MILLER | NASH LLP
ATTORNEYS AT LAW

Miller Nash LLP
www.millernash.com
4400 Two Union Square
601 Union Street
Seattle, WA 98101-2352
(206) 622-8484
(206) 622-7485 fax

3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, OR 97204-3699
(503) 224-5858
(503) 224-0155 fax

500 E. Broadway, Suite 400
Post Office Box 694
Vancouver, WA 98666-0694
(360) 699-4771
(360) 694-6413 fax

Brooks E. Harlow
brooks.harlow@millernash.com
(206) 777-7406 direct line

August 1, 2005

VIA FEDERAL EXPRESS

Oregon Public Utility Commission
Attn: Filing Center
550 Capitol Street N.E., Suite 215
Salem, Oregon 97301

Subject: Docket No. UM 1087

Dear Sir or Madam:

Enclosed, for filing, are an original and one copy of the Response Of Oregon Cable Telecommunications Association In Opposition To PGE's Application For Reconsideration in the above-referenced docket.

Very truly yours,

Brooks E. Harlow

cc w/enc: All Parties of Record

CERTIFICATE OF SERVICE
UM 1087

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by electronic and U.S. first-class mail, properly addressed with postage prepaid, to the following parties:

Paul Davies Central Lincoln PUD P.O. Box 1126 Newport, OR 97365-0090 pdavies@cencoast.com	Rates & Regulatory Affairs Attn: Barbara W. Halle Portland General Electric Company 121 SW Salmon St. 1WTC0702 Portland, OR 97204 barbara.halle@pgn.com
Timothy J. O'Connell Stoel Rives LLP 600 University Street, Suite 3600 Seattle, WA 98101 tjoconnell@stoel.com	V. Denise Saunders Portland General Electric 121 SW Salmon St. 1WTC13 Portland, OR 97204 denise_saunders@pgn.com
Charles M. Simmons Richard S. Diaz MacPherson Gintner Gordon & Diaz P.O. Box 1270 Newport, OR 97365 charles@mggdlaw.com	Stephanie Andrus Assistant Attorney General Department Of Justice 1162 Court St. NE Salem, OR 97301-4096 Stephanie.andrus@doj.state.or.us
Renee Willer Verizon Northwest Inc. P.O. Box 1100 Beaverton, OR 97075 renee.willer@verizon.com	

DATED at Seattle, Washington this 1ST day of August, 2005.

Miller Nash LLP

Carol Munnerlyn, Secretary

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

CENTRAL LINCOLN PEOPLE'S UTILITY DISTRICT, Complainant, v. VERIZON NORTHWEST INC., Defendant.	Case No. UM 1087

RESPONSE OF OREGON CABLE TELECOMMUNICATIONS ASSOCIATION IN OPPOSITION TO PGE'S APPLICATION FOR RECONSIDERATION

August 1, 2005

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

Intervenor Portland General Electric ("PGE") seeks reconsideration and clarification of a Commission Order in the above-captioned matter, pursuant to ORS 756.561 and OAR 860-014-0095. PGE specifically requests that the Commission reconsider its application of the federal pole attachment law to the Pole Attachment Agreement ("Agreement") between Central Lincoln People's Utility District ("CLPUD") and Verizon Northwest, Inc. ("Verizon") established in *Central Lincoln People's Utility District v. Verizon Northwest, Inc.*, UM 1087, Order No. 05-583 (May 16, 2005).[1] PGE also seeks clarification as to the precedential effect of the Commission's Order and resulting Agreement.

PGE's Application for reconsideration fails to meet the requirements of OAR 860-014-0095 and should be denied. PGE is mistaken that the Commission may not apply or refer to federal law when regulating pole attachments. PGE's additional request for "clarification" should also be disregarded as an improper attempt to avoid the Order's precedential value, contrary to state law and other general legal principles.

