

Gerit F. Hull
Counsel
PACIFICORP
825 NE Multnomah, Suite 1700
Portland, OR 97232
(503) 813-6559

Charles A. Zdebski
Raymond A. Kowalski
Allison D. Rule
TROUTMAN SANDERS LLP
401 9th Street, N.W., Suite 1000
Washington, D.C. 20004-2134
(202) 274-2950

Gary G. Sackett (USB 2841)
JONES WALDO HOLBROOK & MCDONOUGH, PC
170 So. Main Street, Suite 1500
Salt Lake City, UT 84101-1644
(801) 534-7336

Attorneys for PacifiCorp, dba Utah Power

Submitted January 20, 2005

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

COMCAST CABLE)	
COMMUNICATIONS, INC., a)	
Pennsylvania Corporation,)	Docket No. 03-035-28
)	
Claimant,)	
vs.)	PACIFICORP'S REQUEST FOR
)	REHEARING
PACIFICORP, dba UTAH POWER , an)	
Oregon Corporation,)	
)	
Respondent.)	
)	

~~Respondent, PacifiCorp, by and through undersigned counsel and p~~Pursuant to Utah Code §§ 63-46b-12 and 54-7-15, PacifiCorp submits this Request for Rehearing of the Commission's Report and Order issued on December 21, 2004, in the ~~above-~~captioned proceeding (the "Order").

I. ALLOWING COMCAST AN ADDITIONAL NINETY90 DAYS TO SUBMIT EVIDENCE WITHOUT DUE PROCESS SAFEGUARDS WOULD VIOLATE PACIFICORP'S RIGHTS

In its Order, the Commission found that Comcast had the burden to demonstrate pole attachment authorization, stating that "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." Order at 31-32.¹ Comcast, however, failed to produce such evidence during discovery, through written testimony or at the hearing of this case—a fact the Commission noted multiple times in its Order. Specifically, the Commission found:

Comcast has generally failed to provide evidence of authorization for the vast majority of its pole attachments that PacifiCorp claims are unauthorized.

Order at 35.² In reaching this conclusion, the Commission observed, "despite the passage of almost two years, [Comcast] has failed to undertake any systematic analysis of the detailed data PacifiCorp has made available from the 2002/2003 Audit." Order at 17.

¹ Pagination for citations to the Order is from the Commission's Word Perfect e-mail version of the Order, which may differ slightly from the Commission's official hard copy version.

² See also, Order at pages 19, 18-19, 26, 27, 29-30, 32, and 4438.

The Commission, however, provided Comcast 90 days from the date of the Order in which “to present to PacifiCorp any additional information or analysis it possesses to prove that Comcast attachments on PacifiCorp poles . . . are in fact authorized or not owned by Comcast.” Order at 52. PacifiCorp requests that the Commission reconsider this allowance of an additional, post-hearing evidentiary presentation by Comcast. As the Commission noted, Comcast had two appropriate windows of time in which to produce evidence of authorization: (1) during this proceeding—in discovery or in hearing testimony; and, (2) prior to Comcast’s initiation of this action, in response to PacifiCorp’s numerous requests. It failed to do so. The undeniable consequences of Comcast’s choices during these periods are that the interests of fundamental fairness, due process, respect for legal processes and finality weigh against any other reason for allowing a post-hearing presentation of evidence outside the rules and procedures of the adversarial process.

Should the Commission conclude that Comcast merits further opportunity to submit evidence, PacifiCorp will in good faith address any compelling evidence provided by Comcast. However, due process requires that Comcast’s submission be governed by reasonable guidelines, safeguards and procedures that protect PacifiCorp and its utility customers. Any further opportunities for Comcast to produce new substantiation for its claims should be designed to permit only ~~evidentiary~~ sound information evidence for justifying a reduction in the number of unauthorized attachments previously found by the Commission.

In this regard, PacifiCorp believes that the Commission should not place PacifiCorp in the position of serving as the “gatekeeper” of any additional information

that Comcast may now produce. PacifiCorp proposes that the Commission: (1) provide the parties with parameters/guidelines governing the type of evidence Comcast may submit; and, (2) should act as the adjudicator in the process of assessing Comcast's any new Comcast evidence.

~~The first, evidentiary parameter requested is that~~ any Comcast submission should be, as the Order suggests, of “additional evidence”; that is, evidence besides that already produced in discovery or in testimony and which was not readily available to Comcast prior to or during the hearing. This would be consistent with the interests of fairness, due process and finality. *See, e.g., McNair v. Haley*, 97 F. Supp. 2d 1270, 1280 (M.D. Ala. 2000) (disallowing untimely evidence “for not diligently attempting to develop the evidence at the trial court level until it was too late.”); *Mikarovski v. Wesson*, 491 N.E.2d 864, 866 (Ill. App. 1986) (excluding evidence, which could have been offered at an earlier time, but was offered for the first time in a post-trial motion and recognizing that plaintiff's attorney's “own lack of diligence” did not amount to just cause to admit evidence).³ Accordingly, PacifiCorp requests that the Commission modify its Order to specify that Comcast must show good cause why the evidence was not or could not have been produced during the extensive discovery and hearing process.

