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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE FORMAL)	
COMPLAINT OF BLYNCSY, INC.)	
AGAINST ROCKY MOUNTAIN POWER)	Docket No. 16-035-41
)	

ROCKY MOUNTAIN POWER’S ANSWER AND MOTION TO DISMISS

Rocky Mountain Power, a division of PacifiCorp (the “Company”), pursuant to Utah Code Ann. §§ 54-4-1 and Utah Admin. Code R746-100-3 and -4, R746-200-9, and R746-345-3 provides its Answer to the formal complaint filed by Blyncsy, Inc. (“Blyncsy” or “Complainant”). In addition, the Company moves that the Complaint be dismissed in its entirety, with prejudice, because Blyncsy’s Complaint does not demonstrate that Rocky Mountain Power has violated any provision of law, Commission order or rule, or Company tariff.

I. PRELIMINARY MATTERS

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II. BACKGROUND

1. Rocky Mountain Power (the “Company”) was approached by Blyncsy in 2015 regarding the proposed placement of devices on various poles of the Company, including street light poles. In meetings with the Company, Blyncsy asserted that it has the right to place such devices on Company-owned poles pursuant to Public Service Commission of Utah (“Commission”) administrative rule R746-345, governing pole attachments (the “Rule”). Based on information provided by Blyncsy, it intends to use such devices to obtain data regarding traffic movement in the area of such devices, transmit that data to Blyncsy via a cellular telephone, aggregate the data (and in doing so change its form), and make the aggregated data available to its respective customers where the devices are located.

2. In discussions with the Company, Blyncsy asserted that it has the right to place such devices on any of the Company’s poles, including street light poles, and that it

has such a right as an “Attaching Entity” under the Commission’s Rule, not because it is either a “public utility, wireless provider, cable television company, [or] communications company,” but on the basis that it will be providing “information services.”

3. In its Formal Complaint, Blyncsy asserts three arguments: (1) that it qualifies as an “Attaching Entity” under the Commission’s Rule; (2) that it qualifies because it provides “information services” as defined in the Telecommunications Act of 1996; and (3) that it should be permitted to not only attach to Company-owned utility poles, but also Company-owned street lighting poles. Based on the arguments and facts presented below, Rocky Mountain Power respectfully requests that the Commission reject all three of these arguments, and dismiss the Complaint.

III. ARGUMENT

Blyncsy Does Not Provide “Information Services” Because (a) Blyncsy Does Not Offer a Capability and (b) Because Blyncsy Does Not Use Telecommunications

4. In Utah, “a public utility must allow any attaching entity nondiscriminatory access to utility poles at rates, terms and conditions that are just and reasonable.” Utah Admin. Code R746-345-1(B)(2).¹ An attaching entity is a “public utility, wireless provider, cable television company, communications company, or other entity that provides information or telecommunications services that attaches to a pole owned or controlled by a public utility.” Utah Admin. Code R746-345-2(A).

¹ As an initial matter, the Company notes that it appears that Blyncsy believes that the definition of secondary poles includes streetlight poles. Secondary poles are a subset of distribution poles used to support overhead distribution wires and provide service drops to customer premises, as defined in Utah Admin. Code R746-345-2(G). The Company allows attachments by authorized attaching entities to both its distribution poles and secondary poles. The Company does not permit attaching entities to place equipment on streetlight poles, as discussed below.

5. The Utah Administrative Code does not define the term “information service.” As described below, Blynscy’s conclusory statement in its Formal Complaint that it “satisfies each element of the [Telecommunications Act of 1996]’s ‘information service’ definition” ignores critical portions of the definition.

6. “The term ‘information service’ means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(24). Blynscy, based on the information provided to the Company and available on its website: (1) does not offer “a capability for generating...information”; and (2) does not use telecommunications according the definition in the Telecommunications Act because it changes the data it receives.

