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Submitted February 4, 2005

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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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COMCAST CABLE COMMUNICATIONS, )  
INC., a Pennsylvania Corporation, )  
Claimant, )  
vs. )  
PACIFICORP, dba UTAH POWER , an )  
Oregon Corporation, )  
Respondent. )

**Docket No. 03 035 28**

**OPPOSITION TO PACIFICORP’S  
REQUEST FOR REHEARING AND  
OPPOSITION TO PACIFICORP’S  
COMPLIANCE FILING**

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Comcast Cable Communications, Inc. (“Comcast”), by and through its attorneys, Ballard Spahr Andrews & Ingersoll, LLP, hereby submits this Opposition to PacifiCorp’s Request for Rehearing (“Rehearing Request”) and Opposition to PacifiCorp’s Compliance Filing (“Compliance Filing”).

## **I. INTRODUCTION**

Comcast opposes the Rehearing Request in which PacifiCorp seeks to squeeze more revenue out of its joint use poles to subsidize its electric rate payers at Comcast’s expense. By virtue of the Commission’s Order, PacifiCorp has not only recovered back rent on the attachments at issue, but has also recovered a windfall \$60 per pole penalty charge unrelated to any costs PacifiCorp has incurred. Considering that the Commission generously awarded this approximately \$2.3 million windfall recovery, PacifiCorp’s Rehearing Request has no basis in anything other than its desire to continue to generate as much revenue as possible from its attachers. Because the money PacifiCorp seeks is completely unrelated to the costs of administering joint use, no injustice or inequitable outcome could possibly result from denying PacifiCorp’s request.

More importantly, PacifiCorp’s posture that it is entitled to these grossly disproportionate penalties overlooks the fact that the Commission specifically found that PacifiCorp’s JTU-generated unauthorized attachment reports were unreliable and that they did not *prove* that the attachments were actually unauthorized.<sup>1</sup> Ultimately, the Commission’s decision struck a balance between what the Commission believed were each of the parties’ rights and responsibilities with respect to pole attachments and record keeping, specifically highlighting its

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<sup>1</sup> See Order, p. 26.

belief that neither party came to the Commission with sufficient documentation of the attachments' authorization or lack thereof.

Although Comcast disagrees with many of the findings of fact and conclusions of law that formed the basis of the Commission's decision, Comcast nonetheless recognizes that the Commission sought to strike a balance between the strengths and weakness of the parties' evidence. Comcast respects the Commission's attempt to strike a compromise and accepts the practical result of the Order, if not the underlying legal conclusions. On that basis Comcast is willing to abide by the decision. PacifiCorp should do so as well.

## **II. PACIFICORP SUFFERS NO HARM AS A RESULT OF COMCAST SUBMITTING PROOF OF AUTHORIZATION FOR ATTACHMENT.**

PacifiCorp has failed to identify any real harm it could possibly suffer as a result of the Commission ordering PacifiCorp to accept Comcast's proofs of authorizations. It cannot. The parties agree that PacifiCorp has no legal right to penalties on attachments for which Comcast or its predecessors obtained proper authorization to attach.<sup>2</sup> PacifiCorp cannot, therefore, suffer any prejudice if Comcast shows proof of prior authorization on poles for which PacifiCorp has improperly assessed a penalty. Unable to show any harm from allowing Comcast to present its evidence of prior authorization to attach, PacifiCorp's position boils down to its argument that Comcast has somehow waived its right to present proofs of authorization. PacifiCorp provides no factual or legal support for this position. Again, it cannot.

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<sup>2</sup> See Order, p. 29.

**A. Comcast Provided Thousands of Pages of Proof of Authorization in the Discovery Phase of this Proceeding.**

Contrary to PacifiCorp's assertion,<sup>3</sup> Comcast did, indeed, provide PacifiCorp with proof of authorization prior to hearing. Comcast properly disclosed and made available to PacifiCorp, during the discovery phase of this proceeding, several thousand pages of permitting documents, referred to as "permitting maps" and "Exhibit A's" in the pleadings,<sup>4</sup> pre-filed testimony<sup>5</sup> and at hearing,<sup>6</sup> and produced all of these documents in response to PacifiCorp's Interrogatories and Document Requests.<sup>7</sup> The bulk of Comcast's proof of prior authorizations will consist of these permitting maps and Exhibit A's, which have been in PacifiCorp's possession since approximately April 2004. These documents cannot constitute unfair surprise or prejudicial evidence since PacifiCorp has had ample opportunity and ability to make its own analysis of the documents and compare them to its own records.<sup>8</sup>

