- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of COMCAST CABLE COMMUNICATIONS, INC., a Pennsylvania Corporation, Claimant, vs. PACIFICORP, dba UTAH POWER, an Oregon Corporation, Respondent.	)	DOCKET NO. 03-035-28
	)	REPORT AND ORDER

ISSUED: December 21, 2004

SYNOPSIS

The Commission ordered Comcast Cable Communications to pay Pacificorp the applicable per pole back rent and unauthorized attachment charges for each Pacificorp pole on which Comcast maintains an unauthorized attachment in Utah. The Commission also ordered Comcast to pay its *pro rata* share of the cost of the 2002/2003 Audit. The Commission ordered Pacificorp to refund to Comcast any amount previously paid to Pacificorp in excess of the $3,773,330.47 Comcast owes to Pacificorp in unauthorized attachment, back rent, and 2002/2003 Audit charges. The Commission acknowledged that Comcast may continue to provide Pacificorp reasonable evidence of authorization or non-ownership of attachments claimed by Pacificorp to be unauthorized and to obtain a refund of applicable charges previously paid to Pacificorp. The Commission determined that, as of the date of this Order, all Comcast attachments identified by the 2002/2003 Audit on Pacificorp poles in Utah are deemed authorized for purposes of all future Comcast and Pacificorp joint-use operations.

By The Commission:

PROCEDURAL HISTORY

This matter arises from a dispute concerning the terms and conditions by which Comcast Cable Communications, Inc. (Comcast) attaches its facilities to Pacificorp's utility poles and whether, and how much, Pacificorp may bill Comcast for failure to obtain prior authorization for said attachments. On October 31, 2003, Comcast filed a Request for Agency Action seeking, among other things, a Commission order declaring that: (1) Comcast is entitled to review and verify the results of a 2002/2003 pole attachment audit (2002/2003 Audit) directed by Pacificorp, (2) the $250.00 per pole penalty levied by Pacificorp for unauthorized attachments is not "fair and reasonable," and (3) Comcast is not liable for any of the costs of the 2002/2003 Audit. On December 1, 2003, Pacificorp responded to Comcast's Request by seeking a Commission order declaring that: (1) Comcast is entitled to review of the 2002/2003 Audit without Commission action, (2) assessment of a significant unauthorized attachment charge is a fair and reasonable deterrent to unauthorized use of utility infrastructure, and (3) Comcast is liable for its *pro rata* share of the 2002/2003 Audit costs.

On March 23, 2004, Comcast filed a Motion for Immediate Relief and Declaratory Ruling requesting a hearing and asking the Commission to order Pacificorp to immediately resume processing Comcast pole attachment applications pending final resolution of this proceeding. On April 30, 2004, following a hearing held on April 6, the Commission issued its Order requiring Pacificorp to resume processing Comcast's pole attachment permit applications.

Evidentiary hearing was held before the Administrative Law Judge on 23-26

August, 2004. Appearing for Comcast were J. Davidson Thomas, Jerold G. Oldroyd, and Michael D. Woods. Charles Zdebski, Allison D. Rule, Gary G. Sackett, and Gerit F. Hull appeared for Pacificorp.

On November 19, 2004, the Administrative Law Judge submitted written interrogatories to Pacificorp requesting additional information concerning expenses for the 2002/2003 Audit, as well as the number of poles, by pole type, owned by Pacificorp in Utah and throughout its service territory. Pacificorp submitted its response on November 24, 2004. Comcast responded on December 9, 2004, disputing the Utah-specific pole count provided by Pacificorp and neither admitting nor denying the accuracy of Pacificorp's representations concerning the cost of the 2002/2003 Audit. On December 20, 2004, Pacificorp filed a letter response refuting Comcast's interpretation of Pacificorp's Utah-specific pole information.

FACTUAL BACKGROUND

Throughout the 1970s and 1980s, Comcast's predecessors in interest–primarily Telecommunications Inc. (TCI), Insight Cablevision (Insight), Falcon, Charter, and AT&T Cable Services (AT&T)–engaged in the initial build-out of the Utah cable television system that is currently owned and operated by Comcast. During this period, pole owners and third-party attachers engaged in a variety of processes governing joint-use[1] of utility poles.[2] There is no

[1]The terms "joint-use" or "joint-use process" refer herein to the process by which a communications company obtains permission to attach its equipment to a utility pole owned by Pacificorp and thereafter maintains that equipment on that pole. A "joint-use pole" is a Pacificorp pole to which such equipment is attached. An "attachment" means the physical connection of a cable line to a pole using a J-hook, bolt hole or similar means.

[2]Mr. Gary Goldstein, currently Design Supervisor for Comcast, has worked in the Utah Design Department for Comcast and its predecessors since 1979 and testified concerning one such process followed in the 1970s and 1980s in which the utility and the cable operator annotated maps during on-site field inspections to document agreement to permit the cable company to attach to the specific poles identified on those maps.

evidence that any of these procedures was widespread or uniformly followed throughout the State; indeed, the testimony of current Comcast employees with some knowledge of the cable industry's initial build-out phase in Utah indicates that joint-use operations were generally characterized by diversity of process and informality. In some cases, for instance, a cable company employee needed to do nothing more than ask permission to attach to a pole and be told "if there's room on the pole, go ahead and attach."

According to Mr. Mark Deffendall, currently a Comcast Construction Supervisor working as a Network Power Supervisor, this informal processing of pole attachment applications continued into the 1990s. When he first arrived in Utah in 1994, Mr. Deffendall worked for Insight and Provo Cable. While employed at these two companies, Mr. Deffendall was intimately involved in the pole attachment application process with Pacificorp. He described in some detail how he prepared written pole attachment applications only to have them set aside and apparently ignored by Pacificorp personnel. Mr. Deffendall characterized the pole attachment process during this period as "not formalized in any way . . . like the process often took place between family members or friends."

Pacificorp and Comcast's predecessors generally did not maintain adequate documentation regarding these procedures or the pole attachment licenses resulting from them. Aside from the maps and supporting documentation maintained by Mr. Goldstein for the Salt Lake Metro district, apparently little or no evidence now exists concerning the pole attachment authorization processes followed in Utah from the 1970s to the mid-1990s, nor of the authorizations themselves.

Pacificorp attempted to change this status quo in 1995 by more closely tracking joint-use processes, as evidenced by letters sent to TCI in October 1995 notifying TCI that Pacificorp was implementing new pole attachment procedures and providing a Joint Pole Notice form to be used to request attachment to Pacificorp poles. Pacificorp also drafted a standard Pole Attachment Agreement to replace the non-standard agreements previously entered into between Pacificorp and third-party attachers. On April 23, 1996, Comcast predecessor Insight entered into an agreement (1996 Agreement) with Pacificorp that was based on this standard agreement. The 1996 Agreement specified a written attachment application process that Insight was required to follow, and provided for a $60.00 unauthorized attachment charge to be paid by Insight if it placed any attachments in violation of that process.

In May 1996, Pacificorp's joint-use department sent letters to TCI offices in Utah inviting TCI personnel to attend joint-use meetings planned to discuss Pacificorp's new standard agreement and other joint-use issues. One such meeting was held on October 18, 1996, in Salt Lake City with Mr. Goldstein, who was then a TCI employee, in attendance. A similar meeting was held at Pacificorp's offices in Park City on May 14, 1997, with invitations sent to TCI personnel in April 1997.

In August 1996, Pacificorp began using its JTU joint-use computer database system, Pacificorp's system of record cataloging all joint-use information for the company. The JTU also provides the source data used to process Pacificorp's invoicing to third-parties for joint-use operations. At start-up, joint-use data from Pacificorp's previous database migrated to JTU, but this prior database did not contain any joint-use data for Utah since Pacificorp maintained no

centralized joint-use records for Utah at that time. Pacificorp maintained some unknown number of attachment authorization documents pertaining to the Salt Lake Metro area, but Pacificorp made no attempt to translate these documents into its JTU database at system start-up, nor did Pacificorp ever review these documents in an attempt to update or verify its JTU data.

Although Pacificorp established a central joint-use department at its Oregon headquarters in 1996, joint-use operations for the State of Utah remained decentralized until 2002. From 1996 to 2002, Pacificorp employees located in Utah conducted joint-use operations for Utah, although none of these employees were dedicated solely to joint-use. In their joint-use roles, these district-level estimators and operations clerks, who were spread across the approximately thirty-five Pacificorp districts within Utah, were responsible for determining safety and make-ready requirements for requested attachments, as well as for inputting joint-use data into the JTU system. Any records relating to attachment permitting were also maintained at the district level in Utah during this period. The joint-use department at Pacifcorp headquarters maintained visibility to the application process via district-level JTU inputs.

In 1996 and 1997, Pacificorp conducted training sessions for its district-level managers, estimators and operations clerks concerning joint-use concepts and the attachment application process. These training sessions, along with the informational meetings Pacificorp held with third-party attachers, were intended to make clear to all parties that any non-standard joint-use authorization processes that may have been used were no longer acceptable. Ms. Corey Fitz Gerald, currently Pacificorp's T&D Infrastructure manager and primary joint-use manager since 1996, was thereafter in regular contact with district-level personnel and claims she had no

reason to believe that those old ways of doing business continued beyond 1997 or 1998. However, Pacificorp did continue to see a general lack of permit applications being submitted even as construction and communications activity expanded in Utah during this period. In 1999 and 2000, Pacificorp management in Oregon began receiving more calls from field personnel questioning whether third-party attachers seen attaching to Pacificorp poles were properly permitted to do so.

