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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** **PREHEARING BRIEF OF PACIFICORP**

PacifiCorp, dba Utah Power ("PacifiCorp"), by its attorneys and pursuant to Utah Admin. Code § R746-100-9(B) and the Order Modifying Hearing Schedule of the Public

Service Commission of Utah[1] submits its prehearing brief in the captioned proceeding.

INTRODUCTION

After negotiating and voluntarily executing three agreements containing controlling and unambiguous provisions regarding pole attachments; after being notified and asked to participate fully by PacifiCorp at every step of the pole attachment process; and after providing no documentary evidence of its attachment authorization for over a year and a half after receiving PacifiCorp's first invoice, Comcast Cable Communications ("Comcast") requests the Commission simply to unwind its express contractual obligations. Resolution of Comcast's request to rewrite the facts and relieve it of its obligations requires a focus on only four clear facts and legal principles.

The four facts are uncontroverted. First, Comcast admitted the accuracy of the attachment count results of PacifiCorp's 2002/2003 Audit, after Comcast hired its own trusted engineering company to verify the results.[2] Second, PacifiCorp identified 35,439 unauthorized Comcast attachments through its own comprehensive, detailed and carefully managed records.[3] Third, after admitting that it only has attachment permit records from the late 1970's and early 1980's,[4] Comcast has provided alleged authorization records for a mere 35 poles,[5] one and a half years after receiving the first unauthorized attachment invoice. Fourth, PacifiCorp has the right pursuant to the 1999 Agreement to charge Comcast portion of the 2002/2003 Audit, and Comcast has provided no evidence to contradict PacifiCorp's cost calculation for that audit.[6]

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[1] Order Modifying Hearing Schedule, Docket No. 03-035-28 (issued July 28, 2004).
[2] Exhibit PC 1.9; deposition Testimony of Steve Brown at 29-33 (Attached as Appendix A to this brief).
[3] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 31.
[4] Deposition Testimony of Gary Goldstein at 13 (Attached as Appendix B to this brief.).
[5] Goldstein Rebuttal Testimony at 5; Coppedge Sur-Rebuttal Testimony, Ex. PC 2.6, at 4.
[6] 1999 Agreement § 2.21.

The four legal principles are black-letter law. First, Comcast is bound by three separate and voluntary agreements—the 1996 Agreement, the 1999 Agreement and the September 8, 2003, Letter Agreement—which together expressly require Comcast to pay $60 per year for each unauthorized attachment and its *pro rata* share of the 2002/2003 Audit costs. Second, to the extent any small portion of Comcast's payment obligations arose after the December 31, 2002, termination of the 1999 Agreement, Comcast admits that the parties have continued in a course of dealing under the terms of the 1999 Agreement. Third, the fundamental terms of the 1996 and 1999 Agreements were incorporated in PacifiCorp's Commission-approved tariffs and the Commission may not modify those terms for retroactive application. Fourth, even if fundamental contract and public utility law did not preclude Comcast from revising its obligations four years after the fact, there is nothing unfair or unreasonable in requiring Comcast to honor its contract and tariff obligations.

After considering the straightforward facts and law, the Commission can only reject Comcast's request to be relieved of its contractual commitments and the consequences of its own conduct.

FACTUAL SUMMARY

The evidence offered at the hearing of this matter will establish the following facts.[7] In the mid-1990s, PacifiCorp initiated a system-wide effort to standardize its joint use contracts and improve existing joint use processes in preparation for the expected future growth resulting from the Telecommunications Act of 1996. PacifiCorp implemented its improved procedures for monitoring joint use and pole attachment

[7] Attached as Appendix C to this brief is a graphic timeline that puts the facts in the case in sequential context.

permitting by educating third-party attachers and confirming its procedures in a standardized joint use agreement and accompanying standard application form.

PacifiCorp provided Comcast's predecessor in interest, TCI, with copies of the required application form as early as October 19, 1995,[8] and began negotiating the terms of the standardized agreement with TCI in 1996. On April 23, 1996, PacifiCorp and Comcast's predecessor, Insight Communications Company ("Insight"), entered a Pole Contact Agreement (the "1996 Agreement").[9] Sections 2.1 to 2.3 of the 1996 Agreement provided express and unambiguous requirements for Comcast/Insight to file applications and obtain permits prior to making attachments.

PacifiCorp's Corey Fitz Gerald also distributed copies of the application form at utility meetings she conducted in Utah in 1996 and 1999. TCI was provided with written notice of these meetings and sent representatives to at least one such meeting.[10] At least one TCI employee requested a pad of PacifiCorp application forms, which Ms. Fitz Gerald provided.[11] The utility meetings were held in order to review PacifiCorp's joint use policies with third party attachers.

During the 1996 meetings, Ms. Fitz Gerald informed third-party attachers of PacifiCorp's intent to conduct a Pole Attachment Audit beginning in 1997.[12] On June 25, 1996, PacifiCorp provided written notification to all third-party attachers, including TCI, of its intent to conduct a pole attachment inventory throughout PacifiCorp's service

[8] Ex. PC 1.24.
[9] In November 1998, Comcast's predecessor, TCI, undertook Insight's rights and obligations pursuant to the 1996 Agreement between PacifiCorp and Insight. Comcast Rebuttal Testimony, Ex. 1.
[10] Ex. PC 1.2.
[11] Ex. PC 1.16
[12] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 14-15; Fitz Gerald Sur-Rebuttal Testimony, Ex. PC1.15, at 2.

area.[13] The notification letter invited all joint users to become involved in the audit. PacifiCorp provided a subsequent written notification of the pole inventory on January 17, 1997.[14] The January 17th letter specifically stated that the audit would become PacifiCorp's "inventory of record for all annual pole attachment rental billings by PacifiCorp."

