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Submitted December 1, 2003

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

COMCAST CABLE COMMUNICATIONS,
INC., a Pennsylvania Corporation,

Claimant,

vs.

PACIFICORP, dba UTAH POWER , an
Oregon Corporation,

Respondent.

Docket No. 03-035-28

**RESPONSE OF PACIFICORP TO
REQUEST OF COMCAST FOR
AGENCY ACTION**

PacifiCorp, dba Utah Power, (“PacifiCorp”) by its attorneys and pursuant to
Section R746-100-3(I) of the Commission’s Rules of Practice and Procedure and Section 63-
46b-6 of the Utah Administrative Procedures Act, hereby responds to the Request for Agency
Action of Comcast Cable Communications, Inc. (“Comcast”) in the above-captioned proceeding.

STATEMENT OF RELIEF SOUGHT BY PACIFICORP

1. PacifiCorp seeks dismissal of the Request of Comcast for Agency Action (“Request for Action”) and an order that Comcast shall pay the amounts owed pursuant to the terms and conditions of the applicable Pole Contact Agreement (“Agreement”) between the Parties.

SUMMARY OF THE REASONS THAT THE RELIEF REQUESTED SHOULD BE GRANTED

2. The pole attachment permitting process is vital to ensure the safety, reliability and integrity of the electric infrastructure and to ensure that Comcast has properly obtained the necessary property rights. A significant monetary penalty for unauthorized attachments is appropriate and the only way to discourage non-compliance is with this requirement.

3. The unauthorized attachment penalty assessed by PacifiCorp and previously approved by the Commission is reasonable, comports with similar penalties adopted by states that regulate pole attachments and is within the jurisdiction of the Commission to enforce.

4. Commission action is not necessary. Comcast has available to it, under terms agreed to by PacifiCorp and Comcast, procedures for participating in and verifying the results of PacifiCorp’s audit of poles. Comcast has, however, refused to avail itself of such procedures. Moreover, PacifiCorp has agreed in writing to refund unauthorized attachment penalties collected in error.

5. Comcast’s claim for rental and pole inspection overcharges is an empty allegation without *prima facie* factual support.

STATEMENT OF THE FACTS

6. Comcast's predecessor in interest, AT&T Cable Services ("AT&T") entered into the Agreement with PacifiCorp on December 20, 1999. *See* Request for Action at Exhibit A; Corey Fitz Gerald Declaration, a copy of which is attached hereto as Exhibit 1, at ¶ 3 ("Fitz Gerald Decl."). The Agreement was a product of an extensive, three-year long negotiation process during which both parties exchanged valuable bargained-for consideration. Fitz Gerald Decl. at ¶ 3.

7. In December 2001, Comcast purchased the AT&T assets in Utah that were governed by the Agreement. *See AT&T-Comcast Merger is Final*, Deseret News, Dec. 20, 2001, at E1. The purchase helped propel Comcast to its status as the largest cable provider in the United States with over 21 million subscribers and recent quarterly revenues in excess of \$1.6 billion. *Comcast Reports Third Quarter 2003 Results*, PR Newswire, Oct. 30, 2003. Comcast is now in the middle of an aggressive \$4 billion effort to replace its plant with two-way digital cable to facilitate the provision of additional revenue producing services such as digital cable, local exchange service, and video-on-demand. *Id.* In Utah alone, Comcast has invested \$110 million dollars and is conducting an around-the-clock operation to upgrade its existing facilities. Matt Richtel, *Fast and Furious: The Race to Wire America*, Nov. 16, 2003 at sec. 3.1.