Since 2001, Pacificorp's joint-use infrastructure has grown tremendously. In 2002, the joint-use department at Pacificorp headquarters in Oregon assumed all joint-use duties and responsibilities from the field, resulting in an expansion of joint-use personnel at headquarters from just three people at the start of 2002 to twenty-two personnel by the end of 2002. Today, approximately thirty personnel within T&D Infrastructure Management are dedicated to joint-use matters.

Between 1997 and early 1999, Pacificorp contracted with the Pole Maintenance Company (PMC) to determine which communications companies were currently attached to which of Pacificorp's joint-use poles (1997/98 Audit). According to Ms. Fitz Gerald, this Audit inspected all Pacificorp-owned transmission and distribution poles for evidence of joint-use and gathered data concerning only these joint-use poles. Pacificorp used the information gathered from this Audit to update the data in the JTU and to ensure that Pacificorp was collecting all pole attachment fees to which it was entitled. Notice of this Audit was provided by letter to TCI and Insight in June 1996 with a second notice mailed in January 1997. These notices indicated that

Pacificorp's cost for the Audit would be $0.80 per pole[3] and that Pacificorp anticipated charging the cable operators attached to its poles fifty percent (50%) of this cost for each pole to which they were attached. However, it is unclear whether Pacificorp ever sought reimbursement of any Audit expenses from its third-party attachers.

Pacificorp's contract with PMC required a ninety-seven percent (97%) accuracy rate per pole. Pacificorp conducted its own quality control operations to ensure this level of accuracy. PMC submitted Audit results to Pacificorp in electronic form; Pacificorp received no paper records for the Audit. Once it had verified these results, Pacificorp entered the information into the JTU database. Because data has been continuously updated in the JTU since completion of the Audit in early 1999, Pacificorp no longer has any record of the specific results of this Audit and cannot re-create a snapshot of JTU data as it existed prior to upload of the 1997/98 Audit data. While Pacificorp testimony indicates that the Audit identified more than 50,000 Pacificorp poles across its Utah territory on which third-parties, including Comcast predecessors, maintained previously unidentified attachments, no record of the Audit now exists to enable Comcast or this Commission to verify these results.

Although not initially disclosed in its notifications to third-party attachers, Pacificorp, in recognition of the uncertainty of joint-use operations as they existed in Utah prior to this Audit, ultimately chose to view the 1997/98 Audit as a joint-use baseline audit of its poles–sometimes referred to as an "amnesty" audit–and therefore did not seek any unauthorized attachment charges for attachments for which no licensing records could be found. Pacificorp

[3]PMC also charged an additional $1.20 per pole for placement of an identification tag onto poles bearing no tag.

did, however, update its billing records to reflect the number of attachments identified by the 1997/98 Audit and invoiced third-party attachers accordingly for pole rental going forward.

In November 1998, TCI assumed control of Insight's cable system, thereby undertaking Insight's rights and obligations under the 1996 Agreement. In January 1999, Pacificorp notified TCI that it planned to hold a meeting in Salt Lake City, Utah, to discuss joint-use issues and to review Pacificorp's joint-use policies. This meeting was held in February 1999.

On December 20, 1999, Pacificorp and Comcast predecessor AT&T entered into a Pole Contact Agreement (1999 Agreement) very similar–indeed, virtually identical–in material terms to the 1996 Agreement between Pacificorp and Insight. Several sections of this Agreement form the basis of the parties' current dispute. Paragraph 2.1 required AT&T to "make written application" to attach to Pacificorp's poles. Paragraph 2.21 gives Pacificorp the right to "make periodic inspections" of AT&T's equipment on its poles and to charge AT&T for these inspections. Paragraph 3.1 establishes AT&T's annual per pole rental charge of $4.65 by reference to Electric Service Schedule No. 4 of Pacificorp's tariff. Paragraph 3.2 provides in pertinent part that Licensor Pacificorp may levy unauthorized attachment charges against Licensee AT&T as follows:

> "Should Licensee attach Equipment to Licensor's poles without obtaining prior authorization from Licensor in accordance with the terms of this Agreement . . . Licensor may, as an additional remedy and without waiving its right to remove such unauthorized Equipment from its poles, assess Licensee an unauthorized attachment charge in the amount of $60.00 per pole per year until said unauthorized Equipment has been removed from Licensor's poles or until such time that Licensee obtains proper authorization for attachment. Said unauthorized attachment charge shall be payable to Licensor within thirty (30) days after receipt of the invoice for said charge *and is in*

> *addition to back-rent determined by the Licensor for the period of the attachment*." (Emphasis added to indicate language not included in 1996 Agreement).

Paragraph 8.7 provides that termination of the Agreement "shall not release Licensee from any liability or obligations hereunder . . . which may have accrued or may be accruing at the time of termination." Finally, paragraph 10.1 states that the Agreement shall remain in effect "until it is terminated by either Party upon three hundred sixty-five (365) days' notice to the other party."

Beginning in 1999, AT&T undertook a major upgrade project on its Utah cable system. Mr. Rodney Bell, Comcast's Upgrade Project Manager who began working for TCI in Utah in 1989, testified that the upgrade has proceeded at approximately the same pace since it began in 1999 and primarily involves overlashing existing attachments, a process of connecting new cable capable of providing enhanced data and video service to pre-existing pole attachments in order to provide those services to customer locations. Only a very small portion of overlashing involves new pole attachment.[4] Although he is not involved in Comcast's new construction operations, Mr. Bell stated that Comcast's budget for new construction is approximately 100 to 120 miles of new plant per year, of which approximately ninety-five percent is underground, resulting in only about 5 miles (or 132 poles) of new aerial plant per year that would result in new attachments.

In December 2001, Comcast assumed ownership and control of AT&T's cable

[4]Overlashing does not typically create a new attachment–it is merely the attachment of a new cable strand to an existing strand or attachment–and is therefore not counted as an unauthorized attachment regardless of whether Comcast requested prior permission to overlash. Neither party has claimed that overlashing is responsible for any of the alleged unauthorized attachments at issue in this proceeding. Mr. Bell estimates that since 2002 the upgrade has covered about 1,500 miles of aerial plant, only ten percent of which involved overlash of new cable (the remainder simply being replacement of older components at pre-existing points of attachment). At approximately 26.4 poles per mile, Mr. Bell estimates that the upgrade has resulted in overlashing approximately 3,960 poles since 2002.

operations in Utah and continued the system upgrade begun under AT&T. According to Comcast, very little new system build (i.e. expansion of the cable system to areas not previously served) has occurred between 1998 and present.

On December 31, 2001, Pacificorp, desiring to update all pole attachment agreements based on its standard agreement first drafted in 1995, provided written notice to AT&T that it intended to terminate the 1999 Agreement. The Agreement subsequently terminated on December 31, 2002. Pacificorp had believed a new agreement would be in place with Comcast prior to termination of the 1999 Agreement. However, the parties never reached a follow-on agreement. The parties have continued in large part to follow the attachment application procedures contained in the 1999 Agreement. However, there is no evidence to indicate that the parties ever specifically discussed or agreed to the continuing applicability of the 1999 Agreement to their joint-use rights and obligations after December 2002.

From November 2002 to May 2004, Pacificorp conducted another detailed inspection of all of its joint-use facilities to identify the type, location, and ownership of all third-party attachments on Pacificorp poles and thereby ensure that Pacificorp was adequately recovering its costs for pole attachments (2002/2003 Audit). Unlike the 1997/98 Audit, the 2002/2003 Audit gathered data for all Pacificorp distribution poles (not just joint-use poles), and for transmission poles on which the inspectors observed a joint-use attachment.[5]

Through a competitive bidding process, Pacificorp contracted with Osmose Utilities Services (Osmose) to perform a comprehensive inspection that included obtaining GPS

[5]Ms. Fitz Gerald testified that approximately 67% of Pacificorp distribution poles are joint-use poles, but that the percentage is much smaller with respect to transmission poles.

coordinates for each Pacificorp pole, the number and ownership of all third-party attachments on those poles, a digital photograph of each pole, and documentation of all identified safety hazards on the poles. Osmose personnel made no attempt to "date" the attachments they identified on joint-use poles since the date of placement is not readily apparent from the attachment itself. Osmose charged Pacificorp $12.27 per joint-use pole inspected and $3.25 per distribution-only pole (i.e. Pacificorp distribution poles that contain no third-party attachments).

As it had done with the 1997/98 Audit, Pacificorp required the 2002/2003 Audit to maintain a 97% accuracy rate. To ensure this level of accuracy, Pacificorp hired a firm named Volt to conduct independent quality control activities on the data received from Osmose. In calculating the total cost of this Audit, Pacificorp added to the Osmose and Volt charges its own internal costs, such as employee salary, attributable to the Audit. Pacificorp then "backed out" twelve percent (12%) of the total Audit cost as that portion of the expense produced by Audit activities undertaken for Pacificorp's sole benefit. Mr. James Coppedge, Pacificorp's manager of field inspections and inventory, testified that Pacificorp determined this twelve percent amount by deciding what percentage of the data to be collected would have been collected if Pacificorp had conducted the Audit for its own benefit without regard to joint-use considerations.

Having backed out its twelve percent, Pacificorp billed the remaining amount to its third-party attachers using a somewhat confusing formula. Pacificorp's original intent was to spread the Audit expense evenly across its entire service territory–the territory covered by the Audit. However, desiring to begin invoicing Audit costs to third-party attachers prior to completion of the Audit, Pacificorp averaged the average per attachment cost over the first five

completed service districts (Kemmerer, Evanston, Ogden, American Fork, and Layton) to calculate a $13.25 per attachment charge which it then billed to Comcast. As of the date of hearing, this process has resulted in Pacificorp charging Comcast approximately $1.1 million for the 2002/2003 Audit, with more invoices yet to come. As pointed out by Comcast, this method of apportioning costs appears on its face to have the potential of permitting Pacificorp to over-recover its Audit expenses. At hearing, Pacificorp pledged to re-calculate these charges to provide an equitable method of apportioning Audit expenses while ensuring that Pacificorp recovers no more than the Audit's actual costs minus the twelve percent attributable to Pacificorp-only activities.

