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State of Utah
Department of Commerce
Division of Public Utilities

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ACTION REQUEST RESPONSE

To: Public Service Commission

From: Chris Parker, Director
Artie Powell, Energy Section Manager
Sam Liu, Utility Analyst

Date: April 2, 2015

Re: **Docket No. 15-035-23**, Rocky Mountain Power's Application for Approval of a Pole Attachment Agreement with New Path Networks.

RECOMMENDATION (APPROVAL)

The Division of Public Utilities (Division) recommends that the Public Service Commission (Commission) approve the Pole Attachment Agreement (the "Agreement") between Rocky Mountain Power and New Path Networks.

ISSUE

On March 5, 2015, PacifiCorp, dba Rocky Mountain Power, filed an Application with the Commission for Approval of the Agreement between Rocky Mountain Power ("Company") and New Path Networks ("New Path" or "Licensee"). Along with the Application, the Company submitted a copy of the Agreement that was negotiated and agreed to, individually, as a "Party" and together as 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 contracts may voluntarily negotiate an alternative contract that differs from the Commission-approved pole attachment agreement in Docket No. 10-035-97 (“Safe Harbor Agreement”).¹ However, an alternative contract must be submitted to, and approved by, the Commission. Since the New Path Agreement differs from the Commission’s Safe Harbor Agreement, 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 5, 2015, 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 New Path (Application at 3). The Agreement represents the Parties’ agreed-to terms and conditions for New Path’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 New Path on January 16, 2015, and by the Company on February 19, 2015 (Agreement, p. 21). The Company states that the Agreement is substantively the same as the pole attachment agreement negotiated between the Company and Beehive Broadband, LLC, approved in Docket No. 14-035-26² (Application at 4).

The Division notes that the contract rental rate for New Path’s pole attachments, as contained in the Agreement (Exhibit A) was calculated using the Company’s Commission-approved Electric Service Schedule No. 4 First Revision.³ Per Electric Service Schedule No. 4, the annual rental rate is \$5.76 per foot of space used.

¹ Report and Order, 10-035-97, November 21, 2012.

² Order Approving Pole Attachment Agreement, 14-035-26, May 7, 2014.

³ On November 25, 2014, the Company filed a first revision of Electric Schedule 4 and Safe Harbor pole attachment agreement in compliance with the Commission’s approve issued in Docket No. 14-035-T13 on November 25, 2014.

The Division compared the New Path Agreement to the Beehive Agreement and to the Commission's Safe Harbor Agreement. The New Path Agreement is substantively the same as the Beehive pole attachment agreement. The substantive differences between the Beehive and New Path Agreements, as compared to the Safe Harbor, include the following:

(1) Changes in the Definitions section-- a brief explanations for definition of "Antenna" and "Wireless Telecommunications Facility" which are included in the previous definition of "Equipment;" "Credit Requirements" and "Security" are removed from the Definition Section, because New Path uses bonding as assurance performance to Rocky Mountain Power and Beehive Broadband uses security as insurance and credit requirements. The Company should consider adding a definition of "Bonding" to this Section.

(2) In Section 2.02 (Attachments: Purpose) the permission to install Equipment for the sole purpose of providing: telecommunications (the "Permitted Purpose") service. This Agreement does not apply to Wireless Telecommunications Facilities. All wireless attachments shall be handled through a separate program for Wireless Telecommunications Facilities by Rocky Mountain Power.

(3) The last paragraph of Section 3.05 (Conformance to Requirements and Specifications) adds an additional sentence to the specifications stating, "Licensee shall operate its Equipment in accordance with all applicable Federal Communications Commission ("FCC") Rules.

(4) Section 3.10 (Third-party Consents, Permits, Licenses, or Grants) adds an additional sentence to this section stating, "Rocky Mountain Power agrees to reasonably cooperate with Licensee as required to obtain such necessary consents, permits, licenses or grants and shall not knowingly interfere with Licensee's efforts to comply with applicable local, state and federal laws."

(5) Section 3.15 (Tax Liability) restates the sentence "against Rocky Mountain Power's Poles or Property that is directly and solely attributed to the use of the same by Licensee" and adds the following statement: "In no event shall Licensee be liable for any transaction taxes or income taxes paid or payable by Rocky Mountain Power arising out of or based upon this Agreement or

the payments made by Licensee hereunder, except to the extent such taxes are included in the rental amount payable as provided under UAR R746-345-5.”

(6) The end of first paragraph of Section 4.01 (Rental Amount) adds an additional sentence to the end of paragraph, “or upon evidence acceptable to Rocky Mountain Power showing a different number of Licensee Attachments.”

(7) Section 5.01 (Indemnification/Release) adds an additional item ...liabilities arising from any “damage to Equipment,” interruption...

(8) ARTICLE VI (Insurance, and Bonding Requirements) upon application to and approved by the Commission, Pole Owner may require Licensee to furnish a bond or other form of financial security instrument to cover the faithful performance by Licensee of its obligations hereunder. Terms and conditions of the bond or other financial security shall be those approved by the Commission. The New Path Agreement uses bonding, and the Beehive Broadband Agreement uses a financial security Agreement. In Section 6.01 (Insurance), sub-Section e. (Umbrella) providing insurance, adds “at least equal to or greater than coverage”, adds new sub-Section f. (Pollution Liability), and requires the contractor to maintain pollution legal liability coverage to apply to sudden and non-sudden pollution conditions. In Section 6.02 (Additional Insurance Requirements), the new Agreement has been amended to include provisions or endorsements on sub-Sections iv and v. Section 6.03 (Bonding) replaces the old section labeled (Security).

In addition to the provisions listed above, minor are made to Section 7.01 (Term and Termination) and Section 7.03 (Notice of Default). Section 7.01 adds an additional statement “within five Business Days after its completion, unless an extension on such (30) day period is mutually agreed upon between the Parties, in Rocky Mountain Power’s sole discretion.” Section 7.03 adds an additional statement: “the additional time necessary to cure the default so long as the defaulting Party is continuously and diligently pursuing a cure to completion. In the event the non-defaulting Party determines, in its sole discretion, the defaulting Party is not continuously and diligently pursuing a cure for the default, the non-defaulting Party shall immediately have available all the remedies set forth in Section 7.04.”

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 \$5.76 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 approved by the Commission, resulting from Docket No. 14-035-T13.

The Division has reviewed the Company's Application, including comparing the Agreement to the previously-approved Beehive Broadband's agreement in Docket No. 14-035-26 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 May 7, 2014 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 Bob Lively, Rocky Mountain Power
Michele Beck, Office of Consumer Services
Yvonne Hogle, PacifiCorp