If anything, PacifiCorp's refusal to accept these proofs of authorization would be prejudicial to Comcast. It was incumbent on PacifiCorp to incorporate its own copies of these documents<sup>9</sup> into its JTU or otherwise compare the alleged unauthorized attachments against this

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<sup>3</sup> PacifiCorp contends that Comcast never presented any proofs of authorization "during discovery, through written testimony or at the hearing of this case." Rehearing Request p. 2.

<sup>4</sup> See Comcast's Responses to PacifiCorp's First Set of Requests for the Production of Documents, attached hereto as Exhibit 1, p. 5; Comcast's Responses to PacifiCorp's First Set of Interrogatories, attached hereto as Exhibit 2, pp 8-9.

<sup>5</sup> See Goldstein Initial Testimony, pp. 3-6; Goldstein Sur-rebuttal Testimony, p. 2.

<sup>6</sup> See August Hearing Transcript (hereinafter "H. Tr."), pp. 80-83.

<sup>7</sup> See Comcast's Responses to PacifiCorp's First Set of Requests for the Production of Documents and First Set of Interrogatories.

<sup>8</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 issue. Comcast agreed immediately and, thereafter, attempted to follow up on PacifiCorp's offer. 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 3. PacifiCorp failed to respond to Comcast's attempts.

<sup>9</sup> At hearing, Sara Johnson admitted that PacifiCorp was in possession of these records but failed to use them to populate its JTU database or to compare them with its computer generated lists of purportedly unauthorized attachments. See H. Tr., pp. 903-906.

documentation. It did not, according to PacifiCorp's own witnesses Sara Johnson and Corey Fitz Gerald.<sup>10</sup> Furthermore, the permitting maps pre-date PacifiCorp's use of the mapstring and pole number identifiers used to generate unauthorized attachment reports. In order to reconcile the permitting maps and Exhibit A's with the JTU generated reports, Comcast must obtain copies of PacifiCorp's service maps and attempt to overlay the permitting maps. Considering that PacifiCorp has had access to all of the required documents and maps since, at the latest, April 2004, PacifiCorp cannot claim that *Comcast's* delay somehow causes it prejudice. If PacifiCorp had in good faith undertaken even a cursory review of its own archived documents or the documents Comcast produced during discovery, it would have been able to see that a great number of the allegedly unauthorized attachments were, indeed, authorized.

**B. The Commission Has Broad Authority to Fashion a Remedy.**

PacifiCorp's characterization of the proofs of authorization as late-filed or post-trial evidence is inappropriate. The Commission has already ruled that Comcast's submission of proofs of authorization in its post-hearing brief could not be admitted as late-filed or post-trial evidence.<sup>11</sup> The Commission's decision does not mean, however, that Comcast's proofs of authorization are tainted for all other post-hearing purposes. Whereas the Commission may have concluded that they were not admissible as evidence on which the Commission may reach findings of fact and conclusions of law in its Order, the Commission has broad authority to fashion any remedy it sees fit to ensure terms and conditions are just and reasonable.<sup>12</sup> Without relying on these proofs as evidence at hearing, the Commission may nonetheless order the parties to analyze the documentation to reach a just and equitable determination of the true number of

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<sup>10</sup> See H. Tr., pp. 728-730, 802-803, 903-906, and 926-932.

<sup>11</sup> See Order Granting PacifiCorp's Motion to Strike, dated November 12, 2004.

<sup>12</sup> See Utah Code §§ 54-4-1, 54-4-2, 54-4-13. Furthermore, the Commission is not bound to adhere strictly to the Rules of Evidence. Utah Admin. Code R746-100-10.

unauthorized attachments. The Commission correctly concluded that it would be inequitable to allow PacifiCorp to collect a windfall of penalty fees on attachments for which both parties have conclusive proof of authorization.

