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Submitted October 8, 2004

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

COMCAST CABLE COMMUNICATIONS, INC., a Pennsylvania Corporation, Claimant, vs. PACIFICORP, dba UTAH POWER , an Oregon Corporation, Respondent.	**Docket No. 03-035-28** **POST-HEARING BRIEF OF PACIFICORP**

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PacifiCorp, dba Utah Power ("PacifiCorp"), by its attorneys and pursuant to Section R746-100-9(B) of the Utah Public Service Commission's ("Commission") Rules of Practice, submits its Post-Hearing Brief in the captioned proceeding.

I. INTRODUCTION

A. Background

This case is about two driving forces that have produced a major dispute: (1) the responsibilities of a Commission-regulated utility company - PacifiCorp - to operate its electric utility plant in the public convenience and necessity and in accordance with its contracts and tariff; and (2) the market-driven incentives for a cable-television operator - Comcast, that is not Commission-regulated - to install and expand its system as rapidly as possible, with the least cost and resistance.

It is not surprising that a major difference of opinion between the companies pursuing these diverse paths has arisen. The resolution of the dispute must address three primary and fundamental components:

- Has Comcast, the company with general permission to use some part of PacifiCorp's public utility plant (the poles) complied with applicable contractual and regulatory provisions for attaching its equipment to utility poles? In particular, has it received the proper authorization for each of its attachments on public-utility property?
- If it has not, then how many of its attachments have been put in place without proper authorization from the utility company?
- Once the number of unauthorized attachments has been determined, what are the

appropriate fees to charge for each?

As the following discussion of the facts and related argument firmly establishes, Comcast has *not* obtained the contractual and tariff-required authorizations; the extent of this failure is nearly 40,000 poles; and the applicable contract/tariff fee of $60 per pole per year for unauthorized attachments and back-rental rates yield aggregate charges to be paid by Comcast to PacifiCorp of between $7.1 million and $10.0 million.

Comcast, on the other hand, claims it should be relieved of these charges. Indicative of the diaphanous nature of the support for Comcast's claims that it *owes nothing* for its past unauthorized-attachment transgressions is the manner in which it began this proceeding. At paragraph 23 of its Request for Agency Action, Comcast emphatically made the following claim:

> **"As a result of [a] preliminary audit, Comcast has located approximately 8,000 utility poles for which it has been billed by and has been paying rents to PacifiCorp, but upon which it has no attached facilities."**

Later in the proceeding, in support of its frantic request for immediate relief from the Commission, Comcast claimed that, as a result of PacifiCorp's discontinuing the processing of Comcast's permit applications, **"Comcast cannot do any of the following tasks that are critical** to operating a cable system, anywhere within the borders of the State: . . . .

- **Build out facilities to serve new areas;** or
- **Bring new customers** on the network."[1]

These statements typify Comcast's approach to this litigation: unexplained factual misrepresentations and expediently shifting positions.

As to the first tactic, Comcast never again mentioned the 8,000 poles melodramatically claimed in its Request for Agency Action as justification for bringing the present action. In the final accounting, it has offered a list of a mere 22 poles it claims were billed in error.[2] Yet, Comcast's own auditor had identified these 22 poles and verified the accuracy of PacifiCorp's Audit in September 2003, *one month before* Comcast filed its Request for Agency Action containing the 8,000 poles claim. Comcast offered neither explanation nor apology for its factual misrepresentation, indicative of Comcast's lack of evidence on the number, location and growth of its own network attachments to PacifiCorp poles.

Comcast's second broadside tactic was to claim that PacifiCorp prevented Comcast from building out to new areas and bringing new customers online when PacifiCorp stopped processing permit applications. This assertion changed 180 degrees at the hearing. After getting the immediate relief requested in April 2004, based in part on its claims to the Commission that new build and new customers were at stake, and then facing the reality of having to pay for its new attachments and new service drops to new customers, Comcast reversed field and presented sworn testimony that claimed virtually no new build and no new customers were at stake in this proceeding.

In contrast, the law and the facts support PacifiCorp's careful, thorough and considered approach in all phases of its dealings with Comcast.

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[1] Comcast March 24, 2004, Motion for Immediate Relief at ¶ 29 (emphasis added).
[2] Comcast Ex. 3.5, attached to Goldstein Sur-Rebuttal Testimony, Comcast Ex. 3.4.

B. Summary of Argument

The hearing was replete with detailed testimony from both sides of the dispute; from the myriad of details discussed by the witnesses emerged a clear picture of the PacifiCorp-Comcast relationship.

As the use by cable television companies of public utility facilities has increased over the years, it has become more important for the utility company, as the owner of the facilities and the provider of critical electric service, to be able to manage, control and maintain the safety and reliability of its utility plant when it is used by third parties.

To that end, PacifiCorp has long had procedures in place to require that attaching parties apply for and receive approval to use the utility system for their purposes. However, as the extent and importance of this secondary use of utility plant increased, PacifiCorp undertook a major effort to control and manage the process as a part of its stewardship of the public utility operation.

A comprehensive audit was undertaken in 1997 to very early 1999 that provided an inventory of all then-existing third-party attachments. This was treated as a benchmark, with all attachments at that time being treated as authorized; in effect, establishing an amnesty audit.[3] In connection with that audit, PacifiCorp redoubled its efforts to educate and train attaching parties in the proper methods for making the process run smoothly.

Because it became clear to PacifiCorp that extensive third-party attachment activity was still taking place without proper authorization, and, therefore, without due regard for the safety and reliability of its system, it undertook a second comprehensive

[3] Thus, any alleged evidence of PacifiCorp's procedures prior to 1999 that were not consistent with the post-1999 attachment requirements is irrelevant to the issues before the Commission.

audit in 2002 to 2003 to establish the extent to which third parties had installed attachments that were not authorized. Conducted by a specialized, independent contractor, the 2002/2003 Audit cataloged tens of thousands of unauthorized attachments on PacifiCorp's Utah electric system.

Because third-party attachers such as Comcast must (and do) enter into pole-attachment contracts with the utility, pursuant to PacifiCorp's Commission-approved tariff, they are bound by the terms of those contracts to follow certain approval procedures. The 2002/2003 Audit established that Comcast had not complied with those procedures.

Further, the contract/tariff provisions that bind the parties explicitly provide that an attacher failing to comply with the specified approval procedure will incur a charge of $60 per pole per year during the period of unauthorized use of the utility plant.

PacifiCorp has billed Comcast for its unauthorized attachments, using a pole count derived directly from the 2002/2003 Audit and applying applicable tariff and contract terms for unauthorized attachment and annual rental charges.

Unauthorized attachment charges accrue from the time of the attachment until approval. With no data supplied by Comcast to establish when particular attachments were made, PacifiCorp has assumed that the attachments were made shortly after the 1997/1998 Audit, resulting in approximately $10 million in cumulative back-rent and unauthorized-attachment charges. Assuming that the unauthorized attachments went up more uniformly over the period from early 1999 to the present, the charges would be approximately $7.1 million.

C. The Six Fundamental Facts

Against this backdrop for analyzing the dispute and looking past Comcast's tactics, the evidence on the record in this matter establishes the following six facts.

- The accuracy of PacifiCorp's 2002/2003 Audit is undisputed. Comcast confirmed this fact with its own independent audit using a trusted contractor.[4]
- The accuracy of PacifiCorp's 1997/1998 Audit, which served as a base-line "amnesty audit" is also undisputed. All evidence converges on a total number of Comcast attachments found in this Audit of 74,000 to 75,000. For nearly five years, Comcast and its predecessors[5] never once complained that they were being billed for the wrong number of attachments.[6]
- During the relevant time period (since the 1997/1998 Audit), there have always been clear application and permitting requirements in place. Even accepting Comcast's anecdotal attempts to contradict clear contract and tariff terms and company-wide policy and training, Comcast's own evidence shows such requirements were in place at least as of the end of the 1997/1998 Audit.
- Comcast has consistently failed – or refused – to provide any meaningful evidence of authorization to attach to PacifiCorp's poles during the timeframe following the 1997/1998 Audit. With the possible exception of

[4] Ex. PC 1.9.

[5] For ease of reference, all future references in this brief to the opposing party will be to Comcast, inclusive of its predecessors-in-interest (TCI Cablevision, Insight Communications Company and AT&T Cable Services/AT&T Broadband), unless otherwise stated, or unless the context merits clarification of the entity at issue for the sake of accuracy. For purposes of this proceeding, it is uncontroverted that Comcast has assumed all liability and responsibility for the obligations and actions of its predecessors.

35 poles, Comcast produced no proof of authorization for the 39,588 poles that PacifiCorp identified and invoiced as unauthorized. This is consistent with Comcast witnesses' testimony establishing that Comcast has no records documenting where or how many attachments it has on PacifiCorp's poles.[7]

- The record evidence fully supports an increase in the number of Comcast's attachments from the 1997/1998 Audit to the 2002/2003 Audit of 39,588. The reasons for the growth were explained in both parties' testimony, and the number was confirmed by the calculations performed at the hearing by counsel for Comcast.[8]
- Finally, the evidence demonstrates that the audit charge passed on to third-party attachers is reasonable and that the charge for unauthorized attachments is reasonable and justified.

II. STATEMENT OF FACTS

The evidence introduced at the hearing in this matter established the following facts.

A. The Accuracy of the 2002/2003 Audit Is Undisputed on the Record

Due to increasing concerns about unauthorized use of its facilities and against the backdrop of major growth in telecommunications activity in Utah, PacifiCorp conducted an audit of its facilities beginning in 2002 ("2002/2003 Audit"). The dispute between the parties here began when Comcast took issue with the results of the 2002/2003 Audit. The

[6] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 18.
[7] August 23, 2004 Transcript of Hearing at 149, lines 23-25 and 150, lines 1-3; August 24, 2004 Transcript of Hearing at 330, lines 20-25.

undisputed record evidence, however, establishes that the results of the 2002/2003 Audit are accurate.

Those results identified 113,976 poles supporting 120,516 attachments made by Comcast. To date, PacifiCorp has billed Comcast for 39,588 poles with unauthorized attachments attributable to Comcast.[9] Not only did Comcast offer no evidence to refute the accuracy of PacifiCorp's Audit, Comcast confirmed the results with its own independent audit conducted by MasTec Services of Canada ("MasTec"), a trusted engineering company that has done work for Comcast in the past. Comcast's Gary Goldstein acknowledged that Comcast places considerable confidence in the work MasTec performs on Comcast's behalf.[10]

1. MasTec Audit

In about September 2003, Comcast retained MasTec to independently verify the results of the 2002/2003 Audit.[11] Comcast never provided PacifiCorp with results of the MasTec Audit for the purpose of refuting unauthorized attachment charges invoiced by PacifiCorp.[12] However, through discovery in this proceeding, PacifiCorp obtained a copy of internal e-mail correspondence stating that the data collected by MasTec appeared to confirm the results of the 2002/2003 Audit in the American Fork district.[13]

The e-mail is dated September 19, 2003 and was written by Steve Brown, Comcast's Director of Construction for the West Division and the individual responsible for overseeing the MasTec Audit. In the e-mail, Mr. Brown informs Comcast employee,

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[8] August 26, 2004 Transcript of Hearing at 814-21.
[9] August 25, 2004 Transcript of Hearing at 649, lines 19-25.
[10] August 23, 2004 Transcript of Hearing at 78, lines 2-10.
[11] August 26, 2004 Transcript of Hearing at 830, lines 2-13; Comcast Request for Agency Action at ¶ 23; Fitz Gerald Initial Testimony, Ex. PC 1.0, at 37.
[12] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 38.
[13] *Id*.

Patrick O'Hare, and Comcast counsel, Michael Woods, that "it appears the pole audit in American Fork hub is accurate." Mr. Brown also indicates that "[w]e have stopped the audits going forward unless it is deemed necessary from all involved as it appears this may be a waste of Comcast funds due to the accuracy of the records."[14]

Mr. Brown testified[15] that, with regard to MasTec's audit in the American Fork district, "[t]he number of attachments within the district seem to correspond with the same number we were coming up with."[16] Mr. Brown also confirmed that the accuracy of records referred to in his e-mail related to the information Comcast obtained from PacifiCorp.[17] As a result, Mr. Brown stopped the audit, stating "we're just wasting our money because we agreed that the number of attachments seemed to be accurate."[18] He also stated that he received no further correspondence from either Mr. Woods, Comcast's attorney dealing with the PacifiCorp dispute, or Mr. O'Hare seeking to reinstate MasTec's efforts.[19]

Despite calling off MasTec's efforts due to the accuracy of PacifiCorp's records, Comcast inferentially referred to the results of the MasTec Audit as justification for bringing the present action. In its Request of Agency Action, Comcast stated that an

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[14] Ex. PC 1.9.
[15] Although Comcast refused to produce Mr. Brown to testify as to matters particularly within his knowledge, excerpts from his deposition testimony were admitted as party admissions.
[16] August 26, 2004 Transcript of Hearing at 831, lines 2-6.
[17] *Id*. at 831, lines 14-17.
[18] *Id*. at 832, lines 22-23. Rather than produce Mr. Brown to provide testimony on the record about his own e-mail correspondence, counsel for Comcast questioned PacifiCorp's Director of Transmission & Distribution Infrastructure Management, Ms. Corey Fitz Gerald about facsimiles (Comcast Ex. 21 and 22) sent to Steve Brown from a MasTec contractor. The cover page to the first facsimile is dated September 5, 2003 and the second is dated September 10, 2003. The dates of the two letters are prior to the date of Mr. Brown's September 19, 2004 e-mail canceling the MasTec audit due to the "accuracy of the records." Accordingly, neither letter had any impact on Mr. Brown's final assessment of the accuracy of PacifiCorp's records or his decision to stop the MasTec audit. Further, the September 10, 2003 e-mail noted that "all the material and data collected will be handed over to Gary Goldstein." As noted herein, Mr. Goldstein testified that he was not involved with Comcast's attempt to refute the results of the 2002/2003 Audit as of June 2004, and he provided no documentation purporting to refute the accuracy of the Audit until July 22, 2004.

audit, apparently by MasTec, had located approximately 8,000 poles not owned by Comcast, but which were erroneously billed to it for supporting unauthorized attachments.[20] However, Comcast never addressed this factual claim in subsequent written or oral testimony, in materials provided during discovery, or in any other evidence offered in this proceeding.

As an exhibit to his written Sur-Rebuttal Testimony, Mr. Goldstein included a list of 22 poles identified in the 2002/2003 Audit which purportedly did not belong to Comcast. Mr. Goldstein testified that those were the poles identified by MasTec as being erroneously billed to Comcast for having unauthorized attachments in connection with the 2002/2003 Audit.[21] Thus, the number of poles Comcast claims were billed in error decreased from 8,000 to 22.

2. 2002/2003 Audit Protocol

The Pole Contact Agreement ("1999 Agreement") between PacifiCorp and Comcast's predecessor, AT&T Cable Services ("AT&T"), imposes no obligation on PacifiCorp to notify Comcast of audits. Despite that, PacifiCorp provided written notification to Comcast of its intent to conduct the 2002/2003 Audit.[22] At Ms. Fitz Gerald's direction, Mr. James Coppedge sent the notification letters to the address provided by AT&T in the 1999 Agreement for legal notification.[23] Mr. Coppedge addressed the letters to Mike Sloan, one of the individuals with whom Ms. Fitz Gerald had negotiated the 1999 Agreement because, during the course of those negotiations, Mr. Sloan informed Mr. Fitz Gerald that she should address all letters sent to AT&T's address

[19] *Id*. at 831, lines 24-25 and 832, lines 1-25.
[20] Comcast Request for Agency Action at ¶ 23.
[21] Goldstein Sur-Rebuttal Testimony, Comcast Ex. 3.4, at 2-3.
[22] Ex. PC 1.4.

for legal notification to his attention.[24] No one from either AT&T or Comcast has ever informed PacifiCorp in writing or otherwise that it wished to receive legal notifications at a different address. Accordingly, PacifiCorp remained contractually obligated to send all such notices to the address set forth in the 1999 Agreement.[25]

In addition to written notification, Ms. Fitz Gerald informed AT&T/Comcast and other companies present during Oregon Joint Use Task Force meetings that PacifiCorp would be conducting a system-wide audit of its entire pole plant. Ms. Fitz Gerald also discussed PacifiCorp's intention to conduct the audit personally with Mike Sloan of AT&T.[26]

At no time did any AT&T representative contact PacifiCorp to request to participate in the 2002/2003 Audit.[27] While it previously acknowledged that such notice was provided,[28] Comcast has subsequently offered testimony in an attempt to dispute this fact. However, Comcast received the same type of notification as Qwest. Yet, Qwest took no issue with the sufficiency of notice it received; in fact, Qwest participated in the 2002/2003 Audit by accompanying contractors hired by PacifiCorp into the field.[29] Because none of the notification letters was returned to PacifiCorp as undeliverable, there is no reason to conclude that Comcast did not receive them.[30]

a. Contractor Selection

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[23] August 25, 2004 Transcript of Hearing at 748, lines 25 and 749, lines 1-6.
[24] Fitz Gerald Sur-Rebuttal Testimony, Ex. PC 1.15, at 4.
[25] Fitz Gerald Sur-Rebuttal Testimony, Ex. PC 1.15, at 4-5; August 25, 2004 Transcript of Hearing at 749, lines 10-12.
[26] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 20.
[27] *Id*.
[28] Comcast Request for Agency Action at ¶ 13.
[29] Fitz Gerald Sur-Rebuttal Testimony, Ex. PC 1.15, at 4.
[30] *Id*. at 4-5.

PacifiCorp hired Osmose Holdings, Inc. ("Osmose") through a competitive bidding process as the contractor to perform the 2002/2003 Audit.[31] In July 2002, PacifiCorp issued a request for proposals ("RFP") to qualified contractors to perform an inventory audit of PacifiCorp's facilities. Specifically, PacifiCorp asked seven contractors to participate in the RFP process. Of those seven, two contractors were selected to make formal presentations.[32] On November 1, 2002, based on Osmose's qualifications and the value and experience it offered at a low cost,[33] PacifiCorp awarded the contract to perform the 2002/2003 Audit to Osmose. Comcast offered no evidence to contest the selection of Osmose as the appropriate choice for the 2002/2003 Audit.

b. Training

Prior to the commencement of the 2002/2003 Audit, Osmose employees were required to attend a three-week training process, which included classroom and field instruction.[34] The topics covered during the training included instruction in the use of IPAQ handheld devices, training in National Electrical Safety Code ("NESC") rules, and training regarding PacifiCorp's construction and distribution standards. Only those employees who passed the training were allowed to work on the 2002/2003 Audit. Based on his 25 years of experience in the telecommunications and cable industry in the construction of communications networks and facilities, Mr. Coppedge, PacifiCorp's Manager of Field Inventory and Inspections, reviewed all the relevant training materials to ensure that the materials adequately addressed the areas covered by the 2002/2003

[31] Coppedge Initial Testimony, Ex. PC 2.0, at 3; August 26, 2004 Transcript of Hearing at 870, lines 5-18.
[32] *Id*.
[33] Coppedge Initial Testimony, Ex. PC 2.0, at 3.
[34] *Id*. at 4.

Audit.[35] In addition, the Customer Acceptance Quality Control ("CAQC") inspectors, the individuals retained by PacifiCorp to ensure a minimum accuracy rate of 97% for the Audit, were required to attend a one-week training session, as well as spend time in the field with current inspectors.[36] The training was far more extensive than that provided by Comcast's witness, Michael Harrelson, in his own training sessions provided to joint use auditors.[37]

c. Data Collection

During the course of the 2002/2003 Audit, the scope of work required that fielders physically visit every distribution pole. A fielder is the auditor, typically an Osmose employee, who collected and entered data collected in the field into an IPAQ handheld device.[38] Fielders were responsible for collecting data associated with the following: the specific licensee attachment, types of equipment, the height of the attachment, any violations associated with the licensee, pole tag information that identifies the pole, GPS coordinates and a photograph of the pole in its current condition.[39] In conducting the pole-by-pole survey, Osmose was provided with digital maps of PacifiCorp's pole locations that were downloaded onto the handheld devices containing FastGate Mobile software.[40]

Once a fielder completed the work packet contained in his handheld device, the data was uploaded to Osmose's database in Buffalo, New York.[41] During this process, the material was subjected to the quality control testing described below. The individual

[35] *Id*.
[36] *Id*.
[37] August 24, 2004 Transcript of Hearing at 411, lines 1-19.
[38] Coppedge Initial Testimony, Ex. PC 2.0, at 5.
[39] *Id*. at 4.
[40] August 25, 2004 Transcript of Hearing at 764, lines 4-11.
[41] *Id*. at 768, lines 3-11

data files were then put into a package and sent to PacifiCorp's Portland, Oregon offices for subsequent quality control testing and entry into JTU, PacifiCorp's joint-use data base.

d. Quality Control

Osmose's contract with PacifiCorp required it to maintain a 97% accuracy rate for the 2002/2003 Audit.[42] The data collected by Osmose went through several rounds of quality control testing. First, after completing a data set for a particular area on the handheld devices, Osmose would conduct its own internal quality control analysis by randomly selecting 10% of the poles in that particular data set and checking to ensure that all the data elements were correct. If Osmose's internal quality control identified that the results were less than 97% accurate, the entire data set was sent back to the field to be redone, and the data was not transmitted to PacifiCorp until it passed with 97% or better accuracy.[43]

Once a data set passed Osmose's quality-control process, it was forwarded to PacifiCorp, where it underwent an additional quality-control process. During the 2002/2003 Audit, PacifiCorp hired contractors from Volt to serve as CAQC inspectors.[44] The CAQC inspectors would take a percentage of the previously quality control-tested data and a percentage of non-quality controlled data and perform additional quality control-testing on the material. If the data did not pass the 97% accuracy threshold, it was not accepted into PacifiCorp's FastGate production server where others would have access to the data and would rely on the information for the generation of reports. Instead, PacifiCorp sent the data back to Osmose to be refielded. Once the data passed

[42] Coppedge Initial Testimony, Ex. PC 2.0, at 7; August 26, 2004 Transcript of Hearing at 994, lines 7-13.
[43] Coppedge Initial Testimony, Ex. PC 2.0, at 5; August 26, 2004 Transcript of Hearing at 874, lines 6-17.

the 97% accuracy threshold, Sara Johnson would begin to run the Mismatch Reports and Exception Reports.[45] These reports are essentially comparisons of the results of the 2002/2003 Audit against the data contained in JTU.[46]

e. Data Entry into JTU

Nothing was updated into JTU at this point. Instead, the Mismatch Report was analyzed to ensure that the data listed in the report was indicative of unauthorized attachments.[47] Ms. Johnson testified at the hearing as to how PacifiCorp conducted this validation. First, she would check to make sure the utility codes were accurate. She would then check to make sure that the reported unauthorized attachment was not subject to an existing or pending permit. Ms. Johnson also compared the data in the Mismatch Report to a Removal Summary Report. The Removal Summary Report documented attachments not found in the 2002/2003 Audit, but which were recorded in JTU. Finally, Ms. Johnson validated the facility coordinates, including pole numbers, to make sure the reported attachments were plotted correctly. Only after the Mismatch Report was validated was the information entered into JTU.[48] Based on the care that Ms. Johnson and others have taken to ensure that joint-use information is accurately input into JTU, Ms. Johnson affirmatively stated that she "stand[s] by the accuracy of the JTU audit."[49]

3. Motivations for the 2002/2003 Audit

PacifiCorp initiated the 2002/2003 Audit to identify the ownership of all third-party attachments to PacifiCorp's poles, the type of attachment, and the location of each

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[44] Coppedge Initial Testimony, Ex. PC 2.0, at 5-6.
[45] Coppedge Initial Testimony, Ex. PC 2.0, at 6; August 26, 2004, Transcript of Hearing at 874, lines 18-25 and 875, lines 1-5.
[46] Coppedge Initial Testimony, Ex. PC 2.0, at 6.
[47] Johnson Initial Testimony, Ex. PC 3.0, at 6.
[48] *Id*. at 7.
[49] August 26, 2004 Transcript of Hearing at 944, line 12.

attachment.[50] The central motivation for conducting the 2002/2003 Audit was the increasing number of observations from PacifiCorp personnel about possible unauthorized attachments being made to PacifiCorp's infrastructure.[51] Additionally, Utah was experiencing a "construction boom" during the period leading up the 2002/2003 Audit.[52] The level of growth occurring in Utah created a corresponding increase in the level of telecommunications activity that PacifiCorp had reason to believe was not properly permitted.

