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Submitted November 8, 2004

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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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COMCAST CABLE COMMUNICATIONS, INC., a Pennsylvania Corporation,	)	
	)	
Claimant,	)	<b>Docket No. 03-035-28</b>
Vs.	)	
	)	<b>PACIFICORP'S REPLY TO</b>
PACIFICORP, dba UTAH POWER , an	)	<b>COMCAST'S OPPOSITION TO</b>
Oregon Corporation,	)	<b>PACIFICORP'S</b>
	)	<b>MOTION TO STRIKE</b>
Respondent.	)	
	)	

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Respondent PacifiCorp submits this Reply to Comcast's Opposition to PacifiCorp's Motion to Strike ("Opposition") and renews its request that the Commission issue an order refus-

ing to consider material generated by Comcast *after* the close of the evidentiary hearings conducted by the Presiding Administrative Law Judge.

## INTRODUCTION

Comcast's post-hearing creation of new evidence is an unmistakable testament to its failure to meet its burden of proof in this case. Having had over a year to develop its case and over two years to demonstrate proof of authorization for tens of thousands of poles, Comcast now comes to the Commission with newly minted "evidence" that—even if it had any factual or statistical validity<sup>1</sup>—could have/should have been developed during the extensive period that the Commission gave the parties to conduct discovery and pre-trial preparation (including three rounds of pre-hearing written testimony).

Comcast's Opposition makes it all the more plain that the testimony and exhibits admitted into the record by the Presiding Judge establish (a) that Comcast did not meet its burden of affirmatively establishing it had proper authorizations, and (b) that PacifiCorp's approach to tabulating the degree of Comcast's non-compliance with the authorization procedures is largely uncontested. In particular, the Opposition dwells on the procedural aspects of how or whether Rule 37 of the Utah Rules of Civil Procedure applies. At the same time, it tries to divert the Commission's attention from its out-of-bounds behavior by claiming that its selective, self-serving development of new evidence should have—in some unstated way—been anticipated by PacifiCorp and the Commission, and that, therefore, it is acceptable to subvert the normal administrative dispute-resolution process. The bottom line, however, is that Comcast manu-

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<sup>1</sup> Because Comcast's attempt to circumvent the orderly procedure long-established for this case provides the foundation for immediate rejection of its submission, PacifiCorp does not address the substance of that submission in detail. This should not obscure PacifiCorp's position that the material submitted by Comcast has no statistical validity, has no proper foundation, and does nothing to undermine the substantive showings made by PacifiCorp in the course of the proceedings.

factured new evidence because, as it recognizes, the hearing cast grave doubt on the sufficiency of the evidence, records and data Comcast presented.

**I. Rule 37 Is Applicable to Comcast's Post-Hearing Behavior.**

Comcast first attempts to avoid responsibility for its dilatory conduct by asserting that Rule 37 of the Utah Rules of Civil Procedure does not apply to the current situation. Through this argument Comcast would have the Commission conclude that manufacturing new evidence after extensive discovery, three rounds of written testimony and a week-long hearing, is somehow less egregious than offering such evidence for the first time at the hearing, where at least there would have been some limited opportunity for cross-examination by PacifiCorp and questioning by the Presiding Administrative Law Judge. Comcast's notion that it is acceptable to engage in a post-hoc attempt to bolster the insufficiencies of its case outside the rigors of the adversarial process demonstrates a fundamental disregard for the intent of Rule 37. Developing and presenting evidence for the first time in a post-hearing brief is even more prejudicial to PacifiCorp than if this evidence existed pre-hearing and was presented for the first time at the hearing. Accordingly, Comcast's actions fall squarely within the category of obstructionist behavior that Rule 37(f) is designed to prevent.

