



Comcast Cable Communications, LLC (“Comcast”), by and through its attorneys, Ballard Spahr Andrews & Ingersoll, LLP, hereby submits this Opposition to PacifiCorp’s Motion to Strike Affidavit of Gary Goldstein (“Motion”). PacifiCorp’s Motion, brought under Utah Admin. Code §§ R746-100-8 and -10 and Rule 37 of the Utah Rules of Civil Procedure, does not meet the technical or substantive requirements of those rules and should, therefore, be denied.

## **I. INTRODUCTION**

PacifiCorp’s Motion seeks to exclude evidence which corroborates the evidence that both Comcast and PacifiCorp presented at the August 23-26 Hearing (“Hearing”): that PacifiCorp’s record keeping and audit practice methodologies are flawed, unreliable and inconsistent with the parties’ historical field practices. The evidence PacifiCorp seeks to exclude, the Affidavit of Gary Goldstein and corresponding sections of Comcast’s Post-Hearing Brief, merely restates evidence presented prior to and during the Hearing and extends Mr. Goldstein’s review of the permitting status of 40 randomly selected poles to 515 randomly selected poles.<sup>1</sup> The Affidavit does not present any evidence or issues not already fully explored in the pre-hearing briefs and on cross-examination at the Hearing. As a result, PacifiCorp’s claims that Mr. Goldstein’s Affidavit presents new or surprising evidence are without merit.

On that basis, PacifiCorp is not entitled to the relief it seeks, including an award of attorney’s fees. Accordingly, PacifiCorp’s Motion should be denied.

## **II. PACIFICORP IS NOT ENTITLED TO DISCOVERY SANCTIONS**

Rule 37 of the Utah Rules of Civil Procedure is not applicable to PacifiCorp’s request for relief and cannot form the grounds on which to strike Mr. Goldstein’s affidavit.

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<sup>1</sup> See Goldstein Rebuttal Testimony pp. 4-7; Transcript of August 23-26 Hearing (hereinafter “H. Tr.”) pp. 71, 73, 91-93, 138, 141.

**A. Rule 37 Only Operates to Exclude Evidence Introduced at Hearing.**

PacifiCorp's claim that Rule 37 may operate to bar the inclusion of evidence in the post-hearing brief is legally-flawed. The plain text of Rule 37 *only* applies to exclude evidence that parties seek to introduce at hearing:

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 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.*<sup>2</sup>

Conspicuously absent from Rule 37 is any authority to exclude evidence from briefings or other documents filed with the Commission. PacifiCorp has offered no legal support whatsoever to support its claim that Rule 37 provides the post-hearing relief it seeks. As a result, Rule 37, on its face, does not provide PacifiCorp the legal basis for the relief it seeks.

**B. Even If Pacificorp Could Avail Itself Of Relief Under Rule 37, It Has Not Shown That Comcast Failed To Disclose A Witness, Documents Or Other Material As Required By Rule 37.**

Even if PacifiCorp could request relief under Rule 37, it has failed to satisfy the elements set forth in Rule 37. To be eligible for relief under Rule 37, PacifiCorp must show failure: a) to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(e)(1); or b) to amend a prior response to discovery as required by Rule 26(e)(2). In other words, PacifiCorp must prove a Rule 26(a) or Rule 26(e)(1) or (2) violation in order to make a Rule 37 claim. However, nowhere in its Motion has PacifiCorp alleged that Comcast violated its Rule 26(a), (e)(1), or (e)(2) obligations. Absent such evidence, PacifiCorp's Rule 37 argument is facially deficient.

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<sup>2</sup> Utah R. Civ. P. 37(f).