Surprisingly, despite the likelihood that it would pass on Audit expenses totaling millions of dollars to its joint-use partners and seek millions more in unauthorized attachment charges, Pacificorp sought no input from these third-party attachers concerning the scope of the inspection or who should conduct the inspection. Pacificorp first notified Comcast about the pending inspection (via letters sent to the AT&T notification address contained in the 1999 Agreement[6]) on December 30, 2002–one day prior to expiration of the parties' 1999 Agreement. These letters indicated that the first Utah service areas to be inspected would be American Fork and Layton. On February 3, 2003, Pacificorp sent a similar letter to AT&T notifying the company that it would soon start its inspection in the Ogden service area. Ultimately, the inspection included all parts of Pacificorp's multi-state service territory, including Utah.

[6]Pacificorp states that it sent these notices to AT&T because it had never been notified that Comcast had assumed control of AT&T's cable business in Utah. While Comcast claims it properly notified Pacificorp of the change of ownership, no documentary evidence of such notice was produced for the record.

While Comcast was paying pole attachment rental fees for only 75,000 Pacificorp poles in Utah prior to the 2002/2003 Audit, the 2002/2003 Audit identified 113,976 Pacificorp poles in Utah on which Comcast maintains 120,516 attachments, including 39,588 poles on which 44,102 unauthorized Comcast attachments were identified. Although Pacificorp intended to bill these unauthorized attachments on a *per pole* basis consistent with the annual rental fee charged for pole attachments, on February 5, 2003, Pacificorp forwarded to Comcast the first of many unauthorized attachment invoices seeking payment on a *per attachment* basis. As of hearing, Comcast had been billed for 42,504 unauthorized attachments.[7]

As noted above, the 1999 Agreement, which terminated on December 31, 2002, permitted Pacificorp to recover back rent in addition to a $60.00 per pole unauthorized attachment charge. Pacificorp interprets the Agreement to permit charging $60.00 per year in unauthorized attachment charges retroactive to when the attachment was originally made. Therefore, Pacificorp calculated in early 2003 that it was entitled to up to $323.25 per pole (five years' back rent plus five years' unauthorized attachment charges).[8] However, Pacificorp decided to charge Comcast only $250.00 per pole, believing this to be a "fair" amount which was consistent with agreements previously reached in Oregon rule-making proceedings between Pacificorp and Comcast's predecessor companies.

Comcast claims receipt of the February 5, 2003, invoice was the first notice it

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[7]Pacificorp claims that it learned of this invoicing error only during the hearing and that it will now bill Comcast on a per pole basis for each pole containing unauthorized Comcast attachments.

[8]In its Post-Hearing Brief, Pacificorp, in recognition of Comcast's claim that the alleged unauthorized attachments were placed at a relatively uniform rate over this nearly six-year period, reduces this figure to $177.79 based on an assumed average of 2.75 years worth of back rent and unauthorized attachment charges.

received concerning the fact that Pacificorp intended to conduct an inspection, had conducted an inspection, or intended to seek back rent and unauthorized attachment charges as a result of the inspection. Claiming that is has no way of to verify the results of the 2002/2003 Audit, Comcast initially refused to pay this invoice and the similar ones that followed, but Comcast did attempt to verify at least a portion of the 2002/2003 Audit results by hiring a company called Mastec to conduct its own field inspections. Mastec began this inspection in the American Fork region but, by September 2003, Comcast personnel, having reviewed the Mastec results, determined that the 2002/2003 Audit results for American Fork appeared accurate and declined to continue field inspections in other regions. However, Mr. Goldstein undertook a further check of the Audit results by randomly sampling thirty-nine of the poles in the Salt Lake Metro area that Pacificorp claimed contained unauthorized attachments. In doing so, he found that the attachments on thirty-five of those thirty-nine poles were in fact authorized.

On June 30, 2003, Pacificorp informed Comcast (as before, via notification to AT&T at the address listed on the 1999 Agreement) that it would no longer grant Comcast's applications to attach to Pacificorp poles due to Comcast's failure to pay the unauthorized attachment invoices or to challenge the accuracy of the invoices. By letter agreement dated September 8, 2003 (Letter Agreement), Pacificorp agreed to resume processing Comcast's attachment applications in exchange for Comcast's payment "under protest" of the outstanding past due balance of $3,828,000.00 in unauthorized attachment charges and back rent for the Ogden, Layton, and American Fork service districts. The Letter Agreement also provided Comcast sixty (60) days in which to provide evidence showing that any of the attachments

claimed as unauthorized were in fact authorized. Upon presentation of such evidence, Pacificorp agreed to refund to Comcast $250.00 per identified authorized attachment. Comcast did not provide any such evidence within this sixty day period. To date, Comcast has received more than $11.6 million worth of invoices for Audit costs, back rent, and unauthorized attachment charges from Pacificorp, and, as of hearing, had paid Pacificorp approximately $5.4 million.

APPLICABLE LEGAL STANDARDS

1. Pursuant to Utah Code Ann. § 54-4-13(1), the Commission has "the power to regulate the rates, terms and conditions by which a public utility can permit attachments to poles of the public utility by cable television companies." Utah Admin. Code R746-345-1(A).

2. This power applies to all public utilities that permit pole attachments to utility poles by cable television companies. R746-345-1(B).

3. Under the Commission's rules, "[t]he rates for pole attachments will be based on a fair and reasonable portion of the utility's costs and expenses for the pole plant, or type of pole plant, investment jointly used with cable television companies." R746-345-3(A).

4. If the parties to a pole attachment contract cannot come to agreement on these terms, the Commission will determine an amount that is "fair and reasonable." R746-345-3(C).

DISCUSSION AND FINDINGS

This dispute comes to us as the apparent result of the failure of two large, sophisticated corporations to effectively cooperate and communicate with each other over the course of many years regarding joint-use processes, inspections, and fees. This failure was compounded by Pacificorp's unilateral decision to get its joint-use house in order by conducting

a comprehensive inspection and then presenting its joint-use partners with the bill. While Pacificorp was well within its rights to do so under the 1996 and 1999 Agreements, we find it inexplicable that Pacificorp should plan and conduct not one but two joint-use pole inspections from 1997 to 2003 without seeking input or assistance from its join-use partners and then claim shock and surprise when Comcast balked at the Audit findings and the bills generated therefrom. For its part, Comcast presents itself as the victim of Pacificorp's heavy-handed attempts to squeeze profits from unsuspecting joint-use partners, yet the record is clear that Comcast possesses virtually no data concerning its joint-use facilities and, despite the passage of almost two years, has failed to undertake any systematic analysis of the detailed data Pacificorp has made available from the 2002/2003 Audit. Instead, it does little more than claim that Pacificorp's numbers cannot be correct and asks this Commission to find accordingly.

In opposing the invoices presented by Pacificorp, Comcast claims that joint-use requires a cooperative spirit and formalized procedures capable of reasonable application in the field. Comcast believes that Pacificorp is now attempting to ignore the informal and undocumented field procedures that characterized joint-use operations in Utah until relatively recent times. Comcast maintains that its personnel are now aware of Pacificorp's attachment licensing procedures and are fully complying with those procedures. Comcast therefore believes the parties can best proceed by using the 2002/2003 Audit as a benchmark to establish the state of joint-use between the parties going forward, not as a "club" to extract money for attachments not previously accounted for in the records of either party. Comcast also challenges its share of the cost of the 2002/2003 Audit as billed by Pacificorp, claiming it had no say in the planning or

conduct of the Audit, the data gathered by the Audit was not necessary to joint-use, and Pacificorp's method of apportioning Audit expenses is intended to overcompensate Pacificorp.

Pacificorp, on the other hand, claims that the parties already have a benchmark audit–the 1997/98 Audit–and that it reasonably seeks to impose back rent and unauthorized attachment charges for the many poles on which it discovered unlicensed Comcast attachments during the 2002/2003 Audit. Pacificorp claims that a formal attachment process strictly adhered to by all parties is necessary to ensure proper accounting for third-party equipment on its poles, proper receipt of revenue from the users of its poles so that its customers are not unfairly required to subsidize the operations of these third-parties, and prompt correction of any unsafe conditions created by the placement of new attachments on its poles. Pacificorp believes the charges it seeks from Comcast are a valuable deterrent against similar future behavior and points out that the $250.00 unauthorized attachment charge is actually less than it is entitled to charge under the 1999 Agreement.

On October 7, 2004, as ordered by the Administrative Law Judge, the parties submitted a Joint Issues Matrix intended to identify the key issues for which the parties seek Commission resolution and providing the parties' respective positions with regard to these issues. The Joint Issues Matrix lists the following eleven issues which we evaluate in turn:

1. Accuracy of the 1997/98 Audit
2. Accuracy of the 2002/2003 Audit
3. Existence of Pacificorp's Application and Permitting Requirements
4. Increase in Number of Comcast Attachments Detected Since the 1997/98 Audit
5. Compliance with Pacificorp's Permitting Requirements
6. Burden to Demonstrate Authorization
7. Evidence of Authorization or Evidence Refuting the Accuracy of the

2002/2003 Audit
8. Existence of Contractual Obligation to Remit Payment for Unauthorized Attachment Charges
9. Just and Reasonableness of Unauthorized Attachment Charge
10. Cost Recovery for the 2002/2003 Audit
11. Fines for Alleged Safety and Clearance Issues and Allocation of Costs for Cleanup of Safety and Clearance Issues

1. Accuracy of the 1997/98 Audit

Whether the 1997/98 Audit is accurate is important for two reasons: first, if accurate, it would provide a baseline from which the results of the 2002/2003 Audit (assuming it is also accurate) could be examined to calculate the number of unauthorized attachments on Pacificorp poles; second, if accurate, then Comcast's concerns regarding the parties' varied and informal pole attachment authorization processes pre-1999 would be irrelevant in calculating the number of unauthorized attachments; an accurate pole attachment count prior to the 2002/2003 Audit would render meaningless the parties' competing accusations regarding prior approval processes and haphazard record-keeping.