Contrary to the assertions made by Comcast, the 2002/2003 Audit was not conducted to turn PacifiCorp's facilities into a "cash cow."[53] The Audit was necessitated by PacifiCorp's obligations to its customers and third-party attachers, like Comcast, to maintain and protect its distribution facilities.[54] To this end, asset management is a core function of any utility's joint-use program. Utility plant cannot be effectively managed if joint users disregard application and permitting requirements and prevent the pole owner from knowing where and how third parties are using its facilities. It is PacifiCorp's responsibility to its customers to prevent unauthorized use, and the application process is the mechanism by which a pole owner protects its facilities from unsanctioned and potentially unsafe use. Otherwise, PacifiCorp's customers are subsidizing the telecommunications industry's use of electric distribution facilities.[55]

B. The 1997/1998 Audit Established an Accurate Baseline

The results of the 1997/1998 Audit are accurate and serve as the foundation for

[50] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 18.
[51] *Id*. at 19.
[52] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 19; Deffendall Initial Testimony, Comcast Ex. 2 at 6; August 23, 2004 Transcript of Hearing at 159, lines 15-18.
[53] Comcast Pre-Hearing Brief at 3.
[54] Fitz Gerald Rebuttal Testimony, Ex. PC 1.11, at 22-23.
[55] August 26, 2004 Transcript of Hearing at 873, lines 12-25.

PacifiCorp's joint-use data. The accuracy of this baseline is supported by the evidence in this proceeding and has not been refuted by Comcast.

1. 1997/1998 Audit Protocol

Beginning in 1997, PacifiCorp undertook a system-wide pole attachment audit (the "1997/1998 Audit') to ensure the accuracy of its rental records and to ensure that third-party attachers were paying rent for all poles to which such companies were attached.[56] The majority of the Audit was performed in 1997 and 1998, but several aspects of the Audit were not completed until early 1999.[57] PacifiCorp selected a company called the Pole Maintenance Company to assist it in conducting the 1997/1998 Audit.[58] During the 1997/1998 Audit, the contractors went pole by pole and collected information for each individual joint-use pole using handheld devices and PacifiCorp's system maps.[59] PacifiCorp required that its auditor maintain a 97% accuracy rate, and PacifiCorp subjected the work performed by the Pole Maintenance Company to quality-control inspections.[60]

2. Notice of 1997/1998 Audit Provided to Comcast

Despite no contractual obligation to do so, PacifiCorp provided Comcast with ample notification of PacifiCorp's intent to conduct the 1997/1998 Audit and invited them to assist in the validation of the data collected. Ms. Fitz Gerald provided this notice during a series of utility meetings conducted in 1996 throughout PacifiCorp's service

[56] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 14.
[57] August 25, 2004 Transcript of Hearing at 708, lines 23-25 and 709, lines 1-4.
[58] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 16.
[59] *Id*.
[60] August 26, 2004 Transcript of Hearing at 861, lines 2-17; Ex. PC 1.17.

territory in Utah.[61] Comcast's employee, Mr. Goldstein, admitted attending at least one of these sessions during his tenure with Comcast.[62] Mr. Goldstein recalled that he learned at the meeting that PacifiCorp was planning to charge Comcast per attachment, something that would have been impossible to do without first conducting an audit.[63] He also stated that he noticed people in the field tagging PacifiCorp poles after the meeting.[64]

PacifiCorp also sent two separate letters to third-party attachers, including Comcast, in anticipation of the 1997/1998 Audit.[65] The first letter, dated June 25, 1996, invited third parties to assist in the validation of the procedures used for collecting the data and the accuracy of the data collected. Both the June 25, 1996 and the January 17, 1997 letters specifically stated that the attachment inventory resulting from the 1997/1998 Audit would become PacifiCorp's "inventory of record for all future annual pole attachment rental billings."[66] Ms. Fitz Gerald also communicated this fact to third-party attachers that attended the utility meetings.[67] Despite receiving more-than-adequate advance notice of the 1997/1998 Audit and receiving numerous offers to participate in the Audit, Comcast did nothing.[68]

3. Results of 1997/1998 Audit

As a result of the 1997/1998 Audit, PacifiCorp collected pole attachment rental fees for a substantial number of poles being used by third parties which had not been

[61] Fitz Gerald Rebuttal Testimony, Ex. PC 1.11, at 13; Fitz Gerald Sur-Rebuttal Testimony, Ex. PC 1.15, at 2.
[62] Ex. PC 1.2; Fitz Gerald Rebuttal Testimony, Ex. PC 1.15, at 2; August 23, 2004 Transcript of Hearing at 96, lines 3-25.
[63] August 23, 2004 Transcript of Hearing at 98, lines 6-9.
[64] *Id*. at 97, lines 1-6
[65] Fitz Gerald Sur-Rebuttal Testimony, Ex. PC 1.15, at 3; Ex. PC 1.17; August 26, 2004 Transcript of Hearing at 836, lines 22-25 and 837, lines 1-16.
[66] Ex. PC 1.17
[67] August 26, 2004 Transcript of Hearing at 840, lines 6-10.
[68] Fitz Gerald Rebuttal Testimony, Ex. PC 1.11, at 13.

subject to pole attachment rental payments prior to the Audit.[69] PacifiCorp, however, did not assess unauthorized attachment charges after the 1997/1998 Audit. Thus, the 1997/1998 Audit was in effect an "amnesty audit."[70] Mr. Goldstein and other attendees at the 1996 utility meetings were informed that unauthorized attachment charges would not be imposed as a result of the 1997/1998 Audit and that the results of the Audit would be used for PacifiCorp's rental and billing records going forward.[71] TCI did not object to the results of the 1997/1998 Audit, any additional attachments attributed to it as a result of the Audit, or the notion that the Audit results would serve as the foundation for all future PacifiCorp joint-use records.[72] Since the 1997/1998 Audit, Comcast never came forward claiming that it was being charged for too few attachments to PacifiCorp's poles.[73]

The detailed records generated by the 1997/1998 Audit were entered into JTU.[74] JTU was created in 1996, and all of PacifiCorp's previous joint-use records were input into JTU at its creation.[75] The JTU database contains all billing and notification data concerning third-party attachments to PacifiCorp's facilities.[76] PacifiCorp continues to update and carefully maintain the joint-use information contained in JTU in order to ensure that PacifiCorp's joint-use records remain current.[77] Comcast, on the other hand, has no such uniform record-keeping system in place and only maintained records of

[69] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 17.
[70] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 17; Fitz Gerald Rebuttal Testimony, Ex. PC 1.11, at 13; August 26, 2004 Transcript of Hearing at 839, lines 23-25.
[71] August 26, 2004 Transcript of Hearing at 902, lines 1-25 and 903, lines 1-2.
[72] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 18; Fitz Gerald Rebuttal Testimony, Ex. PC 1.11, at 14.
[73] Fitz Gerald Initial Testimony, Ex. PC 1.10, at 18; August 23, 2004 Transcript of Hearing at 199, lines 4-25 and 200, lines 1-5; August 24, 2004 Transcript of Hearing at 362, lines 19-25.
[74] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 16; August 25, 2004 Transcript of Hearing at 726, lines 1-9.
[75] August 25 Transcript of Hearing at 666, lines 3-5; August 26, 2004 Transcript of Hearing at 927, lines 18-20.
[76] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 16-17.

"blanket permits" from the late 1970s and early 1980s, and only for the Salt Lake City area.[78]

4. Evidence Presented by Comcast Fails to Refute the Accuracy of the 1997/1998 Audit

The results of the 1997/1998 Audit established a baseline of 74,000 to 75,000 poles supporting attachments by Comcast in Utah.[79] Although the documentation setting forth these numbers was provided to Comcast during discovery, its own witness admitted that he had not reviewed this material prior to offering his written testimony.[80] When confronted with the fact that there was no basis to doubt the accuracy of the 1997/1998 Audit, Mr. Harrelson, the witness Comcast hired to provide expert opinions concerning thirteen different areas, simply stated: "I have no basis, but I do."[81]

Not only has Comcast failed to offer any evidence refuting the accuracy of the 1997/1998 Audit, it offered no valid excuse for its own inertia. While Mr. Goldstein made affirmative statements about PacifiCorp's permitting processes in the 1970s and 1980s, he maintained that he only had a vague memory of attending a utility meeting in 1996 when he testified: "I recall attending one meeting. Although I cannot recall the exact date or all the issues involved . . . Ms. Fitz Gerald submitted a sign-in sheet . . . that has my name in my handwriting, so I assume I was present . . . but I can't say for sure."[82] Likewise, he was unable to remember receiving notice of utility meeting meetings in 1997, stating "[i]t still doesn't refresh my recollection of receiving a letter or not. It was

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[77] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 16-17.
[78] August 23, 2004 Transcript of Hearing at 75, lines 14-25 and 76, lines 1-4; *Transcript of Hearing, Comcast Cable Communications v. PacifiCorp*, Utah PSC Docket No. 03-035-28, Apr. 6, 2004 at 54 (Attached as Appendix D to PacifiCorp Pre-Hearing Brief).
[79] Ex. PC 16; August 26, 2004 Transcript of Hearing at 862, lines 1-20.
[80] August 24, 2004 Transcript of Hearing at 423, lines 11-15.
[81] *Id*. at 426, line 1.
[82] Goldstein Sur-Rebuttal Testimony, Comcast Ex. 3.4, at 1.

seven years ago."[83] It is odd that Mr. Goldstein would have clear recollection of events occurring in the 1970's and 1980's, but have virtually no memory of the training sessions he has admitted attending in 1996.

In summary, Comcast provided no evidence, either via testimony or documents, of the number of attachments it had on PacifiCorp's facilities as of the end of the 1997/1998 Audit, other than Joanne Nadalin's admission that Comcast was paying for about 75,000 attachments.[84] The 1997/1998 Audit, therefore, provides a solid and unrefuted evidentiary base-line from which the number of unauthorized attachments could be established by comparison to a subsequent audit (the 2002/2003 Audit).

C. During the Relevant Time Period, Clear Application and Permitting Requirements Have Always Been in Place

Prior to the initiation of the 1997/1998 Audit, PacifiCorp began a system-wide effort to standardize its joint-use contracts and improve existing joint use processes in preparation for the expected future growth resulting from the Telecommunications Act of 1996. PacifiCorp implemented its improved procedures for monitoring joint use and pole attachment permitting by educating third-party attachers and confirming its procedures in a standardized joint use agreement and accompanying standard application form.[85]

As a result, PacifiCorp had in place, during the relevant time periods at issue in this proceeding, formalized application and permitting requirements in Utah. This fact is supported by the clear and unambiguous testimony of PacifiCorp's witnesses, as well as documentary evidence in the form of written contracts and correspondence in the record

[83] August 23, 2004 Transcript of Hearing at 97, lines 24-25.
[84] Nadalin Initial Testimony, Comcast Ex. 5.0, at 3; August 24, 2004 Transcript of Hearing at 328, lines 12-20.
[85] Fitz Gerald Sur-Rebuttal Testimony, Ex. PC 1.15, at 13; August 25, 2004 Transcript of Hearing at 651, lines 22-25 and 652, lines 1-6.

in this proceeding. Conversely, Comcast offered no evidence to refute PacifiCorp's factual showing, nor did it offer any evidence that it complied with these requirements after the 1997/1998 Audit until 2002, when Comcast's own testimony indicates it first began complying.

1. 1996 and 1999 Agreements

The terms of two agreements negotiated and executed between PacifiCorp and Comcast put it on notice of and made it contractually obligated to follow PacifiCorp's joint-use application and permitting requirements. These agreements were modeled after PacifiCorp's standardized joint-use agreement, which was created to assist PacifiCorp in streamlining its joint-use requirements throughout its service territories.[86]

On April 23, 1996, PacifiCorp and Comcast's predecessor, Insight Communications Company ("Insight"), entered into a Pole Contact Agreement (the "1996 Agreement"). Sections 2.1 to 2.3 of the 1996 Agreement provided express and unambiguous requirements for filing applications and obtaining permits prior to making attachments. Specifically, Section 2.1 provided that when making attachments to PacifiCorp poles, Insight "shall make written application for permission to do so, in the form and in the number of copies as from time to time prescribed by Licensor." Section 2.3 provided that additional equipment could not be attached "without first making application for and receiving permission to do so in accordance with Subsection 2.1." In November 1998, TCI undertook Insight's rights and obligations under the 1996 Agreement.[87]

[86] August 25, 2004 Transcript of Hearing at 684, lines 2-6; August 26, 2004 Transcript of Hearing at 847, lines 21-25 and 848, lines 1-4.
[87] Comcast Exhibit 5.2, Notice Letter of Sale, Trade, or Acquisition of a Cable System.

Subsequently, PacifiCorp and Comcast's predecessor, AT&T, entered into a Pole Contact Agreement on December 20, 1999 ("1999 Agreement"). The negotiations that led to the 1999 Agreement had begun in 1996 between TCI and PacifiCorp. However, due to a consistent lack of communication from TCI's representatives, PacifiCorp was unable to formalize an agreement until almost four years later.[88] The application and permitting terms of the 1996 Agreement are virtually identical to those contained in the 1999 Agreement, and both the 1996 and 1999 Agreements contain application procedures and requirements for initial and overlash attachments, provide for charges for unauthorized attachments, and allow PacifiCorp to recover the costs of inspections of joint-use facilities.[89] Additionally, both Agreements contain provisions confirming that each Agreement supersedes all prior agreements and provisions disallowing oral modification to the terms of each contract. Comcast offered no evidence of written modification to either the 1996 Agreement or the 1999 Agreement.

Claims that changes of ownership somehow excused successors from their contractual obligations ring hollow. The cable operators subject to both agreements – Insight, TCI, and AT&T - can hardly be characterized as "mom and pop" operations. At the time TCI undertook Insight's obligations pursuant to the 1996 Agreement, it was the largest cable operator in Utah, and Insight was the second largest in the state.[90] After the two operators swapped systems, Insight became the 8th largest cable operator in the United States, with 1.1 million subscribers in 1999.[91] Immediately prior to the merger

[88] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 10; August 25, 2004 Transcript of Hearing at 684, lines 7-23.
[89] August 26, 2004 Transcript of Hearing at 911, lines 16-25 and 912, lines 1-12.
[90] Vince Horiuchi, *TCI Hits Utah Channel Suffers With a Tidal Wave of Possibilities*, SALT LAKE CITY TRIB., April 5, 1998, Business at E1.
[91] *Insight Communications Launches Diva's VOD Service in Columbus, Ohio*, BUS. WIRE, December 15, 1999.

with AT&T, TCI was the second largest cable operator in the United States, with approximately 10.5 million subscribers.[92] At the time it entered into the 1999 Agreement, AT&T had spent $100 million dollars in one year to become the largest cable operator in the United States.[93] Accordingly, TCI, Insight, and AT&T were three large and sophisticated cable companies that entered into a business arrangement with PacifiCorp with their eyes open, and it was not unreasonable for PacifiCorp to expect each company to understand and comply with the obligations derived from mutually beneficial negotiations.

2. Tariff Obligations Required Applications and Permits

PacifiCorp's Electric Service Schedule No. 4 on file with the Commission contains three key elements: 1) the requirement that cable operators submit an application and receive approval prior to attaching to PacifiCorp's poles; 2) the requirement that the Parties execute a Joint Facilities Agreement; and 3) the incorporation of the terms, conditions, and liabilities contained in the Parties' Joint Facilities Agreement into the tariff.[94] PacifiCorp filed the same Schedule No. 4 with the Commission from 1997-2001.[95] Accordingly, PacifiCorp's tariff filings required Comcast to make application for attachments.

3. Course of Dealing and Continuing Obligations

In December 2001, PacifiCorp notified AT&T of its intent to terminate the 1999 Agreement effective December 31, 2002 pursuant to Section 10.1 of the Agreement.[96]

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[92] Corey Grice, *AT&T Signs Pacts with TCI Cable Partners*, CNET News, January 8, 1999.
[93] Vince Horiuchi, *New Dishes Pressure Cable Companies*, SALT LAKE CITY TRIB., Dec. 11, 1999, at D8; Charles Haddad, *Cox Deal May Signal Fade Out of Mergers*, PROVIDENCE J. BULL., at July 11, 1999, at 1F.
[94] See Exhibit G to PacifiCorp's Pre-Hearing Brief.
[95] PacifiCorp filed the Schedule No. 4 sheets unchanged as part of complete refilings of tariffs in connection with subsequent PacifiCorp general rate cases.
[96] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 11.

Although the 1999 Agreement had only been executed between the parties three years prior to its termination, it was based on a template that had been in existence for seven years. Because of the obstacles encountered by PacifiCorp in negotiating with TCI in 1995, the template had already been in existence for approximately four years at the time the 1999 Agreement was executed. By 2001, PacifiCorp saw the need to negotiate a new agreement reflecting developments in the industry and the law.[97] PacifiCorp had hoped to negotiate a new agreement with AT&T prior to the termination date for the 1999 Agreement and sent a draft of the new agreement to AT&T representatives on April 18, 2002. Unfortunately, AT&T failed to respond to repeated attempts by PacifiCorp to initiate negotiations for eight months, and the parties have since not been able to reach an agreement as to the terms of the new agreement.[98]

Therefore, since December 2002, the parties have continued to operate pursuant to the terms of the 1999 Agreement by operation of an established course of dealing.[99] Pursuant to the course of dealing established by the parties, PacifiCorp's application and permitting requirements have remained in place.[100] In accordance with those procedures, Comcast continues to make and PacifiCorp continues to process applications for attachments, with the exception of when there was a dispute over unpaid invoices.[101] Comcast is also continuing to pay annual rental fees for its attachments to PacifiCorp's facilities. Rodney Bell, Comcast's Project Manager for Construction, acknowledged that PacifiCorp has never denied Comcast access to PacifiCorp's poles prior to or after the

[97] August 26, 2004 Transcript of Hearing at 845, lines 16-19.
[98] *Id*.
[99] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 12; August 26, 2004 Transcript of Hearing at 847, lines 4-20.
[100] August 25, 2004 Transcript of Hearing at 691, lines 7-18.
[101] August 26, 2004 Transcript of Hearing at 847, lines 4-20.

termination of the 1999 Agreement, with the exception of when there was a dispute over unpaid invoices.[102]

There have been no "new terms" added to the parties' relationship since December 2002. Prior to that, beginning in early 2002, PacifiCorp began requesting application and inspection fees.[103] PacifiCorp provided written notice on April 17, 2002 to third-party attachers of its intent to charge these fees.[104] A copy of the notification letter was also provided to Martin Pollock, a Comcast Permit Coordinator, on July 15, 2002.[105] As explained in the notice letter, PacifiCorp believed that it had the authority to charge application fees pursuant to provisions of the 1999 Agreement allowing for cost recovery relating to PacifiCorp's accommodation of new and existing attachments.[106] The application and inspection fees were thus initiated prior to the termination of the 1999 Agreement. Because these fees were charged pursuant to PacifiCorp's reliance on contractual provisions contained in the 1999 Agreement and were initiated while the Agreement was still in effect – indeed, well prior to its termination - the fees became part of the parties' terms under the 1999 Agreement and were later incorporated in the course of dealings between Comcast and PacifiCorp.

In reliance on Section 3.3 of the 1999 Agreement, PacifiCorp also began charging annual rental fees on a per-attachment, rather than a per-pole, basis. Section 3.3 provides that the rental amounts for annual rental fees and unauthorized attachment charges may be "subject to review and prospective adjustment by Licensor upon ninety (90) days written notice to Licensee." The 1999 Agreement set forth a rental rate of $4.65 per pole.

[102] August 23, 2004 Transcript of Hearing at 264, lines 8-12.
[103] August 26, 2004 Transcript of Hearing at 914, lines 23-25 and 915, lines 1-2.
[104] Late filed Ex. PC 1.28.
[105] *Id*.

On May 27, 2003, PacifiCorp provided written notice to Comcast and other cable operators of its intent to file with the Commission a request for modification of its Electric Schedule No. 4 Tariff, cable television pole attachment rental rate.[107] The May 27, 2003 letter provided third-party cable operators notice of the proposed change from $4.65 per pole to $9.20 per attachment to be effective January 1, 2004. This letter was sent in advance of PacifiCorp's filing its request with the Commission on October 2, 2003. PacifiCorp's October 2nd filing included a statement that notification was provided to cable operators attached to PacifiCorp's poles and contained a spreadsheet listing all the cable operators sent notification letters.[108]

Imposing a per-attachment charge was necessary in order to prevent electric customers from subsidizing Comcast's new build and upgrade in Utah. Increased telecommunications activity has resulted in an increased number of attachments being made to PacifiCorp's poles. Indeed, Mr. Harrelson testified that he remembered "looking at information that showed as many as four attachments on a single pole."[109] The increasing number of attachments created additional burdens on PacifiCorp's poles, the costs of which were not recoverable through a per-pole charge.

Not only does Comcast remain obligated to PacifiCorp under the parties' implied contract, it also remains obligated under Section 8.7 of the 1999 Agreement. That section provides that "any termination of this Agreement shall not release Licensee from any liability or obligations hereunder . . . which may have accrued or may be accruing at the

[106] August 26, 2004 Transcript of Hearing at 910, lines 6-13.
[107] Late filed Ex. PC 1.26.
[108] Late filed Ex. PC 1.27.
[109] August 24, 2004 Transcript of Hearing at 424, lines 20-22.

time of termination."[110] Ms. Fitz Gerald testified that as PacifiCorp's primary negotiator of the 1999 Agreement, her interpretation of that section is that "Comcast was not relieved of its obligations under the terms of this contract regardless of its termination."[111]

4. Joint Pole Notice

The existence of PacifiCorp's application requirements and procedures is also documented by the creation and distribution of a new application form in 1995. PacifiCorp provided Comcast with written notice of the requirement to use PacifiCorp's form as early as October 19, 1995.[112] Attached to the notification letters were copies of the application form, titled "Joint Pole Notice."[113] Ms. Fitz Gerald also distributed copies of the application form at utility meetings she conducted with third-party attachers in Utah in 1996 and 1999. In fact, one TCI employee requested and was provided a pad of Joint Pole Notices to distribute to his employees in the field.[114] In addition, the same application form was incorporated into the 1999 Agreement between AT&T and PacifiCorp. In light of the following, Mr. Bell's contention that he had "no idea PacifiCorp even had an application form"[115] and Mr. Pollock's statement that he was not aware of a permitting process[116] are at best a symptom of internal confusion and inadequate training within Comcast.

[110] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 12.
[111] August 26, 2004 Transcript of Hearing at 915, lines 16-18.
[112] Ex. PC 1.24; August 23, 2004 Transcript of Hearing at 177, lines 12-19.
[113] *Id*.
[114] Fitz Gerald Sur-Rebuttal Testimony, Ex. PC 1.15, at 2; Ex. PC 1.16.
[115] Bell Initial Testimony, Comcast Ex. 1, at 5.
[116] August 23, 2004 Transcript of Hearing at 177, lines 23-25 and 178, lines 1-4.