Rule 26(a) requires, among other things, that each party identify “each individual likely to have discoverable information,”<sup>3</sup> “all discoverable documents,”<sup>4</sup> and each individual likely to be called at trial.<sup>5</sup> Rule 26(e)(1) and (2) extends Rule 26(a) by requiring each party to supplement or amend incorrect or incomplete disclosures or discovery responses. Comcast complied with these rules by providing PacifiCorp with a witness lists identifying Mr. Goldstein as a witness with relevant evidence, and by producing documents and other material related to the substance of Mr. Goldstein’s Affidavit prior to the Hearing.

In accordance with Rule 26, Comcast identified Gary Goldstein as an individual likely to have discoverable information<sup>6</sup> and made him available for deposition on June 10, 2004. Not only did PacifiCorp depose Mr. Goldstein, but it also cross-examined him at the Hearing. There is thus no question that Comcast complied with its Rule 26(a)(1) and (4) obligations to identify Mr. Goldstein as a witness.

Similarly, Comcast properly disclosed and made available to PacifiCorp the documents Mr. Goldstein used to conduct the survey of the 515 poles described in his Affidavit. Specifically, Comcast identified several thousand pages of permitting documents, referred to as “permitting maps” and “Exhibit A’s” in the pre-filed testimony<sup>7</sup> and at the Hearing,<sup>8</sup> and produced all of these documents in response to PacifiCorp’s Interrogatories and Document Requests.<sup>9</sup> PacifiCorp has not alleged that Comcast failed to make this documentation available.

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<sup>3</sup> Utah R. Civ. P. 26(a)(1).

<sup>4</sup> Utah R. Civ. P. 26(a)(2).

<sup>5</sup> Utah R. Civ. P. 26(a)(4)(A).

<sup>6</sup> *See* Comcast Response to PacifiCorp’s First Set of Interrogatories, p. 3.

<sup>7</sup> *See* Goldstein Initial Testimony, pp. 3-6; Goldstein Sur-rebuttal Testimony, p. 2.

<sup>8</sup> *See* H. Tr. pp. 80-83.

<sup>9</sup> *See* Comcast Responses to PacifiCorp’s First Set of Requests for the Production of Documents.

More importantly, PacifiCorp does not allege that Comcast had the survey results in its possession prior to the Hearing. Rather, the crux of PacifiCorp's complaint is that Mr. Goldstein failed to conduct the 515 pole survey prior to the Hearing or the close of discovery. In other words, PacifiCorp is not alleging that Comcast *withheld* the survey results—PacifiCorp is alleging that Comcast failed to *create* the survey results. In essence, PacifiCorp is asking this Commission to sanction Comcast for failing to develop evidence prior to the Hearing.<sup>10</sup>

As early as April 12, 2004, Comcast made available to PacifiCorp the thousands of pages of permitting maps and Exhibit A's that Mr. Goldstein relied on in conducting both the 40 pole survey and the 515 pole survey. Since then, PacifiCorp has had ample opportunity to make its own analysis of the documents and compare them to their own records.<sup>11</sup> PacifiCorp was just as able to “develop” evidence as Comcast. PacifiCorp, however, failed to do so.

Neither Rule 26 nor Rule 37 creates an affirmative obligation for Comcast to analyze the documentation produced in response to PacifiCorp's discovery requests. It is well settled that parties are not required to create evidence in responding to another party's discovery requests.<sup>12</sup> Yet by charging Comcast with failing to “develop” the results of the survey, PacifiCorp seeks discovery sanctions against Comcast for exactly that. Because Rule 37 does not recognize “failure to develop” or create evidence as conduct that can or should be sanctioned, PacifiCorp's claims are contrary to legal precedent and must fail.

**C. PacifiCorp Suffers No Harm, Prejudice Or Surprise From The Results Of The 515 Pole Survey.**

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<sup>10</sup> See Motion p. 3.

<sup>11</sup> In April 2004, PacifiCorp's John Stewart suggested that the parties get together to conduct a joint survey and compare the permitting records at issues. Comcast attempted to follow up on PacifiCorp's offer with little success. See Letter from G. Sapir to C. Zdebski and J. Chapman, dated April 13, 2004, a true and correct copy of which is attached as Exhibit 1.

