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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of Consolidated Applications of Rocky Mountain Power for Approval of Standard Reciprocal and Non-reciprocal Pole Attachment Agreements	)))))))	Docket No. 10-035-97 **RESPONSIVE COMMENTS OF ELECTRIC LIGHTWAVE, LLC**

In accordance with the August 3, 2010, Amended Scheduling Order and the September 20, 2010, Order Consolidating Applications and Second Amended Scheduling Order, Electric Lightwave, LLC, a wholly-owned subsidiary of Integra Telecom Holdings, Inc., ("ELI") hereby submits the following comments in response to the Reply Comments of Rocky Mountain Power for Approval of Standard Non-reciprocal Pole Attachment Agreement ("Reply Comments").

ELI urges the Commission to carefully consider the implications of the terms and conditions suggested for a non-reciprocal Statement of Generally Available Terms pole attachment agreement in the Reply Comments ("Agreement"). The proposed terms of the Agreement add to the burden of licensees and hinders the Commission's "longstanding public policy goal of universal service and competition throughout Utah's telecommunication's markets"[1] by increasing costs and placing the authority to make key decisions which may affect

[1] THE STATUS OF TELECOMMUNICATIONS COMPETITION IN UTAH, Seventh Annual Report to the Governor, Legislature, and the Public Utilities and Technology Interim Committee, October 2004

the ability of licensees to provide telecommunications or cable services within the exclusive jurisdiction of Rocky Mountain Power.

I. Comments to the Proposed Agreement

Generally

The Reply Comments note that Rocky Mountain Power provides an important service in the State of Utah and that Rocky Mountain Power has "an obligation to operate and maintain a safe and reliable electric system for its customers." (Reply Comments, para. 3). ELI does not disagree, and to the extent that the Reply Comments effectuate that goal without unnecessarily hindering a telecommunications provider's ability to attach to Rocky Mountain Power's poles on rates, terms and conditions that are just and reasonable, the terms of the Agreement should be given due consideration. For example, it seems reasonable that a licensee should obtain prior permission from Rocky Mountain Power prior to overlashing additional attachments or equipment to Rocky Mountain Power's poles, as mere notice might result in overloaded poles and create a hazardous situation. However, the Agreement's extreme position fails to account for instances wherein mere notice may be appropriate and expedite speedy attachment and hence the delivery of services.

ELI believes that other terms and conditions in the Agreement and the explanations in the Reply Comments are potentially contrary to the public interest and that Rocky Mountain Power has failed to provide a suitable justification for language that differs from the reciprocal pole attachment Statement of Generally Available Terms ("SGAT"). ELI understands that the SGAT is a reciprocal pole attachment agreement, but to the extent that reciprocity does not factor into any justification for differentiating the language in the Agreement, the language should remain consistent between the SGAT and the Agreement.

Section Specific Comments to the Agreement

Section 2.02: The Reply Comments provide that it is not unreasonable for Rocky Mountain Power to require a licensee to identify its "Permitted Purpose," and that such identification is "not intended to limit any entity." (Reply Comments, para. 10). The justification for this "identification requirement" is that it does not impose an unreasonable burden on the licensee and that it is necessary in light of inadequate labeling. The proposed solution does not address the problem. If labeling is the issue, then the Agreement should address labeling, which it does in Section 3.04, which references the requirements set forth in UAR R746-345-1. Further, contrary to Rocky Mountain Power's assertion, Section 2.02 does limit a licensee's permitted purpose by placing sole discretion whether to lift those limitations with Rocky Mountain Power. Authority to expand or modify a licensees business should lie with the Commission; there is no need to shift that authority to Rocky Mountain Power.

Section 3.01: Requires payment for annual rent for the entire year, regardless of when approval to attach is received. As justification for this requirement, Rocky Mountain Power suggests that it would be an unreasonable burden to assess the costs for each pole on an annual basis. However, it has not provided any indication supporting such an assertion. Since the SGAT already permits such pro-rating, Rocky Mountain Power should already be able to perform this function. Calculations such as pro-rating are largely an automated process, which do not require large employee time commitments. Most pole attachment licensees are required to perform such calculations for a variety of transactions they are involved in, and requiring Rocky Mountain Power to do so is not unreasonably burdensome. Assessing charges for what could be a significant part of a year for an attachment never used is not just and reasonable and represents a windfall for Rocky Mountain Power.

Section 3.02: There are a number of issues with Rocky Mountain Power's language under Section 3.02: First, it eliminates the need for any measure of reasonableness in Rocky Mountain Power's assessment that the accommodation of any attachments necessitates Make-ready Work. The Agreement should provide standards by which a licensee can determine if Rocky Mountain Power's demand for Make-ready Work is reasonable. Second, Section 3.02 should not default to an automatic acceptance of a Cost Estimate if a licensee fails to object; this is contrary to how acceptance and rejection generally work and will likely lead to abuse and unnecessary conflict. Third, Rocky Mountain Power should not be able to charge a licensee for Make-ready Work not actually performed. Such a requirement also conflicts with the language under UAR R746-345-3(c)(7). Fourth and finally, Rocky Mountain Power asserts that a 14 day turn-around time is unreasonable. While ELI does not have knowledge as to the reasonableness of a 14 day turn-around time, it would be interesting to learn how often, and under what circumstances, a 14 day turn-around is complied with between parties to the SGAT. If a 14 day time frame is deemed unreasonable after such an investigation, then Rocky Mountain Power should have to complete Make-ready Work in accordance with UAR R746-345-3. Notwithstanding, ELI believes that the Commission should re-examine the requirements set forth in UAR R746-345-3 as applied to less than 20 poles. A 45 day turnaround time for Make-ready Work for one or two poles may be just as unreasonable as requiring a 14 day turnaround time for an application applying to thousands of poles.

