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Submitted April 2, 2004

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

COMCAST CABLE COMMUNICATIONS, INC., a Pennsylvania Corporation, Claimant, vs. PACIFICORP, dba UTAH POWER , an Oregon Corporation, Respondent.	**Docket No. 03 035 28** **RESPONSE OF PACIFICORP TO CLAIMANT'S MOTION FOR IMMEDIATE RELIEF AND DECLARATORY RULING**

Pursuant to Rule 746-100-3 of the Rules of Practice and Procedure of the Public Service Commission of Utah ("Commission") and Section 63-46b-6 of the Utah Code Annotated, PacifiCorp hereby responds to the above-captioned Motion filed by Claimant on March 23, 2004.

PacifiCorp opposes Claimant's Motion and urges the Commission to deny the relief requested for the reasons set forth below.

COUNTERSTATEMENT OF THE CASE

Both Claimant and Respondent are public utilities regulated by this Commission. Claimant is a provider of cable television, telecommunications and information services. Respondent is a provider of electric service, but not telecommunications service. In accordance with Section 54-4-13 of the Utah Code Annotated, Respondent allows Claimant, pursuant to a permitting process, to attach its wires and cables to Respondent's utility poles for the provision of its services to its customers.

In the instant proceeding, Claimant challenges Respondent's assessment to it of monetary sanctions for installing attachments without complying with the permitting process ("unauthorized pole attachments") as well as Claimant's share of the cost of the audit that is being conducted of all third-party attachments that have been made to Respondent's poles. This summer, a hearing in this proceeding will be held to determine the merits of Claimant's case.

The question of unauthorized pole attachments has been a point of contention between the parties for some time. The pole attachment permitting process is vital to Respondent because it is the mechanism by which Respondent ascertains whether proposed attachments may safely be made to its poles without impairing the capability of the poles to perform their primary function of reliably supporting electric distribution lines. Moreover, it is the mechanism by which Respondent tracks the number of poles in use for purposes of calculating the rental that is due. Accordingly, upon the discovery of thousands of unauthorized pole attachments during the course of its audit of pole attachments, Respondent began to assess sanctions against Claimant for having installed its attachments without going through the permitting process. Respondent

also began to bill Claimant for its *pro rata* share of the cost of the ongoing audit, which brought to light the unauthorized attachments.

Claimant contested the magnitude of charges made by Respondent as sanctions for making unauthorized attachments, as well as the assessment for a share of the cost of the audit of pole attachments that is being conducted by Respondent. Respondent, however, was unwilling to continue to process Claimant's current applications for attachment permits unless Claimant paid Respondent's invoices.

In September of 2003, the parties worked out an interim solution to this problem in the form of a letter agreement. This is the agreement of September 8, 2003 ("Letter Agreement"), to which Claimant refers in ¶ 13 of its Motion, which we attach hereto for the convenience of the Commission as Exhibit 1.

The Letter Agreement acknowledged and preserved Claimant's legal positions. It contemplated the instant proceeding before the Commission which would resolve the dispute between the parties and it provided for the refund by Respondent of any monies that might be disallowed by the Commission or that might have been erroneously assessed. (Letter Agreement, pp. 1-2). In return for the payment of present and future invoices by Claimant, Respondent agreed to resume processing of Claimant's permit applications. Processing would continue for so long as Claimant remained current in payment of its invoices. *Id.*, p.2.

Respondent draws the Commission's attention to the following provision of the Letter Agreement:

> In the case of a dispute of future invoices for service areas in Utah, the parties will agree to handle the dispute pursuant to the terms of this Letter Agreement unless the parties have finalized a new pole attachment agreement.

Id. The parties have not finalized a new pole attachment agreement. The Letter Agreement accordingly remains in effect.

