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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** **COMCAST CABLE COMMUNICATIONS, LLC'S POST-HEARING BRIEF**

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I. BACKGROUND AND INTRODUCTION.

This case revolves around one central theme: PacifiCorp's unauthorized attachment claims are credible only if it has been meticulous in keeping pole attachment and ownership records. During the August 23-26 Hearing (the "Hearing"), Comcast exposed the truth: PacifiCorp's record keeping and audit practice methodologies are flawed, unreliable and turn a blind eye to the parties' historical field practices. First, PacifiCorp has engaged in so many positional changes that it has completely undermined its own credibility, proving that its conduct towards Comcast has been patently unreasonable. Second, neither the supposed "baseline" or amnesty audit that PacifiCorp conducted in 1997-1999 ("1997/1999 Audit") nor the 2002/2003 Audit can be relied upon. Third, the $250 per *attachment* penalty is unreasonable. Fourth, PacifiCorp has engaged in a number of other unfair, unjust and unreasonable practices, that the Commission must address if workable joint use practices are ever going to be achieved.

Comcast has requested certain specific relief from the Commission in this proceeding including refund of approximately $5.4 million in overcharges that PacifiCorp has forced it to pay in penalties and charges related to the 2002/2003 Audit; a declaration that Comcast not be required to pay approximately $6.2 million in additional penalties; and a declaration that numerous other aspects of PacifiCorp's conduct are unjust, unreasonable and unlawful. The evidence and testimony submitted during the Hearing strengthened Comcast's position. It also forced PacifiCorp to change its position and retreat from earlier claims, contradict itself, and admit to critical errors under cross-examination and examination by the administrative law judge. The long list of admissions and contradictions includes, but is not limited to the following:

- At the Hearing, PacifiCorp admitted that the 1997/1999 Audit under-reported the number of Utah poles due to the fact that it did not count

certain poles that were "mislabeled" in PacifiCorp's database as poles leased by PacifiCorp rather than owned by PacifiCorp.

- PacifiCorp characterized a facially inaccurate, critical document, upon which it relied heavily, to attempt to show that Comcast's predecessors had notice of the 1997/1999 Audit as "a copying error."

- PacifiCorp asserted a complete change of position on safety issues after realizing that its own safety problems created a proverbial "glass house" for it in this and related Commission proceedings.

- PacifiCorp abruptly retreated from its claim, early at the Hearing, that it had actual results from the 1997/1999 Audit, admitting that the so-called results were nothing more than a print-out of 2002 data from its database.

- PacifiCorp made baseless claims that Comcast was "woodshedding" witnesses and evidence.

- PacifiCorp admitted to improperly billing Comcast the $250 "unauthorized" attachment penalty on a ***per-attachment*** rather than a per-pole basis causing an overcharge of nearly $750,000.

- PacifiCorp revealed that the payments from Comcast to PacifiCorp for audit charges and penalties effectively function as communications-to-electric subsidies, not the other way around.

- PacifiCorp admitted that it had impermissibly inflated 2002/2003 Audit charges to Comcast both by improperly "averaging averages" and including out-of-state communities in its calculations.

- PacifiCorp asserted a frivolous claim that if it did not enforce the $250 penalty, the Commission would somehow violate Utah law by engaging in retroactive rate making, an issue that was never raised by PacifiCorp until it filed its Pre-Hearing Brief.

- PacifiCorp admitted that Comcast is as concerned with electric network integrity as PacifiCorp.

These are not isolated examples, but are part of a pattern of failed justifications for PacifiCorp's unreasonable and unlawful conduct. To accept PacifiCorp's contention that

approximately $11.6 million[1] in "unauthorized" attachment penalties and survey charges is reasonable, the Commission must accept PacifiCorp's argument that the basis for the $250 penalty is unassailable and that PacifiCorp's record-keeping is perfect, or close to perfect.

The record established in this dispute proves that neither contention is true. PacifiCorp cannot articulate a reasonable or acceptable basis—whether regulatory, contractual, tariff-based or otherwise—for the imposition of a $250 per pole penalty, which is flat-out illegal in 32 states. Likewise, it has failed to show that its "baseline" database (the non-existent record of the 1997/1999 Audit) is an accurate measure of the number of poles to which Comcast was attached in the late 1990's. Because of these failures, the best hope for a rational resolution of this dispute is to use the current 2002/2003 Osmose Audit, that was thoroughly explored at trial and over the several months of pre-trial proceedings, as the baseline.

In the final analysis, accepting PacifiCorp's position would require the Commission to dismiss the evidence and find (1) that PacifiCorp's records database and audits are accurate; (2) that a $250 penalty is fair and reasonable under Utah Code Ann. § 54-4-13 and Utah Admin. Code R746-345-3 and was a contract provision or was included in a properly filed tariff; and (3) that PacifiCorp has otherwise behaved reasonably with respect to a variety of other practices such as imposing fines for presumed safety violations and over-recovering through multiple layers of inspection fees. The evidence simply does not permit the Commission to draw

[1] This amount includes only invoices received by Comcast as of the beginning of August 2004. At that point, PacifiCorp had billed Comcast for 42,504 "unauthorized" attachments, totaling more than $10.6 million and more than $1.0 million in audit costs. August 23-26 Hearing Transcript (hereinafter "H. Tr."), pp. 649-50, 815, 999. However, Corey Fitz Gerald testified during the Hearing that not all of the supposedly "unauthorized" attachments have been billed yet. H. Tr., p. 815. Accordingly, the more than $11.6 million that PacifiCorp has billed Comcast is not a final number. PacifiCorp will be invoicing Comcast more attachment penalties and more audit costs in the future. *Id.*

such conclusions. Therefore, Comcast is entitled to all relief requested in its Request for Agency Action.

II. PACIFICORP'S ADMISSIONS, CONTRADICTORY STANCES, AND CONSTANT POSITIONAL CHANGES REFLECT THE UNREASONABLENESS OF ITS CONDUCT TOWARD COMCAST.

Cross-examination is said to be a greater method of determining the truth than any of the other tools and techniques available to lawyers and the law.[2] This proved to be true during the Hearing of this matter. The cross-examination of PacifiCorp's witnesses revealed many inconsistencies and "errors" in PacifiCorp's strategy. While pointing out *all* of the fallacies and contradictions stated by PacifiCorp would not be valuable in resolving the issues still pending before the Commission, it is noteworthy that there are no fewer than ten major items, highlighted below in subsections A-J, that came to the forefront at the Hearing. These items show the underlying motivation of PacifiCorp's case, namely, using any argument available in a desperate attempt to retain the millions of dollars it has collected from Comcast and the millions more it seeks to collect. These examples demonstrate the critical, substantive strengths of Comcast's case and the equally critical, substantive weaknesses in PacifiCorp's case. The Commission must critically analyze these ten items against PacifiCorp's main justification for the penalty, which is that the penalty was necessary to keep Comcast from racing ahead and making new attachments without following proper PacifiCorp procedures.

This basic justification presents several major problems. First, the overwhelming majority of Comcast attachments have been in place for 15-25 years.[3] Additionally, subsequent to the 1997/1999 Audit, the large majority of Comcast's aerial work involved overlashing

[2] *See, e.g.*, Frances L. Wellman, The Art of Cross-Examination 27 (Touchstone Simon and Schuster, 4th Ed 1987) ("As yet, no substitute has ever been found for cross examination as a means of separating truth from falsehood, and of reducing exaggerated statements to their true dimensions").

[3] H. Tr., pp. 70-71.

upgraded fiber optic wires to existing cables, not installing new attachments.[4] Because of these facts, it is implausible that PacifiCorp had a genuine concern of Comcast's attachment procedures.

A second problem with PacifiCorp's contention is that PacifiCorp claimed new procedures and enforcement were necessary to keep up with Utah's construction boom. However, PacifiCorp's own procedures during the years at issue belie this contention. For example, at the beginning of 2002, in the weeks leading up to the 2002 Winter Olympic Games, PacifiCorp had only 3 employees in the joint-use department,[5] but by the end of that year when the only company involved in significant aerial plant activity was Comcast, PacifiCorp had 22 employees![6] Today, PacifiCorp has approximately 30 such employees.[7] The fact that PacifiCorp created such a large joint use department long after most of the post 1996-Act build-out ceased, strongly suggests that PacifiCorp's motives had more to do with profit than with pole process and safety.

A. During The Hearing, PacifiCorp Admitted For The First Time That The 1997/1999 Audit Did Not Count "Leased" Poles That Were Counted During The 2002-2003 Audit.

Perhaps the most important development at the Hearing, both as it pertains to PacifiCorp's credibility and as to PacifiCorp's fundamental claim that Comcast has attached to more than 44,000 additional poles since the last audit, is James Coppedge's admission that thousands of poles that were counted in 2002/2003 may *not* have been counted in the prior 1997/1999 "baseline" Audit. PacifiCorp's James Coppedge testified that Osmose, PacifiCorp's

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4 H. Tr., pp. 230-31.

5 H. Tr., p. 658.

6 *Id.*

7 H. Tr., pp. 659-60.

contractor for the 2002/2003 Audit, discovered in 2002 or 2003 that certain PacifiCorp-owned poles were labeled in PacifiCorp's joint use database (hereinafter "JTU") as foreign-owned poles, which PacifiCorp merely leases.[8] Osmose produced a document—addressed at the Hearing—confirming the mislabeling of these poles, which also corroborates Mr. Coppedge's explanation of the situation. The Osmose document and Mr. Coppedge's corroborating testimony demonstrate that there could be 7,500 poles (or possibly even more) *per district* that PacifiCorp may have failed to count during the 1997/1999 Audit. Given the fact that PacifiCorp has approximately 20 districts in Utah, and that its own contractor Osmose noted that the problem could be systemic, PacifiCorp cannot seriously claim that the 1997/1999 Audit is a reliable "baseline."

PacifiCorp's critical admission that it did not count poles in the 1997/1999 Audit that *were* counted in the 2002/2003 Audit could, by itself, account for PacifiCorp's claim that Comcast has attached to 44,000 poles[9] since the so-called "baseline" audit ended in 1999. This admission raises serious questions about the credibility and integrity of PacifiCorp's 1997/1999 Audit and the entire methodology which is the foundation of PacifiCorp's case.

B. PacifiCorp's Credibility Was Again Tarnished By A Supposed "Copying Error."

PacifiCorp has built its entire defense of this case around the notion that the 1997/1999 Audit was the baseline for the 2002/2003 Audit now in dispute. In making that argument, PacifiCorp has asserted throughout this proceeding that notice of the 1997/1999 Audit was properly served to all attachers, thereby opening the door to those attachers to participate

[8] H. Tr., p. 996.

[9] If there were an average of only 2,500 "mislabeled" poles in each of PacifiCorp's districts (one-third the amount Osmose estimated were mislabeled in the Salt Lake Metro District alone) the number of "mislabeled" poles across PacifiCorp's Utah service area would be 50,000.

and monitor the results of that survey. PacifiCorp maintains that all operators were properly notified in advance of the 1997/1999 Audit. With respect to this notice, PacifiCorp relies entirely on: (a) the fact that one Comcast employee, Gary Goldstein, was at a meeting in 1996 where the new survey might possibly have been discussed;[10] and (b) a series of notice letters that PacifiCorp supposedly sent out to Comcast's predecessors.[11]

PacifiCorp does not have copies of those notice letters.[12] Corey Fitz Gerald attempted explained that PacifiCorp did not keep copies of these signed letters but merely retained the mailing labels showing a list of the those attachers that received each letter.[13] However, PacifiCorp did not provide copies of the address labels and offered no explanation of where they are. Therefore, proof of the address labels are nowhere in the record.

Ms. Fitz Gerald confirmed that her predecessor (and former supervisor), Robert Coates, did not maintain copies of the notice letters that were supposedly sent out. She also discussed what, if any, notice of the 1997/1999 Audit was sent to cable operators in the Salt Lake Valley, the most populous of Comcast's and PacifiCorp's Utah service areas:

> Q. And so you have no letters notifying the operator in Salt Lake Valley [of the audit], correct?
>
> A. Salt Lake Valley "was not part of the 1996 Schedule. In looking at the second page of Exhibit 1.17, the letter dated January 17, 1997, on the backside of that letter Salt Lake City is listed as one of the districts in Utah. There are five Utah districts. And it says, "With Copies to: AT&T BIS-Central Division, AT&T Broadband & Internet Services."
>
> Q. And this address is attached to the second page that we just were talking about, the letter dated January 17, 1997?

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[10] H. Tr., pp. 96-99.

[11] H. Tr., pp. 97-99.

[12] H. Tr., pp. 717-18.

[13] *Id.*

A. Yes, it is.

Q. And it's on the back of that that we have a bunch of different communities, including Salt Lake City, with AT&T entities listed there, correct?

