

## JOINT ISSUES MATRIX

### IN THE MATTER OF COMCAST V. PACIFICORP DOCKET NO. 03-035-28

ISSUES	COMCAST POSITION	PACIFICORP POSITION
Accuracy of the 1997/1998 Audit	<p>Comcast believes that to the extent that this audit (which actually was completed in 1999) was conducted at all, there are a number of serious problems with it that disqualify it from serving as a baseline for determining unauthorized attachments from pole counts in the current audit. First, to the extent that notice was given, it was insufficient. Second, if there was notice, it was not clear that this was to be an “amnesty” audit. Third, to the extent the notice letters were sent, they indicated an intention to assess charges for the audit. The fact that PacifiCorp ultimately did not is not a sign of altruism, but more likely a sign that there were problems with the audit which prevented PacifiCorp from charging cable operators for them. In addition, there are no verifiable records from that audit, as well as the fact that this audit was the first time PacifiCorp attempted to keep an electronic database or inventory of its Utah pole plant. Most important, however, testimony and exhibits with respect to Osmose and the 2002/2003 audit established that there were as many as several</p>	<p>Beginning in 1997 through early 1999, PacifiCorp undertook a system-wide pole attachment 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.</p> <p>PacifiCorp required that the contractors hired to perform the 1997/1998 Audit maintain an accuracy rate of 97%. Comcast’s predecessors had written and oral notice of the 1997/1998 Audit and were given an opportunity to refute the results. They never did so.</p> <p>The results of the 1997/1998 Audit are available in the form of records for Comcast’s attachments prior to the 2002/2003 Audit that demonstrate Comcast was being billed for attachments to 74,000-75,000 poles. Comcast never complained that it was being billed for attachments to too few poles.</p> <p>There is no evidence to support Comcast’s speculation that the recorded unauthorized</p>

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	<p>thousand poles <i>per district</i> (and there are 20 districts in Utah today) that were owned by others with space on those poles leased by PacifiCorp. This alone could account for the discrepancy in so-called “unauthorized attachments.</p>	<p>attachments are the result of misidentified “leased poles,” nor any proof of how many Comcast attachments might be on such poles.</p> <p>Also, PacifiCorp did not bill Comcast for attachments to misidentified leased poles.</p>
<p>Accuracy of the 2002/2003 Audit</p>	<p>Comcast is willing to agree with Osmose’s conclusion that it is attached today to approximately 114,000 (113,979) PacifiCorp poles and believes that this number could be used as the going-forward baseline for future audits. The approximately 44,000 pole difference between the 1997/1999 Audit are due to deficiencies and undercounting from that audit, not to the fact that Comcast within the a period of only 4 or 5 years attached to 44,000 new poles.</p>	<p>PacifiCorp hired an experienced and trusted contractor, Osmose, through a competitive bidding process to conduct the 2002/2003 Audit. Osmose’s contract required it to maintain a 97% accuracy rate for the Audit, and the data collected during the Audit was subjected to several rounds of quality control testing.</p> <p>The results of the Audit were carefully entered into JTU, PacifiCorp’s joint-use database.</p> <p>The accuracy of PacifiCorp’s Audit was confirmed by Comcast’s own audit conducted by MasTec. As a result, Comcast stopped MasTec’s efforts after only auditing one district.</p>
<p>Existence of PacifiCorp’s Application and Permitting Requirements</p>	<p>Notwithstanding provisions in the agreement and some effort by PacifiCorp beginning in 1996 to train pole personnel in new procedures, these procedures were inconsistent and haphazard. There is no evidence to suggest that the 1997/1999 audit was a “clean slate.”</p>	<p>As demonstrated by the permits offered by Mr. Goldstein, PacifiCorp has had permitting procedures in place since the 1970s.</p> <p>Moreover, PacifiCorp had clear application and permitting requirements in place throughout Utah as of 1996, at the very latest. This is</p>

