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September 24, 2004

**VIA FACSIMILE, FEDERAL EXPRESS & E-MAIL**

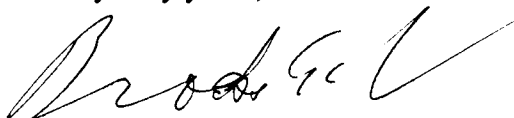
Ms. Annette Taylor  
Oregon Public Utility Commission  
550 Capitol Street NE, Suite 215  
Salem, Oregon 97310

Subject: Docket No. UM 1096

Dear Ms. Taylor:

Enclosed, for filing, are an original and five copies of the Response of OCTA In Opposition Of PGE Withdrawal Of Complaint in the above-referenced docket.

Very truly yours,



Brooks E. Harlow

cc w/enc: All Parties of Record

CERTIFICATE OF SERVICE  
Docket No. UM 1096

I certify that I have caused to be served the foregoing Response Of OCTA In Opposition Of PGE Withdrawal Of Complaint by U.S. Mail, postage prepaid and properly addressed, to the parties as follows:

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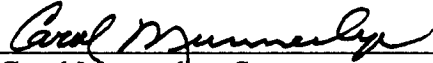
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Dated this 24<sup>th</sup> day of September, 2004.

  
Carol Munnery, Secretary

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BEFORE THE PUBLIC UTILITY COMMISSION  
OF THE STATE OF OREGON

PORTLAND GENERAL ELECTRIC  
COMPANY,

Petitioner,

v.

VERIZON NORTHWEST INC.,

Respondent.

Docket No. UM 1096

RESPONSE OF OCTA IN OPPOSITION  
TO PGE WITHDRAWAL OF COMPLAINT

**I. INTRODUCTION**

The Oregon Cable Telecommunications Association (“OCTA”) opposes the “Withdrawal Of Complaint” filed by Portland General Electric Company (“PGE”) on September 9, 2004. OCTA opposes the withdrawal because PGE has failed to comply with the Commission’s rule regarding settlement, which requires that settlement be served on all parties to this case and filed with the Commission (“OPUC”) for review and approval. OAR 860-014-0085. PGE has not only not filed its settlement agreement, it has refused to provide a copy of the settlement agreement to OCTA, a party to the proceeding. The Commission should reject the withdrawal of complaint and order the parties to file their agreement for review and approval, as required by the settlement rule.

**II. FACTUAL BACKGROUND**

On July 15, 2003, PGE filed its formal complaint against Verizon Northwest, Inc. (“Verizon”) in this docket. On January 20, 2004, OCTA filed its Petition To Intervene in this docket. OCTA was granted intervention as a party on February 9, 2004. Throughout 2003 and

1 2004, the parties have filed dozens of pleadings and the Administrative Law Judges assigned to  
2 the docket entered numerous rulings and memoranda. However, no testimony was ever filed by  
3 the parties. At the request of the parties, evidentiary filings and proceedings on the merits were  
4 repeatedly deferred to permit the parties to attempt to resolve the case through settlement.  
5 However, PGE did not attempt to withdraw its complaint at any time until after a full and final  
6 settlement was reached. Thus, PGE was able to use the threat of Commission action as an  
7 incentive to the parties to achieve a voluntary settlement.

8           On September 3, 2004, a telephonic status conference was held among the parties  
9 and the Administrative Law Judge (“ALJ”). At the status conference, the parties stated that they  
10 had reached a full and final settlement of the docket. PGE and Verizon represented to the ALJ  
11 that the settlement had been reduced to writing and all that remained to be accomplished was to  
12 obtain the necessary signatures and exchange executed copies of the final document. OCTA  
13 expressed a desire to review the settlement agreement and committed to confer with PGE and  
14 Verizon regarding obtaining and reviewing the settlement agreement.