8. In December 2001, PacifiCorp notified Comcast that it was terminating the Agreement as of December 31, 2002 and that it was PacifiCorp's wish that the Parties negotiate a replacement agreement before the end of the year. Fitz Gerald Decl. at ¶ 5. PacifiCorp then sent an electronic draft of the new agreement to Comcast's counsel on April 18,

2002. *Id.* However, after repeated inquiries from PacifiCorp's representative throughout the year, Comcast did not respond with any comments on the draft until December 11, 2002. *Id.*

9. The delayed response prevented the parties from meeting PacifiCorp's goal of negotiating a new agreement before December 31, 2002. Fitz Gerald Decl. at ¶ 6. Nevertheless, PacifiCorp not only continued to allow Comcast to keep its attachments on PacifiCorp's poles, PacifiCorp processed applications for new attachments. *Id.* Except for past due amounts, Comcast, in turn, continued to pay the annual rental fees assessed by PacifiCorp. *Id.* This arrangement was consistent with § 8.7 of the Agreement which states; "**Any termination of this Agreement shall not release Licensee [Comcast] from any liability or obligations hereunder, whether of indemnity or otherwise, which may have accrued or may be accruing at the time of termination**" (emphasis added).

10. As part of administering its pole plant for joint use purposes, PacifiCorp initiated an audit of all of its facilities in November 2002. Fitz Gerald Decl. at ¶ 7. The purpose of the audit was to identify all of the licensees on PacifiCorp's poles, the type of attachments owned by each licensee, and whether the attachments were properly attached to PacifiCorp's poles. Fitz Gerald Decl. at ¶ 8.

11. Comcast, through its predecessor AT&T, was aware as early as 2001 that PacifiCorp intended to audit all of its pole plant in Utah. Fitz Gerald Decl. at ¶ 10. PacifiCorp and AT&T were both members of the Oregon Joint-Use Task Force, which was charged by the Oregon legislature to define pole attachment compliance and appropriate sanctions for non-compliance. *Id.* The recommendations to the Oregon legislature were unanimously adopted by the members of the Joint Use Task Force. The Joint Use Association was formed out of the Joint

Use Task Force to consider issues beyond compliance and sanctions. Comcast is a member of this Association as well. During the Task Force's discussions, PacifiCorp notified all involved, including AT&T, that PacifiCorp intended to audit all of its pole plant. *Id.* At no time did AT&T ever express interest in participating in how the audit was conducted when in fact AT&T's facilities would be subject to the Audit. *Id.*

12. When PacifiCorp was ready to begin the audit in Utah, PacifiCorp sent out a request for proposals from qualified contractors. Fitz Gerald Decl. at ¶ 9. After a competitive bid process, PacifiCorp hired OSMOSE Utilities Services, Inc., a capable and experienced industry-recognized contractor. *Id.* Before actually conducting the audit in specific areas in Utah, including Layton, Salt Lake City, Tooele, Park City, Ogden, Jordan Valley and American Fork, PacifiCorp's Jim Coppedge, a manager of inventory and inspections with PacifiCorp's T&D Infrastructure Management unit, sent a letter providing thirty (30) days advance notice to Comcast of PacifiCorp's intent to begin the audit. *See* J. Coppedge letters, a copy of which is attached hereto as Exhibit 2 ("Coppedge Letters"); Fitz Gerald Decl. at ¶ 11. Specifically, each letter stated:

The inspection will be starting in [location] within approximately 30 days from the date of this notice. Upon completion, you will be notified of any unauthorized attachments, as well as any compliance issues. Your company will be invoiced according to the terms of your agreement with PacifiCorp. Further [i]nformation can be obtained from Laura Raypush in our billing department at (503) 813-6304 or you may contact me directly.

13. Two of the relevant sections of the Agreement addressing audits and unauthorized attachments are:

§ 2.21 Licensor [PacifiCorp] shall have the right to inspect each new installation of Licensee's Equipment upon and in the vicinity of such poles and to make periodic inspections of Licensee's Equipment as it deems necessary. Licensor reserves the right to charge Licensee for the expense of any field inspections, including inspections for make-

ready work, inspections during installation of Licensee's equipment, and any further periodic inspections deemed necessary by Licensor. Such inspections, whether made or not, shall in no manner relieve Licensee of any responsibility, obligation, or liability assumed under this Agreement. The frequency of periodic inspections is dependent on the performance of the Licensee in conforming with the terms of this agreement.

§ 3.2 Should Licensee attach Equipment to Licensor's poles without obtaining prior authorization from Licensor in accordance with the terms of this Agreement, or should Licensee fail to remove its Equipment from Licensor's poles when requested to do so 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 Licensor for the period of the attachment.