**C. A Full Evidentiary Hearing On Comcast's Proofs Of Authorization Is Unnecessary.**

Moreover, PacifiCorp's contention that it should be entitled to a full evidentiary hearing is false. Such a hearing would be unnecessarily burdensome. As stated above, the bulk of Comcast's proofs of authorization consist of permitting maps and Exhibit A's that Gary Goldstein or other Comcast personnel will reconcile with PacifiCorp's modern service maps. The analysis will be identical in form to that submitted with Mr. Goldstein's pre-filed testimony and hearing testimony. PacifiCorp had ample opportunity to thoroughly cross-examine Mr. Goldstein on his methodology and to present testimony in opposition both through pre-filed testimony and at the hearing. Although PacifiCorp characterizes Mr. Goldstein's evidence as inadequate,<sup>13</sup> the Commission accepted it and ordered PacifiCorp to refund unauthorized attachment penalties based upon it.<sup>14</sup> The additional proofs of authorization Comcast will provide are merely an enlargement *of the same survey* that Mr. Goldstein conducted on a smaller scale and that PacifiCorp has had ample opportunity to vet.

At no time has PacifiCorp made any allegation that the permitting maps and Exhibit A's do not constitute proper authorizations. To the contrary, PacifiCorp's own witness John Cordova stated at deposition that the permitting maps and Exhibit A's were the standard method of granting attachment authorizations in the 1970's and 1980's.<sup>15</sup> Similarly, PacifiCorp's Sara

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<sup>13</sup> Rehearing Request, p. 4.

<sup>14</sup> Order, p. 26.

<sup>15</sup> Cordova Deposition Transcript, pp. 17-19, a true and correct copy of which is attached as Exhibit 4.

Johnson and Corey Fitz Gerald acknowledged the existence of PacifiCorp's own copies of these documents.<sup>16</sup> By challenging the reliability of the permitting maps and Exhibit A's which Comcast will submit in response to the Commission's Order, PacifiCorp would also be challenging the reliability of the substantially similar proofs presented as evidence in the pre-filed testimony and at hearing, as well as the testimony of its own witness. *PacifiCorp has not alleged that the permitting maps and Exhibit A's were not the proper means of obtaining authorization to attach in the 1970's and 1980's.* Having failed to do so, it is not appropriate to raise this issue on review.<sup>17</sup>

Furthermore, PacifiCorp's contention that Comcast's proofs of authorization are unsubstantiated wholly overlooks the fact that the majority of the evidence PacifiCorp presented through pre-filed testimony and at hearing consisted of computer generated reports for which no paper documents or substantiating proof is available. More importantly, the Commission specifically found that these records are not a reliable means of determining whether unauthorized attachments exist.<sup>18</sup> Holding Comcast's proofs to a higher evidentiary standard than PacifiCorp's unauthorized attachment assessment would be extremely unfair and prejudicial.

**D. Comcast's Pre-Hearing Analysis Concluded that PacifiCorp's Audit Was Flawed and Wholly Unreliable.**

Comcast disagrees with PacifiCorp's contention that it was required to conduct a systematic analysis prior to the hearing or to initiating this action.<sup>19</sup> The analysis Comcast

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<sup>16</sup> See footnote 10, *supra*.

<sup>17</sup> See, e.g., *Smith v. Hales & Warner Const., Inc.*, 2005 UT App 38, fn. 1; *438 Main Street v. Easy Heat, Inc.*, 2004 UT 72.

<sup>18</sup> Order, p. 26.

<sup>19</sup> Rehearing Request, p. 3.

undertook revealed that PacifiCorp's determination of authorization was based on data containing significant gaps and erroneous premises. Based on the totality of the circumstances surrounding PacifiCorp's audit, both parties' records and Comcast's construction practices, it was abundantly clear to Comcast that PacifiCorp's audit was flawed and unreliable. Comcast has identified numerous flaws and inconsistencies in PacifiCorp's unauthorized attachment initiative, casting a large shadow of doubt over the accuracy of the entire project. It would be unreasonable to require Comcast to prove PacifiCorp wrong pole by pole given the overwhelming evidence of the fundamental inaccuracies of the audit.