15           OCTA has been in discussions on and off with Verizon and PGE since the date of  
16 the last telephonic status conference, September 3, 2004. As of the date of this filing, PGE and  
17 Verizon have been unwilling to provide OCTA with a copy of the settlement agreement. PGE  
18 provided OCTA with a copy what had deemed to be the non-confidential adjunct to the  
19 settlement agreement, a document entitled “Joint Use Agreement Between Portland General  
20 Electric Company and Verizon Northwest, Inc.” dated September 3, 2004 (“Joint Use  
21 Agreement”). The agreement contained a list of exhibits, from Exhibit A through Exhibit K.  
22 The document provided to OCTA included Exhibits A through I and K, but omitted Exhibit J.  
23 PGE claimed that Exhibit J, entitled a “compliance supplement” was confidential.

24           The OCTA checked with one of its members and determined that the Joint Use  
25 Agreement is essentially a PGE standard form agreement that has been offered to the member,  
26

1 **with the exception of Exhibit J.** The “compliance supplement” denominated as Exhibit J in the  
2 PGE/Verizon Joint Use Agreement does not exist in the OCTA member’s agreement.

3 A copy of the relevant provisions of the Joint Use Agreement is attached hereto as  
4 Attachment 1. Under the terms of Section 8.8 of the Joint Use Agreement, Exhibit J modifies  
5 certain provisions of PGE’s standard Joint Use Agreement. In particular, Section 8.8 provides  
6 that a pole owner “may impose charges upon Licensee For Unauthorized Attachments and non-  
7 compliant attachments in accordance with applicable state law, rules and regulations.” **However**  
8 **Exhibit J expressly purports to modify this provision. (“Subject to the limitations set forth**  
9 **in . . . Exhibit J . . .”)**. Thus, the provision for charges for unauthorized attachments for parties  
10 other than Verizon appears to be merely a reference to state law, rules and regulations. With  
11 regard to the Verizon agreement, however, Exhibit J apparently modifies those provisions.  
12 Moreover, Article XI of the Joint Use Agreement makes it clear that the secret Exhibit J  
13 “trumps” the non-confidential provisions of the agreement:

14 The Parties have agreed to supplemental terms and conditions for certain  
15 Attachments covered under this Agreement, as further enumerated in Exhibit J  
16 (Compliance Supplement), which is attached and incorporated by reference.  
17 Should there arise any conflict between the terms listed in the Compliance  
18 Supplement, while operative, and this Agreement, the terms of the Compliance  
19 Supplement shall control.

20 OCTA has not received any portion of the settlement agreement itself. It is left to speculate  
21 whether or not there are special terms and conditions similar to Exhibit J.

22 OCTA’s members provide cable and broadband services using fiber optic and  
23 coaxial cables. They compete directly with phone companies like Verizon for broadband  
24 services. PGE and other electric utilities are also potential competitors of OCTA members, using  
25 either their own fiber optic facilities or broadband over power line (“BPL”). For the most part,  
26 OCTA members own no poles of their own. They rely almost exclusively on the poles of  
telephone and electric utilities to string their wires and fiber to their customers.

1 III. LEGAL BACKGROUND

2  
3 A. Federal Law Requires PGE and Verizon to Provider Non-discriminatory  
4 Access to Poles.

5 Federal law governs, in part, regulation of pole attachment rates and practices by  
6 “utilities,” defined as follows:

7 (a) As used in this section:

8 (1) The term “utility” means any person who is a local exchange carrier  
9 or an electric, gas, water, steam, or other public utility, and who owns or controls  
10 poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire  
communications. Such term does not include any railroad, any person who is  
cooperatively organized, or any person owned by the Federal Government or any  
State.

11 47 U.S.C. § 224. Under this definition, both PGE and Verizon are “utilities” for purposes of  
12 Section 224.

13 States can take on an active role in regulating pole attachments if they meet  
14 certain conditions. *See generally Id.* Those conditions are not relevant to the issue at hand.  
15 Even where a state meets the conditions precedent, the principal of non-discrimination in the  
16 provision of pole attachments is an overarching requirement of federal law:

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

19 *Id.* There is no express mechanism to monitor and enforce this provision. Thus, enforcement is  
20 left to interested parties to pursue such rights as they may have under appropriate state  
21 procedural mechanisms.