This point is underscored by a decision issued by the United States Court of Federal Claims in which the court rejected out of hand one party's attempt to submit additional evidence in post-trial briefs and accompanying affidavits. *Advanced Materials, Inc. v. United States*, 54 Fed. Cl. 207 (2002). In that case, the party's submission consisted of an expert's analysis of evidence. The court recognized that "it [is] highly irregular to submit new expert analysis of evidence in post-trial briefs filed after the trial was completed." *Id.* at 211. In rejecting the party's late submission, the court noted that evidence is properly introduced at a hearing or trial

as part of the “adversarial process” and that the other party in that case was prejudiced because it had no opportunity to cross-examine the witness on the contents of the untimely affidavits. *Id.*

Even recognizing that an administrative hearing may not be conducted pursuant to the same strict evidentiary requirements as hearings outside the context of administrative litigation, fundamental notions of fairness are nevertheless applicable. This principle has been applied in the analogous context of arbitration proceedings. *Dover Elevator Systems v. United Steel Workers of America*, 1998 U.S. Dist. Lexis 12063 (N.D. Miss. 1998). In *Dover Elevator Systems*, the court vacated an arbitrator’s decision that relied in part on untimely evidence submitted for the first time in a post-hearing brief, finding that, despite the less stringent standards applicable in arbitration hearings, the “presentation of new evidence *ex parte* with the post-hearing brief violates all semblance of fair play.” *Id.* at 5.

## **II. No Good Cause Exists for Comcast’s Failure to Develop and Offer Its Evidence in a Timely Manner.**

Comcast makes no effort in either its post-hearing brief or in its Opposition to demonstrate why its untimely evidence could not have been presented earlier. Comcast’s only excuse for its failure to provide the results of Mr. Goldstein’s survey consists of the single statement, “they did not exist.”<sup>2</sup> However, Comcast does not provide any explanation to show why Mr. Goldstein could not have conducted his analysis prior to the hearing. To the contrary, Comcast witnesses testified that Comcast was in possession of the documents used in the survey since the 1970s and 1980s.<sup>3</sup> Where a party is unable to state why untimely evidence could not be produced earlier, it is fair to exclude such evidence.<sup>4</sup> The situation is even more egregious here:

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<sup>2</sup> Opposition at 6.

<sup>3</sup> Transcript of Hearing at 82, line 25 and 83, lines 1-5.

<sup>4</sup> *McNair v. Haley*, 97 F. Supp. 2d 1270, 1280 (M.D. Ala. 2000) (affirming a magistrate judge’s decision to exclude untimely evidence “[r]easoning that the petitioner was to blame for not diligently attempting to develop the evidence

Comcast is not producing pre-hearing evidence at a late date; it is producing material created post-hearing.

Waiting until after discovery and hearing to manufacture additional evidence without notice to the Commission or PacifiCorp circumvents the purpose underlying an adversarial process and disregards fundamental concepts of fairness and due process. Indeed, Comcast acknowledged in its post-hearing brief that the reasoning behind conducting a subsequent survey was that PacifiCorp effectively demonstrated the questionable evidentiary value of Mr. Goldstein's first survey. Comcast's assertion that its own failure to meet its burden of proof through three rounds of testimony and a hearing equates to a "good cause" justification for its failure to disclose is an untenable "bootstrap" exercise.<sup>5</sup> Thus, Comcast's claim that "PacifiCorp is asking this Commission to sanction Comcast for failing to develop evidence prior to the Hearing"<sup>6</sup> is a perverse mischaracterization of the situation. The only "sanction" PacifiCorp seeks is to require Comcast to play by long-established rules of procedure and equity.

### **III. Comcast's Actions Prejudice PacifiCorp and Deprive It of Due-Process Rights.**

In the analogous context of the submission of evidence through post-trial motions, courts have recognized the manifest unfairness of allowing parties to submit new evidence after a hearing when such evidence was not provided during discovery or at trial. *Tristrata Technology, Inc. v. ICN Pharmaceuticals, Inc.*, 314 F. Supp. 2d 356 (D. Del. 2004), is particularly instructive. In *Tristrata*, the court considered whether new evidence in the form of a late-filed declaration purporting to show the invalidity of certain patents should be rejected. After careful

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at the trial court level until it was too late."); *Koshatka v. Philadelphia Newspapers, Inc.*, 1984 U.S. Dist. Lexis 24372 (E.D. Pa. 1984).