5. Joint Use Training

In addition to negotiating agreements with third-party attachers and repeatedly distributing the application forms, PacifiCorp conducted training for both its employees and employees of third parties regarding the specifics of PacifiCorp's joint-use application and permitting procedures. PacifiCorp conducted joint-use training with its own employees in PacifiCorp's district offices throughout Utah beginning in 1996.[117] Specifically, PacifiCorp targeted its application and permitting training to estimators, operations clerks supporting the estimators, and operations managers overseeing the estimators because these were the individuals in the field offices responsible for the application and permitting aspects of joint use.[118] This training consisted of a review of PacifiCorp's standardized joint-use agreement, instruction on the use of JTU, and instruction on the use of PacifiCorp's application form.[119]

As a result of this training, Ms. Fitz Gerald testified that she is not aware of any districts that approved attachments to PacifiCorp's poles on an informal basis after 1996.[120] Rather, third-party attachers would submit applications to PacifiCorp estimators in the district offices, and those individuals would then enter all applications received by third-party attachers into JTU.[121] Accordingly, PacifiCorp's main offices in Portland were able to monitor and keep track of joint-use activities in Utah.[122] In fact, after the training sessions, Ms. Fitz Gerald testified that she received consistent feedback from

[117] August 25, 2004 Transcript of Hearing at 667, lines 8-16.
[118] August 25, 2004 Transcript of Hearing at 671, lines 3-6; August 26, 2004 Transcript of Hearing at 789, lines 20-25 and 790, lines 1-21.
[119] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 26.
[120] August 26, 2004 Transcript of Hearing at 901, lines 1-9.
[121] August 25, 2004 Transcript of Hearing at 664, lines 14-17 and 666, lines 6-11.
[122] August 25, 2004 Transcript of Hearing at 665, lines 21-25 and 666, lines 1-11; August 26, 2004 Transcript of Hearing at 899, lines 10-14.

individuals in the field concerning possible unauthorized activity occurring on PacifiCorp's facilities.[123]

Regular interaction with PacifiCorp estimators and operations clerks on joint-use issues is indicative that PacifiCorp district personnel not only understood PacifiCorp's joint-use policies, but were implementing these policies, despite a lack of compliance on the part of TCI and other third-party attachers.[124] It was in response to the concerns of non-compliance raised by actual operations personnel, such as linemen, that PacifiCorp conducted utility meetings with third-party attachers in both 1996 and 1999, despite having already provided written notice of the requirement to use the application form. In addition, the concerns raised by field personnel partly led to the 2002/2003 Audit.[125]

PacifiCorp held the utility meetings in order to review its joint-use policies with third-party attachers.[126] PacifiCorp also conducted the meetings in order to erase any confusion that might have existed as a result of any perceived past inconsistency in PacifiCorp's prior joint-use practices. Specifically, Ms. Fitz Gerald reviewed with third parties the application and permitting requirements contained in PacifiCorp's standardized joint-use agreement and instructed third parties on the use of PacifiCorp's application form.[127] TCI was provided with written notice of these meetings and sent representatives, including Mr. Goldstein, to at least one such meeting.[128]

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[123] August 25, 2004 Transcript of Hearing at 672, lines17-23. Comcast attempted to suggest that Ms. Fitz Gerald acknowledged that PacifiCorp field personnel: i.e.; persons actually working on electric facilities in the field, had some responsibility for approving applications. Ms. Fitz Gerald, however, made clear that "field personnel" meant only PacifiCorp's "field officers," i.e., administrative personnel with inside office duties. August 26, 2004 Transcript of Hearing at 789, lines 13-25 and 790, lines 1-21.
[124] August 26, 2004 Transcript of Hearing at 901, lines 11-25 and 902, lines 1-2.
[125] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 19.
[126] August 26, 2004 Transcript of Hearing at 900, lines 5-8.
[127] Fitz Gerald Initial Testimony, Ex. PC 1.0 at 26; Fitz Gerald Sur-Rebuttal Testimony, Ex. PC 1.15, at 2.
[128] Ex. PC 1.2.

In 2002, after the Transmission and Distribution ("T & D") Infrastructure Management Department was created to handle permit application processing in Portland, Ms. Fitz Gerald trained T&D Infrastructure employees as to the terms contained in PacifiCorp's standard template pole attachment agreements. These training sessions lasted four hours, and the training involved a review of the meaning and application of every provision of the agreement.[129]

6. Birchall E-mail

In response to a discovery request from PacifiCorp, Comcast provided a copy of an e-mail dated December 22, 1999 from Heather Birchall of the Fossil Creek Land Company to Corey Fitz Gerald.[130] In this e-mail, Ms. Birchall inquired about applications for attachments she submitted for the Ogden, Utah area. She also asked for some additional information about PacifiCorp's permitting process and requirements. In response to her inquiry, Ms. Fitz Gerald cited to a provision in the 1999 Agreement and stated the application requirements apply to both new and existing attachments. Comcast witness, Martin Pollock, identified Fossil Creek Land Company as an agent that acted on behalf of Comcast, to "acquire land arrangements and make existing and new overlash attachments for pole mounts."[131]

Despite making claims in their written testimony that PacifiCorp had no application requirement or process, both Mr. Pollock and Mr. Goldstein acknowledged at the hearing that it appears that Ms. Birchall knew that PacifiCorp had an application requirement for both new and existing attachments in 1999.[132] The exchange between

[129] Fitz Gerald Rebuttal Testimony, Ex. PC 1.11, at 7.
[130] PacifiCorp Exhibit 11.
[131] August 23, 2004 Transcript of Hearing at 186, lines 10-14.
[132] *Id*. at 86, lines 1-4 and 186, lines 18-21.

Ms. Fitz Gerald and Ms. Birchall demonstrates yet another instance where PacifiCorp's pole attachment applications requirements were carefully explained to Comcast. It also demonstrates that those responsible for making attachments on behalf of Comcast knew of PacifiCorp's application and permitting requirements. What remains a mystery is why Mr. Bell and Mr. Pollock did not become aware of these requirements until 2000 and 2002, respectively.

7. Evidence Presented by Comcast Fails to Refute the Existence of PacifiCorp's Application and Permitting Requirements

Comcast provided no credible evidence refuting the existence of a permitting process during the relevant time period. Rather, the testimony provided by Comcast's witnesses is replete with inconsistencies. The one thing that does become clear from the testimony is that, during the relevant time period, there was a consistent lack of training and oversight of Comcast personnel responsible for joint use.

a. Changing Testimony

In his written testimony, Mr. Bell speaks of his "understanding" that overlashing equipment to existing attachments did not require permits.[133] However, upon cross-examination, he admitted that his "understanding" was derived from a prior job he had held from 1993 to 1995, not from any examination of the 1996 Agreement between Insight and PacifiCorp, which was adopted by TCI in 1998, the 1999 Agreement between PacifiCorp and AT&T, or any subsequent conversations with PacifiCorp or Comcast personnel.[134]

Mr. Pollock also offered written testimony about PacifiCorp's pole attachment application procedures that was proven inaccurate or false upon cross-examination.

[133] Bell Initial Testimony, Comcast Ex. 1, at 4.

While initially asserting that PacifiCorp had no pole attachment application process in place in 1999,[135] Mr. Pollock conceded on cross-examination that his prior statement was not accurate. In reality, Mr. Pollock had no involvement with pole attachment permitting from 1999-2002. Accordingly, he had no knowledge of PacifiCorp's application requirements during that time period because he worked solely on underground issues.[136] In direct contrast to his written testimony, Mr. Pollock also stated during cross-examination that it was his assumption Comcast was making application for both new and overlash attachments from 1999-2002.[137]

b. Lack of Training and Oversight for Comcast Employees

Despite offering written testimony about PacifiCorp's application and permitting procedures and despite attending at least one utility meeting where permitting procedures were discussed, Mr. Goldstein acknowledged at the hearing that he had no actual knowledge of PacifiCorp's application and permitting procedures after 1989.[138] Similarly, Mr. Bell acknowledged that although his job duties include managing the Comcast employees responsible for obtaining permits for attachments, he has not received any training from Comcast with respect to permitting procedures for new attachments, and he was unaware of any such training provided by Comcast to its employees.[139] Mr. Bell also admitted that no one from Comcast made any attempt to explain to him the terms contained in the 1999 Agreement or the implications of the Agreement.[140] Accordingly, Mr. Bell has admitted that for at least five years, he and his

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[134] August 23, 2004 Transcript of Hearing at 235-238.
[135] Pollock Initial Testimony, Comcast Ex. 6, at 8.
[136] August 23, 2004 Transcript of Hearing at 183, lines 18-25; 184, lines 1-25; 187, lines 21-25.
[137] *Id*. at 184, lines 12-25.
[138] *Id*. at 83, lines 6-14.
[139] *Id*. at 280, lines 15-23.
[140] *Id*. at 281, lines 2-7.

subordinates were operating unchecked pursuant to erroneous assumptions made prior to two contractual agreements binding Comcast to clear application and permitting requirements. This fact is bolstered by the written and oral testimony of Mr. Pollock, Mr. Bell's supervisee. Mr. Pollock admitted that he, like Mr. Bell, received no training from his predecessor or anyone else at Comcast since starting in his position in 1999.[141]

Even after personally receiving a copy of PacifiCorp's application form in 2000 and being told that the form should be used when making attachments to PacifiCorp's facilities, Mr. Bell did not give Mr. Pollock a copy of the application form until 2002.[142] And in written testimony, Mr. Bell claimed that he provided a copy of PacifiCorp's application form to Sheryl Pehrson, Comcast's Permit Coordinator for new build, soon after receiving the form from PacifiCorp and that Comcast then began complying with application requirements.[143] However, upon cross-examination, Mr. Bell stated he in fact had no knowledge whether or not Ms. Pehrson or others responsible for obtaining permits for new build were using the form prior to or after he provided it to them.[144] Unfortunately, Comcast chose not to produce Ms. Pehrson at the hearing and failed to produce any written testimony from her to verify Mr. Bell's rather ambiguous claims or to offer clarification on these issues.

c. No Testimony From Comcast Employees Responsible for Obtaining Permits for New Build

Not only did Comcast fail to offer testimony from Sheryl Pehrson, it failed to provide any testimony from employees responsible for permitting initial attachments and

[141] *Id*. at 178, lines 1-25; 179, lines 1-4; Pollock Rebuttal Testimony, Comcast Ex. 6.5, at 3.
[142] Bell Initial Testimony, Comcast Ex. 1, at 5, Pollock Initial Testimony, Comcast Ex. 6, at 8; August 23, 2004 Transcript of Hearing at 188, lines 17-21.
[143] Bell Initial Testimony, Comcast Ex. 1, at 5; August 23, 2004 Transcript of Hearing at 242, lines 18-23.
[144] August 23, 2004 Transcript of Hearing at 241, lines 20-24.

failed to enter into evidence any copies of applications for initial attachments to demonstrate compliance with PacifiCorp's requirements before or after the 1997/1998 Audit.[145] Instead, the only evidence of compliance offered by Comcast is in the form of Mr. Bell's unsupported speculation that Comcast's new-build Permit Coordinators began using PacifiCorp's application form at some point in 2001 after he provided it to them.[146] However, Mr. Bell subsequently admitted that he has no actual knowledge of when, or even if, the new-build group began submitting applications for attachments to PacifiCorp, contradicting his prior written and sworn oral testimony.[147]

d. Comcast's Disregard for PacifiCorp's Requirements

The fact that Comcast chose to disregard the established joint-use policies of PacifiCorp and ignore Comcast's contractual obligations does not negate the existence of PacifiCorp's requirements. The only thing that is clear from the evidence offered by Comcast is that no one at Comcast made any real effort to ensure that its employees were complying with contractual obligations to make applications and obtain permits for both new attachments and overlashes. Mr. Pollock's testimony provides ample illustration of this fact.

Mr. Pollock testified that while he was responsible for obtaining permits for Comcast's underground work from 1999-2002, he would make contacts with individual local governments in order to learn about the processes and procedures he should be following. However, Mr. Pollock has no recollection of whether he engaged in similar

[145] Comcast provided only what it claimed were "Exhibit A" authorization forms from the late 1970s and early 1980s for 35 poles in the Salt Lake metro area, all from Mr. Goldstein's files.
[146] August 23, 2004 Transcript of Hearing at 241, lines 24-25.
[147] *Id*. at 247, lines 20-25 and 248, lines 1-2.

activities once he became responsible for obtaining permits for aerial attachments to PacifiCorp's poles.[148]

Comcast's continuing behavior proves its lack of concern for PacifiCorp's application processes. On February 24, 2004, PacifiCorp provided written notification to Comcast of the implementation of a new application form.[149] The letter provided a copy of the application form and included detailed instructions on how to complete the form.[150] The letter also stated that the change "will take effect immediately."

Despite the fact that PacifiCorp sent this notification to Comcast, and then subsequently provided a copy of the new form personally to Mr. Pollock in March 2004, Mr. Pollock did not begin using the form until several months later. The reason cited by Mr. Pollock for his delay in complying with PacifiCorp's requirements was that no one told him to start using the form.[151]

D. The Evidence Supports the Increased Number of Attachments Discovered by Comparing the 1997/1998 and 2002/2003 Audits

The calculations made by both PacifiCorp and Comcast during this proceeding support the increased number of Comcast attachments in the time period between the 1997/1998 Audit and the 2002/2003 Audit. During the same time period, there was an increase in PacifiCorp's and Comcast's customer base stemming from the construction boom experienced in Utah. This corresponded with a tremendous growth in telecommunications activity throughout the United States as a result of the Telecommunications Act of 1996. Comcast provided no credible evidence pertaining to

[148] *Id*. at 217, lines 5-14.
[149] Ex. PC 1.5; Transcript of August 23, 2004 Hearing at 198, lines 2-13.
[150] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 24; Ex. PC 1.5.
[151] August 23, 2004 Transcript of Hearing at 197, lines 11-22.

the scope of its upgrade or the scope of new build in Utah to contradict the evidence presented by PacifiCorp.

1. The Calculations Conducted By Both PacifiCorp and Comcast Confirm the Increased Number of Comcast Attachments

The results of the 1997/1998 Audit corroborate the increase in the number of Comcast attachments made prior to the 2002/2003 Audit. While PacifiCorp did not maintain contemporaneous paper records of the results of the 1997/1998 Audit due to the volume of data involved, it is able to recreate the results from the electronic records contained in the JTU system. The recreation is possible by comparing the billing records for Comcast just prior to the uploading of the 2002/2003 Audit data with the data in the JTU system after the 2002/2003 Audit.[152] This results in a list of poles supporting Comcast attachments in the JTU system prior to the 2002/2003 Audit.[153]

During discovery in this proceeding, PacifiCorp undertook this data recreation and provided a printout of the results to Comcast.[154] The analysis indicated that there were between 74,000 and 75,000 poles supporting attachments made by Comcast prior to the 2002/2003 Audit. This number reflects the number of poles with Comcast attachments detected as a result of the 1997/1998 Audit and any subsequent applications made by Comcast prior to 2002.[155] It is no coincidence that Comcast's own witnesses have acknowledged in written and oral testimony that prior to the 2002/2003 Audit, Comcast was being billed and was paying rent for attachments to approximately 75,000

[152] August 24, 2004 Transcript of Hearing at 420, lines 7-25.
[153] August 26, 2004 Transcript of Hearing at 862, lines 1-13.
[154] Ex. PC 16.
[155] August 26, 2004 Transcript of Hearing at 862, lines 16-20.

poles.[156] No one at Comcast, not even its expert witness, reviewed or refuted the JTU data.

As demonstrated at the hearing by counsel for Comcast and Ms. Fitz Gerald, the accuracy of the 1997/1998 Audit is further supported by taking the number of poles Comcast is currently attached to and subtracting from that number the number of poles billed as unauthorized.[157] As of August 24, 2004 PacifiCorp has on record that Comcast is attached to 113,976 total poles and maintains 120,516 total attachments to those poles. To date, Comcast has been billed for 42,504 unauthorized attachments. However, PacifiCorp has identified 2,916 of the 42,504 attachments that were billed in excess of one attachment per pole.[158] Thus, there are a total number of 39,588 poles with unauthorized attachments that have been billed to date. Subtracting the number of poles supporting Comcast un authorized attachments from the total number of poles supporting attachments by Comcast yields 74,388 poles. This number, in turn, corresponds with the number of attachments billed to Comcast as a result of the 1997/1998 Audit, and was corroborated by Joanne Nadalin's testimony.[159]

2. Evidence of Growth in Utah and in the Communications Industry

Beginning in the late 1990s and continuing through today, there has been a level of unprecedented growth occurring throughout PacifiCorp's service territory in Utah.[160] This has been accompanied by what Comcast termed a "construction boom" throughout

[156] Nadalin Initial Testimony, Comcast Ex. 5, at 3; August 24, 2004 Transcript of Hearing at 361, lines 24-25 and 362, lines 1-9.
[157] August 26, 2004 Transcript of Hearing at 814-821.
[158] August 25, 2004 Transcript of Hearing at 649, lines 19-25. PacifiCorp is already in the process of correcting this error.
[159] August 26, 2004 Transcript of Hearing at 863, lines 5-25 and 864, lines 1-10.
[160] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 19.

the state.[161] Both PacifiCorp and Comcast have benefited from this growth by virtue of an increased customer base and resulting revenue. In conducting an analysis of its own customer growth in the Salt Lake Valley, Ogden, Layton, and American Fork Districts from 1999-2003, PacifiCorp concluded that it added 38,000 new residential customers.[162] It would follow that as the largest cable provider in Utah and the United States, Comcast would have experienced a similar increase in new customers.

The developments in Utah also corresponded with enormous growth occurring in the telecommunications industry during the same time period as a result of the passage of the Telecommunications Act of 1996. The Telecommunications Act increased competition among providers of communications services and helped spur the development of new and advanced services. Industry statistics demonstrate the infrastructure expansion of the cable industry from 1998-2002 in response to competitive pressure by satellite providers.[163] The National Cable and Telecommunications Association ("NCTA") reported that cable expenditures increased from $5.6 billion in 1997 to more than $16 billion in 2001.[164] The Federal Communications Commission has also documented the increased growth in the cable industry, reporting that the number of homes passed by cable systems increased by 2% per year from 1998-2001.[165]

The number of new attachments that were discovered by PacifiCorp's 2002/2003 Audit is indicative of the fact that Comcast expanded its system in line with the rest of the cable industry. Indeed, it is fully consistent with the exponential growth of Comcast's

[161] Deffendall Initial Testimony, Comcast Ex. 2, at 6.
[162] August 26, 2004 Transcript of Hearing at 840, lines 11-25 and 841, lines 1-14.
[163] Fitz Gerald Sur-Rebuttal Testimony, Ex. PC 1.15, at 11.
[164] Ex. PC 1.21.
[165] *Annual Assessment of Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, MB Docket No. 03-172 (rel. Jan. 28, 2004)(Table 1); Ex. PC 22.

network nationwide. In just two years, between 2002 and 2004, Comcast upgraded more than 80,500 miles of its systems to deploy expanded services sooner.[166] Additionally, Comcast's average expenditures used for upgrades and construction of new systems equated to an average expenditure of $3 billion in three years.[167]

3. Drop Poles and Interset Poles

Given the "construction boom" in Utah and resulting increased customer base during the relevant time period, attachments required to reach these customers using drop poles[168] would account for a substantial portion of the unauthorized attachments made by Comcast after the 1997/1998 Audit.[169] Comcast's own expert witness acknowledged this fact in his Initial Testimony.[170] This is a particular concern in light of the fact that cable operators typically hire contractors to do new service work. These contractors are rarely held accountable for obtaining authorization for attachments made to drop poles. Rather, they are paid in a manner that incentivizes speed over accuracy.[171] Indeed, PacifiCorp personnel have been told by contractors working for Comcast that they were given no authority to perform required make-ready work and were told to install facilities as fast as possible and in any way possible.[172]

Mr. Harrelson was correct in stating "a service provider must hook up a customer very quickly after a request for service comes in."[173] It is precisely for this reason that PacifiCorp and Comcast negotiated for a provision in the 1999 Agreement that allowed

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[166] Comcast March 12, 2004 Annual Report (10-K) at 28.
[167] *Id*. at 36.
[168] The term "drop poles" refers to the poles placed between mainline distribution or transmission poles and a customer in order to maintain adequate clearances between the two points and to serve the customer.
[169] Fitz Gerald Rebuttal Testimony, Ex. PC 1.11, at 26.
[170] Harrelson Initial Testimony, Comcast Ex. 4, at 38.
[171] Fitz Gerald Rebuttal Testimony, Ex. PC 1.11, at 26; Coppedge Sur-Rebuttal Testimony, Ex. PC 2.6, at 5-6; Jackson Rebuttal Testimony, Ex. PC 9.0, at 10.
[172] Lund Sur-Rebuttal Testimony, Ex. PC 4.7, at 4.

Comcast to make an initial attachment one day in advance of submitting an application for the attachment. This accommodation, however, does not in any way relieve Comcast of its obligation to submit an application for the attachment. Mr. Harrelson confirmed that his analysis of the 1999 Agreement led him to the conclusion that attachments made to drop poles must be permitted.[174]

While stating that hooking up new customers may require an attachment to a drop pole, Mr. Bell stated he did not know whether the installers report when they make such an attachment or whether applications are made, as he is not responsible for hooking up new customers.[175] Mr. Goldstein also stated that there could be drop poles that Comcast would need to make attachments to in order to serve new customers. However, his work in Comcast's design department did not include designing plant for hooking up individual customers. Accordingly, like Mr. Bell, he could not provide a number of attachments made to drop poles since 1999.[176] Additionally, Mr. Harrelson never saw any records of how many drops poles Comcast has attached to since the 1997/1998 Audit.[177] Lack of reviewing critical data, however, did not deter Mr. Harrelson from opining, without any demonstrable support, that Comcast did not make 35,000 attachments since the 1997/1998 Audit.