22 B. Oregon Laws and Rules Give the PUC Power to Regulate Pole Attachment  
23 Rates Terms and Conditions.

24 As permitted by 47 U.S.C. § 224, Oregon law gives the OPUC broad authority  
25 over regulation of pole attachments. For example, ORS § 757.273 requires the PUC “to regulate  
26 in the public interest the rates, terms and conditions for attachments” to poles. Further, that



1 (6) If a stipulation is rejected, the Commission or ALJ shall provide the  
2 parties sufficient opportunity on the record to present evidence and argument on  
3 the matters contained in the settlement or stipulation. No further hearing need be  
4 held where a review hearing has already been held under section (5) of this rule  
5 and the Commission or ALJ determines that the issues were fully addressed in the  
6 prior hearing.

7 OAR 860-014-0085.

8 **IV. DISCUSSION AND ARGUMENT**

9 PGE's "Voluntary Withdrawal Of Complaint With Prejudice" consisted of two  
10 lines as follows:

11 Complainant [PGE] hereby withdraws the complaint filed on July 15, 2003, in  
12 this case, with prejudice and without costs and attorney fees.

13 PGE cited no authority whatsoever for its "voluntary withdrawal" of its complaint. In  
14 subsequent communications with OCTA (not filed with the OPUC), PGE asserted that the OPUC  
15 "looks to the Oregon Rules of Civil Procedure [ORCP]" for guidance to the extent the procedural  
16 rules adopted by the OPUC do not contain a specific provision on point, which is the case here.  
17 See OAR 860-011-0000(3)\* \* \* ."<sup>1</sup> The OCTA agrees that plaintiffs in a court of law may,  
18 subject to certain requirements, voluntarily dismiss their complaints. However, OCTA disagrees  
19 that court rules should govern here in any event. Moreover, the OPUC has a rule that  
20 specifically governs this situation, which is its settlement rule. Thus, PGE is not entitled to  
21 simply "withdraw" its complaint. Indeed, PGE is required to file its settlement agreement with  
22 the Commission, serve it on all the parties, and seek Commission approval of the settlement of  
23 the complaint.

24 This is a Commission "proceeding." The Commission's settlement rule expressly  
25 applies to "all Commission proceedings." OAR 860-014-0085(1) (emphasis added). Moreover,  
26 "any such agreement shall be subject to Sections (2) through (6) of this rule." Id. (emphasis

27 \_\_\_\_\_  
28 <sup>1</sup> PGE also cited the case *In Re Portland General Electric Co., Order No. 96-055 (March 4,*  
29 *1996)*, which allowed a withdrawal under ORCP 54A. That case is irrelevant, however, as there  
30 is no indication that a settlement was involved. Moreover, the order did not involve the  
31 withdrawal of the complaint, but rather the withdrawal of an application for reconsideration.



1 added). Thus, by its terms, the Commission's rule governing settlements is very broad. The rule  
2 is mandatory for all agreements as indicated by the use of the term "shall" in subsection (1). The  
3 rule does not apply only when the parties decide they want Commission review or approval.  
4 Under the rule, PGE and Verizon must file the settlement, explain why it should be approved,  
5 provide copies of its filings to all parties, and secure the OPUC's approval. The complainant  
6 may not simply say, "Never mind."

7           The fundamental error in PGE's approach is that it ignores the fundamental  
8 difference between courts and regulatory commissions. Courts are established as a dispute  
9 resolution forum for private litigants. The OPUC, on the other hand, is a public forum for  
10 advancement of the public interest. Its powers to resolve disputes such as this are ancillary to  
11 those broader functions. Thus, the OPUC is granted broad regulatory power over all the acts and  
12 practices of PGE and Verizon:

13           The commission is vested with power and jurisdiction to supervise and regulate  
14 every public utility and telecommunications utility in this state, and to do all  
15 things necessary and convenient in the exercise of such power and jurisdiction.  
16 ORS § 756.040(2). So while courts can only act when parties come before them with a "case or  
17 controversy," the OPUC can reach out and bring in utilities for investigation and other  
18 proceedings whenever it is necessary to protect the public interest.

