



State of Utah
Department of
Commerce

KLARE BACHMAN
Executive Director
JASON PERRY
Deputy Director

**Division of
Public Utilities**

IRENE REES
Director

OLENE S. WALKER
Governor

GAYLE F. McKEACHNIE
Lieutenant Governor

DATE: January 8, 2004

TO: PUBLIC SERVICE COMMISSION

FROM: DIVISION OF PUBLIC UTILITIES

Irene Rees, Director
Judith Johnson, Manager, Energy Section
Ingo Henningsen, Manager, Telecommunications Section
Tom Peel, Technical Consultant
Krystal Fishlock, Technical Consultant

SUBJECT: Docket No. 03-035-28, In the Matter of Comcast Cable Communications, Inc., a Pennsylvania Corporation vs. PacifiCorp, dba UTAH POWER, an Oregon Corporation.

The Division thanks the Commission for its patience in the Division's late response to the Commission's Request for Agency Action due January 2nd. The Division has now completed its initial investigation.

ISSUE:

On October 31, 2003, Comcast Cable Communications Inc. ("Comcast") filed a complaint against PacifiCorp, dba Utah Power ("PacifiCorp") alleging inappropriate charges for pole attachments audits and unauthorized pole attachments penalties and rents.

RECOMMENDATION:

The Division recommends the Commission schedule a pre-hearing conference to discuss and determine the relevant issues and establish procedural and hearing dates for this case.

BACKGROUND:

Comcast's complaint requests the Commission enter an Order:

1. Declaring that Comcast is entitled to review and verify the conclusion of PacifiCorp's audit;
2. Declaring that a \$250.00 per pole penalty for any verified unauthorized attachments is not "fair and reasonable," and ordering PacifiCorp to refund the \$3,828,000 paid by Comcast, plus interest;
3. Declaring that PacifiCorp is entitled only to the fair and reasonable rental value for pole attachments that PacifiCorp can prove are unauthorized, if any;
4. Declaring that Comcast is entitled to offset any amounts owed to PacifiCorp with rents paid by Comcast for attachments that do not exist, or to reimburse (sic) by PacifiCorp in the event that the amounts overpaid by Comcast exceed those owed to PacifiCorp for unauthorized pole attachments;
5. Declaring that Comcast is not liable for the cost of the audit; and
6. Awarding such other and further relief as the Commission deems just, reasonable, and equitable.

On December 1, 2004, PacifiCorp filed its response to Comcast's complaint requesting the Commission enter an Order:

1. Declaring that Comcast is entitled to review and verify the conclusions of PacifiCorp's audit without action of by the Commission;
2. Declaring that the assessment of a significant charge for unauthorized attachments is a fair and reasonable deterrent to conduct that jeopardized 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 costs of the audit; and
4. Dismissing with prejudice the Request for Agency Action filed by Comcast in the above-captioned proceeding.

The claims made by Comcast in its request are both legal and factual. Based on our preliminary review, the Division has identified the following issues:

Audit charges:

Concerning request #1 and #5 of Comcast and request #1 and #3 of PacifiCorp:

- §2.21 of the contract indicates the pole owner may charge the attaching party for audit (inspection) costs.
- PacifiCorp indicates that the audit costs charged to Comcast are for pole attachments of non-PacifiCorp attachments and not an internal inventory. PacifiCorp's internal audit is conducted and charged to its own pole maintenance accounts.
- According to PacifiCorp, Comcast was invited to participate in the planning of the pole audit.
- Comcast claims that it is unable to review and verify the conclusions of PacifiCorp's audit. Comcast has not provided factual evidence that it has been prevented from reviewing PacifiCorp's audit.
- §3.1 of the contract allows the attaching party the opportunity to submit an accounting of its attachments to the pole owner. Comcast has not provided factual evidence that it has been prevented from performing its own audit of pole attachments. Comcast has not provided evidence of the results of its own audits or evidence to challenge or "verify" any discrepancies in PacifiCorps audit.

Unauthorized Pole Attachment Charges:

Concerning request #2 and #3 of Comcast and request #2 of PacifiCorp:

- §3.2 of the contract indicates the pole owner may charge penalties (\$60 per attachment) and back-rent for unauthorized pole attachments.
- §8.3 of the contract indicates a late payment interest rate of 1.5% per month. The Division believes that the PacifiCorp, in its charges to Comcast, has treated unauthorized pole attachment penalties and back-rent as late payments.
- PacifiCorp has charged Comcast 4 years back-rent and penalties for all unauthorized pole attachments identified in its most recent pole audit.
- The contract is unclear as to whether the penalty can be back-charged. It is stated in §3.2 of the contract that rent can be back-charged. The impact of back-charging the penalty is significant.
- PacifiCorp has not provided evidence of the actual length of time for the unauthorized attachment of Comcast and has assumed 4 years based on the date of its prior audit. PacifiCorp not Comcast has provided evidence to indicate that the prior audit was performed in the same area as the poles now being charged for, in which one could conclude that the attachments could be 1 to 4 years old, or even older attachments in which the “paper work” was overlooked. Regardless, PacifiCorp has charged Comcast 4 years back-rent.
- Attachment A shows a re-calculation of PacifiCorp’s charges assuming no back-charge for the penalty. Attachment A also shows the difference between one versus four years of rent.

Offsetting Rent and Reimbursements:

Concerning Request #4 of Comcast: The contract does not provide for offsetting current charges against prior charges.

Dismissing Comcast’s Request for Agency Action:

Concerning request #4 of PacifiCorp:

- Comcast cites Utah Code Ann. §54-1-2.5, 54-4-1, 54-4-13, and §63-46b-1, *et. seq.* as legal basis for the Commission’s jurisdiction over the disputed issues.
- Public Service Commission Rule R746-345-2C requires PacifiCorp to file any contract used to execute its pole attachment tariff and physical arrangements. R746-345-2C also requires the contract be directly referenced in the tariff.
- PacifiCorp’s tariff on file with the Commission references the contract general terms and condition found in Exhibit A of Comcast’s filing.
- PacifiCorp claims the Commission approved the contract as part of PacifiCorp’s pole attachment tariff.

Additional Relief:

Concerning request #6 of Comcast: The Division has not identified any additional issues to review at this time.

attach: 1

cc: Committee of Consumer Services

Jerold G. Oldroyd, Esq., Counsel, Michael Woods, Esq. and J Davidson Thomas, Comcast
Gerit Hull, Counsel, and Raymond A Kowalski, PacifiCorp