<sup>5</sup> See *Mikarovski v. Wesson*, 491 N.E. 2d 864, 866 (Ill. App. 1986) (excluding evidence, which could have been offered at an earlier time, but was offered for the first time in a post-trial motion and recognizing that plaintiff's attorney's "own lack of diligence" did not amount to just cause to admit evidence).

consideration, the court found that “principles of equity and the unreliability of the representations in the [ ] Declarations necessitate its exclusion.” *Id.* at 359.<sup>7</sup>

In reaching its conclusion that permitting the late submission would be unfair, the court found that ICN, the party seeking admission of the new evidence, failed to put the opposition on notice during discovery of its belief that the patents were invalid. *Id.* at 358. Specifically, the court cited to ICN’s responses to interrogatories that failed to discuss any independent investigation taken to demonstrate such invalidity. The court also noted that transcripts of a Rule 30(b)(6) deposition of ICN’s witnesses demonstrated that the opposition had no indication from ICN that it undertook any investigation of the validity of the patents. *Id.* Similarly, the court found the representations made in the untimely declaration to be “inherently unreliable” because there was “no opportunity to test the reliability of the statements . . . through discovery or cross-examination.” *Id.* at 359.

As in *Tristrata*, concerns regarding fairness require the exclusion of Mr. Goldstein’s affidavit and untimely “survey.” PacifiCorp’s Notice of Rule 30(b)(6) Deposition specifically directed Comcast to produce witnesses for deposition that could address “all efforts of Comcast and MasTec to refute or confirm the findings of PacifiCorp’s 2003 Audit.”<sup>8</sup> Likewise, Pacifi-

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<sup>6</sup> Opposition at 5.

<sup>7</sup> See also *Applied Medical Resources v. United States Surgical*, 967 F. Supp. 861, 864 n.3 (E.D. Va. 1997) (excluding opinion of counsel evidence not admitted at trial or produced during discovery); *Koshatka v. Philadelphia Newspapers*, 1984 U.S. Dist. Lexis 24372, at 1-2 (E.D. Pa.) (“It is well settled that a court need not consider evidence submitted after a hearing on a motion for summary judgment.”).

<sup>8</sup> Comcast did not object to producing witnesses to address this issue. The June 3, 2004, e-mail attached to Comcast’s Opposition provides an example of Comcast’s questionable discovery tactics. While declining to produce witnesses to address lines of inquiry related to the scope and pace of Comcast’s build-out in Utah, Comcast relied on such information at hearing over the objection of counsel for PacifiCorp. Further, PacifiCorp responded to Comcast’s June 3<sup>rd</sup> e-mail in a letter dated June 7, 2004, and notified Comcast that PacifiCorp intended to question Comcast’s designees on the issues set forth in paragraphs 6-9 of its Notice of Deposition because PacifiCorp considered the scope of Comcast’s build-out to be “directly related to the central issues of this litigation.” (PacifiCorp’s June 7, 2004, letter is included as Attachment 1.) Comcast’s Opposition also attempts to shift the burden to PacifiCorp for Comcast’s own failure to abide by its discovery obligations. The timing of the Rule 30(b)(6) depositions had no impact on Comcast’s obligations to produce the appropriate witnesses.

Corp sought evidence of authorization for the poles invoiced as unauthorized in document requests and interrogatories propounded on Comcast.

In its Opposition, Comcast relies on Rule 33(d) of the Utah Rules of Civil Procedure for the notion that it was under no obligation to develop its late-filed evidence in responding to discovery requests. Rule 33(d) states that a party may produce business records in response to an interrogatory request when “the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served.” However, this right is conditioned on several factors, including that the responding party “specify the records from which the answer may be derived.” Rule 33(d) dictates that “[a] specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.” Comcast’s “specification” consisted of the following statement: “PacifiCorp has possession of many of these documents.” Comcast produced thousands of pages of material in response to discovery requests – most of which were unrelated to PacifiCorp’s requests—and its response failed utterly to identify with any specificity the documents to which Comcast referred, as required by Rule 33. Comcast’s disregard for the discovery process cannot be offered now to support its backdoor submission of evidence created after the time for scrutiny by PacifiCorp and the Commission has passed. Rather, Comcast’s behavior illustrates the manifest injustice to PacifiCorp that would result from allowing it to bolster an unpersuasive presentation of evidence at the hearing with supplemental evidence.

