
BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

COMCAST CABLE COMMUNICATIONS,)	
INC.,)	Docket No. 03-035-28
)	
Claimant,)	PREPARED SUR-REBUTTAL
v.)	TESTIMONY OF COREY
)	FITZ GERALD
PACIFICORP, dba UTAH POWER,)	FOR PACIFICORP
)	
Respondent.)	July 22, 2004
)	

1

2 **Q. Please state your name and business address.**

3 A. My name is Corey Fitz Gerald. My business address is 650 NE Holladay, Suite
4 700, Portland, Oregon 97232.

5 **Q. Have you previously submitted testimony in this proceeding?**

6 A. Yes.

7 **Q. Attached to your written sur-rebuttal testimony are Exhibits PC 1.16 through**
8 **1.24. Were these prepared by you or under your direction?**

9 A. Yes.

10 **Q. What areas will your testimony address?**

11 A. My testimony will address the sufficiency of the notice provided to Comcast's
12 predecessors for both the 1997/1998 Audit and the 2002/2003 Audit. It will also
13 address Comcast's predecessors' failure to participate in either audit and will address
14 Comcast's new claims that the 1997/1998 and 2002/2003 Audits were not accurate.

1 **Q. Have you read the rebuttal testimony offered by Michael Harrelson, Rodney Bell,**
2 **Gary Goldstein, Joanne Nadalin, and Martin Pollock on behalf of Comcast in this**
3 **proceeding?**

4 A. Yes. I have read their testimony.

5 **Q. What is your response to Mr. Goldstein's and Mr. Bell's claim that TCI was not**
6 **aware of the 1997/1998 Audit?**

7 A. As I have explained, although PacifiCorp had no contractual obligation to do
8 so, it provided Comcast ample notification of 1997/1998 Audit. I do not know why
9 Mr. Goldstein denies any memory of being informed of the 1997/1998 Audit. I
10 personally informed TCI employees of PacifiCorp's intention to conduct the
11 1997/1998 Audit during the utility meetings with third-party attachers in 1996. Mr.
12 Goldstein attended at least one of these meetings where I discussed PacifiCorp's intent
13 to conduct the audit. Moreover, notices of these meetings were sent to numerous TCI
14 officials, and the meeting Mr. Goldstein attended was also attended by at least four
15 other TCI employees. Attached as Exhibit PC 1.16 is a letter I sent to Keith Perkins,
16 another TCI employee who attended one of these meeting. This letter documents his
17 request for a pad of Joint Pole Notices, the attachment application form that was
18 reviewed with third-party attachers at the meetings.

19 Despite signed proof that TCI employees attended the 1996 utility meetings,
20 Mr. Goldstein has not offered any explanation as to why he or the other TCI employees

1 at these meetings cannot recall even attending the meetings, much less the information
2 relayed to them during the meetings.

3 In addition to the notice provided at the utility meetings I conducted, Bob
4 Coates of PacifiCorp provided two separate letters to third-party attachers, including
5 TCI, notifying them of PacifiCorp's intention to conduct the 1997/1998 Audit.
6 Attached as Exhibit PC 1.17 is a copy of the form of each letter. These letters
7 specifically invited third-party attachers to "validate the data capture procedures or the
8 accuracy of the data."

9 **Q. Please respond to Gary Goldstein's and Mr. Bell's claim that Comcast's**
10 **predecessors were never informed of the results of the 1997/1998 Audit.**

11 A. Mr. Goldstein and Mr. Bell are incorrect. TCI was informed of the results of
12 that audit through the invoices for attachment rental fees sent to TCI subsequent to the
13 audit. These invoices sought payment for a substantial number of poles being used by
14 TCI for which the company had not previously been paying rent. Additionally, these
15 invoices included backup data consisting of pages of documentation listing every pole
16 for which PacifiCorp had a record of a TCI attachment. TCI never complained about
17 the additional poles that were invoiced for rental fees as a result of the 1997/1998
18 Audit, nor did it ever ask for any verification of the results of that audit or question the
19 backup data provided with the invoices, despite the clear invitation to do so in the
20 notification letters.