Comcast challenges the accuracy of the1997/98 Audit on several grounds, including insufficient notice, lack of verifiable Audit records, testimony that Comcast could not have installed the requisite number of attachments since 1999, and indications that thousands of poles previously identified in Pacificorp records as "leased" were discovered during the 2002/2003 Audit to be Pacificorp-owned. Pacificorp, on the other hand, claims that the Audit was verified to an accuracy of 97% by its own quality control personnel as well as by the contractor it hired to conduct the Audit. Pacificorp also notes that Comcast's predecessors were given both oral and written notice of the 1997/98 Audit and its results but did not refute those

results. Pacificorp admits that independent records of the Audit are no longer available for Comcast or Commission review. However, Pacificorp believes that the results of the Audit are accurately reflected in the JTU records submitted by Pacificorp showing that, prior to upload of the 2002/2003 Audit results into the JTU, Comcast was being billed for attachments on approximately 75,000 Pacificorp poles in Utah. Pacificorp notes that neither Comcast nor its predecessors ever disputed being billed for attachment to this number of poles.

We begin with Comcast's claim of insufficient notice and find it without merit. Pacificorp sent two notices to Comcast predecessors concerning its plans to conduct this Audit–the first notice was mailed in June 1996 and the second in January 1997. Comcast claims these notices were deficient because they did not notify third-party attachers of Pacificorp's intent to treat this Audit as an "amnesty" audit. We disagree. Notice is notice–we fail to see how notifying the parties that the results of the Audit would not be used to assess unauthorized attachment penalties would have provided "better" notice that an audit was planned.[9]

However, we do find the lack of independent, verifiable Audit records troubling. The fact that the Audit records were transferred to Pacificorp in electronic form does not satisfy questions as to why Pacificorp could not and did not retain this electronic data separately (either in computer or printed format) in order to preserve a verifiable record of the Audit's results. Pacificorp maintains that these results are available and have been re-produced in the form of Comcast billing records maintained in JTU immediately prior to upload of the 2002/2003 Audit

[9]Comcast also implies that Pacificorp's alleged failure to charge its joint-use partners the planned $.80 per pole inspection fee stems from Pacificorp's recognition of problems with the Audit results. We find no support in evidence for this implication and conclude that the matter of inspection fees has no bearing on the Audit's accuracy.

results. However, while these billing records appear helpful to resolving this dispute, it cannot reasonably be argued that billing records existing in JTU in January 2003, which had been continuously updated since the end of the 1997/98 Audit in early 1999, accurately reflect the results of that Audit.

Comcast witnesses also testified that, in their opinion, there is simply no way that Comcast could have made 35,000 new attachments from early 1999 to 2003, as claimed by Pacificorp, let alone 35,000 new, *unauthorized* attachments. Mr. Goldstein testified that most of Comcast's attachments have been in place for the past 15 to 25 years (indeed, that 95-98% of Comcast's cable plant was in place by 1989) and that most of the construction his department has designed since 1999 has involved underground plant for line extensions and service to new subdivisions. He further stated that if Pacificorp's accounting of unauthorized attachments were accurate then Comcast would have had to install nearly one third of its entire aerial plant between the end of the 1997/98 Audit and the end of the 2002/2003 Audit and that simply did not happen. Mr. Goldstein also pointed out, as one example of the inaccuracy of Pacificorp's joint-use data, that Pacificorp has attempted to charge unauthorized attachment fees to Comcast for twenty-two poles located in Cedar Fort, Utah, an area located in its American Fork service district that is not, and has never been, served by Comcast.

Although Mr. Bell has not been directly involved in obtaining attachment permits for Comcast, he echoed Mr. Goldstein's testimony regarding the small number of new attachments Comcast has made since initial system build-out in the 1970s and 1980s, as well as Mr. Goldstein's assertion that Comcast has not made 35,000 new attachments since 1997/98.

Mr. Bell testified that in the cable industry such a large amount of aerial plant construction would be considered a "massive project" and that the vast majority of Comcast's cable plant work since 1999 has involved system upgrade, only five percent (5%) of which has impacted aerial plant. He further testified that virtually all of the system upgrade aerial plant construction involved overlash to existing pole attachments and estimated that the upgrade has resulted in only 130 poles per year with new attachments.

These opinions are supported by the testimony of Mr. Michael T. Harrelson, Comcast's expert witness in this matter. Mr. Harrelson is a consulting electrical engineer with more than forty years of experience in electrical utility and joint-use operations. Mr. Harrelson testified that he does not believe Comcast could have placed so large a number of new attachments since 1999. Mr. Harrelson also notes that attachments to drop poles that may not have been counted during the 1997/98 Audit may be a substantial factor in the perceived increase in the number of attachments from the 1997/98 Audit to the 2002/2003 Audit.[10]

To refute this position, Pacificorp points out the conspicuous absence from the evidence presented by Comcast of any concrete information regarding the scope, pace, or quantity of new service construction undertaken by Comcast from 1999 to 2003. Pacificorp witnesses, on the other hand, testified that, given the growth in Utah during the years in question, Comcast could well have made upwards of 40,000 new attachments since the conclusion of the 1997/98 Audit. For example, Ms. Fitz Gerald testified that in the Salt Lake, Ogden, American Fork and Layton service districts alone Pacificorp added more than 38,000 new residential

[10]Drop poles are poles placed specifically to "drop" service from a distribution pole to a customer residence. Pacificorp counted attachment to drop poles as "attachments" during the 2002/2003 Audit.

electric customers between 1999 and 2003. Likewise, Pacificorp's expert witness, Mr. Thomas Jackson, a veteran of electrical utility operations and a joint-use consultant, testified that he is not at all surprised that the 2002/2003 Audit identified approximately 35,000 unauthorized attachments. Mr. Jackson stated that he has witnessed a twenty percent (20%) increase in pole attachment figures over a five year period even when there has been no cable system upgrade such as the one undertaken by Comcast here in Utah.

Finally, Comcast claims that identification during the 2002/2003 Audit of thousands of Pacificorp poles erroneously labeled as "leased" poles demonstrates that the 1997/98 Audit could not have accurately counted all Comcast attachments on Pacificorp poles since Pacificorp had itself so drastically undercounted the number of poles that it owns. Documentary evidence introduced at hearing indicates that Osmose identified potentially thousands of poles in just one Pacificorp service district that were incorrectly labeled as "leased" poles rather than Pacificorp-owned poles, and that such mislabeling could be widespread across Pacificorp's service territory. Comcast argues that this mislabeling may be a primary reason why the 2002/2003 Audit now identifies so many Comcast attachments as "new" and "unauthorized."

Pacificorp acknowledges that mislabeling "leased" poles was a problem identified by the 2002/2003 Audit, but provides no evidence refuting Comcast's assertions concerning the potential scale of this problem. Pacificorp took pains to note that no attachments identified on "leased" poles were counted against Comcast as "unauthorized" until the true ownership of the pole was determined, but Pacificorp failed to offer any reasonable alternative to the conclusion that a widespread undercount in the 1997/98 Audit due to mislabeled "leased" poles may be a

significant cause of the otherwise massive number of "unauthorized" attachments identified by the 2002/2003 Audit. From this evidence, it is reasonable to conclude that, prior to the 2002/2003 Audit, potentially tens of thousands of Pacificorp-owned poles across Utah were incorrectly listed in Pacificorp records as Pacificorp-leased poles. Because PCM inventoried only Pacificorp-owned poles during the 1997/98 Audit, any Comcast attachments on the mislabeled poles would not have been counted nor, as a result, granted "amnesty".

Of further concern is the fact that, of thirty-nine poles in Comcast's Salt Lake Metro area randomly selected by Mr. Goldstein from the 2002/2003 Audit's list of unauthorized attachments, attachments on thirty-five poles were found to have been authorized years, perhaps decades, ago. No one would suggest that such a result can or should be extrapolated to Pacificorp's entire service territory, but the fact that almost 90% of the poles in this small sample were incorrectly identified as containing unauthorized attachments adds credence to Comcast's argument that the results of the 1997/98 Audit which provide the foundation for Pacificorp's unauthorized attachment calculations are not trustworthy.

The lack of verifiable Audit records, coupled with the demonstrated inaccuracy of Pacificorp's pole labeling and unauthorized attachment accounting, lead us to conclude that the 1997/98 Audit does not provide an adequate pole attachment accounting baseline to support Pacificorp's claims concerning Comcast's unauthorized attachments.

However, this does not end our inquiry since the fact remains that as of January 2003, immediately prior to Pacificorp's first billing to Comcast based upon the 2002/2003 Audit, Pacificorp was billing Comcast for attachment to approximately 75,000 poles in Utah. This is

one of the very few facts in this docket upon which there appears to be no dispute. This figure is confirmed by Ms. JoAnne Nadalin, Comcast's Director of Business Operations in Salt Lake City, who testified that, prior to receiving Pacificorp's first invoice based upon 2002/2003 Audit results, Comcast was being billed for and was paying Pacificorp for attachment to approximately 75,000 poles in Utah.