<sup>12</sup> See Utah R. Civ. P. 33(d).

Even if PacifiCorp were able to satisfy the elements of Rule 37, it would still not be entitled to sanctions. Rule 37(f) provides that previously undisclosed witnesses, documents or other materials may be used at hearing so long as the failure to disclose is harmless and good cause exists for the failure to disclose.

Comcast could not disclose the results of the 515 pole survey during discovery or prior to the Hearing because it had not yet conducted the survey. This fact is undisputed. PacifiCorp makes no allegations that Comcast created the survey results prior to the Hearing and improperly withheld them.<sup>13</sup> The good cause for Comcast's failure to disclose the results is plain and simple: they did not exist.

More importantly, PacifiCorp is not harmed by Comcast's inclusion of Mr. Goldstein's survey results in the post-hearing brief. The methodology Mr. Goldstein used to conduct the 515 pole survey was identical to the 40 pole survey Mr. Goldstein undertook prior to the Hearing. PacifiCorp had ample opportunity to cross-examine Mr. Goldstein thoroughly on his methodology and to present testimony in opposition both through pre-filed testimony and at the Hearing. It is unclear how PacifiCorp could be harmed from not being able to re-examine Mr. Goldstein on the exact same issues, especially considering the fact that, although PacifiCorp had ample opportunity during both the written testimony phase of this proceeding and at the Hearing to question or contradict Mr. Goldstein's testimony, PacifiCorp never attempted to challenge the methodology or accuracy of Mr. Goldstein's original 40 pole survey. In fact, PacifiCorp never presented evidence to support an argument that Mr. Goldstein's information was incorrect. Instead, PacifiCorp merely asserted that the original survey was not large enough.

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<sup>13</sup> See Motion p. 3.

It can hardly argue now that Comcast has attempted to satisfy this complaint by providing a larger survey.

PacifiCorp's contention that Rule 403 of the Utah Rules of Evidence (in addition to Rule 37) should operate to exclude Mr. Goldstein's Affidavit also must fail. PacifiCorp's claims that it would be severely prejudiced unless the record could be opened so that PacifiCorp could "fully study and investigate what Mr. Goldstein did, permitting PacifiCorp to depose Mr. Goldstein [again] and providing PacifiCorp with the opportunity to respond" are disingenuous.<sup>14</sup> As indicated, it was merely an enlargement of *the same survey* that PacifiCorp has had ample opportunity to scrutinize. PacifiCorp has failed to show, because it cannot, that failure to re-examine Mr. Goldstein on identical issues results in fundamental unfairness or prejudice. This is reflected in Utah law.

For example, in *Christenson v. Jewkes*, the Utah Supreme Court denied the petitioner's Rule 37 request to exclude witness testimony even though the witness in question was identified only five days before trial. The court reasoned that the party was not prejudicially unprepared to cross-examine the witness because the substance of the testimony concerned issues on which the party was otherwise obliged to prepare and put on testimony in order to make his case. The court further noted that no actual harm occurred because the party was able to conduct a thorough cross-examination of the witness and to put on opposing testimony.<sup>15</sup>

The same principles apply to PacifiCorp's Rule 37 motion. Mr. Goldstein's Affidavit presents no new issues not already explored at the Hearing. PacifiCorp had a full and fair opportunity to cross-examine Mr. Goldstein on his survey and to present opposing testimony. Having been able to prepare for and fully examine Mr. Goldstein on his survey

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<sup>14</sup> Motion pp. 6-7.

<sup>15</sup> See *Christenson v. Jewkes*, 761 P.2d 1375, 1378 (Utah 1988).

methodologies, PacifiCorp cannot show any harm or prejudice as a result of Mr. Goldstein's Affidavit.