19           The Washington Commission recognized the difference between a court and a  
20 regulatory agency when it rejected the efforts of a number of intervenors to withdraw from the  
21 Qwest-U S West merger case after they reached settlements with U S West. Although the  
22 circumstances did not require WUTC approval of the settlements, the WUTC refused to allow  
23 the intervenors to withdraw from the case.

24           [Quoting the Staff with favor] "[T]he context where you have two private  
25 litigants trying to resolve a single private issue between the two of them [is a]  
26 circumstance [that] differs dramatically from when we have a public agency or  
public body in findings and determinations as to whether something is or is not  
consistent with the public interest."

1 We agree that the two types of proceedings are fundamentally different.  
2 Moreover, the bases and purposes for our conduct of adjudicative proceedings are  
3 fundamentally different from those conducted by the constitutional and statutory  
4 courts.

5 *In Re Application of U S WEST, Inc. and Qwest Communications International, Inc.*, Docket No.  
6 UT-991358, Eighth Supplemental Order Denying Petitions For Leave To Withdraw (Wash. Util.  
7 & Trans. Comm. June 19, 2000).

8 The OPUC's settlement rule is a tacit recognition that the OPUC follows these  
9 same principles as expressed by the WUTC. The Commission is not a tool to be used by  
10 litigants. Having invoked the jurisdiction of the Commission, PGE cannot now complain that  
11 because its business needs have been met it can simply go away. Even absent the settlement  
12 rule, the OPUC has broad jurisdiction to review and investigate PGE's activities. While the  
13 settlement rule provides the most straightforward route to accomplish a review of the settlement,  
14 the OPUC should also be mindful that another party with important substantive rights is  
15 involved. As discussed above OCTA's members have rights to non-discriminatory treatment  
16 under state and federal law.

17 OCTA wants to be clear that it does not seek a ruling on whether all agreements  
18 affecting pole attachment rates and terms should be made public. Instead, OCTA respectfully  
19 submits that they should be under these circumstances. Specifically, when the OPUC's  
20 jurisdiction has been invoked and a party to the case who is not privy to the settlement requests  
21 the agreement, it should be provided. The facts in this case provide a good illustration of why  
22 disclosure is needed. Even with just the limited disclosure of the Joint Use Agreement portion of  
23 the settlement agreement, there are signs of possible discriminatory treatment vis-à-vis Verizon  
24 and cable companies. The PGE and Verizon appear to have foregone to some unknown extent  
25 their ability to impose charges for unauthorized attachments to their poles. That same  
26 concession has not been made, at least as to one other PGE licensee, an OCTA member.

1           With regard to the remainder of the settlement agreement one can only speculate  
2 what other provisions might favor or disfavor Verizon. Lacking any disclosure whatsoever,  
3 there is no way for OCTA or the OPUC to know if the Settlement complies with Federal and  
4 state law or not. It is not unreasonable to speculate that the settlement agreement might further  
5 modify the terms of the Joint Use Agreement. For example, it could provide that one or both of  
6 the parties will reduce, waive, or forgive payment of rent going back or going forward. If cable  
7 companies and other licensees of poles have been and are dutifully paying rent, that would  
8 arguably be discriminatory. If such provisions are contained in the settlement, then PGE and  
9 Verizon should explain, in some fashion, why the course of dealing between them is so unique  
10 that a waiver or reduction of rent in the amounts provided for is an appropriate mechanism to  
11 compensate for past claims. Explaining a settlement in this way is unusual in a court, but is  
12 exactly what the OPUC's rule contemplates.