1 **Q. In her rebuttal testimony, Ms. Nadalin questions the adequacy of the notice**
2 **provided to Comcast regarding the 2002/2003 Audit. What is your response to**
3 **her assertions?**

4 A. Contrary to Ms. Nadalin's opinion, Comcast was not only informed of
5 PacifiCorp's *intent* to conduct the 2002/2003 Audit, it was also informed that
6 PacifiCorp *actually* was conducting the audit. As with the 1997/1998 Audit, Comcast
7 had ample notice of the 2002/2003 Audit, and, as with the 1997/1998 Audit, Comcast
8 never approached PacifiCorp requesting to participate in the 2002/2003 Audit.
9 Comcast received the same form of audit notification as Qwest. Yet, Qwest took no
10 issue with the sufficiency of notice it received, and even participated in the 2002/2003
11 Audit by accompanying Osmose workers into the field.

12 **Q. Ms. Nadalin appears to claim that notices were wrongly addressed to Mike Sloan.**
13 **Why were the audit notification letters addressed to Mike Sloan?**

14 A. During the negotiations that led to the adoption of the 1999 Agreement, I
15 communicated directly with Mike Sloan, who was handling the negotiations in Utah on
16 behalf of AT&T. It was during the course of these negotiations that he informed me
17 that all legal notices from PacifiCorp should be sent to his attention. I have never been
18 provided with the name of any other individual at Comcast to whom such notices
19 should be sent.

20 It seems unlikely that no one at Comcast would have been aware of the
21 notification letters. None of the notification letters were returned as undeliverable to

1 PacifiCorp, indicating to me that someone within Comcast accepted delivery of the
2 letters. Moreover, the notices were mailed to the address designated for the receipt of
3 legal notification by Comcast in the 1999 Agreement. See Ex. PC 1.18. I have never
4 been informed by Comcast that it wished to receive legal notices at a different address.
5 If the address provided in the 1999 Agreement was no longer a valid address for legal
6 notification, it was Comcast's responsibility to inform PacifiCorp of this change.

7 **Q. What is your response to Ms. Nadalin's claim that some of the 30-day notification**
8 **letters were sent after the audit was already underway?**

9 A. Her claim is based on incorrect information. In her testimony, Ms. Nadalin
10 provided a chart comparing the date of the 30-day notification letters with the date of
11 invoices for particular districts. However, the dates listed by Ms. Nadalin in that chart
12 are not accurate. Ms. Nadalin misdated by a full year the date of the notices sent for
13 the American Fork and Layton districts. Indeed, Exhibit PC 1.4 to my initial testimony
14 contains notification letters for American Fork and Layton dated December 30, 2002,
15 *not* 2003, as Ms. Nadalin contended. This error would explain Ms. Nadalin's
16 erroneous conclusion that "some of the invoices came long before the notices had been
17 sent." In light of the correct dates, that statement simply is not true.

18

1 **Q. In her testimony, Ms. Nadalin notes that some invoices were dated 36 days after**
2 **the date of the notification letter and that this fact undermines the notice provided**
3 **to Comcast. What is your reaction to this observation?**

4 A. First, Ms. Nadalin's observation is irrelevant. Comcast never attempted to
5 contact PacifiCorp about the audit. This is true in instances where there was a 36-day
6 time span between notification and invoicing and where there was a 108-day time span.
7 Accordingly, it seems to me that the time between notification and invoicing has
8 nothing to do with Comcast's failure to become involved with the 2002/2003 Audit.

9 Second, PacifiCorp processed the results of the 2002/2003 Audit and invoiced
10 for unauthorized attachments on an ongoing basis. In terms of resource allocation, it
11 would have made no sense to wait until an entire district was completed prior to
12 processing the results from that district. Rather, once a smaller area within a district
13 was completed, the data for that area was processed and any unauthorized attachments
14 were invoiced. This is reflected by the fact that PacifiCorp sent more than one invoice
15 on different dates for each district.