**E. PacifiCorp's Rehearing Request Retracts Its Prior Representation That It Would Honor Any Proofs of Authorization Comcast Produced.**

Finally, PacifiCorp made numerous representations on the record that it would refund fees paid on poles for which Comcast could produce proofs of authorization.<sup>20</sup> The Commission took note of this fact in its Order and, in fashioning its remedy, presumably relied upon PacifiCorp's apparent willingness to charge Comcast *only* for those attachments for which no proof of authorization exists. Ultimately, PacifiCorp's post-judgment retraction of this position constitutes a new argument that Comcast has not been able to address either in the briefings or at hearing. Having not raised this issue at hearing, in the pre-filed testimony or in the briefs, it is not appropriate to raise it now.<sup>21</sup> PacifiCorp's argument that Comcast's opportunity to submit proofs of authorization somehow expired are therefore improperly raised in this Rehearing Request. Accordingly, PacifiCorp's Request should be denied.

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<sup>20</sup> See Order, p. 29.

<sup>21</sup> See, e.g., *Smith v. Hales & Warner Const., Inc.*, 2005 UT App 38, fn. 1; *438 Main Street v. Easy Heat, Inc.*, 2004 UT 72.



### **III. PACIFICORP'S UNAUTHORIZED ATTACHMENT PENALTIES CONSTITUTE A WINDFALL.**

PacifiCorp has already received a more than generous award by virtue of the Order. It has received: (a) unauthorized attachment fees in addition to back rent and (b) penalties on attachments for which PacifiCorp's own policies did not historically require paper proof of authorization to attach. It is undisputed that neither of these awards has any basis in costs or other losses PacifiCorp has suffered.<sup>22</sup> Having awarded PacifiCorp back rent plus interest, the Commission made sure that PacifiCorp recovered any loss it may have sustained.<sup>23</sup>

PacifiCorp's only argument in support of the non-cost based penalties is that they are a deterrent to future unauthorized attachment.<sup>24</sup> However, the Commission made no findings that Comcast systematically defied PacifiCorp's permitting requirements or was perpetrating a scheme to attach without authorization. To the contrary, the Commission specifically found that Comcast is, and has been since at least 2002, diligently complying with PacifiCorp's requirements by filing attachment applications. It is clear, then, considering that the Commission concluded that there is no wrongful conduct to deter, that there is little value in imposing a retroactive deterrent. Charging Comcast a \$180 per pole penalty instead of a \$60 per pole penalty would grant PacifiCorp an additional \$120 per pole windfall profit with which to subsidize its electric rate payers at Comcast's expense.

Moreover, Comcast firmly believes that the \$60 per pole charges constitutes an illegal penalty, both under state law and prevailing pole attachment precedent. As Comcast explained

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<sup>22</sup> See Response of PacifiCorp to Claimant's First Set of Data Requests, p. 14 ("Charges...include all costs incurred to perform the Audit, as well as the cost of correction for all non-compliant conditions found in the Audit and a penalty associated to the non-compliant attachment...Penalties are assessed as an incentive to change non-compliant practices.").

<sup>23</sup> See Order, p. 43.

<sup>24</sup> See footnote 19, *supra*.

in its pre- and post-hearing briefs, the \$60 per pole unauthorized attachment penalty violates state law that expressly prohibits liquidated damages. State law could not be more clear: liquidated damages that constitute a penalty for breach of a contractual agreement are unlawful.<sup>25</sup> Furthermore, FCC precedent, which applies in 32 states, mandates that any “penalty” be administered in a way to encourage compliance with permitting procedures, but that does not act as an incentive for the pole owner to keep poor records, as PacifiCorp has done in this case.<sup>26</sup> Any “penalty” should be based in *bona fide* loss to PacifiCorp for actual unpaid rent, should be applied prospectively and should only be applied in those circumstances where the Commission believes that it is necessary to deter future unlawful conduct. A penalty that rewards or creates an incentive for a pole owner to keep poor records or otherwise manage its joint use functions inconsistently should never be applied.

In this case, charging Comcast even a \$60 penalty is not warranted. The Commission has already awarded PacifiCorp back rent plus interest on attachments for which PacifiCorp failed to keep adequate records. Consequently, PacifiCorp has been compensated for any *bona fide* loss it may have suffered. Finally, it is clear from the Order that the Commission does not consider Comcast placing unauthorized attachments to be a current or continuing problem. In short, Comcast believes the \$60 per pole penalty constitutes an illegal windfall to PacifiCorp.

It goes without saying, therefore, that Comcast believes that PacifiCorp is not entitled to even \$60 per pole, let alone the extra \$120 per pole it seeks in its Rehearing Request. While Comcast disagrees with the \$60 per pole penalty the Commission awarded PacifiCorp, limiting the penalty to \$60 per pole (as opposed to the \$250 PacifiCorp originally requested) is consistent with the Commission’s findings that PacifiCorp’s policies and practices contributed significantly

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<sup>25</sup> *Woodhaven Apartments v. Washington*, 942 P.2d 918, 920 (Utah 1997).