14. Comcast never responded to Mr. Coppedge's letters nor did Comcast or any of its representatives contact Ms. Raypush for additional billing information. Fitz Gerald Decl. at ¶¶ 10 & 13. In fact, at no point did Comcast ever inquire concerning the auditor or seek to have its personnel monitor or participate in the audit. Fitz Gerald Decl. at ¶ 10. Moreover, Comcast did not object when it was informed that it would be invoiced in accordance with the terms of the Agreement. Coppedge Letters at Exhibit 2; Fitz Gerald Decl. at ¶¶ 10 & 13.

15. PacifiCorp conducted the audit, and when it was complete with respect to the Ogden, American Fork and Layton service districts, PacifiCorp checked the data it collected against existing records. Fitz Gerald Decl. at ¶ 12. Attachments not accounted for by records or permits were deemed unauthorized attachments. *Id.* PacifiCorp identified 15,312 such unauthorized attachments belonging to Comcast in those districts. *Id.*

16. In January 2003, as shown by Comcast's Exhibits C through L, PacifiCorp sent Comcast a bill for \$3,828,000.00. Fitz Gerald Decl. at ¶ 13. The invoices also included an

invitation to bring to the attention of PacifiCorp any inaccuracies in its determinations. *Id.* The \$3,828,000.00 figure was based on a conservative assessment of \$250.00 per pole. *Id.* As stated in *supra* ¶ 14, § 3.2 of the Agreement entitled PacifiCorp to charge Comcast \$60 per unauthorized attachment per year. Request for Action at Exhibit A. On the assumption that each unauthorized attachment had been attached after 1998, the last year PacifiCorp completed an audit of its Utah service territory, PacifiCorp multiplied \$60 by four years for a total of \$240 per pole. PacifiCorp could also have charged for 2003 but chose not to do so. In addition, § 3.2 entitled PacifiCorp to charge for back-rent for each of the four years and § 8.3 entitled PacifiCorp to interest at a rate of 1.5% per month. *Id.* The back-rent and the interest charge more than make up the additional \$10 that produced the \$250.00 figure.

17. The \$60 per year charge for each unauthorized attachment was intended to provide an incentive for attaching entities like Comcast to follow the application process as set forth in § 2.1 of the Agreement. By not submitting an application, PacifiCorp was prevented from ensuring in part: (1) that each new attachment complies with applicable safety codes, including the National Electrical Safety Code; (2) that attaching entities like Comcast have obtained permission from property owners to use affected property for the provision of communications services; and (3) that PacifiCorp has an accurate record of the attachments on its pole for purposes of proper plant management.

18. For the five months after PacifiCorp sent the invoices, Comcast only engaged in nominal communications with PacifiCorp regarding the invoices, forcing PacifiCorp in July to stop processing applications for new attachments. *See* Request for Action at Exhibit M; Fitz Gerald Decl. at ¶ 14. Comcast then took issue with the outstanding invoice, and

challenged the accuracy of the audit and the number of unauthorized attachments. Fitz Gerald Decl. at ¶ 16. PacifiCorp repeated its willingness to adjust the invoice if Comcast could prove that any of the 15,312 unauthorized attachments were in fact authorized or somehow not owned by Comcast. *Id.* To facilitate this, PacifiCorp offered to make its data available to Comcast for inspection but Comcast did not accept PacifiCorp's offer. *Id.*

19. As shown in Comcast's Exhibit N, PacifiCorp and Comcast entered into the letter agreement dated September 8, 2003 ("Letter Agreement") whereby Comcast agreed to pay the outstanding unauthorized attachment charges on the condition that PacifiCorp resume processing Comcast's applications. Fitz Gerald Decl. at ¶ 17. The Letter Agreement stated:

Comcast shall have a period of sixty (60) days in which to identify individual poles within the Ogden, American Fork, and Layton service districts where Comcast has credible documentation indicating that attachments PacifiCorp has identified as unauthorized attachments are: (1) subject to a valid installation permit granted by PacifiCorp to Comcast, AT&T, or any of their predecessors; or (2) are the personal property of an entity other than Comcast; or (3) do not exist.