The pole attachment permitting process is the primary means by which an electric utility protects the integrity of its electric distribution infrastructure from unsafe or unsound pole attachments and pole attachment practices.[1] The pole attachment permitting process can be time consuming, especially if make-ready work is determined to be required before attachments can be made.[2] The pole attachment permitting process is also the means by which an electric utility keeps track of the number of attachments for purposes of the annual rental invoice.[3]

These three facts about the pole attachment permitting process – passage of time, cost of make ready work and increased rent – create powerful incentives for an attacher to avoid the pole attachment permitting process and install its facilities without obtaining the requisite permits. Few attachers out-and-out trespass on utility property by placing their facilities on poles before they have entered into an underlying access agreement with the pole owner. But once they have obtained the right of access – and, make no mistake, Claimant here has such right – *unpermitted* pole attachments can become a problem. Because the pole attachment permitting process is so undeniably related to the protection of the structural integrity of the electric distribution infrastructure, it is disingenuous to claim that Respondent's efforts to enforce the pole attachment permitting procedure are not related to the integrity of the infrastructure.

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[1] *See, e.g., Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.,* 17 FCC Rcd 6268, 6269 n.4 (2002) ("*Mile Hi II*") (noting that it is customary for pole attachment agreements to require an application/permitting process); *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.,* 15 FCC Rcd 11450, 11457 (Cable Services Bureau 2000) ("*Mile Hi I*") ("The applications process provides assurance to [the utility] that it will be compensated for [a cable company's] attachments and satisfied that [the cable company's] attachments are in compliance with safety codes . . .").

[2] *See, e.g., Mile Hi I,* 15 FCC Rcd at 11458 n.76 (the application process can serve to notify a utility of the need for make-ready work).

[3] *See Mile Hi II,* 17 FCC Rcd at 11457-58 (a "benefit" of failing to submit an application for an attachment is a lower annual fee due to the utility's "ignorance of the particular attachment.").

In the case now before the Commission, Respondent, through its ongoing audit of attachments that have been placed on its poles, has discovered literally thousands of unauthorized pole attachments that have been made by Claimant. The Commission's attention is again drawn to the Letter Agreement between the parties, where, in Exhibit 2 to the Letter Agreement, it is shown that in only three of Respondent's service districts in Utah, some 15,312 unauthorized attachments had been discovered. (Exhibit 2 attached to the Letter Agreement).

It is difficult to imagine a more significant and widespread assault on the integrity of Respondent's electric distribution infrastructure in Utah. Yet Claimant has managed to compound this very serious circumstance by engaging in unsafe and unsound pole attachment installation practices. In addition to denying Respondent its legal right and opportunity to study the poles, perform any necessary make ready work, and inspect the work post-installation, Claimant has installed its attachments in ways that violate the National Electrical Safety Code, such as invading the 40" safety space between its lines and the electric lines,[4] and using construction methods that violate motor vehicle codes (not to mention common sense), such as installing optical fiber from a moving bucket truck.[5]

[4] The National Electric Safety Code ("NESC") places upon pole owners the obligation to maintain certain strict tolerances (*e.g.* vertical clearances, line sag, pole strength, etc.). Institute of Electrical and Electronics Engineers, Inc., *National Electrical Safety Code* §§ 23-26 (2002). The Commission's rules require a utility's facilities and infrastructure to be designed, constructed, maintained and operated in accordance with the provisions outlined in the NESC. *See* Utah Administrative Code R746-340-3. In addition, the Federal Communications Commission ("FCC") has endorsed the NESC as the standard upon which utilities may rely when evaluating requests for access under section 224(f)(2). *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Interconnection between Local Exchange Carriers and Commercial Radio Service Providers,* 11 FCC Rcd 15499, 16067-6072 ¶¶ 1143-1151 (1996).

[5] The Commission's rules impose certain safety obligations on telecommunication companies such as Comcast, which rules may have been violated by Comcast's unsafe construction methods. *See* Utah Administrative Code R746-340-6 (requiring telecommunications companies to perform work in a safe manner); *see also Hudson v. AT&T Broadband,* Utah PSC Docket No. 02-2383-01, 2003 Utah PUC LEXIS 15, *8 (Jan. 15, 2003) (noting that the Commission has jurisdiction to investigate AT&T's practices with respect to the design, construction, and installation of facilities to determine if such practices violated code and safety regulations).

Once an attacher has an underlying pole access agreement with the electric utility, the remedies available to the utility to protect its property are greatly reduced. Outright removal of the unauthorized pole attachments, for example, is generally not an option. Respondent here feels it has only two realistic remedies that it can bring to bear in order to protect its infrastructure: monetary sanctions and denial of permit processing. In the face of Claimant's extensive and outrageous behavior, Respondent had no choice but to employ both remedies in order to bring a halt to the continuing assault on its electric distribution infrastructure. Respondent's actions were prudent and proper.