A. Correct.

Q. Corey, isn't it true that AT&T wasn't even in the cable television business until 1999.

A. I can't confirm that.

Q. If I told you that were the case, would you have a reason to doubt me?

A. No.

Q. Can you explain to me why an address block attached to a letter dated 1997 to a company that didn't even exist until 1999 was produced in discovery in this proceeding?

A. I cannot. I didn't author the letters.[14]

At the end of the day's hearing, PacifiCorp raised the issue, seeking to characterize and correct what it termed as a "ministerial" "copying error."[15] The following day, and after having an opportunity to consult with counsel, Ms. Fitz Gerald suddenly was able to explain that a "copying error" is why a letter appeared to have been sent to a company that would not come into existence for another three years. When Comcast sought re-cross of Ms. Fitz Gerald on this point, PacifiCorp erupted:

Q. Objection. This is patently harassing. It is clear to anyone this is a copying error. It is attachment E from the 1999 agreement and Ms. Fitz Gerald explained that.[16]

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[14] H. Tr., p. 720.

[15] H. Tr., p. 777.

[16] H. Tr., p. 888.

Comcast maintains that PacifiCorp's position is nowhere near "clear." An equally plausible inference is that the document as produced, filed, and authenticated by Ms. Fitz Gerald during her first moments on the stand,[17] was intended to convey the impression that a notice letter had, in fact, been sent to the cable operators in the Salt Lake Valley during this time frame. In any case, Ms. Fitz Gerald admitted, for whatever reason, that she was not able to explain the obvious discrepancy in the document during her first day of testimony, but was able to explain it after consulting with her counsel.[18] This "copying error"—at a minimum—shows that notice of the 1997/1999 Audit may not have been adequate.

C. The So-Called "Results" Of The 1997/1998 Audit Entered The Record As An Exhibit Under A More Accurate Title: Manipulated JTU Output.

In addition to the problems associated with whether PacifiCorp gave cable operators proper notice of the 1997/1999 Audit, PacifiCorp faces the challenge of explaining why no records from that survey are available. During the Hearing, PacifiCorp attempted to create the impression that the results were reliable, accurate, and readily available, not to mention produced during discovery.[19] Specifically, during opening statements PacifiCorp stated that "[t]he results of that audit are far from not being around and available in records but have been produced in discovery and have been maintained in electronic format since it was completed in 1998."[20] When called on to state the origin and substance of these documents, PacifiCorp recanted its attempt to claim that the "results" were anything other than the

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17 H. Tr., pp. 646-53.

18 H. Tr., p. 889.

19 H. Tr., p. 36.

20 *Id.*

manipulated JTU output that PacifiCorp had produced months earlier.[21] This mistake, however, was not a "copying error," but rather a "labeling error."[22]

D. PacifiCorp Initiated And Then Abandoned Its Assertion That Safety Was A Central Theme To This Case.

No PacifiCorp reversal during this proceeding was more startling than PacifiCorp's abandonment of its safety mantra. In the April 6, 2004 Hearing (the "April Hearing") when PacifiCorp was forced to make an accounting of the reasons why it had shut down Comcast's upgrade for the second time in approximately eight months, it devoted essentially all ten pages of its argument to its claims that the shut down was necessary to make Comcast comply with permitting processes and safety standards.[23] Specifically, PacifiCorp argued "that this proceeding really is about safe and reliable provision of electric utility service."[24] PacifiCorp characterized its actions as a "serious effort to make sure that [its] infrastructure is safe."[25] In fact, PacifiCorp went so far as to assert that it would introduce evidence at the August Hearing demonstrating that "the safety violations are numerous."[26] Additionally, PacifiCorp's counsel made reference to "a box of photographs and other documentation relating to attachments made by Comcast in Utah that do not comply with the National Electric Safety Code."[27] Despite these arguments, the Commission ruled that

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[21] H. Tr., pp. 419-21.

[22] H. Tr., p. 643.

[23] Transcript of Hearing, April 6, 2004, pp. 19-29. *See also* Prepared Direct Testimony of B. Lund, pp. 6-9.

[24] Transcript of Hearing, April 6, 2004, p. 19.

[25] *Id.* at p. 22.

[26] *Id.* at p. 25.

[27] Transcript of Hearing, April 6, 2004, pp. 25, 67. Despite these claims, and despite the fact that PacifiCorp visited the Division of Public Utilities ("DPU") immediately prior to the April hearing to enlist their support in the case, particularly on the safety issues, only a few photographs were entered into the record through the (continued...)

PacifiCorp could not hold Comcast hostage and prevent the completion of its upgrade until it paid millions of dollars in additional unauthorized attachment penalties and related charges.

PacifiCorp did not completely abandon hope that "playing the safety card" against Comcast would still pay dividends later in the case so it offered the direct testimony of Brian Lund.[28] However, after Comcast's expert Mickey Harrelson, reached several pointed conclusions about PacifiCorp's own safety practices, [29] all PacifiCorp safety talk abruptly ended. This pillar of PacifiCorp's defense was simply replaced with new justifications, including the rote and unconvincing "network integrity"[30] and electric-subsidy-of-cable arguments.[31] Indeed, during the Hearing, PacifiCorp disclaimed all safety concerns.[32] In fact, PacifiCorp stated the following with a straight face:

> This case is about two contracts and tariff filings between the parties. It has to do with unauthorized attachment charges and charges for the pro rated cost of an audit. We have attempted to keep the case focused on that throughout the pre-filed testimony and this hearing. I know that Comcast would like to turn it into a referendum [on] safety issues and I don't think that's appropriate….[33]

(...continued)
direct testimony of Brian Lund. Given the DPU's concerns regarding safety at the April Hearing, which were clearly based on PacifiCorp's insistence that safety was the number one concern in this case, Comcast reasonably anticipated that it was going to be an important issue in this proceeding. But after the initial round of pre-filed testimony in which Comcast's expert, Mickey Harrelson, pointed out that when it came to safety, PacifiCorp was living in the proverbial glass house, and after the DPU failed even to enter an appearance in this proceeding, it was clear that PacifiCorp precipitously abandoned the safety issue.

[28] *See* Prepared Direct Testimony of B. Lund.

[29] *See, e.g.*, Direct Testimony of Michael T. Harrelson, pp. 43-44 (noting many instances in which PacifiCorp installs its facilities in violation of the applicable code and even one instance in which PacifiCorp tied off cable facilities with a rope); Rebuttal Testimony of Michael T. Harrelson, pp. 10, 16-18 (highlighting that PacifiCorp's attachments reveal "improper training, poor workmanship, poor post-inspections or poor quality control").

[30] H. Tr., p. 652.

[31] H. Tr., pp. 652, 872-873.

[32] H. Tr., pp. 523-24, 578, 592.

[33] H. Tr., p. 592.

Comcast, of course, did not seek to turn the case into a "referendum" on safety. It was PacifiCorp that first raised the issue at the April Hearing and sought initially to pursue it in the weeks leading to trial.

During the course of the Hearing, PacifiCorp fought diligently to keep discussion of anything related to safety violations out of the record.[34] For example, when beginning its cross examination of Comcast expert Mickey Harrelson, it outlined some 13 issues on which Mr. Harrelson offered an opinion.[35] PacifiCorp's strategy (at least at that point) was to show that Mr. Harrelson was really only an expert on safety-related issues, but since safety was not to be an issue in the proceeding, he would have little or nothing to contribute. In addition, any line of Comcast re-direct or cross examination that even tangentially implicated anything that could be called a safety issue drew a PacifiCorp objection.[36]

Notwithstanding the fact that PacifiCorp sought to distance itself from safety considerations at the Hearing, it was forced to admit that network integrity is just as important to communications companies as it is to utilities.[37] Specifically, PacifiCorp's Corey Fitz Gerald testified that network integrity is critical to the deployment of cable services and that cable companies have an interest in ensuring the safety of both communications and utilities workers as well as the public. Safety, particularly as it relates to the critical future issues of assigning cost responsibility for future plant cleanup, continues to be an important issue for the parties and

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[34] H. Tr., pp. 523-24, 578, 592.

[35] H. Tr., pp. 372-75.

[36] *See, e.g.,* H. Tr., pp. 523-24, 578, 592.

[37] H. Tr., pp. 682-83.

will have to be dealt with. This is especially true given PacifiCorp's position that it still may fine Comcast for safety violations.[38]

E. PacifiCorp's False And Specious Claim that Comcast Was "Woodshedding" Evidence And Witnesses Is Without Merit.

In PacifiCorp's closing statement, and throughout the Hearing, PacifiCorp devoted substantial energy to implying that Comcast was hiding evidence and witnesses.[39] Specifically PacifiCorp asserted that "Comcast notably failed to produce" certain witnesses[40] including Sheryl Pehrson who PacifiCorp argued was "missing." Because of this, PacifiCorp asserted that the Commission should draw a negative inference akin to a missing witness jury instruction.[41] PacifiCorp's assertion is without merit.

Ms. Pehrson was identified by Comcast as early as April 12, 2004, when, in response to PacifiCorp's First Set of Interrogatories, Comcast identified Ms. Pehrson as a Comcast employee having information about the issues raised in this action.[42] Ms. Pehrson's identity, moreover, was known to PacifiCorp's representatives with whom she deals regularly and could easily have been identified by PacifiCorp during the normal course of this proceeding. Indeed, PacifiCorp did identify Ms. Pehrson as a potential witness during discovery. At that time, PacifiCorp's counsel indicated its intention to depose Ms. Pehrson, and even sent an email to Comcast confirming that intention.[43] Comcast would certainly have made Ms. Pehrson

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38 H. Tr., p. 803.

39 H. Tr., pp. 809, 1043-44, 1046-48.

40 H. Tr., p. 809.

41 H. Tr., p. 1047.

42 *See* Comcast Responses to PacifiCorp's First Set of Interrogatories, p. 4.

43 *See* Email from Charles A. Zdebski to Angela W. Adams and Genevieve D. Sapir, dated May 27, 2004, a true and correct copy of which is attached as Exhibit A, in which PacifiCorp notes that it has "a potential interest in deposing Marty Pollock and Sheryl Pehrson."

available for deposition if PacifiCorp had so requested. For some reason, however, PacifiCorp opted not to take Ms. Pehrson's deposition. If the deposition had been conducted, PacifiCorp could have relied on the deposition during the Hearing and, therefore, it could not claim that Comcast had failed to produce the witness. In any case, PacifiCorp should not be allowed to demand any kind of negative inference simply because, in hindsight, it now believes that it might liked to have asked Ms. Pehrson a few questions.[44] Comcast cannot be penalized for PacifiCorp's second thoughts about its discovery strategy.

F. PacifiCorp Admitted To Improperly Billing Comcast For The Cost Of The Audit, The $250 Penalty And Annual Rent On A Per-*Attachment* As Opposed To A Per-*Pole* Basis.

One of the ways PacifiCorp artificially inflated the amounts it collected from Comcast was to assess various charges, including the 2002/2003 Audit costs, the $250 penalty and even annual pole-rental billing on a per-*attachment* as opposed to a per-*pole* basis.

The 1999 Agreement, that PacifiCorp terminated, and the applicable Commission regulations specify that pole rentals and unauthorized attachment charges are to be charged on a per-pole basis.[45] Regardless, output from the Osmose survey that PacifiCorp produced in discovery indicated that PacifiCorp assessed the penalty on a per-attachment basis with two, three or even as many as four Comcast attachments deemed to be "unauthorized" on a single

[44] *See, e.g., State v. Thompson*, 776 P.2d 48, 50-51 (Utah 1989) ("a party may not comment on an opposing party's failure to produce a witness if the witness is equally accessible to both parties"); *State v. Smith*, 706 P.2d 1052, 1057 (Utah 1985) (upholding the trial judge's finding that a missing witness instruction was improper because defense counsel failed to subpoena the witnesses in question and therefore could not establish their unavailability); *Morrison v. United States*, 365 F.2d 521, 524 (D.C. Cir. 1966) (noting that a party's mere failure to call a witness does not automatically justify an unfavorable inference, but rather must be considered in the totality of the circumstances).

[45] *See* Exhibit PC 15, ¶ 3.2; and Utah Power & Light Company Electric Service Schedule No. 4, a true and correct copy of which is attached as Exhibit B.

pole. This would mean that the "unauthorized" attachments penalties for a single pole could be $500, $750 or even $1000.

