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July 30, 2015

Public Utility Commission of Oregon
Attn: Filing Center
201 High Street S.E.
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Salem, Oregon 97308-1088

Re: Fourth Supplemental Filing of Advice No. 15-09, Rule C Customer Attachment to Facilities
DOJ File No. 734700-GG1408-13

The Department of Justice represents the Department of Transportation (ODOT) in the above-referenced matter. Portland General Electric (PGE or Company), through its latest revised filing, seeks to make governmental agencies such as ODOT responsible for the cost of relocating utility facilities if relocation is required more than once in a two-year period and require ODOT to pay for additional costs if PGE has to perform work related to relocating utility facilities during non-Scheduled Crew hours. As discussed below, PGE's proposal conflicts with a long-established nearly universal common-law rule followed in Oregon and nearly every other jurisdiction that utilities are required to bear the entire cost of relocating from the public right-of-way when required to do so by state or local authorities. There are important interests at stake here. The Company's novel legal theory, if adopted, would divert substantial public funds to PGE. ODOT respectfully requests that this matter be suspended and referred to an administrative law judge so that the parties have an opportunity to develop a record and fully brief the important legal issues at stake here.

In 1983, the U. S. Supreme Court recognized and reaffirmed the nearly universal rule that dates back as far as 1905, that "[u]nder the traditional common-law rule, utilities have been required to bear the entire cost of relocating from a public right-of-way whenever required to do so by state or local authorities." *Norfolk Redevelopment and Housing. Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 US 30, 35, 104 S Ct 304, 78 L Ed2d (1983), (*citing New Orleans Gas Light. Co. v. Drainage Commission of New Orleans*, 197 US 453, 462, 25 S Ct 471, 49 L Ed 831 (1905). Oregon courts recognize the same rule.

In *Multnomah County v. Rockwood Water Dist.*, 219 Or 356, 361, 347 P2d 110 (1959), the Oregon Supreme Court stated:

> "It is an almost a universal common-law rule that private utility companies are required to move at their own expense their water, electric and other lines, subject to the police power of the state, and whenever the health and public safety require this to be done, unless they are covered by special ordinance or law.

Transit Commission v. Long Island Railroad Co., 253 NY 345, 171 NE 565 (1930); *New Orleans Gaslight Company v. Drainage Commission of New Orleans*, 197 US 453, 462, 25 S Ct 471, 49 L Ed 831 (1905)."

Accord: *Northwest Natural Gas Co. v. City of Portland*, 70 Or App 647, 690 P2d 1099 (1984) ("Utilities locating facilities in a public right-of-way must bear the cost of relocation when required to do so by a government exercising its legitimate authority"); *Northwest Natural Gas Co. v. City of Portland*, 300 Or 291, 711 P2d 119 (1985) ("The general principle that utilities must bear the expense of utility relocation when such relocation is required to accommodate public works * * * has been adopted by this court"); *Northern States Power Co. v. Fed. Transit Admin.*, 358 F.3d 1050, 1053 (8th Cir. 2004) (calling the common law utility-relocation rule "undisputed precedent"); *City of Auburn v. Qwest Corp.*, 260 F 3d 1160, 1167 (9th Cir 2001) (noting that the rule has been followed in virtually every jurisdiction except, possibly, Arkansas); *see generally Moving the Lines: The Common Law of Utility Relocation*, 45 Val. U. L. Rev. 457 (Winter, 2011).

In the *Norfolk Redevelopment* case, the U.S. Supreme Court, invoked a well-settled principle of statutory construction that "the common law . . . ought not to be deemed to be repealed, unless the language of a statue be clear and explicit for that purpose." Statutes in derogation of the common law are to be strictly construed, *Lane County v. RA Hentz Construction Company*, 228 Or 152, 364 P2d 627 (1961), and "judicially-created law is not changed by legislative act unless the intent of the legislature to do so is clearly shown." *Smith v. Cooper*, 256 Or 485, 494, 475 P2d 78 (1970).

There is no express language in ORS 758.010 or 758.025 that the legislature intended to interfere with the common-law rule that the utility must bear the expense of utility relocation. To the contrary, ORS 758.025 specifically provides that the public body is not required to avoid or minimize costs to the utilities that materially affect the project. Hence, the common-law rule applies here.

PGE's proposal that ODOT be responsible for the cost of relocating utility facilities when relocation is required more than once in a two-year period and requiring ODOT to pay for additional costs if PGE has to perform work related to utility relocation during non-Scheduled Crew hours squarely conflicts with the well-established common-law rule that utilities have been required to bear the entire cost of relocating their facilities within a public right-of-way whenever required to do so by state or local authorities.

PGE's proposal also conflicts with rate making principles. Relocation costs are operating expenses embedded in the utility's rates that it charges its ratepayers, including ODOT. If PGE is allowed to recover relocation costs from ODOT is would over-recover those costs. Additionally, relocation costs are expenses that PGE's ratepayers should be ultimately responsible for because they receive the benefit of PGE's use of the right-of-way. It is not a cost that should be shifted to Oregon's taxpayers, many of whom receive no benefit from PGE's use of the right-of-way.

For the foregoing reasons, ODOT respectfully requests a hearing in this matter so it has an opportunity to develop a record and submit legal argument on the important issues raised by the Company's filing.

Sincerely,

David B. Hatton

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Senior Assistant Attorney General
Government Services Section

DBH:bwl/6684421-v2
cc: Service List

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of July 2015, I served a copy of the foregoing by causing a copy thereof to be sent by electronic mail to the parities listed below.

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