ARGUMENT

I. Claimant Has No Need for Relief from the Commission.

The simple fact is that Claimant has within its own control the means by which to compel Respondent to resume the processing of Claimant's pole attachment permit applications. No order of the Commission is necessary. Under the terms of the Letter Agreement between the parties, Respondent will process the pole attachment permits if Claimant pays its invoices as it agreed to do when this dispute first arose. (Letter Agreement, p.2).

The rub, of course, is that Claimant wants Respondent to process the permit applications without paying the invoices. In the Letter Agreement, however, the parties agreed that Claimant would pay Respondent's invoices while the dispute was pending before this Commission. The Letter Agreement states:

> [I]n the event that Comcast files an action or petition with the applicable legal or regulatory body having jurisdiction over pole attachment matters within the state of Utah and such governing body finds that the fee of $250.00 per pole for "unauthorized pole attachments" paid by Comcast under this Letter Agreement is unreasonable or unenforceable, then PacifiCorp agrees to refund to Comcast the amount of the difference between what is considered reasonable and the $250.00 per pole fee upon the lawful binding order of such governing body directing such a refund.

Id.

Now, it seems, Claimant is no longer willing to wait until this proceeding has run its course and a proper determination has been made, based upon consideration of testimony and documentary evidence. And so it has concocted a tale of extortion and access denial, the elements of which are similarly belied by the contents of the Letter Agreement, and requested the Commission to rule immediately, based on a hurried and limited exchange of pleadings and nearly impromptu oral argument. The Commission should see this tactic for what it is, namely, an attempt to bypass the very procedure which Claimant has invoked in seeking relief from this Commission – a procedure that both parties envisaged when they signed the Letter Agreement.

Both parties agree that Federal Communications Commission ("FCC") law and policy do not govern this dispute. Nonetheless, Claimant has supported many of its arguments with citations to FCC law. In that vein, Respondent refers the Commission for guidance to an FCC case, *Fiber Technologies Networks, L.L.C. v. Duquesne Light Company*, 18 FCC Rcd 10628 (Enforcement Bureau, May 27, 2003). This too was a case where the attacher was in arrears in its payment obligations and the electric utility was demanding payment pending the outcome of the complaint proceeding before the FCC under threat of exercising its remedies, including removal of attachments. The FCC denied the attacher's request for a stay, stating: "Fibertech fails to explain . . . how it would be irreparably harmed if it simply paid Duquesne the $565,814 amount now, with the expectation that it would later recover this payment as a refund if it succeeds in proving the section 224 violations alleged in its Complaint." 18 FCC Rcd at 10632. Note that here the relevant "harm" would not be the so-called anticompetitive effects alleged by Claimant, but rather the payment of money by the attacher, *which Respondent has agreed to refund* if so ordered by Commission at the conclusion of this proceeding.

II. The Contentions in Claimant's Motion Are Refuted by the Letter Agreement.

Examination of the Letter Agreement reveals that the parties contemplated the very circumstances that have now played out and that Respondent's invoices are not part of some "holistic attack on pole attachment regulation." (Motion, ¶ 4). Indeed, it takes some nerve on the part of a company that has made *thousands* of unauthorized pole attachments to make such an allegation.

For example: "PacifiCorp permitted Comcast to proceed with its upgrade – temporarily." (Motion, ¶ 13). "[O]n October 31, 2003, Comcast commenced this action. . . ." (Motion, ¶ 14). "This did not deter PacifiCorp." (Motion, ¶ 15). Of course Respondent was not "deterred" by the filing of Claimant's Request for Agency Action (the "Request"). As shown above, the Letter Agreement contemplated and anticipated the filing of the Request. The parties even agreed in advance on how they would behave once the Request was filed. It is no indictment of Respondent to say that it continued to send out invoices, as though the filing of the Request alerted Respondent for the first time that Claimant challenged the basis for the invoices. Respondent did not change its behavior "temporarily." It acted consistently and precisely as Claimant expected Respondent to act.