16 **Q. What is your response to Ms. Nadalin's opinion that a desk-top audit would not**
17 **have been helpful?**

18 A. Comcast never explored the option of a desk-top audit with PacifiCorp. On the
19 other hand, Qwest did participate in a desk-top audit with PacifiCorp. I can only
20 conclude that Qwest did not share Ms. Nadalin's opinion regarding the usefulness of
21 such an exercise. If Comcast had participated in a desk-top audit, all the data collected

1 by Osmose in the field would have been available to Comcast. Additionally,
2 Comcast's participation in a desk-top audit could have facilitated a dialogue between
3 the two parties regarding the results of the audit.

4 In addition, the desk-top audit exercise is intended to save companies like
5 Comcast a great deal of time and expense in sending out field personnel by limiting
6 their inspections only to those poles for which they believe audit results may be in
7 question based on their visual audit of photographs and supporting data. The offer
8 made to Comcast to perform a desk-top audit was another attempt by PacifiCorp to
9 allow Comcast to engage in the process, which they again declined by silence. If
10 Comcast had chosen to participate, PacifiCorp certainly would have responded to
11 feedback or concerns offered and been able to respond during the course of the Audit.

12 It is ironic that Ms. Nadalin claims that a desk-top audit would have been less
13 than helpful because it would have required simultaneous access to Comcast's records.
14 It is now clear that Comcast has no relevant records. But if it did, we certainly could
15 easily have arranged to have PacifiCorp's results and Comcast's records in the same
16 room at the same time.

17 **Q. Please respond to Ms. Nadalin's assertion in her rebuttal testimony that the**
18 **documentation sent to Comcast by PacifiCorp was insufficient.**

19 A. The first I have heard of this complaint was in the context of Ms. Nadalin's
20 initial testimony. Ms. Nadalin was sent the exact information she requested. I cannot
21 imagine why she is now claiming that the information she received is "insufficient." If

1 Ms. Nadalin was not satisfied with the additional information that was provided to her
2 by PacifiCorp, she should have contacted me or Laura Raypush so that one of us could
3 have walked through the information with her. Additionally, a desk-top audit would
4 have presented another opportunity where the data could have been explained to
5 Comcast.

6 **Q. What is your response to Mr. Goldstein's assertion that he has proof of**
7 **authorizations for attachments invoiced by PacifiCorp as unauthorized?**

8 A. Of the over 35,000 unauthorized attachments invoiced to Comcast as a result of
9 the 2002/2003 Audit, Mr. Goldstein has only documented 34 *possible* instances, in a
10 district outside the focus of this proceeding, where unauthorized attachments may have
11 been incorrectly invoiced. Further, this claim has for the first time been made in
12 Comcast's rebuttal testimony. PacifiCorp has consistently maintained that it is willing
13 to recall any invoices for unauthorized attachments in situations where Comcast is able
14 to present documentation of prior authorization. Yet, Comcast has waited over a year
15 since it was invoiced for unauthorized attachments in the Salt Lake City metro district
16 to come forward with any documentation at all regarding authorization for the poles at
17 issue in that area. With the exception of seven documents purporting to demonstrate
18 prior authorization, Comcast has yet to produce any documentation demonstrating
19 authorization for attachments invoiced as unauthorized in the Layton, Ogden, or
20 American Fork districts.

1 The eleventh-hour nature of Comcast’s testimony on this matter, its accounting
2 for only one-tenth of one percent of the attachments at issue, and the limitation to one
3 district tangential to this proceeding speak for themselves.