I. DISCUSSION

A. The Commission Properly Applied Subsection 224(i) Of The Federal Pole Attachment Act.

PGE erroneously argues that because Oregon is certified to regulate pole attachments under 47 U.S.C. § 224(c) of the federal Pole Attachment Act, as amended (the "Act"), the Commission may not apply or reference any part of the Act.[2] PGE is wrong. Nothing in subsection 224(c) prohibits a certified state commission from applying the Act,

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[1] Earlier, the Commission had ruled that CLPUD's form pole attachment agreement was unjust, unfair and unreasonable. *See Central Lincoln People's Utility District v. Verizon Northwest, Inc.*, UM 1087, Order No. 05-042 (Jan. 19, 2005).

[2] The Act was amended in 1996, as part of the Telecommunications Act of 1996, to require utilities to provide non-discriminatory access to poles, *see* 47 U.S.C. § 224(f)(1), in return for allowing utilities to enter into competitive businesses. The amended Act also established additional "mandatory access" principles to ensure that access proceeds on a nondiscriminatory, just and reasonable basis. *See* 47 U.S.C. §§ 224 (g)-(i) (generally requiring a utility to treat attachers as it would treat itself and its affiliates).

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

including subsection 224(i), the specific statutory provision at issue. PGE cites no legal authority to the contrary.[3] Subsection 224(c) merely preempts Federal Communications Commission ("FCC") jurisdiction and regulation in certified states so that a certified state commission may not be forced to follow FCC rules interpreting the Act.[4]

In fact, a plain reading of the statute indicates that certain pole owners must follow the mandatory access provisions of the Act, including 47 U.S.C. §§ 224(i). Specifically, subsections (f) through (i) of 47 USC § 224—the mandatory access provisions—are independent of any FCC regulation and govern "utilities," "pole owners," and "entities," whether the utility is regulated by the FCC or a PUC in a certified state.[5]

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[3] Subsection 224(i) essentially provides that once a party obtains access to a pole, that party may not be forced to incur any expense for the subsequent activities (relocations, change-outs, etc.) on that pole that solely benefit another party, including the pole owner, unless that original party also benefits. *See* 47 U.S.C. § 224(i). PGE's existing contract, which was signed under protest by at least one OCTA member, Charter Communications, requires that attachers pay for subsequent activities that benefit the pole owner, contrary to the express language in subsection 224(i).

[4] Section 224(c) states in relevant part:

> (1) Nothing in this section shall be construed to apply to, or to give the [FCC] jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by a State. (emphasis added).
>
> Although the FCC has no jurisdiction over pole attachments in Oregon, the Commission is in any case free to adopt FCC rules and case precedent to carry out its obligations under ORS 757.273 to provide for "just, fair and reasonable" rates, terms and conditions of pole attachments.

[5] For example, section 224(f)(1) makes no reference to the FCC, but only to utilities:

> (1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

Similarly, Sections 224(g), (h)-(i) include no language either limiting or requiring specific FCC action. Instead these sections refer to "utilities," "pole owners" and "entities":

> (g) A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(FOOTNOTE CONT'D)

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ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

If PGE is correct—which it is not—that the Commission is "exempt" from applying subsection 224(i), then the Commission would also be free to allow utilities in Oregon to deny access to attachers altogether, despite Congress's mandate in subsection 224(f)(1) that all utilities "provide . . . nondiscriminatory access. . . ." That is not to say the Commission may not implement the mandatory access provisions of the Act differently than the FCC. But the Commission may not ignore Congress's statutory directives altogether. Utilities in Oregon must provide access consistent with the Act.[6]

Furthermore, barring a contrary directive from the Oregon state legislature, the Commission has the discretion to adopt rules and follow laws that it believes fulfill its mandate to regulate pole attachments in a fair, just and reasonable manner under ORS 757.273. As Verizon correctly asserted in its Response "[n]o party has ever cited any Oregon law suggesting that a pole owner should be able to foist off on an attacher the cost for rearranging pre-existing proper attachments just because the pole owner intends to make some new use of the pole," a practice that subsection 224(i) specifically prohibits.[7] Indeed, allocating costs based on the

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> (h) Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.
>
> (i) An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).