It is disingenuous to say, "It became very clear to Comcast that PacifiCorp would continue to generate these disputed charges for a long as possible." (Motion, ¶ 17). Claimant knew in September of 2003, when it signed the Letter Agreement, that there would be additional invoices: "Comcast acknowledges that this Letter Agreement only applies to the Ogden, American Fork and Layton service districts, and that the inventories in other service districts may disclose additional 'unauthorized pole attachments' in other service districts, which would result in additional charges for those districts." (Letter Agreement, p.2). Claimant would

certainly have been in the best position to know the extent of its unauthorized pole attachments in other districts and the magnitude of the invoices that were sure to follow.

Claimant places particular emphasis on the fact that Respondent has sought "millions of dollars in penalties ***even as the legality of those penalties are the subject of this open and pending Commission proceeding***." (Motion, ¶ 22) (emphasis in original). Yet Claimant's objections to the penalties were known at the time of the Letter Agreement. Nevertheless, the Letter Agreement contains no provision for Respondent to suspend its invoices upon the filing of the Request, nor does the Letter Agreement contain a cap on the total amount that Claimant would have to pay during the pendency of the proceeding before this Commission.

Claimant is correct about one thing, however: this is an open and pending Commission proceeding. The proceeding should proceed to its orderly conclusion, and not be undermined at the outset by Claimant's maneuvering.

III. Suspension of Permit Processing Is Not a Denial of Access.

Despite its efforts to couch its Motion as a denial of access (Motion, Section II.B), Claimant has not been denied access to Respondent's poles. Indeed, Claimant admits that Respondent "owns and controls the vast majority of poles in this State to which Comcast's facilities are attached." (Motion, ¶ 3). There would be no attachments by Claimant if it had been denied access. Claimant has an undisputed right of access to install, repair modify and upgrade its attachments on Respondent's poles.

Claimant does not, however, have a right to avoid compliance with the pole attachment permitting procedure and the payment of penalties for making unauthorized pole attachments,

which are among the terms and conditions of its access.[6] The essence of the regulatory regime in Utah regarding the joint use of facilities by different utilities is that the use by one utility of another utility's facilities must not impair the primary function of the host facilities. *Utah Cable Television Operators Ass'n, Inc. v. Public Serv. Comm'n,* 656 P.2d 398, 401 (Utah 1982) (noting that the Commission has jurisdiction over all pole attachment agreements in order to determine whether the contract interferes with utility service and whether it serves the public interest).

Having granted access to Claimant, Respondent must have some meaningful way of enforcing the terms and conditions of that access and particularly *these* terms and conditions, which are the primary means by which Respondent assures compliance with Utah law and controls the integrity of its electric distribution infrastructure.

Claimant argues that its arrears are "unrelated" to the fees and charges associated with permit processing and, therefore, Respondent's decision to stop processing permits in the face of Claimant's repeated failure to pay such arrears is the equivalent of a denial of access. (Motion, ¶¶ 20, 22). Claimant ignores the fact that *this is the remedy it granted to Respondent* in the Letter Agreement. Respondent is simply enforcing the terms of the Letter Agreement. Moreover, the permitting process is not "unrelated" to Claimant's arrears. Claimant's failure to follow the permitting process resulted in the monetary penalties which Claimant has refused to pay. Thus, Claimant's arrears are the result of, and directly related to, its decision not to follow the permitting process for thousands of attachments.

[6] Much as Claimant might wish to litigate here the primary issue in this proceeding, namely the reasonability of the penalty for making unauthorized pole attachments, Respondent trusts that the Commission agrees that this is beyond the scope for resolution of the pending Motion.

IV. Safety and the Reliability of the Electric Distribution Infrastructure Are at the Heart of Respondent's Suspension of Permit Processing.

Claimant pins its Motion on its own respect for safety (Motion, ¶ 27) and the assertion that Respondent has not – or did not until the last minute (Motion, n.13) – assert safety and engineering grounds for suspending the processing of permits. This is a specious argument.

The circumstances today are the same as the circumstances in September, 2003, when the parties signed the Letter Agreement, namely: Respondent halted the processing of pole attachment permits until Claimant paid $3.8 million in unauthorized attachment penalties. Claimant at that time did not contest Respondent's *right* to suspend application processing for lack of a safety or reliability underpinning. Its attempt to do so now rings hollow.