(a) Blynscy Does Not Offer a Capability and Therefore Does Not Provide an Information Service

7. Based on the definitions provided in the federal statute and cases addressing other types of companies, Blynscy does not provide information services because it does not offer a capability for the customer to collect information, but only the information itself. Information service is “*the offering of a capability* for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications....” 47 U.S.C. § 153(24) (emphasis added).

8. “For example, cable broadband internet has been classified as an information service ... as defined in 47 U.S.C. § 153.” *Union Elec. Co. v. Cable One, Inc.*, No. 4:11-CV-299 CEJ, 2011 WL 4478923, at *3 (E.D. Mo. Sept. 27, 2011) (citing

National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005)). Broadband internet is an information service because broadband providers “offer[] a single, integrated service, Internet access, to the subscriber.” FCC Declaratory Ruling and Notice of Proposed Rulemaking, Mar. 15, 2002 (https://apps.fcc.gov/edocs_public/attachmatch/FCC-02-77A1.pdf), at 24. In other words, Internet providers qualify as attaching entities because they offer Internet access; not just information, but the capability to obtain information. “E-mail, newsgroups, the ability for the user to create a web page that is accessible by other Internet users, and the DNS are applications that are commonly associated with Internet access service. Each of these applications encompasses the capability for ‘generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.’” *Id.* at 25. The FCC therefore concluded that “cable modem service, an Internet access service, is an information service.” *Id.* at 25.

9. Blyncsy does not provide an information service because, unlike broadband Internet providers, it only offers information to its customers, not a capability. Their website indicates that Blyncsy merely collects data.

10. The federal statute indicates Blyncsy is not an information service because it only provides data, not a capability. Although Blyncsy may collect information, it does not offer the capability to access the information directly to its clients. Instead, it offers only the data it collects (after conversion to a different format). Based on the foregoing, Blyncsy does not provide an information service, which means it is not an Attaching Entity under the Utah Commission Rule.

(b) Blynscy Does Not Provide an Information Service Because It Does Not Make the Information Available Directly Via Telecommunications

11. Information service is “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*....” 47 U.S.C. § 153(24) (emphasis added). Thus, to provide an information service, the entity must make the information available via telecommunications. “The term ‘telecommunications’ means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(50).

12. Although Blynscy may acquire, store, and utilize data about traffic trends, it does not do so “via telecommunications” because Blynscy alters the data it receives.

Blynscy explains how it collects data from passersby on their website:

When you use a mobile device that has Wi-Fi and/or Bluetooth enabled, our Blynscy sensors may observe information your phone transmits, including your device’s Wi-Fi, Bluetooth MAC address and/or similar device identifier (e.g., advertising identifier), type, and signal strength. *Instead of storing your MAC address or similar device identifier, we create a unique identifier that we then store (“Blynscy ID”).*

Privacy Policy, <http://www.blynscy.com/privacy-policy/>, last updated Jan. 13, 2016, accessed on October 25, 2016 (emphasis added). To qualify as an entity that provides information service, the entity must use telecommunications, which requires that the data the entity collects remain unchanged. Blynscy, according to its own website, alters “the form or content of the information” it receives. Blynscy devices collect information from passersby by accessing the information from their cellphones, like Wi-Fi, Bluetooth, and MAC addresses. *Id.* Importantly, instead of storing the information its devices collect,

Blyncsy creates “a unique identifier that [it] then store[s],” what Blyncsy refers to as, a “Blyncsy ID.” *Id.* Blyncsy therefore changes “the form or content of the information as sent and received,” and accordingly, Blyncsy does not provide an information service as described in the Act. 47 U.S.C. § 153(50).

Utah Statutes Do Not Allow the Commission to Expand the Definition of Attaching Entity to Encompass Blyncsy or Other Similar Types of Equipment

13. Blyncsy offers a fundamentally different type of service than those companies that qualify as attaching entities under the Utah administrative rules, such as cable, telecommunications or advanced internet services that are commonly offered as services by attaching entities via wireline, fiber or wireless equipment. Those companies provide information services by way of offering certain capabilities to its customers, a service that Blyncsy does not offer, and the Commission is prohibited by statute from expanding the definition of attaching entity to include Blyncsy and other similar devices or equipment.

