



State of Utah
Department of Commerce
Division of Public Utilities

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ACTION REQUEST RESPONSE

To: Public Service Commission

From: Division of Public Utilities
Chris Parker, Director
Artie Powell, Energy Section Manager
Justin Christensen, Utility Analyst

Date: November 22, 2017

Re: Docket No. 17-035-58, Rocky Mountain Power Pole Attachment Agreement with XO Communications Services LLC.

RECOMMENDATION (APPROVAL)

The Division of Public Utilities (Division) recommends that the Public Service Commission (Commission) approve the Pole Attachment Agreement (Agreement) between Rocky Mountain Power and XO Communications Services LLC (XO Communications).

ISSUE

On October 24, 2017, PacifiCorp, dba Rocky Mountain Power, filed an Application with the Commission for Approval of the Agreement between Rocky Mountain Power (Company) and XO Communications (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 Administrative Rule 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 XO Communications 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 October 25, 2017, 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

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 XO Communications (Application at 3). The Agreement represents the Parties' agreed-to terms and conditions that will allow XO Communications to attach telecommunications equipment to the Company's poles in Utah in order for XO Communications to conduct its telecommunications business in a number of areas in Utah (Application, p. 2).

The non-reciprocal Agreement was signed by the Company on October 5, 2017 and by XO Communications on September, 20 2017. (Agreement, p. 24).

The Division compared the XO Communications Agreement to the Commission's Safe Harbor agreement. The Division did find numerous substantive differences in the Agreement and the Safe Harbor agreement. The Division enumerates these substantive differences below:

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

First, several changes were made to Article I, the portion of the Safe Harbor agreement that contains the contract definitions. In this section the revised contract adds, modifies, or clarifies definitions for the following items that are particular to this specific agreement:

- Unlike the Safe Harbor, the Agreement adds a definition for “Credit Requirements,” specifying how the Company reasonably determines creditworthiness (Agreement, pp. 4-5.)
- The definition of “Inspection” has been expanded to include a subsection called “Periodic Safety Inspection” that pertains to the integrity of the Company’s distribution poles (Agreement, p. 5).
- The definition of “Security” has also been updated to reflect the cost, including labor, to remove and dispose of Licensee attachments should the need occur (Agreement, p. 6).
- The Agreement adds a definition for “Material Adverse Change” that is not found in the Safe Harbor definitions (Agreement, pp. 5-6).

In addition to the changes in definitions described above, there are several material terms and conditions contained within the Agreement that differ from the Safe Harbor, but were mutually negotiated and agreed to by the Parties. These changes are summarized below:

1. Section 3.02 includes changes to the make-ready work process. Among other things, the Company will determine if any make ready work is required before Licensee is permitted to attach its equipment to the Company’s poles. If make-ready work is deemed necessary, the Company will then provide the cost estimate to Licensee, who must either accept or reject the cost estimate within 30 days of the notice. The Licensee has the option of having the Company perform the work or employing a self-build option that must be approved by the Company. This section also states that the Parties will negotiate

solutions in good faith to try to accommodate Licensee's project requirements (Agreement, pp. 8-9).

2. Section 3.08 contains important updates with respect to safety requirements. Licensee must place and maintain its equipment in strict conformity with various safety requirements, including those found in the National Electrical Safety Code (NESC) and requirements contained in the Company's current Distribution Construction Standards (Exhibit B) to the Agreement (Agreement, p. 7). According to Section 3.08, Licensee agrees to indemnify the Company and hold the Company harmless in certain situations, such as claims resulting from a power outage caused by Licensee. The section also contains specifications for where and how to properly place attaching equipment to ensure the safety of employees and contractors at large (Agreement, pp. 10-11).
3. Sections 6.01 through 6.03 contain additional insurance and bonding requirements that are more stringent than similar terms contained in the Safe Harbor agreement (Agreement, pp. 17-19).
4. Section 7.03 allows a defaulting party additional time to cure a default if it is diligently pursuing a cure (Agreement, p. 20).
5. Section 8.08 prohibits Licensee from assigning the Agreement without the Company's prior written consent. The section further defines terms that may be required should the Company approve a successor assignee. (Agreement, p. 21).

The Division finds that many of the changes in the Agreement that differ from the Safe Harbor that are identified above, appear to be designed to allow the Company to manage pole attachments more efficiently and to 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 Commission² and is attached as Exhibit A to the Agreement. Besides the annual rental rate, the tariff includes a schedule of non-recurring fees that were approved by the Commission in Docket No. 10-035-97.³

The joint use standards have varying dates of revision and appear to be in conformance with the most recent NESC requirements as well as the Company's own procedures for reviewing and documenting updates to its construction standards.

The Company represents that all construction will meet or exceed the requirements of the latest edition of the National Electrical Safety Code (NESC). All work will be performed in a safe manner that complies with the rules of the NESC, the Occupational Safety and Health Administration (OSHA) and the rules of any state agencies having jurisdiction. (Agreement, p. 31).

The Division notes that the Company submitted its 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 granting XO Communications access to the Company's poles through this Agreement will allow XO Communications to conduct its business in a number of 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

² 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.

³ Docket No. 10-035-97, Report and Order, November 21, 2012.

of the Agreement are, for the most part, consistent with the Commission approved Safe Harbor agreement. Where differences occur, they have been mutually agreed to by the Parties.

CC: Jana Saba, RMP

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Michele Beck, OCS