That one party billed rent for these poles and the other paid rent for them without protest is sufficient evidence to permit us to reasonably conclude that both parties viewed these attachments as authorized attachments. There is no evidence in the record indicating that either party ever challenged this number of poles as too high or too low, or that either party doubted or challenged the authorized status of the attachments on these poles. Apparently, not until it was presented with the results of the 2002/2003 Audit did Comcast question Pacificorp's joint-use records or the invoices based on those records. The simple fact is that Comcast has offered no independent count of the number of attachments it maintains on Pacificorp poles, nor of the number of Pacificorp poles on which it maintains these attachments. Comcast cannot say how many of its attachments have been previously authorized by Pacificorp and is therefore unable even to hazard a reasonable estimate of the number of its unauthorized attachments. Given the lack of Comcast pole attachment data and the agreement of the parties concerning the accuracy of Pacificorp's billing prior to the 2002/2003 Audit, we find that as of January 2003 Comcast maintained authorized attachments on 75,000 Pacificorp poles in Utah.

2. Accuracy of the 2002/2003 Audit

Given this baseline of 75,000 poles, calculation of the number of Pacificorp poles

currently hosting unauthorized Comcast attachments should be a relatively straightforward exercise in subtraction, if the results of the 2002/2003 Audit are accurate and taking into account the problem of the mislabeled "leased" poles. It is clear from all testimony presented, as well as from the post-hearing brief and Joint Issues Matrix presented by Comcast, that Comcast does not challenge the underlying accuracy of the 2002/2003 Audit. Indeed, Comcast asserts that the pole and pole attachment numbers resulting from this Audit would provide a reasonable baseline for pole attachment numbers going forward in its joint-use relationship with Pacificorp. However, Comcast does challenge the use of these results in conjunction with the results of the 1997/98 Audit to calculate the number of unauthorized attachments made by Comcast. Pacificorp, meanwhile, points to the 97% accuracy rate required of Osmose, as verified by both Volt and by Pacificorp personnel, and also to the results of the inspection conducted by MasTec, as proof of the accuracy of this Audit. The only evidence that Comcast has put forward to challenge Pacificorp's claim that Comcast currently maintains 120,516 attachments on 113,976 Pacificorp poles are the 22 poles in Cedar Fort not owned by Comcast. Furthermore, Comcast's own expert and counsel have essentially concurred with the results of the 2002/2003 Audit and acknowledged the reasonableness of using them as a baseline going forward. We therefore conclude that the 2002/2003 Audit provides a reasonably accurate baseline accounting of poles and pole attachments for use by the parties in their joint-use relations going forward and that the number of poles and pole attachments to be used is 113,954 and 120,516, respectively.

However, whether Pacificorp's use of these results provides an accurate accounting of the current number of unauthorized Comcast attachments is a different matter. We

simply do not know how many of the attachments identified by the 2002/2003 Audit are actually unauthorized. While we know, for example, that Pacificorp incorrectly identified 35 of the 39 poles in the Salt Lake Metro region examined by Mr. Goldstein as "unauthorized", we have virtually no information regarding the status of the attachments found on the remainder of the 39,588 poles at issue. Furthermore, we have no idea of the true extent of Pacificorp's "leased" pole problem–each "leased" pole reasonably accounting for one less unauthorized attachment fee chargeable by Pacificorp.

To its credit, Pacificorp has never claimed that its audit results are infallible and has offered, virtually from the beginning of this process, to remove from Comcast's invoices any attachment which Comcast can prove is authorized. In each unauthorized attachment invoice, Pacificorp has provided Comcast a listing of each allegedly unauthorized attachment complete with mapstring identifiers as well as longitude and latitude data gathered by GPS during the 2002/2003 Audit. Unfortunately, Comcast has not to this point used this, and any other information it may possess, to clarify the status of these attachments. Comcast claims the data Pacificorp has provided is not sufficient to enable it to confirm whether the attachments on these poles have previously been authorized, but Comcast seems to have made little attempt to even try to audit Pacificorp's data. Instead of making a good faith attempt to refute Pacificorp's own numbers, Comcast has rested on its assertion that it is simply unable to verify the results of the 2002/2003 Audit. However, Mr. Goldstein's own review of a very limited number of poles makes clear that Comcast could, if it chose to do so, employ its own records to review the unauthorized attachment invoices it has received. In addition, Pacificorp has repeatedly offered

to make available to Comcast the GPS coordinates, electronic maps, mapstrings, and digital photos which would enable Comcast to review every attachment Pacificorp now claims belongs to Comcast. That Comcast has so far chosen not to do so seems more a product of inconvenience or stubborn inaction than of impossibility.

While we agree with Comcast that the 2002/2003 Audit results can not be used in conjunction with the 1997/98 Audit results, we disagree with Comcast's conclusion that the actual number of unauthorized attachments therefore can not be determined. We have already found that we are not limited in this case to the results of the 1997/98 Audit. Given Comcast's demonstrated unwillingness to this point to perform any comprehensive review of Pacificorp's unauthorized attachment claims, we are left with these undisputed facts: (1) the 2002/2003 Audit identified 113,954 Pacificorp poles on which Comcast maintains attachments, and (2) as of January 2003, Comcast maintained authorized attachments on 75,000 Pacificorp poles. We therefore find that the 2002/2003 Audit identified 38,954 Pacificorp poles containing Comcast attachments not previously identified in Pacificorp's joint-use records. Subtracting the 35 authorized Salt Lake Metro poles identified by Mr. Goldstein, we find and conclude that Comcast maintains previously unidentified attachments on 38,919 Pacificorp poles in Utah. As such, this figure represents the maximum number of unauthorized attachment and back rent charges Pacificorp may levy against Comcast in this docket; it does not necessarily represent the actual number of poles containing unauthorized attachments, but it does provide a ceiling for that number. This number may be reduced upon reasonable showing by Comcast to Pacificorp of prior authorization or non-ownership of the specific attachments in question.

3. Existence of Pacificorp's Application and Permitting Requirements

Comcast claims that the results of the 2002/2003 Audit cannot be used to calculate the number of unauthorized attachments because the informal and varied attachment authorization procedures that existed in Utah until a very few years ago did not typically produce attachment authorization records. Thus, the fact that no records exist does not mean that newly identified attachments are unauthorized. Comcast argues that even if the 1997/98 Audit is viewed as providing amnesty to all pre-1999 attachments, the parties continued to follow these informal procedures for some time after the 1997/98 Audit, so adequate permitting records post-amnesty do not exist.

Because we find the appropriate pole attachment baseline to be the 75,000 poles for which Comcast was paying pole attachment fees as of January 2003, the various attachment authorization processes employed prior to January 2003 are irrelevant. However, whether or not adequate procedures were followed after January 2003 is important to this inquiry. To answer this question, we need look no further than the testimony of Mr. Martin Pollock, Comcast's current permitting manager, who testified that he has scrupulously adhered to Pacificorp's joint-use application requirements since assuming his current position in 2002, resulting submission of applications for use by Comcast of approximately 15,000 Pacificorp poles.[11] We know the number of poles containing authorized attachments as of January 2003. We conclude that

[11]While this number initially appears to support Pacificorp's contention that Comcast can and did place over 38,000 new attachments since 1999, Mr. Pollock testified that ninety-eight percent (98%) of these new attachments supported Comcast's system upgrade project and that 98% of those were for overlashing to existing attachments, not for new attachments.

Comcast has followed required authorization application procedures since 2002. We therefore need not be concerned about what procedures were in place in prior decades.

4. Increase in Number of Comcast Attachments Detected Since the 1997/98 Audit

We have already discussed this issue at length above. Suffice it to say that Comcast believes it cannot have built since 1999 the 39,588 new unauthorized attachments claimed by Pacificorp. Pacificorp believes that Comcast did indeed add this many new attachments to Pacificorp poles and claims that Utah's construction boom combined with attachments made by Comcast to drop and interset poles may account for a large portion of this increase. Pacificorp correctly notes that throughout these proceedings Comcast has failed to provide any evidence–maps, databases, printed lists, or witness testimony–to establish just how many attachments it maintains on Pacificorp poles or when those attachments were made. Both parties have attempted to show how industry practice and common sense regarding new build and system upgrade support their respective positions. We do not discount the testimony of multiple Comcast witnesses who, based on their years of experience, emphatically stated that Comcast could not have built that many new attachments since 1999, but neither can we discount the unrefuted facts presented by the 2002/2003 Audit. Because Comcast failed to present any evidence to establish how many new attachments it has made since 1999, we must accept the 2002/2003 Audit results, as modified by what little evidence Comcast has presented of authorization and non-ownership, and find that the Audit identified 38,919 poles on which previously unidentified Comcast attachments exist. We do not know when these attachments were made, but we conclude that they do exist.

5. Compliance with Pacificorp's Permitting Requirements

Because we find that since 2002 Comcast has generally complied with Pacificorp's joint-use procedures and conclude that Comcast maintained 75,000 attachments on Pacificorp poles as of January 2003, we find it unnecessary to resolution of the matters before us to dwell upon the attachment application activities of the parties prior to January 2003.

6. Burden to Demonstrate Authorization

Comcast objects to Commission consideration of this issue, claiming that which party bears the burden of demonstrating authorization was not explicitly addressed in these proceedings. However, Comcast continues by urging the Commission to review the totality of the evidence presented concerning authorization and to conclude, based upon the lack of pertinent records maintained by either party, that, to the extent Pacificorp maintained any authorization procedures over the years, they were lax and haphazard. Pacificorp argues that it has at all relevant times had in place clear application procedures, that it has provided Comcast numerous opportunities to provide documentation proving authorization, and that Comcast's failure to provide such documentation establishes its failure to comply with Pacificorp's procedures.