PacifiCorp conducted a system-wide pole attachment audit during 1997 and 1998 ("1997/1998 Audit").[15] As a result of that audit, PacifiCorp collected pole attachment rental fees for a substantial number of poles being used by third parties which had not been making pole-attachment rental payments prior to the 1997/1998 Audit.[16] PacifiCorp, however, did not assess unauthorized attachment charges as a result of the 1997/1998 Audit. Thus, the 1997/1998 Audit was in effect an "amnesty audit."[17] TCI did not object to the results of the audit or any additional attachments attributed to it as a result of the 1997/1998 Audit.[18]

The detailed records generated by the 1997/1998 Audit were entered into "JTU", PacifiCorp's data base containing joint use attachment information. PacifiCorp continues to update and carefully maintain the joint use information contained in JTU in order to ensure that PacifiCorp's joint use records remain current. In short, the JTU system contains all data concerning third-party attachments to PacifiCorp's facilities.[19] Comcast, on the other hand, has no such uniform record-keeping system in place and only

[13] Fitz Gerald Sur-Rebuttal Testimony, Ex. PC 1.15, at 3; Ex. PC 1.17.
[14] *Id*.
[15] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 13.
[16] *Id*. at 17.
[17] Fitz Gerald Rebuttal Testimony, Ex. PC 1.11, at 13-14.
[18] *Id*. at 18.
[19] *Id*. at 16-17.

maintained records of "blanket permits" from late 1970s and early 1980s.[20]

On December 20, 1999, PacifiCorp entered a subsequent Pole Contact Agreement with Comcast's predecessor in interest, AT&T Cable Services ("AT&T") (the "1999 Agreement").[21] The express and unambiguous application and permitting requirements of the 1999 Agreement were virtually identical to the 1996 Agreement. The application form required by PacifiCorp was included as an attachment to both Agreements. In addition, the application requirement, as well as all other terms, conditions and liabilities contained in the 1996 and 1999 Agreements are incorporated in PacifiCorp's Electric Service Schedule 4 tariff filings on April 15, 1997, March 12, 1999, May 26, 2000, and November 8, 2001.[22]

In January 2002, PacifiCorp notified AT&T that it was terminating the 1999 Agreement as of December 31, 2002.[23] PacifiCorp intended to negotiate a new agreement with AT&T prior to December 31, 2002. The parties, however, were unable to negotiate a replacement agreement, but have continued to operate under the terms and conditions in the 1999 Agreement.[24]

In the meantime, PacifiCorp conducted a second pole attachment audit beginning in November 2002 ("2002/2003 Audit"). On December 30, 2002, PacifiCorp provided AT&T with written notice of the portion of the 2002/2003 Audit to be conducted in the American Fork and Layton districts. On February 3, 2003, PacifiCorp provided AT&T

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[20] Deposition Testimony of Gary Goldstein at 13 (Appendix B); *Transcript of Hearing, Comcast Cable Communications v. PacifiCorp*, Utah PSC Docket No. 03-035-28, Apr. 6, 2004 at 54 (attached as Appendix D to this brief).
[21] Request for Agency Action, Ex. A.
[22] The Electric Service Schedule 4 filings are attached as Appendix E to this brief.
[23] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 11.
[24] Request for Agency Action ¶ 12; *Transcript of Hearing, Comcast Cable Communications v. PacifiCorp*, Utah PSC Docket No. 03-035-28, Apr. 6, 2004 at 16 (Attached as Appendix F to this brief); Fitz Gerald Initial Testimony, Ex. PC 1.0, at 12.

with written notice of the portion of the 2002/2003 Audit to be conducted in Ogden.[25] Neither AT&T nor Comcast requested to participate in any way in the 2002/2003 Audit.

Beginning in February 2003, PacifiCorp notified Comcast that the most recent audit of licensee attachments identified approximately 15,312 pole attachments in the Ogden, Layton and American Fork districts which did not exist during the earlier 1997/1998 Audit and for which there were no pole attachment permits. The notifications invited Comcast to come forward with any documentary evidence in its possession to refute the charges.[26] After receiving unauthorized attachment invoices in early 2003, Comcast provided no evidence of any inaccuracies in the 2002/2003 Audit or PacifiCorp's permit records.

In mid-July 2003, PacifiCorp was compelled to stop processing pending pole attachment applications submitted by Comcast because Comcast failed to either pay the $3,828,000 in charges for the identified unauthorized attachments or to provide any evidence that the charges had been assessed in error.[27] On September 8, 2003, the Parties executed a Letter Agreement ("2003 Letter Agreement") whereby PacifiCorp agreed to resume processing Comcast permit applications, but only for so long as Comcast remained current with its payment obligations.[28] In the 2003 Letter Agreement, Comcast also agreed to provide any evidence it had to show that the unauthorized attachment charges were incorrect within 60 days.[29] Comcast paid $3,828,000 in charges for unauthorized attachments, but never submitted any evidence challenging any of the

[25] Ex. PC 1.4.
[26] Ex. PC 1.6.
[27] Request for Agency Action ¶ 18; Declaration of Corey Fitz Gerald, Ex. 1 to Response of PacifiCorp to Request for Agency Action ¶¶ 13-16.
[28] Ex. PC 1.8.
[29] *Id*.

charges. Comcast then filed a Request for Agency Action with the Commission on October 31, 2003.