In addition to the attachments made to drop poles, both Mr. Bell and Mr. Goldstein testified that Comcast comes across new poles set by PacifiCorp in the course of conducting its upgrade to which it must make an initial attachment.[178] These poles are

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[173] Harrelson Initial Testimony, Comcast Ex. 4, at 38.
[174] August 24, 2004 Transcript of Hearing at 501, lines 19-25 and 502, lines 1-11.
[175] August 23, 2004 Transcript of Hearing at 257, lines 3-15.
[176] *Id*. at 110, lines 6-25.
[177] August 24, 2004 Transcript of Hearing at 503, lines 2-8.
[178] August 23, 2004, Transcript of Hearing at 110, lines 2-5 and 255, lines 18-25.

often called "interset" or mid-span poles and are typically set between two existing poles to maintain mid-span clearance.[179] Because Mr. Goldstein's duties during the relevant time period are limited to designing plant rather than permitting, he has no knowledge of whether Comcast contractors in the field bother to make applications for such attachments. Mr. Bell's testimony is likewise unenlightening, as he claims to have no responsibility for this aspect of the upgrade and could not say whether Comcast made application for these attachments.[180]

4. No Evidence Offered by Comcast Regarding New Build in Utah or the Scope of Upgrade

Comcast has conclusively admitted in writing during this proceeding that its upgrade and attachments to PacifiCorp's facilities require substantial "new build" attachments to poles. In bringing its Motion for Immediate Relief, Comcast averred that it was unable to "build out facilities to serve new areas" or "to bring new customers on the network" as a result of PacifiCorp's refusal to process applications in the face of mounting past due invoices.[181] Mr. Bell has also testified that during the two-month period when PacifiCorp stopped processing permits, Comcast was prevented from building approximately 400 miles of plant. Comcast's plea for help in its Motion and Mr. Bell's written testimony flatly contradict the assertions subsequently made by both Mr. Bell and Mr. Goldstein that the majority of new build in Utah was conducted

[179] August 26, 2004 Transcript of Hearing at 879, lines 13-16.
[180] August 23, 2004 Transcript of Hearing at 255, lines 18-25; 256, lines 1-5 and 257, lines 16-25.
[181] Comcast March 24, 2004 Motion for Immediate Relief at ¶ 29.

underground.[182] If this were the case, then PacifiCorp's freeze in processing applications would have little to no effect on Comcast's ability to bring "new customers online."[183]

Rodney Bell testified that Comcast has made relatively few attachments since its initial buildout, and offered his unsupported opinion that Comcast has not made 35,000 new attachments since 1997.[184] Mr. Bell was unable, however, to cite to any documentary evidence to support this conjecture. During cross-examination, Mr. Bell acknowledged that he has never actually been involved in the process of obtaining a permit for a particular attachment.[185] Mr. Bell also admitted that, despite testifying under oath that Comcast did not make 35,000 new attachments, he was not actually responsible for new build and has no knowledge of how many new attachments were arranged by those with such responsibilities.[186]

Mr. Bell listed three Comcast employees with responsibilities for new cable build from 1998 to the present.[187] Interestingly, none of these individuals provided testimony on behalf of Comcast as to how many new attachments have been made since 1998. Comcast also failed to offer testimony from its new-build permit coordinator, Sheryl Pehrson. There is little doubt she could have provided much needed information regarding how many permits Comcast obtained for new-build construction prior to 2003. Indeed, the very existence of a new-build department, as identified by Mr. Bell and Mr. Pollock, for Comcast's operations in Utah belies the notion that most of Comcast's footprint was completed in the 1970s and 1980s. Rather than provide testimony from

[182] Goldstein Rebuttal Testimony, Comcast Ex. 3.2, at 3; August 23, 2004 Transcript of Hearing at 279, lines 11-16.
[183] Comcast Motion for Immediate Relief at ¶ 30.
[184] August 23, 2004 Transcript of Hearing at 230, lines 16-23.
[185] *Id*. at 232, lines 9-12.
[186] *Id*. at 233, lines 20-23 and 234, lines 1-18.
[187] *Id*.

anyone with responsibility for new build in Utah, Comcast chose to rely on testimony by individuals who had no knowledge of the very statements they offered as evidence in the form of opinion testimony.

In a last-minute attempt to bolster his inconsistent testimony, Mr. Goldstein cited to the existence of design maps, not provided in discovery or offered into evidence in this proceeding. He also stated that there would be design maps for new build to new subdivisions and residential developments, and they would show "where new pole attachments might have been made."[188] Despite claiming to have access to these maps, Mr. Goldstein never provided these items as evidence supporting his opinion that Comcast has not made 35,000 new attachments in the last seven years, nor did Comcast produce them during discovery. Instead, the only evidence offered by Mr. Goldstein was an analysis he conducted in less than a month of 39 poles in the Salt Lake Valley district.

From February 2003, when the first invoices were sent, until July of 2004, the only evidence offered by Comcast purporting to refute the result of the 2002/2003 Audit was provided by Mr. Goldstein. Mr. Goldstein, however, admits he can only speak to Comcast's activity in the Salt Lake Valley metro district prior to 1989. Mr. Goldstein offered written testimony that his records, limited as they are, demonstrate that the 2002/2003 Audit was not accurate and that Comcast has authorization for the attachments on the poles being billed as unauthorized.[189] His testimony simply is not credible.

As with his records, Mr. Goldstein's data analysis was extremely limited in scope. As of June 10, 2004, Mr. Goldstein had not participated in any effort to refute the

[188] August 23, 2004 Transcript of Hearing at 109, lines 9-11.
[189] Goldstein Rebuttal Testimony, Comcast Ex. 3.2, at 3-4.

2002/2003 Audit by proving authorization for Comcast's attachments.[190] However, a month later, Mr. Goldstein suddenly provided, as an exhibit to his rebuttal testimony, a list of 39 poles in Salt Lake Valley, 35 of which he claims support authorized attachments.[191]

In conducting his analysis, Mr. Goldstein stated that he "was provided with a listing of the supposed illegal attachments in the Salt Lake Valley."[192] Of that sampling he selected 39 poles for further analysis. Mr. Goldstein then stated that, of the limited sample of 39 poles that he examined, 35 purportedly supported authorized attachments that had been billed as unauthorized in error.[193]

Despite boldly asserting in his written testimony that his small sampling refuted the 2002/2003 Audit, Mr. Goldstein backed away from this claim during his cross-examination, admitting that his analysis did not involve a representative sampling, nor was it statistically valid.[194] He also confirmed that his analysis of 39 poles was the extent of his efforts to refute the 2002/2003 Audit. Accordingly, all Mr. Goldstein's limited analysis demonstrates is that of the 39,588 poles invoices as unauthorized, 35 poles *might* have been billed in error.

E. Comcast Has Consistently Failed to Produce Any Evidence Documenting Authorization

Other than a list of 35 poles submitted for the first time as an attachment to Mr. Goldstein's Rebuttal Testimony and not produced during discovery, Comcast has never provided PacifiCorp any evidence allegedly documenting its authorization for

[190] August 23, 2004 Transcript of Hearing at 76, lines 13-16.
[191] Exhibit 1 to Goldstein Rebuttal Testimony, Comcast Ex. 3.3. Although he claimed that it was a "random" collection, there is nothing to support such a claim. Mr. Goldstein presented no credentials that would qualify him to do any kind of meaningful survey.
[192] August 23, 2004 Transcript of Hearing at 76, lines 23-25.

attachments to the 39,588 poles invoiced as unauthorized. Both Mr. Goldstein and Mr. Pollock testified that they were not asked to make any effort to compile documents to prove Comcast's authorization in response to the September 8, 2003 Letter Agreement between the parties.[195] Not only has Comcast refused to provide proof of authorization to PacifiCorp, it has ignored similar requests made by its own employees. Mr. Pollock testified that his supervisors, Rodney Bell and Tim Jackson, never responded to an e-mail in which he requested original authorization for attachments, stating "I have no records of them . . . Any feedback or advice would be helpful."[196]

1. No Response to Unauthorized-Attachment Invoices

PacifiCorp began invoicing Comcast for unauthorized attachments in February 2003.[197] Every invoice was accompanied by pages of backup data supporting the charges listed in the invoice. For every pole identified in the backup data, PacifiCorp provided the Global Positioning System ("GPS") location for longitude and latitude, as well as PacifiCorp's map-string number and pole-identification number. The letter accompanying the invoices invited AT&T to challenge the unauthorized attachment charge within 30 days by providing copies of permits to PacifiCorp demonstrating authorization.[198]

AT&T not only failed to pay the invoiced amounts, it also failed to provide any proof of authorization or contact anyone at PacifiCorp to discuss the invoices. As a

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[193] Goldstein Rebuttal Testimony, Comcast Ex. 3.2, at 5.
[194] August 23, 2004 Transcript of Hearing at 93, lines 3-19.
[195] *Id*. at 76, lines 5-12; 204, lines 6-25 and 205, lines 1-3.
[196] PC Ex. 12; August 23, 2004 Transcript of Hearing at 205, lines 17-25 and 206, lines 1-17.
[197] August 25, 2004 Transcript of Hearing at 744, lines 2-6.
[198] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 31-32; Ex. PC 1.6.

result, approximately $1.5 million in invoiced unauthorized attachment charges became past due, some by as much as four months.[199]

2. No Response to June 30, 2003 Letter

In response to the absence of any communication from AT&T and increasing past-due amounts, PacifiCorp sent another written notice to Comcast on June 30, 2003.[200] The June 30, 2003 letter documented that, as of that date, PacifiCorp had received no payment or notice of dispute regarding the invoices. The letter also warned that, "due to the lack of response and good faith efforts to settle any disputes," PacifiCorp might be forced to cease granting further applications. Despite the fact that the June 30, 2003 letter requested Comcast to contact PacifiCorp immediately, it was only after PacifiCorp was forced to cease processing Comcast applications that Comcast first contacted PacifiCorp about the invoices - almost a month after receiving the June 30, 2003 letter and five months after receiving the first invoice.[201]

Despite the documented lack of communication from AT&T, and later Comcast, Ms. Nadalin's initial testimony stated that, when she came to work at Comcast in February 2003, it was her "understanding" that Comcast was "disputing" the invoices for unauthorized attachments.[202] In reality, Ms. Nadalin has no actual knowledge of how or even if these invoices were being disputed.[203] Further, she could point to no written documentation establishing Comcast's intent to dispute the invoices during the time between the first invoices being sent and her call to Ms. Fitz Gerald on July 29, 2003.[204]

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[199] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 33-34; August 24, 2004 Transcript of Hearing at 303, lines 21-25.
[200] Ex. PC 1.7; August 24, 2004 Transcript of Hearing at 307, lines 8-19.
[201] Nadalin Initial Testimony, Comcast Ex. 5, at 3; August 24, Transcript of Hearing at 308, lines 12-18.
[202] Nadalin Initial Testimony, Comcast Ex. 5, at 2.
[203] August 24, 2004 Transcript of Hearing at 352, lines 13-18.
[204] *Id*. at 308, lines 19-25 and 309, lines 1-10.

3. No Documentation Even After Communications with PacifiCorp Personnel

In her testimony, Ms. Nadalin attempted to excuse her employer's non-responsiveness and non-payment by claiming that PacifiCorp failed to provide adequate information that would allow AT&T, and later Comcast, to evaluate the charges. However, as shown, each invoice contained pages of backup data identifying poles by map string and identification numbers, as well as GPS coordinates. Despite admitting that she had access to all of this information, Ms. Nadalin alleged in her written testimony that PacifiCorp was assessing unauthorized charges without identifying the poles supporting the unauthorized attachments.[205]

Not only did every invoice provide adequate information, PacifiCorp also provided Ms. Nadalin, upon her request, with a list of all poles to which Comcast maintained attachments in particular districts.[206] In her initial testimony, Ms. Nadalin complained that this information was not helpful to her. Yet, she never contacted Ms. Fitz Gerald or any other PacifiCorp employee to get assistance in interpreting the data or to request additional or different data.[207] Ms. Nadalin claimed that there was no need to do so because at that time, in August 2003, Mr. Goldstein was reviewing his records in an attempt to verify the results of the 2002/2003 Audit.[208] However, Mr. Goldstein testified during a deposition and at the hearing of this matter that as of June 10, 2004, he had not

[205] August 24, 2004 Transcript of Hearing at 314, lines 18-25 and 315, lines 1-14; Nadalin Initial Testimony, Comcast Ex. 5, at 3.
[206] Fitz Gerald Rebuttal Testimony, Ex. PC 1.11, at 17.
[207] August 24, 2004 Transcript of Hearing at 319, lines 4-19.
[208] *Id*. at 324, lines 3-7.

participated in any Comcast effort to refute the results of the 2002/2003 Audit.[209] In any event, Mr. Goldstein only maintained records for the Salt Lake Metro district.[210]

In addition to providing Comcast with backup data with every invoice and the additional materials requested by Ms. Nadalin, PacifiCorp also offered to allow Comcast to conduct a "desk-top audit" of the attachments identified as unauthorized by PacifiCorp.[211] A desk-top audit would have provided Comcast the opportunity to view the results of the 2002/2003 Audit as they were maintained in PacifiCorp's database and would have provided another opportunity for the two parties to create a dialogue about the charges. Comcast never responded to PacifiCorp's offer of a desk-top audit.[212] Despite admitting she was "not sure exactly what a desk-top audit is or what it would involve,"[213] Ms. Nadalin failed to seek clarification from PacifiCorp about what a desk-top audit would entail. Instead, she summarily dismissed the opportunity provided by PacifiCorp as not a "good idea."[214]

4. No Documentation after the September 8, 2003 Letter Agreement

On September 8, 2003, the parties entered into a Letter Agreement, in which Comcast agreed to pay PacifiCorp $3,828,000.00 for its outstanding pole attachment charges and, in exchange, PacifiCorp promised to immediately resume processing Comcast's pole attachment applications. In addition, the letter provided Comcast an additional 60 days in which it could identify poles within the Ogden, Layton or American

[209] August 23, 2004 Transcript of Hearing at 76, lines 13-17.
[210] August 24, 2004 Transcript of Hearing at 324, lines 3-9.
[211] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 34.
[212] *Id*.
[213] August 24, 2004 Transcript of Hearing at 321, lines 17-18.
[214] Nadalin Rebuttal Testimony, Comcast Ex. 5.1, at 6; August 24, 2004 Transcript of Hearing at 321, lines 17-18.

Fork districts where Comcast had documentation of authorization.[215] Comcast failed to provide any evidence of authorization within the 60 days provided in the Letter Agreement. Instead, on October 31, 2003, it initiated this proceeding.

The testimony of Comcast's witnesses establishes that Comcast never made any effort to come forward with evidence of authorization pursuant to the Letter Agreement. Mr. Goldstein testified that he had no awareness of the Letter Agreement, and that he provided no documentation in response to Comcast's obligation to come forward with proof of authorization in 60 days.[216] Likewise, Mr. Pollock was never asked by Comcast to provide documents in response to the Letter Agreement.[217] Further, as established in Section II (A)(1), Comcast's efforts to refute the 2002/2003 Audit by conducting its own survey were canceled on September 19, 2003.

5. Comcast, as a Pole-Attachment Licensee, Has No Record of Authorization

The scant evidence offered by Comcast demonstrates that it has no records for attachments it has made to PacifiCorp's poles in Utah from 1989-2002. Additionally, any records that Comcast does have prior to 1989 are limited to the Salt Lake Valley district.[218] In response to discovery requests from PacifiCorp, Comcast produced approximately 1,809 documents consisting of applications for attachments, overlash notices, inspection reports, power supply applications, and removal notices relating to activity taking place on PacifiCorp's poles in American Fork, Layton, and Ogden.

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[215] Ex. PC 1.8. Specifically the Letter Agreement stated "Comcast shall have a period of sixty (60) days in which to identify individual poles within the Ogden, American Fork, and Layton service districts where Comcast has credible documentation indicating that attachments PacifiCorp has identified as unauthorized pole attachments are: (1) subject to a valid installation permit granted by PacifiCorp to Comcast, AT&T, or any of their predecessors; (2) are the personal property of an entity other than Comcast; or (3) do not exist."
[216] August 23, 2004 Transcript of Hearing at 76, line 5-12.
[217] *Id*. at 204, lines 6-25 and 205, lines 1-3.
[218] *Id*. at 80, lines 24-25 and 81, lines 8-11.

Of the 1,809 documents, only 302 of the documents related to poles invoiced by PacifiCorp to Comcast for unauthorized attachments,[219] and of the 302 relevant documents, 295 of the applications were submitted *after* the invoices for unauthorized attachments were issued, were for new attachments to the same poles where unauthorized attachments had been found, or were for overlashes to existing attachments that were invoiced as unauthorized. Most of the applications produced by Comcast in discovery were for overlash attachments, with no application documentation for the underlying initial attachment.[220]

The records produced by Comcast during discovery relating to attachments made in the 1970s and 1980s were kept by Mr. Goldstein. These records only pertained to attachments made by Comcast in the Salt Lake Valley district. When asked why he did not provide documentation demonstrating authorization for other areas in Utah, Mr. Goldstein testified: "I have no evidence of proof that we were attached to those poles . . . My only evidence is strictly related to the Salt Lake Valley."[221] Mr. Goldstein testified that, aside from Mr. Pollock, who did not begin keeping records for attachments until 2002, he was unaware of anyone else at Comcast involved in the process of keeping track of applications and authorizations.[222] When asked who would have records for areas outside the Salt Lake Valley, Mr. Goldstein stated, "I don't know where they are, if they do exist."[223] Like Mr. Goldstein, both Mr. Pollock and Mr. Bell were unaware of any permit records maintained by Comcast that would establish authorization for Comcast's

[219] Coppedge Initial Testimony, Ex. PC 2.0, at 9.
[220] *Id*.
[221] August 23, 2004 Transcript of Hearing at 75, lines 14-16.
[222] *Id*. at 87, lines 22-25 and 88, lines 1-20.
[223] *Id*. at 87, lines 20-21.

attachments, other than the ones kept by Mr. Pollock starting in 2002.[224] Mr. Pollock stated that he knew of no way to determine whether Comcast made proper applications for pole attachments prior to 2002.[225]

Not only does Comcast have no records of authorization for its attachments, it also has no records documenting how many attachments it maintains on PacifiCorp's poles. As the Director of Business Operations for Comcast's Salt Lake City market, Ms. Nadalin testified that she has no idea how many customers Comcast has connected in the past four years.[226] She admitted that she has no independent information based on Comcast's records about the number of poles Comcast is attached to in Utah, stating, "I don't have firm data on how many we are attached to."[227] She also stated that she was not aware of anyone else at Comcast who would have that information. Even more telling, Mr. Goldstein, who is responsible for designing Comcast's system throughout Utah and who has been employed by Comcast for over 30 years, is unaware of any evidence in Comcast's possession documenting the number of attachments it has made since the 1997/1998 Audit.[228] Mr. Bell testified that Comcast did have maps showing "the new design of our cable and where it's located," but Comcast never offered these maps as evidence in this proceeding.[229] Because of its nearly non-existent record-keeping, Comcast must rely on PacifiCorp's billing statements. The broad collection of supporting data and testimony concerning PacifiCorp's carefully maintained records provide the only reliable evidence of Comcast's attachments and whether they are

[224] *Id*. at 203, lines 18-25; 204, lines 1-2; and at 252, lines 2-10.
[225] *Id*. at 203, lines 18-25 and 204, lines 1-2.
[226] August 24, 2004 Transcript of Hearing at 330, lines 20-25.
[227] *Id*. at 361, lines 1-21.
[228] August 23, 2004 Transcript of Hearing at 149, lines 23-25 and 150, lines 1-3.
[229] *Id*. at 252, line 21-22.

authorized or not. Therefore, Comcast is in no position to question the accuracy of PacifiCorp's data.[230]

F. Application and Permitting Requirements Are Essential to Joint-Use Management

Asset management is a primary focus of PacifiCorp's joint-use program, and application and permitting requirements play an essential role in managing any joint-use relationship.[231] Specifically, application and permitting requirements assist PacifiCorp in ensuring: (1) that it is receiving all appropriate joint-use revenues so that electric customers do not subsidize cable company shareholders and customers; (2) that each new attachment made by Comcast complies with applicable safety codes; (3) that Comcast has obtained permission from property owners to use affected property; and (4) that PacifiCorp has an accurate record of the attachments on its poles for the purpose of proper plant management. Indeed, Comcast's Permit Coordinator, Mr. Pollock, recognized the importance of permitting processes and acknowledged that such requirements serve to protect the interests of both pole owners and third-party attachers.[232] Mr. Harrelson also admitted that "[p]ole owners need to know who attaches to their poles"[233] and acknowledged that pole owners have a valid interest in guarding against unauthorized use.[234]

Mr. Bell stated that addressing safety compliance is an important issue relating to pole attachments and new construction.[235] In fact, Mr. Bell recently attended a meeting with PacifiCorp personnel to address safety issues. He acknowledged at the safety

[230] August 24, 2004 Transcript of Hearing at 361, lines 24-25 and 362, lines 1-5.
[231] August 26, 2004 Transcript of Hearing at 872, lines 15-25 and 873, line 1.
[232] August 23, 2004 Transcript of Hearing at 209, lines 14-22.
[233] August 24, 2004 Transcript of Hearing at 468, lines 14-15.
[234] *Id*. at 468, lines 16-25 and 469, lines 2-6.

meeting that Comcast does have significant safety violations it needs to fix and that Comcast does not do make-ready evaluations prior to overlashing to existing attachments.[236] While matters of safety are not a primary issue in this case, the resolution of safety violations is closely tied to compliance with a pole owner's permitting requirements. Indeed, Mr. Bell recognized that safety was an important aspect of any joint-use process and that the permitting process provides the mechanism by which parties can inspect existing facilities and ensure that safety issues are addressed in a timely manner.[237]

Unauthorized use places the integrity, reliability and safety of PacifiCorp's electric system at risk.[238] Ms. Fitz Gerald explained the importance of an unauthorized-use provision, stating, "PacifiCorp has an unauthorized attachment charge to incent companies not to avoid the permitting process, which is the grounds for providing safe and reliable asset management and cost recovery."[239] Mr. Harrelson also acknowledged in his written testimony that "[j]oint use can be a tricky business" and "a full-time job to keep all that in balance."[240] Managing a joint-use relationship is made even more difficult when third-party attachers willfully ignore contractually mandated application and permitting procedures. The imposition of charges for unauthorized attachments is often the only meaningful mechanism available to pole owners to prevent unauthorized use and protect their investment in critical distribution infrastructure.[241]

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[235] August 23, 2004 Transcript of Hearing at 259, lines 15-17.
[236] *Id*. at 262, lines 7-25.
[237] August 23, 2004 Transcript of Hearing at 263, lines 16-25 and 264, lines 1-7.
[238] Fitz Gerald Rebuttal Testimony, Ex. PC 1.11, at 22.
[239] August 26, 2004 Transcript of Hearing at 873, lines17-20.
[240] Harrelson Initial Testimony, Comcast Ex. 4, at 8.
[241] Jackson Sur-Rebuttal Testimony, Ex. PC 9.0, at 12.

G. Cost of 2002/2003 Audit Is Reasonable

Despite requesting that the Commission excuse it from a contractual obligation to remit payment for its share of the costs associated with the 2002/2003 Audit, Comcast offered no credible evidence in support of its request. Instead, the evidence offered by PacifiCorp illustrates how Comcast and third-party attachers have benefited from the information gathered during the 2002/2003 Audit. Further, the evidence demonstrates PacifiCorp's continuing efforts to ensure that the costs of the Audit are fairly distributed among third-parties and to ensure that it does not over-recover costs related to the Audit.

1. Components of the 2002/2003 Audit

During the course of the Audit, Osmose employees recorded the number and types of attachments maintained by each communications company and took a GPS reading and digital photograph for each pole.[242] In addition, Osmose employees measured clearances between attachments to PacifiCorp's poles, measured ground clearances, and measured the distance from the top communications conductor to the bottom of the electrical conductor.[243]

As Ms. Fitz Gerald explained, the data collected during the 2002/2003 Audit assisted PacifiCorp in managing joint use to the direct benefit of joint-users:

> The reason that PacifiCorp opted to collect GPS coordinates on joint use poles is that it is a universal location identifier. One of the most common problems we've experienced, at least I've experienced in the last ten years, is parties arguing over whose location identifier, whether its address or pole number or some other form should be the location record for billing purposes . . . So the GPS identifier was a universal way to share location information.[244]

[242] August 26, 2004 Transcript of Hearing at 799, lines 4-25 and 800, lines 12-15.
[243] *Id*. at 800, lines 2-11.
[244] August 26, 2004 Transcript of Hearing at 869, lines 8-14.