Putting aside the parties' disagreement regarding procedures and the failure to follow them, the basic fact remains, and we conclude, that Comcast bears the burden of proving that its attachments are properly authorized. Comcast initiated these proceedings by claiming, among other things, that Pacificorp sought payment for unauthorized attachments which are in fact authorized. Commission precedent and procedure, as well as fundamental principles of due

process, clearly establish that it is claimant Comcast's responsibility to provide evidence to prove its allegations. Comcast's counsel admitted as much in response to questioning from the Administrative Law Judge at hearing: it is the licensee's burden to prove that it has a license.

Except for 35 poles in its Salt Lake Metro area and 22 poles in Cedar Fort, Comcast has failed to meet this burden. Comcast claims that it is unable to provide sufficient evidence because so many of its attachments over previous decades were authorized "informally" without any written records produced or maintained. That may well be the case. However, we start not with Comcast having to prove authorization for all 113,976 poles identified in the 2002/2003 Audit, but for only the 38,919 poles (minus any misidentified "leased" poles containing allegedly unauthorized attachments) for which Comcast was not paying rent as of January 2003. Until it provides sufficient evidence of authorization, Comcast remains liable to Pacificorp for unauthorized attachment and back rent charges as discussed below.[12]

7. Evidence of Authorization or Evidence Refuting the Accuracy of the 2002/2003 Audit

We have already determined that the 2002/2003 Audit provides a reasonable joint-use baseline pole and pole attachment accounting for the parties going forward and that Comcast has generally failed to provide evidence of authorization for the vast majority of its pole attachments that Pacificorp claims are unauthorized. We note with approval Pacificorp's oft-stated willingness–repeated by Pacificorp witnesses and counsel at hearing–to update its database

[12]We do not know whether such evidence exists. However, Mr. Goldstein testified, for instance, that Comcast should possess maps showing all construction–new build and upgrade–undertaken by Comcast since 1999. Presumably, Comcast should also possess this information and could use it to at least confirm that none of these recently authorized attachments are contained in the unauthorized attachment listings Pacificorp has provided. Furthermore, should Comcast decide to pursue this matter further, we would expect it to thoroughly inspect its own files to discover any record of authorizations from the 1970s to 1999 and to to use those records, if any, to prove the authorized status of the attachments in question.

and subtract from its unauthorized attachment invoicing any attachments for which Comcast provides adequate proof of prior authorization. Comcast remains free to present such evidence to Pacificorp, and the burden remains on Comcast to do so.

8. Existence of Contractual Obligation to Remit Payment for Unauthorized Attachment Charges

Paragraph 3.2 of the 1999 Agreement permitted Pacificorp to

> assess an unauthorized attachment charge in the amount of $60.00 per pole per year until said unauthorized Equipment has been removed from Licensor's poles or until such time that Licensee obtains proper authorization for attachment. Said unauthorized attachment charge shall be payable to Licensor within thirty (30) days after receipt of the invoice for said charge and is in addition to back-rent determined by the Licensor for the period of attachment.

However, Comcast correctly points out that the 1999 Agreement was terminated by Pacificorp effective December 31, 2002. Pacificorp argues that termination has no effect upon Comcast's obligations because paragraph 8.7 of the 1999 Agreement makes clear that termination of the Agreement does not relieve a party of its obligations accrued while the Agreement was in effect and because the parties continued in a course of dealing abiding by the terms of the 1999 Agreement.

First, we conclude that any obligation of Comcast to pay unauthorized attachment charges that accrued while the 1996 or 1999 Agreements were in effect remains a valid and enforceable obligation despite the termination of these Agreements. The meaning and intent of paragraph 8.7 of these Agreements could not be more clear, or more reasonable–liabilities assumed during the life of the contract are not extinguished by the mere termination of the contract. Comcast is therefore obligated to pay applicable unauthorized attachment charges and

back rent for each of the 38,919 poles identified for which Comcast has yet to produce any evidence of authorization or non-ownership.[13] As a result of this finding, we need not address Pacifcorp's second claim regarding an implied-in-fact contract between the parties.

We next turn to the contract meaning of the unauthorized attachment charge language from paragraph 3.2 as quoted above. Pacificorp maintains that this language anticipates charging an unauthorized attachment fee retroactively to the date of placement, *in addition to* any applicable back rent, and continuing forward until such time as Comcast has rectified the unauthorized condition. Comcast argues that the provision is not retroactive and applies the unauthorized attachment charge prospectively *until* the condition has been resolved.

Ms. Fitz Gerald, who negotiated the terms of the Agreements with Comcast's predecessors, testified that she understood paragraph 3.2 to apply unauthorized attachment charges retroactively to the date of placement of the attachment. While we do not doubt that this was Ms. Fitz Gerald's understanding, there is no evidence indicating what her counterparts at Insight or AT&T understood this provision to mean. Indeed, while Ms. Fitz Gerald indicated that her counterparts at AT&T objected to the $60.00 amount of the unauthorized attachment charge, they apparently did not discuss the specific application of this provision.

Even after months of review, days of testimony, briefing and argument regarding the meaning of paragraph 3.2, we are left to conclude that its terms are ambiguous concerning the claimed retroactive application of the $60.00 unauthorized attachment charge. Comcast argues,

[13]Because we find that Comcast has adhered to Pacificorp's pole attachment application procedures since 2002, it does not appear that any of the alleged unauthorized attachments were placed by Comcast after the December 31, 2002, termination of the 1999 Agreement. Therefore, all 38,919 alleged unauthorized attachments are subject to applicable unauthorized attachment charges and back rent.

and we agree, that well settled principles of contract construction require that ambiguous terms be construed against the drafter of those terms.[14] Given its facial ambiguity and the lack of evidence of any "meeting of the minds" concerning this paragraph, we construe the ambiguity against Pacificorp and conclude that the unauthorized attachment charge does not apply retroactively. Such a conclusion produces a reasonable result. Not only may Pacificorp receive back rent as compensation for the revenue it lost due to unauthorized attachment, but it may also impose a $60.00 penalty as a deterrent to future unauthorized attachments while avoiding a retroactive recovery of additional amounts that would arguably bear little or no relation to the economic harm suffered by Pacificorp or to the recognized goals of joint-use.

We are mindful that Comcast received the first invoices for unauthorized attachment charges in February 2003. However, we also note that within a short time of receiving these initial unauthorized attachment invoices, Comcast disputed these charges, filed its Request for Agency Action with the Commission in October 2003, and continued receiving invoices for additional unauthorized attachment charges during the pendency of these proceedings. Indeed, not until hearing in this matter in August 2004 did Pacificorp learn that it had mistakenly billed thousands of unauthorized attachment charges on a per attachment rather than per pole basis. Given the magnitude of the problem facing the parties (we are not dealing here with just one or even one thousand disputed attachments), the fact that this matter has now been before the Commission for resolution for over a year, and the relative confusion of all parties regarding issues central to resolution of their dispute, we do not believe imposition of

[14] *Parks Enterprises, Inc. v. New Century Realty, Inc.*, 652 P.2d 918, 920 (Utah 1982) ("It is also settled law that a contract will be construed against its drafter.")

multiple "annual" unauthorized attachment charges commencing February 2003 would be fair, just, or reasonable. We therefore conclude that any unauthorized attachment fee assessed by Pacificorp shall be effective the date of this Order, and find that imposition of multiple, annual unauthorized attachment fees would not be just and reasonable in this case.

9. Just and Reasonableness of Unauthorized Attachment Charge

Comcast challenges both the $250 total unauthorized attachment and back rent charge invoiced by Pacificorp and the $60.00 unauthorized attachment charge provided for in the 1996 and 1999 Agreements, claiming these amounts are unjust and unreasonable. Comcast argues that similar amounts have recently been rejected as unreasonable by the Federal Communications Commission (FCC) and several state commissions. Pacificorp counters that the unauthorized attachment charge contained in the Agreements serves an important function in joint-use operations by deterring third-party attachers from ignoring a permitting process intended to ensure safe and reliable asset management and cost recovery.

Comcast notes that the $250.00 charge sought by Pacificorp is nowhere stated in any agreement or contract between the parties and should therefore be disallowed. Pacificorp, however, points out that the $250.00 charge is not a single charge but represents its attempt to adopt a reasonable charge in accordance with its interpretation of the 1999 Agreement. We fail to see merit in Comcast's position since any charge compounded over a number of years would necessarily produce a figure not specifically contained in the Agreements. Such absence can not possibly be said to render the figure unjust or unreasonable. We therefore decline to find the $250.00 charge in question unfair, unjust, or unreasonable merely because it is not specifically

referred to in the 1999 Agreement.

Comcast also argues that the $60.00 charge contained in the 1999 Agreement is the product of a contract of adhesion and is therefore not enforceable. Comcast claims that no meaningful negotiation took place prior to signing the 1996 and 1999 Agreements, as evidenced by the fact that neither of these Agreements differed in any material aspect from the template agreement proffered by Pacificorp. Comcast also argues that the parties enjoyed very different bargaining positions since Pacificorp owned the facilities to which Comcast required access in order to provide services to its customers. Therefore, Comcast's predecessors had no choice but to sign the agreements presented to them or risk losing facilities critical to their operations.