Although PacifiCorp initially claimed the right to charge Comcast $250 per attachment, PacifiCorp recognized the impropriety of such a practice during the Hearing.[46] In fact, Ms. Fitz Gerald testified on numerous occasions that this billing practice was an error on PacifiCorp's part and would be remedied.[47] This "error" alone accounts for at least 2,916 attachments for which PacifiCorp has invoiced Comcast $250 per attachment.[48] This single "error" amounts to approximately $750,000 in the overcharges.[49] Moreover, PacifiCorp made identical admissions with respect to the assessment of survey charges[50] and rental fees.[51]

In addition to being unreasonable and amounting to nearly three-quarters of a million dollars in additional over-recovery on the $250 penalty alone, this practice is contrary to reasonable standards of cost recovery. For example, Osmose priced its inspection charges to PacifiCorp on a per-pole basis.[52] PacifiCorp's tariff specifies that pole rentals are to be charged on a per-pole basis.[53] Additionally, the pole rental formula contained in the rules proposed by the Commission,[54] which is identical to the FCC's formula, allocates one foot of space to the communications attacher. Following this formula, the FCC does not permit charging attachers

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46 H. Tr., p. 650.

47 *See, e.g.,* H. Tr., pp. 650, 654-655, 795, 855-56.

48 H. Tr., p. 856.

49 H. Tr., pp. 705, 855-56.

50 H. Tr., pp. 963-64.

51 H. Tr., pp. 709-11.

52 H. Tr., pp. 964-65.

53 *See, e.g.,* Exhibit B. *See also* Exhibit G to PacifiCorp's Pre-Hearing Brief.

54 *See* Docket No. 04-999-03.

on a per-attachment basis. PacifiCorp's admissions move the parties one small step closer toward ultimate resolution and show, yet again, that PacifiCorp has been caught red-handed.

G. PacifiCorp Admitted That The Penalties For "Unauthorized" Attachments And Safety Violations That It Receives And Anticipates Receiving From Comcast Effectively Act As A Communications-To-Electric Subsidy.

At several points in the course of this proceeding PacifiCorp has argued that the survey and charges associated with it were necessary to prevent PacifiCorp ratepayers from subsidizing cable services.[55] However, during the Hearing, Ms. Fitz Gerald admitted that the penalties collected as a result of the audits actually force communications companies to subsidize the cost of power.[56]

1. Comcast Payments Subsidize PacifiCorp.

The term "cost recovery" when used by a monopolist like an electric utility can be, and often is, a euphemism for monopoly profit—revenues over and above what a firm could generate if there were a competitive market for its goods or services.[57] Whatever economic or other term that is applied, PacifiCorp admitted that Comcast's payment of the $250 and related survey charges was a cable-to-electric subsidy, not the other way around as PacifiCorp had led the Commission to believe.[58] Specifically, at the Hearing, PacifiCorp's Ms. Fitz Gerald testified that the money PacifiCorp has demanded from Comcast "is a credit to the ratepayers."[59]

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[55] H. Tr., pp. 652, 872-873.

[56] H. Tr., p. 1029.

[57] *See*, *generally*, James C. Bonbright, Albert L. Danielsen, David R. Kamerschen, *Principles of Public Utility Rates*, Chapter 19 (Public Utility Reports 1988).

[58] H. Tr., p. 1029.

[59] *Id.*

The term "cost recovery" means that there is an out-of-pocket cost that the utility is not recovering.[60] For example, if PacifiCorp pays a contractor $100 to transfer a Comcast facility from an old pole to a new pole, sends the invoice to Comcast and Comcast sends a check for $100 to PacifiCorp, that is cost recovery. If, on the other hand, PacifiCorp invoices Comcast for "unauthorized attachments" at $250 per *attachment* and there is no relationship whatsoever between that invoice and PacifiCorp's costs supposedly associated with the "unauthorized" attachment, that is not cost recovery, but, rather is over-recovery, or monopoly profit made possible only by PacifiCorp's good fortune to own the monopoly pole resource. If it goes as a credit to ratepayers as Ms. Fitz Gerald admitted, it is a communications-to-electric subsidy, plain and simple, not the other way around.

2. Comcast's Payments Also Subsidize T&D Infrastructure Management's FastGate® Connectivity And Mapping Database.

The PacifiCorp admission at the Hearing about how these excess revenues are treated is not the sole source of Comcast's subsidy to PacifiCorp, there are others. For example, PacifiCorp's testimony shows beyond doubt that the detailed pole data that Osmose collected, scrubbed, and sent to PacifiCorp ended up as a critical part of PacifiCorp's ***core electric management operations***.[61] Specifically, this information did not end up simply in the JTU database, which PacifiCorp's uses for billing, but it ended up in PacifiCorp's FastGate® electric line connectivity mapping database that it had begun to assemble separately in 2001.[62] This is presumably one reason why the 2002/2003 Audit cost Comcast $13.25 per attachment or, in the case of four attachments, as much as $53 per pole, while the 1997/1999 Audit cost only $0.80

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[60] *See, generally*, James C. Bonbright, Albert L. Danielsen, David R. Kamerschen, *Principles of Public Utility Rates*, Chapter 19 (Public Utility Reports 1988).

[61] *See, e.g.*, H. Tr., pp. 772-74, 937-38, 956, 979, 1040.

[62] H. Tr., pp. 770-74.

per pole. It is entirely inappropriate for Comcast or any other communications attacher to pay these core electric management expenses. Doing so creates yet another source of dramatic communications-to-electric subsidy.

H. PacifiCorp Admitted To Over-Recovery On Audit Cost Calculations.

During the Hearing, PacifiCorp was compelled to admit that it miscalculated the way in which it charged for "recovery" of its Osmose audit costs. Comcast first raised these discrepancies in the pre-filed testimony of Comcast expert Mickey Harrelson.[63] Among other things, Mr. Harrelson pointed out that by employing a methodology that in essence "averaged averages"[64] PacifiCorp was over-recovering by more than $1.50 per attachment. Mr. Harrelson also pointed out that PacifiCorp inflated its per attachment charges to Comcast for the Utah audit by including the supposed costs to PacifiCorp of communities in Wyoming.[65] It is no coincidence that the Wyoming communities were also the highest in the matrix, thereby driving the unit costs even higher.

At least with respect to the "averaging averages" problem and the problem created by inflating the charge with Wyoming study areas, PacifiCorp's James Coppedge dutifully committed to recalculating the audit costs based on system-wide or state-wide information after Comcast's pre-filed testimony pointed out that PacifiCorp's current "cost" calculation allowed PacifiCorp to profit substantially from the audit.[66]

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63 *See* Sur- Rebuttal Testimony of M. Harrelson, pp. 5-7.

64 H. Tr., pp. 636-38.

65 Sur-Rebuttal Testimony of M. Harrelson, pp. 6-7.

66 H. Tr., p. 964.

I. PacifiCorp's New Theory That Invalidating the $250 Penalty Amounts To Retroactive Ratemaking Is Without Merit.

After relying almost exclusively on a contract argument to support its claims for a $250 penalty, PacifiCorp introduced an 11th hour claim in its pre-trial brief and at the Hearing that *not* enforcing the $250 penalty would violate Utah tariff law and amount to retroactive rate making.[67] As set forth in greater detail in Section IV.C., this argument is frivolous. It is frivolous not only because the $250 penalty was never an element of the tariff, but also because no contract (form or otherwise) has ever been on file with the Commission containing a provision for the penalty.[68]

J. PacifiCorp Admitted That It Does Not Have The Monopoly On Network Integrity.

Just as PacifiCorp was forced to admit that Comcast indeed does care about safety, it likewise was forced to admit that it does not have the monopoly on concerns for electric network integrity. When Ms. Fitz Gerald was questioned directly about the consequences to cable if the electric power is not available (whether due to poor communications practices or other causes) she had no choice but to admit[69] that Comcast's customers would not be able to receive its services if the network's integrity was compromised.[70]

III. COMCAST DOES NOT HAVE MORE THAN 44,000 UNAUTHORIZED POLE ATTACHMENTS IN UTAH.

While the items discussed in the prior section concerning the important developments at the Hearing underscore the fundamental strengths of Comcast's case and weaknesses in PacifiCorp's, the fact remains that the principal issues left for resolution in this

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67 *See, e.g.*, PacifiCorp Pre-Hearing Brief, pp. 16-18.

68 In fact, PacifiCorp has never filed any form contract with the Commission.

69 H. Tr., pp. 682-683.

70 *Id.*

proceeding are (1) whether Comcast could possibly have attached to more than 44,000 poles in just four or five years; (2) whether the $250 penalty imposed by PacifiCorp is just and reasonable; and (3) whether PacifiCorp has otherwise behaved reasonably with respect to other related terms and conditions of joint use. This section will address the first of these issues and Sections IV and V will address the remaining two issues, respectively. In addressing these issues, Comcast specifically relies on, and incorporates by reference, its Pre-Hearing Brief and its pre-trial testimony in this proceeding.

To accept PacifiCorp's core contention that it is entitled to the millions of dollars for which it has invoiced Comcast, this Commission would need to accept that the information in PacifiCorp's JTU Database is perfect, or nearly perfect, and that Comcast has attached to more than 44,000 poles since the 1997. PacifiCorp's claim is nonsense and is based on the 1997/1999 Audit results which remain as much a mystery today as when Comcast first learned of the audit during the pre-trial phase of this proceeding.

A. Comcast Did Not Install 44,000 New Pole Attachments Between 1997 and 2003.[71]

Throughout this proceeding, PacifiCorp has claimed that the 1997/1999 Audit supposedly served as the baseline for the "unauthorized" attachment penalties at issue in this case.[72] However, in order for PacifiCorp's audit and database information to be correct, Comcast would have to have installed more than 44,000 new pole attachments between the end of the 1997/1999 Audit and the beginning of the 2002/2003 Audit. During the Hearing, Comcast

[71] Since the conclusion of the Hearing, Comcast has attempted to quantify the number of PacifiCorp poles to which it is attached. However, because Comcast's records include all "poles passed," (H. Tr., pp. 509-10), rather than simply reflecting those to which Comcast is attached, it is impossible to derive the number of poles to which Comcast is attached without conducting a system-wide audit. However, Comcast believes that PacifiCorp's number of approximately 114,000, is likely reasonably accurate and could serve as the baseline going forward.

[72] *See* §§ I and II.A., *supra*; Prepared Direct Testimony of C. Fitz Gerald, pp. 14-15; H. Tr., pp. 715-17.

witnesses testified, at length, that Comcast simply did not make that many new attachments.[73] For example, Comcast's Gary Goldstein explained at the Hearing that:

> [M]ost of Comcast's attachments have been in place for approximately 15 to 25 years and that Comcast could not have attached the 35,000 poles since 1999. Most of the new construction…my department has designed – has been for line extensions and service to new subdivisions which is primarily underground construction. We have not designed 35,000 poles of aerial construction since 1999.[74]

Mr. Goldstein, the head of Comcast's design department, further testified that he did not design or supervise the design of 44,000 new attachments between the years of 1999 and 2004[75] and that Comcast did not budget for that type of expansion during those years.[76] Mr. Goldstein also estimated that 95% or 98% of Comcast's plant was built prior to 1989.[77]

Later in the Hearing, Comcast's Rodney Bell testified that "Comcast has not made 35,000 new attachments since 1997 or 1998."[78] Mr. Bell also estimated that Comcast has probably only installed 5 miles of new aerial plant per year in recent years.[79] At an average span of 200 feet between poles,[80] totaling 26.4 poles per mile, Mr. Bell's estimate of the number of new attachments that Comcast has installed over the last seven years would be less than 1,000.[81]

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[73] H. Tr., pp. 70-71, 107, 117-18, 230, 279.

[74] H. Tr., pp. 70-71.

[75] H. Tr., p. 117.

[76] H. Tr., p. 118.

[77] *Id.*

[78] H. Tr., p. 230.

[79] H. Tr., p. 279. PacifiCorp attempted to obfuscate this testimony by focusing on Martin Pollock's testimony concerning the 15,000 overlash applications he has submitted in the past two years. H. Tr., p. 202. However, there is a huge difference between brand new attachments and overlashing, which consists only of the placement of a new conductor on an existing attachment.

[80] H. Tr., p. 256.

[81] Mr. Bell's estimate that Comcast has upgraded 150 miles of aerial plant represents a different figure. H. Tr., p. 255. Overlashing existing plant is not at issue in this case. PacifiCorp has stated it is only invoicing charges for attachments to poles which had no attachments as of the 1997/1999 Audit. H. Tr., p. 654.

Thus, according to the testimony of Comcast's lead designer and the head of the upgrade team, Comcast could not possibly have installed 44,000 new pole attachments in the last few years. Moreover, approximately 98% of all Comcast outside plant activity has been related to its upgrade (which began in 1999) and involves the replacement or addition of new facilities to existing plant, *not* the placement of additional pole attachments.[82] In any case, Comcast could not possibly have attached to 44,000 additional poles since the completion of the 1997/1999 Audit. Accordingly, the 1997/1999 Audit cannot be relied on as the foundation for the charges imposed by PacifiCorp.[83]

B. The Information In PacifiCorp's JTU Database Has Not Accurately Identified "Unauthorized" Attachments, Cannot Be Verified And, Therefore, Cannot Serve As The Basis For The Charges Invoiced To Comcast.

