

Claimant Comcast Cable Communications, LLC (“Comcast”), hereby files this Memorandum in Opposition to PacifiCorp’s Motion for Leave to Late-File the Rebuttal Testimony of Tom Jackson submitted July 15, 2004.

INTRODUCTION

In deciding whether to grant PacifiCorp’s Motion, the Utah Public Service Commission (“Commission”) should weigh the following four factors: “(1) whether [PacifiCorp] acted in good faith; (2) the danger of prejudice to [Comcast]; (3) the reason for [PacifiCorp’s] delay; and (4) the length of the delay and its potential impact” on the resolution of this matter. *Stoddard v. Smith*, 2001 UT 47, ¶ 24, 27 P.3d 546 (citing *West v. Grand County*, 942 P.2d 337, 340-41 (Utah 1997)).

Considering these factors, the Commission should deny PacifiCorp’s motion. PacifiCorp’s Motion was brought in bad faith. Additionally, PacifiCorp’s Motion is untimely and, if granted, would prejudice Comcast unduly. Likewise, granting this Motion will have a pronounced detrimental effect on the overall scheduling of this case. Finally, PacifiCorp has failed to establish any proper justification for its unreasonable delay. For those reasons, as more particularly set forth below, the Commission should deny PacifiCorp’s Motion.

FACTUAL BACKGROUND

1. More than three months ago, on April 4, 2004, PacifiCorp stipulated to a Procedural Order pursuant to which initial testimony was due June 25, 2004, rebuttal testimony on July 7, and sur-rebuttal testimony on July 16, 2004. PacifiCorp willingly stipulated to these deadlines. (*See* [Proposed] Stipulated Procedural Order, filed April 4, 2004, p.2).

2. The Commission executed this stipulated order on April 8, 2004.

3. On June 9, 2004, prior to the discovery cut-off, Comcast identified its expert witness, Michael T. Harrelson. Comcast identified this witness near the end of discovery because Mr. Harrelson was not located and retained by Comcast until that time. However, Comcast immediately identified Mr. Harrelson as soon as he was retained and, in any event, before the end of discovery.

4. Additionally, although the discovery period ended on June 11, 2004, Comcast willingly produced Mr. Harrelson for deposition on June 23, 2004.

5. Immediately prior to the initial testimony deadline, and at the request of PacifiCorp, Comcast agreed to extend each of the testimony deadlines. Because PacifiCorp claimed that it needed additional time to prepare testimony, and in order to accommodate PacifiCorp's request, Comcast agreed to extend each of the deadlines for filing testimony by one week.

6. Comcast's counsel explained to PacifiCorp's counsel that extending these deadlines more than one week would inhibit the parties' ability to prepare pre-hearing briefs and prepare for the hearing itself.

7. The parties filed their initial testimony on July 2, 2004. After the filing of Comcast's initial testimony, PacifiCorp did not request additional time to file rebuttal testimony. In fact, PacifiCorp did not request additional time to file rebuttal testimony until after the rebuttal testimony deadline had passed.

8. The parties filed rebuttal testimony on July 14, 2004. The following day, on July 15, 2004, after PacifiCorp had an opportunity to review Comcast's rebuttal testimony, its

counsel notified Comcast for the first time that it had retained an expert, Tom Jackson, to testify in this matter.

9. Despite the facts that: (a) it has been more than a month since Comcast notified PacifiCorp that it intended to offer expert testimony; (b) PacifiCorp deposed Comcast's expert more than three weeks ago, and (c) PacifiCorp reviewed Mr. Harrelson's initial testimony almost two weeks ago, PacifiCorp now seeks to file expert testimony beyond the deadlines established in the Procedural Order.

ARGUMENT

As set forth above, the Commission should weigh the following four factors in determining whether to grant PacifiCorp's Motion: "(1) whether [PacifiCorp] acted in good faith; (2) the danger of prejudice to [Comcast]; (3) the reason for [PacifiCorp's] delay; and (4) the length of the delay and its potential impact" on the resolution of this matter. *Stoddard*, 2001 UT 47, ¶ 24. Because PacifiCorp acted in bad faith, and in so doing is attempting to prejudice Comcast and negatively impact the scheduling of this case, the Commission should deny PacifiCorp's Motion.

