

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

Gary G. Sackett
JONES WALDO HOLBROOK & McDONOUGH, PC
170 So. Main Street, Suite 1500
Salt Lake City, UT 84101-1644
Telephone: (801) 534-7336
Facsimile: (801) 328-0537

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

Attorneys for PacifiCorp, dba Utah Power

Submitted February 8, 2005

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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

On January 20, 2005, in accordance with the Commission's December 21, 2004, Order in this case, PacifiCorp submitted its Request for Rehearing. On February 4, 2005,

Comcast submitted a pleading entitled “Opposition to PacifiCorp’s Request for Rehearing and Opposition to PacifiCorp’s Compliance Filing.”¹ In this filing, PacifiCorp replies to the portion of Comcast’s filing in which it addresses PacifiCorp’s justification for rehearing.²

INTRODUCTION

Comcast’s Opposition proves the need to grant PacifiCorp’s Request for Rehearing. In its filing, Comcast, with what can be described as admirable candor, makes clear that it: (1) wants the Commission to join Comcast in its disregard for due process; (2) intends to engage in precisely the evidentiary machinations PacifiCorp has asked the Commission to preclude or adjudicate; and (3) continues to ignore Commission processes by yet again seeking to introduce evidence it chose not to adduce at the hearing. With the glimpse into the impending evidentiary morass provided by Comcast, PacifiCorp asks that the Commission recognize for, and approve, the relief requested in its Request for Rehearing.

A. PacifiCorp’s Due Process Rights Are Real

Comcast brushes aside PacifiCorp’s due-process concerns by citing the Commission’s “broad authority to fashion *any* remedy it sees fit.”³ Comcast’s argument, however, ignores Utah Supreme Court precedent stating that the Commission’s broad authority does not permit it to act outside the bounds of state and federal constitutional

¹ PacifiCorp intends to file a separate response to the portion of Comcast’s Opposition addressing PacifiCorp’s Compliance Filing in accordance with Commission Rule R746-100.4.D.

² PacifiCorp recognizes there is no explicit provision for a reply to an opposition to a request for rehearing. However, Commission rule R746-100.4.D generally contemplates replies to motions and the like.

³ Comcast Opposition at 5 (emphasis added).

requirements and safeguards.⁴ As stated in PacifiCorp's Request for Rehearing, the same due-process considerations that led the Commission to reject Comcast's previous *post hoc* submission of evidence now preclude allowing Comcast to submit still more purported evidence.⁵

B. Comcast's Statements Make Plain The Need for a Process to Establish the Adequacy of Its Evidence of Authorization

If Comcast is allowed to submit more evidence, the Commission must establish criteria to protect against unsubstantiated and inadequately supported information. Comcast's Opposition proves this need.

First, Comcast admits that the "bulk" of its purported proof will consist of materials provided in discovery by April 2004.⁶ This is not the "additional" evidence the Commission contemplated. Because the burden of proof to establish authorization has always been on Comcast, it is unacceptable for Comcast to claim that it will now analyze and prove what it refused to do, even through the hearing of this matter. Indeed, Comcast still persists in its claim that it should not have had to prove its case: "Comcast disagrees with PacifiCorp's contention that it was required to conduct a systematic analysis prior to the hearing or initiating this action."⁷ Such denial can only be understood if Comcast believes it can prepare its case seven months after it has ended.⁸

⁴ *Utah Department of Business Regulation v. Public Service Commission*, 720 P.2d 420, 423 (Utah 1986) (requiring that Commission decisions be supported by substantial evidence, within the Commission's statutory authority, and in keeping with the statutory and constitutional rights of the parties).

⁵ PacifiCorp Request for Rehearing at 5.

⁶ Comcast Opposition at 4.

⁷ Comcast Opposition at 7.

⁸ In fact, Comcast apparently still does not have the tools to prepare its case, now claiming that: "In order to reconcile the permitting maps and Exhibit A's with the JTU generated reports,

Second, with regard to the burden of proof, Comcast now claims that it would be “unreasonable to prove PacifiCorp wrong pole by pole given the overwhelming evidence of the fundamental inaccuracies of the audit.”⁹ Putting aside the fact that the Commission concluded, based partly on Comcast’s own analysis by Steve Brown and Mastec, that the 2002/2003 Audit was highly accurate,¹⁰ such “pole by pole” proof is exactly Comcast’s burden. Comcast has now foreshadowed its intent to try to shrug it off. To provide adequate due process, an adjudicatory mechanism is required to prevent Comcast from simply providing an “analysis” that is “identical in form”¹¹ to Mr. Goldstein’s prior efforts; *i.e.*, unsupported lists of poles for which Comcast claims authorization.

Third, as to Mr. Goldstein’s alleged analysis, throughout this proceeding, PacifiCorp has maintained that an affidavit from Mr. Goldstein simply listing poles, many of which are unverifiable, in no way constitutes evidence. PacifiCorp had no opportunity to obtain discovery from Mr. Goldstein on this submission. Perpetuation of such process will not satisfy the rigors of due process. The problems inherent in accepting scant and unsupported information as persuasive evidence will be exacerbated by foreclosing any opportunity for investigation and rebuttal by PacifiCorp.

In sum, the Commission stated that Comcast had the burden of proof in this proceeding.¹² Mandating adequate proof and due process only preserves the proper allocation of that burden on Comcast—the Complainant and the proponent of new evidence. Comcast will suffer no harm from following proper rules and due-process

Comcast must obtain copies of PacifiCorp’s service maps and attempt to overlay the permitting maps.” *Id.* at 5.

⁹ *Id.* at 8.

¹⁰ Order at 28; Ex. PC 1.9.

¹¹ Comcast Opposition at 6.

¹² Order at 31-32.

safeguards.

C. The Commission Should Strike Comcast's Latest Attempt to Submit Post-Hearing Evidence

Comcast continues to have difficulty following the rules. In its Opposition, it yet again seeks to introduce evidence it chose not to introduce at trial. The Opposition contains four exhibits, consisting of discovery responses, an unsigned letter from Comcast's counsel and an excerpt of a deposition of a PacifiCorp employee. There is no justification for Comcast to be offering additional evidence in an opposition to a rehearing request submitted almost six months after the hearing of this matter. As with the previous attempt to circumvent the strictures of due process, the Commission should strike Comcast's exhibits and references to them.

CONCLUSION

For the foregoing reasons, PacifiCorp requests that the Commission grant PacifiCorp's Request for Rehearing.

RESPECTFULLY SUBMITTED this 8th day of February 2005.

PACIFICORP

Gary G. Sackett
JONES WALDO HOLBROOK & MCDONOUGH, PC

Gerit Hull, Counsel
PACIFICORP

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

Attorneys for PacifiCorp, dba Utah Power

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of February, 2005, a true and correct copy of **PacifiCorp's Reply in Support of Request for Rehearing** was sent via e-mail and mailed, postage prepaid to:

Jerold G. Oldroyd
Anthony C. Kaye
Angela W. Adams
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
Comcast Cable Communications, Inc.
183 Inverness Drive West, Suite 200
Englewood, Colorado 80112
michael_woods@cable.comcast.com

J. Davidson Thomas
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