In about September 2003, Comcast retained MasTec to conduct a separate audit of its pole attachments in Utah in an attempt to refute the accuracy of PacifiCorp's 2002/2003 Audit. However, shortly after the initiation of the MasTec audit, Steve Brown, Comcast's Director of Construction for the West Division, halted MasTec's work after a review of the MasTec data gathered in American Fork led to the conclusion that PacifiCorp's Audit was accurate and that further effort by MasTec would be a "waste of money."[30]

In discovery in this proceeding, Comcast provided PacifiCorp with several boxes of documents. Only a small portion of the documents relate to the American Fork, Layton or Ogden districts, and all but seven documents are dated after the date of the unauthorized attachment invoices.[31] On July 14, 2004, over a year and a half after the first invoices were sent for American Fork, Layton and Ogden, Comcast offered for the first time, documentation challenging PacifiCorp's unauthorized attachment records, but only for 35 poles in the Salt Lake Metro district.[32] On July 22, 2004, Comcast offered materials not produced during discovery concerning 22 poles in American Fork challenging the accuracy of the 2002/2003 Audit.[33]

PacifiCorp hired a company called Osmose to assist it conducting the 2002/2003 Audit. The total cost to PacifiCorp for the Utah portion of the 2002/2003 Audit was $3,103,903.93. PacifiCorp allocated to itself all costs (approximately 12% of the total

[30] Ex. PC 1.9.
[31] Coppedge Initial Testimony, Ex. PC 2.0, at 9; Ex. PC 2.4.
[32] Goldstein Rebuttal Testimony, Ex. 1.
[33] Goldstein Sur-Rebuttal Testimony, Ex. 1.

cost) for the 2002/2003 Audit incurred in determining PacifiCorp's attachments to third party poles and in capturing certain data elements useful only to PacifiCorp. After paying the full amount of those costs, PacifiCorp allocated the remaining balance of the costs for the 2002/2003 Audit *pro rata* among all the licensees on PacifiCorp's pole plant based upon the total number of applicable attachments that each licensee has. PacifiCorp charged Comcast $502,294.25 or $13.25 per attachment, times 37,909 attachments, as its *pro rata* cost of the 2002/2003 Audit in the Ogden, Layton and American Fork districts.

I. Fundamental Contract Law Requires Comcast to Pay $60.00 Per Year for Each Unauthorized Attachment and its *Pro Rata* Share of the Costs of the 2002/2003 Audit.

A. The Express and Unambiguous Language of the 1996 and 1999 Agreements Establish Comcast's Payment Obligations.

Two written pole attachment agreements apply to this dispute – an April 23, 1996, Pole Contact Agreement (the "1996 Agreement") and a December 20, 1999, Pole Contact Agreement (the "1999 Agreement"). Both are very similar, and both bind Comcast to promises enforceable in this proceeding.

1. The 1996 Agreement.

The 1996 Agreement provided, in express and unambiguous language, that Comcast must obtain approval from PacifiCorp prior to making an attachment. Section 2.1 stated that when Comcast wishes to attach, it "shall make written application for permission to do so, in the form and in the number of copies as from time to time prescribed by Licensor." Then, "[u]pon receiving an approved copy of the application from Licensor, but not before," Comcast may use its equipment as "described in the applications upon the pole(s) identified therein." And if Comcast wished to attach additional equipment, it could not do so "without first making application for and

receiving permission to do so in accordance with Subsection 2.1." 1996 Agreement §§ 2.1-2.3 Ex. 1 to Nadalin Rebuttal Testimony.

The 1996 Agreement also expressly provided that if Comcast attached to PacifiCorp's poles without obtaining prior authorization from Licensor "in accordance with the terms of this Agreement," then PacifiCorp could assess Comcast "an unauthorized attachment charge in the amount of $60.00 per pole per year." *Id.* § 3.2. The 1996 Agreement applied until the parties entered the 1999 Agreement.

2. The 1999 Agreement.

The 1999 Agreement was the product of an extensive, three-year negotiation process during which PacifiCorp and Comcast's predecessors[34] exchanged valuable bargained-for consideration.[35] Sections 2.1-2.3 of the 1999 Agreement, like the 1996 Agreement, expressly and unambiguously spelled out the process to obtain authorization to attach. Just as in the 1996 Agreement, Section 2.1 of the 1999 Agreement required that when Comcast wanted to make an attachment, it "shall make written application for permission to do so, in the form and number of copies as from time to time prescribed by Licensor." Section 2.2 granted the right to install only as "described in the application," only if prior notice was provided PacifiCorp, and only if – for new-build attachments – Comcast provided a **"**completed, signed copy of the application referenced in Section 2.1 within one business (day) after making attachment." Finally, just as in the 1996 Agreement, Comcast could not place additional equipment "without first making

[34] In December 2001, Comcast purchased the AT&T assets in Utah that were governed by the Agreement. *See AT&T-Comcast Merger is Final*, Deseret News, Dec. 20, 2001, at E1. Section 8.5 of the Agreement evidences that the Agreement "shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto." Accordingly, Comcast was thereafter bound to the 1999 Agreement.