20. Comcast evidently hired a contractor to verify the results of PacifiCorp's audit in the aforementioned areas. Fitz Gerald Decl. at ¶ 16. On several occasions, PacifiCorp received and responded to inquiries from Comcast's contractor regarding PacifiCorp's findings and how to read the maps of PacifiCorp's operating territory. *Id.* In addition, PacifiCorp reiterated its invitation to Comcast's contractor to review the findings of the audit at PacifiCorp's offices. *Id.*

21. Instead of providing data stemming from its own audit within the sixty (60) days expressly agreed to in the Letter Agreement, Comcast filed this Request for Action seeking help from the Commission. Fitz Gerald Decl. at ¶ 18. Specifically, Comcast, the largest cable company in the country with customers in the millions and annual revenues in the billions,

seeks to be rescued from its own dereliction by the Commission in the form of a determination that the terms and conditions of the Agreement which its predecessor negotiated and executed are unreasonable. In addition, Comcast claims without any factual support that it “has located approximately 8,000 utility poles for which it has been billed by and has been paying rents to PacifiCorp, but on which it has no attached facilities.” However, Comcast provided no evidence to PacifiCorp or the Commission supporting this claim. Fitz Gerald Decl. at ¶ 16.

RESPONSES TO PARTICULAR ALLEGATIONS OF COMCAST

22. PacifiCorp agrees that the Agreement, dated December 20, 1999, submitted as Exhibit A by Comcast with its Request for Agency Action, governs the relationship between the Parties. Request for Action at ¶¶ 4, 6-7 & 9. As stated *supra* ¶ 8, PacifiCorp agrees that it commenced the termination process contemplated in this Agreement in December 2001 by initiating negotiations for a new agreement. Request for Action at ¶ 10; Fitz Gerald Decl. at ¶ 5. Nonetheless, despite the fact that a new agreement has not yet been successfully negotiated, PacifiCorp has continued to honor the terms of the Agreement and has not sought to terminate Comcast’s valid attachment permits nor threatened Comcast with removal of its facilities from PacifiCorp’s poles. Request for Action at ¶ 12; Fitz Gerald Decl. at ¶ 6. Similarly Comcast has filed pole attachment applications and has not disputed its liability for pole rental charges pursuant to § 8.7. Fitz Gerald Decl. at ¶ 6. Thus, by their course of dealing, mutual acknowledgement, and § 8.7 of the Agreement, the parties have continued to operate under the terms and conditions in the Agreement.

23. PacifiCorp agrees that Comcast has the right, pursuant to Utah law and the Agreement, to apply to PacifiCorp for non-exclusive licenses permitting Comcast to attach its

cables to PacifiCorp's utility poles. Request for Action at ¶¶ 5-6. The Agreement provides at § 2.1 that to attach equipment to any of PacifiCorp's utility poles, Comcast is required to apply for and obtain PacifiCorp's permission. Request for Action at ¶ 6. The Agreement further provides at § 3.1 that, pursuant to Schedule 4 of PacifiCorp's Rate Schedules for Electric Service in the State of Utah, Tariff No. 44 ("Tariff"), a copy of which is attached hereto as Exhibit 3, Comcast is required to pay PacifiCorp an annual pole attachment rental rate of \$4.65 per pole per year. Request for Action at ¶ 7. PacifiCorp agrees that, except for past due amounts, Comcast has continued to pay the Tariff rate of \$4.65 per pole per year for its authorized attachments. Request for Action at ¶ 12; Fitz Gerald Decl. at ¶ 6.

24. PacifiCorp disagrees that its Tariff does not make provision for penalties for unauthorized attachments. Request for Action at ¶ 8. The Tariff incorporated by reference PacifiCorp's standard pole attachment agreement, which was filed with the Commission and is essentially identical to the 1999 Agreement between the Parties. As explained *supra* ¶ 13, the Agreement, at § 3.2, provides for a monetary charge of \$60.00 per pole per year *in addition to back-rent* for unauthorized attachments. Furthermore, at § 8.3, the Agreement provides for interest at the rate of 1.5% per month. Therefore, the Commission has endorsed a charge for unauthorized attachments and it is disingenuous, at the least, for Comcast to allege otherwise.