14. Only Section 54-4-13 of the Utah Code specifically addresses Commission jurisdiction over joint use of facilities and pole attachments. Section 54-4-13(1) provides the Commission with authority to direct that a public utility shall permit another public utility to jointly use the first public utility’s facilities under certain circumstances. Section 54-4-13(2) describes the conditions under which a cable television company may share in and enjoy certain right-of-way easements held by the public utility with which it has a pole attachment contract, including the condition that the Commission determine “that under the terms and conditions of the pole attachment contract, the use of the utilities facilities by the cable television company will not

interfere with the primary utility function or render it facilities unsafe, and that the contract is in the public interest.”

15. The Commission has not been granted the express power to order the Company to allow the type of attachments Blynscy is requesting to its poles or any other facilities. Blynscy cannot claim any express power, as Section 54-4-13 addresses joint use only by other public utilities and cable television companies.

16. Nor should the Commission find an implied power be found to exist. To allow otherwise could lead to absurd results that would create safety issues due to almost unlimited attachments to Company-owned poles. The Company has been contacted by numerous other companies and organizations requesting the attachment of surveillance cameras, automated residential water meters, and other equipment that could, due to overcrowding or incompatibility, cause safety issues for the Company and other attaching entities.

17. More likely are requests for the attachment of surveillance cameras and associated transmitting equipment by multiple companies or other organizations that would receive the recorded information, edit and compile it, then send the information to customers. This type of attaching entity is not contemplated by the state or federal pole attachment programs and the Commission cannot expand its authority to include virtually any form of entity that happens to collect and retransmit data.

18. Based on a Google images search, it appears that Blynscy has, and is taking advantage of alternative placements for its equipment, including on bridges and

street signs. These alternative placements would not be viable for attaching entities such as telecommunications or cable providers.²

Pole Attachments on Street Light Poles Are Not Permitted Under the Rules

19. Pole attachments are permitted on poles that support electrical distribution wires, not streetlight poles. The Rule defines a “Distribution Pole,” as “[a] utility pole, excluding towers, used by a pole owner to support mainly overhead distribution wires or cable.” Utah Admin. Code R746-345-2(C). A “Secondary Pole” is “[a] pole used to provide service drops, the aerial wires or cables connecting to a customer premise.” Utah Admin. Code R746-345-2(G).

20. Notwithstanding that the Rule provides definitions of “Distribution Pole” and “Secondary Pole” the terms are not used anywhere in the rule. Rather, R746-345 simply refers to poles or utility poles. However, the Company’s Safe Harbor agreement, which was prepared for the implementation of the Rule and approved by the Commission in Docket No. 10-035-97, provides that a “Pole” is defined as a “‘Distribution Pole’ as defined in Utah Admin. Code R746-345-2(C),” thus making “Pole” and “Distribution Pole” interchangeable for purposes of the Company’s Safe Harbor agreement.

21. The Company’s Safe Harbor agreement specifically provides that the agreement applies to the use of the Company’s Poles *only* (Agreement Section 2.01). Even without reference to the Commission-approved Company Agreement, it would be reasonable to interpret the Rule’s inclusion of the definition of “Distribution Pole” as having some purpose under the Rule, and that the most reasonable purpose is the intent that the Rule applies to Distribution Poles. The Rule also requires that to establish the

² Images included as Attachment 1.

pole attachment relationship, the pole owner and attaching entity enter into the standard Commission-approved contract (the Safe Harbor) or other Commission-approved contract. Every pole attachment contract approved by the Commission to date applies to distribution poles or transmission poles with distribution underbuild – not street light poles.

22. In addition, street light poles are not contemplated by other sections of the Rule. For example, the pole attachment rate methodology specified in Utah Admin. Code R746-345-5 does not support including street light poles under coverage of the Rule: First, the cost of those poles is not included in the cost of poles used in calculating the rate. Second, the rebuttable presumptions specified are based on the characteristics (height, usable space) of *distribution* poles, not street light poles. Further, electrical make-ready work relates to relocations of electrical facilities to accommodate pole attachments, and applicable safety codes – that must be adhered to under the Rule – govern placement of all attachments on electrical utility poles.