1. There Was No Database Of Utah Poles Or Attachments Prior To The 1997/1999 Audit.

When the JTU was implemented in 1996, it contained absolutely no information regarding the permitting, authorization, or general joint use history of joint use poles in the State of Utah.[84] Although Ms. Fitz Gerald testified that the JTU was created using existing data from its predecessor system, that system related only to PacifiCorp's other states of operation, not Utah.[85] PacifiCorp made no effort to enter information into the JTU regarding past permitting or authorization for any pole attachments in Utah,[86] despite the fact that it had retained at least some records evidencing early pole attachment permitting in Utah.[87]

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[82] H. Tr., p. 230.

[83] *See* § III.C.1., *infra*, for a discussion of allegedly "unauthorized" attachments which Comcast can prove were, in fact, authorized.

[84] H. Tr., pp. 801-03.

[85] H. Tr., p. 802.

[86] H. Tr., pp. 801-803, 903.

[87] *Id.*

Specifically, Ms. Fitz Gerald testified as follows:

Q. You also testified yesterday that there was another data base … that JTU essentially replaced; is that correct?

A. That's correct.

Q. And that predecessor to JTU contained all the permitting information that PacifiCorp had gathered and put into the data base at that time?

A. It did.

Q. Was the information that went into that predecessor, JTU data base maps?

A. No. And just to be very clear, the information wasn't pertaining to the State of Utah.

Q. Oh, so there was nothing in … the predecessor to JTU, nothing in Utah was in that data base?

A. No. Because as we talked about earlier, PacifiCorp didn't centralize the joint use function between Utah Power and PacifiCorp until 1996.[88]

Thus, instead of loading what historical permitting authorization information into the JTU that existed, PacifiCorp apparently started to build the Utah records in the JTU from scratch, relying *solely* on the unverifiable 1997/1999 Audit.[89]

After failing to populate the JTU with information regarding Utah, PacifiCorp undertook the 1997/1999 Audit.[90] The 1997/1999 Audit, according to PacifiCorp, ostensibly served as the "baseline" for the charges assessed in this case. PacifiCorp then audited its facilities again beginning in 2002. The results of the 2002/2003 Audit were then compared to the results of the 1997/1999 Audit, to identify "unauthorized" attachments.[91]

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88 H. Tr., pp. 802-03, 903-04.

89 H. Tr., pp. 903-904.

90 H. Tr., pp. 716-17.

91 H. Tr., p. 654.

On its surface, this approach seems sound. However, this methodology assumes that the information in the JTU after each audit was accurate, a premise neither the Commission nor Comcast can verify because the survey results are not available.[92] PacifiCorp's request that Comcast and the Commission take its assertions and claims on faith, is not reasonable.

2. PacifiCorp Has Not Produced The Results Of The 1997/1999 Audit And Has Represented That Such Results Do Not Exist.

The 1997/1999 Audit is unverifiable because PacifiCorp has not produced, and does not have, documents showing the results of the 1997/1999 Audit.[93] In fact, and as indicated earlier, although PacifiCorp attempted to proffer certain documents at the Hearing as results of this audit, PacifiCorp has expressly represented that no such results exist.[94]

In discovery, PacifiCorp made the following representation to Comcast:

> PacifiCorp states that in the normal course of business it does not possess *any paper documents that would individually "evidence, relate to or reference the results of the 1997-1998 Audit."* Moreover, PacifiCorp states that it does not possess any paper documents that would independently evidence the specific data that was used as the baseline comparison to the results of the 2004 Audit in the American Fork, Layton and Ogden districts."[95]

PacifiCorp concluded that it was "unable to provide a static document that would individually reflect the results of the 1997-1998 Audit or the baseline used for comparison to the 2003 Audit in the three districts that are the subject of this litigation."[96]

It is difficult to understand how PacifiCorp could contend that the results of this audit, which do not exist, "have been produced in discovery."[97] On the one hand, during

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[92] *See* May 18, 2004 Letter from Charles Zdebski to Genevieve Sapir, a true and correct copy of which is attached as Exhibit C, ¶¶ 2, 5.

[93] H. Tr., pp. 26, 59-60.

[94] H. Tr., pp. 59-60.

[95] See Exhibit C, ¶ 2 (emphasis added).

[96] *Id.* at ¶ 5.

discovery PacifiCorp claimed that the audit results did not exist.[98] On the other, PacifiCorp claimed during the Hearing that the audit results were produced during discovery.[99] This contradiction raises doubts not only as to the veracity of PacifiCorp's position as it pertains to the origin of the information in the JTU but also as to the accuracy and reliability of this unverified audit.

In any event, PacifiCorp has produced no results of the 1997/1999 Audit, whether during discovery or afterward.[100] In fact, the documents that PacifiCorp attempted to introduce into the record as audit results are nothing but an electronic manipulation, or a "snapshot," of the data in the JTU *just prior* to loading the results of the 2002/2003 Audit onto that system.[101] However, unless the JTU information remained entirely static and unchanged from 1999 to 2003, a snapshot of the information in the JTU in 2003 does not accurately or adequately represent the information gathered during the 1997/1999 Audit. Even if this "snapshot" accurately re-creates the data appearing in the JTU in 2003, it does not reflect the results of the 1997/1999 Audit.

These results are critical to PacifiCorp's claims. As Comcast's JoAnne Nadalin testified:

> the results of the '97/'98 audit, that would have been helpful. The list of the poles that we were being billed for would have been helpful. It certainly would have helped us do some kind of a validation or verification of these invoices and move this thing forward.[102]

(...continued)

97 H. Tr., p. 36.

98 See Exhibit C.

99 H. Tr., p. 36.

100 H. Tr., pp. 419-22.

101 H. Tr., pp. 420-21.

102 H. Tr., p. 340.

The data that PacifiCorp *was* able to produce, however, is not helpful to such determinations and, therefore, cannot serve as the basis upon which PacifiCorp has charged Comcast more than $11 million in "unauthorized" attachment penalties and associated fees.

3. The 1997/1999 Audit Excluded Many Joint Use Poles And Comcast Attachments.

In addition to PacifiCorp's failure to produce the results of the 1997/1999 Audit, there was testimony about "leased" poles—poles that by definition could not have been counted as a part of that audit because PacifiCorp records listed these pole as foreign-owned on which PacifiCorp apparently paid rent. During the Hearing, PacifiCorp's James Coppedge testified that during the 2002/2003 Audit, Osmose fielders discovered many poles were mislabeled in the JTU as poles leased by PacifiCorp from other companies, such as Qwest, rather than being labeled as PacifiCorp owned poles.[103] During discovery, Osmose produced a document reflecting its understanding of the errors in the JTU regarding these leased poles.[104] This document, Comcast Exhibit 4.5, reflects that in 2003, there were approximately 15,000 poles in the JTU labeled as leased poles in the Salt Lake Metro District alone.[105] Of these 15,000, roughly 50% were mislabeled and were not actually leased poles but were owned by PacifiCorp.[106] Accordingly, Osmose estimated that approximately 7,500 poles were mislabeled in the Salt Lake Metro District alone. Osmose further anticipated that "[t]his problem could be widespread throughout

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[103] H. Tr., pp. 960-61.

[104] PacifiCorp's counsel devoted a considerable effort to showing that the document had never been seen by PacifiCorp prior to Comcast producing it. H. Tr., pp. 960-61. However, Comcast did not produce this document. Osmose produced it pursuant to a subpoena and, therefore, it was produced to PacifiCorp's counsel at the same time that it was produced to Comcast.

[105] Comcast Exhibit 4.5, § 1.2.

[106] *Id.*

the PacifiCorp service territory and needs to be fixed to accurately collect the joint use information in the other effected cost centers."[107]

Although PacifiCorp worked hard to persuade the Commission to refuse the document or, at the very least, entirely discount it,[108] PacifiCorp's James Coppedge confirmed the accuracy of the information contained in the document. Specifically, Mr. Coppedge testified that when Osmose outlined the leased pole problem, Mr. Coppedge requested that Osmose send him the details of the problem. As a result of that colloquy, Mr. Coppedge and Osmose representative Chris Diliberto worked out a solution.[109] The document produced by Osmose, confirming the mislabeling of these poles, corroborates Mr. Coppedge's explanation of the situation.

Further, Mr. Coppedge testified that he and Mr. Diliberto began to discuss this issue on a Wednesday or Thursday.[110] Thereafter, on Friday, July 25, 2003, Osmose completed this proposal.[111] Mr. Coppedge testified that he and Mr. Diliberto talked about the problem for several days and over a weekend and came to resolution the following week.[112] This testimony authenticates the document, which PacifiCorp attempted to disown, in which Osmose estimates that PacifiCorp has system-wide problems as a result of mislabeled, uncounted poles.

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[107] *Id.*

[108] In addition, PacifiCorp made an effort to cast doubt on the authenticity of the document. H. Tr., p. 639. PacifiCorp objected to the Commission admitting it as an Exhibit saying, "[t]hat strikes me as the worst kind of document lacking foundation and authentication to be admitted into evidence in any particular hearing or proceeding. We don't know what the genesis of it was. Nobody is here from Osmose to talk about it. Nobody spoke to Osmose about the document. We don't know whether there's accuracy in the document or not and what it speaks to. And I suggest it's not the kind of thing that should be admitted into evidence even under lenient evidentiary rules." *Id. See also* H. Tr., pp. 457-58. As indicated, Mr. Coppedge authenticated the document and it was admitted. H. Tr., pp. 960-61, 981-82.

[109] *Id.*

[110] H. Tr., p. 961.

[111] See Comcast Exhibit 4.5.

[112] H. Tr., p. 961.

Later in the Hearing, Mr. Coppedge testified that if these poles were mislabeled in the JTU during the 1997/1999 Audit, and there is no evidence to suggest otherwise, the correction of this labeling during the 2002/2003 Audit would result in the tabulation of "unauthorized" attachments on poles that were not even counted during the 1997/1999 Audit.[113] In fact, Mr. Coppedge specifically testified as follows:

> JUDGE GOODWILL: But if a pole had been in the system as leased and was subsequently identified as PacifiCorp and had Comcast attachments on it that were previously not identified, then that would be billed to Comcast as an unauthorized attachment?
>
> WITNESS: That would be my understanding, yes.[114]

PacifiCorp's admission that it did not count poles in the 1997/1999 Audit that were counted in the 2002/2003 Audit could, by itself, largely account for the discrepancy in pole attachment numbers. PacifiCorp currently has approximately 20 districts in Utah. Osmose estimated that just one of those districts had approximately 7,500 mislabeled poles. At that approximate rate, PacifiCorp could have tens of thousands of poles that were mislabeled in the JTU as leased poles in 1997 and, therefore, would not have been counted during the 1997/1999 Audit. This error alone could account for the discrepancy between the 1997/1999 Audit data and the 2002/2003 Audit data.[115]

Mistakes, errors, and problems such as those outlined above demonstrate that neither the 1997/1998 Audit nor the 2002/2003 Audit produced accurate results upon which PacifiCorp can reasonably rely to impose penalties exceeding $10 million.[116] In any case,

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[113] H. Tr., pp. 984-85, 996.

[114] H. Tr., p. 996.

[115] In addition, as Comcast's expert Mickey Harrelson noted at the Hearing, PacifiCorp instructed Osmose to assume that any unidentifiable pole belonged to PacifiCorp. H. Tr., pp. 543-44.

[116] During the Hearing, Comcast presented another similar problem. "[T]here's evidence in the record that shows that PacifiCorp has claimed ownership of any of a number of poles actually owned by telephone (continued...)

PacifiCorp's audit results are not close to perfect and there has been substantial mismanagement of the data that was gathered that never would have been addressed had Comcast not been forced to seek relief from this Commission. Given that the joint use information for these mislabeled leased poles was not counted in the 1997/1999 Audit, the results of that audit cannot serve as the baseline for the current charges.

4. Finally, The 1997/1999 Audit Cannot Be Relied Upon Because Comcast Was Not Given Effective Notice Of The Audit And That Audit Decidedly Was Not An "Amnesty" Or "Baseline" Audit.

PacifiCorp's notice to Comcast predecessors of the 1997/1999 Audit was flawed at best. Had notice been proper, and had Comcast been informed, Comcast would have had an opportunity to participate, verify the results, and corroborate the so-called "baseline" that PacifiCorp relies on here. In that event, there would likely be no pending case before the Commission.

