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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
Joni Zenger, Technical Consultant

Date: December 8, 2014

Re: Docket No. 15-035-82, Application for Approval of a Pole Attachment Agreement with Rocky Mountain Power and TDS Baja 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 TDS Baja Broadband, LLC.

ISSUE

On November 12, 2015, 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 TDS Baja Broadband, LLC (TDS Baja or Licensee) (or collectively, "Parties"). On November 17, 2015, the Commission issued a Notice of Filing and Comment Period for interested parties to submit comments on or before December 14, 2015 and reply comments on or before December 29, 2015. 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.

The Company's Application explains that the Agreement at issue in this docket deviates in some respects from the standard contract (commonly known as the "Safe Harbor" agreement) the Commission approved on November 21, 2012.¹ Under Utah Code Admin. § R746-345-3(B) (1), the parties to pole attachment contracts may voluntarily negotiate an agreement that differs from the Commission-approved Safe Harbor pole attachment agreement. However, an alternative contract must be submitted to, and approved by, the Commission. Since the TDS Baja 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 November 12, 2015, the Commission issued an Action Request to the Division to review the Application and make recommendations to the Commission based on the Division's findings. This memorandum is in response to the Commission's Action Request, as well as its November 17, 2015 Notice for Comments in this matter.

DISCUSSION AND FINDINGS

The Division reviewed the Company's Application, the Agreement, and the Exhibits that accompany the Agreement, including Electric Service Schedule 4 (Exhibit A) and the Company's Distribution Construction Standards for Joint Use (Exhibit B).

The Division determined that the Agreement was voluntarily negotiated between the Company and TDS Baja (Application at 3). The Agreement represents the Parties' agreed-to terms and conditions that will allow TDS Baja to attach cable and broadband equipment to the Company's poles in Utah in order for TDS Baja to conduct its cable and broadband business (Application at 3).

¹ Docket No. 10-035-97, Report and Order, November 21, 2012.

The Agreement is non-reciprocal, as opposed to the reciprocal relationship reflected in the Safe Harbor (Application at 5a). The Agreement was signed by TDS Baja on October 7, 2015 and by the Company on October 22, 2015 (Agreement, p. 21). The Agreement is substantively the same as the pole attachment agreement negotiated between the Company and New Path Networks, LLC (New Path) approved by the Commission in Docket No. 15-035-23² (Application at 4).

The Division compared the TDS Baja Agreement to the New Path agreement and to the Commission's Safe Harbor agreement. Some provisions of the Agreement have been relocated to other sections; other terms have been consolidated or clarified for stylistic purposes. As an example, a table of contents was added for convenience. Several other provisions were modified to reflect standard industry practices, regulatory requirements, and updated National Electric Safety (NES) code requirements.

Other minor modifications from the Safe Harbor include non-substantive wording changes and terms that differ from the Safe Harbor, but that were mutually negotiated between the Parties, such as provisions regarding warranties, limitations of liability and assignment, and credit and insurance conditions. The Division did find numerous substantive differences in the Agreement and the Safe Harbor agreement. The Division enumerates these substantive differences below:

1. Section I contains the Definitions of the Agreement. Unlike the Safe Harbor, the Agreement excludes in the definition of "Attachment" antennas or wireless equipment placed on a pole. Also, Section 2.02 states that the Agreement does not apply to wireless, Wi-Fi, and pole-top attachments.
2. The Agreement inserts a four-part "Inspection" definition that is contained in part in Sections 3.23 and 3.24 in the Safe Harbor. According to the Agreement, there are four types of inspections: pre-construction, special, audit, and periodic safety. All are intended to ensure the safety and integrity of the Company's poles. The re-organization of these terms in the Agreement improves the ease and readability of the contract.

² Docket No. 15-035-23, Order Approving Pole Attachment Agreement, April 29, 2015.

3. The Agreement adds a definition for “Material Adverse Change” which defines any event or occurrence that might have a material adverse effect on the Company. Verbiage of this nature is contained in Section 6 of the Safe Harbor, but not to the extent that it is contained in the Agreement.
4. Section 2.01 describes circumstances where overlashing is permissible. Licensee can overlash one instance of up to 48 or less count fibers without submitting a permit, as opposed to Section 3.01 of the Safe Harbor that allows Licensee to overlash a single 96 or less count fiber without submitting an application.
5. Section 2.03 lists the grounds on which the Company may reject an application for attachments. This makes the conditions concise and clear.
6. Section 3.02 includes a lengthy section of make-ready work, which apparently combines Section 3.09 of the Safe Harbor with other sub-parts with the intent of reducing uncertainty to the Licensee. The Company explains in its Application 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, Licensee is allowed twice as long--180 days instead of 90 days-- to complete the installation of attachments in Section 3.06. On the other hand, Section 3.06 of the Agreement requires the Licensee to submit an Application within ten, rather than 30, business days after installation of service drops in order to give the Company adequate time to review the installation for compliance with applicable construction standards (Application at 5d).
7. Section 3.10 states that if the Licensee does not accept the cost to accommodate its continued attachment when requested to relocate, Licensee must remove the attachment within 30 days, rather than the 40 days allowed in the Safe Harbor, Section 3.12.