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		<p>evidenced by two contracts with Comcast’s predecessors, numerous training sessions conducted to train third parties on PacifiCorp’s joint-use procedures, and PacifiCorp’s application form that was provided to TCI in 1995.</p> <p>Any perceived inconsistency in PacifiCorp’s permitting processes prior to 1996 was accounted for by the 1997/1998 Audit, which provided all third party attachers a clean-slate for past practices.</p>
<p>Increase in Number of Comcast Attachments Detected Since the 1997/1998 Audit</p>	<p>The overwhelming majority of attachments which PacifiCorp claims are unauthorized are due primarily to deficiencies and undercounting in the only other audit or attempt to populate its electronic pole databases which occurred in the 1997/1999 audit. The leased pole issue, in and of itself, could account for virtually the entire discrepancy. In addition, inter-set poles where PacifiCorp attached Comcast facilities but did not report them into JTU (or to Comcast) could account for a portion of the discrepancy as well. Comcast hard line-attachments were approximately 98% completed by the mid to late 1980s, and any “boom” in aerial plant activity as it pertains to Comcast was overlashing to existing attachments. The vast majority of any new build activity as been underground to new housing areas, with many</p>	<p>As a result of the 2002/2003 Audit, PacifiCorp identified 113,979 poles supporting 120,516 attachments made by Comcast. To date, PacifiCorp has billed Comcast for 39,855 poles with unauthorized attachments attributable to Comcast.</p> <p>The 2002/2003 Audit accurately demonstrates an increase in the number of attachments made by Comcast since the 1997/1998 Audit.</p> <p>There are several factors that can account for the increase in Comcast attachments during that time period. Attachments made by Comcast to drop poles and interset poles would account for a significant number of poles supporting Comcast attachments. Additionally, from 1996 and continuing today, Utah experienced a</p>

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	<p>of those being in-fill developments of what was once open or agricultural land already passed by aerial cable facilities.</p>	<p>construction boom that coincided with an outgrowth in the telecommunications industry and a massive upgrade by Comcast.</p> <p>Comcast’s attempt to reconcile the increase in the number of Comcast attachments is in the form of unsupported speculation. Comcast failed to produce any documentary evidence regarding the scope, nature, or timeframe of its upgrade and new build construction in Utah.</p>
<p>Compliance with PacifiCorp’s Permitting Requirements</p>	<p>The record demonstrates that once Comcast (or its predecessors) had been informed what the permitting processes were—and they were ever-changing—it sought to adhere to them. Examples such as the hiring of Marty Pollock in 2002 when Comcast learned that PacifiCorp was requiring that permits be filed for overlashing (Mr. Pollock has submitted over 15,000 such applications to date); the fact that Gary Goldstein has meticulous permitting records; Mark Defendall’s testimony that in some areas there were no requirements at all support this point.</p>	<p>Despite entering into two Pole Contact Agreements containing application and permitting requirements, receiving written notification of the requirement to use PacifiCorp’s application form, attending training sessions conducted by PacifiCorp, and being informed on numerous occasions about PacifiCorp’s requirements, Comcast and its predecessors failed to comply with these requirements until 2002.</p> <p>Comcast witnesses documented that they received no training from Comcast or its predecessors regarding appropriate joint-use practices.</p>
<p>Burden to Demonstrate Authorization</p>	<p>This issue has not been explicitly addressed in the proceeding and Comcast objects to its inclusion in this matrix. Without waiving that objection, Comcast states that each party has introduced evidence regarding the issue of pole</p>	<p>During the relevant time period, PacifiCorp had in place clear application and permitting requirements.</p> <p>Further, PacifiCorp provided Comcast with</p>

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	<p>authorization and that evidence should be reviewed by the Commission in light of the totality of relevant facts and the lack of records on the part of either part demonstrates one of Comcast’s core contentions: to the extent that PacifiCorp had procedures at all, they were lax and haphazard.</p>	<p>numerous opportunities to provide documentation of authorization. Comcast uniformly failed to take advantage of any of these opportunities.</p> <p>PacifiCorp carefully maintains and updates its joint-use data base. Comcast, on the other hand, has no such uniform record-keeping mechanism in place. The absence of any documentation from Comcast establishes its failure to comply with PacifiCorp’s requirements for at least seven years.</p>
<p>Evidence of Authorization or Evidence Refuting the Accuracy of the 2002/2003 Audit</p>	<p>As indicated above, Comcast does not dispute “the accuracy of the 2002/2003 Audit,” and would be willing to agree to the aggregate pole number that Osmose has generated going forward as a baseline. In other words, Comcast reasonably believes that it is attached to most of the poles that Osmose has said, despite the fact that there is evidence in the record that Comcast was said to be attached to poles in a town (Cedar Fort) where it did not even own the cable system, as well as other problems.</p>	<p>With the exception of 35 poles, Comcast provided no evidence that it is authorized to maintain attachments on the poles invoiced as having Comcast unauthorized attachments.</p>
<p>Existence of Contractual Obligation to Remit Payment for Unauthorized Attachment Charges</p>	<p>The 1999 Agreement was unilaterally terminated by PacifiCorp. PacifiCorp cannot selectively rely on only those provisions that it deems favorable to its interests and claim that the termination had no effect, legal or otherwise. To the extent any charge applies for “unauthorized attachments” at all to this</p>	<p>Section 3.2 of the 1999 Agreement provides that PacifiCorp may assess a \$60.00 per year per pole charge for unauthorized attachments until such time as the attachment is removed or authorization is obtained.</p> <p>The parties have established an implied contract</p>