With regard to the digital pictures taken during the course of the 2002/2003 Audit, Mr. Fitz Gerald stated:

> [T]he photograph depict[ing] a specific point in time, protects Comcast from being inaccurately charged in the future for…an unauthorized attachment...This will clear that up. It also is a fairly common complaint from licensees attached to PacifiCorp owned poles that other licensees will move their attachments when making a new attachment in order to sort of squeeze in and make room and that they aren't always the ones that create a violation, that somebody else may have done it on their behalf and that they are not responsible. In this particular case if that were to happen, we would have a photograph of exactly the location of those attachments at that point in time.[245]

In conducting the 2002/2003 Audit, PacifiCorp relied on FastGate, an existing software-based tool that was already being used within the T&D Infrastructure Management Department.[246] FastGate is not a mapping database. Rather, OMS is PacifiCorp's mapping data base of record and is maintained in PacifiCorp's Mapping Department, not T&D Infrastructure Management. FastGate and OMS are not connected and do not share data.[247] PacifiCorp uses FastGate primarily as a connectivity tool. Its primary function is to serve outage management software.[248]

Comcast alleged that PacifiCorp conducted the 2002/2003 Audit in order to populate its connectivity database, rather than to assist in the management of joint-use.[249] Comcast's assertion is flatly untrue. The only evidence offered by Comcast to support its accusation is the fact that PacifiCorp used FastGate to assist with the data collection during the Audit. PacifiCorp had conducted a previous audit, the cost of which was

[245] *Id*. at 868, lines 6-22.
[246] August 25, 2004 Transcript of Hearing at 773, lines 4-6.
[247] *Id*. at 772, lines 7-11.
[248] *Id*. at 773, lines 11-17.
[249] Comcast Pre-Hearing Brief at 60.

borne solely by PacifiCorp, to "populate" its connectivity database.[250] Further, the information gathered during the 2002/2003 Audit is not used by PacifiCorp for connectivity or outage management purposes.[251]

Because the FastGate system was an existing and proven technology already in use within T&D Infrastructure, PacifiCorp elected to add another layer onto the existing FastGate platform. Using existing technology benefited Comcast and other third-party attachers by helping to ensure the accuracy of the 2002/2003 Audit. Also, using FastGate was more cost effective than having to create an entirely new and untested database to house the results of the Audit.

2. *Pro Rata* Cost Allocation

For the 2002/2003 Audit, Osmose charged PacifiCorp $12.27 per pole to audit joint-use poles. In addition to the charges invoiced by Osmose for the Audit, PacifiCorp incurred costs for administrative and overhead components of the Audit. This included the cost of hiring Volt contractors to perform quality-control testing of the data and the time spent by PacifiCorp personnel analyzing the data collected and entering it into JTU.[252] Prior to allocating any costs among third parties, however, PacifiCorp assigned to itself all costs incurred in determining the number of PacifiCorp's attachments to third-party poles and capturing certain data elements useful only to PacifiCorp.[253] As a result, PacifiCorp did not pass on to third-party attachers approximately 12% of the total 2002/2003 Audit costs.[254]

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[250] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 13.
[251] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 12-13.
[252] August 26, 2004 Transcript of Hearing at 967, lines 1-25 and 968, line 1.
[253] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 40.
[254] August 26, 2004 Transcript of Hearing at 995, lines 6-21.

PacifiCorp allocated all other audit costs that would not have been incurred but for the joint use of facilities by third parties. This amounted to a charge of $13.25 per attachment.[255] PacifiCorp arrived at audit charges for third parties by using the average costs incurred in the first five districts where the Audit had been completed.[256] PacifiCorp considered the $13.25 charge to be the best option for recovering costs of the inventory in a timely fashion. While claiming in his Initial Testimony that PacifiCorp's methodology allowed it to "recover [] three, four, or five times the cost of the audit,"[257] Comcast's expert witness, Mr. Harrelson, later admitted that his calculations were flawed and multiple recovery was not possible.[258]

At the time the charge was calculated, PacifiCorp did not have cost data for the 2002/2003 Audit for its entire service territory because the audit was not yet completed in those areas. Rather than waiting until the results of the 2002/2003 Audit were several years old, PacifiCorp elected to establish a *pro rata* charge based on cost data that was immediately available for five districts. PacifiCorp considered the five districts where the cost analysis was conducted to be a fair representation of PacifiCorp's service territory.[259] It had always been PacifiCorp's intention to reassess, as more data became available, the Audit costs and send subsequent billing that would actually reflect the total cost of the audit based on the total number of attachments.[260] Ms. Fitz Gerald testified to this fact, stating "it is possible for us to create the actual cost per attachment for each district independently or for the state on an average . . . [a]nd we are not opposed to going

[255] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 40.
[256] Ex. PC 2.5; August 26, 2004 Transcript of Hearing at 905, 16-18.
[257] Harrelson Initial Testimony, Comcast Ex. 5, at 33.
[258] August 24, 2004 Transcript of Hearing at 388, lines 2-5.
[259] August 26, 2004 Transcript of Hearing at 905, lines 19-20.
[260] *Id.* at 963, lines 13-25.

back and revising that methodology." Comcast, on the other hand, has provided no record evidence as to what a reasonable cost for the Audit or any of its elements would have been or what a reasonable *pro rata* charge would have been.

III. ARGUMENT

A. Comcast Has the Burden to Prove Its Case by a Preponderance of the Evidence

Commission precedent and fundamental notions of fair process dictate that Comcast, as the Claimant, licensee and custodian of specific probative evidence, bears the burden of proof in this matter. That burden typically encompasses both the burden of production and the burden of persuasion.[261] The former is the burden to produce evidence "which proves or tends to prove the proposition asserted."[262] The latter requires a party to convince the trier of fact that his evidence is entitled to greater weight.[263] "The proper standard of proof in the administrative context is generally the 'preponderance of the evidence' standard."[264]

1. Comcast Has Failed to Meet Its Burden of Persuasion

A dispute decided in a formal adjudicative proceeding before the Utah Public Service Commission places the burden of persuasion squarely on the Complainant. If a Complainant fails to meet its burden of persuasion, the Commission should dismiss the Complaint.[265] Comcast simply has not presented a preponderance of evidence sufficient to persuade a reasonable finder of fact. Two examples discussed more fully in Section D.1.b(2), *infra*, illustrate Comcast's failure.

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[261] *Koesling v. Basamakis*, 539 P.2d 1043, 1046 (Utah 1975). The Utah Rules of Evidence have since been amended, but the import of the case remains unchanged.
[262] *Id*.
[263] *Id*.
[264] *Harken Southwest Corp. v. Board of Oil, Gas and Mining*, 920 P.2d 1176, 1182 (Utah 1996).

First, as justification for bringing the present action, Comcast claimed that the 2002/2003 Audit was inaccurate because its own audit located 8,000 utility poles for which PacifiCorp had billed Comcast in error. As the proponent of this proposition, Comcast had the burden to provide a persuasive preponderance of evidence supporting its claim. Comcast, however, never offered any evidence pertaining to the 8,000 improper billings claimed in its Request for Agency Action. Instead, Comcast claimed at the last minute that a list of 22 allegedly improper billings proved the inaccuracy of the 2002/2003 Audit. While there are many other facts that prove the accuracy of the 2002/2003 Audit, Comcast's flip-flop here illustrates its failure to meet its burden on factual claims.

Second, Comcast likewise failed to offer a persuasive preponderance of evidence that it had authorization for the attachments invoiced as unauthorized. With the exception of a list of 35 poles purportedly supporting authorized attachments, Comcast provided no documentation establishing authorization for any of the attachments made to the 39,588 poles invoiced as unauthorized. Indeed, the presiding Administrative Law Judge posed the question: "Doesn't Comcast, as a licensee, bear the burden of proving whether or not it has a license for an attachment?" Comcast's counsel replied: "I believe that's true."[266] Comcast's failure to carry its burden of persuasion on this factual element was the direct result of its corollary failure to meet its burden of production.

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[265] *Complaint of Nielson v. Qwest Corp. No. 01-049-40*, 2001 Utah PUC Lexis 531 (2001); *Complaint of Westside Dev. Associates v. PacifiCorp*, No. 00-035-01, 2000 Utah PUC Lexis 39 (2000).
[266] August 26, 2004 Transcript of Hearing at 1055, lines 17-20.

2. Comcast Failed to Meet Its Burden of Production

Not only does Comcast's status as Claimant and licensee place upon it the burden of persuasion, that status and its position as custodian of key evidence requires that it carry the burden of production. Again, two examples illustrate its failure to do so.

First, the results of the 2002/2003 Audit indicated the number of poles Comcast attached to increased by 39,588 since the 1997/1998 Audit. Central to Comcast's case is its assertion that it is unlikely that it made this many attachments in five years. However, in discovery in this proceeding, Comcast denied PacifiCorp, and therefore, the Commission the ability to review any Comcast evidence to support its assertions.[267] PacifiCorp propounded discovery on Comcast seeking identification of its build-out and overbuild plans specifying where Comcast had installed new and updated pole attachments, including maps and reports depicting the location of pole attachments.[268] Comcast refused to provide that discovery on the grounds that it was irrelevant, and produced no records, no maps and no identification of where or when it made its upgrades or new attachments. At the hearing, Comcast persisted in refusing to provide direct and probative evidence, and merely proffered witnesses that opined about the extent of Comcast's pole attachment activities. It therefore failed to carry its burden of production on this point.

Second, Comcast claimed that it was in fact making applications for permits for new build. However, it produced two witnesses who had no factual knowledge of this claim, and Comcast failed to produce the four personnel in its new build department,

[267] The presiding Administrative Law Judge in this proceeding has characterized the testimony of Comcast's witnesses as opinion testimony that will be weighed based on the facts presented at the hearing. August 23, 2004 Transcript of Hearing at 105, lines 7-22.

Sheryl Pehrson, Keith Perkins, Bob Cowden, and Lyndon Latuhingoa, who would have knowledge.[269] Again, Comcast failed its burden of production on a factual claim. Indeed, as discussed more fully in Section D.1.b(2), *infra*, PacifiCorp is entitled to a missing witness inference on this point.

In sum, if this matter were before a jury, a directed verdict in favor of PacifiCorp would be appropriate in light of Comcast's failure to provide a persuasive preponderance of evidence – and, in many cases, no evidence - supporting critical elements of its case. In the context of a hearing before the Commission, Comcast's failure to produce evidence supporting its case should bar Comcast from receiving its requested relief.

B. Comcast Is Bound by the Terms of Its Contractual Agreements

The uncontroverted evidence established that Comcast is bound by three separate and voluntary agreements - the 1996 Agreement, the 1999 Agreement and the September 8, 2003 Letter Agreement - which together expressly require Comcast to pay $60 per year per pole for each unauthorized attachment and its *pro rata* share of the 2002/2003 Audit costs. To the extent any small portion of Comcast's payment obligations arose after the December 31, 2002 termination of the 1999 Agreement, it is undisputed that the parties have established an implied contract through a course of dealing incorporating the terms of the 1999 Agreement.

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

Two written pole attachment agreements apply to this dispute – an April 23, 1996 Pole Contact Agreement (the 1996 Agreement) and a December 20, 1999 Pole Contact

[268] Ex. PC 1.19; Ex. PC 1.20.
[269] August 23, 2004 Transcript of Hearing at 234, lines 2-14 and 243, lines 18-20.

Agreement (the 1999 Agreement). Both are very similar, and both bind Comcast to promises enforceable in this proceeding.

a. The 1996 Agreement

The 1996 Agreement provided, in express and unambiguous language, that Comcast must obtain approval from PacifiCorp prior to making attachment to PacifiCorp's poles. Section 2.1 stated that, when a Licensee wishes to attach, it "shall make written application for permission to do so, in the form and in the number of copies as from time to time prescribed by Licensor." Then "[u]pon receiving an approved copy of the application from Licensor, but not before," the licensee may use its equipment as "described in the applications upon the pole(s) identified therein."[270] Section 2.3 applied to overlashing[271] and stated that if a Licensee wished to attach additional equipment, it could not do so "without first making application for and receiving permission to do so in accordance with Subsection 2.1."

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

The 1996 Agreement applied until the parties entered the 1999 Agreement on December 20, 1999. Thus, for those attachments Comcast made from early-1999 - after the "amnesty" of the 1997/1998 Audit ended – through the December 20, 1999 effective date of the 1999 Agreement, the terms of the 1996 Agreement govern. Comcast presented no evidence at the hearing to suggest that the terms of the 1996 Agreement did

[270] 1996 Agreement, Comcast Ex. 5.2 and Ex. 1 to Nadalin Rebuttal Testimony, at § 2.2.
[271] August 25, 2004 Transcript of Hearing at 757, lines 8-22.

not apply. In fact, Comcast's witnesses' only evidence about the 1996 Agreement was that they were ignorant of its terms.[272]

b. The 1999 Agreement

The 1999 Agreement was the product of a lengthy, three-year negotiation process during which PacifiCorp and Comcast[273] exchanged valuable bargained-for consideration.[274] Corey Fitz Gerald explained that she negotiated the 1999 Agreement with AT&T's authorized personnel, Rob Trafton and Mike Sloan, who ultimately signed off an all changes negotiated for the agreement.[275] The 1999 Agreement was based on PacifiCorp's standard form pole contract agreement. As Ms. Fitz Gerald had done with about 85 to 100 other agreements, she tendered to AT&T the standard form agreement, then negotiated the specific changes requested by the licensee.[276]

Sections 2.1 through 2.3 of the 1999 Agreement, like the 1996 Agreement, expressly and unambiguously spelled out the process to obtain authorization to attach. Just as in the 1996 Agreement, Section 2.1 of the 1999 Agreement required that when Comcast wanted to make an attachment, it "shall make written application for permission to do so, in the form and number of copies as from time to time prescribed by Licensor."

Section 2.2 granted the right to install as "described in the application," only if prior notice was provided to PacifiCorp, and only if – for new build attachments –

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[272] August 23, 2004 Transcript of Hearing at 178, lines 1-25; 179, lines 1-4; 188, lines 17-21; 235-238; 281, lines 2-7; Bell Initial Testimony, Comcast Ex. 1, at 5; Pollock Initial Testimony, Comcast Ex. 6, at 8.
[273] In December of 2001, Comcast purchased the AT&T assets in Utah that were governed by the Agreement. *See AT&T-Comcast Merger is Final*, DESERET NEWS, Dec. 20, 2001, at E1. Section 8.5 of the Agreement evidences that the Agreement "shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto." Accordingly, Comcast was thereafter bound to the 1999 Agreement.
[274] PacifiCorp's Response to Request for Agency Action at ¶ 6; Declaration of Corey Fitz Gerald, Exhibit 1 to Response of PacifiCorp to Request for Agency Action at ¶ 3.
[275] August 26, 2004 Transcript of Hearing at 850-851.
[276] August 25, 2004 Transcript of Hearing at 699, line 25 and 700, lines 1-18; August 26, 2004 Transcript of Hearing at 847, lines 22-25.

Comcast provided a "completed, signed copy of the application referenced in Section 2.1 within one business [day] after making attachment." Finally, just as in the 1996 Agreement, Comcast could not place additional equipment "without first making application for and receiving permission to do so in accordance with 2.1."[277]

Unauthorized attachment charges were governed by Section 3.2, which was virtually identical to Section 3.2 of the 1996 Agreement, and allowed PacifiCorp to "assess an unauthorized attachment charge in the amount of $60.00 per pole per year.[278] One difference from the 1996 Agreement that the parties specifically negotiated was that the unauthorized attachment charge would be payable "within thirty (30) days after receipt of the invoice for said charge . . . in addition to back-rent determined by Licensor for the period of the attachment."[279]

Regarding inspections, Section 2.21 stated that PacifiCorp "shall have the right . . . to make periodic inspections of Licensee's Equipment as it deems necessary . . . [and] the right to charge Licensee for the expense of any field inspections, including . . . any further periodic inspections deemed necessary by Licensor."[280]

2. The Terms of the 1999 Agreement Continue To Control the Parties' Relationship

Although PacifiCorp terminated the 1999 agreement as of December 31, 2002, the terms of the 1999 Agreement continue to control the parties' relationship. First, Section 8.7 of the 1999 Agreement makes plain that Comcast remains bound to its obligations under the Agreement. That section states: "Any termination of this

[277] 1999 Agreement, Sections 2.1-2.3 (emphasis added), Exhibit A to Comcast Request for Agency Action.
[278] 1999 Agreement, Section 3.2, Ex. A to Comcast Request for Agency Action; August 25, 2004 Transcript of Hearing at 699, lines 17-25 and 700, lines 1-4.
[279] *Id.* at Section 3.2; August 26, 2004 Transcript of Hearing at 849, lines 17-19 and 850, lines 2-12.
[280] *Id.* at Section 2.21.

Agreement shall not release Licensee [Comcast] from any liability or obligations hereunder, whether of indemnity or otherwise, which may have accrued or may be accruing at the time of termination." Ms. Fitz Gerald provided uncontradicted testimony as to PacifiCorp's understanding of this provision.[281]

Second, the parties have created, by their formalized course of dealing, an implied-in-fact agreement that carries over the terms of the 1999 Agreement.[282] Under Oregon law, an implied-in-fact agreement exists where the parties exhibit "mutual expressions of assent" and the "natural and just interpretation of the parties warrants such a conclusion."[283] Again, Ms. Fitz Gerald provided uncontroverted testimony on the parties' course of dealings conduct, stating that "PacifiCorp has continued to honor the terms of those agreements."[284] Likewise, Comcast has acknowledged that the "parties are conducting business with one another and Comcast continues to pay an annual pole attachment rental rate of $4.65."[285] But for Comcast's failure to obtain the requisite permits for attaching to PacifiCorp's poles, the record in this case makes clear that the parties continue to perform under the terms of the 1999 Agreement.

Since the termination of the 1999 Agreement on December 31, 2002, there have been no changes to the parties' relationship, and the parties have continued to operate

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[281] August 26, 2004 Transcript of Hearing at 853, lines 5-20 and 915, lines 10-18.
[282] Fitz Gerald Decl. at ¶ 6.
[283] *Owen v. Bradley*, 371 P.2d 966, 970 (Or. 1962) (an implied contract arises "where the natural and just interpretation of the parties warrants such a conclusion"); *Jaqua v. Nike, Inc.*, 865 P.2d 442, 445 (Or. Ct. App. 1993) (the parties must exhibit "mutual expressions of assent" for an implied contract to exist). Section 8.6 of the 1999 Agreement specifies Oregon law for resolving disputes. Utah courts have not taken a definitive position on enforceability of such choice of law provisions. However, federal courts have stated that Utah would apply general contract principles expressed in Restatement (Second) of Laws § 187 (1971, 1988), generally upholding their validity. See, *Shearson Lehman Bros., Inc. v. M & L Inv.*, 10 F.3d 1510, 1514-15 (10th Cir. 1993). Utah law is similar to Oregon law in its recognition of implied-in-fact agreements. *Gleason v. Salt Lake City*, 74 P.2d 1225, 1227 (Utah 1937). *See also Morgan v. Board of State Lands*, 549 P.2d 695, 697 (Utah 1976); *In re Estate of Orris*, 622 P.2d 337, 340 (Utah 1980).
[284] August 26, 2004 Transcript of Hearing at 847, lines 6-12.
[285] Comcast Request for Agency Action at ¶ 12.

pursuant to the same material terms of the 1999 Agreement. The imposition of application and inspection fees was not a change to the parties' established course of dealings, as Comcast suggests. Rather, PacifiCorp's right to seek cost-recovery for expenses resulting from joint use of its facilities was incorporated in both the 1996 and 1999 Agreements.[286] PacifiCorp provided written notice to third parties of its intent to charge application and inspection fees and implemented the fees prior to the termination of the 1999 Agreement.[287] Further, Comcast consented to the fees through its payment of invoices. Thus, application and inspection fees were charged and paid pursuant to the then-existing 1999 Agreement, and were incorporated into the parties' course of dealing after the termination of the 1999 Agreement.[288]

Likewise, the right to conduct inspections of joint-use facilities is clearly set forth in Section 2.21 of the 1999 Agreement, and PacifiCorp initiated the 2002/2003 Audit before the termination of the 1999 Agreement.[289] Thus, the obligation to pay its *pro rata* share of the 2002/2003 Audit costs was a liability "accruing at the time of termination" within the meaning of Section 8.7.

The issue of billing Comcast on a per-attachment rather than a per-pole basis is appropriately considered as a tariff matter, rather than a contract matter. Section 3.1 of the 1999 Agreement allows PacifiCorp to charge Comcast for all "attachments made to

[286] August 26, 2004 Transcript of Hearing at 910, lines 6-13.
[287] Ex. PC 1.28.
[288] Indeed, the continued relationship between PacifiCorp and Comcast after the termination of the 1999 Agreement is analogous to a holdover tenancy. The Supreme Court of Utah has held: "It is a firmly established rule that proof of a holding over after the expiration of a fixed term in a lease gives rise to the presumption, which in the absence of contrary evidence will be controlling, that the holdover tenant continues to be bound by the covenants which were binding upon him during the fixed term." *Cottonwood Mall Co. v. Sine*, 767 P.2d 499, 503 (Utah 1988). *See also* UTAH CODE ANN. § 70A-1-205(4)(2004)([t]he express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade).

poles" in accordance with the Commission approved rental tariff incorporated as Exhibit A to the 1999 Agreement. As Ms. Fitz Gerald explained, in 2003, PacifiCorp filed with the Commission a request to increase the annual pole rental rate.[290] On May 27, 2003, prior to its filing with Commission, PacifiCorp provided Comcast and other licensees notice of the proposed change to the cable television pole attachment rental rate from $4.65 *per pole* to $9.20 *per attachment* to be effective January 1, 2004.[291]

PacifiCorp's intent was to comply with the tariff and begin charging the new rate upon Commission approval. However, PacifiCorp admits that it made a billing error when it recently began (sometime in 2004) to invoice Comcast for pole rental on a per-attachment basis instead of a per-pole basis.[292] Not only will PacifiCorp rectify this error, it has resulted in no harm to Comcast, as the total number of attachments billed to date is still fewer than the number of poles on which Comcast has attachments. In all events, this billing error might be a technical tariff violation, but it does not affect the course of dealing during the time of the instant dispute. As noted by the presiding Administrative Law Judge, "this docket is looking backward at unauthorized attachment and back rental charges and not current day forward with respect to those."[293]

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[289] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 13.
[290] August 25, 2004 Transcript of Hearing at 711, lines 11-19; Ex. PC 1.27.
[291] Ex. PC 1.26. In its Pre-Hearing Brief, Comcast contended that PacifiCorp recent rate filings were a symptom of its "rapacious" behavior. However, Comcast's analysis of PacifiCorp's requested rate changes was misleading and factually inaccurate. Contrary to the assertions made by Comcast that PacifiCorp is attempting to impose a $25.00 rate increase, PacifiCorp has requested a rate increase for cable attachments from $4.65 per pole to $9.20 per attachment, as demonstrated in Ex. 8 to Comcast's Pre-Hearing Brief. PacifiCorp felt that this increase was justified in light of the fact that the $4.65 rate had been in effect for at least 15 years and no longer provided fair compensation to PacifiCorp for the use of its facilities. The $29.40 rate referenced by Comcast is the rental rate requested for *telecommunications* attachments, not cable attachments. Comcast has not indicated it maintains telecommunications attachments to PacifiCorp's poles. Thus, the telecommunications rate would have no impact on Comcast.
[292] August 25, 2004 Transcript of Hearing at 711, line 20 and 712, line 4.
[293] *Id*. at 714, lines 14-17.

3. The September 8, 2003 Letter Agreement

On September 8, 2003, the parties entered a Letter Agreement under which Comcast expressly agreed to pay the then-outstanding unauthorized attachment invoices of approximately $3 million and remain current on future invoices. In the 2003 Letter Agreement, the parties again addressed the requirement under the 1996 and 1999 Agreements that Comcast obtain authorization for its attachments. Although PacifiCorp agreed to refund any unauthorized attachment charges upon receipt of such satisfactory proof, Comcast never provided any documentation pursuant to the September 8, 2003 Letter Agreement challenging the accuracy of the charges.