4 **Q. What is your response to the claims by Mr. Bell and Mr. Goldstein that Comcast**
5 **has not made 35,439 new attachments since 1998?**

6 A. It is impossible to evaluate the truth or accuracy of this claim.

7 **Q. Why is that?**

8 A. During discovery in this proceeding, PacifiCorp specifically requested that
9 Comcast provide information relating to its build-out/overbuild in Utah, including
10 where Comcast has installed new and updated pole attachments. Comcast refused to
11 provide this information, claiming it was irrelevant. Exhibit PC 1.19 is a copy of
12 PacifiCorp’s interrogatory and documents requests and Comcast’s response. When
13 asked to supplement its response to this interrogatory, Comcast again refused to
14 provide the requested information, as shown in Exhibit PC 1.20.

15 The rebuttal testimony of Mr. Bell and Mr. Goldstein, then relies on factual
16 assertions that Comcast previously claimed were irrelevant to this proceeding.
17 Comcast’s refusal to provide information in this area prevents PacifiCorp (or the
18 Commission) from being able to provide any meaningful assessment of its claims.
19 However, as Mr. Coppedge has explained in his sur-rebuttal testimony, it is entirely
20 reasonable to conclude that Comcast *has* made the relatively modest amount of 37
21 miles of new attachments per district since 1998.

1 **Q: In their rebuttal testimony, Mr. Bell, Mr. Goldstein and Mr. Harrelson indicate**
2 **that it is unlikely that the number of Comcast's attachments would increase**
3 **substantially from 1998 to 2002. Do you agree with this assertion?**

4 A: No. All cable companies faced drastic changes to the market during that time,
5 which forced them to rapidly build and upgrade their networks.

6 **Q: Please explain.**

7 A: Between 1998 and 2002, cable operators were confronted with increased
8 competition from a multitude of different multichannel video programming distributors
9 brought about by the Telecommunications Act of 1996 (Pub. L. No. 104-104, 110 Stat.
10 56) and the Satellite Home Viewer Improvement Act of 1999 ("SHVIA")(Pub. L. No.
11 106-113, 113 Stat. 1501A-523). The Telecommunications Act brought about
12 competition in the broadband arena from local telephone companies and other wireless
13 companies that had traditionally not served the more rural customers in Utah. The
14 SHVIA provided competition to rural cable operators because it allowed satellite
15 carriers to offer their subscribers local TV broadcast signals in their local markets, and
16 it also authorized satellite carriers to provide distant or national broadcast programming
17 to subscribers. The SHVIA helped to place satellite providers on an equal footing with
18 local cable television operators as to the availability of broadcast programming, and
19 thus gave consumers more and better choices in selecting an alternative to cable
20 distributors.

1 Spurred in part by this competition, industry statistics clearly demonstrate the
2 infrastructure expansion of the cable industry between 1998 and 2002. Legislative
3 testimony by the National Cable Television Association (NCTA) (later renamed
4 National Cable Telecommunications Association) shows that between 2000 and 2001,
5 DBS subscribers increased at an annual rate of *43 percent* by January, 2001, and that
6 24 percent of Utah households had direct-to-home dish service.

7 See <http://www.ncta.com/legislative/testimony.cfm?PRid=110&showArticles=ok>.

8 Rural cable operators would have been forced to respond to the new
9 competitive arena. Naturally, they would expand their service area and update their
10 facilities to maintain or head off losses to their market share. The massive amount of
11 new expenditures for cable infrastructure during the 1998 to 2002 period has been
12 clearly documented. As shown in Exhibit PC 1.21, NCTA reported that cable
13 expenditures increased from \$5.6B in 1997, doubling to \$10.6B in 1998, and continued
14 to increase to more than \$16B in 2001 before dropping off. Moreover, the Federal
15 Communications Commission has recently reported that the number of households
16 passed by cable systems increased about 2 percent per year during this period. Annual
17 Assessment of the Status of Competition in the Market for the Delivery of Video
18 Programming, MB Docket No. 03-172 Tenth Annual Report (rel. Jan. 28, 2004)(Table
19 1). See Ex. PC 1.22

20

1 **Q: Did Comcast respond to the changes in the market?**

2 A: I believe that Comcast and its predecessors must have responded in kind with
3 the rest of the cable industry. Comcast is now the single largest cable company in the
4 nation. There is no doubt that the industry leader grew consistent with the cable
5 industry statistics above, which demonstrates that cable infrastructure expenditures and
6 the number of households passed by cable systems increased greatly during the
7 relevant period. The number of new attachments that were discovered by PacifiCorp's
8 most recent audit demonstrates to me that Comcast expanded its system in line with the
9 cable industry as a whole.