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	<p>dispute, the agreement manifestly does not support a \$250 unauthorized attachment charge. Any charge should be applied prospectively only after the parties have agreed or stipulated to a present baseline. Moreover, any ambiguity in the contract (and at a minimum this provision is ambiguous) must be construed against PacifiCorp.</p>	<p>through a course of dealing incorporating the terms of the 1999 Agreement, and Comcast remains obligated to PacifiCorp under the parties' implied contract.</p> <p>Section 8.7 of the 1999 Agreement provides that the termination of the Agreement does not release Comcast from its liabilities and obligations that had accrued or were accruing at the time of termination.</p> <p>Finally, any unauthorized attachments made after the termination of the 1999 Agreement remain subject to an unauthorized attachment charge pursuant to an established course of dealing between PacifiCorp and Comcast.</p> <p>Unauthorized attachment charges are necessary in order to protect electric rate-payers and prevent them from having to subsidize the activities of communications providers.</p>
<p>Just and Reasonableness of Unauthorized Attachment Charge</p>	<p>It is not justified by the agreement. It is not justified by the tariff. It is not justified by Utah law, and is in fact is illegal under Utah law as a penalty. It does not reflect any true measure of "harm" or "injury" suffered by the pole owner. It is illegal in 32 states. Other state commissions (including, recently, New York) have rejected calls for identical \$250 fees, ruling that back rent only was adequate</p>	<p>The charge imposed by PacifiCorp is justified by the language of the 1999 Agreement, as incorporated in PacifiCorp's Commission approved tariff. The agreement provides for a charge of \$60.00 per pole per year. Since Comcast bears the burden of demonstrating authorization for its attachments, PacifiCorp calculated the charge based upon an attachment period beginning early in the period between</p>

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	<p>compensation. In those few states where a similar fee is in place, it can only be applied on a going forward, not retroactive basis.</p> <p><u>PacifiCorp's new "alternative" charge of \$178.00 per pole is unreasonable as well.</u></p>	<p>the two audits. Alternatively, assuming a uniform rate of unauthorized attachments over a 5.5 year period yields a minimum charge of approximately \$178.00 per pole.</p> <p>The \$60.00 per pole per year charge is within the bounds of reasonableness. Comcast's non-compliance with PacifiCorp's permitting and application requirements proves the need for the charge, and the charge is similar to charges in other states where Comcast has agreed to a charge for unauthorized use.</p> <p>The charge is similar to what the Commission has approved for unauthorized use of electricity and is far less onerous than what Comcast imposes on those who use its services without authorization.</p>
<p>Cost Recovery For the 2002/2003 Audit</p>	<p>The record demonstrates that PacifiCorp has overcharged Comcast for the costs of the audit and PacifiCorp has admitted this to be the case, by "averaging averages;" by including Wyoming communities in its charge; and by invoicing attachers on a per-attachment basis.</p>	<p>Section 2.21 of the 1999 Agreement between AT&amp;T and PacifiCorp clearly allows PacifiCorp to recover the costs associated with inventories of joint-use facilities.</p> <p>PacifiCorp backed out of the cost passed on to third parties any amounts attributable to aspects of the 2002/2003 that were solely for PacifiCorp's benefit.</p> <p>Comcast and other third-party attachers directly benefited from the 2002/2003 Audit.</p>

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		<p>In addition, PacifiCorp has committed to examine all the cost data now available for the 2002/2003 Audit to ensure that it will not over or under-recover the costs associated with the Audit.</p>
<p>Fines For Alleged Safety And Clearance Issues and Allocation Of Costs For Cleanup of Safety And Clearance Issues</p>	<p>Comcast believes that there should not be fines, or the prospects of fines for aerial plant configurations that PacifiCorp alleges, or might allege are Comcast's responsibility. Allocation of any costs for aerial plant clean-up <del>must</del> <u>must</u> <u>be</u> fair, just and reasonable. Unless it can be proven that Comcast has created a violation or clearance issue, it should not be assessed for the costs of clean up</p>	<p>Whether there should be charges for safety violations is not an issue in this case. The entire focus of the evidentiary proceeding has been on Comcast's unauthorized pole attachments. PacifiCorp has not billed Comcast in any way for its past safety violations. Nevertheless, PacifiCorp has contract and tariff authority under which it may <del>to</del> hold Comcast reasonably responsible for its documented unsafe use of PacifiCorp's facilities.</p>