4. The Agreements Make Clear that the Unauthorized Attachment Charges Accrue From When Comcast Improperly Attached

Comcast has argued that the $60.00 per pole per year charge for unauthorized attachments should be applied on a going-forward basis, starting at the discovery of the unauthorized attachment.[294] However, a plain reading of Section 3.2 of both the 1996 and 1999 Agreement does not tie the initiation of unauthorized use charges to the discovery of the unauthorized use. Section 3.2 states that the charge accrues "*should Licensee attach* . . . without obtaining prior authorization" and said charge "is in addition to back-rent determined by the Licensor for the period of the attachment."[295] Thus, it is the act of attaching to PacifiCorp's facilities without authorization, not the discovery of

[294] August 23, 2004 Transcript of Hearing at 16, lines 11-17.
[295] Section 3.2, 1996 and 1999 Agreement (emphasis added).

the attachment, which triggers accrual of the fee. When contract language is clear, a court need not look beyond it for interpretation.[296]

Common sense precludes interpreting Section 3.2 as setting the amount of remedies based on the amount of time from discovery of the unauthorized use to the point when Comcast sends the check. "All interpretation is contextual, and the body of knowledge that goes by the name of 'common sense' is part of the context of interpreting most documents, certainly most business documents."[297] Section 3.2 was designed to discourage unauthorized pole attachments rather than to encourage a cable operator to hide its unauthorized pole attachments as long as possible so that a single $60.00 charge would be applied over a long time horizon, reducing the operator's risk and annual cost for violation of that provision.

Section 3.2 is unambiguous. Should, however, there be any question of ambiguity and the Administrative Law Judge thus consider parol evidence, the only record evidence is Ms. Fitz Gerald's unrefuted testimony.[298] Ms. Fitz Gerald clearly explained that it was always her understanding, as the negotiator of the 1999 Agreement, that "the unauthorized attachment charge began on the date of attachment or back to the last date that either party could prove that it had been attached."[299] Alternative language to Section 3.2 was never suggested by Comcast during the contract negotiations leading up to the execution of the 1999 Agreement.[300] In contrast, Ms. Fitz Gerald testified that in Wyoming, PacifiCorp charged a single $60.00 charge plus five years' back rent for

[296] *Green River Canal Co. v. Thayn*, 84 P.3d 1134, 1140-41 (Utah 2003); *McElroy v. B.F. Goodrich Co.*, 73 F.3d 722, 727 (7th Cir. 1996).
[297] *McElroy*, 73 F.3d at 726-27; *Erickson v. Bastian*, 102 P.2d 310, 314-15 (Utah 1940).
[298] Comcast took the position that parol evidence on the meaning of the parties' agreement was irrelevant. See, Comcast Response to PacifiCorp's First Set of Requests for Production of Documents, Request No. 2 and Comcast Response to PacifiCorp's First Set of Interrogatories. Attached hereto as Exhibit A.
[299] August 26, 2004 Transcript of Hearing at 853, lines 13-17.

unauthorized attachments because the agreement applicable in that instance did not contain the key language negotiated in the 1999 Agreement providing that the unauthorized use charge was to apply "per pole per year."[301]

C. Comcast Is Bound by the Terms, Conditions and Procedures Established by PacifiCorp's Commission-Approved Tariff

This dispute arises in the context of the operations of a Utah public utility whose rates, charges and operations are regulated by the Utah Public Service Commission and are governed by the utility tariff provisions filed with and approved by the Commission. Although certain aspects of the relationship between the two parties are governed by private contract, PacifiCorp's Commission-approved tariff forms the foundational framework for the rights, responsibilities and obligations of the parties that deal with the utility company.

In particular, PacifiCorp's Electric Service Rate Schedule 4, entitled "Pole Attachments – Cable Television," provides the basic authority for PacifiCorp to make its utility plant available to outside parties, such as Comcast, for placement of certain facilities. The availability of PacifiCorp's facilities for joint use by cable operations pursuant to the tariff is contingent upon three conditions:

> (1) The approval by Utah Power and Light Company of the Customer's application for permission to place equipment on Company poles. (2) The execution of an appropriate Joint Facilities Agreement between the cable television company and Utah Power & Light Company. (3) The availability of utility poles . . . of sufficient size and capacity . . . .[302]

The tariff goes on to indicate that "[t]terms, conditions, and liabilities for service under this Schedule shall be those specified in the Joint Facilities Agreement between the

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[300] August 26, 2004 Transcript of Hearing at 853, lines 18-20.
[301] *Id*. at 916, lines 10-13.

Company and the Customer," with the per-pole rate as specified in Schedule No. 4 ($4.65 for the periods in question).[303] As between PacifiCorp and Comcast, the 1999 Agreement is the "Joint Facilities Agreement" referred to in Electric Rate Schedule No. 4.

Because that agreement was executed by the parties under the authority of PacifiCorp's tariff, the parties are bound by it until it is modified or replaced pursuant to the terms of the tariff or by a *prospective* modification of the agreement or the underlying tariff terms by the Commission. Indeed, as the Utah Supreme Court has recently restated, the tariff provisions that govern a utility's rights and obligations have the force of law. In *Questar Gas Co. v. Public Serv. Comm'n* 2001 UT 93, ¶ 18, n.13; 34 P.3d 218, 224, the Court noted that:

> Courts have consistently held that tariffs have the force of law. *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chtd.*, 681 P.2d 1258, 1263 (Utah 1984); *see also Shehi v. Southwestern Bell Tel. Co.*, 382 F.2d 627, 629, n.2 (10th Cir. 1967) ("A tariff . . . is more than a mere contract—'*it is the Law.*' " (citations omitted)); *Atkin, Wright & Miles, Chtd. v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330, 334 (Utah 1985).[304]

This principle means that actions completed under the auspices of a tariff provision have the force of law and can only be modified or undone with prospective effect. However, Comcast's position in this case is nothing more than a request that the Commission retroactively read out of the tariff that the parties will be governed by a joint facilities contract that they previously entered into in this case—the 1999 Agreement. But, as the *Questar* case instructs, this can only be done prospectively, with the

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[302] Ex. G to PacifiCorp's Pre-Hearing Brief.PacifiCorp PSCU Tariff No. 44, Electric Service Schedule No. 4, Sheet No. 4.1.

[303] *Id*. On April 15, 1997, March 12, 1999, May 26, 2000, and November 8, 2001, PacifiCorp filed Electric Service Schedule No. 4 to its tariff. Each schedule is an identical refilling in connection with a sequence of general rate cases.

[304] *Questar Gas Co. v. Public Serv. Comm'n*, 2001 UT 93, para. 18, n.13; 34 P.3d 218, 224.

Commission "provid[ing] a rational basis for its decision" to change a prior practice.[305]

Accordingly, not only is Comcast bound as a matter of contract law to its obligations under the Agreement, but the principles of Utah public utility law do not permit the retroactive modification to the clear terms of the 1999 Agreement in the way Comcast seeks from the Commission.

A central element of the incorporated 1999 Agreement was the unauthorized attachment charge. That charge is a reasonable regulatory means to encourage Comcast and other licensees to make attachments that do not put the safety and reliability of PacifiCorp's electric distribution network at risk. Ensuring that a cable operator's use of an electric utility's facilities is undertaken in a safe and responsible manner is a task firmly entrusted to the Commission by statute.[306]

Comcast has noted that Schedule No. 4 sets out a pole-attachment rate ($4.65 per pole) for cable attachers, but that it does not explicitly state a rate for unauthorized pole attachments.[307] This observation ignores the direct incorporation of the terms and conditions of the Joint Facilities Agreement (i.e., the 1999 Agreement), as provided in item 2 of original Sheet No. 4.1 of Electric Service Schedule No. 4 and executed by the parties. Thus, the unauthorized pole attachment rate is incorporated in the tariff by reference and is a fundamental term and condition designed to accomplish multiple goals, including compliance with permitting requirements, protection of the integrity of the electric system, and assurance that the electric ratepayers will not subsidize unreported pole attachments.

[305] *Id.* at ¶ . 20.
[306] UTAH CODE ANN. §§ 54-4-13(2)(b), 54-4-14 (2004).
[307] Comcast Request for Agency Action at ¶ 8.

Having provided the structure for parties to agree to a term such as an unauthorized attachment rate or fee by approving Electric Service Schedule No. 4, the Commission may not modify those terms except with prospective effect after appropriate hearings. Except for limited circumstances not present in this case (nor even argued),[308] rates established under the aegis of the Commission's authority and approval may be modified with prospective effect only.[309] Thus, the Commission must reject Comcast's request to reduce or eliminate the unauthorized attachment charge, because—among other reasons—it does not possess the statutory authority, except on a forward-looking basis, to make such changes.

1. Any Failure of PacifiCorp to File a Form Contract Is Irrelevant

Comcast may argue that PacifiCorp has not complied with the provision of Electric Service Schedule No. 4 because it did not file a "current standard Joint Facilities Agreement" and that, therefore, the 1999 Agreement is not controlled by PacifiCorp's tariff. That argument must fail.

First, PacifiCorp and Comcast entered into the 1999 Agreement in compliance with item 2 of Electric Service Schedule No. 4. Therefore, the 1999 Agreement controls—both contractually and under the terms of the Commission-approved tariff. Second, any failure of PacifiCorp to carry out the ministerial requirement of filing a "standard" joint-facilities agreement under provisions of Schedule No. 4 on sheet 4.2 does not abrogate, nullify or otherwise have any effect on the binding nature of the terms of the 1999 Agreement and its execution under Schedule No. 4.

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[308] *MCI Telecommunications Corp. v. Public Serv. Comm'n,* 840 P.2d 765 (Utah 1992).
[309] UTAH CODE ANN. § 54-4-4 (2004); *Utah Dep't of Bus.Regulation v. Pub. Serv. Comm'n* 720 P.2d 420 (Utah 1986).

The requirement to file a "standard" or template contract is to make available to potential pole licensees the general terms and conditions that they can expect to address in negotiating a specific agreement with the electric utility pursuant to item two on Original Sheet 4.1 of Schedule No. 4. PacifiCorp's failure to file such a form with the Commission may have been a technical violation of the tariff that could affect a party who had yet to negotiate an agreement, but it is irrelevant to the consummated PacifiCorp-Comcast agreement.

Schedule No. 4's requirement to file a standard, form contract is a ministerial act that has no application to the matter before the Commission. Comcast has not argued - nor could it - that it has in any way been harmed or prejudiced by PacifiCorp's failure to place a form contract on file with the Commission. It understood what the substantive requirements were for attaching to public utility property; they negotiated the 1999 Agreement with PacifiCorp; the agreement was executed; and the parties have been, and will be, bound by its terms until the parties or the Commission might change them on prospective basis.

2. Section R746-345-1(A) Does Not Provide Retroactive Modification Authority

The tariff-based approach to the unauthorized-attachment charges at issue in this proceeding is consistent with the approach of the Utah regulations on pole attachments. In its Request for Agency action, Comcast cited Utah Admin. Code § R746-345-1.A for the proposition that the Commission has retroactive authority to change the amount of the unauthorized pole attachment charge agreed to in the Agreement. A generalized statement of Commission's power to regulate the pole-attachment process does not "trump" basic principles of utility regulation. In particular, § R746-345-3.C states in

relevant part: "If the parties to a pole attachment contract cannot come to agreement on [the rates for pole attachments], the Commission will determine an amount that is 'fair and reasonable.'" The parties here did come to an agreement on unauthorized attachment rates—not once, but three times. Section R746-345-1 does not provide any relief to Comcast from its contractual obligations.

D. Comcast Failed to Prove Its Case

The record evidence is clear and largely uncontroverted, the burden of proof is straight forward and squarely on Comcast, and the applicable contractual and tariff obligations are all identified and unambiguous. Properly analyzed against this analytical framework, Comcast's case evaporates. The only reasonable conclusions are: (1) Comcast failed to comply with applicable application and permitting requirements; (2) Comcast failed to provide records of attachment authorizations; (3) Comcast produced no actual evidence to counter PacifiCorp's proof that it made 39,588 unauthorized attachments; and (4) Comcast provided no basis to conclude that it should not pay its *pro rata* share of the costs of the 2002/2003 Audit.

1. Comcast Failed to Prove that It Complied with the Permitting Requirements in Place

a. The Evidence Establishes that Written Application and Permit Requirements Applied at All Relevant Times

During the timeframe relevant to this proceeding, PacifiCorp had in place clear and unambiguous application and permitting requirements, as set forth in both the 1996 and 1999 Agreements.[310] Comcast was and remains obligated to make application and receive permission for both initial and overlash attachments to PacifiCorp's facilities.

[310] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 26-27; August 26, 2004 Transcript of Hearing at 911, lines 16-25.

The record evidence confirms the existence and enforcement of these application and permitting procedures.

PacifiCorp implemented the current procedures in 1995 through a system-wide effort to standardize its joint-use contracts and improve existing joint-use procedures.[311] As part of this process, PacifiCorp developed a new application form, referred to as a "Joint Pole Notice" or "JPN," and distributed the form to third-party attachers it October 1995.[312] The letter accompanying the form instructed third parties to "replace your existing forms with this new one."[313] PacifiCorp's application form was incorporated into the 1999 Agreement as Attachment B to that contract.[314] In addition, Ms. Fitz Gerald conducted joint-use training, which included a review of the application form and PacifiCorp's standardized agreements, for both PacifiCorp personnel with joint-use responsibilities and third-party attachers throughout Utah from1996 to 1999.[315] Ms. Fitz Gerald distributed copies of the application form at the utility meetings she conducted with third-party attachers, including TCI.[316] At these meetings, Ms. Fitz Gerald carefully explained PacifiCorp's joint-use procedures and reviewed its standardized agreement with attendees, including Mr. Goldstein.[317] It is no overstatement that Comcast offered no evidence to refute the existence of PacifiCorp's application and permitting requirements.

[311] Fitz Gerald Sur-Rebuttal Testimony, Ex. PC 1.15, at 13.
[312] Ex. PC 1.24.
[313] *Id*.
[314] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 9.
[315] August 25, 2004 Transcript of Hearing at 667, lines 8-16 and August 26, 2004 Transcript of Hearing at 900, lines 5-8.
[316] Fitz Gerald Sur-Rebuttal Testimony, Ex. PC 1.15, at 2.
[317] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 26; Fitz Gerald Sur-Rebuttal Testimony, Ex. PC 1.15, at 2.

b. The Parol Evidence Rule Does Not Allow for Comcast's Claimed Excuses for Non-Compliance

Rather than provide any evidence that it complied with permitting requirements prior to 2002, Comcast's witnesses offered inconsistent testimony replete with excuses for Comcast's documented non-compliance with PacifiCorp's policies for over 6 years. Indeed, Comcast does not dispute that PacifiCorp had application and permit requirements in place, both as a matter of contract and joint-use policy by the mid to late 1990's and certainly by the end of the 1997/1998 Audit. Comcast's position boils down to arguing that during the 1970s or 1980s, PacifiCorp either waived or erratically applied permit requirements in practice, and that this practice continued until the mid-1990s, thus excusing Comcast's non-compliance. Comcast's arguments must fail.

First, the parol evidence rule prevents the use of oral and extrinsic evidence to contradict or alter a written contract. If a contract is integrated, a court may only consider extrinsic evidence if the contract language is ambiguous.[318] There is a presumption of integration when the parties have reduced to writing "an apparently complete and certain agreement."[319]

In the present case, the 1999 Agreement represents a fully integrated agreement. The parties could not, and did not,[320] rewrite or supplant the application and permitting terms of the 1996 and 1999 Agreements. The terms in both agreements are express and unambiguous, and both agreements contain integration clauses. For example, Section 8.8 of the 1999 Agreement provides that "[t]his Agreement, including any exhibits attached

[318] Utah and Oregon law are consistent. If a contract is fully integrated, parties may not offer extrinsic evidence of the existence of additional terms not contained in the writing, although extrinsic evidence would be admissible to interpret any ambiguous terms. *Wescold, Inc. v. Logan Int'l, Ltd*., 852 P.2d 960 (Or. App. 1993); *Hall v. Process Instruments and Control*, 890 P.2d 1024, 1026 (Utah 1995).
[319] *Hall v. Process Instruments and Control*, 890 P.2d 1024, 1026 (Utah 1995).

referenced herein, constitutes the entire agreement between the parties, and may not be amended or altered except by an amendment in writing executed by the parties." It further provides that "[t]his Agreement shall supersede all prior negotiations, agreements and representations, whether oral or written, between the Parties relating to the attachment and maintenance of Licensee's facilities on PacifiCorp's poles within the locality covered by this Agreement." Section 8.8 means that alleged oral agreements modifying the application and permitting process could not void the 1999 Agreement, nor were any prior oral arrangements incorporated within the 1999 Agreement.

Second, even if the Commission were to consider Comcast's parol evidence on permitting, the record evidence flatly contradicts Comcast's assertions. In fact, the evidence demonstrates that Comcast's non-compliance was due to lack of supervision and training of its joint-use, not any lapse on the part of PacifiCorp.

Even the Exhibit A authorization documents provided by Mr. Goldstein as an exhibit to his initial testimony show that PacifiCorp always had written application procedures in place.[321] As described by Mr. Goldstein, there was nothing informal about PacifiCorp's procedures in the 1970s and 1980s.[322] Instead, the process involved collaboration between Comcast and PacifiCorp. Representatives of each party would conduct "walk-outs" to physically inspect facilities before attachments were made. Once the parties arrived at an agreement as to what make-ready work was required, Comcast would submit both an Exhibit A form and marked design maps indicating where attachments would be placed.[323] Thus, while the procedures may have become more

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[320] *See supra*, Part II (C)(3).
[321] Comcast Ex. 3.1.
[322] Goldstein Initial Testimony, Comcast Ex. 3, at 3.
[323] *Id*.

standardized and formalized since 1995, PacifiCorp has always maintained written application and permitting requirements.

Moreover, it is critical to focus on the fact that the key timeframe for this litigation begins well after the expiration date of Mr. Goldstein's knowledge. Comcast's liability here for unauthorized attachments begins at the conclusion of the 1997/1998 Audit.

PacifiCorp eradicated any perceived inconsistency in its permitting requirements in 1995 and 1996, prior to the 1997/1998 Audit, through the implementation of standardized agreements, improved procedures and joint-use training of both PacifiCorp and telecommunications company personnel.[324] PacifiCorp provided uncontradicted testimony and supporting documentation establishing the existence of formal application and permitting procedures. PacifiCorp personnel responsible for joint-use were carefully trained on appropriate joint-use procedures in1996,[325] and Ms. Fitz Gerald testified that as a result of this training, she was unaware of any districts in Utah that approved attachments to PacifiCorp's facilities on an informal basis.[326]

Comcast's witnesses (it presented no documentary evidence on this point) did nothing to contradict the developments during this crucial timeframe. First, Mr. Deffendall, in his written testimony, unambiguously stated that PacifiCorp was requiring written applications in the late-1990s.[327] Second, despite the promise in Comcast's opening statement that Mr. Goldstein would offer testimony about PacifiCorp's

[324] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 26-27.
[325] August 25, 2004 Transcript of Hearing at 667, lines 8-16.
[326] August 26, 2004 Transcript of Hearing at 901, lines 1-9.
[327] Deffendall Initial Testimony, Comcast Ex. 2, at 6. At the hearing, Mr. Deffendall's testimony became a bit confused, suggesting that perhaps his knowledge of PacifiCorp attachment procedures related to power supplies. Comcast cannot have it both ways. Either Comcast is bound by Mr. Deffendall's admission on

permitting processes from the first days of cable "right through the present,"[328] Mr. Goldstein admitted that he had no knowledge of permitting procedures after 1989.[329] Third, Mr. Bell admitted at the hearing that he had never actually been involved in the process of obtaining permits for attachments.[330] Mr. Bell did, however, confirm that he had received a copy of the JPN no later than 2000 and provided the JPN to Comcast's new build department soon thereafter, in the belief that Comcast was complying with application and permitting requirements.[331] Fourth, even Mr. Pollock assumed this was the case, as evidenced by Fossil Creek Land Company -- apparently Comcast's agent -- acting in compliance with PacifiCorp's application and permitting requirements as of 1999.[332] Finally, Mr. Pollock admitted at the hearing that he had no actual knowledge of the facts alleged in his written testimony and stated that he could not speak to PacifiCorp's application and permitting procedures prior to 2002 because his work only involved obtaining permits for underground construction.[333]

2. Comcast Provided No Records of Authorization

Comcast failed to prove by a preponderance of the evidence that it had the right to attach to PacifiCorp's facilities. PacifiCorp never claimed to be infallible, but instead encouraged third-party attachers to come forward with evidence of authorization to dispute any invoices for unauthorized attachments.[334] Comcast continually failed to do so.

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permitting requirements in the late 1990's, or his testimony must be dismissed as irrelevant because it relates to power supplies and not cable wire attachments.

[328] August 23, 2004 Transcript of Hearing at 28, lines 24-25 and 29, lines, 1-2.
[329] *Id*. 83, lines 12-14.
[330] *Id*. at 232, lines 9-12.
[331] *Id*. at 242, lines 9-23.
[332] *Id*. at 186, line 18-25 and 187, lines 1-2.
[333] *Id*. at 183, lines 18-25; 184, line 1-25; and 187, lines 21-25.
[334] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 33.

It offered no response to PacifiCorp's letters accompanying the unauthorized attachment invoices,[335] no response to PacifiCorp's subsequent letter notifying Comcast that invoices had become past due,[336] no response after subsequent conversations between PacifiCorp and Comcast personnel,[337] and no response after signing the September 8, 2003 Letter Agreement.[338]

Comcast's failure to provide documentary evidence persisted through this proceeding. Mr. Coppedge's testimony stands unrefuted, indeed, unquestioned, that after carefully reviewing the alleged permit documents produced in discovery by Comcast, he found that only seven applications that were dated prior to the date of the corresponding invoices for unauthorized attachments.[339]

Faced with a complete lack of documentary evidence, Comcast resorted to witness testimony to establish authorization. That evidence proved no less ethereal. Mr. Goldstein's and Mr. Pollock's testimony established that Comcast has no records for attachments it made to PacifiCorp's poles from 1989-2002. Mr. Goldstein, Mr. Pollock and Mr. Bell all testified that they were unaware of any permitting records kept by Comcast that could establish authorization for Comcast's attachments.[340] Mr. Bell also stated that Comcast had maps and data showing where Comcast's attachments were located, but he did not produce these maps or data in this proceeding.[341] Incredibly, not only does Comcast have no records of authorization for its attachments, it also has no

[335] Ex. PC 1.6.
[336] Ex. PC 1.7.
[337] August 24, 2004 Transcript of Hearing at 319, lines 4-19.
[338] Ex. PC 1.8.
[339] *Id*.
[340] August 23, 2004 Transcript of Hearing at 87, lines 22-25; 88, lines 1-20; 203, lines 18-25 and 204, lines 1-2.
[341] *Id*. at 252, lines 21-22.

documentation showing how many attachments it maintains on PacifiCorp's poles.[342] When asked by the Administrative Law Judge about how many attachments were made by Comcast since the 1997/1998 Audit, Mr. Goldstein was unable to even provide a guess.[343]

Comcast's purported proof on the issue of authorization comes down exclusively to the 35 poles in the Salt Lake Metro district identified for the first time in Mr. Goldstein's July 14, 2004, Rebuttal Testimony. Even Mr. Goldstein, however, admitted that prior to that testimony, he had made no effort to assist Comcast in providing proof of authorization, had no records for anywhere other than Salt Lake Valley and for anytime other than before 1989, was unaware of any such records elsewhere in his company,[344] and that his analysis of the 35 poles was neither a representative sampling nor statistically valid.[345] Accordingly, Comcast either shrugged off or collapsed under its burden to produce a persuasive preponderance of evidence establishing authorization for the 39,588 pole attachments at issue.