Throughout this proceeding, Comcast has had serious questions about whether PacifiCorp sent valid notice to Comcast's predecessor prior to the 1997/1999 Audit and whether any such notice set forth the scope of the audit, let alone provided an opportunity to participate meaningfully in that audit. PacifiCorp has stubbornly claimed that it notified all parties that would be affected by the results of the audit.[117] As indicated, *supra* § I.B., PacifiCorp's notice claims lie under a cloud because (1) there were no originals of the notice letters; (2) there were no copies of the notice letters; (3) there were no copies of the mailing labels that PacifiCorp

(...continued)
companies when in fact those poles are owned by the telephone company. The problem is, of course, has an inflationary effect on the number of poles that were found in 2003 as opposed to the poles found in 1997 and 1998. In addition, there's a certain population of poles that simply aren't accessible or even visible. They may be back in the backyard or a back alley or on a fence, behind a fence or maybe a vicious dog that's on the property that prevents the fielder from going out and counting the pole and conducting the survey on it. If those weren't discovered in 1997/1998 and they are discovered in 2003, there's another inflationary pressure there." H. Tr., p. 27.

[117] *See* Prepared Sur-Rebuttal Testimony of C. Fitz Gerald, p. 3.

supposedly maintained in lieu of the letters that were sent; and (4) there was more than a little mystery surrounding a supposed "copying error" introduced as Exhibit PC 1.17 which conveyed that notice was sent in 1996 to an AT&T entity (and Comcast predecessor) that did not even exist until 1999![118]

Apart from these basic notice questions, the evidence contradicts PacifiCorp's claims that the 1997/1999 Audit was an "amnesty" or "baseline." The first disputed letter, dated June 25, 1996, announced the survey and represented that the attachers would be charged for the cost of the survey.[119] It also stated that unauthorized pole attachment fees may be assessed "when warranted."[120] The second disputed letter, dated January 17, 1997, contained the same information.[121] Ms. Fitz Gerald, however, testified that "[a]t the utility meetings that were held both in '96 and in '97, when we discussed the inventory we also said at that time that we would not be charging any unauthorized attachment fees in the State of Utah."[122] The letters, however tell a very different story, asserting that fees and penalties would be charged.[123]

At a minimum, these inconsistencies demonstrate that PacifiCorp's head of joint use has no idea if the notices of the 1997/1999 Audit were ever sent or to whom they were sent. At worst, they demonstrate an intentional misrepresentation regarding the notice of the 1997/1999 Audit. Either way, the PacifiCorp notice claims cannot be credited and they explain, at least in part, why Ms. Fitz Gerald was unable to testify with any specificity as to which communications companies sought additional clarifications and information regarding the

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118 *See* Exhibit PC 1.17.

119 *Id.* at p. 1, ¶ 4.

120 *Id.* at ¶ 5.

121 *Id.* at p. 3, ¶¶ 3-4.

122 H. Tr., p. 840.

123 *See* Exhibit PC 1.17.

1997/1999 Audit. Indeed, based on the record, an equally plausible deduction from PacifiCorp's decision not to bill and penalize operators for the 1997/1999 Audit is that the notice was so deficient, and the audit so flawed, that charging communications carriers was inappropriate.

Not only is there no consensus that the 1997/1999 Audit was the baseline or "amnesty" audit that PacifiCorp hopes to create, but there are serious questions about whether Comcast or its predecessors even knew that the audit was under way, as detailed above. Indeed, Ms. Fitz Gerald admitted under examination by Judge Goodwill that she was less than clear with cable operators that it was an amnesty or baseline audit. Specifically, she testified as follows:

> JUDGE GOODWILL: The 1996 meeting that I think had some indication that Mr. Goldstein probably attended, there was some discussion at that meeting of the anticipated '97/'98 Audit?
>
> THE WITNESS: Yes.
>
> JUDGE GOODWILL: Did you spell out during that meeting or any of those meetings that you've referenced your intent that it would be a baseline or amnesty audit?
>
> THE WITNESS: I don't believe I ever used the word amnesty. That really just came up in this litigation as a way to describe the fact that there weren't going to be any charges for anything that may or may not have been permitted or, you know, done on a handshake.[124]

Comcast had no reason to know that the 1997/1999 Audit was going to be its shot at amnesty for past attachments. Indeed, even assuming that PacifiCorp sent, and cable operators received, the questionable notice letters, those letters manifest the pole owner's clear intention both to charge audit costs *and* unauthorized attachment penalties to cable operators.[125] PacifiCorp characterizes this audit very differently today.

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[124] H. Tr., p. 902.

[125] *See* Exhibit PC 1.17.

If PacifiCorp had given Comcast proper notice of the 1997/1999 Audit and announced that the Audit would serve as a baseline for all future joint use accounting, Comcast would have been able to participate in and monitor the 1997/1999 Audit in order to ensure that its records corresponded properly to the results of the Audit. Proper notice of the 1997/1999 Audit would have given all the parties an opportunity to verify the now non-existent results and, therefore, correct the clear errors of the Audit so that, moving forward, the parties would have the same record of attachments.

C. The 2002/2003 Audit Results Cannot Be Relied Upon To Identify "Unauthorized" Attachments.

From the outset of the dispute, PacifiCorp has attempted to prove the accuracy and precision of the 2002/2003 Audit. PacifiCorp has even asserted numerous times that Comcast has admitted that the 2002/2003 Audit is accurate. Comcast has made no such admission. In fact, Comcast has identified at least one area for which PacifiCorp invoiced Comcast for "unauthorized" attachments where Comcast does not even have facilities.[126] Specifically, PacifiCorp invoiced Comcast for numerous "unauthorized" attachments in Cedar Fort, Utah. However, Comcast has no facilities in Cedar Fort, Utah.[127]

The testimony, briefing and exhibits in this proceeding unambiguously demonstrate that the 2002/2003 Audit cannot accurately determine authorized attachments. Furthermore, PacifiCorp has, itself, admitted to making numerous sizable errors in its calculation of both audit results and audit cost data.

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[126] H. Tr., p. 71.

[127] H. Tr., p. 126.

1. During the 2002/2003 Audit, PacifiCorp Identified Many Attachments As "Unauthorized" Which It Had Previously Permitted For Attachment More Than Two Decades Ago.

During the initial cable build in Utah in the late 1970's and 1980's, Comcast's predecessor, TCI, permitted its pole attachments by engaging in a three-party walk-out with Mountain Bell, predecessor to Qwest, and Utah Power & Light, predecessor to PacifiCorp.[128] The representatives for each of the companies made notations for make-ready and other instructions on permitting maps that were submitted to Utah Power & Light and Mountain Bell, respectively, with an Exhibit A sheet, which the pole owners signed to indicate authorization for TCI to attach to the poles.[129] During discovery, Comcast produced original permitting maps and Exhibit A's from the Salt Lake area[130] to PacifiCorp.[131] These maps reflect that Comcast's predecessor received permission from PacifiCorp to attach to many of the poles that PacifiCorp claims are "unauthorized" as a result of the 2002/2003 Audit.[132]

During discovery, Comcast's Gary Goldstein undertook a survey to verify the results of the 2002/2003 Audit by comparing PacifiCorp's "unauthorized" attachment invoices to the permitting maps and Exhibit A's that were used in the 1970's and 1980's.[133] Mr. Goldstein randomly selected a sample of 39 poles that PacifiCorp identified as having "unauthorized"

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[128] H. Tr., pp. 114-15. *See also* Initial Testimony of G. Goldstein, pp. 2-6.

[129] Initial Testimony of G. Goldstein, pp. 2-6.

[130] PacifiCorp has attempted to argue throughout this proceeding that it is unbelievable that Gary Goldstein has maintained these records when no records are available for other areas. However, this is fairly standard given that permitting and joint use were handled locally until at least 1996. Indeed, PacifiCorp's own witnesses have testified that joint use was entirely de-centralized until at least the late 1990's. H. Tr., p. 803. Given that fact, it is not hard to understand that some areas seemed better organized, requiring paper permitting such as maps and Exhibit A's while other areas, especially less populated areas, handled permitting less formally (if at all) and, therefore, did not create a paper trail of pole attachment records.

[131] Affidavit of Gary Goldstein ("Goldstein Aff."), a true and correct copy of which is attached as Exhibit D, ¶ 3.

[132] *Id.*

[133] Goldstein Aff., ¶ 4.

attachments as a result of the 2002/2003 Audit.[134] In comparing that selection of poles to permitting maps, he discovered that Comcast had original permitting to prove authorization for attachment for 35 of the 39 poles.[135] During the Hearing, Mr. Goldstein specifically testified as follows: "Looking at a random sample of 39 poles which PacifiCorp identified as unauthorized in the 2002/2003 audit, I found that TCI had obtained permits for at least 35 back in the 1970's and 1980's."[136]

With his testimony, Mr. Goldstein provided Comcast Exhibit 3.4, which details the mapstring numbers, pole numbers, original permitting map numbers and Exhibit A numbers of the poles for which Comcast had original permitting but for which PacifiCorp has nonetheless charged "unauthorized" attachment fees.[137]

Through written testimony and testimony during the Hearing, PacifiCorp attempted to cast doubt on this survey by complaining of its size.[138] Specifically, Mr. Coppedge testified that he did not believe that a 39 pole sample was a "representative sample."[139] PacifiCorp, however, made no attempt to discount the survey results other than to attack the number of poles sampled by Mr. Goldstein. Although Mr. Goldstein provided a spreadsheet identifying all pertinent information with which PacifiCorp could either verify or discount his survey, PacifiCorp failed to present any evidence during the written testimony, pre-hearing briefing, or Hearing to contradict the results of that survey.

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134 Goldstein Aff., ¶ 5.

135 H. Tr., p. 71.

136 *Id.*

137 Goldstein Aff., ¶ 7.

138 H. Tr., p. 957. *See also* Prepared Sur-Rebuttal Testimony of J. Coppedge, pp. 4-5.

139 H. Tr., p. 957.

However, since PacifiCorp complained of the size of Mr. Goldstein's sample survey, Mr. Goldstein undertook to survey a much larger sample of poles at the conclusion of the Hearing.[140] In so doing, Mr. Goldstein assigned a member of his design staff, Joseph Guice, to verify original attachment records for at least 500 of the poles invoiced by PacifiCorp as having "unauthorized" attachments.[141]

Mr. Guice randomly selected 515 poles from PacifiCorp's invoices containing so-called "unauthorized" attachments. He plotted the latitude and longitude coordinates provided by PacifiCorp on the permitting maps.[142] Mr. Goldstein then compared these records to Comcast's permitting maps and Exhibit A's from the 1970's and 1980's. In this fashion, Comcast located the original permitting for the great majority of the 515 randomly selected poles.[143] In the instances where the permitting maps and Exhibit A's did not definitively show authorization—because the poles on the map did not correspond exactly to PacifiCorp's latitude and longitude measurements—Mr. Goldstein verified whether the permitting existed by field checking the information. Specifically, Mr. Goldstein actually traveled to the site, looked at the pole and determined whether it was the pole originally permitted.[144]

The results of Mr. Goldstein's second survey are attached as Exhibit B2. This spreadsheet identifies mapstring numbers and pole numbers as provided by PacifiCorp's invoices. Further, it provides the identification of the nodes where these poles and attachments are located. The fourth and fifth columns identify the permitting map number and Exhibit A

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[140] Goldstein Aff., ¶ 8.

[141] Goldstein Aff., ¶ 9.

[142] Goldstein Aff., ¶ 10.

[143] Goldstein Aff., ¶ 11.

[144] Goldstein Aff., ¶ 12.

number upon which the original permitting for these attachments can be found.[145] The final column specifies whether Comcast was permitted to attach to that specific pole in the original permitting paper work.[146]

Exhibit B1 reflects that Comcast located permitting records for 412 of the 515 poles surveyed.[147] This means that 80% of the poles randomly surveyed have back-up permitting records showing that Utah Power & Light permitted these attachments in the 1970's and 1980's.[148] Poles for which no record could be located totaled 60, or 11.7% of those surveyed.[149] Another 39 poles, or 7.6% of those surveyed, accounted for drop poles for which Comcast could not locate permits because, until recently, such permits were not required.[150] The remainder of the poles surveyed did not have Comcast attachments on them.[151] All total, out of 515 poles surveyed, Comcast could not prove authorization for less than 20%.[152]

Such results go beyond simply casting doubt on PacifiCorp's claim that attachments that appeared on a "mismatch report" as a result of the 2002/2003 Audit, were, in fact, unauthorized. Mr. Goldstein's surveys show that PacifiCorp's determination that Comcast lacked authorization for 44,000 poles is largely incorrect,[153] and cannot possibly serve as the basis for more than $11 million dollars in penalties and related charges.

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145 Goldstein Aff., ¶ 14.