I. PacifiCorp's Request for Additional Time Should be Denied Because it Was Made in Bad Faith.

PacifiCorp made the current Motion in bad faith, strategically waiting until after the first two rounds of testimony were filed before deciding, for the first time, that it needed an expert to refute Comcast's position. PacifiCorp deliberately waited until after the rebuttal testimony of all parties was filed before first suggesting that it needed more time to file rebuttal testimony. PacifiCorp's claim that Mr. Jackson's testimony will be "limited to the issues addressed by Mr. Harrelson in his direct testimony" is disingenuous considering the fact that it

waited until after it had an opportunity to review Mr. Harrelson's rebuttal testimony before suddenly deciding that it needed an expert witness to file rebuttal testimony. (*See* Motion, ¶ 7).

After Comcast designated its expert, PacifiCorp failed to retain an expert. After PacifiCorp took Mr. Harrelson's deposition, it failed to designate an expert. After all initial testimony had been filed, PacifiCorp failed to either identify an expert or request additional time from the Commission or Comcast to file rebuttal testimony. In fact, initial testimony was filed by all parties nearly two weeks before PacifiCorp made the current motion. Notably, PacifiCorp failed to either move for an extension of time or even contact Comcast regarding such an extension of time to file rebuttal testimony until after the parties filed rebuttal testimony. The Commission should deny PacifiCorp's Motion since PacifiCorp knowingly waited until after the rebuttal testimony deadline had passed to request an extension to file such rebuttal testimony.

II. PacifiCorp's Motion Should be Denied Because its Unduly Prejudices Comcast.

PacifiCorp's timing and strategy in waiting until the eleventh hour to finally identify an expert witness are improper and prejudicial to Comcast. *Debry v. Cascade Enterprises*, 879 P.2d 1353, 1361 (Utah 1994) (denying a party's request to untimely designate an expert witness because such designation did not allow the opposing party adequate time to depose the expert and still adequately prepare for trial). Based on the current scheduling deadlines, it will be difficult, if not impossible, for Comcast to accommodate PacifiCorp's untimely request to file testimony well after the established deadlines.

Comcast and PacifiCorp agreed on the scheduling deadlines in this case more than 3 months ago. Comcast then granted PacifiCorp's request for an extension of time to file testimony. Comcast granted this request out of professional courtesy. Despite this allowance of

additional time and the fact that Comcast has made a good faith effort both to comply with the Procedural Order and, where possible, to accommodate PacifiCorp's schedule, PacifiCorp now seeks to abuse this Commission's process and scheduling order by introducing a new witness, additional rounds of testimony, and a deposition within weeks of the hearing.¹

PacifiCorp's attempt to file rebuttal testimony after the agreed upon deadline does nothing but shift the difficulties associated with PacifiCorp's failure to timely designate an expert witness to Comcast. If PacifiCorp is allowed to file this testimony after the deadline, it will be forcing Comcast to not only abide by the deadlines which PacifiCorp itself admits it cannot abide by, but to do so with the added burden of extra rounds of testimony and depositions. Likewise, although PacifiCorp claims that seven business days was not enough time to file rebuttal testimony for its expert, it requests that Comcast be given only five days to accomplish the same thing. (*See* Motion, ¶¶ 2, 8). In so doing, PacifiCorp fails to take into account the fact that the schedule requires the parties to file pre-hearing briefs within a week of its requested final testimony deadline. It is impossible for Comcast to prepare for deposition, conduct a deposition, file an additional round of testimony, and still abide by the current scheduling order taking the new testimony into account.