23. Blynco, in its formal complaint, attempts to argue that the Company’s Electric Service Schedule No. 4 is applicable to street light poles because under the Act attachment is permitted to a “pole, duct, conduit, or right of way owned or controlled by a utility.” This ignores that under the Company’s approved Electric Service Schedule No. 4, the “Availability” paragraph states that its availability is conditioned on the execution of a pole attachment agreement (i.e. a negotiated agreement) or the applicability of the Commission-approved Standard Agreement, which as discussed above, effectively precludes the applicability of the Schedule to street light poles.

24. In sum, under the Company's Safe Harbor agreement, and a reasonable interpretation of the Commission's Rules, an Attaching Entity has no right to attach to either (a) a Company-owned pole holding only a street light, powered by underground service, or (b) a Company-owned pole, with a street light, which is not used by the Company to support mainly overhead distribution wires or cable (i.e., a street light on a pole with only secondary service attached for the street light).

Additional Operational Issues Raised by Blynscy's Request and Devices

25. In addition to the issues discussed above, there are numerous operational and logistical issues that must be addressed if Blynscy were to attach its devices to Company-owned poles, any of which may make it impossible for the attachment to be compatible with existing equipment.

26. First, the Blynscy devices if powered by an approximately 1' x 3' solar panel, as shown in the attachment, are not compatible with joint use. Such a large installation on Company-owned poles would make it impossible for the poles to be climbed by Company personnel and workers of other attaching entities, and the personnel would be unable to safely access and service other attachments or power lines on the poles. The Company cannot allow physical impediments on its poles that cause safety issues for its personnel or other authorized attaching entities.

27. The Company's understanding is that alternatively Blynscy devices may be powered by a 110 volt power source. Company-owned distribution poles do not have such access, and powering attachments is not as simple as plugging into a wall socket. In addition, if it were possible to power the devices using existing distribution facilities on distribution poles, there would be the additional issues of metering. According to the

Company's Electric Service Requirements, meters cannot be placed on distribution poles or streetlights and the Company does not offer non-metered service for attaching entities.

28. Finally, there are safety questions that must be answered before Blynscy devices could be attached to any Company-owned poles: (1) what grounding methods will Blynscy utilize to ensure the devices are compliant with the National Electrical Safety Code (NESC); (2) does the installation include a shut-off switch that could be accessed by Company personnel working on the poles; and (3) who would install and maintain the devices? Such attachments require proper grounding and a shut-off switch for safety, and installation and maintenance requires qualified workers meeting OSHA and NESC requirements for working in proximity to energized lines and equipment.

29. As set forth in the Argument section above, the Company does not believe that Blynscy qualifies as an attaching entity, but if the Commission finds that it does, there are numerous issues that must be addressed before Blynscy's equipment could be placed on Company facilities.

III. MOTION TO DISMISS

25. The Company moves under Utah Rules of Civil Procedure, Rule 12(b)(6) for an Order dismissing the Complaint based on the argument set forth above. The Company has shown that the Complaint fails to establish the Company violated Commission rules, Company tariffs or that its actions are unjust.

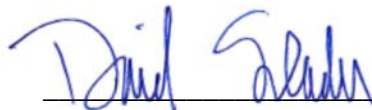
26. The Company has complied with the Rule, and as set forth above, Blynscy does not qualify as an attaching entity because it is not providing information services as defined in the Telecommunications Act, and the Company is therefore under no obligation to allow Blynscy to become a joint user of its poles.

CONCLUSION

WHEREFORE having fully answered Complainant's complaint and finding no violation of law, Commission Rule, or Company tariffs to base an award of the relief requested, the Company prays for the dismissal of the Complaint with prejudice.

Dated this 27th day of October, 2016.

Respectfully submitted,



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ATTACHMENT 1

Images of Alternative Placements of Blyncsy Devices