25. PacifiCorp agrees that it notified Comcast of its intent to conduct an audit of its network of utility poles to identify unauthorized pole attachments. Request for Action at ¶ 13; Fitz Gerald Decl. at ¶¶ 10-11. PacifiCorp strongly disagrees, however, with Comcast's contention that PacifiCorp did not permit Comcast to participate in the audit process. Request for Action at ¶ 14; Fitz Gerald Decl. at ¶ 10. As explained *supra* ¶ 12, PacifiCorp sent letters

notifying Comcast of its intent to audit specific areas where Comcast had attachments on PacifiCorp's poles. Fitz Gerald Decl. at ¶ 11; Coppedge Letters at Exhibit 2. Comcast did not respond to any of those letters and did not ask to participate in the audits or arrangement of the audits. Fitz Gerald Decl. at ¶ 10. In addition, as evidenced by the Letter Agreement, PacifiCorp has been completely willing to adjust the results of the audit if Comcast ever demonstrates that the results are inaccurate. Request for Action at Exhibit N; Fitz Gerald Decl. at ¶ 17.

26. PacifiCorp agrees that beginning in January 2003, PacifiCorp notified Comcast that the most recent audit of licensee attachments identified approximately 15,312 pole attachments in the Ogden, Layton and American Fork districts which did not appear on the 1998 audit and for which there were no pole attachment permits. Request for Action at ¶ 15; Fitz Gerald Decl. at ¶ 12. PacifiCorp agrees that its audit is continuing and that Comcast's attachments in other areas have yet to be counted. Request for Action at ¶ 15. PacifiCorp will not speculate as to the likely outcome of the continued audit. *Id.*

27. PacifiCorp agrees that it assessed a monetary charge of \$250 for each unauthorized attachment it discovered. Request for Action at ¶ 16; Fitz Gerald Decl. at ¶ 13. The \$250 charge is justified on the basis that the Agreement, which was negotiated and executed by Comcast's predecessor in interest, entitles PacifiCorp to charge \$60 per unauthorized attachment per year plus back rent and interest.¹ Request for Action at Exhibit A, §§ 3.2 & 8.3. Thus, PacifiCorp could have gone back to its last audit and charged in excess of \$300 per

¹ Although PacifiCorp does not agree that *Public Service Co. of Colorado v. Federal Communications Commission*, 328 F.3d 675 (D.C. Cir. 2003), cited by Comcast, governs this case, it is interesting to note that that case authorizes a five year retroactive period for imposition of unauthorized attachment fees.

unauthorized attachment, but it believed instead that the figure of \$250.00 more fairly represented the amount owed.

28. PacifiCorp agrees that in mid-July 2003 it was compelled to stop processing pending pole attachment applications submitted by Comcast. Request for Action at ¶ 18; Fitz Gerald Decl. at ¶ 15. Comcast had ignored repeated requests by PacifiCorp to either pay the charges for unauthorized attachments or to provide evidence that the charges had been assessed in error. Fitz Gerald Decl. at ¶¶ 13-16. Under the terms of the Letter Agreement, PacifiCorp agreed to resume processing but only for so long as Comcast remained current with its payment obligations.² Request for Action at Exhibit N; Fitz Gerald Decl. at ¶ 17. This Comcast has failed to do.³

29. PacifiCorp agrees that the terms of Comcast's payment of the \$3,828,000 to PacifiCorp are contained in the Letter Agreement. Request for Action at ¶ 21; Fitz Gerald Decl. at ¶ 17. PacifiCorp calls to the Commission's attention the fact that the Letter Agreement contains a provision whereby PacifiCorp agrees to refund to Comcast charges collected for attachments that are shown by Comcast to have been validly permitted. Request for Action at Exhibit N; Fitz Gerald Decl. at ¶ 17. However, Comcast has never proffered any evidence to PacifiCorp or the Commission that the unauthorized attachment charges or the cost of the audit were assessed in error. Fitz Gerald Decl. at ¶ 18. Moreover, Comcast's contention that

² The Letter Agreement states, at page 2, second full paragraph, "PacifiCorp shall immediately resume processing Comcast's applications for permission to install pole attachments...so long as Comcast's payments of future charges invoiced by PacifiCorp do not exceed thirty (30) days past the due date stated on the invoice, going forward." Request for Action at Exhibit N.