146 *Id.*

147 Goldstein Aff., ¶ 15.

148 *Id.*

149 Goldstein Aff., ¶ 16.

150 Goldstein Aff., ¶ 17.

151 Goldstein Aff., ¶ 18.

152 Goldstein Aff., ¶ 19.

153 PacifiCorp devotes much argument to the accuracy of Osmose's work. Comcast does not have adequate information to determine the accuracy of the pole count derived from the Osmose survey. Comcast demonstrated, however, that there are known inaccuracies such as counting pole in the Cedar Fort, Utah area where (continued...)

2. Comcast Has Consistently And Repeatedly Disputed The Use Of The 2002/2003 Audit To Determine Unauthorized Attachments.

PacifiCorp relies heavily on the fact that Comcast did not undertake a massive survey at the outset of this proceeding or prior to the filing of this action, in order to disprove the results of the 2002/2003 Audit. Such an undertaking was not practical or reasonable at that time, especially given the fact that PacifiCorp allotted attachers only between 30 to 60 days from the date of each invoice to make that determination. As a result of that ultimatum and PacifiCorp's rush for immediate payment, Comcast's priority was to protect its interests against insatiable PacifiCorp demands by initiating and prosecuting this proceeding. In addition, Comcast was in the middle of a system-wide upgrade of its plant and, therefore, did not have the man-power necessary to undertake such a project.[154]

Moreover, and as readily admitted throughout this proceeding, Comcast does not have the original permitting records for many of the districts at issue in this case, that is, assuming that those districts ever had paper permitting procedures to begin with.[155] Permitting was decentralized until at least the late 1990's[156] and each district permitted pole attachments by its own method, including orally. In particular, during the Hearing, Comcast's JoAnne Nadalin testified as follows:

> [M]y understanding from our employees who worked in the field with PacifiCorp employees was that neither party was going to find records for American Fork, Layton, or Ogden because at the time those systems were built, PacifiCorp – Utah Power & Light didn't require pieces of paper for that. So looking for pieces of

(...continued)
Comcast has no attachments and provides no services. However, Comcast believes that the pole count information from the Osmose survey would adequately serve as a "baseline" going forward in meaningful joint use planning. Comcast's argument focuses on PacifiCorp's analysis of that count compared to the records in the JTU and the resulting determination of whether Comcast pole attachments were authorized.

[154] H. Tr., pp. 229-30.

[155] H. Tr., pp. 324, 338-39.

[156] H. Tr., p. 803.

> paper that neither party had required back in those days wasn't going to help us resolve this matter.[157]

Ms. Nadalin further testified that

> [w]e knew that for American Fork, Ogden, and Layton, based on the conversation our field personnel had with PacifiCorp field personnel, that documents had not been required in the years that were under – when that plant was being built.[158]

Accordingly, historical permitting records are scant due to historically lax permitting and record keeping procedures.[159] This fact supports Comcast's position that, although historical permitting records are not available, it does not mean PacifiCorp's assessments of authorization are correct. In fact, at the Hearing, PacifiCorp's own witness testified to the relaxed past permitting procedures. Ms. Fitz Gerald testified as follows:

> JUDGE GOODWILL: When did you first hear that in Utah permitting procedures may have been less formal, more of the handshake that we've heard about in this hearing as opposed to anything anticipated under the agreements that PacifiCorp had with attachers?
>
> THE WITNESS: I believe my first recollection of that was when I began doing field training in 1996 for the new JTU system and the new form and our estimators were saying, so it's not acceptable for us to just, you know, sign off on a map or sometimes they bring us in a napkin and they list, you know, the locations of the poles on a napkin and say I want to go here, you know.

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[157] H. Tr., p. 324.

[158] H. Tr., pp. 338-39.

[159] This was confirmed by the following exchange between PacifiCorp's Corey Fitz Gerald and Judge Goodwill:

> **JUDGE GOODWILL**: Does PacifiCorp currently have any physical copies of the maps and Exhibit A's that Mr. Goldstein referred to in his testimony as having been used to provide permit approval in the '70s and '80s?
>
> **THE WITNESS**: I know that there are some. To what extent and what areas they cover, I'm not familiar. But I have seen Exhibit A's informal agreement files and in archive files, so I know they do exist.

In addition to providing further support for the fact that permitting procedures were informal and permitting records scarce, this passage raises an additional question: If PacifiCorp had these records in its possession, and knew that it had them, why did it not produce these records during discovery in this proceeding?

> Sometimes we drive out with them and just look at it and say, yeah, it looks like there's room. We can't do that anymore. No, you can't do that anymore.[160]

PacifiCorp also refused to produce certain records to Comcast prior to this dispute which Comcast requested in order to verify the "unauthorized" attachment invoices.[161] In the face of PacifiCorp's refusal to produce such documents[162] and the ever mounting millions of dollars in penalties that continued to accumulate, Comcast made the decision to request assistance from the Commission rather than attempting to contradict PacifiCorp's invoices pole-by-pole.

3. PacifiCorp Has Admitted To Mismanaging The Results Of The 2002/2003 Audit Both With Regard To "Unauthorized" Attachment Penalties And Audit Costs.

In its Pre-Hearing Brief, PacifiCorp claims that it has "identified 35,439 unauthorized Comcast attachments through its own comprehensive, detailed and carefully managed records."[163] That total is now over 44,000.[164] However, these claims of careful management are suspect, at best, given the testimony at the Hearing that PacifiCorp has charged Comcast for "unauthorized" attachments in at least one area where Comcast has no facilities,[165] and PacifiCorp's admissions that it has overcharged Comcast nearly $750,000 for "unauthorized" attachments as well as for survey costs.[166]

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160 H. Tr., p. 900.

161 H. Tr., pp. 315-16, 334-36.

162 H. Tr., pp. 340-41.

163 PacifiCorp Pre-Hearing Brief, p. 2.

164 H. Tr., pp. 819-20.

165 H. Tr., pp. 71, 126.

166 H. Tr., pp. 649-55, 705, 855-56.

a. PacifiCorp Has Admittedly Overcharged Comcast For "Unauthorized" Attachments.

During the Hearing, Ms. Fitz Gerald testified that PacifiCorp charged Comcast for at least 2,916 attachments mistakenly.[167] At a rate of $250 per attachment, PacifiCorp mistakenly billed Comcast nearly $750,000 in penalties. This error accounts for a significant amount of the penalties, nearly 7% of the total amount billed. Although PacifiCorp admitted the error and committed to fixing it,[168] this error illustrates that the "carefully managed" records of PacifiCorp cannot realistically serve as the basis for the imposition of over $11 million in penalties and related charges.

b. PacifiCorp Admitted That It Needs To Recalculate Audit Charges After Comcast Pointed Out That Previous Calculations Yield Substantial PacifiCorp Over-Recovery.

In addition to overbilling Comcast for the number of attachments, PacifiCorp over-recovered for the audit/survey charges. Despite the fact that Mr. Coppedge testified that "PacifiCorp can't recover any more money than th[e] audit cost[s]. It can't invoice the attachments or the licensees any more money that th[e] audit cost[s]," [169] the evidence shows that PacifiCorp has done exactly that.

In his pre-filed testimony, Mr. Coppedge set forth a cost calculation that calculated the per attachment charge for 75,999 attachments.[170] The total costs involved were $860,040.77.[171] Mr. Coppedge's numbers, reflected by Exhibit PC 2.5, yield a per-attachment

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[167] *Id.*

[168] Ms. Fitz Gerald's assertion on page 650 of the Hearing Transcript that she had not realized the per pole versus per attachment distinction prior to the Hearing is puzzling given that she also testified that PacifiCorp recently changed its billing policies to per attachment billings rather than per pole billings. H. Tr., pp. 709-11, 791.

[169] H. Tr., p. 997.

[170] Exhibit PC 2.5, pp. 2-6.

[171] *Id.*

cost of slightly less than $11.32 per attachment.[172] Instead, PacifiCorp charged attachers $13.25 per attachment.[173] That is an over-recovery of more than $1.50 per attachment and nearly $150,000 just for this sample of attachments. Given that the 2002/2003 Audit was a multi-state audit of nearly 1.5 million poles, PacifiCorp could have profited in the millions if Comcast had not pointed out this mathematical discrepancy. PacifiCorp agreed to recalculate the audit costs only after Comcast devoted substantial testimony and briefing to the issue.[174] Again, PacifiCorp waited until it was caught before appearing to consider the propriety of its "carefully managed" results.

4. The 2002/2003 Audit Located Poles That Were Not Counted During The 1997/1999 Audit.

Finally, as discussed above, and prior to and during the Hearing, Comcast introduced evidence showing that PacifiCorp "lost" thousands of poles in Utah that were not included as part of the 1997/1999 "baseline."

IV. THE $250 PENALTY IMPOSED BY PACIFICORP IS NOT FAIR, JUST AND REASONABLE UNDER THE PROVISIONS OF UTAH CODE ANN. § 54-4-13, UTAH ADMIN. CODE R746-345-3, AND 47 U.S.C. § 224.

Having shown the multiple flaws in PacifiCorp's core claim that Comcast has attached to 44,000 poles in just a few years, the patent unreasonableness of PacifiCorp's $250 penalty is equally obvious.

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172 Comcast Pre-Hearing Brief, pp. 61-63.

173 H. Tr., pp. 969, 997.

174 H. Tr., pp. 964-65.

A. The $250 Penalty Is Not Fair And Reasonable As Mandated By Utah Admin. Code R746-345-3 Or Any Other Standard Of Reasonableness And Is Illegal In 32 States.

PacifiCorp argues that a $250 penalty is necessary to deter Comcast and other attachers from taking a "free ride" on PacifiCorp's poles.[175] In other words, PacifiCorp argues that the $250 penalty is necessary to deter Comcast from making new attachments to PacifiCorp poles without first notifying PacifiCorp. The Federal Communications Commission ("FCC") and the United States Court of Appeals for the District of Columbia Circuit agree that the very penalty that PacifiCorp is imposing is excessive.[176] The FCC ruling on this issue makes it the law in the 32 states where the FCC has jurisdiction over pole attachment matters.[177]

PacifiCorp, however, has attempted to diminish the importance of this ruling by stating that the charge "is not illegal in 32 states. It's been held unlawful by one regulator in Washington, D.C."[178] But this misstates the weight of *Mile-Hi*, which held that a $250 penalty was "excessive" even though, in contrast to the present action, that penalty actually appeared in an executed contract between the parties. Although, the original opinion was issued by the Cable Services Bureau, the full FCC affirmed the decision,[179] and, finally, the United States Circuit Court of Appeals for the District of Columbia affirmed the decision.[180]

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[175] PacifiCorp Pre-Hearing Brief, pp. 19-20.

[176] *See, e.g.*, Comcast Hearing Exhibit 13; and *Mile Hi Cable Partners, L.P. v. Public Service Co. of Colo*., 17 F.C.C. Rcd 6268 (2002).

[177] The FCC's authority over pole attachments is derived from 47 U.S.C. § 224(c), which provides that the FCC has jurisdiction over the rates, terms and conditions of pole attachments except where an individual State certifies that it regulates such matters. Utah and 16 other states and the District of Columbia have so certified. *See States That Have Certified That They Regulate Pole Attachments*, 7 FCC Rcd. 1498 (1992). The remaining 32 states are regulated by the FCC.

[178] H. Tr., pp. 56-57.

[179] *Mile Hi Cable Partners, L.P. v. Public Service Co. of Colo*., 17 F.C.C. Rcd 6268 (2002).

[180] *Public Service Co. of Colorado v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

Mile-Hi, which flatly holds that a $250 penalty is illegal, governs pole attachment law in 32 states.[181] Ironically, PacifiCorp even cites *Mile-Hi with approval*, for the proposition that the FCC "has acknowledged that some unauthorized attachment charge would be reasonable."[182] PacifiCorp, however, stops short of mentioning that the FCC also held that:

> "[i]n determining a just and reasonable fee, we must balance the need to provide an effective remedy with the need to encourage utilities not to delay audits of unauthorized attachments. We believe that a fee equal to five times the annual rent strikes the necessary balance under these circumstances."[183]

At the Hearing, however, PacifiCorp attempted to bolster its imposition of the $250 penalty by arguing that it is consistent with unauthorized attachment penalties allowed in other states.[184] PacifiCorp specifically mentioned penalties allowed in California, Louisiana and Oregon.[185]

Oregon's authorization of a $250 charge has been discussed extensively in this proceeding, as has the fact that its longevity is uncertain because it is now under attack at the Oregon Court of Appeals.[186] In addition, PacifiCorp argued that the $250 penalty it seeks to defend also is reasonable when compared to a $10,000 penalty supposedly authorized in

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[181] For a full discussion of the *Mile-Hi* opinions, *see* Comcast Pre-Hearing Brief, pp. 28-33.

