, the Commission, which also has the responsibility of regulating the Company with respect to electric service obligations, which can be impacted by pole attachment arrangements, should make its own determinations.

Definitions. URTA seems to object to the Agreement having more definitions than the Safe Harbor, although it does not say what is objectionable about having more definitions. The Company believes having a few additional definitions can add clarity in an agreement. Clarity is not an objectionable thing, and can indeed reduce the likelihood of disputes.

Pole top Attachments. NextG objects to the Agreement's exclusion of pole top attachments from the Agreement under the definition of Attachment. In particular, NextG asserts, "Rocky Mountain Power should allow pole top attachment on poles at or below 37.5 feet above ground level at the regulated rate outlined in R746-345-5." (NextG Comments, para. 7.) It appears that NextG desires to have access to the Company's electrical space under an agreement and rule that was designed for access to communications space. The statement in the

Agreement that it does not apply to pole top attachments certainly does not mean that the Company will not allow pole top attachments on its distribution poles. Rather, the provision reflects a policy that a joint use contract is not the appropriate vehicle to provide for such attachments that extend into, and above, the space already allocated for the Company's electric distribution facilities. In addition, the Company has determined that, poles 37.5 feet in height above ground or shorter, cannot safely accommodate pole top antenna attachments. Safe placement of pole top antennas requires significant engineering study.

For the reasons stated above, RMP believes approval of the Agreement is reasonable and in the public interest.

DATED this 31st day of August, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **REPLY COMMENTS** to be served upon the following by electronic mail or U.S. postage to the addresses shown below on August 31, 2010:

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