³ Currently Comcast is more than 30 days past due on over \$230,000.00 in pole contact fees that are due and payable. Fitz Gerald Decl. at ¶ 19.

PacifiCorp has charged Comcast annual rent (not a charge for unauthorized attachment) for 8,000 poles that do not have Comcast attachments is not supported by any factual evidence and should not be credited. Request for Action at ¶ 23. In fact, PacifiCorp carefully tracks and manages its poles and the attachments placed on them by licensees. The audit process currently under way involves visiting every pole (not just a representative sample) and recording each licensee present on the pole as well as the nature of each piece of equipment on the pole. Fitz Gerald Decl. at ¶ 8.

30. PacifiCorp agrees that it has invoiced Comcast for its *pro rata* share of the cost of the audit. Request for Action at ¶ 24; Fitz Gerald Decl. at ¶ 20. This was done pursuant to § 2.21 of the Agreement in which Comcast agrees to pay the expense of any field inspections. Request for Action at Exhibit N. It is irresponsible of Comcast to claim, without any support, that the audit was undertaken “solely by PacifiCorp for the purposes of updating its facilities and assessing its system of utility poles.” Request for Action at ¶ 24. The audit benefits all attaching licensees and, more importantly, it would not have been conducted but for the presence of those attachments. PacifiCorp has entire separate inspection procedures in place for its own facilities. Fitz Gerald Decl. at ¶ 8. Those inspections are paid for entirely by PacifiCorp. *Id.*

REQUEST FOR DISMISSAL OF THE REQUEST OF COMCAST FOR AGENCY ACTION

31. The charges for unauthorized attachments under § 3.2 of the Agreement are not only allowed by Utah law, they are encouraged as a matter of Utah’s public policy. The statute empowering the Commission to regulate pole attachments, Utah Code Ann. § 54-4-13, mandates that pole attachment agreements be “designed to ensure the continued safe operation of the utilities service and facilities without any additional burden on the...property [upon which

the facilities are situated].” Utah Code Ann. § 54-4-13(2) (2003). The Commission then has the responsibility to “determine that under the terms and conditions of the pole attachment contract the use of the facilities by the cable television company will not interfere with the primary utility function or render its facilities unsafe, and that the contract is in the public interest. Utah Code Ann. § 54-4-13(2)(b) (2003).

32. Unlicensed attachments present a significant threat to the safety and reliability of PacifiCorp’s pole plant. The application process, as called for by §§ 2.1 and 2.4 of the Agreement, requires that the parties take precautions to ensure that the pole in question meets the standards of applicable safety codes including the National Electrical Safety Code. Such precautions may include weight and wind-loading studies and rearranging any pre-existing attachments of other licensees to ensure that there is proper separation from energized lines. Unlicensed attachments are not subject to this rigorous safety regime and are therefore likely to pose a threat to the safety and reliability of the pole plant.

33. Unlicensed attachments also impose burdens on the property upon which PacifiCorp’s facilities are located in excess of what may be allowed by public authorities and private property owners. The Agreement, in § 2.16, requires Comcast to “be solely responsible for obtaining from public authorities and private owners of real property and maintaining in effect any and all consents, permits, licenses or grants necessary for the lawful exercise of the permission granted by any application approved hereunder.” Prior to filing an application, § 2.16 requires Comcast to submit to PacifiCorp a written warranty for each attachment “that (1): identifies the consents, permits, licenses or grants necessary for the lawful exercise of the permission granted by any application approved hereunder; and (2) specifies that Licensee has

obtained all such approvals.” If this procedure is not followed, there is no safeguard against Comcast’s violating Utah Code Ann. § 54-4-13(2)(a) that requires prior consent of the land owner before a cable company may traverse the property. Similarly, absent the permitting process, there is no occasion to ensure that the use contemplated by Comcast “is the same or similar to that granted the public utility and that such use will not impose additional burden on the servient tenement.” Utah Code Ann. § 54-4-13(2)(d).