[35] PacifiCorp's Response to Request for Agency Action ¶ 6; Declaration of Corey Fitz Gerald, Ex. 1 to Response of PacifiCorp to Request for Agency Action ¶ 3.

application for and receiving permission to do so in accordance with 2.1." 1999 Agreement §§ 2.1-2.3 (emphasis added), Exhibit A to Comcast Request for Agency Action.

Unauthorized attachment charges were governed by Section 3.2, which was virtually identical to Section 3.2 of the 1996 Agreement, and allowed PacifiCorp to "assess an unauthorized attachment charge in the amount of $60.00 per pole per year . . . [payable] within thirty (30) days after receipt of the invoice for said charge . . . in addition to back-rent determined by Licensor for the period of the attachment." *Id.* § 3.2.

Regarding inspections, Section 2.21 stated that PacifiCorp "shall have the right . . . to make periodic inspections of Licensee's Equipment as it deems necessary . . . [and] the right to charge Licensee for the expense of any field inspections, including . . . any further periodic inspections deemed necessary by Licensor." *Id.* § 2.21.

3. The Parties Are Bound by the Terms of the 1996 and 1999 Agreements.

The parol evidence rule prevents the use of oral and extrinsic evidence to sidestep a written contract. Specifically, in the absence of fraud or other invalidating cause, when a contract is integrated, the parol evidence rule operates to exclude "evidence of terms in addition to those found in the agreement." *Lee v. Barnes*, 977 P.2d 550, 552 (Utah Ct. App. 1999) (quoting *Hall v. Process Instruments and Control*, 866 P.2d 604, 606 (Utah Ct. App. 1993)). If a contract is integrated, a court may only consider extrinsic evidence if the contract language is ambiguous. *Id*. The Utah Supreme Court has recognized that there is a presumption of integration when the parties have reduced to writing "an apparently complete and certain agreement." *Hall v. Process Instruments and Control*,

890 P.2d 1024, 1026 (Utah 1995). [36]

In the present case, alleged chats or "handshakes" between field engineers or office managers, even if proven, cannot lawfully rewrite or supplant the application and permitting terms of the 1996 and 1999 Agreements. Both agreements have express integration clauses. For example, Section 8.8 of the 1999 Agreement provided that the 1999 Agreement, along with any attached exhibits to the Agreement, "constitutes the entire agreement between the parties, and may not be amended or altered except by an amendment in writing executed by the parties." It further provided that the 1999 Agreement "shall supersede all prior negotiations, agreements and representations, whether oral or written, between the Parties relating to the attachment and maintenance of Licensee's facilities on PacifiCorp's poles within the locality covered by this Agreement." Because the terms of the 1999 Agreement are unambiguous and there have been no accusations of fraud or any other invalidating action, any alleged oral agreements modifying the application and permitting process under the 1996 and 1999 Agreements are void.

B. The Terms of the 1999 Agreement Control the Parties' Relationship Since That Time.

Although the 1999 Agreement was terminated at the end of 2002, Comcast remains bound to its obligations to PacifiCorp under the 1999 Agreement for several reasons. First, Section 8.7 of the 1999 Agreement states: "Any termination of this Agreement shall not release Licensee [Comcast] from any liability or obligations

[36] In similar situations, Utah has adopted the Uniform Commercial Code ("UCC"), which, among other things, declares a written contract that was designed as the final expression of the parties' wishes to be the only binding agreement on the issue. UTAH CODE ANN. § 70A-2-202 (2004). Utah courts have consistently interpreted the UCC to bar the application of oral agreements on terms that are within a signed written contract. *Boud v. SDNCO, Inc.*, 2002 UT 83, ¶ 20, 54 P.3d 1131, 1137 (Utah 2002); *Hall v.*

hereunder, whether of indemnity or otherwise, which may have accrued or may be accruing at the time of termination." Second, the Parties have continued to operate under the terms of the 1999 Agreement[37], thus creating a course of dealing contract consistent with the 1999 Agreement. Indeed, the applicability of the terms of the 1999 Agreement is not in dispute as both Parties have agreed that the Agreement, submitted as Exhibit A by Comcast with its Request for Agency Action, and its course of dealings following the terms of the 1999 Agreement governs the relationship between the Parties.[38]

Finally, the continued relationship between PacifiCorp and Comcast after the termination of the 1999 Agreement is analogous to a holdover tenancy. The Supreme Court of Utah has held: "It is a firmly established rule that proof of a holding over after the expiration of a fixed term in a lease gives rise to the presumption, which in the absence of contrary evidence will be controlling, that the holdover tenant continues to be bound by the covenants which were binding upon him during the fixed term." *Cottonwood Mall Co. v. Sine*, 767 P.2d 499, 503 (Utah 1988) (emphasis added).

