

-BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH-

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| COMCAST CABLE |) | |
| COMMUNICATIONS, INC., a |) | |
| Pennsylvania Corporation |) | <u>DOCKET NO. 03-035-28</u> |
| |) | |
| Claimant, |) | |
| |) | |
| vs. |) | <u>ORDER GRANTING PACIFICORP'S</u> |
| |) | <u>MOTION TO STRIKE</u> |
| PACIFICORP, d.b.a. UTAH POWER, an |) | |
| Oregon Corporation, |) | |
| |) | |
| Respondent. |) | |

ISSUED: November 12, 2004

For The Commission:

On October 8, 2004, pursuant to previously agreed schedule, Comcast Cable Communications, Inc. (Comcast) submitted its Post-Hearing Brief in this docket. Comcast attached as Exhibit D to its Brief an Affidavit of Gary Goldstein purporting to provide additional evidence of the unreliability of Pacificorp's 2002/2003 Audit. In his Affidavit, Mr. Goldstein claims to have drawn a random sample of five-hundred fifteen (515) Pacificorp poles in the Salt Lake Metro area on which Pacificorp has alleged Comcast maintains unauthorized attachments. Mr. Goldstein claims his examination of Comcast records revealed that the attachments on four-hundred twelve (412) of these poles are in fact authorized. Exhibit D2 of Comcast's Brief provides pole-by-pole results of Mr. Goldstein's analysis. Comcast discusses the results of this analysis at pages 35-36 of its Brief.

On October 14, 2004, Pacificorp submitted its Motion to Strike Affidavit of Gary Goldstein, arguing that Comcast should not be permitted to create and seek admission of new evidence after the evidentiary hearing has closed. Pacificorp argues that to permit Mr. Goldstein's Affidavit into evidence would deprive Pacificorp of the opportunity to cross-examine him regarding this new evidence. Pacificorp seeks to have the Affidavit, as well as pages 35-36 of Comcast's Brief discussing the Affidavit, stricken from the record, citing Utah Rules of Civil Procedure (URCP) Rule 37(f) and Utah Rule of Evidence (URE) 403 in support of its Motion.

On October 28, 2004, Comcast filed its Opposition to Pacificorp's Motion to Strike Affidavit of Gary Goldstein, arguing that URCP Rule 37 is not applicable to Pacificorp's Motion and that Pacificorp would suffer no harm, prejudice or surprise as contemplated by URE 403 from inclusion of this evidence in the record.

While we do not find the prohibitions of URCP 37(f) to be controlling in the post-hearing phase of this docket, we are guided by the basic principles of fairness and due process embodied in both URCP 37 and URE 403. Comcast, relying on several Utah cases, argues that Pacificorp would not be prejudiced by inclusion of this new evidence. However, the cited cases are not applicable here since they concern witnesses or evidence disclosed shortly *before* trial while Pacificorp's Motion is concerned with evidence created and presented to the Commission *after* the evidentiary hearing has closed. This is not simply material that was overlooked during the evidentiary hearing but was nonetheless known to all parties prior to hearing. Mr. Goldstein's affidavit constitutes "new" evidence that strikes at the foundation upon which

Pacificorp has built its case. To enter this evidence into the record in the form of a sworn affidavit without providing Pacificorp sufficient opportunity to examine the evidence and cross-examine its proponent would constitute a blatant disregard for this Commission's long-standing procedures as well as well-established notions of due process in administrative proceedings.

This we will not do.

Both parties seek award of costs and attorneys fees generated in litigation of this Motion. However, we find that the parties' actions in this matter have been neither extreme nor frivolous and therefore decline to award fees and costs.

Wherefore, based upon the foregoing information, and for good cause appearing, the Administrative Law Judge enters this proposed ORDER granting PacifiCorp's Motion to Strike Affidavit of Gary Goldstein and declining to enter the Affidavit, and those portions of Comcast's Brief discussing the Affidavit, into the record.

DATED at Salt Lake City, Utah, this 12th day of November, 2004.

/s/ Steven F. Goodwill
Administrative Law Judge

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Approved and Confirmed this 12th day of November, 2004, as the Order of the
Public Service Commission of Utah.

/s/ Ric Campbell, Chairman

/s/ Constance B. White, Commissioner

/s/ Ted Boyer, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#41226