13           Finally, the OPUC is supposed to consider the interests of the customers of pole  
14 licensees. While this is a dispute between PGE and Verizon, they will both ultimately expect to  
15 pass through the financial impacts of the settlement to their ratepayers. Likewise, cable  
16 companies must recover the costs of their pole attachments from their customers. Whether the  
17 terms and conditions of the settlement are made available to cable companies immediately or at  
18 contract renewal, there is a likelihood that at some point cable customers will feel the impact.  
19 The Commission cannot possibly ensure that the settlement will result in a fair and reasonable  
20 allocation of pole costs among the three sets of customers without reviewing the agreement.

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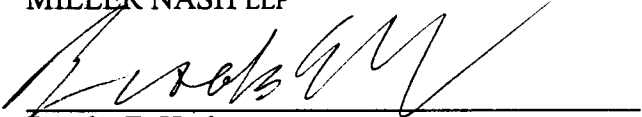
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V. CONCLUSION

For the foregoing reasons, the Commission should reject the withdrawal of complaint and order the parties to file their agreement for review and approval, in accordance with OAR 860-014-0085.

DATED this 24<sup>th</sup> day of September, 2004.

MILLER NASH LLP



Brooks E. Harlow  
OSB No. 03042

Attorneys for Intervenor  
Oregon Cable Telecommunications  
Association

**ATTACHMENT 1**

**JOINT USE AGREEMENT**

**BETWEEN**

**PORTLAND GENERAL ELECTRIC COMPANY**

**AND**

**VERIZON NORTHWEST INC.**

**September 3, 2004**

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## **LIST OF EXHIBITS**

- Exhibit A (PGE's Attachment Specifications)
- Exhibit B (Verizon's Attachment Specifications)
- Exhibit C (Attachment Matrix)
- Exhibit D (PGE's Attachment Permit Application)
- Exhibit E (Verizon's Attachment Permit Application)
- Exhibit F (Licensee Approved Vendors)
- Exhibit G (Ownership Dispute Criteria)
- Exhibit H (PGE's Fee Schedule)
- Exhibit I (Verizon's Fee Schedule)
- Exhibit J (Compliance Supplement)
- Exhibit K (Novation Agreement)



## JOINT USE AGREEMENT

This Joint Use Agreement is made and entered into this 3<sup>rd</sup> day of September, 2004, between **Portland General Electric Company ("PGE")**, an Oregon Corporation, and **Verizon Northwest Inc. ("Verizon")**, a Washington Corporation, both of which are hereinafter referred to individually as a Party and collectively as the Parties.

### WITNESSETH

WHEREAS, PGE is engaged in the business of providing energy service to customers in certain areas within the state of Oregon; and

WHEREAS, Verizon conducts its communication business in some of the same areas in Oregon; and

WHEREAS, Verizon and PGE place and maintain some poles or pole lines upon or along the same highways, streets or alleys and other public or private places for the purpose of supporting the wires and facilities used in their respective businesses; and

WHEREAS, the Parties desire to cooperate in maintaining joint use of their respective poles when and where joint use of their poles shall be of mutual benefit; and

WHEREAS, the desirability of joint use of particular poles is dependent upon the service requirements of each Party, including considerations of safety and economy, and each Party should determine, in its sole judgment, whether or not such service requirements can properly be met by the joint use of particular poles.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein, the Parties hereby agree as follows:

### ARTICLE I - DEFINITIONS

#### Access by Qualified Worker:

All work within the Electrical Supply Space on PGE poles, or work that requires an object or piece of equipment to be brought within ten feet (10') of a primary conductor on PGE poles, shall be performed by qualified PGE personnel or qualified PGE approved electrical contractors. In non-emergency situations, all work within the Electrical Supply Space on Verizon poles, or work that requires an object or piece of equipment to be brought within 10 feet of a primary conductor on Verizon poles, shall be performed by qualified electrical contractors or qualified PGE personnel.