C. The September 8, 2003 Letter Agreement.

On September 8, 2003, the parties entered a Letter Agreement under which Comcast agreed to pay the then-outstanding unauthorized attachment invoices of approximately $3 million and remain current on future invoices ("2003 Letter Agreement"). In the 2003 Letter Agreement, the parties again addressed the requirement under the 1996 and 1999 Agreements that Comcast obtain authorization for its

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Process Instruments and Control, 890 P.2d 1024, 1026 (Utah 1995); *West One Trust Co. v. Morrison*, 861 P.2d 1058 (Utah 1993); *Eie v. St. Benedict's Hosp.*, 638 P.2d 1190, 1194 (Utah 1981).

[37] Fitz Gerald Decl. ¶ 6.

[38] Request for Action ¶¶ 4, 6-7, 9 and 12; Response of PacifiCorp to Comcast's Request for Action ¶ 22; *Transcript of Hearing*, *Comcast Cable Communications v. PacifiCorp*, Utah PSC Docket No. 03-035-28, Apr. 6, 2004, at 16 (Appendix E to this Brief).

attachments. Specifically, the parties agreed:

> Immediately upon the execution of this Letter Agreement and payment in full as provided below, Comcast shall have a period of sixty (60) days in which to identify individual poles within the Ogden, American Fork, and Layton service districts where Comcast has credible documentation indicating that attachments PacifiCorp has identified as unauthorized pole attachments are: (1) subject to a valid installation permit granted by PacifiCorp . . . or (2) are the personal property of an entity other than Comcast; or (3) do not exist.

2003 Letter Agreement, at 1. Although PacifiCorp agreed to refund any unauthorized attachment charges upon receipt of such satisfactory proof as described in the 2003 Letter Agreement, Comcast provided no documentation challenging the accuracy of the charges. Instead, on October 31, 2003, it initiated this proceeding.

D. Applied to the Facts, Comcast's Voluntary and Negotiated Contractual Obligations Require Payment.

Over seven years after the 1996 Agreement and four years after the 1999 Agreement, Comcast has provided virtually no evidence to support its claims that it did not know of PacifiCorp's permitting requirements, that those requirements were altered by the parties, or that it has authorization for the 35,439 attachments PacifiCorp identified as unauthorized. In fact, faced with overwhelming record evidence and clear contractual and legal principles, Comcast has resorted to blaming PacifiCorp for its situation and seeking simply to poke small holes in PacifiCorp's evidence rather than build its own case. However, after agreeing to three written contracts and voluntarily following a course of dealing contract, Comcast is not entitled to pick and choose the provisions in the contract it likes, then dismiss the provisions it dislikes. While PacifiCorp has provided extensive evidence to show that it has painstakingly and properly identified 35,439 unauthorized attachments, Comcast has not even provided "substantial evidence"

to support its position, much less to have shown by a preponderance of evidence that it is entitled to any relief. Nor has it provided actual evidence of what it believes its *pro rata* cost of the 2002/2003 Audit should be.

In a final attempt to avoid responsibility, Comcast asserts that the 1999 Agreement's unauthorized use fee should not accrue from the point when Comcast began its improper activity but should accrue from the day Comcast was caught.[39] A plain reading of Section 3.2 of the contract does not tie the initiation of unauthorized use fees to the discovery of the unauthorized use. Instead, the fee accrues "should Licensee attach . . . without obtaining prior authorization." 1999 Agreement § 3.2. Thus, it is the act of unauthorized attachment, not the discovery of the attachment, that triggers accrual of the fee. When contract language is clear, a court need not look beyond it for interpretation. *Green River Canal Co. v. Thayn,* 2003 UT 50, ¶ 17, 84 P.3d 1134, 1140-41 (Utah 2003); *McElroy v. B.F. Goodrich Co*., 73 F.3d 722, 727 (7th Cir. 1996).

Moreover, common sense precludes interpreting Section 3.2 as setting the amount of remedies based on the amount of time from discovery of the unauthorized use to the point when Comcast sends the check. Comcast's interpretation impermissibly reads the purpose of Section 3.2 out the Agreement. Section 3.2 was designed to discourage unauthorized pole attachment use rather than to encourage a cable operator to hide its unauthorized pole attachments as long as possible so that a single $60.00 charge would be applied over a long time horizon, reducing the operator's risk and annual cost for violation of that provision. "All interpretation is contextual, and the body of knowledge that goes by the name of 'common sense' is part of the context of interpreting most

[39] *Transcript of Hearing, Comcast Cable Communications v. PacifiCorp*, Utah PSC Docket No. 03-035-28, Apr. 6, 2004, at 53-54 (Attached as Appendix G to this brief).

documents, certainly most business documents." *McElroy*, 73 F.3d at 726-27; *Erickson v. Bastian*, 102 P.2d 310, 314-15 (Utah 1940).

II. Settled Principles of Public Utility Law Preclude the Commission From Retroactively Revision Fundamental Terms Established in 1999.

This dispute arises in the context of the operations of a Utah public utility, whose rates, charges and operations are regulated by the Utah Public Service Commission and by the utility tariff provisions filed with and approved by the Commission. Although certain aspects of the relationship between the two parties are governed by private contract, PacifiCorp's tariff incorporates the terms of the 1999 Agreement. Accordingly, not only is Comcast bound as a matter of contract law to its obligations under the Agreement, but the principles of Utah public utility law do not permit the retroactive modification to the clear terms of the 1999 Agreement in the way Comcast seeks from the Commission.