[6] Commission Staff agrees. *See, e.g., The Battle for the Utility Pole and the End-Use Customer*, Attachment E—Pole Joint Use Principles, (Dec. 15, 2003) (stating that federal laws set the basic principles for nondiscriminatory attachment access in Oregon) (hereinafter "White Paper"), available at: http://www.puc.state.or.us/safety/workgrp/staffrpt.pdf.

[7] *Verizon's Response To PGE's Application For Reconsideration*, UM 1087, p. 2 (filed July 25, 2005) (hereinafter "Verizon Response").

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

associated benefit, as subsection 224(i) requires, is fair, facilitates pole access and reduces cost disputes, as other certified state commissions have recognized.[8]

For these reasons, the Commission correctly applied 47 U.S.C. § 224(i) to the Agreement and PGE's Application should be denied.

B. PGE's Request For "Clarification" Is An Improper Attempt To End-Run Generally Applicable Commission Precedent.

PGE also seeks clarification that the Commission's Orders and resulting Agreement are strictly limited to the relationship between CLPUD and Verizon. PGE is a large and sophisticated pole owner and more than likely understands that its existing contract contains many of the exact same or similar rates, terms and conditions found unjust and unreasonable in the Commission's Orders. Despite those findings, PGE seeks the Commission's blessing to continue enforcing those rates, terms and conditions deemed inappropriate by the Commission on attachers—some who were pressured into signing PGE's unreasonable agreement without negotiation under threat of sanctions[9]—until the Commission rules on each contract (in separate cases) or establishes new regulations pursuant to the rulemaking (a process that could take years).[10] PGE's request is without basis and turns long-standing principles relating to case

---

[8] *See, e.g., Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Order Adopting Policy Statement On Pole Attachments, (NYPSC Aug. 6, 2004) ("In fairness to all Attachers, if an attachment is legal when made, subsequent rearrangements should be paid for by the Attacher that requires the rearrangement [, including the Pole Owner,] and not previous Attachers.").

[9] OCTA recognizes that these facts are not in the record in this docket. However, PGE has introduced new facts in its application. PGE application at 4 ("PGE has been notified that some licensees are interpreting the Order to mean that rates, terms and conditions in a pole attachment contract different from those in the contract between Central Lincoln and Verizon are unenforceable."). If the Commission is to consider an application based on such extra-record facts, it is important for the Commission to have all the facts, not just PGE's truncated version.

[10] In this regard, any argument that PGE's pole attachment agreement is "presumed reasonable," under ORS § 757.285, was negated by the pressure PGE used in many cases to get attachers to sign its agreement. As the Commission is also well-aware, CLPUD threatened all its attachers with sanctions unless they signed the agreement that the Commission ultimately found unjust, unfair and unreasonable in many material respects.

(FOOTNOTE CONT'D)

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

precedent on its head. As Verizon correctly observed in its Response, although the Commission-approved Agreement is not a "mandatory model" "[t]hat is not to suggest . . . that normal principles arising from the interpretation of Commission precedent should not apply. . . . Parties should be able to refer to that precedent, just as they would rely on any other decision from this Commission."[11] Indeed, even if the Commission were forced to rule on PGE's (or another pole owner's) contract on a case-by-case, attacher-by-attacher basis, as PGE suggests, barring unusual factual differences, the Commission likely would pass on the same rates, terms and conditions in a similar manner.[12]

The "sign and sue" rule adopted by the FCC and upheld by the United States Court of Appeals for the District of Columbia Circuit serves to alleviate this problem because pole owners are aware that if they impose unjust and unreasonable contract rates, terms and conditions on attachers, attachers can refuse to comply and will prevail in any complaint brought to the FCC. *See Southern Co. Serv., Inc. v. F.C.C.*, 313 F.3d 574, 583 (D.C. Cir. 2002) (affirming the FCC rule and stating that "[f]or example, one scenario in which 'sign and sue' is likely to arise is when the attacher acquiesces in a utility's 'take it or leave it' demand that it pay more than the statutory maximum or relinquish some other valuable right—without any *quid pro quo* other than the ability to attach its wires on unreasonable or discriminatory terms.").