PacifiCorp's attempts to alleviate the problems associated with its self-imposed untimely designation of an expert by burdening Comcast with additional responsibilities should

¹ PacifiCorp complains that it has not had a reasonable amount of time to designate an expert because Comcast designated its expert near the end of discovery. Even assuming that PacifiCorp was somehow prevented from retaining an expert prior to Comcast's retention of an expert, PacifiCorp has had ample time to do so since it was notified of Comcast's designation of Mr. Harrelson. PacifiCorp's suggestion that it has not had the opportunity to designate an expert is disingenuous given that Comcast identified its expert more than five weeks ago and made that expert available for deposition shortly thereafter.

not be allowed by this Commission. It will serve only to delay this action and derail Comcast's ability to put its case before the Commission. For these reasons, the PacifiCorp's Motion should be denied.

III. PacifiCorp's Request is Without Justification and Will Negatively Effect the Scheduling of this Proceeding.

PacifiCorp has not offered any sound justification for its failure to previously include the testimony of Mr. Jackson. Moreover, it is impossible for Comcast to agree to PacifiCorp's request to include a last minute witness and late testimony amid attempting to summarize the voluminous record for the Commission in pre-hearing briefing.²

PacifiCorp's contention that its untimely filing "can be done without any disruption of the current procedural schedule" is both false and misleading. (*See Motion*, ¶ 9). PacifiCorp contends that it cannot retain an expert with more than a month to do so but then asserts that Comcast should be able to prepare for and take that expert's deposition and prepare additional testimony in less than two weeks without disrupting the briefing deadline one week later. Such a contradiction cannot be condoned by this Commission.³

² Delaying the hearing date to accommodate this request is also impossible due to the fact that PacifiCorp is wrongfully holding more the \$5,000,000 belonging to Comcast and is demanding millions more. Additionally, the entire communications industry in Utah is awaiting the outcome of this proceeding which, will be a vital step in regulating joint use relationships in Utah.

³ Comcast notes for the record that the Federal Communications Commission has denied similar untimely requests made by the same counsel that currently represents PacifiCorp. *See Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, FCC 02-270 (2002) (In denying a request for leave to file supplemental information, the FCC held, "We cannot condone [the pole owner's] failure to provide the appropriate information at the required time.")

CONCLUSION

Because it has failed to meet each of the requisite elements for getting an extension of time, PacifiCorp's Motion should be denied.

Dated: July 16, 2004.

COMCAST CABLE COMMUNICATIONS, LLC

Jerold G. Oldroyd, Esq.
Angela W. Adams, Esq.
Ballard Spahr Andrews & Ingersoll, LLP
One Utah Center, Suite 600
201 South Main Street
Salt Lake City, Utah 84111-2221

Michael D. Woods, Esq.
Comcast Cable Communications, LLC
183 Inverness Drive West, Suite 200
Englewood, Colorado 80112

J. Davidson Thomas, Esq.
Genevieve Sapir, Esq.
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Ave., N.W.
Second Floor
Washington, D.C. 20006

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of July, 2004, an original, eight (8) true and correct copies, and an electronic copy of the foregoing **MEMORANDUM IN OPPOSITION TO PACIFICORP'S MOTION FOR LEAVE TO LATE-FILE REBUTTAL TESTIMONY OF TOM JACKSON** were hand-delivered to:

Ms. Julie Orchard
Public Service Commission of Utah
Heber M. Wells Building, Fourth Floor
160 East 300 South
Salt Lake City, Utah 84114
lmathie@utah.gov

and a true and correct copy mailed, postage prepaid thereon, to:

Gerit Hull
PacifiCorp
825 N.E. Multnomah, Suite 1700
Portland, Oregon 97232
Gerit.Hull@pacificorp.com

Charles A. Zdebski
Troutman Sanders, LLP
401 9th Street, NW, Suite 1000
Washington, DC 20004
charles.zdebski@troutmansanders.com

Gary G. Sackett, Esq.
Jones Waldo Holbrook & McDonough
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
gsackett@joneswaldo.com

Patricia E. Schmid, Esq.
Heber M. Wells Building, Fourth Floor
160 East 300 South
Salt Lake City, Utah 84114
pschmid@utah.gov