On April 15, 1997, March 12, 1999, May 26, 2000, and November 8, 2001, PacifiCorp filed an Electric Service Schedule No. 4 to its tariff. Each Schedule is virtually identical and contains three key elements: 1) the requirement that cable operators submit an application and receive approval prior to attaching to PacifiCorp's poles; 2) the requirement that the Parties execute a Joint Facilities Agreement; and 3) the incorporation of the terms, conditions and liabilities contained in the Parties' Joint Facilities Agreement into the tariff.[40] The tariff, approved by the Commission,[41] has the

[40] Attached as Appendix E to this brief are PacifiCorp's Electric Service Schedule No. 4 tariff filings.
[41] The tariff was issued by authority of Report and Order of the Public Service Commission of Utah in Docket No. 03-2035-02.

force of law.[42] A central element of the incorporated Agreement was the unauthorized attachment charge. That charge is a mechanism designed to ensure that Comcast and other licensees have the proper incentive to avoid unauthorized attachments that risk the safety and reliability of PacifiCorp's electric distribution network. Ensuring that a cable operator's use of an electric utility's facilities is undertaken in a safe and responsible manner is a task firmly entrusted to the Commission by statute. UTAH CODE ANN. §§ 54-4-13(2)(b), 54-4-14 (2004).

Comcast is correct that the tariff sets forth various pole attachment rates, but its assertion that there is no "rate" set by the Commission for unauthorized pole attachments is not correct.[43] Indeed, Comcast omitted Schedule 4 from the partial tariff it included as an attachment to its Request for Agency Action. The unauthorized pole attachment rate is incorporated in the tariff by reference and is a fundamental term and condition designed to accomplish multiple goals, including compliance with permitting requirements, protection of the integrity of the electric system, and assurance that the electric ratepayers will not subsidize unreported pole attachments.

The Commission does not have the authority to engage in retroactive rate-making of a tariff term established four years prior to a proceeding. All rate-making must be prospective in effect, with the only exception being an unforeseeable event that results in an extraordinary increase or decrease in expenses or revenues. UTAH CODE ANN. § 54-4-4 (2004); *Utah Department of Business Regulation v. Public Serv. Comm'n* 720 P.2d 420 (Utah 1986); *MCI Telecommunications Corp. v. Public Serv. Comm'n,* 840 P.2d 765 (Utah 1992). No such event has occurred here to justify avoidance of the requirement

[42] *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chtd.*, 681 P.2d 1258, 1263 (Utah 1984); *Atkin, Wright & Miles, Chtd. v. Mountain States Tel. & Tel. Co.* 709 P.2d 330, 334 (Utah 1985).

that rate-making in this case must be prospective in effect. Thus, the Commission does not possess the statutory authority to do what Comcast asks of it.

This tariff-based approach to the charges at issue in this proceeding is consistent with the approach of the Utah regulations on pole attachments. In its Request for Agency action, Comcast improperly relies on the Utah Admin. Code § R746-345-1(A) for the proposition that the Commission has retroactive authority to change the amount of the unauthorized pole attachment charge agreed to in the Agreement. However, Utah Admin. Code § R746-345-3(C) states in relevant part: "If the parties to a pole attachment contract cannot come to agreement on [the rates for pole attachments], the Commission will determine an amount that is "fair and reasonable." Comcast fails to recognize that the parties here have already come to an agreement on unauthorized attachment rates—not once, but three times. In addition, the 1996 and 1999 Agreements were incorporated in tariffs.

III. Even if Black-Letter Contract and Public Utility Law Did Not Preclude Comcast's Relief, It Is Just and Reasonable to Require Comcast to Honor its Pole Attachment Obligations as Other Regulators Have Done.

Assuming *arguendo* that well-settled principles of contract and utility law did not preclude Comcast's request to have the Commission revise Comcast's express obligations and agreements, the provisions at issue must be found to be fair, reasonable and enforceable. Comcast should be made to live up to its promises for four reasons: (1) the charge serves important business and public policy purposes; (2) other pole attachment regulators have upheld similar and even higher charges; (3) the evidence of Comcast's behavior proves the need for the charge; and (4) the unauthorized attachment

[43] Comcast Request at ¶ 8.

charge is virtually identical to what the Commission has approved for unauthorized use of electricity and is far less onerous than what Comcast imposes on those who use its services without authorization.

A. Unauthorized Pole Attachment Charges Serve Important Business and Policy Interests

The unauthorized attachment charge is fair and reasonable because it serves significant business and policy interests. The $60 per year charge for each unauthorized attachment was intended to provide an economic incentive for attaching licensees to follow the application process as set forth in Section 2.1 of the Agreement. By not submitting an application, Comcast prevents PacifiCorp from ensuring in part: (1) that it is receiving all appropriate joint use revenues and not requiring electric customers to subsidize cable company shareholders; (2) that each new attachment by Comcast complies with applicable safety codes, including the National Electrical Safety Code; (3) that Comcast has obtained permission from property owners to use affected property for the provision of communications services; and (4) that PacifiCorp has an accurate record of the attachments on its pole for purposes of proper plant management. Avoiding the charge for violating the Agreement permits Comcast to improperly gain free-ride on the public-utility network built by PacifiCorp.