[182] PacifiCorp Pre-Hearing Brief, p. 21.

[183] *Mile H Cable Partners, L.P. v. Public Service Co. of Colo.*, 17 FCC Rcd 6268, ¶ 9.

[184] H. Tr., p. 57.

[185] *Id.*

[186] The Oregon regulations have been the subject of numerous pieces of contested litigation—two at the Oregon Public Utility Commission: *Central Lincoln People's Utility District v. Verizon Northwest Inc.*, UM 1087, Petition for Removal of Attachments, (filed May 22, 2003), and *Portland General Elec. Co. v. Verizon Northwest Inc., UM 1096*, Petition for Relief, (filed July 15, 2003); another was brought before the United States District Court for the District of Oregon: *Verizon Northwest v. Portland General Elec. Co.*, Civ. No. 03-1286-MO (filed Sept. 17, 2003); and finally, one before the Oregon Court of Appeals: *Qwest Corporation v. Public Utility Commission of Oregon*, Petition for Review of Rules Pursuant to ORS 183.400(1), CA A123511, (filed Jan. 12, 2004). The last of these judicial proceedings is a direct challenge brought by Qwest of the $250 unauthorized attachment and safety penalties (and other penalty rules). PacifiCorp has intervened in support of the regulations.

California.[187] PacifiCorp apparently spoke in error, because California's penalty is actually 20 times less than that, though still considerable at $500.[188] Equally important, the California Public Utility Commission expressly held that the fee could not be imposed retroactively,[189] as PacifiCorp seeks to do in the present case.

The Louisiana Public Service Commission ("LPSC") authorized a $10,000 per-occurrence penalty for infractions of a 1999 LPSC order. While the order specified that pole attachers must secure permits before attaching to poles, there was no discussion in the order or any detailed consideration by that commission in the course of that proceeding, regarding appropriate amounts for unauthorized attachment penalties. It simply was never an issue the Louisiana commission addressed. The focus in that proceeding, first and foremost, was rental rates.[190]

PacifiCorp did, however, neglect to raise a recent order from the New York Public Service Commission. That proceeding did consider—in great detail—the amount of, and procedures for, assessing unauthorized attached penalties. Indeed, electric utilities in the New York proceeding had urged the New York Public Service Commission to adopt the Oregon Public Utility Commission's regulations *en toto,* including the $250 unauthorized attachment penalty. The New York Public Service Commission flatly rejected that position and held that:

> In order to provide a common baseline for all future pole audits, all pole Owners and Attachers shall either stipulate as to what attachments are on the poles or conduct an audit to determine what attachments are on the poles to be completed within three years of the date this policy statement is adopted.

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[187] H. Tr., p. 57.

[188] *See Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, 2000 Cal. PUC LEXIS 228, *49 (2000).

[189] *Id*. at *49-*50. *See also* H. Tr., p. 608.

[190] *See General Order*, 1999 La. PUC LEXIS 13 (March 12, 1999).

> Owners and Attachers may choose to simply agree that their current records will be the baseline. Parties are encouraged to compare current records before choosing whether to stipulate or to conduct audits. If a joint audit is conducted it will be done at each parties own expense. After the stipulation or audit is completed, unlicensed attachments found will result in a rate of three times the pole rental per attachment back to the date of the stipulation or audit.[191]

As Comcast has argued extensively throughout this case, an agreed-upon baseline pole count is *exactly* what this case demands.[192] Additionally, other jurisdictions, such as New York, have followed the FCC's lead in determining that back rent for several years, not the equivalent of back rent for 53 years,[193] is an appropriate penalty when attachments are *proven* to be unauthorized.

Comcast does not dismiss outright the notion that some reasonable unauthorized attachment charge could be appropriate. Rather, Comcast argues that if any "penalty" is to be imposed, it should not exceed five years' back rent, which is $23.25 under the current rental rate of $4.65 per pole per year. Any "penalty" should be based on *bona fide* loss to PacifiCorp for actual unpaid rent and should be applied prospectively only.

B. The $250 Penalty Is Not Contract-Based.

PacifiCorp has attempted throughout this proceeding to justify the $250 penalty as contract-based. PacifiCorp's theory contains two critical flaws. First, neither Comcast nor its predecessors ever executed a contract with PacifiCorp providing for a $250 unauthorized attachment charge. Second, the contract most recently in effect between the parties, which was unilaterally terminated by PacifiCorp in 2001,[194] expressly allowed for a penalty in the amount

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[191] H. Tr., pp. 611-612. A true and correct copy of the New York Public Service Commission's Order is attached hereto as Exhibit E.

[192] Comcast, moreover, has expressed its willingness to do so.

[193] PacifiCorp's penalty is the equivalent of more than 53 years back rent at the current rental rate of $4.65 per pole per year. Comcast Pre-Hearing Brief, p. 35.

[194] H. Tr., pp. 685, 689.

of $60.00 ***per pole***.[195] PacifiCorp attempts to rely on the agreement that it terminated in 2001 creates a number of very real problems, not the least of which is that there is no agreement at all to rely on.[196]

1. The 1999 Agreement Did Not Have A Provision Allowing A $250 Unauthorized Attachment Charge.

AT&T, Comcast's predecessor, and PacifiCorp entered into a Pole Contact Agreement on December 20, 1999 ("1999 Agreement").[197] Section 3.2 of the 1999 Agreement provides as follows:

> Should Licensee attach Equipment to Licensor's poles without obtaining prior authorization from Licensor in accordance with the terms of this Agreement…Licensor may, as an additional remedy and without waiving its right to remove such unauthorized Equipment from its poles, assess Licensee an unauthorized attachment charge in the amount of $60.00 per pole per year until said unauthorized Equipment has been removed from Licensor's poles or until such time that Licensee obtains proper authorization for attachment.[198]

This provision expressly provides for a $60 penalty. PacifiCorp is attempting to impose a fee more than four times greater than this, arguing that the penalty is retroactive at PacifiCorp's discretion and can be applied for whatever number of years it deems appropriate, however arbitrary. PacifiCorp argues that the agreement language supports such a determination and was negotiated by two sophisticated parties over the course of several years. Thus, it argues that the 1999 Agreement should be enforced as written.[199] The contract, however, does not apply

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195 *See* Comcast Exhibit 11.

196 H. Tr., pp. 685, 689.

197 H. Tr., pp. 46, 684-85.

198 *See* Comcast Exhibit 11.

199 H. Tr., pp. 46, 698-700, 849-52.

retroactively by its express terms, and settled Utah law provides that ambiguous contract terms are construed against the drafter—PacifiCorp.[200]

Given the relative bargaining power of the parties,[201] the penalty contained in the terminated agreement should not be applied. It is well settled law that contracts of adhesion,[202] such as the 1999 Agreement, should be strictly construed against the drafter.[203] Since the 1999 Agreement was not actually negotiated, as testified to by Ms. Fitz Gerald, and was simply enforced by PacifiCorp's monopoly power over the pole plant, it must be deemed a contract of adhesion and treated accordingly. The terms of the 1999 Agreement should be strictly construed against PacifiCorp and in favor of Comcast.[204]

Both the $60 penalty as well as the $250 penalty are unfair and unreasonable under prevailing law, particularly given the circumstances surrounding the "negotiation" of § 3.2 of the 1999 Agreement. During the Hearing, PacifiCorp admitted on numerous occasions that although the terms of the 1999 Agreement were supposedly "negotiated," the form and substance of the contract were almost identical to PacifiCorp's standard form contract.[205]

Specifically, PacifiCorp argued during opening statements that the $60 per pole per year penalty was negotiated between the parties prior to the execution of the 1999

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[200] *See, e.g., Parks Enterprises, Inc. v. New Century Realty, Inc*., 652 P.2d 918, 920 (Utah 1982) ("It is also settled law that a contract will be construed against its drafter."). *See also Zions First National Bank v. National American Title Ins. Co*., 749 P.2d 651 (Utah 1988); *Hoffman v. Life Ins. Co. of North America*, 669 P.2d 410 (Utah 1983); *Cherry v. Utah State University*, 966 P.2d 866 (Utah Ct. App. 1998).

[201] *See* Comcast Pre-Hearing Brief, pp. 35-36.

[202] The term "contract of adhesion" is defined as "a contract entered without any meaningful negotiation by a party with inferior bargaining power." Williston on Contracts, § 32:12 (4th Ed.).

[203] *See, e.g., Bull HN Information Systems, Inc. v. Hutson*, 229 F.3d 321, 331 (1st Cir. 2000) ("contracts of adhesion are construed strictly against the drafter and the risks of ambiguity fall on the drafter"). See also Parks Enterprises, Inc. *v. New Century Realty, Inc.*, 652 P.2d 918, 920 (Utah 1982) ("It is also settled law that a contract will be construed against its drafter").

[204] *Id.*

[205] H. Tr., pp. 49, 698-700, 849-52, 911-12.

Agreement.[206] Moments later, however, PacifiCorp acknowledged that the "1999 agreement was essentially the old mid-nineties agreement that PacifiCorp had with all its communications entities."[207] Additionally, Ms. Fitz Gerald testified as follows:

> JUDGE GOODWILL: But it seems to me at least that the actual agreements that came out of that negotiation process were the '96 and '99 agreements were virtually identical. I don't believe I've seen a copy of the '96 template but I can only assume that they were very close to the terms in that template. Can you point me to any provisions specifically in the final agreement that were changed as a result of negotiation between the parties?
>
> THE WITNESS: I don't believe that for – that for the most part that the actual operations, the permitting, the rentals, unauthorized attachment charges in general in all of the contracts that I negotiated, there were no significant changes to any of those provisions.[208]

The 1999 Agreement could not have been effectively negotiated between two equally powerful parties if the signed agreement amounted to little more than PacifiCorp's form contract. This admission was compounded when Ms. Fitz Gerald testified that she recalled having specific discussions with AT&T representative Robert Trafton regarding Section 3.2. of the 1999 Agreement. However, she also testified that even though Mr. Trafton objected to the amount of the charge and suggested that a smaller charge replace the $60 figure, PacifiCorp ultimately insisted on the $60 penalty.[209]

PacifiCorp's so-called "negotiations" with communications companies were conspicuously short on give and take. The terms of the agreements were identical, or nearly identical, to those contained in PacifiCorp's form contract. They were not negotiated and should not serve as the basis for PacifiCorp's fees. Furthermore, PacifiCorp's own expert, Tom

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206 H. Tr., p. 46.

207 H. Tr., p. 49.

208 H. Tr., pp. 911-912.

209 H. Tr., pp. 698-700, 849-52.

Jackson, admitted during cross-examination that for a penalty term to be applied it must be negotiated.

> THE WITNESS: I think the reasonableness of fees are an issue to be negotiated between the parties, and whatever the parties reach in an agreement in a contract should be the fees that should be charged
>
> . . .
>
> Q. If it's negotiated in the contract, then it's reasonable to apply it?
>
> A. That's the reason you negotiate contracts, yes, sir.[210]

The converse is also true; if a term is not negotiated, as in the present case, it should not be applied.

2. PacifiCorp Unilaterally Terminated The 1999 Agreement.

At least as critical as the fact that the penalty was not negotiated and that the language of the 1999 Agreement does not support the existence of a $250 unauthorized attachment penalty, is the fact that PacifiCorp canceled the 1999 Agreement outright. The bottom line is that the parties currently do not have a contract.[211] PacifiCorp claimed it terminated the contract because it wanted updated terms and conditions in such contracts.[212] Whether, in fact, this is the case, what is clear is that PacifiCorp is demanding that Comcast adhere to a contract that it does not expect to be bound. In fact, PacifiCorp imposed additional permitting fees, inspection fees and audit fees on Comcast after the 1999 Agreement was terminated without any negotiations with Comcast. PacifiCorp clearly did not feel bound by the 1999 Agreement it unilaterally terminated.

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[210] H. Tr., pp. 1025-26.

[211] H. Tr., pp. 685, 689.

[212] H. Tr., p. 845.

C. Prohibiting The Unreasonable Penalty Would Not Amount To Retroactive Ratemaking.

In its Pre-Hearing Brief, PacifiCorp presented the novel argument that a prohibition on the $250 penalty would amount to illegal retroactive ratemaking. In so doing, PacifiCorp relies on its assertions (1) that the 1999 Agreement was filed with the Commission, (2) that it was approved by the Commission and incorporated expressly into the Electric Service Schedule No. 4 ("Tariff 4"), and (3) that the contract is still in effect. One obvious irony of PacifiCorp's position is that it is PacifiCorp that is trying to change its tariffs retroactively—not Comcast. PacifiCorp is attempting to make its tariff broader and more encompassing in order to defend its penalty. This argument does not withstand scrutiny.

