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Submitted October 14, 2004

**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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COMCAST CABLE COMMUNICA-	)	
TIONS, INC., a Pennsylvania Corp.,	)	
	)	<b>Docket No. 03-035-28</b>
Claimant,	)	
v.	)	
PACIFICORP, dba UTAH POWER,	)	<b>PACIFICORP'S MOTION TO</b>
an Oregon Corporation,	)	<b>STRIKE AFFIDAVIT OF GARY</b>
	)	<b>GOLDSTEIN</b>
Respondent.	)	

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PacifiCorp, through counsel of record and pursuant to Utah Admin. Code §§ R746-100-8 and-10 and Rule 37 of the Utah Rules of Civil Procedure, submits this Motion to Strike, requesting a Commission order striking the Affidavit of Gary Goldstein and the associated portion of Comcast's Post-Hearing Brief that were filed on

October 8, 2004,<sup>1</sup> and refusing to consider Comcast's surprise post-hearing evidence.

## PROCEDURAL HISTORY AND DISCUSSION

As part of its Post-Hearing Brief, Comcast submitted additional evidence, not previously provided during any phase of this proceeding, consisting of an Affidavit by Mr. Gary Goldstein and the purported results of a survey conducted at Mr. Goldstein's direction *after the close of the hearing*.<sup>2</sup> Mr. Goldstein's Affidavit and accompanying attachment represent an attempt by Comcast to rehabilitate a witness who provided inconsistent and damaging testimony during this proceeding. It is contrary to the Utah Rules of Civil Procedure, Utah Rules of Evidence, and fundamental notions of fair play and orderly procedure to unilaterally *create new evidence* after the close of the hearing and attempt to make it part of an evidentiary record that was developed under a structure agreed to by the parties and ordered by the Commission. Such an attempt to subvert the orderly processing of a formal dispute before an independent tribunal is virtually unheard of and should not be condoned by the Commission.

Comcast's tactics are a gross abuse of the process of developing and disclosing evidence—a process that is governed by the Commission's Procedural Order<sup>3</sup> issued in this case and the Utah Rules of Civil Procedure.<sup>4</sup> In particular, Rule 37(f) provides:

If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(e)(1), or to amend a prior response to

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<sup>1</sup>The Goldstein Affidavit and attachments numbered 1 and 2 make up Exhibit D to the Post-Hearing Brief.

<sup>2</sup> Comcast Post-Hearing Brief, Ex. D, ¶ 8.

<sup>3</sup> Paragraph 8 of the Commission's April 8, 2004, Stipulated Procedural Order states that "discovery in this matter shall be governed by the Utah Rules of Civil Procedure."

<sup>4</sup> Utah Admin. Code § R746-100-8.B explicitly adopts discovery Rules 26-37 from the Utah Rules of Civil Procedure.

discovery as required by Rule 26(e)(2), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court may order any other sanction, including payment of reasonable costs and attorney fees, any order permitted under subpart (b)(2)(A), (B) or (C) and informing the jury of the failure to disclose.<sup>5</sup>

Comcast has not demonstrated good cause for its failure to develop and produce the results of Mr. Goldstein's survey prior to the hearing,<sup>6</sup> nor is such failure harmless. Rather, Comcast's actions are blatantly self-serving, and they have deprived PacifiCorp of the opportunity to cross-examine Mr. Goldstein on his additional testimony or to respond to Comcast's new "evidence." Accordingly, Rule 37(f) precludes the inclusion of Mr. Goldstein's Affidavit, the attached survey and any discussion of such new matters in Comcast's Post-Hearing Brief. In light of Comcast's egregious actions, the additional sanction of requiring payment of PacifiCorp's attorneys' fees is appropriate.

Comcast's gambit is even more insidious than a "mere" violation of Rule 37(f). If Comcast (the claimant) wanted to refute the evidence being developed by PacifiCorp (the respondent), it was bound to develop its own evidence *before the commencement of the hearing*, not after all the evidence was in so that it could engineer an "experiment" that would escape the light of open scrutiny.

The record shows that PacifiCorp sent the first invoices for unauthorized attachment charges to Comcast in early 2003. These invoices invited Comcast to come forward with documentation refuting the charges for unauthorized attachments made to PacifiCorp's facilities.<sup>7</sup> In response to the absence of any communication from Comcast

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<sup>5</sup> Utah R. Civ. Proc. 37(f) (2004).

