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Division of Public Utilities

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## ACTION REQUEST RESPONSE

**To:** Public Service Commission

**From:** Chris Parker, Director  
Artie Powell, Energy Section Manager  
Joni Zenger, Technical Consultant

**Date:** April 7, 2014

**Re:** Docket No. 14-035-26, Rocky Mountain Power's Application for Approval of a Pole Attachment Agreement with Beehive Broadband, LLC.

### RECOMMENDATION (APPROVAL)

The Division of Public Utilities (Division) recommends that the Public Service Commission (Commission) approve the Agreement between Rocky Mountain Power and Beehive Broadband LLC.

### ISSUE

On March 7, 2014, PacifiCorp, dba Rocky Mountain Power, filed an Application with the Commission for Approval of a Pole Attachment Agreement ("Agreement") between Rocky Mountain Power ("Company") and Beehive Broadband LLC ("Beehive") (or collectively, "Parties"). Along with the Application, the Company submitted a copy of the Agreement that was negotiated and agreed to by the Parties, as well as a copy of the Company's Joint Use Distribution Construction Standards and its Electric Service Schedule No. 4.

Under Utah Admin. § R746-345-3(B)(1), the parties to pole attachment contract may voluntarily negotiate an agreement that differs from the Commission-approved “Safe Harbor” pole attachment agreement in Docket No. 10-035-97.<sup>1</sup> However, an alternative contract must be submitted to, and approved by, the Commission. Since the Beehive Agreement differs from the Commission’s Safe Harbor, 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.

On March 10, 2014, the Commission issued an Action Request to the Division for a review of the Application for Approval of the Agreement. This memorandum is in response to the Commission’s Action Request.

## **DISCUSSION AND FINDINGS**

The Division reviewed the Company’s Application, the Agreement, and accompanying exhibits. The Agreement was voluntarily negotiated between the Company and Beehive (Application at 3). The Agreement represents the Parties’ agreed-to terms and conditions for Beehive’s attachments to the Company’s poles in Utah (Application at 3). The Agreement is non-reciprocal, as opposed to the reciprocal relationship reflected in the Safe Harbor (Application at 5). The Agreement was signed by Beehive on February 18, 2014, and by the Company on February 27, 2014 (Agreement, p. 21). The Company states that the Agreement is substantively the same as the pole attachment agreement negotiated between the Company and Zayo Group LLC, approved in Docket No. 12-035-114<sup>2</sup> (Application at 4).

The Division notes that the contract rental rate for Beehive’s pole attachments, as contained in the Beehive Agreement (Exhibit A) was calculated using the Company’s Commission-approved

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<sup>1</sup> Report and Order, 10-035-97, November 21, 2012.

<sup>2</sup> Order Approving Pole Attachment Agreement, 12-035-114, January 9, 2013.

Electric Service Schedule No. 4 First Revision.<sup>3</sup> Per Electric Service Schedule No. 4, the annual rental rate is \$6.33 per foot of space used.

The Division compared the Beehive Agreement to the Zayo Group Agreement and to the Commission's Safe Harbor agreement. The Beehive Agreement is substantively the same as the Zayo Group pole attachment agreement. The substantive differences between the Zayo Group and Beehive Agreements, as compared to the Safe Harbor, include the following: Section 2.01 contains a provision for Licensee's overlappings, consistent with the Safe Harbor agreement approved by the Commission on November 21, 2012, in Docket No. 10-035-97. Section 3.14 adds an additional sentence to the audit section stating, "the inclusion of additional items in an Audit" may be requested by a Party, who will be solely responsible for the cost of the additional items (Section 3.14). A section is also added to indicate that the Parties waive any right to a jury trial related to any dispute arising from the Agreement (Section 8.14).

In addition to the provisions listed above, minor changes from the Safe Harbor agreement exist, such as the addition of a table of contents for convenience of the reader and the relocation of certain provisions to another place in the agreement to clarify or consolidate provisions (Application at 5g). Several provisions were modified to reflect regulatory requirements, industry practice, or National Electric Safety Code requirements (Application at 5e).

The Company notes that it modified the sections governing the application process to match its existing business practices in exchange for certain benefits to "Licensee" (Application at 5c). For example, the Agreement modifies Section 2.03 Reservation of Rights to clearly explain under what conditions the Company may reject an applicant's request for attachment, and Section 7.02 Default, details specific events of default. Additionally, while rents accrue earlier under the Agreement than under the Safe Harbor, the Agreement allows Beehive a longer period, 45 days as opposed to 30 days, to pay outstanding invoices (Section 4.04); a longer period to

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<sup>3</sup> On December 3, 2012, the Company filed a revised Electric Schedule 4 and Safe Harbor pole attachment agreement in compliance with the Commission's Report and Order issued in Docket No. 10-035-97 on November 21, 2012.

complete its installations, 180 days as opposed to 90 days (Section 3.03); and Beehive can extend this period without submitting a new application or incurring additional fees.

Other changes appear to be designed to allow the Company to manage pole attachments more efficiently. For example, in the event that Beehive does not accept the cost of continued attachment when requested to relocate, Beehive is required to remove the attachment 10 days sooner (Section 3.12) under the Agreement than under the Safe Harbor (Application at 5d). Parties can terminate the Agreement upon 90 days written notice, during which time Beehive must remove its attachments (Section 7.10). The Agreement excludes Licensee pole-top attachments from the definition of Equipment (Application at 5b). Finally, Section 3.10 provides for timely termination of the permit for any pole in the event that Beehive fails to provide evidence of necessary permits or licenses for access or use of land upon which the pole is situated (Application at 5d).

Section 3.03 of the Agreement requires Beehive to submit an Application within five business days after installation of service drops. The Company states that this change will allow time for it to review the installation for compliance with applicable construction standards, and it provides a mechanism for the Company to assess rent for the additional space used (Application at 5d).

According to the Company's Application, the Agreement contains the Company's updated terms regarding indemnification, credit and insurance, as well as limitations of liability and warranties, which terms are reflected throughout the Agreement (Application at 5f). Beehive must maintain commercial general liability insurance at a higher limit than provided in the Safe Harbor, maintain umbrella liability insurance to cover any shortfalls in other coverage, and maintain business interruption insurance.

All of the terms described above are reasonable and have been mutually agreed to by both Parties. 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) that appear to be in conformance with the National Electrical

Safety Code requirements. As previously mentioned, the pole attachment rental rate of \$6.33 per foot of space that was filed with the Application is taken directly from Rocky Mountain Power's Revised Electric Service Schedule No. 4 that is on file with the Commission. Besides the annual rental rate, the tariff includes a schedule of non-recurring fees. The revised Schedule No. 4 fees are required by the Commission, resulting from Docket No. 10-035-97.

The Division has reviewed the Company's Application, including comparing the Agreement to the previously-approved Zayo Group agreement in Docket No. 12-035-114 and the Commission-approved Safe Harbor pole attachment agreement in Docket No. 10-035-97. As stated previously, each of the terms and conditions of the Agreement, including the changes outlined above and in the Company's Application, were negotiated and agreed to by the Parties. The Division notes that the Company submitted the Application in a timely manner. The Division finds the terms and conditions in the Agreement itself to be reasonable and balanced.

## **CONCLUSION**

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's November 21, 2012 standard Safe Harbor agreement. Where differences occur, they have been mutually agreed to by the Parties and are similar to the changes approved by the Commission in previous dockets. With this memorandum, the Division requests that this action request be closed.

CC Dave Taylor, Rocky Mountain Power  
Michele Beck, Office of Consumer Services  
Yvonne Hogle, PacifiCorp