34. When attachments are unauthorized, the failure to obtain landowner consents and the consent of PacifiCorp to use its facilities can amount to criminal trespass and/or theft. *See* Utah Code Ann. §§ 76-6-206; 76-6-404 (2003). At common law, the remedies for trespass lie in damages for the fair rental value of the land or a share of the profits derived from the trespass. *See Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231 (Va. 1946). In addition, the unlicensed attachments raise the possibility of civil liability for burdening the underlying easements or rights-of-way in excess of what may have been contemplated by the property owner’s original grant. There have been numerous claims filed to this effect whereby communications companies paid settlements for using easements and rights-of-way that were granted to power companies for the provision of electric service. *See e.g. Clark v. CSX Transportation, Inc.*, Cause No. 29D03-9308-CP-404 (Indiana); *In re AT&T Fiber Optic Cable Installation*, Cause No. IP99-C-9313 H/K (S.D. Indiana); *Firestone v. American Premier Underwriters and U.S. Railroad Vest Corp.*, Cause No. 06C01-CP-379 (Indiana).

35. Moreover, the Agreement was not only approved by the Commission as part of PacifiCorp’s tariff, it was also negotiated by PacifiCorp and Comcast’s predecessors in interest. Fitz Gerald Decl. at ¶ 3. Therefore any and all sections in the Agreement, including

§ 3.2 on unauthorized attachment charges, § 2.21 on audits and § 2.16 on landowner consent, are products of a bargained for exchange between the parties. *Id.* In fact, the negotiations over the Agreement encompassed a three year period in which both parties traded valuable consideration before voluntarily executing the Agreement. *Id.* Comcast's efforts to not have to pay either the unauthorized attachment charges or the cost of the audit amount to a bad faith attempt to escape financial obligations incurred under an agreement it negotiated and voluntarily signed.

36. To the extent that Comcast argues that the unauthorized attachment charges at issue here are out of step with the national standard, Comcast is mistaken. First, the pole attachment policies of the Federal Communications Commission ("FCC") are not controlling here. Congress enacted the Pole Attachments Act in 1978 to fill the vacuum of pole attachment regulation in the absence of state or local regulations. However, Congress explicitly stated when it passed the Act that it considered pole attachment regulation to be a matter of state and/or local concern. S. Rep. No. 95-580 at 16-17. To that end, Congress included § 224(c) in the Act allowing the individual states to opt out of the federal pole attachment statute and implement its own policies. Utah is one of the states that certified to the FCC that it regulates pole attachments.

37. As a state that regulates pole attachments, Utah has made it crystal clear that it intends not to be bound by what the federal government does regarding pole attachments. The Supreme Court of Utah stated: "Congress recognized the 'inherent power of a State' to regulate pole attachment contracts and intended to provide a forum for litigation concerning such contracts only in cases where no state forum was available...**Thus, any regulation of utility pole attachment contracts by a state, regardless of the nature of the specificity of such**

regulation, negates FCC jurisdiction over contracts in that state by providing a state forum for complaints concerning such contracts.” *Utah Cable Television Operators Assoc., Inc. v. Public Service Commission of Utah*, 656 P.2d 398, 400 (1982) (emphasis added).

38. The Commission has not hesitated to deviate from the federal Pole Attachments Act when it has found it reasonable to do so. For example, in one instance the Commission found that incumbent local exchange carriers should benefit from the state’s pole attachment statute despite that the federal Act specifically excludes such entities. *See In the Matter of Interconnection Contract Negotiations Between AT&T of the Mountain States, Inc., and U.S. West Communications, Inc.*, 1998 Utah PUC LEXIS 163 (Apr. 28, 1998).