Indeed, Comcast's failure to produce evidence of attachment authorizations should be resolved similarly to circumstances meriting a missing witness presumption. If a party fails to produce evidence which is under its control and reasonably available to it and not reasonably available to the adverse party, then a tribunal may infer that the evidence would have been unfavorable to the party who could have produced it and did

[342] August 24, 2004 Transcript of Hearing at 361, lines 1-21.
[343] August 23, 2004 Transcript of Hearing at 150, lines 2-7.
[344] *Id*. at 76, lines 5-12 and 204, lines 6-25 and 205, lines 1-3.
[345] If Comcast believes that the law as announced by the Federal Communications Commission should control the Utah Public Service Commission, then it must also accept that this analysis does not meet FCC criteria for statistically valid analyses necessary to overcome evidentiary presumptions in FCC proceedings. 47 C.F.R. § 1.363 addresses the introduction of statistical data as evidence in FCC proceedings and sets forth a detailed and rigorous standard that must be met in order for such evidence to be considered. The

not.[346] Four factors must be present before a negative inference may be drawn from a party's failure to call a particular witness:

> (1) [T]he party must have the power to produce the witness; (2) the witness must not be one who would ordinarily be expected to be biased against the party; (3) the witness's testimony must not be "comparatively unimportant, or cumulative, or inferior to what is already utilized" in the trial; and (4) the witness must not be equally available to testify for either side.[347]

Comcast should have presented at the hearing witnesses from its new build department who were responsible for obtaining authorization for new attachments. Those witnesses would have included the following Comcast employees: Keith Perkins (1998-2000), Bob Cowden (2000-2002), and Lyndon Latuhingoa (2002 forward).[348] The new build department was apparently supervised by Shelley Jensen,[349] and Sheryl Pehrson was the permit coordinator.[350] Indeed, in his testimony, Mr. Bell unequivocally passed the buck on this issue to Ms. Pehrson as of 2000.[351] In light of Comcast's shocking failure to produce any of the witnesses with real knowledge on this issue, the Commission should draw the negative inference that Comcast's new-build department failed to submit appropriate pole attachment permits to PacifiCorp. All four factors allowing a negative inference are present in this case and apply to Comcast's new-build personnel.

FCC has stated that this standard is applicable in the context of pole attachment proceedings for the purpose of overcoming evidentiary presumptions, a situation analogous to the evidentiary posture in this case.

[346] *Wilson v. Merrell Dow Pharmaceuticals, Inc*., 893 F.2d 1149, 1150-51 (10th Cir. 1990).

[347] *Id*

[348] August 23, 2004 Transcript of Hearing at 234, lines 2-14.

[349] *Id.* at 184, lines 12-25.

[350] *Id.* at 243, lines 18-20.

[351] Mr. Bell testified that he received a pole attachment permit form from Mr. Spencer sometime in September 2000, and that he provided the form to Sheryl Pehrson at some point after his meeting with Mr. Spencer. However, he had no idea whether or when Ms. Pehrson began following the process. August 23, 2004 Transcript of Hearing at 241, lines 17-24; 242, lines 18-19; 247, lines 20-25; and 248, lines 1-2.

3. Comcast Failed to Prove the Actual Number of Unauthorized Attachments Between the 1997/1998 Audit and 2002/2003 Audit

Comcast's weak attempts to attack the reliability of key data from two careful and thorough audits solely through opinion testimony of Comcast's build-out rate simply do not carry Comcast's burden of proof.[352] The Administrative Law Judge recognized this at the hearing and asked Comcast to present actual evidence: "[The] Commission would be very interested in any information that can be provided presumably by Comcast concerning the number of attachments [overlashes over billings] etcetera that have been accomplished since the last audit."[353]

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[352] As an additional red herring to explain away the increase in the number of unauthorized attachments, Comcast has implied that the attachments are the result of misidentified "leased poles." This suggestion is specious, for several reasons. First, Comcast once again refuses to actually provide its own evidence on the number of attachments it made between the 1997/1998 Audit and the 2002/2003 Audit, but instead simply flails at PacifiCorp's data and methodology. This time it flails without establishing any proof beyond mere speculation of the number of leased poles that might be an issue, or even any proof of how many Comcast attachments might be on those poles. And Comcast makes this gambit through an unauthenticated, unsigned and unsponsored document. There are, however, no holes to be poked here.

Mr. Coppedge made clear that the Osmose proposal to address the leased poles was something he did not solicit, did not even recall seeing prior to this litigation, and certainly did not think enough of to ask Osmose to follow up on with any work. August 26, 2004 Transcript of Hearing at 958, line18 and 965, line 25. In fact, Mr. Coppedge explained that PacifiCorp did in fact have the internal means to research and determine ownership of the poles (*Id*. at 983, lines 21-25 and 984, lines 1-14) and worked out a solution to any alleged "leased pole" problem without further help from Osmose. *Id*. at 992, lines 21-25 and 993, lines 1-4. PacifiCorp's billing system had checks in place so that it did not bill Comcast for attachments to misidentified lease poles. *Id*. at 995, lines 22-25 and 996, lines 1-6. Even Comcast's witness Mr. Harrelson acknowledged that Comcast was not billed for attachments on these poles, *Id* at 461, lines 13-25, because "it's too late to count them." August 24, 2004 Transcript of Hearing at 551, lines 4-16. Indeed, PacifiCorp would only bill Comcast for such attachments if it was able to determine that it owned the pole and Comcast had an attachment on that pole that had not previously been identified. August 26, 2004 Transcript of Hearing at 996, lines 5-13. So, any mistake is one that inures to the benefit of Comcast. August 24, 2004 Transcript of Hearing at 551, lines 17-19.

Finally, even if one accords any validity to Comcast's argument, it does not even come close to explaining why it should not be billed for 39,588 unauthorized attachments. The dispute between the parties over the number of Comcast's unauthorized attachments was fully developed well prior to the July 28, 2003 date of the unsolicited Osmose proposal identifying the alleged leased pole issue. And as Mr. Harrelson acknowledged, the proposal itself only suggested that 7,500 leased poles might be in issue, and Comcast has no basis for questioning whether PacifiCorp properly accounted for these poles and attachments in its work in the 1997/1998 and 2002/2003 Audits and whether PacifiCorp had "some way to validate this data." *Id*. at 538-541. In fact, PacifiCorp did, and nobody at Comcast, including Mr. Harrelson, bothered to speak to Osmose or present Osmose's testimony regarding the document. See *Id*. at 547, lines 1-19.

[353] August 23, 2004 Transcript of Hearing at 105, lines 16-22.

The accuracy of the results of the 2002/2003 Audit is fairly described as unblemished. Comcast confirmed the results through Steve Brown's testimony and MasTec's work. Comcast's sea change from a claim of 8,000 erroneously billed in its initial pleading, to a claim of only 22 pole attachments left as allegedly suspect after MasTec completed its work, speaks for itself.

As to the 1997/1998 Audit, PacifiCorp provided those results to Comcast in discovery.[354] They documented that prior to the 2002/2003 Audit, Comcast was paying rent for 74,000 to 75,000 poles.[355] This number was confirmed by Comcast's own witnesses in written and oral testimony.[356] No one at Comcast provided any evidence refuting the results of the 1997/1998 Audit. Indeed, Comcast's proffered omnibus expert did not believe he had reviewed any evidence from the 1997/1998 Audit results.[357]

Faced with Comcast's failure to refute or even consider the results of the 1997/1998 Audit, counsel for Comcast issued a litany of objections in an effort to avoid the introduction of critical evidence. The presiding Administrative Law Judge, however, overruled Comcast's objections and confirmed that "to the extent that this provides a look at what PacifiCorp claims is its billing records essentially prior to the uploading of the 2003 Audit information, it would be useful."[358]

In fact, the calculations performed by Comcast's counsel at the hearing further confirmed the accuracy of both the 1997/1998 Audit and the 2002/2003 Audit.[359] Specifically, as a result of the 2002/2003 Audit, PacifiCorp documented that Comcast

[354] Ex. PC 16.
[355] *Id.* at 862, lines 19-25 and 863, lines 1-4.
[356] Nadalin Initial Testimony at 3; August 24, 2004 Transcript of Hearing at 361, lines 24-25 and 362, lines 1-9.
[357] August 24, 2004 Transcript of Hearing at 423, lines 14-15.
[358] *Id.* at 422, lines 4-8.
[359] August 26, 2004 Transcript of Hearing at 814-824.

maintains attachments to 113,976 poles and has made unauthorized attachments to 39,588 of those poles.[360] Subtracting the number of poles supporting unauthorized attachments from the total number of poles where Comcast is attached yields 74,388 poles – the same number of poles both Comcast and PacifiCorp confirmed Comcast was being billed for prior to the 2002/2003 Audit.

The increase in attachments made by Comcast to PacifiCorp's facilities occurred during a period of rapid and tremendous growth in Utah and the communications industry. During the same time period, PacifiCorp added 38,000 new residential customers in the Salt Lake Metro, Ogden, Layton and American Fork districts alone.[361] Certainly, Comcast would have seen a parallel growth in its customer base throughout Utah during that time period, growth that tracked the huge growth reported in industry statistics and Comcast's company-wide financial data. That growth included attachments to drop poles and interset poles. Comcast's witness Mr. Harrelson admitted that attachments to drop poles could account for a substantial number of unauthorized attachments.[362]

And Comcast admitted that aerial attachments to PacifiCorp's facilities were a critical part of its huge upgrade, complaining that it was unable either to hook-up new customers or to build out its facilities -- at a loss of 200 miles of build per month -- when PacifiCorp ceased processing its permits.[363] Ultimately, in light of the size and scope of Comcast's operations and the absence of evidence from its new build personnel, and

[360] August 25, 2004 Transcript of Hearing at 649, lines 19-25; August 26, 2004 Transcript of Hearing at 863, lines 5-25.
[361] August 26, 2004 Transcript of Hearing at 840, lines 11-25 and 841, lines 1-14.
[362] Harrelson Initial Testimony, Comcast, Ex. 4, at 38.
[363] Comcast March 24, 2004 Motion for Immediate Relief at ¶ 19; Bell Initial Testimony, Comcast Ex. 1, at 13.

despite previously opining that Comcast did not make 35,000 new attachments, Mr. Bell admitted that he simply did not know how many new attachments had been made since 1999.[364]

4. Comcast Failed to Prove that Paying Its *Pro Rata* Share of the 2002/2003 Audit Costs Is Unreasonable

PacifiCorp invoiced Comcast for its *pro rata* share of the cost of the 2002/2003 Audit.[365] This was done pursuant to Section 2.21 of the 1999 Agreement, obligating Comcast to pay the expense of any field inspections. In fact, the cost allocation method for the 2002/2003 Audit was not only contemplated by the terms of the 1999 Agreement, it was more than fair and reasonable.[366] Comcast offered not one suggestion as to what would consist of a more equitable share of the audit costs. Instead, Comcast asked that Commission excuse it wholesale from its obligations to pay for its fair share of an inventory from which it directly benefited.

As demonstrated by the testimony in this hearing, PacifiCorp made considerable efforts to ensure that the costs of the Audit were fairly allocated among itself and third-party attachers. PacifiCorp first backed out of the amount passed on to third parties all audit costs associated with the capturing of data elements that were only of use to

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[364] August 23, 2004 Transcript of Hearing at 223, lines 20-23 and 234, lines 1-18.
[365] Request for Action at ¶ 24; Fitz Gerald Decl. at ¶ 19.
[366] *See e.g.,* ILL. ADMIN. CODE 315.40 (2003) (allowing the utility to charge a cable company *the full cost* of an audit where the audit demonstrates that "the CATV operator has failed to report more than 5% of his attachments or is in noncompliance on 5% or more of the poles to which it is attached.") (emphasis added); *Complaint of Michigan Cable Telecommunications Assoc. and Harron Cablevision of Michigan, Inc. against the Detroit Edison Co. Regarding the Terms and Conditions of Pole Attachments*, Case No. U-11964, 1999 Mich. PSC LEXIS 261 (Sept. 28, 1999) (affirming settlement agreement providing for audit costs to be allocated among all responsible attaching parties); 366 *In the Matter of Knology, Inc. v. Georgia Power Co.*, 18 FCC Rcd 24615, ¶ 29 (rel. Nov. 20, 2003) ("the costs of a pole inspection unrelated to a particular company's attachments should be borne by all attachers"); *In the Matter of Cable Television Ass'n of Georgia. v. Georgia Power Co.*, 18 FCC Rcd 16,333, ¶ 15 (rel. Aug. 8 2003), *recons. denied*, 18 FCC Rcd 22,287 (2003) (recognizing reasonableness of requiring attacher that is responsible for violations to bear cost of the audit).

PacifiCorp.[367] Second, to avoid billing for audit costs years after the audit was completed, PacifiCorp initially based the *pro rata* charge on the cost data immediately available after completing the audit in several preliminary districts.[368] Now that the audit has been completed throughout PacifiCorp's service territory, it will go back and reassess the data to ensure that the *pro rata* cost-recovery for the audit reflects an average of the overall total cost of the audit based on the total number of attachments.[369]

Faced with a complete inability or refusal to provide actual data on what it contends the total and *pro rata* costs of the 2002/2003 Audit should have been, Comcast resorted to naked assertions that it derived no benefit from the 2002/2003 Audit. Those assertions are contradicted by the testimony of Comcast's own witnesses and the weight of evidence in the record. Comcast took particular issue with the gathering of GPS coordinates and digital photographs for each pole during the 2002/2003 Audit. However, Ms. Nadalin testified that GPS coordinates for the poles Comcast was being billed for prior to the 2002/2003 Audit would have been very helpful,[370] and Ms. Fitz Gerald explained that photographs showing the condition of a particular pole at a specific point in time protects third parties from being inaccurately charged in the future.[371] Comcast cannot have it both ways, one moment asserting that PacifiCorp's joint use records are inadequate (despite having no records of its own documenting attachments made during the relevant time period) , and the next moment complaining that it should not bear a portion of the expense for gathering the information it claims it so desperately requires.

[367] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 40; August 26, 2004 Transcript of Hearing at 995, lines 6-21.
[368] August 26, 2004 Transcript of Hearing at 905, lines 10-20.
[369] *Id.* at 963, lines 13-25.
[370] August 25, 2004 Transcript of Hearing at 349, lines 12-18.
[371] August 26, 2004 Transcript of Hearing at 868, lines 6-22.

E. Comcast Failed to Prove that the Unauthorized Attachment Charges Are Unenforceable.

Comcast's last resort in this proceeding is to ask the Commission to save it from its own promises and conduct. Faced with an overwhelming factual record documenting the soundness of PacifiCorp's actions and clear legal principles binding Comcast to its commitments after failing to prove either that it has honored them or been excused from them, Comcast shamelessly asks the Commission to nullify its obligations. The unauthorized attachment charge, however, pursuant to Section 3.2 of the 1996 and 1999 Agreements and PacifiCorp's tariffs, is not unenforceable either as a matter of regulatory law or common law. Comcast should be made to live up to its promises because: (1) the charge serves important business and public-policy purposes; (2) other pole attachment regulators have upheld similar and even higher charges; (3) the evidence of Comcast's behavior proves the need for the charge; (4) the FCC's decisions on unauthorized attachment charges do not apply here; (5) two sophisticated and resourceful parties freely and voluntarily negotiated the 1999 Agreement; and, (6) the unauthorized attachment charge is not an unlawful liquidated damages provision. To the extent PacifiCorp made arguments on these issues in its Pre-Hearing Brief, it incorporates those arguments by reference here and adds only the following.

1. Application and Permit Requirements and Unauthorized Pole Attachment Charges Serve Important Business and Policy Interests

Both PacifiCorp's and Comcast's witnesses made the need for adherence to attachment application and permitting procedures, and the rationale for an unauthorized attachment charge, unequivocally clear. Ms. Fitz Gerald explained that unauthorized use

places the safety and reliability of PacifiCorp's electric system at risk.[372] Specifically, application and permitting requirements are necessary in order to ensure adequate cost recovery for joint use and to provide effective asset management.[373] Mr. Pollock confirmed the importance of such procedures and stated that application and permitting requirements benefit both PacifiCorp's customers and third-party attachers to PacifiCorp's facilities.[374] His supervisor, Mr. Bell, confirmed that addressing safety issues was an important part of joint-use, and acknowledged that Comcast has substantial safety problems on PacifiCorp's facilities which the parties must work together to correct.[375] Even Mr. Harrelson admitted that application and permitting procedures serve important interests and that some unauthorized attachment charge is reasonable.[376] And Mr. Jackson explained that unauthorized attachment charges are often the only way to prevent unauthorized use and protect critical infrastructure.[377]

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

As shown in PacifiCorp's Pre-Hearing Brief, certified States such as Oregon, California and Louisiana expressly allow unauthorized attachment charges ranging from $250.00 up to $10,000.00 per attachment violation. The Oregon Administrative Rules authorize pole owners to sanction pole occupants the greater of $250.00 per pole or 30 times the owner's annual rental fee per pole for failure to obtain a permit prior to installing an attachment.[378] Comcast was integrally involved in the task force that led to

[372] Fitz Gerald Rebuttal Testimony, Ex. PC 1.11, at 22.
[373] August 26, 2004 Transcript of Hearing at 873, lines 17-20.
[374] August 23, 2004 Transcript of Hearing at 209, lines 14-22.
[375] *Id*. at 263, lines 16-25 and 264, lines 1-7.
[376] August 24, 2004 Transcript of Hearing at 468, lines 14-16 and 471, lines 18-25.
[377] Jackson Sur-Rebuttal Testimony, Ex. PC 9.0, at 12.
[378] OR. ADMIN. R. 860-028-0140(1)(a)-(b)(2004).

the adoption of the Oregon unauthorized attachment charge.[379] The California Public Utility Commission authorizes penalties of $500 to be paid to the incumbent utility for each unauthorized attachment. That Commission also authorizes utilities to seek further remedies in a civil action.[380] The Louisiana Public Service Commission requires pole occupants to file written requests with pole owners prior to attaching or overlashing; in the event pole occupants make unauthorized pole attachments, the Louisiana Public Service Commission may assess reasonable penalties up to $10,000 per occurrence.[381]

Comcast introduced two new cases in this proceeding in its attempt to prop up Mr. Harrelson's discredited opinion on the reasonableness of unauthorized attachment charges. The first case is a California Public Utility Commission decision stating:

> CCTA asserts that rule VI.D.4 allows the Commission to impose penalties retroactively for past attachments that were placed without written authorization but which were legally placed at the time. This was not our intent. Instead the rules should apply only to any pole attachments made after the date the decision was issued. We will modify the rules accordingly.[382]

That case is inapposite and distinguishable. It involved pole attachments that were lawfully placed without written authorization. Subsequently, the California Commission changed the rules, requiring the payment of a $500 charge and creating remedies in a civil action for all pole attachments placed without written authorizations.[383] Realizing that its rule made illegal what were previously legal

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[379] Response of PacifiCorp to Request of Comcast for Agency Action, Ex 4; August 26, 2004 Transcript of Hearing at 859, lines 3-11.

[380] *Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service*, 1998 Cal. PUC LEXIS 879 (Oct. 22, 1998)*; Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service*, 2000 Cal. PUC LEXIS 228 (March 16, 2000).

[381] *Review of LPSC Orders U-14325, U-14325-A and General Order dated December 17, 1984 dealing with agreements for Joint Utilization of Poles and Facilities by Two or More Entities*, Docket No. U-22833, 1999 La. PUC LEXIS 13 (Mar. 12, 1999).

[382] August 25, 2004 Transcript of Hearing at 608, lines 18-25.

[383] Section VI.D is from the 1998 California decision (1998 Cal. PUC LEXIS 879) and reads:

attachments, the California Commission clarified its intent that those prior attachments would remain legal, but attachments without written authorization after the effective date of the rules would be deemed unlawful and subject to charges. In the instant case, Comcast's attachments without authorization were always unlawful, and PacifiCorp always had authority pursuant to the 1996 and 1999 Agreements to assess a charge for unauthorized pole attachments. Nevertheless, PacifiCorp conducted the 1997/1998 amnesty audit that deemed all of Comcast's then-existing pole attachments authorized even if Comcast did not have written authorization. From that point forward, PacifiCorp assessed charges for new unauthorized attachments.

The second case introduced through Mr. Harrelson is a decision by the New York Public Service Commission authorizing the imposition of an unauthorized pole attachment charge of three times the pole rental per attachment.[384] There, the Commission determined that by August 6, 2007, unauthorized pole attachment charges in that state may be revised to three times the annual pole rental per attachment. Importantly, the Commission also stated that "[t]he Policy Statement . . . shall govern the

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D. Unauthorized Attachments
1. No telecommunications carrier or cable TV company may attach to the right of way or support structure of another utility without the express written authorization from the utility.

2. For every violation of the duty to obtain approval before attaching, the owner or operator of the unauthorized attachment shall pay to the utility a penalty of $ 500 for each violation. This fee is in addition to all other costs which are part of the attacher's responsibility. Each unauthorized pole attachment shall count as a separate violation for assessing the penalty.

3. Any violation of the duty to obtain permission before attaching shall be cause for imposition of sanctions as, in the Commissioner's judgment, are necessary to deter the party from in the future breaching its duty to obtain permission before attaching. Any Commission order imposing such sanctions will be accompanied by findings of fact that permit the pole owner to seek further remedies in a civil action.

4. This Section D applies to existing attachments as of the effective date of these rules.

relationship between attachers and utilities, unless they mutually agree otherwise, on a prospective basis."[385] Therefore, in New York, parties that agree to their own terms – like Comcast and PacifiCorp did here - never have to implement the change; and those electing the change, may wait until late 2007 before doing so.

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

The truth is, Comcast's own behavior proves the fairness and reasonableness - indeed, the necessity - of the unauthorized attachment charge. PacifiCorp stated this in its Pre-Hearing Brief, and the evidence adduced at the hearing confirms this conclusion. Specifically, Comcast has continued to disregard application and permitting requirements since 1996, even when faced with unauthorized attachment charges in two agreements.

Witness testimony confirmed that Comcast has made no effort to adequately train or supervise its employees responsible for joint-use.[386] Specifically, Comcast and its predecessors spent years negotiating detailed joint-use agreements with PacifiCorp, yet Mr. Bell confirmed that no one reviewed the implications of these contractual arrangements with employees responsible for ensuring compliance with Comcast's contractual obligation to abide by PacifiCorp's application and permitting requirements.[387] Likewise, Comcast provides little or no supervision or oversight of the contractors it retains to conduct its upgrade. When questioned about unsafe and unpermitted work being performed on PacifiCorp's poles, Comcast contractors have

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[384] August 25, 2004 Transcript of Hearing at 611, lines 11-25 and 612, lines 1-4. See, *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Case No. 03-M-0432, 2004 N.Y. PUC LEXIS 306 (Aug. 6, 2004).
[385] 2004 N.Y. PUC LEXIS 306 (at Section titled "Conclusion").
[386] August 23, 2004 Transcript of Hearing at 280, lines 15-23.
[387] *Id*. at 281, lines 2-7.

reported that they were told by Comcast to install facilities as quickly as possible and in any way possible.[388]

Finally, even considering only Comcast's scant evidence, its own admission establishes that its new build department knew of the application and permitting requirements, and was provided the correct form by a senior Comcast employee, no later than 2000. Comcast, however, offered no records or testimony establishing that applications have been made. Thus, even disregarding PacifiCorp's evidence, it is undisputed that Comcast has been blithely ignoring its obligations for nearly three years prior to this proceeding. The only question then is the extent of Comcast's unauthorized attachment activities, and on that point Comcast once again offered no evidence. Enforcement of Section 3.2 is necessary to deter Comcast's behavior.

4. The FCC's Interpretation of "Just and Reasonable" Does Not Apply in Utah

Comcast ultimately asks the Commission to shed the autonomy it claimed by certifying that it regulates pole attachments.[389] Comcast would now have the Commission ignore its independent authority, ignore its own opportunity to analyze and decide this case, and simply blindly follow the Federal Communications Commission. Congress prohibits the FCC from regulating pole attachments in states certifying that the state will regulate pole attachments.[390] As a result, none of the FCC's pole attachment regulations, which include its rules on rates, terms and conditions, lawfully limit the State of Utah's application of its own pole attachment law.