[11] Verizon Response at p. 3.

[12] It is well-established that administrative agencies, like the Commission, are required to follow their own precedent, unless the precedent is distinguishable or overruled. *See, e.g.*, ORS 183.482(8)(b)(B) (prohibiting an agency from making decisions that are "[i]nconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency."); *see also Oregon City Fed'n of Teachers v. Oregon City Educ. Ass'n*, 36 Ore. App. 27, 38 n. 10, 584 P.2d 303 (1978) (affirming the Employment Relations Board's decision to give its prior decision the effect of *stare decisis* in the same manner that a court would be required to give precedential effect to its prior decisions).

Likewise, when the FCC makes a rule pursuant to a case (as opposed to a rulemaking) that involves only one pole owner and attacher, that case law "rule," to the extent generally applicable, applies to all other pole owners and attachers. Consequently, in states where pole attachment matters are regulated by the FCC, pole owners and attachers alike understand that utility-imposed deviations from the Act, FCC rules and/or precedent are unenforceable.

Indeed, pole owners (including Oregon pole owners) typically use the same agreement for all their attachers; in addition, many pole owners share agreements. As a result, barring unusual circumstances, the terms and conditions of pole attachment agreements are generally applicable to all pole owners and attachers alike and thus case precedent applicable to one agreement is generally applicable to all. Recognizing that pole attachment agreements can be standardized, even Staff has recommended the creation of a state-wide agreement "because [p]ole owners and occupants continue to disagree on specific contract obligations, rates, terms and conditions in many areas." *See* White Paper, Attachment A.

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

OCTA members are not advocating that the Order was "intended to establish the only rates, terms and conditions that are legally enforceable in . . . Oregon," as PGE claims. Rather, OCTA members are simply seeking the fair, just and reasonable treatment they are entitled to under ORS 757.273. For example, despite the Commission's unambiguous ruling based on its reading of Oregon's pole attachment rental rate rule that "[c]osts that do not fall into one of the categories set out in the [rental rate] carrying charge may not be added into the rental rate,"[13] PGE continues to add improper surcharges to its rental rate, including a $1.99 per pole charge entitled "UAM Overhead not in Carrying Charges." More incredibly perhaps, CLPUD has refused to allow attachers—even those attachers forced to sign CLPUD's unreasonable contract under threat of sanctions—to use the Commission-approved Agreement or benefit in any way from the Commission's Orders. CLPUD has even refused to reduce its rates for other attachers, consistent with the rental rate rule, the Commission's Order, and principles of non-discrimination.[14]

Granting PGE's request for clarification would therefore violate the Commission's obligation to ensure that pole attachments in Oregon proceed on fair, just and reasonable rates terms and conditions. Denying PGE's request, on the other hand, is not only consistent with applicable law but will serve the public interest by promoting private resolution of disputes, and eliminating the need for further litigation and the expenditure of additional time and resources of the parties and this Commission.[15]

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[13] January Order at p. 14.

[14] See Note 9, *supra*.

[15] The value of the Commission's Orders cannot be overstated in this regard. For example, three attachers to Central Electric Cooperative's poles (Qwest, Bend Cable, and Crestview Cable) were able to reach negotiated settlements on new contracts not long after the Commission's ruling in this case. *See generally*, record in UM 1191.

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

II. CONCLUSION

For the reasons set forth above, PGE's Application fails to meet the standard required by OAR 860-014-0095 should be denied.

Respectfully submitted this 1st day of August, 2005.

MILLER NASH LLP

Brooks E. Harlow
OSB No. 03042

Attorneys for Intervenor
Oregon Cable Telecommunications Association

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352