Section 3.03: Service drops are a critical component of a telecommunications provider's business. The Reply Comments assert that the SGAT conflicts with the Rules regarding service drops, however, that is not the case. There is no prohibition in the Rules that would prevent adoption of the SGAT language in the Agreement, and the language in the SGAT still requires a

licensee to follow all procedures applicable to Attachments generally. Rocky Mountain Power has remedies in the Agreement for licensee's failure to follow such procedures.

Section 3.05: Regarding the Agreement's requirement that a licensee must indemnify Rocky Mountain Power for any claims associated with a power outage caused by installation of a streetlight photo-control socket, such indemnification is unjust and unreasonable to the extent it is caused by Rocky Mountain Power. Further, a licensee should only be required to indemnify Rocky Mountain Power to the extent Rocky Mountain Power is held liable for such claims.

Section 3.06: As with Section 3.05, there is no basis for Rocky Mountain Power shifting liability to a licensee for Rocky Mountain Power's own negligence. The language in Section 3.06 gives Rocky Mountain Power the ability to perform negligent work without care as to the consequences. Unlike a reciprocal pole attachment agreement, the shift in liability invites poor performance; while a licensee should be responsible for costs associated with a failure to abide by the terms of the Agreement, it is not in the public's best interest to give Rocky Mountain Power free rein to lower its standards, knowing another party will be picking up the tab for its negligence.

Section 4.01: modifies Article V of the Safe Harbor Agreement by excluding from the rental rate additional activities. ELI notes that as a whole the rates and charges set forth in Exhibit B warrant further discussion. Items such as return trip fees present opportunities for conflict and abuse, and should be set forth with greater specificity.

Section 4.04: In respect to disputed invoices, UAR R746-345-6 should be followed. Those terms are just and reasonable, and there is no need to attempt to modify them as Rocky Mountain Power is proposing.

Section 5.01: Rocky Mountain Power claims that the language in Section 5.01 is substantively the same as the SGAT. While that may be the case, as noted above, it is not the

standard that should be applied for non-reciprocal pole attachment agreements. Whereas a reciprocal agreement incentivizes the parties to perform using ordinary care, a non-reciprocal agreement acts as a disincentive to pole owners to use ordinary care if they know the licensee is responsible for the pole owner's ordinary negligence.

Section 6.03: Compared to the SGAT, this section removes the Commission's authority to determine whether, upon application by a pole owner, the licensee must furnish a bond or other security to cover faithful performance by a licensee, and leaves the amount of the security at the discretion of Rocky Mountain Power. Such a provision increases a licensee's cost to do business, will likely impede deployment of telecommunications services, and does little to alleviate the issues raised by Rocky Mountain Power.

Section 7.01: This Section requires a 90 day removal period following termination of the Agreement. Just as Rocky Mountain Power claims that 14 days does not provide adequate time for review of Make-ready Work if thousands of poles are involved, likewise 90 days is not sufficient for removal of facilities on thousands of poles – a process that takes considerable more time than review of Make-ready Work. The SGAT provides for 365 days, and the same time period should be permitted under the Agreement. Providing 365 days for removal is reasonable given the work involved in removal, and is likely to decrease the chances of injury to persons or damage to property. Additionally, 7.01 also permits Rocky Mountain Power to terminate a pole attachment for any reason on 30 days written notice. Such a right could cause serious disruption to telecommunications services, and should not be permitted. If Rocky Mountain Power needs to terminate a pole attachment, it should have good cause for doing so, provide adequate time for relocation, and have a suitable alternative to the terminated pole attachment.

Section 7.02: Expands Rocky Mountain Power's ability to declare a default by adding bankruptcy to the list. Not only does the Bankruptcy Code prohibit such an action, declaring a

default for bankruptcy is unnecessary in practice as a Debtor is required to provide adequate assurance of future performance. The additional language should be removed.

Section 8.07: Expands Force Majeure to include major equipment breakdown or failure. If such breakdown or failure is beyond the control of Rocky Mountain Power, then it qualifies as force majeure; it should not automatically be labeled as a force majeure if the failure of the equipment was the result of Rocky Mountain Power's negligence.

Section 8.08: This Section imposes additional hurdles for any licensee proposing to assign a pole attachment agreement. The additional hurdles are unnecessary if the assignee is obligated to abide by the terms and conditions of the Agreement.

II. FCC Proceedings and Summary

The issue of broadband deployment has received a great deal of emphasis following President Obama's pledge to prioritize universal broadband. As part of its plan to implement the directives of the Obama Administration, the FCC has stated that it seeks to lower costs for deployment and speed access to utility poles.[2] While Rocky Mountain Power has correctly pointed out that the Commission has decided to regulate pole attachments in Utah, the Commission certainly shares the same goals as the FCC in respect to universal broadband.

ELI respectfully requests that the Commission carefully evaluate the terms and conditions of the Agreement in light of the emphasis being placed on universal broadband and competition in telecommunications generally. Where the terms of the SGAT can apply to a non-reciprocal agreement, they should be implemented. To the extent they cannot, the Agreement's terms and conditions must be just and reasonable, and facilitate the stated goals of the Commission.

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2 *See Implementation of Section 224 of the Act; a National Broadband Plan for our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, FCC 10-84 (rel. May 20, 2010) (*Pole Attachments Order).*

Respectfully Submitted this 21st day of September, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2010, an original and five (5) true and correct copies of the foregoing **RESPONSIVE COMMENTS OF ELECTRIC LIGHTWAVE, LLC** were delivered via overnight UPS delivery and sent via email to:

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