39. If the Commission were to undertake a survey to determine whether its approval of § 3.2 of the Agreement is consistent with what other jurisdictions have done, it would find that it is eminently reasonable. States that regulate pole attachments such as Oregon, California and Louisiana have each promulgated regulations authorizing charges for unauthorized attachments ranging from \$250.00 up to \$10,000.00 per attachment violation. *See* OAR 860-028-0140(1)(a)-(b) (regulation promulgated by the Oregon Public Utility Commission authorizing pole owners to sanction pole occupants the higher of \$250.00 per pole or thirty (30) times the owner’s annual rental fee per pole for failure to obtain a permit prior to installing an attachment); *Order Instituting Rulemaking on the Commission’s Own Motion Into Competition for Local Exchange Service*; *Order Instituting Investigation on the Commission’s Own Motion Into Competition for Local Exchange Service*, 1998 Cal. PUC LEXIS 879 (Oct. 22, 1998) (authorizing penalties of \$500 to be paid to the incumbent utility for each unauthorized attachment and allowing utilities to seek further remedies in a civil action); *In re: Review of*

LPSC Orders U-14325, U-14325-A and General Order dated December 17, 1984 dealing with agreements for Joint Utilization of Poles and Facilities by Two or More Entities, 1999 La. PUC LEXIS 13 (Feb. 24, 1999) (“Order”) (requiring pole occupants to file written requests with pole owners prior to attaching overloading and in the event any provision of the Order is violated, the Louisiana Public Service Commission may assess reasonable penalties not to exceed \$10,000 per occurrence).⁴ Indeed, Comcast was integrally involved in the task force that led to the adoption of the Oregon unauthorized attachment penalty.

40. A survey of other jurisdictions would also show that § 2.21 of the Agreement regarding charges for inspections is a reasonable term of attachment. *See* Ill. Admin. Code 315.40 (2003) (allows the utility to charge a cable company the full cost of an audit where the audit demonstrates that “the CATV operator has failed to report more than 5% of his attachments or is in noncompliance on 5% or more of the poles to which it is attached.”); *In the Matter of the Complaint of Michigan Cable Telecommunications Assoc. and Harron Cablevision of Michigan, Inc. against The Detroit Edison Co. Regarding The Terms and Conditions of Pole Attachments*, 1999 Mich. PSC LEXIS 261, *6 (Sept. 28, 1999) (affirming settlement agreement providing for audit costs to be allocated among all responsible attaching parties).⁵

41. In sum, the Commission should deny Comcast’s Request for Action and uphold the reasonableness of the relevant terms and conditions in the Agreement because the terms and conditions: (1) were a product of a bargained for exchange between the parties and were subsequently approved by the Commission; (2) implement the policy concerns expressly

⁴ Excerpts from these orders are attached hereto as Exhibit 4 for the Commission’s convenience.

⁵ The excerpt from this order is attached hereto as Exhibit 5 for the Commission’s convenience.

endorsed in Utah's pole attachment statutes; and (3) are eminently reasonable in light of what other jurisdictions have done with regard to unauthorized attachment charges and allocating the cost of pole audits.

WHEREFORE, PacifiCorp respectfully requests that the Commission enter an Order:

1. Declaring that Comcast is entitled to review and verify the conclusions of PacifiCorp's audit without action by the Commission;
2. Declaring that the assessment of a significant charge for unauthorized attachments is a fair and reasonable deterrent to conduct that jeopardizes the electric distribution infrastructure and declining to order PacifiCorp to refund the \$3,828,000 paid by Comcast;
3. Declaring that Comcast is liable for its *pro rata* share of cost of the audit;
and
4. Dismissing with prejudice the Request for Agency Action filed by Comcast in the above-captioned proceeding.

RESPECTFULLY SUBMITTED this 1st day of December, 2003.

PACIFICORP

A handwritten signature in black ink, appearing to read "Gerit Hull", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of December, 2003, an original, eight (8) true and correct copies, and an electronic copy of **REQUEST FOR AGENCY ACTION** were hand-delivered to:

Ms. Julie Orchard
Commission Secretary
Public Service Commission of Utah
Heber M. Wells Building, Fourth Floor
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