It is true that both the 1996 Agreement and the 1999 Agreement were based on a template pole attachment agreement drafted by Pacificorp in 1995. While the terms of this template agreement were ostensibly subject to negotiation, Ms. Fitz Gerald confirmed in her testimony that the 1996 Agreement and the 1999 Agreement contain essentially the same terms–especially the same substantive terms relating to pole attachment authorization processes and unauthorized attachment charges–as the template agreement. Ms. Fitz Gerald even stated that during negotiation of the 1999 Agreement, AT&T objected to the $60.00 unauthorized attachment charge amount but ultimately relented, resulting in no substantive change from the template agreement Pacificorp had originally tendered to AT&T. We decline, however, to view AT&T as a corporate David in a land of Goliaths. Ms. Fitz Gerald testified that she conducted negotiations over an extended period of time both in person and via email with at least two representatives of AT&T. Although these negotiations resulted in little if any change from the

standard agreement put forward by Pacificorp, they were negotiations nonetheless. Furthermore, they were negotiations between two dominant and sophisticated corporations with access to teams of attorneys, as well as to this Commission. We therefore decline to view the product of such negotiation as a contract of adhesion.

Comcast further argues that the $60.00 unauthorized attachment charge is unjust and unreasonable on its face and points to recent rulings of the FCC and sister states in support of this contention. Comcast notes that in *Mile Hi Cable Partners, L.P. v. Public Service Co. Of Colorado*,[15] the FCC held that a $250.00 penalty was "excessive" even though that amount appeared in a contract between the parties. However, as both Comcast and Pacificorp point out, this Commission has certified to the FCC that it regulates pole attachments[16] so the FCC's pronouncements, such as those in *Mile Hi*, are not controlling on this Commission.[17] Furthermore, while the FCC in *Mile Hi* approved the Enforcement Bureau's earlier decision that a just and reasonable unauthorized attachment charge is five times the annual attachment rental rate, the FCC limited the application of its decision to the facts before it in that case. We are not persuaded that those facts–evincing heavy handed and unilateral actions by the pole owner–are applicable to this docket, and we specifically decline to adopt or establish in this docket a one-size-fits-all unauthorized attachment charge or formula.

Mr. Harrelson challenges Pacificorp's unauthorized attachment charge not by

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[15] 15 FCC Rcd 11450 (Cab. Serv. Bur. 200) (affirmed by the FCC at 17 F.C.C. Rcd 6268 (2002) and the DC Circuit at *Public Service Co. of Colorado v. FCC*, 328 F.3d 675 (2003)).

[16] *States That Have Certified That They Regulate Pole Attachments*, 7FCC Rcd. 1498 (1992).

[17] 47 U.S.C. 224(C)(1).

relying on case law and decisions in other jurisdictions but by reference to his own experience in joint-use operations, claiming that the $250 unauthorized attachment charge is not reasonable because it engenders ill will among joint-use partners. Mr. Harrelson also believes it would be unjust to impose an authorized attachment charge in this case since Pacificorp only recently put in place a standardized joint-use process. Mr. Harrelson points out that joint-use requires, first and foremost, cooperation and communication among the joint-use partners and that unauthorized attachment charges which one party inevitably views as a penalty do nothing to foster necessary cooperation and can actually poison an otherwise cooperative atmosphere. While we recognize the value and necessity of the cooperation cited by Mr. Harrelson, we find and conclude that where two resourceful and sophisticated parties freely agree upon an amount to be paid as compensation for placement of an unauthorized attachment, we will not lightly second-guess their judgment regarding the reasonableness of such a charge, and we decline to do so here.

In order to calculate the total amount per unauthorized attachment that Comcast owes Pacificorp, we must determine how many years worth of back rent Pacificorp may add to its $60.00 unauthorized attachment charge. We do not know how much time has passed since placement of any of the alleged unauthorized attachments, but we do know that almost six years have passed since completion of the 1997/98 Audit in early 1999. Since this Audit was to have been an amnesty audit, it is reasonable to treat any attachment not identified by that Audit as having been placed no earlier than 1999. In addition, we know that any new attachments made by Comcast since early 1999 were placed at a relatively uniform rate. Assuming therefore that

all alleged unauthorized attachments were placed at a relatively uniform rate over the past six years, we assign an average life span of three years to each of these attachments. Thus, Comcast is presumed to owe three years worth of back rent per unauthorized attachment, or $13.95. Adding this amount to the $60.00 unauthorized attachment charge produces a total unauthorized attachment and back rent charge of $73.95. We find this amount to be just and reasonable under the circumstances presented in this docket.

10. Cost Recovery for the 2002/2003 Audit

Comcast challenges both the overall cost of the 2002/2003 Audit and its share of those costs, stating that it is not responsible for any of the costs of the Audit since Pacificorp did not solicit Comcast's involvement in its planning, procurement, or conduct. Alternatively, Comcast argues that even if it is required to pay some of the costs associated with this Audit a great portion of this cost provides little information of actual benefit to joint-use generally or to Comcast specifically. Mr. Harrelson testified that an adequate audit could have been conducted for a price in the range of one to two dollars per pole. He attributes the $13.25 per attachment cost presented by Pacificorp to the unnecessary features, such as GPS coordinates and digital photographs, added by Pacificorp, as well as to an apparent desire by Pacificorp to recover more from its joint-use partners than the Audit actually cost.

Pacificorp has agreed to re-calculate the *pro rata* share of Audit expenses across Pacificorp's entire service area now that the Audit has been completed. However, in response to Comcast's oft-repeated assertions that it was not provided adequate notice of the Audit, was not given an opportunity to join in planning for the Audit, and therefore should not be held

responsible for the cost of many activities associated with the Audit, Pacificorp maintains that it is entitled under the terms of the 1999 Agreement to conduct periodic joint-use inspections of its facilities and to pass the costs incurred to its joint-use partners, and that the Agreement does not require Pacificorp to provide prior notification nor to involve any other party. Pacificorp notes that it has "backed out" twelve percent of Audit expenses to cover those portions of the Audit conducted solely for Pacificorp's benefit and asserts the simple proposition that all third-party attachers benefitted from the Audit and should therefore have to pay their fair share of its expenses.

We agree with Pacificorp. Given Comcast's admitted inability to provide meaningful data regarding the number, location, and placement of its attachments, as well as Comcast's stated desire to use the 2002/2003 Audit as a "baseline" for the parties' joint-use operations going forward, we find that the 2002/2003 Audit's comprehensive inspection of all joint-use facilities was not only desirable but necessary. If the parties had come to the 2002/2003 Audit with some general agreement concerning the approximate number of attachments maintained on Pacificorp poles and the locations and status (i.e., authorized or unauthorized) of those attachments, then the extra expense attributable to digital photographs and GPS coordinates may well have been unnecessary, but such was not the case here. We therefore conclude that the information gathered provides a much-needed foundation for current and future joint-use operations between the parties. The GPS location, digital photo, mapstring identifier, and pole number data collected should aid immensely in documenting the identity and location of each

pole attachment, ensuring accurate billing and more accurate authorization records in the future.[18] Likewise, information gathered concerning potential safety issues, while not immediately relevant to the issues in this docket, nonetheless should be of interest to all parties who own poles or maintain attachments.[19] Given the dearth of reliable attachment information available prior to this Audit, it is apparent that Comcast can and will benefit from the data collected and should pay for it accordingly.

We also find reasonable Pacificorp's stated intention to charge a *pro rata* per attachment Audit fee based upon the Audit costs for its entire service area, but we are not convinced that Pacificorp's plan to back out twelve percent of Audit expenses prior to calculating the per attachment charge best represents the actual Audit benefit gained by Pacificorp. Mr. Coppedge testified that Pacificorp's decision concerning this twelve percent figure was based simply on Pacificorp's view of the relative benefit the parties' gained from the Audit. However, the evidence on the record is not sufficient to convince us that twelve percent is a reasonable amount. We instead conclude that the actual benefit accruing solely to Pacificorp from the 2002/2003 Audit is most objectively represented by the $3.25 per distribution-only pole that Osmose charged Pacificorp for inspection of those poles. Since the information Pacificorp gained from inspection of its distribution-only poles was also gained from inspection of its joint-use distribution poles, it is reasonable to assign $3.25 of the cost of inspecting all poles to

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[18]Our decision today should under no circumstances be interpreted as finding reasonable the inclusion of such, or similar, components in future joint-use inspections. We highly encourage the parties to work together in the future to plan and conduct inspections tailored to the information needs of the moment so that the costs of the inspection are appropriately balanced by the needs of the joint-use partners.

[19]Pacificorp and Comcast have repeatedly pledged their continuing commitment to safety and we expect them to continue to work together in the future to maintain their joint-use facilities in a safe condition.

Pacificorp. We find that doing so more accurately and objectively assigns to Pacificorp the costs of those Audit activities from which it believed it would derive the sole benefit.

In response to post-hearing questions posed by the Administrative Law Judge, Pacificorp submitted information indicating that the total system-wide cost of the 2002/2003 Audit was $6,932,618.52, including charges by Osmose and Volt of $6,245,850.55 and $429,967.00, respectively, and internal Pacificorp costs of $218,965.00. We note that these component costs actually add up to $6,894,782.55 rather than the $6,932,618.52 stated by Pacificorp and find that the total cost of the Audit was $6,894,782.55. Pacificorp also indicated that Pacificorp's system-wide numbers of distribution-only, transmission-only and joint-use poles were 536,974, 19,679 and 345,318, respectively. The total number of system-wide third-party pole attachments was 542,161.