<sup>26</sup> *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 17 FCC Rcd 6268, ¶ 9 (2002).

to the parties' dispute. In fashioning the remedy that it did, Commission was not punishing Comcast for wrongful conduct or rewarding PacifiCorp for its administration of its joint use poles. The Commission merely concluded that Comcast did not meet its burden of proof. PacifiCorp must not interpret this to mean that the Commission sanctioned PacifiCorp's own faulty record keeping practices.<sup>27</sup> An award of additional windfall amounts would unfairly reward PacifiCorp for its own failure to create and ensure that its employees were adhering to consistent record keeping practices and would fail to take into account PacifiCorp's own complicity in the lack of attachment records.

#### **IV. COMCAST OPPOSES PACIFICORP'S COMPLIANCE FILING.**

Finally, Comcast believes PacifiCorp's Compliance Filing is deficient. The Commission specifically found that "a widespread undercount in the 1997/1998 Audit due to mislabeled leased poles may be a significant cause of the otherwise massive number of unauthorized attachments identified by the 2002/2003 Audit."<sup>28</sup> In other words, a great number of the poles PacifiCorp counted in the 2002/2003 Audit were not captured in the 1997/1998 "baseline" audit, thereby causing those poles to register as having unauthorized attachments. The Commission ordered PacifiCorp to determine which poles captured in the 2002/2003 Audit were mislabeled as leased poles and therefore not captured in the 1997/1998 Audit.

In response to the Commission's Order, PacifiCorp only identified eight (8) poles. Based on the evidence produced at the hearing alone, Comcast believes that this number should reach into the tens of thousands.<sup>29</sup> Upon closer inspection of PacifiCorp's Compliance Filing, it does

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<sup>27</sup> See Order, p. 18 (Commission noting that PacifiCorp should have consulted with Comcast prior to embarking on the 1997/1998 and 2002/2003 Audits); Order, p. 26 (Commission finding that PacifiCorp's baseline audit was an unreliable method for determining unauthorized attachments).

<sup>28</sup> Order, p. 25.

<sup>29</sup> See Order, p. 50.

not appear that PacifiCorp adequately investigated whether any poles captured in the 2002/2003 Audit were mislabeled and, therefore, not included in the 1997/1998 Audit. While PacifiCorp's explanation of how it determined that only eight poles were not captured in the 1997/1998 Audit is rather confusing, it appears that PacifiCorp ran a series of JTU reports to reach this number. Rather than assess how many poles were not captured in the 1997/1998 Audit, it appears PacifiCorp ran a JTU report to determine whether it charged Comcast fees for attachments on mislabeled poles currently owned by utilities other than PacifiCorp. In essence PacifiCorp has done the opposite of what the Commission requested. It has created a list of mislabeled foreign-owned poles for which it charged penalties instead of creating a list of previously mislabeled PacifiCorp-owned poles for which it charged penalties. As a result, this filing is not responsive to the Order and is deficient.

It is clear from the evidence produced at hearing, and from findings set forth in the Order, that the mislabeled poles *would not* have appeared in the JTU. Indeed, that was the heart of the problem—that the poles were labeled as leased and not accounted for in the baseline audit. Although Comcast greatly appreciates PacifiCorp not charging it for poles owned by other utilities, this is not the analysis the Commission ordered PacifiCorp to undertake. Comcast requests that the Commission immediately order PacifiCorp to engage in the proper analysis and issue a refund.

## **V. CONCLUSION**

For the reasons set forth above, Comcast respectfully requests that the Commission deny PacifiCorp's Rehearing Request and order PacifiCorp to conduct an investigation of the mislabeled poles *not* captured in the 1997/1998 Audit.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of February, 2005.

**COMCAST CABLE COMMUNICATIONS, LLC**

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 4<sup>th</sup> day of February, 2005, an original, five (5) true and correct copies, and an electronic copy of the foregoing **OPPOSITION TO PACIFICORP'S REQUEST FOR REHEARING AND OPPOSITION TO PACIFICORP'S COMPLIANCE FILING** were hand-delivered to:

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