Second, PacifiCorp requests the Commission specify that any additional evidence of authorization submitted by Comcast be accompanied by adequate and authenticated supporting data. The problems inherent in accepting new Comcast evidentiary submissions with less than such support are illustrated by the inadequacies of the scant

³ The 10th Circuit addressed this issue in an unpublished decision which is nevertheless instructive. *Williams v. Hudson*, 2000 U.S. App. LEXIS 31835 (10th Cir. 2002) (“Because the Court cannot conceive of any reasonable basis for Plaintiff's failure to submit proper evidence to support his claim, the Court

evidence sponsored by Mr. Goldstein at the hearing. As an exhibit to his Rebuttal Testimony, Mr. Goldstein provided a list that he created of 35 poles purportedly supporting authorized Comcast attachments that were mistakenly invoiced as unauthorized. Mr. Goldstein, however, failed (both in his written testimony and at the hearing) to provide any back-up data or signed permits that would allow PacifiCorp the opportunity to judge the accuracy of his assessment. Accordingly, PacifiCorp requests that the Commission clarify that any new evidence submitted by Comcast must be accompanied by adequate and authenticated supporting data.⁴

If Comcast has evidence that satisfies these two criteria, it may then submit a motion to the Commission seeking an order modifying the December 21, 2004, Order that specified the number of unauthorized Comcast attachments on PacifiCorp's poles. Should Comcast file a motion to reduce the number of unauthorized attachments found by the Commission, PacifiCorp requests that Comcast's new evidence be subject to reasonable discovery, rebuttal and cross-examination by PacifiCorp; and, if necessary, a full evidentiary hearing process. Without such safeguards in place, there is no mechanism to protect against unsubstantiated "proof." The Order could be interpreted to suggest an assumption by the Commission that any additional information presented by Comcast would automatically be deemed correct. Such an assumption would foreclose any PacifiCorp analysis and Commission review of the information. Indeed, as the Commission stated previously, not allowing "sufficient opportunity to examine and cross-examine [the evidence's] proponent would constitute a blatant disregard for this

declines to permit Plaintiff to supplement his response at this late date." See also *Koshatka v. Philadelphia Newspapers, Inc.*, 1984 U.S. Dist. Lexis 24372 (E.D. Pa. 1984).

⁴ PacifiCorp also requests that the Commission reconsider its acceptance of Comcast's authorization for the 35 poles Mr. Goldstein established by *ipse dixit*.

Commission's long-standing procedures as well as well-established notions of due process in administrative proceedings." Order Granting PacifiCorp's Motion to Strike, at 3. Anything short of the appropriate safeguards would violate PacifiCorp's rights and ~~render meaningless~~detract from the extensive effort of the Commission and the parties to properly hear and litigate this matter last year.

II. UNDER THE 1999 AGREEMENT, UNAUTHORIZED ATTACHMENT CHARGES BEGIN ACCRUING UPON THE DATE OF ATTACHMENT

A. The Commission's Three-Year-Average Method Should Apply.

PacifiCorp requests that the Commission reconsider its decision regarding the accrual date of the unauthorized attachment charge specified in Section 3.2 of the 1999 Agreement. The unambiguous plain language of Section 3.2 provides that the unauthorized attachment charge is triggered by the act of attaching to PacifiCorp's poles without permission, not the discovery of unauthorized attachments. Even if Section 3.2 were ambiguous, it should not be construed against PacifiCorp.⁵ PacifiCorp offered uncontroverted and credible parol evidence from Corey Fitz Gerald—the principal negotiator of the 1999 Agreement—which clarified the intent and meaning of section 3.2. Order at 37.

In determining a just and reasonable period for which to assess Comcast for back rent of poles on which there were unauthorized attachments, the Commission assumed that these attachments were made somewhat uniformly over a six-year period, yielding an average of three years' back rent for the aggregate of unauthorized attachments. Order at

⁵ See *Wilburn v. Interstate Elec.*, 748 P.2d 582, 585-86 (Utah Ct. App. 1998) (doctrine of interpreting contract provisions against the drafter not automatically employed simply because of the existence of an ambiguity); *Home Sav. & Loan v. Aetna Casualty & Sur. Co.*, 817 P.2d 341, 347 (Utah Ct. App. 1991) (“Generally, ambiguous provisions will be construed against the drafter of the contract only if extrinsic evidence fails to clarify the intent of the parties.”).

39-40. This same analysis should be applied to the determination of the period of time over which the \$60-per-year unauthorized-attachment fee is to be charged. That is, both back rent and unauthorized attachment charges apply ~~to a pole beginning with the occurrence of the same event~~—the unauthorized attachment. Using the same time period to determine unauthorized attachment charges under Section 3.2, as well as back rent, the total charge per pole should be:

$$(\$60.00 + \$4.64) \times 3 = \$193.95 \text{ per pole.}^6$$

This rate is just and reasonable. First, Comcast made no effort to dispute PacifiCorp's invoices: “Comcast could if it chose to do so, employ its own records to review the unauthorized attachment invoices That Comcast has so far chosen not to do so seems more a product of inconvenience or stubborn inaction than of impossibility.” Order at 27-28. Second, PacifiCorp has remedied the Commission's concerns regarding erroneous charges.⁷

B. At Minimum, the Point of Discovery Should Be Used. Should the Commission conclude that unauthorized attachment charges are not permitted for periods prior to the date of discovery of the attachment, charges should accrue at a minimum for the period forward from the date of discovery. The plain language of the 1999 Agreement, Section 3.2, specifies that unauthorized attachment charges accrue annually.