These business goals coincide perfectly with the Commission's public policy goals, as unauthorized pole attachments have severe public policy implications. In its efforts to: (1) ensure that an electric utility recovers all appropriate revenue relevant to its rate base; (2) protect the safety, integrity and reliability of the electric grid; and (3) promote mutually beneficial and acceptable joint use practices, on terms that are not unfair to and do not overburden the owner and manager of valuable network elements,

the Commission should embrace a contract provision that incentivizes proper attachment practices. Indeed, statutory requirements demand that pole attachments function in a safe manner that is in the public interest.[44] Accordingly, the economic costs associated with unreported attachments are not limited to the bare rental costs of pole space. Other costs, such as harm to the important business and policy goals outlined above, should be included in the accounting. However, estimates of these harms are inexact and, accordingly, the parties accepted the charge as set forth in the 1996 and 1999 Agreements to resolve the inexact nature of these harms.

It is worth noting that the typical measure of damages for the unauthorized use of another's property in order to run a business enterprise would entitle PacifiCorp to the profits that Comcast made as a result of the unauthorized use of the poles.[45] Therefore, the proper charge would require an assessment of Comcast's profits resulting from each of the unauthorized lines. Given the shared nature of much of the cable network, not only would it be very difficult to compute accurately the volume and type of use that occurred on each of these 15,000 pole attachments, but the fees owed by Comcast would certainly be higher than $60 per pole. Accordingly, because the charge was mutually agreed to, serves important business and policy goals, and constitutes a reasonable estimation of harm, the charge is fair and reasonable.

B. The Unauthorized Use Charge and *Pro Rata* Audit Charges Are Similar to the Amount of Such Charges in Other Jurisdictions

States such as Oregon, California and Louisiana that regulate pole attachments have each promulgated regulations authorizing charges for unauthorized attachments

[44] UTAH CODE ANN. § 54-4-13 (2004).

ranging from $250.00 up to $10,000.00 per attachment violation. *See* Oregon Administrative Rules §§ 860-028-0140(1)(a) & (b) (regulation promulgated by the Oregon Public Utility Commission authorizing pole owners to sanction pole occupants the higher of $250.00 per pole or 30 times the owner's annual rental fee per pole for failure to obtain a permit prior to installing an attachment); *Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service; Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service*, 1998 Cal. PUC LEXIS 879 (Oct. 22, 1998) (authorizing penalties of $500 to be paid to the incumbent utility for each unauthorized attachment and allowing utilities to seek further remedies in a civil action); *In re: Review of LPSC Orders U-14325, U-14325-A and General Order dated December 17, 1984 dealing with agreements for Joint Utilization of Poles and Facilities by Two or More Entities*, 1999 La. PUC LEXIS 13 (Feb. 24, 1999) (requiring pole occupants to file written requests with pole owners prior to attaching or overlashing; and in the event any provision of the Order is violated, the Louisiana Public Service Commission may assess reasonable penalties not to exceed $10,000 per occurrence).

Indeed, Comcast was integrally involved in the task force that led to the adoption of the Oregon unauthorized attachment charge.[46] Even the Federal Communications Commission, in whose consistent pro-communications company rulings Comcast seeks refuge, has acknowledged that some unauthorized attachment charge would be reasonable. *In the Matter of Cable Television Ass'n of Georgia v. Georgia Power Co.*, 18 FCC Rcd 16,333, ¶ 22 (rel. Aug. 8 2003), *recons. den.*, 18 FCC Rcd 22,287 (2003)

[45] Restatement (Second) of Torts § 158 (1965); *Raven Red Ash Coal Co. v. Ball*, 185 Va. 534, 39 S.E.2d 231 (Va. 1946).

("Penalties for unauthorized attachment are not per se unreasonable."); *In the Matter of Mile Hi Cable Partners, L.P. v. Public Service Company of Colorado*, 17 FCC Rcd 6268, ¶ 11 (rel. March 28, 2002), *rev. den.*, 328 F.3d 675 (D.C. Cir. 2003) (recognizing just and reasonable unauthorized attachment fees provide incentives for attachers to comply with a reasonable application processes and declining to establish standard of general applicability regarding reasonable unauthorized attachment fees).

In addition, PacifiCorp agrees that it has invoiced Comcast for its *pro rata* share of the cost of the audit.[47] This was done pursuant to § 2.21 of the 1999 Agreement in which Comcast agrees to pay the expense of any field inspections. The charge for the audit was not only contemplated by the 1999 Agreement, but the charge was more than fair and reasonable. *See* Ill. Admin. Code § 315.40 (2003) (allowing the utility to charge a cable company *the full cost* of an audit where the audit demonstrates that "the CATV operator has failed to report more than 5% of his attachments or is in noncompliance on 5% or more of the poles to which it is attached.") (emphasis added); *In the Matter of the Complaint of Michigan Cable Telecommunications Assoc. and Harron Cablevision of Michigan, Inc. against The Detroit Edison Co. Regarding The Terms and Conditions of Pole Attachments*, 1999 Mich. PSC LEXIS 261, *6 (Sept. 28, 1999) (affirming settlement agreement providing for audit costs to be allocated among all responsible attaching parties);[48] *In the Matter of Knology, Inc. v. Georgia Power Co.*, 18 FCC Rcd 24,615, ¶ 29 (rel. Nov. 20, 2003) ("the costs of a pole inspection unrelated to a particular company's attachments should be borne by all attachers"). *In the Matter of Cable Television Ass'n of Georgia et al. v. Georgia Power Co.*, 18 FCC Rcd 16,333, ¶ 15 (rel.