There is no evidence that the Commission ever saw, considered, or gave its imprimatur to the unauthorized pole attachment fee that PacifiCorp claims is part of its tariff. In fact, if the Commission were to accept PacifiCorp's position that the pole attachment fee is part of Tariff 4, the Commission would then be engaged in retroactive ratemaking because it would be retroactively broadening Tariff 4 to include terms and conditions that have not previously been part of the Tariff. In addition to this blatant initial irony, there are four other glaring problems with this argument. First, the Commission has no record of PacifiCorp ever submitting, or of the Commission approving, *any* form agreement in connection with PacifiCorp's Tariff 4 submissions, let alone the 1999 Agreement. Second, such a contract would not constitute a term of Tariff 4 even if it was filed with the Commission. Third, PacifiCorp unilaterally terminated the 1999 Agreement which it now seeks to use to protect its actions. Fourth, the $250 penalty was not specified in the 1999 Agreement.

1. The Commission Has No Record Of PacifiCorp Ever Filing A Form Contract In Connection With Its Tariff 4 Submissions.

The filings produced by PacifiCorp as Exhibit G to its Pre-Hearing Brief all contain the following language: "A copy of the Company's current standard Joint Facilities Agreement is on file with the Public Service Commission."[213]

However, despite this clear language indicating PacifiCorp's responsibility to file a form contract with the Commission, a simple review of the dockets to which PacifiCorp cites reveals that PacifiCorp has never filed any form contract with the Commission as referenced in the Tariff 4 filings.[214] Not one of these dockets contains a form agreement filed by PacifiCorp.

2. Even If PacifiCorp Had Filed A Form Contract With The Commission, The Terms Of That Form Contract Are Not Incorporated Into The Tariff.

The language in Tariff 4 merely states that a form contract is on file. As indicated, Tariff 4 does not, as PacifiCorp suggests, incorporate the terms and conditions of the contract into the Tariff.[215] While the Tariff requires a copy of the utility's "general form" contract or agreement be provided to the Commission, the Tariffs do not state that this "general form" is incorporated by reference into every joint use contract. If the form contract was part of Tariff 4 there would be no incentive for utilities to engage in negotiation or bargaining over the terms of such agreements. This result would eviscerate the structure of the administrative scheme, which expressly contemplates specific pole attachment agreements be *negotiated* between the pole owner and attachers.

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213 PacifiCorp Pre-Hearing Brief, Exhibit G, pp. 2, 4, 6, 8.

214 *See* Docket Nos. 01-035-01, 99-035-10, and 97-035-01.

215 PacifiCorp Pre-Hearing Brief Exhibit G, pp. 2, 4, 6, 8.

Moreover, it is impossible to incorporate the terms of a general form agreement into the Tariff 4 because of the other provisions of that Tariff.[216] Each Tariff produced by PacifiCorp states that the "terms, conditions, and liabilities for service under this Schedule shall be those specified in the Joint Facilities Agreement between the Company and the Customer"—not the terms, conditions and liabilities found in the "general form" agreement filed with the Commission. Thus, even if PacifiCorp had filed a form agreement with the Commission, which it did not, its terms and conditions do not govern the relationship of the parties. Furthermore, there is no language in these Tariffs stating that the 1999 Agreement was specifically incorporated therein.[217] Rather, the Tariffs indicate that the tariffs on file with the Commission are considered part of the agreements that PacifiCorp has with attachers—not the other way around.[218] PacifiCorp has it completely backwards.

The Tariffs on file with the Commission are silent on the issue of an unauthorized pole attachment charge. There is nothing in these Tariffs referring to such a fee. As stated above, PacifiCorp's argument is that because the 1999 Agreement was specifically incorporated into the Tariffs—which it was not—and because a $60 unauthorized pole attachment charge was included in the 1999 Agreement, somehow the $250 unauthorized pole attachment charge

[216] At least two of these Tariffs were filed prior to the execution of the 1999 Agreement. It obviously would be impossible for those previously filed Tariffs to incorporate the terms and conditions of a contract that had not yet been negotiated or executed.

[217] Utah Admin. Code R746-345-2(C), states that when a utility uses a contract or agreement to implement the tariff, that contract or agreement must be "directly referenced in the tariff." As mentioned above, the 1999 Agreement is not "directly referenced" in the tariffs attached as Exhibit G to PacifiCorp's Pre-Hearing Brief.

[218] "Service under this Schedule will be in accordance with the terms of the Joint Facilities Agreement between the Company and the Customer. The Electric Service Regulations of the Company on file with and approved by the Public Service Commission of the State of Utah, including future applicable amendments, will be considered as forming a part of and incorporated in said Agreement." PacifiCorp Pre-hearing Brief, Exhibit G, pp. 2, 4, 6, 8. (emphasis added).

became part and parcel of Tariff 4 and, therefore, constituted PacifiCorp's pole attachment "rates." This argument has no merit.

3. PacifiCorp Cannot Rely On The Terms Of The Contract That It Unilaterally Canceled.

In 2002, PacifiCorp exercised its right to terminate the 1999 Agreement upon 365 days' notice. However, PacifiCorp now is improperly attempting to breathe new life into the agreement that it did away with three years ago. PacifiCorp cannot both terminate the contract and then demand that Comcast honor its provisions, as interpreted by PacifiCorp, regardless of that termination. Once a contract is terminated, it no longer provides rights or remedies to any party, least of all the party which caused its termination.[219] Application of this principle, combined with the equitable considerations,[220] demands that the Commission reject PacifiCorp's *post-hoc* attempt to defend its current position with the terms of an agreement it unilaterally terminated years ago.

4. The Penalty PacifiCorp Seeks To Impose Has Never Been Stated In Any Contract Between The Parties.

PacifiCorp's retroactive ratemaking argument also relies on its assertion that the $250 penalty it seeks to collect was stated in the 1999 Agreement. This assertion is not true. The 1999 Agreement plainly provides for a $60 penalty. PacifiCorp's attempts to justify the

[219] *See, e.g., Genter v. Conglomerate Mining Co.*, 64 P. 362, 365 (Utah 1901) (a party "cannot be allowed to avail himself of the benefits of a contract, and still repudiate its obligation"); *Penn Star Mining Co. v. Lyman*, 231 P. 107,112 (Utah 1924) ("it is not so clear to see, in case a contract is terminated and ended, how a party retains the right to enforce its provisions, or any of them, unless the right to do so is preserved in the contract").

[220] Equity considerations prevent a party from complaining of the effects of its own actions. *See, e.g., Battistone v. American Land & Development Co.*, 607 P.2d 837, 839 (Utah 1980) ("equity generally will not assist one in extricating himself from circumstances which he has created").

penalty by explaining that it has discovered a way to extrapolate the $250 penalty from a provision that provides for a $60 penalty must be rejected outright.[221]

V. THIS DISPUTE IS JUST ONE DIMENSION TO PACIFICORP'S EFFORT TO TURN ITS POLES INTO A MONOPOLY PROFIT CENTER.

As evidenced by the record in this proceeding, and the recent filing of other dockets at the Commission,[222] effective joint use management is critical to the provision of important state-of-the-art communications and utility services to Utah consumers. PacifiCorp has derailed joint use in Utah by sacrificing the opportunity to engineer and implement effective joint use management practices for money-making schemes under the blanket of "cost recovery." In so doing, PacifiCorp has abandoned its critical role as the owner and administrator of the essential pole resource that is critical to providing these services. This proceeding provides a text book example of how *not* to conduct and charge for a pole audit. Comcast is hopeful that the Commission will draw on the considerable factual record assembled here and the considerable body of pole-attachment precedent addressing similar if not identical issues, to begin to repair PacifiCorp's relationship with Comcast.

PacifiCorp was forced at the Hearing to acknowledge that portions of its for profit scheme had to be modified including that the charges must be assessed on a per-pole basis rather than on a per-attachment basis and over charges on survey costs must be refunded and the admission that "leased" pole may not have been counted in the baseline audit. While a step in

[221] Even if the Commission were to assume that somehow this penalty is an element of the Tariff 4 rate, which it clearly is not, there are specific requirements in Utah Admin. Code R746-345-4 requiring the pole owner to first notify the communications carriers before applying for a change in a pole rate element. The pole owner must also file a petition with the Commission indicating that it has provided such notification and whether the communications company objects to the tariff amendment. PacifiCorp did not fulfill any of these requirements in attempting to incorporate its penalty structure into the Tariff.

[222] H. Tr., p. 6. *See also*, Docket 04-035-42 and Docket 04-999-03.

the right direction, obviously these corrections are only the beginning to workable joint use practices between the parties.

A. Absent Clear Commission Action PacifiCorp Still Intends To Impose Penalties For Alleged Safety And Clearance Issues

PacifiCorp reaffirmed its position at the Hearing that, at some point, it may impose penalties or charges on attachers for violations of the National Electrical Safety Code ("NESC").[223] As set forth in the unchallenged testimony of Comcast expert Mickey Harrelson, imposing fines for NESC violations would be counterproductive, at best, and would inevitably lead to disputes. PacifiCorp offered no credible testimony to rebut this fact and declined to cross-examine Mr. Harrelson on safety issues. The Commission therefore, should enter an order prohibiting PacifiCorp from imposing a fine for alleged safety violations.

B. PacifiCorp Has Established Unreasonable Permitting, Application And Inspection Fees.

Despite claiming that Comcast and PacifiCorp have continued to operate under the terms of the 1999 Agreement,[224] PacifiCorp has implemented six levels of inspections and associated fees as well as application fees, that were not in place at the time the contract was terminated.[225] Comcast has had no choice but to pay these exorbitant amounts, that have no rational relationship to PacifiCorp's costs, even though there is no contractual or other support for them. PacifiCorp continues to implement these fee changes, as well as "policy" changes, to such items as permitting requirements without notifying the Comcast employees that are expected to implement those changes.[226]

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223 H. Tr., p. 803.

224 H. Tr., p. 50.

225 H. Tr., pp. 192-93, 909-10, 1052-53. *See also* Initial Testimony of M. Pollack, pp. 8-12.

226 H. Tr., pp. 197-98.

VI. CONCLUSION.

In addressing these and other problems, the Commission must keep in mind not only the specific issues on trial in this proceeding and in related proceedings but the context in which they occurred. Despite PacifiCorp's claims that it had to centralize its permitting processes because of the large-scale Utah build out, PacifiCorp only did so long *after* the new build stopped. In addition, the $250 penalty, audit-cost invoicing and the steady inflation of administrative fees occurred simultaneously with PacifiCorp's decision to raise pole-attachment rents from less than $5.00 per pole to nearly $30.00 per ***attachment.*** This is the context from which this dispute emerged and which should be considered in resolving this matter.[227]

While perhaps no single PacifiCorp witness presented the face of the monopolist—rapacious or otherwise—the basic fact remains that PacifiCorp single-handedly has derailed joint use in Utah and it is up to the Commission to put it back on track. Granting the relief Comcast has requested will be a giant step in that direction.

For the reasons set forth herein, and consistent with Comcast's Request for Agency Action and its other submissions in this proceeding, Comcast request the following relief:

(1) An immediate refund of the entire amount of the approximately $5.4 million that Comcast has paid to PacifiCorp in connection with the 2003 Audit, plus interest;

(2) An order denying and declaring invalid PacifiCorp's claim that Comcast has made "unauthorized attachments" to PacifiCorp poles;

(3) An order declaring the unauthorized attachment penalty amount of $250 per attachment is unjust, unreasonable and unlawful;

[227] For a more detailed discussion of PacifiCorp's improper use of essential facilities, *see* Comcast Pre-Hearing Brief, pp. 16-19.

(4) An order declaring that the maximum unauthorized pole attachment penalty that PacifiCorp shall be permitted to charge for future audits shall not exceed five years' back rent per pole;

(5) An order directing the parties to establish a baseline number of poles to which Comcast is presently attached that shall be used for the purposes of future billings and any future inventories or audits of attachments to PacifiCorp poles;

(6) An order declaring the imposition or attempted imposition of fines or penalties for purported "safety" violations on PacifiCorp poles would be unjust, unreasonable and unlawful;

(7) An Order declaring PacifiCorp's permitting and inspection fees are unjust, unreasonable and unlawful;

(8) An order directing the parties to negotiate in good faith a just and reasonable plan, including a fair, just, and reasonable allocation of cost and other responsibility, for addressing *bona fide* safety issues that exist on PacifiCorp poles using the principles set forth in the National Electrical Safety Code;

(9) An order directing the parties to negotiate a just, fair and reasonable pole attachment agreement; and

(10) An order granting such other relief as is just, reasonable and proper.

DATED: October 8, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of October, 2004, an original, five (5) true and correct copies, and an electronic copy of the foregoing **POST-HEARING BRIEF** were hand-delivered to:

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