[388] Lund Sur-Rebuttal Testimony, Ex. PC 4.7, at 4.
[389] *States That Have Certified That They Regulate Pole Attachments*, 7 FCC Rcd. 1498 (1992).
[390] 47 U.S.C. 224 (c)(1).

Comcast's almost exclusive reliance on FCC case law in bringing the present action is misplaced and should be given little or no consideration by the Commission. Specifically, Comcast would have the Commission replace its own authority with the FCC's decision in *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Col.* ("*Mile Hi*").[391] In that case, the FCC interpreted and applied the Pole Attachments Act's "just and reasonable" standard. *Mile Hi* is not applicable to and is distinguishable from the instant dispute. Despite Comcast's contention that *Mile Hi* binds the 32 non-certifying states to an FCC-created bright-line standard, this is simply not the case.

a. *Mile Hi* Bears Little Factual Resemblance to This Case

The facts of this case bear little resemblance to those present in *Mile Hi*. In *Mile Hi*, the pole owner unilaterally changed the terms of its pole attachment agreement with the cable operator. Specifically, the pole owner raised the amount of the unauthorized pole attachment charge from $50.00 to $250.00 and, apparently for the first time, allowed the imposition of an audit charge when an unauthorized attachment was discovered.[392] The attaching entity acquiesced to the new terms, but voiced objections and reservations.[393]

In contrast, the record in the instant case demonstrates that the unauthorized attachment contract provision has remained materially the same since the mid-1990's and that contract negotiations over the provision were mutual, thorough and amicable. In 1999, PacifiCorp and Comcast's predecessor, AT&T, specifically discussed the

[391] *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Col.*, 15 FCC Rcd 11450 (Cab. Serv. Bur. 2000). The Enforcement Bureaus decision was affirmed by the FCC at 17 FCC Rcd 6268 (2002).
[392] 15 FCC Rcd 11450, at para 5.
[393] *Id.* at para. 4.

unauthorized pole attachment charge and, after negotiating the point, mutually agreed that the amount should be $60.00 per pole, per year.[394]

In *Mile Hi*, there were several occasions where the pole owner's auditor found that the cable operator was attached to fewer poles, including those alleged to be unauthorized, than the number for which it had been paying the annual fee.[395] Moreover, an amnesty or baseline audit was never conducted. Rather, the pole owner simply presumed that the unauthorized attachments existed from the time it first provided the cable operator access to its poles (14 years prior). Finally, the FCC Enforcement Bureau's decision relied on the cable operator's data purporting to establish an industry-average unauthorized attachment fee; the respondent/pole owner failed to produce any evidence of its own.[396]

In contrast, as a result of the 2002/2003 Audit in Utah , it became apparent that Comcast was not paying rent for 39,588 poles on which it maintained attachments. In addition, the 1997/1998 Audit effectively provided Comcast a baseline or amnesty audit. Finally, Comcast offered no evidence of an industry average unauthorized attachment fee.[397] Instead, PacifiCorp showed that the $60 per pole per year charge is consistent or less than unauthorized attachment charges in other states that regulate pole attachment matters.[398]

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[394] August 26, 2004 Transcript of Hearing at 851, lines 10-25 and 852, line 1.
[395] 15 FCC Rcd 11450 at para 6.
[396] The survey offered by the complainant/cable operator showed that, in one instance, TCI paid an unauthorized attachment charge for as much as $750.00 per pole.
[397] The presiding Administrative Law Judge in fact stated at the hearing that he sees no evidence of industry-wide standard practice. August 24, 2004 Transcript of Hearing at 533, lines 6-7.
[398] PacifiCorp Pre-Hearing Brief at 20-21.

b. *Mile Hi* Is Not the Law of 32 States

The *Mile Hi* decision is not the law of 32 states and has not been applied by any state. Moreover, while affirming the Enforcement Bureau's earlier decision, the FCC specifically limited the scope of the decision to the facts presented in that case.

First, the FCC stated:

> [w]e find that the Bureau's determination - i.e., that a just and reasonable unauthorized attachment fee is five times the annual rent that Complainant would have paid if the attachment had been authorized - is appropriate *in these circumstances.*[399]

By using the qualifying phrase "in these circumstances," the FCC narrowly limited the scope and precedential value of the Enforcement Bureau's initial decision. This was made evident as the FCC then went on to review the case-specific facts, and specifically disavowed any notion that the Enforcement Bureau's initial decision created a standard of "general applicability" regarding reasonable unauthorized attachment fees.[400]

Second, the FCC recognized that it could apply a different standard for unauthorized pole attachment charges in other factual circumstances, stating: "Our conclusion does not preclude a finding, under other circumstances, that action by an attacher might support a penalty reflecting exemplary or punitive damages.[401]

Finally, the *Mile Hi* decision has not been adopted or otherwise used as a test for "reasonableness" by any state Commission,[402] nor has that decision been adopted or otherwise used by a state or federal court (except for the subsequent *Mile Hi* appellate

[399] 17 FCC Rcd. 6268 at para 9 (emphasis added).
[400] *Id.* at para. 11.
[401] 17 FCC Rcd. 6268 at note 24.
[402] LEXIS State Administrative Agency Decisions, Combined database (September 15, 2004).

ruling affirming the FCC's decision in that particular case).[403] Comcast's unsupported assertion that *Mile Hi* is the law in 32 states is simply wrong. Indeed, certified-state unauthorized pole attachment charges – such as those in Louisiana, California and Oregon -- better reflect whether PacifiCorp's charge is reasonable.

5. The 1999 Agreement is the Product of Equal Bargaining Power

When considering Comcast's request for regulatory intervention in its behavior, it is important to remember that the 1999 Agreement is the product of equal bargaining power between two sophisticated and large business entities. As explained by Ms. Fitz Gerald, the 1999 Agreement was not the product of monopolistic behavior as contended by Comcast.[404] The 1999 Agreement between PacifiCorp and AT&T contained a charge for unauthorized pole attachments of $60 per pole per year, plus back-rent.[405]

The language contained in the 1999 Agreement was negotiated between Ms. Fitz Gerald and AT&T's authorized personnel, Rob Trafton and Mike Sloan.[406] Indeed. Comcast's predecessors mulled over the terms of the 1999 Agreement for years before signing.[407] Ms. Fitz Gerald testified that while Mr. Trafton originally negotiated for a lower charge than the $60 charge, he never suggested an alternate amount and ultimately agreed to the $60.00 per pole, per year charge, with back-rent.[408]

During the course of these negotiations, there were no allegations of unequal bargaining power. Indeed, Comcast has admitted that PacifiCorp never engaged in

[403] LEXIS Federal & State Cases, Combined database (September 15, 2004); *Pub. Serv. Co. of Col. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).
[404] Comcast's Pre-Filed Brief at 36.
[405] August 26, 2004 Transcript of Hearing at 850, lines 2-6.
[406] *Id.* at 850, lines 10-25, 851 at 1-8
[407] Fitz Gerald Initial Testimony, Ex. PC 1.0, at 8.
[408] August 26, 2004 Transcript of Hearing at 851, lines 14-25 and 852 line 1.

monopolistic behavior towards it.[409] Mr. Bell acknowledged that PacifiCorp had never treated its poles as essential facilities and required Comcast to "do it our way or [ ] the highway."[410] Similarly, Mr. Pollock stated that other than two instances when there was a dispute over unpaid invoices, he was unaware of any instance where PacifiCorp denied Comcast access to its facilities.[411] In the words of Comcast's own witnesses, there is no monopolistic behavior in this case.

When Comcast acquired AT&T, it acquired the obligations of AT&T.[412] There is nothing unfair about PacifiCorp's continued right to enforce the 1999 Agreement that Comcast voluntarily agreed to when it acquired AT&T. This is particularly so since Comcast apparently performed no due diligence as to AT&T's permit authorizations and records.[413]

6. PacifiCorp's Unauthorized Attachment Charge is Not an Unlawful Liquidated Damages Provision

Comcast's final plea to be relieved of its promises asks the Commission to hold that the unauthorized attachment charge is void as against public policy as an unlawful liquidated damages provision. Comcast's grasp on this straw slips for several reasons, foremost of which is that Section 3.2 is not a liquidated damages provision, but rather a tariff rental rate for a specific type of attachment.

The unauthorized attachment charge of Section 3.2 is simply a tariff charge. It became a tariff charge by the direct incorporation of the terms and conditions of the Joint

[409] August 23, 2004 Transcript of Hearing at 264, lines 8-21.
[410] *Id*. at 264, lines 13-17.
[411] *Id*. at 207, lines 21-25
[412] Standard business practice dictates that acquisitions contain standard representation and warranty and indemnification provisions providing Comcast recovery from AT&T Broadband for charges for unauthorized attachments placed on PacifiCorp's poles after the amnesty audit, but before Comcast acquired that company.
[413] August 23, 2004 Transcript of Hearing at 114, lines 4-6.

Facilities Agreement (i.e., the 1999 Agreement), as provided in item 2 of original Sheet No. 4.1 of Electric Service Schedule No. 4 and executed by the parties. Thus, the unauthorized pole attachment charge is incorporated in the tariff by reference and is a fundamental term and condition of the tariff. As such, it is not subject to revisionism under common law theories of liquidated damages provisions.

Common-sense analysis confirms that the unauthorized attachment charge is simply a rental rate incorporated in a tariff. The parties' 1996 and 1999 Agreements provide for two types of attachments—authorized and unauthorized—and two corollary types of attachment rental rates. Indeed, in the 1999 Agreement, for example, the relevant charges for each type of attachment appear on page six under the same section entitled "Article III[:] Rentals." Section 3.1 provides the rental rate for the first type of attachments – authorized attachments. Section 3.2 then naturally provides the rental rate for the other type of attachments – unauthorized attachments. Section 3.3 refers back to the "rental amounts specified in Sections 3.1 and 3.2" and, like many standard rental agreements, notes that such amounts are subject to adjustment on 90 days' written notice.

Common sense also shows that the parties are disputing a rental rate charge, not a material breach-of-contract claim and a dispute over the resulting damages. Liquidated damages issues always arise in a situation where one party has materially breached an agreement, the other has terminated the agreement, and both sides have ceased performance, leaving them only to battle over the damages owed the non-breaching party.[414] Here, of course, the parties are still operating under the same terms of the 1999

[414] *See, e.g., United States ex rel. Clark Eng'g Co. v. Freeto Constr. Co.*, 547 F.2d 537 (10th Cir. 1977) (performance under contract was untimely and not legally excusable); *Broderick Wood Products Co. v. United States*, 195 F.2d 433 (10th Cir. 1952)(failure to perform under contract); *Bair v. Axiom Design, L.L.C.*, 20 P.3d 388 (Utah 2001)(breach for failure to return transparencies); *Robbins v. Finlay*, 645 P.2d

Agreement as they have for nearly five years, Comcast is still attached to and building out its network on PacifiCorp's poles, and PacifiCorp is still facilitating and managing the maintenance and growth of Comcast's network. There has been no material breach, cessation of performance and claim for resulting damages, but rather only a dispute over rental rates.

a. Even If PacifiCorp's Unauthorized Attachment Charge Is a Liquidated Damages Provision, Comcast Must Prove It Is Unlawful

Even if Section 3.2 were analyzed under common law liquidated damage principles, it is not invalid. A liquidated damages provision is lawful unless the party opposing it carries the burden of proving that it is simply an unlawful penalty provision. In other words, the law places the burden on the party who would avoid a liquidated damages provision to prove that no damages were suffered or that there is no reasonable relationship between compensatory and liquidated damages.[415]

The purpose of a liquidated damages provision is to obviate non-breaching party's proof of actual damages.[416] In determining the validity of a liquidated damages provision, it is fair to say that Utah courts might well apply Oregon law in this case.[417]

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623 (Utah 1982)(plaintiff entitled to liquidated damages for breach of an employment contract covenant; *Perkins v. Spencer*, 243 P.2d 446 (Utah 1952)(sellers to rescind a contract for non-payment and to keep the down payment as liquidated damages.); *Savage Indus. v. American Pulverizer Co.*, 1996 U.S. App. LEXIS 33157 (10th Cir. 1996)(breach for failure to install conveyer); *Bramhall v. ICN Medical Laboratories, Inc.*, 586 P.2d 1113 (Or. 1978)(liquidated damages for breach of employment contract; *Fishermen's Marketing Ass'n. v. Wilson*, 566 P.2d 897 (Or. 1977)(breach of the association's by-laws and membership agreement); *Martin Bros. Signs, Inc. v. Vice*, 846 P.2d 1205 (Ct. App. Or. 1993)(breach of contract). *LTR Rental Co. v. Simmons*, 595 P.2d 1283 (Ct. App. Or. 1979) (awarded liquidated damages for breach of contract for an exclusive license to maintain washers and dryers).

[415] *See e.g., Illingworth v. Bushong*, 688 P.2d 379, 388 (Or. 1984); *Young Elec. Sign Co. v. United Standard West, Inc.*, 755 P.2d 162, 164 (Utah 1988).

[416] *Bair v. Axiom Design, L.L.C.*, 20 P.3d 388, 394 *citing Young Elec. Sign Co.*, 755 P.2d at 164.

[417] See discussion at supra note 282 citing *Shearson Lehman Bros., Inc. v. M & L Inv.*, 10 F.3d 1510 (10th Cir. 1993).

Under Oregon law, liquidated damages must be set at an amount which is reasonable in the light of:

> (i) the anticipated or actual harm caused by the breach;
>
> (ii) the difficulties of proof of loss; and
>
> (iii) the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.[418]

i. Comcast Failed to Establish the Charge Is an Unreasonable Estimation of Anticipated or Actual Harm Caused by a Breach

Comcast has not proven that Section 3.2, if it is viewed as a liquidate damages provision, is unlawful. First, Comcast relies solely on the *Mile Hi*[419] decision. As shown above, however, Comcast's reliance on that decision is misplaced because the FCC limited the application of that case to its facts, and the FCC's determination of "reasonableness" is not the law in certified states such as Utah.

Second, Comcast has offered no evidence to prove that Section 3.2 is an unreasonable estimation of anticipated or actual harm caused by unauthorized attachments. To the contrary, as shown here, witnesses for both parties testified as to the importance of permitting procedures, the problems cause by unauthorized attachments and the pole owner's legitimate and important interests in enforcing compliance with the permitting process through unauthorized attachments charges. It is not realistically

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[418] OR. REV. STAT. § 72.7180(1)(2003). *See Kesterson & Pacific Coast Timber Co. v. Juhl,* 970 P.2d 681 (Or. Ct. App. 1998); *Ditommaso Realty, Inc., v. Moak Motorcycles, Inc.*, 773 P.2d 391, 392 (Or. Ct. App. 1989)(*citing Illingworth v. Bushong*, 688 P.2d 379 (Or. 1983)); *Voicemail Int'l v. Envoy Global, Inc.*, 19 Fed. Appx. 641 (9th Cir. 2001). The Utah Supreme Court adopted a similar liquidated damages test: [A]n agreement, made in advance of breach fixing the damages therefore, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless (a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and (b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation. *See Reliance Ins. Co. v. Utah Dep't of Transp.*, 858 P.2d 1363,1367 (Utah 1993); *Woodhaven Apartments v. Washington*, 942 P.2d 918 at 921.

[419] *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Col.*, 15 FCC Rcd. 11450 ("*Mile Hi*").

possible to calculate the harm that tens of thousands of unauthorized attachments cause to these interests, let alone the harm caused to PacifiCorp's ability to collect appropriate joint use revenues and accomplish full-cost recovery, protect vital safety and reliability concerns, avoid violation of property owners' rights, manage its plant, and protect its customers and the public, all while meeting its obligations to the Utah PSC. In addition, avoidance of the permitting process increases the transactions costs between the parties (*e.g.*, the costs associated with PacifiCorp having to police its facilities, determine whether a particular attachment was authorized, and force compliance). In light of the foregoing, and Comcast's failure to offer any evidence on the harm caused to such interests, a charge of $60 per pole per year is an eminently reasonable estimation of the anticipated or actual harm caused by unauthorized attachments.

ii. Comcast Fails to Establish that Proof of Loss is Not Difficult to Establish and Remedy Is Easily Obtained

Comcast again relies solely on the *Mile Hi* decision to prove this element, but that case is inapposite. In addition, Comcast offers no actual evidence to sustain its burden of showing that proof of loss is not difficult to establish. In fact, it would be quite difficult to prove the amount, nature and scope of loss caused by unauthorized attachments to all of the interests outlined in the preceding section.

Comcast also offers no actual evidence to sustain its burden of showing that a remedy is not inconvenient or not infeasible. There is no doubt it will be inconvenient and nearly infeasible to obtain a remedy for the loss caused by unauthorized attachments. One need only look at the facts of this case to confirm the truth of this proposition. After nearly ten years of effort to formalize and standardize its joint use procedures; after countless meetings, training sessions, conversations and correspondence with Comcast;

after investing millions of dollars in two painstaking audits; after centralizing its joint use group and expanding it to over 30 employees to meet the needs of attachers; after myriad negotiations; after untold man hours and physical resources devoted to policing, inspecting and maintaining its plant and seeking to collect lost operating costs; and after dealing with numerous regulatory issues and proceedings, Comcast has yet to reimburse PacifiCorp and its customers for the free use of PacifiCorp's poles made by Comcast in generating unregulated cable television and next-generation service revenues. And PacifiCorp has yet to obtain Comcast's earnest compliance in correcting permitting and safety concerns. If this is not the type of difficulty in calculating and proving loss, and the type of difficulty in obtaining a legal remedy, that justifies a modest liquidated damages provision, it is hard to imagine what would be.

IV. RELIEF MERITED

PacifiCorp strongly urges the Commission to reject Comcast's bold request that it be granted a "clean slate." Such a ruling would serve no other purpose than to reward Comcast for its repeated failures to engage in a productive, reasonable and fair joint-use relationship. Allowing Comcast a free pass for its ten-year history of non-compliance with PacifiCorp's application and permitting requirements would set a dangerous precedent by not just condoning the behavior, but rewarding Comcast for its avoidance of responsibility.

PacifiCorp already gave Comcast one "clean slate" with the 1997/1998 Audit. During the utility meetings in 1996, Ms. Fitz Gerald explained to Comcast that, while the results of the 1997/1998 Audit would not result in charges for unauthorized attachments, the information gathered during the Audit would be used for PacifiCorp's rental records

going forward.[420] Granting that relief again would adversely affect every electric customer of PacifiCorp in Utah. Indeed, the charges collected for unauthorized attachments are not a net revenue mechanism for PacifiCorp; they eventually become a credit to PacifiCorp's electric customers. Accordingly, PacifiCorp respectfully requests that the Commission consider a more balanced approach to resolving this dispute.

To date, PacifiCorp has identified 39,588 poles supporting unauthorized attachments made by Comcast. Comcast's own audit confirmed that number of Comcast attachments detected by PacifiCorp during the 2002/2003 Audit. Comcast, as the licensee, has the burden of proof to demonstrate it has authorization for attachments for these poles. Yet, it has only provided a list of 35 poles for which it claims to have authorization, and a list of 22 poles on which it claims it has no attachment. Comcast's witnesses have stated that Comcast has no records of how many new customers it has hooked up for four years or how many attachments it maintains on PacifiCorp's poles.

Therefore, the only area left open to resolve is the proper application of the contractual provision in the 1999 Agreement obligating Comcast to pay an unauthorized attachment charge of $60.00 per pole per year. Ms. Fitz Gerald explained that as the negotiator of the 1999 Agreement, it was her interpretation that "should the licensee attach equipment . . . the unauthorized attachment charge began on the date of attachment or back to the date that either party could prove that it had been attached."[421]

Because Comcast, as the licensee, has not offered any proof documenting when it made any of the 39,588 unauthorized attachments, PacifiCorp believes that the language of the 1999 Agreement allows for application of the $60.00 per pole charge for five

[420] August 26, 2004 Transcript of Hearing at 902, lines 17-24.
[421] August 26, 2004 Transcript of Hearing at 853, lines 14-17.

years, plus recovery of five years back rent. In other words, in the absence of any evidence to the contrary from the licensee, the licensee is fairly held responsible back to the date of the last audit – the last comprehensive effort by the pole owner to police the licensee's activities. Here, this encompasses the time period from the end of the 1997/1998 Audit – very early 1999 – through 2003 (and in fact, should continue through the present day, as Comcast has not sought permits for all but a de minimis number of unauthorized attachments).[422] PacifiCorp conservatively calculated this charge to be $250, an amount Comcast agreed was reasonable in Oregon.

Comcast indisputably bears the burdens of production and persuasion with respect to establishing how long Comcast's unpermitted attachments have been situated on PacifiCorp's poles. Comcast has failed to demonstrate by a preponderance of the evidence how long any particular Comcast attachments were so situated. Therefore, PacifiCorp was reasonable in assessing a charge based upon five years of occupancy. However, PacifiCorp acknowledges that it cannot establish with certainty when during the last five years the unauthorized attachments at issue were made, through no fault of its own. Comcast's witnesses have testified that the upgrade was conducted at a relatively steady pace since 1999.[423] Accordingly, an alternative method for determining the total charges for unauthorized attachment is to assume that the unauthorized attachments were installed at a uniform rate beginning at the end of the 1997/1998

[422] There is no truth to Comcast's insinuation that PacifiCorp is simply trying to establish a uniform $250 unauthorized attachment charge in every state in its service territory. While the charge for unauthorized attachments that Comcast agreed to was based upon language in PacifiCorp's standardized joint-use agreement, PacifiCorp negotiated different unauthorized charges with other companies. For example, the charge provided in the agreement applicable in Wyoming did not contain the same "per pole per year language" as provided in the 1999 Agreement. Accordingly, the terms of that agreement dictated a one time charge of $60.00, plus five years back rent, as opposed to a $60.00 charge per pole for the duration of the unauthorized attachment. In addition, unauthorized attachment charges in Oregon start at $250, but can go up or down depending on actions taken by the licensee. OAR 860-028-0140.

Audit—approximately April 1999—continuing through the end of September 2004. This spans 5.5 years and would provide an average period of unauthorized attachment of 2.75 years. Including 2.75 years' worth of back rent at $4.65 would yield a charge of:

($60.00 + $4.65) x 2.75 = $177.79 per pole.

Multiplying this times 39,588 poles with unauthorized attachments gives:

$177.79 x 39,588 = $7,038,350.

PacifiCorp believes this is the minimum charge that is consistent with the evidence (and the absence of Comcast's evidence),[424] the terms of the agreements between the parties and the Commission-approved tariff provisions.

V. CONCLUSION

Wherefore, based on the extensive factual record and clear legal conclusions supporting PacifiCorp's position, PacifiCorp requests that the Commission dismiss Comcast's Petition for Agency Action, enter judgment in PacifiCorp's favor, and order Comcast to pay PacifiCorp all just and reasonable charges owed for 39,588 poles supporting unauthorized attachments, Comcast's *pro rata* portion of the 2002/2003 Audit

[423] August 23, 2004 Transcript of Hearing at 272, line 25 and 273, lines 1-9.

[424] Comcast's own evidence establishes that Mr. Bell and Ms. Pehrson had actual knowledge of application and permitting requirements, and copies of the necessary JPN form, no later than 2000 - approximately 2.5 years before the conclusion of the 2002/2003 Audit and the beginning of the parties' dispute.

and the reasonable attorneys' fees and costs incurred by PacifiCorp in defending this proceeding.

RESPECTFULLY SUBMITTED this 8th day of October, 2004.

PacifiCorp

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of October 2004, a true and correct copy of the enclosed was mailed via electronic mail, first-class mail or overnight courier service to:

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