⁶ Should the Commission find that unauthorized attachment charges are not permitted for periods prior to the date of discovery of the attachment, PacifiCorp argues in the alternative that charges should accrue at a minimum for periods going forward from the date of discovery. The plain language of the 1999 Agreement, Section 3.2, specifies that unauthorized attachment charges accrue annually. For the reasons stated above, PacifiCorp believes the most reasonable interpretation of this language means that those charges accrue beginning on the date of attachment and annually thereafter. The only other plausible interpretation is that the charges begin to accrue on the date of discovery. Under this interpretation, PacifiCorp would be due at a minimum an unauthorized attachment charge of \$82.50 per pole [$\$60 * (1/2 * 19 \text{ months during the audit} * 1/12) + \$60 * (7 \text{ months post-audit} * 1/12)$], plus back rent at the Commission-determined rate of \$13.95, for a total of \$96.45 per pole.

⁷ *See Compliance Filing of PacifiCorp's Compliance Filing Concerning "Leased Poles," filed this date.*

For the reasons stated above, PacifiCorp believes the most reasonable interpretation of this language means that those charges accrue beginning on the date of attachment and annually thereafter. The only other plausible interpretation of Section 3.2 is that the charges begin to accrue on the date of discovery. Here, the discoveries were made during the time of the 2002/2003 Audit, from November 2002 through May 2004—a period of 19 months. Utilizing the technique used in the Order and assuming relatively uniform discovery over the 19 months would yield an average period of $(19 \times .5) + (7 \text{ post-audit months}) = 16.5 \text{ months}$. Added to the \$13.95 back-rental rate determined in the Order, this yields

$$(16.5/12) \times \$60.00 + \$13.95 = \$96.45 \text{ per pole.}$$

CONCLUSION

While PacifiCorp supports the Commission's Order issued in this proceeding and recognizes that it is the product of considered analysis, there remain two discrete issues that merit reconsideration by the Commission. For the foregoing reasons, PacifiCorp requests that the Commission grant PacifiCorp's Request for Rehearing.

~~RESPECTFULLY SUBMITTED~~RESPECTFULLY SUBMITTED this 20th day of
January, 2005.

~~PACIFICORP~~PACIFICORP

Gary G. Sackett
JONES WALDO HOLBROOK & MCDONOUGH, PC

Gerit F. Hull, Counsel
PACIFICORP

Charles A. Zdebski
Raymond A. Kowalski
Allison D. Rule
TROUTMAN SANDERS LLP

Attorneys for PacifiCorp, dba Utah Power
Gerit
Hull
Counsel
PacifiCorp
825 NE Multnomah, Suite 1700
Portland, OR 97232
Telephone: (503) 813-6559
Faeximile: (503) 813-7190

and

Gary G. Sackett
Jones Waldo Holbrook & McDonough, PC
170 So. Main Street, Suite 1500
Salt Lake City, UT 84101-1644
Telephone: (801) 534-7336
Faeximile: (801) 328-0537

and

Charles A. Zdebski
Raymond A. Kowalski
Allison D. Rule
Troutman Sanders LLP
401 9th Street, N.W., Suite 1000

*Washington, D.C. 20004-2134
Telephone: (202) 274-2950
Facsimile: (202) 274-2994
Attorneys for PacifiCorp, dba Utah Power*

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of January, 2005, a true and correct copy of **PacifiCorp's Request for Rehearing** was sent via e-mail and mailed, postage prepaid to:

Jerold G. Oldroyd, Esq.
Anthony C. Kaye, Esq.
Angela W. Adams, Esq.
Ballard Spahr Andrews & Ingersoll, LLP
One Utah Center, Suite 600
201 South Main Street
Salt Lake City, Utah 84111-2221

oldroydj@ballardspahr.com

adamsaw@ballardspahr.com

Michael D. Woods, Esq.
Comcast Cable Communications, Inc.
183 Inverness Drive West, Suite 200
Englewood, Colorado 80112

michael_woods@cable.comcast.com

J. Davidson Thomas, Esq.
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Ave., N.W.
Second Floor
Washington, D.C. 20006

dthomas@crblaw.com

gsapir@crblaw.com

And a true and correct copy was served via electronic mail and hand-delivery to:

_____ Ms. Julie Orchard
Commission Secretary
Public Service Commission of Utah
Herber M. Wells Building, Fourth Floor
160 East 300 South
Salt Lake City, Utah 84114
lmathie@utah.gov

_____ Michael L. Ginsberg
Patricia E. Schmid
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84114
pschmid@utah.gov

_____ **Gary G. Sackett**