**D. Mr. Goldstein's Affidavit Does Not Constitute New or Surprise Evidence.**

PacifiCorp improperly characterized Mr. Goldstein's affidavit as "new" or "surprise" evidence. Utah courts have held that unfair surprise does not exist where the substance of a party's testimony is disclosed prior to hearing.<sup>16</sup> As is clear from Mr. Goldstein's pre-filed testimony and his testimony at the Hearing, Comcast disclosed and entered into the record the results of Mr. Goldstein's 40 pole survey and his explanation of his methodology in reaching those results. Neither the Commission nor PacifiCorp should be surprised that Mr. Goldstein's Affidavit states that PacifiCorp erroneously identified a significant majority of the poles properly permitted and documented in the 1970s and 1980s as unauthorized attachments. This was the substance of Mr. Goldstein's prior testimony both in writing and at the Hearing.<sup>17</sup> The Affidavit merely reiterates his prior testimony: that PacifiCorp improperly identified approximately 80% of the poles originally permitted by the permitting maps and Exhibit A's as "unauthorized."

Moreover, PacifiCorp had ample opportunity to reach these conclusions on its own. As discussed above, Comcast provided PacifiCorp with the permitting maps and Exhibit A's that Mr. Goldstein used to conduct his survey more than six months ago. If PacifiCorp declined to analyze these materials on its own, it may not now claim surprise simply because Comcast did choose to engage in a survey.

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<sup>16</sup> See *Erickson v. Wasatch Manor, Inc.*, 802 P.2d 1323, 1327 (Utah 1990) (no surprise where substance of the testimony was disclosed prior to trial); see also *State v. Treseder*, 66 Utah 543, 548 (Utah 1926) (discussion of what the law deems "surprise" generally).

<sup>17</sup> See Goldstein Rebuttal Testimony, p. 5; H. Tr. pp. 91-94.



Additionally, it is somewhat disingenuous of PacifiCorp to claim prejudicial surprise in this instance when it has also filed a supplemental affidavit since the close of the Hearing. On September 17, 2004, PacifiCorp filed a Motion to Submit Late-Filed Exhibits seeking to file the Affidavit of Corey Fitz Gerald as well as three documents attached to that affidavit, which were not introduced at the Hearing. Although PacifiCorp attempted to introduce additional information and documents subsequent the Hearing, without objection from Comcast, it now objects to Comcast's efforts to do the same. This double standard should not be condoned by the Commission.

Finally, PacifiCorp's irresponsible statements alleging improper conduct during the depositions are completely inappropriate and should be stricken. Those depositions took place nearly four months earlier and a variety of remedies were available to PacifiCorp to correct any wrongs it felt it suffered at that time. Worse, PacifiCorp falsely represents that Comcast never requested that PacifiCorp withdraw, narrow or modify the subject areas of deposition examination. To the contrary, Comcast did indeed make such a request.<sup>18</sup> However, rather than withdraw, narrow or modify the subject areas, PacifiCorp waited until the last days of the discovery period to take any depositions. By then there was no time remaining for follow up depositions with other Comcast employees. PacifiCorp only has itself to blame for failing to develop a full factual record.

### **III. CONCLUSION**

For the reasons set forth above, Comcast respectfully requests this Commission to deny PacifiCorp's Motion to Strike Affidavit of Gary Goldstein.

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<sup>18</sup> See Email from A. Adams to C. Zdebski dated June 3, 2004, a true and correct copy of which is attached as Exhibit 2.

Additionally, because PacifiCorp has failed to identify any legal basis for relief in bringing this Motion, Comcast requests that the Commission deem this Motion frivolous and award Comcast costs and attorneys fees associated with the filing of this Opposition.

**RESPECTFULLY SUBMITTED this 28th day of October, 2004.**

**COMCAST CABLE COMMUNICATIONS, LLC**

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 28th day of October, 2004, an original, five (5) true and correct copies, and an electronic copy of the foregoing **OPPOSITION TO PACIFICORP'S MOTION TO STRIKE AFFIDAVIT OF GARY GOLDSTEIN** were hand-delivered to:

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