More to the point, however, Respondent has, in fact, informed Claimant that its serious safety violations and unsafe installation practices constitute separate grounds for the cessation of application processing. *See* Letter dated March 19, 2004, from Charles A. Zdebski to Michael D. Woods, attached as Exhibit 6 to Claimant's Motion, p.3 ("The cessation of application processing appears to be the only means by which PacifiCorp can bring an end to Comcast's unsafe practices."). In that letter, Respondent detailed several representative examples of safety violations and unsafe installation practices, including:

- On or about March 11, 2004, Comcast construction crews were discovered attaching fiber to PacifiCorp's infrastructure using a moving bucket truck. One crew member drove the truck while another crew member attached fiber from the bucket. This horrific incident occurred *after* Comcast was informed that the construction project had been shut down for improper construction practices.

- In many of its projects in Utah, Comcast has repeatedly attached fiber without first requesting permission from PacifiCorp. In addition to the thousands of unauthorized attachments identified in the litigation you reference in your letter, PacifiCorp has discovered repeated incidences where Comcast crews have engaged in unsafe construction practices that present a direct threat to public and worker safety as well as the reliability of PacifiCorp's distribution network. Examples include:

- Attaching fiber within the 40" safety space mandated by the National Electrical Safety Code and attaching power supplies and service drops without the requisite ground clearance. *See* Attachment 1.

- Attaching or overlashing fiber without submitting an application or performing necessary make-ready work. *See* Attachment 2.

- Not taking necessary precautions to protect the safety of Comcast's contractors. *See* Attachment 3.

- Attaching stand-off arms without proper clearance and attaching fiber over roadways without meeting minimum clearance requirements. *See* Attachment 4.

Id.

Nor was this the first time that Respondent had cited safety and engineering concerns in connection with possible suspension of pole attachment permit processing. On February 20, 2004, Respondent wrote a letter to Claimant, which letter is attached hereto as Exhibit 2. The letter stated in part:

> In addition, PacifiCorp field personnel have observed Comcast crews in the Ogden, Utah area performing construction on PacifiCorp poles without permits and in violation of NESC rules. We are documenting these instances and will provide further detail in the near future. Comcast's continued violation of permitting and NESC requirements will further jeopardize Comcast's rights to access PacifiCorp's poles.

The point is made: the suspension of pole attachment application processing is as much related to the safety and reliability of the electric distribution plant as it is to Claimant's non-payment of invoices for penalties stemming from Claimant's bypassing of the ordinary means by which the integrity of the electric distribution infrastructure is protected. Nevertheless, should the Commission so desire, Respondent is prepared to document myriad instances of unsafe installations and installation practices which compelled Respondent to protect its infrastructure by means of the few remedies at its disposal.

CONCLUSION

Respondent has no motive to impede Claimant's upgrade of its plant nor to impair competition in the telecommunications sector, as so weakly alleged by Claimant. Respondent *is* motivated to improve the reliability of its electric distribution plant and has set about the daunting task of documenting attachments to its poles and curing violations that come to light. When these efforts resulted in a confrontation with Claimant regarding its unauthorized pole attachments, the parties worked out a way forward. At bottom, Claimant's Motion is nothing more than an effort to renege on Claimant's part of the bargain while continuing to hold Respondent to its part.

Respondent has shown above that Claimant has established no factual or legal basis for "immediate" relief. By merely living up to the bargain it struck last September, Claimant can resume its upgrade and avoid all of the alleged harm to itself and its customers. Should it turn out at trial that the money paid by Claimant pursuant to its Letter Agreement with Respondent was improperly collected, the money will be refunded. In short, there is no need for Commission action at this stage, except to deny Claimant's Motion.

For the foregoing reasons, Respondent respectfully requests that this Commission deny Claimant's Motion for Immediate Relief and Declaratory Ruling.

RESPECTFULLY SUBMITTED this 2nd day of April, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2004, a true and correct copy of

PacifiCorp's Response to Claimant's Motion for Immediate Relief and Declaratory Ruling

was hand-delivered to:

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