

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**

3 UM 1096

4 PORTLAND GENERAL ELECTRIC
5 COMPANY,

6 Petitioner,

7 v.

8 VERIZON NORTHWEST, INC.

9 Respondent.

STAFF'S REPLY TO OCTA'S OPPOSITION TO
PGE'S WITHDRAWAL OF COMPLAINT

10 On or about September 24, 2004, Oregon Cable Telecommunications Association
11 (OCTA) filed its opposition (Opposition) to Portland General Electric Company's (PGE) notice
12 that it was withdrawing its complaint in this matter.¹ As OCTA would likely readily
13 acknowledge, OCTA's filed its Opposition not to simply keep the UM 1096 open, but to keep
14 the docket alive to somehow force PGE and Verizon Northwest, Inc. (Verizon) to allow OCTA
15 to review their newly negotiated pole attachment agreement (Agreement). For the following
16 reasons, staff asks the Administrative Law Judge (ALJ) to deny OCTA's Opposition.

17 **Brief Background**

18 PGE filed its complaint against respondent Verizon pursuant to the Commission's pole
19 attachment rules. *See generally* OAR 860, Division 28. Subsequently, staff, and then later
20 OCTA, intervened in the dispute. Recently PGE and Verizon were able to negotiate a new pole
21 attachment agreement (Agreement) that resolved all issues existing between them. PGE then
22 filed its notice withdrawing its complaint (Notice). OCTA filed its Opposition to PGE's Notice.
23 In brief, OCTA asks the Commission to "reject the withdrawal of complaint and order the parties
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26 ¹ Staff notes that OCTA inadvertently neglected to serve it was its Opposition. Staff understands that the parties
have until October 8, 2004 to reply to OCTA.

1 to file their agreement for review and approval, in accordance with OAR 860-014-0085.” OCTA
2 Opposition at 10.

3 **Argument**

4 1. *The Commission does not generally require contracting parties to file their pole*
5 *attachment agreements for the Commission’s review.*

6 The Commission’s rules governing pole attachment agreements do not require the
7 contracting parties to file their agreements with the Commission. This approach is consistent
8 with ORS 757.285, which provides, in part:

9 *Agreements regarding rates, terms and conditions of attachments shall be deemed*
10 *to be just, fair and reasonable, unless the Public Utility Commission finds upon*
11 *complaint by a public utility...or licensee party to such agreement...that such*
12 *rates, terms and conditions are adverse to the public interest and fail to comply*
13 *with the provisions hereof. (Emphasis added).*

14 Thus, ORS 757.285 declares that pole attachment agreements are presumed to be lawful,
15 unless found otherwise after a complaint brought by either the public utility or the licensee party.
16 Under this legal structure, the Commission does not routinely review pole attachment
17 agreements that are acceptable to the contracting parties. Further, under this framework, the
18 Commission’s authority to review the agreement for “fairness” ends when the contracting parties
19 withdraw their complaint for Commission review of the agreement.²

20 Here, PGE, the moving party, has filed its notice withdrawing its complaint. Verizon did
21 not file a cross-complaint, and both parties have stated orally to the ALJ that they have
22 negotiated a new pole attachment agreement. Staff, representing the Commission, does not
23 object to PGE’s Notice withdrawing its complaint. Under these circumstances, the ALJ should
24 honor PGE’s notice to withdraw its complaint and close this docket.

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² Even should a party end a proceeding by withdrawing its complaint as described, the Commission would still be free to commence its own investigation of the matter under ORS 757.273, as well as its general regulatory powers.

1 2. *OAR 860-014-0085 does not require the contracting parties to file their pole attachment*
2 *agreement for Commission review.*

3 OCTA relies upon OAR 860-014-0085 (Rule) in support of its request to review the
4 Agreement. The Rule governs settlement proceedings and the creation of stipulations resolving
5 issues in proceedings. OAR 860-014-0085(4) requires that stipulations must be filed with the
6 Commission for its review. OCTA argues the Rule is “mandatory for all agreements” and “does
7 not apply only when the parties decide they want Commission review or approval.” OCTA
8 Opposition at 7. OCTA misapplies the Rule.

9 To staff’s knowledge, the Commission has never applied OAR 860-014-0085 to prevent
10 the moving party to a private complaint proceeding from withdrawing its complaint. The reason
11 is simple: in a private complaint, with no cross-complaint, particularly a private complaint
12 brought under ORS 757.285, the Commission’s authority to proceed with the case ends when the
13 moving party notifies the Commission that it is withdrawing its complaint. As such, once the
14 moving party notifies the commission that it is withdrawing its complaint, where there is no
15 cross-complaint, the Commission’s authority to apply its procedural rules, including OAR 860-
16 014-0085, ends. In such a case, the Commission simply acknowledges receipt of the notice and
17 closes the docket (again, assuming there was no cross-complaint still at issue). OAR 860-014-
18 0085, including the requirement to file a stipulation, simply no longer applies once a moving
19 party withdraws its complaint.

20 Further, even if OAR 860-014-0085 were applicable to the present circumstances, which
21 it is not, OCTA has not shown that the Rule allows OCTA to review PGE’s and Verizon’s pole
22 attachment agreement. Arguably, OAR 860-014-0085 only requires the parties file the
23 “stipulation.” In the present case, the “stipulation” does not necessarily mean the pole
24 attachment agreement. Instead, the “stipulation” may be nothing more than a short statement by
25 PGE and Verizon that they agree UM 1096 should be closed. If so, OCTA could arguably
26 review the short statement under the Rule, but not the pole attachment agreement.

1 Or, even if the docket again somehow remains open under the Rule, OCTA has not
2 explained why that fact would then allow it to review PGE's and Verizon's confidential pole
3 attachment agreement. PGE and Verizon may file a motion claiming the Agreement is
4 confidential and not subject to disclosure to OCTA. Under the Commission's law and policy of
5 not requiring contracting parties to file their pole attachment agreements, the Commission would
6 likely grant such a motion for confidentiality.

7 Finally, OCTA's desired application of OAR 860-014-0085 is unpersuasive because it
8 would have absurd results. OCTA claims PGE and Verizon must file their Agreement under the
9 Rule because it represents a stipulation reached while the case was still open. Assume, however,
10 PGE filed its notice withdrawing its complaint one minute *before* it signed the pole attachment
11 agreement with Verizon. Under that fact, a "stipulation" did not exist at the time PGE withdrew
12 its complaint, so OAR 860-014-0085 would not apply even under OCTA's interpretation.
13 Clearly, this would be absurd and it serves to illustrate that the Rule was not intended to apply as
14 OCTA now urges.

15 Perhaps the solution for OCTA is to file its own complaint, under a legal theory not clear
16 to staff, to somehow force PGE and Verizon to share their Agreement with it. However, keeping
17 UM 1096 alive against the wishes of the moving party is not the proper procedural course.

18 DATED this ____ day of October 2004.

19 Respectfully submitted,

20 HARDY MYERS
21 Attorney General

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23 _____
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25 Assistant Attorney General
26 Of Attorneys for the Public Utility Commission
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