We therefore find that the total number of Pacificorp poles on which the 2002/2003 Audit was conducted is 882,292[20]. Multiplying this figure by $3.25 yields an Audit cost of the benefit accruing solely to Pacificorp of $2,867,449. Subtracting this amount from the total $6,894,782.55 cost of the Audit yields an Audit cost attributable to joint-use of $4,027,333.55. Dividing this total cost by the 542,161 joint-use attachments across Pacificorp's system results in a per attachment Audit cost of $7.43. Multiplying this per attachment cost times Comcast's 120,494[21] Utah attachments results in a *pro rata* Comcast share of the

[20]We disregard the 19,679 transmission poles as *de minimis* given Ms. Fitz Gerald's testimony that the percentage of transmission poles containing third party attachments, and therefore inspected during the 2002/2003 Audit, is very small.

[21]Pacificorp's 2002/2003 Audit results indicate Comcast maintains 120,516 attachments on Pacificorp poles in Utah. From this amount, we deduct 22 attachments in recognition of the 22 poles in Cedar Fort included in Pacificorp's count which do not contain Comcast attachments.

2002/2003 Audit of $895,270.42.

11. Fines for Alleged Safety and Clearance Issues and Allocation of Costs for Cleanup of Safety and Clearance Issues

Comcast has been, and apparently remains, concerned that Pacificorp may seek to impose fines for alleged safety violations and allocate to Comcast costs associated with correction of such safety violations. Comcast argues that there should be no fines imposed by Pacificorp for safety violations alleged by Pacificorp. Comcast further claims that any allocation of costs incurred in correcting safety violations must be fair, just and reasonable. Pacificorp believes that the matter of alleged safety violations is not an issue in this docket, but that it is entitled to hold Comcast reasonably liable for any documented unsafe use of Pacificorp facilities.

As stated by the Administrative Law Judge during the evidentiary hearing, we believe that any issues of safety flowing from this docket were adequately addressed during the hearing of April 6, 2004, and by our subsequent Order directing the parties to work together to identify and rectify any issues regarding safety addressed at that hearing. Pacificorp has not to this point sought to levy any fines for safety violations against Comcast, nor did Comcast's Request for Agency Action initiating this docket allege that Pacificorp had sought an unreasonable cost allocation of safety violation correction expenses from Comcast. We therefore do not address further, and specifically make no finding with respect to, any alleged safety violations, or any fines or costs associated with them.

CONCLUSION

Comcast's Request for Agency Action initiating this docket sought a Commission statement that Comcast is entitled to review and verify the results of the 2002/2003 Audit.

Commission action on this point is unnecessary because Pacificorp has stated on numerous occasions that it would welcome Comcast efforts to verify these results, is willing to provide Comcast all data produced by the 2002/2003 Audit, and will change its records and billing invoices to properly reflect any attachments for which Comcast can produce proof of authorization. We wish only that the parties had cooperated fully toward this end at the outset and expect them to do so in the future.

Comcast also requested a Commission finding that the $250.00 unauthorized attachment and back rent charge sought by Pacificorp is not fair and reasonable. While we specifically make no finding with respect to the justness and reasonableness of the $250.00 charge originally sought by Pacificorp, we do conclude that the terms of the 1996 and 1999 Agreements preclude retroactive application of the $60.00 unauthorized attachment fee provided for in those Agreements. We find and conclude that, under the facts presented, a $73.95 combined unauthorized attachment and back rent charge is permitted under the terms of the 1999 Agreement and is just and reasonable.

We recognize that authorization records for potentially thousands of attachments placed from the 1970s through at least the mid-1990s simply may not exist, but the burden must remain on Comcast to come forward with all records that do exist to demonstrate to the best of its ability which attachments alleged by Pacificorp to be unauthorized are in fact authorized. Comcast must decide whether it desires or is able to challenge Pacificorp's claims regarding its attachments on the poles at issue. If Comcast is unable or unwilling to provide such evidence then it will have failed to satisfy its burden of proof and the remaining attachments must be

considered unauthorized. Pending Comcast presentation to Pacificorp of specific evidence proving authorization or disproving ownership of the attachments in question, Pacificorp may impose back rent charges on up to 38,919 poles.

We also recognize that Comcast's burden is increased by the fact that some as yet unknown number of Pacificorp-owned poles were, prior to the 2002/2003 Audit, misidentified in Pacificorp's own records as "leased" poles. Because Comcast could not have obtained proper authorization for mislabeled "leased" poles even if it had attempted to do so, we conclude that it would be neither fair, just, nor reasonable for Pacificorp to charge the $60.00 unauthorized attachment fee for any pole identified by the 2002/2003 Audit as containing a Comcast attachment when that pole had previously been identified by Pacificorp as a "leased" pole. To the extent that Comcast maintained such an attachment, it should have been paying rent but apparently was not so it may now be charged back rent in accordance with the terms of this Order.

The evidence on record indicates that potentially thousands of poles in one Pacificorp service district in Utah were mislabeled as "leased" poles. Although this mislabeling could have been widespread throughout Pacificorp's service territory, we do not know how many poles in Utah were mislabeled. We therefore order Pacificorp to inform Comcast and the Commission within thirty days of the date of this Order of the number of poles identified by the 2002/2003 Audit as containing unauthorized Comcast attachments that had been previously mislabeled as "leased" poles, and to provide Comcast with reasonable documentation to enable Comcast to confirm this number. Although Pacificorp is entitled to charge back rent for these

poles in accordance with the terms of this Order, Pacificorp may not impose an unauthorized attachment charge for any pole previously mislabeled as a "leased" pole.

Finally, Comcast requested a Commission finding that Comcast is not liable for any of the costs of the 2002/2003 Audit. We deny this request and conclude instead that Comcast is liable to Pacificorp for its reasonable *pro rata* per attachment share of that portion of the 2002/2003 Audit conducted for the benefit of joint-use operations, as indicated *supra*. However, we recognize that our findings today impose upon Comcast a per attachment Audit cost that is nearly twice the annual pole attachment rental fee that it has historically paid to Pacificorp. Were it not for the almost total lack of meaningful joint-use information available to the parties and to the Commission in this docket, we would likely have concluded that undertaking such extensive inspection activities was not justified and that imposing such a high Audit cost on third-party attachers was neither just nor reasonable. Now that this baseline data has been collected and the cost of its collection fairly distributed, we expect future joint-use inspection activities and costs to be much more in line with those of the 1997/98 Audit.

Therefore, based upon the evidence in the record, and pending receipt from Pacificorp of data relating to its misidentified "leased" poles, we find that Comcast owes Pacificorp $2,878,060.05 in unauthorized attachment and back rent charges for 38,919 poles and $895,270.42 in 2002/2003 Audit expenses for 120,494 attachments in Utah, for a total of $3,773,330.47. Pacificorp is ordered to refund to Comcast any amounts over $3,773,330.47 previously paid by Comcast in unauthorized attachment, back rent, and Audit charges.

We further find and conclude that an accurate accounting of the pole attachments

and monies due therefrom requires that Comcast retain the option of providing additional evidence of authorization or non-ownership to Pacificorp concerning claimed unauthorized attachments. Based on the submission of any such reasonable evidence, as well as on the number of misidentified "leased" poles to be provided by Pacificorp, Pacificorp shall make additional refunds to Comcast for unauthorized attachment and back rent fees previously paid and update its JTU database accordingly.

Based upon the foregoing information, and for good cause appearing, the Administrative Law Judge enters the following proposed

ORDER

NOW, THEREFORE, WE HEREBY ORDER:

1. Within thirty (30) days of the date of this Order, Pacificorp to refund to Comcast any amount over $3,773,330.47 which Comcast previously paid to Pacificorp in unauthorized attachment, back rent, and 2002/2003 Audit charges.

2. Within thirty (30) days of the date of this Order, Pacificorp to provide Comcast and the Commission information indicating the number of Pacificorp-owned poles in Utah identified during the 2002/2003 Audit as mislabeled "leased" poles for which Pacificorp has previously billed Comcast back rent and/or unauthorized attachment charges.

3. Within sixty (60) days of presentation of the information provided pursuant to paragraph 2 above, Pacificorp to refund to Comcast all unauthorized attachment charges for each pole identified by the 2002/2003 Audit as a mislabeled "leased" pole for which Comcast has previously paid unauthorized attachment charges and back rent.

4. Within ninety (90) days of the date of this Order, Comcast to present to Pacificorp any additional information or analysis it possesses to prove that Comcast attachments on Pacificorp poles in Utah identified by the 2002/2003 Audit as unauthorized are in fact authorized or are not owned by Comcast.

5. Within thirty (30) days of the presentation of the evidence provided pursuant to paragraph 4 above, Pacificorp to refund to Comcast all unauthorized attachment charges paid by Comcast for each pole identified by the 2002/2003 Audit as containing unauthorized Comcast attachments shown by Comcast evidence to have been previously authorized. Upon presentation of such evidence, Pacificorp shall update its joint-use database accordingly.

5. Within thirty (30) days of the presentation of the evidence provided pursuant to paragraph 4 above, Pacificorp to refund to Comcast all unauthorized attachment and back rent charges paid by Comcast for each pole identified by the 2002/2003 Audit as containing unauthorized Comcast attachments but which are shown by Comcast evidence to not be owned by Comcast. Upon presentation of such evidence, Pacificorp shall update its joint-use database accordingly.

6. From the date of this Order, all Comcast attachments on Pacificorp poles in the State of Utah identified by the 2002/2003 Audit shall be deemed authorized for purposes of the parties' joint-use operations going forward. Pacificorp shall update its JTU database to reflect said authorization.

Pursuant to Utah Code 63-46b-12 and 54-7-15, agency review or rehearing of this order may be obtained by filing a request for review or rehearing with the Commission within 30

days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code 63-46b-14, 63-46b-16 and the Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 21st day of December, 2004.

/s/ Steven F. Goodwill
Administrative Law Judge

Approved and Confirmed this 21st day of December, 2004, as the Report and 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#42035