10 **Q. Please respond to Ms. Nadalin's characterization of PacifiCorp's discovery**
11 **requests as being limited to information pertaining to overlashing.**

12 A. She is simply wrong. In its document request No. 7, PacifiCorp specifically
13 asked that Comcast, for every attachment that Comcast believed PacifiCorp had
14 mistakenly identified as unauthorized, provide all documentation demonstrating its
15 authority to maintain the attachment in question. See Ex. PC 1.23. After many written
16 objections, Comcast produced boxes and boxes of documents, all of which, with the
17 exception of seven documents, were unrelated to the attachments identified as
18 unauthorized in the American Fork, Layton or Ogden districts. In fact, the bulk of
19 documentation provided by Comcast for these areas related to overlashed attachments
20 made *after* invoices for unauthorized attachments were sent.

1 **Q. What is your response to Mr. Bell’s opinion that there has been “a lot of**
2 **continuity” in Utah despite the various changes in ownership involving Comcast’s**
3 **predecessors?**

4 A. To a certain extent, I agree with Mr. Bell’s position. Throughout the various
5 changes of ownership of cable systems in Utah, I have seen a consistent and continuing
6 pattern of the disregard for contractual obligations on the part of Comcast’s
7 predecessors. The 1996 Pole Contact Agreement between PacifiCorp and TCI’s
8 predecessors, included in Comcast’s rebuttal testimony as Exhibit 1 and the 1999
9 Agreement, illustrate this point. In the 1996 Agreement, Sections 2.1 through 2.3 set
10 forth the permitting and application requirements applicable to TCI by virtue of its
11 operation of systems previously operated by Insight. Yet, Mr. Pollock, Mr. Bell and
12 Mr. Defendall claim in their initial testimony that PacifiCorp had no formal permitting
13 requirements in place prior to 2001. As stated in previous testimony, PacifiCorp has
14 always had a permitting process in place, and later than 1996 had revised and clarified
15 that process in accordance with the standard agreements being developed during that
16 time period. In fact, in 1995, TCI joint use personnel were provided written notice of
17 the requirement to use a new application form—PacifiCorp’s Joint Pole Notice—in
18 order to obtain permits for their attachments. These letters are attached as Exhibit PC
19 1.24.

20 What becomes clear from the provisions of the 1996 Agreement, the attached
21 exhibits, and the 1999 Agreement is that PacifiCorp did have application and

1 permitting requirements in place—requirements that Comcast and its predecessors
2 have not abided by.

3 **Q. Please provide an example of Comcast’s disregard for PacifiCorp’s application**
4 **and permitting requirements.**

5 A. Mr. Pollock’s position on the new application form provides a representative
6 example. In his rebuttal testimony, Mr. Pollock claims that no one has asked him to
7 change the form on which he submits applications. This statement is false. On
8 February 24, 2004, PacifiCorp sent a letter to Comcast notifying it of the new
9 application form. The letter clearly stated that the “change will take place
10 immediately.” Further, Exhibit PC 1.5 to my initial testimony demonstrates that
11 PacifiCorp not only distributed the new form to Comcast, it provided detailed
12 instructions as to how to fill out the form. Despite this notification and the instructions
13 provided by PacifiCorp, Comcast has ignored this new requirement, just as with
14 PacifiCorp’s other application and permitting requirements.

15 Mr. Pollock’s claim that no one has asked him to use this form is indicative of
16 how Comcast has typically responded to its joint use obligations. If I understand its
17 position correctly, Comcast believes that, until it is caught violating the terms of the
18 contract or PacifiCorp’s procedures, it has no obligation to comply with any of its
19 contractual obligations. The fact that compliance with a particular requirement may
20 not be immediately policed and enforced by PacifiCorp in no way undermines the
21 existence of that requirement.