8. Section 3.13 adds termination of the permit for a pole as a remedy for Licensee's failure to timely provide evidence of third-party consents, permits, licenses or grants for access to or use of the land upon which a pole is situated.
9. According to Section 4.04, the Licensee must pay all charges within 45 days of the invoice date, as opposed to the 60 days found in Section 5.03 in the Safe Harbor agreement.
10. Section 5.02 of the Agreement includes express language in all caps and bold regarding the Company's disclaims on all warranties, express or implied, under all circumstances in which the Company will not be liable. This section takes the place of Section 7.12 in the Safe Harbor.
11. Sections 6 and 7 have been re-organized and contain insurance and security requirements (as opposed to Section 10.03 Bonding in the Safe Harbor). Section 7.01 was modified to allow each Party to terminate the agreement upon 90 days written notice to the other, within which time Licensee must remove its attachments. The Safe Harbor allows one year from the receipt of notice for Licensee to remove attachments.
12. Other terms and conditions regarding warranties and assignment, limitations of liability, and credit and insurance, have been amended in the Application, but were agreed to and negotiated by the Parties (Application at 5f).

The Division determines that many of the changes in the Agreement that differ from the Safe Harbor appear to be designed to allow the Company to manage pole attachments more efficiently and provide more certainty to the Licensee who desires to attach to the Company's poles. Where substantive changes to the Safe Harbor have been made, the changes have been balanced for the most part with the Licensee and the Company. The Division believes the terms described above are reasonable and, as previously stated, 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 of \$5.76 per foot of space, which is taken directly from the Company's First Revision to Electric Service Schedule No. 4 that is currently on file with the Commission.³ Besides the annual rental rate, the tariff includes a schedule of non-recurring fees. As previously mentioned, the revised Schedule No. 4 fees are required by the Commission as a result of Docket No. 10-035-97.⁴

Exhibit B accompanies Electric Service Schedule No. 4 and contains the Company's Distribution Construction Standards that govern joint use. The joint use standards contained in Exhibit B as part of the Application include the following Information Standards: EU 001, EU 101, EU 211, EU221, EU 231, EU 241, EU 251, EU 261, EU 271, EU 281, and EU 401, each of which have varying dates of revision—ranging from May 31, 1993 for low-voltage service drops, to December 12, 2014 for street light clearances. These sections on Distribution Construction Standards contain drawings covering joint use of poles by supply and communications circuits and equipment. Some of the drawings specify the clearances required and the typical arrangement of attachments.

The Company's Distribution Construction Standards for Joint Use appear to be in conformance with the National Electrical Safety Code (NESC) 2007 requirements and with Utah Admin. Code § R746-310 (13), which governs electricity service by electric utilities and states that the NESC refers to the 2007 edition of the NESC Code.⁵

The NESC is the American National Standard for the safety of electric supply (power) and communication utility systems installed and maintained under qualified control by public or private utilities.⁶ The NESC is revised every five years. Therefore, next year the 2017 edition of

³ On November 25, 2014, the Company filed a first revision to Electric Schedule 4 in compliance with the Commission's Order issued in Docket No. 14-035-T13. The revision became effective on December 25, 2014.

⁴ Docket No. 10-035-97, Report and Order, November 21, 2012.

⁵ <http://www.rules.utah.gov/publicat/code/r746/r746-310.htm#T1>. 13. "National Electrical Safety Code" means the 2007 edition of the National Electrical Safety Code, C2-2007, as approved by the American National Standards Institute, ISBN 07-7381-4893-8, incorporated by reference.

⁶ <http://www.csemag.com/single-article/weighing-in-on-the-national-electrical-safety-code-nesc/4be8b5a0d835e08d6cc614195e45efef.html>.

the NESC will be published, and the Company's Distribution Construction Standards, as contained in the Company's Electric Service Schedule No. 4 are based on outdated NESC standards and should be reviewed for compliance with the 2017 NESC. The EU standards listed in the Company's Exhibit B were reviewed anywhere from 2007 to 2010 to 2014.

The Division recommends that the Company's Distribution Construction standards for joint use need to be reviewed and updated, from the 2007 NESC to the 2014 NESC, the most current NESC code. The Division requests, in the Company's reply comments, that it explain these Information Standards fully, including what protocols and systems are in place to review and/or update each standard to the most current NESC Code.

This finding should not be a condition for approval of the Application, because the Company is still in conformance with the current Utah code that references the 2007 NESC. However, with the security and reliability of the electrical grid at stake, it makes sense that ten-year old codes should be reviewed and updated where necessary.

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. The approval of this Application is in the public interest, as allowing TDS Baja access to the Company's poles through this Agreement will allow TDS Baja to conduct its cable and broadband business in areas within the state of Utah.

CONCLUSION

After reviewing the Company's filing and accompanying documents, the Division finds that the Agreement between 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 Robert Lively, Rocky Mountain Power

Yvonne Hogle, PacifiCorp

Megan McKay, PacifiCorp

Michele Beck, Office of Consumer Services