<sup>6</sup> Comcast hasn't even bothered to seek leave from the Commission to undertake this extraordinary course of action.

<sup>7</sup> Ex. PC 1.6.

and increasing past-due amounts, PacifiCorp sent another written notice to Comcast on June 30, 2003.<sup>8</sup> The June 30, 2003 letter documented that, as of that date, PacifiCorp had received no payment or notice of dispute regarding the invoices. Comcast again failed to offer any documentation refuting the invoiced charges. The invitation to do so was also extended to Comcast during conversations between JoAnne Nadalin and Corey Fitz Gerald in July 2003. On September 9, 2003, Comcast entered into a Letter Agreement which required it to come forward with any documentation demonstrating authorization within 60 days of the date of the agreement.<sup>9</sup> Rather than comply with its obligations pursuant to the Letter Agreement, Comcast brought the instant action—and then waited until the close of the record to attempt to develop evidence.

During discovery in this proceeding, PacifiCorp propounded document and data requests to Comcast seeking any evidence of authorization for the poles invoiced by PacifiCorp as supporting Comcast unauthorized attachments. Comcast filed three rounds of written testimony and offered its witnesses for examination at a hearing of this matter. Rather than conduct a survey in response to any of these events occurring during the course of the last two years, Comcast waited until it filed its Post-Hearing Brief to submit Mr. Goldstein's survey of an additional 515 poles.

At the hearing of this matter, counsel for PacifiCorp specifically asked Mr. Goldstein whether his efforts to demonstrate authorization were limited to the survey of 39 poles attached to his Rebuttal Testimony.<sup>10</sup> In response, Mr. Goldstein never mentioned

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<sup>8</sup> Ex. PC 1.7; August 24, 2004 Transcript of Hearing at 307, lines 8-19.

<sup>9</sup> Ex. PC 1.8.

<sup>10</sup> Despite Comcast's claim in its Post-Hearing Brief (at 33) that the survey of 39 poles was conducted during discovery in this proceeding, PacifiCorp was not provided a copy of the results of his survey until July 14, 2004, as an exhibit to Mr. Goldstein's Rebuttal Testimony—long after discovery had closed. In fact, Mr. Goldstein testified during a deposition and at the hearing of this matter that as of June 10, 2004, he had not participated in any Comcast effort to  
(continued...)

that he was conducting or planned to conduct a more extensive analysis:

Q. But other than those 35 poles, you haven't gone through the effort to prove that ?

A. No, I have not.<sup>11</sup>

Comcast's only excuse for its unconscionable behavior is Mr. Goldstein's claim that he waited until after the hearing to provide this new evidence because of PacifiCorp's complaints that his original survey of 39 poles was too small. However, his claim has no basis in fact and must be discounted out of hand. PacifiCorp objected to the Mr. Goldstein's original 39 pole survey in written Sur-Rebuttal Testimony filed on July 22, 2004, and in its Pre-Hearing Brief. Accordingly, Mr. Goldstein and Comcast were on notice of PacifiCorp's objections well in advance of the August 23, 2004 hearing. If Comcast believed it could, at that stage, prove that PacifiCorp's assertions were inaccurate or unfounded, it was obligated to produce its evidence in accordance with the procedural schedule. At absolute minimum, if it had good cause, it could have sought leave from the Commission for time to develop evidence that would be offered in the normal course of an adversary proceeding. Instead, it waited until the hearing had ended.

There is no credible excuse available to Comcast as to why it could not have conducted this survey in the normal course of developing its case, thus providing PacifiCorp the opportunity for cross-examination and response in the normal course of the proceeding. Quietly appending Mr. Goldstein's post-hearing survey to its Brief after all testimony has been filed and subject to cross-examination is an unacceptable maneuver that deprives PacifiCorp of its due-process rights to confront and respond to evi-

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(...continued)

refute the results of the 2002/2003 Audit. August 23, 2004, Transcript of Hearing at 76, lines 13-17.