1 **Q. Do you have other comments on Mr. Pollock’s rebuttal testimony?**

2 A. Yes. On page 1 of his rebuttal testimony, Mr. Pollock states that PacifiCorp’s
3 policy is that Comcast may modify or overlash its facilities one day after submitting an
4 application. As I have explained in my initial and rebuttal testimony, Mr. Pollock’s
5 understanding is incorrect. Comcast is in fact required to obtain PacifiCorp’s
6 permission prior to overlashing attachments. Yet, on page 2 of his rebuttal testimony,
7 Mr. Pollock appears to acknowledge this actual permitting requirement for overlashing.
8 There he states that a Comcast contractor *misunderstood* Comcast’s directives because
9 the contractor began overlashing “before the permits were submitted.” So Mr. Pollock
10 *does* know the correct procedure.

11 Mr. Pollock also states that no one told him that Comcast was required to
12 correct the pre-existing violations on a pole prior to modifying or overlashing. While I
13 understand that Mr. Lund has informed Mr. Pollock and other Comcast employees that
14 prior make-ready work to resolve safety issues is required, in most instances Comcast
15 has already completed the overlashing work prior to submitting applications to
16 PacifiCorp (contrary to the requirements set forth in the 1999 Agreement), leaving little
17 opportunity for PacifiCorp to ensure that safety issues and all required make-ready
18 have been addressed.

19

1 **Q. Please address Mr. Harrelson’s characterization of the 1999 Agreement as**
2 **“expired.”**

3 A. Although PacifiCorp provided termination notice for the 1999 Agreement in
4 anticipation of negotiating a new agreement, it is my understanding that in the interim
5 the parties have by mutual agreement continued to operate under the terms of the 1999
6 Agreement. Mr. Harrelson simply ignores this fact, previously admitted by Comcast.

7 **Q. Do you have any other comments regarding the rebuttal testimony filed by**
8 **Comcast?**

9 A. Yes. PacifiCorp performed a cost analysis of the five districts where the
10 2002/2003 Audit had been completed and determined the costs incurred by Osmose
11 and PacifiCorp in conducting the 2002/2003 Audit and any quality-control testing. The
12 total number of attachments was compiled, and the sum total of attachments for each
13 district was divided into the cost of the audit as determined per district. The resulting
14 per attachment rates per district were averaged to arrive at an across-the-board per
15 attachment rate. Each licensee was invoiced based on the number of its attachments.

16 Ms. Nadalin complains that PacifiCorp included some internal costs in its
17 calculation of audit expense to be passed to third parties. While I am not sure what Ms.
18 Nadalin means by “internal costs,” I have previously stated that some costs incurred by
19 PacifiCorp were incorporated in the cost allocation. These costs account for
20 PacifiCorp staff time used to process and Quality Control (“QC”) the results of the
21 2002/2003 Audit. Inclusion of such costs is not only appropriate, but completely

1 consistent with a fully allocated cost methodology because these costs would not have
2 been incurred but for third party attachments on PacifiCorp's facilities. On the other
3 hand, costs incurred for the sole benefit of PacifiCorp were excluded from the
4 calculations, as demonstrated by Ex. PC 2.5.

5 PacifiCorp did arrive at a blended rate for determining the portion of the audit
6 to be passed on to third parties. The blended rate does not result in an over-recovery of
7 costs by PacifiCorp, and in fact, PacifiCorp expects to under-recover the costs it
8 incurred for the 2002/2003 Audit. PacifiCorp elected to use a blended rate because
9 PacifiCorp felt that it would be less confusing than flat-rate costs across six states
10 because so many third party attachers maintained a presence in more than one state.
11 PacifiCorp merely arrived at a methodology it felt would best address the predicted
12 concerns of third party attachers.

13 **Q. Does this conclude your testimony?**

14 A. Yes.