[46] Response of PacifiCorp to Request of Comcast for Agency Action, Ex. 4.
[47] Request for Action ¶ 24; Fitz Gerald Decl. ¶ 19.

Aug. 8 2003), *recons den*, 18 FCC Rcd 22,287 (2003) (recognizing reasonableness of requiring attacher that is responsible for violations to bear cost of the audit).

C. Comcast's Actions Prove the Need for the Unauthorized Use Charge

Ultimately, Comcast's own behavior proves the fairness and reasonableness - indeed, the necessity—of the unauthorized attachment charge. It has engaged in a pattern of noncompliance by ignoring the notices, meetings and forms provided throughout Utah by PacifiCorp in the mid-1990's, refusing to acknowledge or comply with the contract terms it agreed to in 1996, 1999 and on September 8, 2003, and avoiding the careful and detailed factual evidence provided by PacifiCorp. Comcast's responses have essentially been that it didn't know, it wasn't its fault, PacifiCorp didn't do enough, and that it's all so unfair. Laid bare, Comcast's case consists of documents relating to 35 poles possibly authorized in the Salt Lake Metro District, 22 poles in the American Fork District, and a continuing refrain that PacifiCorp is at fault, so the parties should start from a clean slate. That clean slate was provided after the 1997/1998 Audit, and if all of the notices, meetings, forms, instructions, contractual agreements and opportunities to participate and correct problems are not enough to obtain Comcast's cooperation, then honoring its payment obligations should be.

D. The Terms of Section 10R.9 of the Tariff and Section 3.2 of the Agreement Are Virtually Identical and Are Both Fair and Reasonable and PacifiCorp Asks Less Than Comcast Does of Those Who Use Its Service Without Authorization

PacifiCorp asks of Comcast no more than what the Commission has allowed PacifiCorp to ask of its electric ratepayers. Section 3.2 of the Agreement provides a

[48] PacifiCorp's Response to Request of Comcast for Agency Action, Ex 5.

remedy very similar to the remedy provided in PacifiCorp's electric rate tariff[49] approved by the Commission. Specifically, Section 10R.9, Schedule 300, of the electric tariff specifies that unauthorized connection by any customer is subject to a fee of $75.00 and that PacifiCorp may recover revenue losses due to the unauthorized connection. If a charge of $75.00, plus lost revenues, to each individual Utah consumer with an unauthorized connection is fair and reasonable, a charge of only $60.00 per year, plus lost revenues, to the largest cable company in the country and one of the largest companies in the world is fair and reasonable.

PacifiCorp also seeks from Comcast less than what Comcast asks of those who use its services. Indeed, Comcast's business practice regarding unauthorized use is to engage in "aggressive house-to-house audits" of its customers (see "Stop Thief," *Cablefax*, Vol. 15, No. 91, May 12, 2004), enforce statutory penalties on its customers for nonpayment, and favor prosecution of those who steal its services on the grounds that paying customers should not have to subsidize the thefts of others through higher cable rates. In one particular instance, Comcast attempted to extract $10,000 from a single customer for his/her unauthorized use of its cable services.[50]

CONCLUSION

The relief sought by Comcast stands in contradiction to overwhelming evidence and fundamental legal principles discussed in this Brief. PacifiCorp has demonstrated, and Comcast has not refuted, that Comcast and its predecessors were on notice of PacifiCorp's application and permitting requirements and were provided with numerous opportunities to participate in a cooperative joint use relationship with PacifiCorp.

[49] The Tariff was issued by authority of Report and Order of the Public Service Commission of Utah in Docket No. 03-2035-02.

However, Comcast and its predecessors failed to participate in either the 1997/1998 Audit or the 2002/2003 Audit and failed to maintain accurate records of their attachments to PacifiCorp's poles. Moreover, for almost ten years, Comcast and its predecessors have engaged in a pattern of noncompliance in which they have ignored their contractual obligations and PacifiCorp's numerous outreach efforts. Comcast now seeks to blame PacifiCorp for the consequences of its own failure to act.

Prior to and throughout this proceeding, PacifiCorp has provided overwhelming evidence that its joint use records are thorough, accurate and carefully administered. Rather, than directly refuting any of PacifiCorp's evidence, Comcast repeatedly claims that it was not aware of the Parties' procedures and obligations or of either audit. The evidence in this proceeding flatly contradicts these claims, and the law binds Comcast to honor its obligations. Further, granting the extraordinary relief requested by Comcast would set a dangerous precedent by creating contractual uncertainty between parties to utility contracts throughout Utah.

WHEREFORE, PacifiCorp respectfully requests that the Commission:

(1) Deny the relief requested by Comcast;

(2) Declare the unauthorized attachment charges imposed by PacifiCorp fair and reasonable and in keeping with the parties' contract and obligations; and

(3) Declare that Comcast is liable for its *pro rata* share of the cost of the 2002/2003 Audit.

[50] *Comcast v. Naranjo*, 303 F. Supp. 2d 43 (D. Mass. 2004).

RESPECTFULLY SUBMITTED this 13th day of August, 2004.

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CERTIFICATE OF SERVICE

I certify that on August 13, 2004, I mailed a copy and e-mailed PDF files of the **PREHEARING BRIEF OF PACIFICORP** to:

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