#### **IV. There Is No Evidence Supporting the Reliability of the New “Evidence.”**

Comcast’s failure to establish the reliability of Gary Goldstein’s latest survey also justifies the exclusion of his affidavit and purported survey results. The untimely evidence is

sponsored by Mr. Goldstein, a Comcast witness whose credibility was called into question during cross-examination and questioning by the Presiding Judge. Further, Comcast’s assertion that PacifiCorp “never attempted to challenge the methodology or accuracy of Mr. Goldstein’s original 40 pole survey”<sup>9</sup> is contradicted by the record.

Rather, PacifiCorp’s cross-examination of Mr. Goldstein illustrated the unreliability and lack of foundation of Mr. Goldstein’s initial analysis. Specifically, Mr. Goldstein admitted that the underlying documents used in his survey were limited to the Salt Lake Metro district and to a timeframe that ended in 1989.<sup>10</sup> Mr. Goldstein also admitted that the maps he used in conducting his survey would not indicate poles where additional new attachment had been made by Comcast.<sup>11</sup> Further, Comcast never offered into evidence the documents relied upon by Mr. Goldstein in his initial survey or his subsequent survey conducted after the hearing. Instead, Comcast produced *one* map purporting to be a representative example of the maps Mr. Goldstein had in his files<sup>12</sup> and copies of three “Exhibit A” forms dating between 1980 and 1983.<sup>13</sup>

On cross-examination, Mr. Goldstein conceded that the one map entered into evidence in this case had no relation to the 39 poles included in his original survey.<sup>14</sup> Mr. Goldstein also confirmed Comcast’s failure to offer sufficient evidence during cross-examination:

Q: [T]he sum total of the evidence of these blanket authorizations you provided come from 1980-1983?

A: That’s correct. They are the ones that are here.<sup>15</sup>

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<sup>9</sup> Opposition at 6.

<sup>10</sup> Transcript of Hearing at 94, lines 23-25.

<sup>11</sup> Transcript of Hearing at 137, lines 21-25.

<sup>12</sup> Comcast Exhibit 15.

<sup>13</sup> Exhibit 1 to Goldstein Initial Testimony.

<sup>14</sup> Transcript of Hearing at 136, lines 14-23.

<sup>15</sup> Transcript of Hearing at 82, lines 14-18.



#### **IV. PacifiCorp's Post-Hearing Motion to Submit Late-Filed Exhibits Is Easily Distinguishable.**

Finally, Comcast's claim that its actions are justified because PacifiCorp offered evidence into the record after the hearing has no merit.<sup>16</sup> On September 17, 2004, PacifiCorp submitted three additional exhibits merely to clarify the record. Two exhibits, Ex. PC 1.26 and 1.28, consisted of correspondence sent to Comcast and other cable operators.<sup>17</sup> As to Ex. PC 1.26, Ms. Fitz Gerald testified at the hearing that this document existed and that she had it in her files.<sup>18</sup> The other exhibit consisted of a PacifiCorp tariff filing with the Commission, which is publicly available. Indeed, counsel for Comcast stated during his opening statement that Comcast had conducted a review of PacifiCorp's tariff filings.<sup>19</sup> Further, two representatives of Comcast were listed on the certificate of service accompanying PacifiCorp's filing.<sup>20</sup>

Moreover, in the interest of fairness and full disclosure, PacifiCorp submitted its supplemental documentation almost a full month before post-hearing briefs were filed in order to allow Comcast the opportunity to either object to PacifiCorp's request for admission or respond to the submission in its post-hearing brief. Comcast deprived PacifiCorp of any similar opportunity or courtesy. PacifiCorp's submission of additional exhibits stands in stark contrast to the dilemma created by Comcast's untimely submission, where the witness sponsoring the new evidence testified at the hearing that he neither had additional evidence nor had undertaken any additional analysis.<sup>21</sup>

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<sup>16</sup> PacifiCorp's Motion to Submit is still pending before the Presiding Judge, and Comcast has affirmatively expressed no opposition. Opposition at 9. Comcast, on the other hand, has not moved for the admission of its post-hearing-developed survey.