<sup>11</sup> August 23, 2004 Transcript of Hearing at 141, lines 19-21.

dence. In Comcast's own words: "Cross-examination is said to be a greater method of determining the truth than any of the other tools and techniques available to lawyers and the law."<sup>12</sup>

Although the Commission is "not bound by the technical rules of evidence,"<sup>13</sup> Utah Rule of Evidence 403 provides additional guidance regarding traditional notions of fairness for which Comcast has demonstrated complete disregard. Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the *danger of unfair prejudice*, confusion of the issues, or misleading the jury, or *by considerations of undue delay*, waste of time, or needless presentation of cumulative evidence.

(Emphasis added.)

Indeed, the late-generated evidence offered as Exhibit D to Comcast's Post-Hearing Brief meets the criteria enumerated in Rule 403 for being excluded. Specifically, the Advisory Committee Note accompanying the Rule states that the notion of "'surprise' would be within the concept of 'unfair prejudice' as contained in Rule 403." Because Comcast has denied both PacifiCorp and the Presiding Administrative Law Judge the opportunity to cross-examine Mr. Goldstein on the data collected or the methodology employed in conducting the latest survey, the risk of prejudice to PacifiCorp far outweighs any relevance that could be attributed to Mr. Goldstein's delinquent survey.

Allowing consideration of Comcast's untimely evidence would not only severely prejudice PacifiCorp, it would risk creating an undue delay in the resolution of this matter to the detriment of PacifiCorp and its electric customers. Short of reopening the record, allowing PacifiCorp to fully study and investigate what Mr. Goldstein did,

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<sup>12</sup> Comcast Post-Hearing Brief at 4 (citing FRANCES L. WELLMAN, *THE ART OF CROSS-EXAMINATION* 27 (Touchstone Simon and Schuster, 4th ed. 1987) ).

<sup>13</sup> Utah Admin. Code § R746-100-10.F. This provision also states that testimony shall be "subject to cross-examination."

permitting PacifiCorp to depose Mr. Goldstein, and providing PacifiCorp with the opportunity to respond to Comcast's out-of-time evidence with additional testimony of its own, PacifiCorp will be unfairly prejudiced and its due process rights will be compromised. Indeed, the Advisory Committee Note to Utah Rule 403 cites the note accompanying the analogous Federal Rule 403 indicating that, in most instances, a continuance is the appropriate mechanism for dealing with "surprise." The relief demanded by Comcast's disregard for the rules of procedure governing this proceeding would substantially delay any resolution of this matter.

This is all the more troubling in light of what occurred at the Rule 30(b)(6) depositions of Comcast's corporate representatives on June 9 and 10, 2004. In response to the clear language and requirements of the 30(b)(6) notices that Comcast produce specific personnel having particular knowledge of particular subjects, and without any request by Comcast to withdraw, narrow or modify the subject areas of the examination, Comcast produced three witnesses who knew very little about the subject matters spelled out in the 30(b)(6) notice. It was only after Mr. Goldstein's deposition that Comcast suddenly produced any evidence attempting to refute PacifiCorp's records.

Accordingly, the only fair resolution in keeping with the Commission's Rules R746-100-8 and R746-100-10 and the spirit of Rule 37(f) of the Utah Rules of Civil Procedure is to strike Exhibit D from Comcast's Post-Hearing Brief and the accompanying text in its Brief, thus eliminating the information contained in the exhibit from further consideration.

#### CONCLUSION

For the foregoing reasons, PacifiCorp requests that the Commission grant its request that the "evidence" developed and submitted by Comcast after the close of the hearings be stricken from the record in this proceeding and not given any consideration,

weight or credence. In particular, PacifiCorp moves to strike from Comcast's Post-Hearing Brief Exhibit D and all of pages 35 and 36.

Because of the extreme nature of Comcast's attempts to circumvent the constraints of presenting its evidence to be scrutinized in open hearings, and pursuant to Commission Rule R746-100-8.B, which adopts Utah Rule of Civil Procedure 37(f), PacifiCorp seeks a Commission order requiring Comcast to pay PacifiCorp's attorneys' fees incurred in filing this Motion.

RESPECTFULLY SUBMITTED this 14th day of October 2004.

PACIFICORP

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## CERTIFICATE OF SERVICE

I certify that on the 14th day of October 2004, a true and correct copy of PACIFICORP'S MOTION TO STRIKE AFFIDAVIT OF GARY GOLDSTEIN was sent via e-mail and by U.S. mail to:

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