each Party's Attachments comply with the Attachment Permit and this Agreement. The Parties' desire to conduct these post inspections jointly; however, should Licensee's representative be unavailable, the Owner may conduct the post inspections without Licensee. Initially, each Party will conduct one hundred percent (100%) post inspection on Attachment Permits. Should Licensee's Rate of Non-Compliance be at or below five percent (5%), Owner will decrease the frequency with which it conducts post inspections. Should Licensee's Rate of Non-Compliance be at or above ten percent (10%), Owner may start conducting pre and post inspections on all permits. All inspection will be billed on an hourly basis, according to Owner's Fee Schedule.

(b) Either Party may change the practice listed in Section 8.7(a) upon ninety (90) days written notice.

8.8 Subject to the limitations set forth in Article XI and Exhibit J, Owner may impose charges upon Licensee for Unauthorized Attachments and Non-Compliant Attachments in accordance with applicable state law, rules and regulations.

8.9 Upon the completion of work performed for the benefit of the requesting Party, the costs of which have been pre-approved by the requesting Party, the Party performing the work shall present to the requesting Party an itemized invoice of its proportionate share of the costs incurred. The use of other arrangements, such as flat rate schedules, for determining the cost of work performed shall be permitted under this Agreement.

8.10 Unless otherwise stated in this Article, all invoices are due within forty-five (45) days of receipt. All invoices not disputed or paid when due shall bear interest at the lesser rate of eighteen (18%) per year or the maximum allowed by law in the state of Oregon. Failure to pay or dispute a Party's invoice in accordance with this Agreement may be deemed an Event of Default pursuant to Article XII.

8.11 A two percent discount (2%) may be applied to any invoice (or the undisputed portion thereof) paid within ten (10) calendar days of receipt. For purposes of this Section, payment shall be deemed to have been made upon receipt by the invoicing Party.

## ARTICLE XI - Compliance Supplement

The Parties have agreed to supplemental terms and conditions for certain Attachments covered under this Agreement, as further enumerated in Exhibit J (Compliance Supplement), which is attached and incorporated by reference. Should there arise any conflict between the terms listed in the Compliance Supplement, while operative, and this Agreement, the terms of the Compliance Supplement shall control.

## ARTICLE XII- DEFAULT & REMEDIES

12.1 The occurrence of any one or more of the following events constitutes an “Event of Default” by a Party:

- (a) Failure to pay any undisputed sum due under this Agreement within ten (10) days after receipt of Written Notice of such failure from the invoicing Party.
- (b) Failure by Licensee to complete all construction associated with attaching Licensee’s Equipment to Owner Facilities within six (6) months unless the parties agree in writing to extend the time period for construction.
- (c) Failure by Licensee to provide prior Written Notice to Owner of intent to assign this Agreement or the Equipment attached to Owner’s Facilities.
- (d) Assignment of this Agreement, in violation of the terms and conditions of this Agreement, without prior written consent from the other Party.
- (e) A petition is filed by or against Licensee under the Federal Bankruptcy Code or any similar law or statute of the United States or any state (and with respect to any petition filed against Licensee, such petition is not dismissed within sixty (60) days after the filing thereof) or Licensee is adjudged a bankrupt or insolvent, or receiver, custodian or trustee is appointed for Licensee or for any of the assets of Licensee which appointment is not vacated within thirty (30) days of the date of appointment, or Licensee becomes insolvent, is unable to pay its debts and they become due, or makes a transfer in fraud of creditors.
- (f) Failure to perform or observe any other term or condition of this Agreement not otherwise listed in this Section that is a material breach of this Agreement and such failure continues for thirty (30) days after Written Notice from the other Party.

12.2 So long as an Event of Default applicable to this Agreement continues beyond the specified period or, if no period is specified, beyond thirty (30) days, the non-defaulting Party may terminate this Agreement without notice or demand except as expressly required above, revoke all Attachment Permits issued to Licensee and pursue any other remedy it may have