<sup>17</sup> Exhibit 1.28 begins with a facsimile transmittal sheet addressed to Marty Pollock, one of Comcast's witnesses.

<sup>18</sup> Transcript of Hearing at 713, lines 17-20.

<sup>19</sup> Transcript of Hearing at 21.

<sup>20</sup> Ex. PC 1.27.

<sup>21</sup> PacifiCorp Motion to Strike at 4; Transcript of Hearing at 141, lines 19-21.

## CONCLUSION

Comcast had ample opportunity to conduct its latest survey during the pre-hearing period, yet it failed to do so until all opportunities for cross-examination by PacifiCorp were foreclosed. Comcast now seeks the Commission's leave for a second chance to meet its burden of proof after failing to do so at the hearing or through its prior substantive pleadings. Such a request is contrary to the rules governing this proceeding and to fundamental principles of fairness and due process. Left unabated, Comcast's actions would set a dangerous precedent of providing an incentive to litigants to disregard discovery obligations by simply manufacturing evidence after the risk of scrutiny through cross-examination had passed. Indeed, Comcast's admitted ability to produce the survey at issue at any time prior to the hearing begs the question whether Comcast made a deliberate decision to "sandbag" PacifiCorp with new evidence once there was no opportunity to respond effectively.

For the foregoing reasons, PacifiCorp requests that the Commission grant the relief requested in its Motion to Strike.

RESPECTFULLY SUBMITTED this 8th day of November 2004.

PACIFICORP

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June 7, 2004

**Via Email and First Class Mail**

Angela W. Adams  
Ballard Spahr Andrews & Ingersoll, LLP  
201 South Main Street, Suite 600  
Salt Lake City, Utah 84111

**Re: Comcast Cable Communications, Inc. v. PacifiCorp dba Utah Power**

Dear Angela:

I am writing to in response to your e-mail of June 3, 2004, in which you stated for the first time that Comcast will not produce a witness(es) to respond to the areas of inquiry contained in paragraphs 7-9 of PacifiCorp's Notice of 30(b)(6) Deposition ("Notice") of Comcast Cable Communications, Inc. ("Comcast"). Please be informed that PacifiCorp intends to question Comcast's designees about those areas during the depositions scheduled for June 9<sup>th</sup> and 10<sup>th</sup>. If Comcast fails to provide testimony regarding those subject areas, either because its witnesses are unprepared or incompetent on such areas, or because they are directed not to respond, PacifiCorp will seek all appropriate relief from the Utah Public Service Commission.

Paragraphs 7-9 of the Notice relate to safety standards, the scope of Comcast's build out of its facilities, and Comcast's construction standards. These areas are directly related to the central issue of this litigation; whether Comcast followed a policy and practice of complying with all requirements for making authorized attachments to PacifiCorp's facilities. In addition, the pace and scope of Comcast's build out and its construction and safety practices are relevant to Comcast's business decisions to comply or not with PacifiCorp's permitting requirements, particularly in light of Comcast's recent claim that PacifiCorp changed its permitting requirements just prior to the 2003 Audit, a claim that seems to coincide neatly with what we believe to be Comcast's business decision to aggressively build out its facilities in Utah.

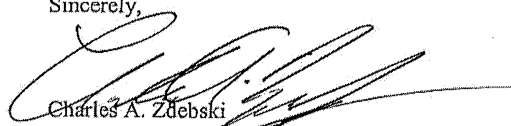
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Angela W. Adams  
June 7, 2004  
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Please feel free to contact me if you wish to discuss this matter further.

Sincerely,



Charles A. Zdebski

cc: Michael D. Woods, Esq.  
J. Davidson Thomas, Esq.  
Jerold G. Oldroyd, Esq.  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 8th day of November, 2004 a true and correct copy of **PACIFICORP'S REPLY TO COMCAST'S OPPOSITION TO PACIFICORP'S MOTION TO STRIKE** was sent via e-mail or mailed, postage prepaid, to:

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