

BEFORE THE PUBLIC UTILITY COMMISSION
OF THE STATE OF OREGON

PORTLAND GENERAL ELECTRIC
COMPANY,

Petitioner,

v.

VERIZON NORTHWEST INC.,

Respondent.

Docket No. UM 1096

**VERIZON NORTHWEST INC.'S
REPLY TO RESPONSE OF OCTA
IN OPPOSITION TO PGE
WITHDRAWAL OF COMPLAINT**

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Verizon Northwest Inc. ("Verizon"), by and through undersigned counsel, hereby submits this Reply to the Response of the Oregon Cable Telecommunications Association ("OCTA") in opposition to the Voluntary Withdrawal of Complaint with Prejudice filed by Portland General Electric ("PGE") on September 9, 2004 ("Opposition"). OCTA's demand that Verizon and PGE disclose the contents of their confidential settlement agreement to OCTA's members -- entities that have neither participated in, nor are in any way affected by, the terms and conditions thereof -- is contrary to both Oregon law and the Oregon Public Utility Commission's ("Commission's") sound public policy favoring the voluntary and informal settlement of disputes within its jurisdiction. Lacking in legal support, and devoid of reason, OCTA's Opposition should be dismissed and this docket should be closed immediately pursuant to PGE's withdrawal of its Complaint with prejudice and without costs.

I. FACTUAL BACKGROUND.

The instant case centers upon a private dispute between PGE and Verizon, at the heart of which is a straightforward question of contract law -- does a valid and binding

agreement continue to exist between the parties? After years of attempting to resolve their disagreements regarding the interpretation and implementation of the Joint Pole Agreement executed by Verizon (then General Telephone Company of the Northwest) and PGE on July 1, 1985, and later amended on August 21, 1996,¹ both PGE and Verizon filed Complaints with the Commission and U.S. District Court for the District of Oregon, respectively. No substantive action has been taken in either proceeding. No testimony has been filed, no prehearing conferences have been convened, and no hearings have been held. Indeed, by the time OCTA petitioned to intervene in the instant proceeding (over six months after PGE's Complaint was filed), the parties were well on their way to resolving their disagreements. It is telling that at no time did OCTA or any of its members seek to participate in, or contribute to, the negotiation and settlement of the underlying dispute. Why would they -- neither the settlement nor the underlying agreements affect any party other than PGE and Verizon. They in no way alter the rates to be paid by other pole attachers, nor do they change the terms or conditions pursuant to which other parties may attach to either PGE's or Verizon's poles. Having resolved their private dispute, PGE filed notice withdrawing its Complaint and Verizon has also taken steps to dismiss its complaint before the Oregon District Court.

II. LEGAL ARGUMENT

The fundamental premise of OCTA's Opposition cannot be correct. It cannot be the case that *anytime* a party engages the assistance of the Commission (no matter how brief the engagement) in the resolution of a purely private dispute, that party is forever foreclosed from settling that dispute without the Commission or any interested party (no

¹ This amendment together with the 1985 Agreement are collectively referred to herein as the "Joint Pole Agreement" or "Agreement."

matter how tangential the interest) examining and potentially challenging every and any aspect of that purely private settlement. Such an outcome would be absurd and would have a chilling effect on a party's willingness to seek the Commission's assistance in resolving contested cases. As discussed more fully below, OCTA's arguments are contrary to the law and would severely undermine the Commission's policy favoring the voluntary settlement of private disputes.

A. The Law Is Clear -- A Party May Voluntarily Dismiss its Complaint at Any Time Up to Five Days Prior to Trial.

The Commission's procedural rules are silent with respect to the voluntary dismissal of a complaint. In the absence of a procedural rule directly on point, the Commission looks to the Oregon Rules of Civil Procedure ("ORCP") for guidance.² Rule 54 of the ORCP makes clear, "an action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal with the court and serving such notice on the defendant not less than five days prior to the day of trial if no counterclaim has been pleaded ... upon notice of dismissal..., the court *shall* enter a judgment of dismissal."³ This Rule is legally binding on the Commission. No counterclaim has been plead in the instant proceeding and a trial date is months away. Accordingly, because PGE has withdrawn its Complaint with prejudice and without costs, the Commission must enter a judgment of dismissal and close this docket immediately.

This basic right of litigants to withdraw their cause of action to avoid unnecessary proceedings, and thereby conserve the scarce resources of the Commission and its Staff, is confirmed by the Commission's Order No. 96-055, in which the Commission granted

² OAR 860-011-0000(3) ("The Oregon Rules of Civil Procedure shall govern in all cases except as modified by these rules, by order of the Commission, or by ruling of the ALJ.").

³ ORCP 54(A)(1) (emphasis added).

the Utility Reform Project's ("URP's") Notice of Withdrawal of its application for reconsideration. In finding that ORCP 54 applied to URP's voluntary withdrawal from the proceeding, the Commission stated:

*It is in the interest of all parties, and in the public interest, to encourage parties to withdraw from a case when they determine that they should not proceed. To impose a sanction on a party wishing to withdraw might discourage such actions and would ultimately increase the burden on the other parties and on our Staff.*⁴

The Commission should follow the same course here -- it must apply ORCP 54 to PGE's voluntary withdrawal of its Complaint and enter a judgment of dismissal without further delay.

B. The Commission's Rule Regarding Voluntary Settlement Is Inapplicable to the Facts at Hand.

Ignoring completely the unambiguous legal requirement and policy rationale mandating the immediate dismissal of PGE's complaint, OCTA attempts to broaden the scope of the Commission's procedural rules to encompass the facts of the instant dispute. However, OCTA's tortured interpretation of OAR 860-014-0085 ("Rule 85") cannot be allowed to stand. Rule 85 does not give the Commission, or any party for that matter, the authority to open up privately-negotiated settlements of complex, longstanding disputes, which neither involve nor affect anyone other than the signatory parties. Indeed, Verizon was unable to locate a single Commission decision in which Rule 85 was employed to examine the contents of a private settlement, affecting only the rights and obligations of the parties to that dispute, such as the agreement at issue here. Nor was Verizon able to find a single case requiring approval of a settlement pursuant to Rule 85 when private litigants had settled all of the outstanding issues in a contested case.

⁴ *In Re Portland General Electric Co.*, Order No. 96-055 (March 4, 1996) (emphasis added).

Longstanding practice before the Commission confirms that the scope of Rule 85 is not as broad as OCTA claims. The Commission has approved several motions for dismissal and has never required that parties obtain Commission approval of their settlement agreements.⁵ In these cases, because the Complainants had resolved all outstanding issues with the Defendants, the Commission appropriately found that no reason existed for further consideration of the complaints, and that they should be dismissed with prejudice.⁶ In those cases where parties have submitted their settlements for approval by the Commission, the settlement (for instance, in a proceeding setting rates) had broader implications and affected the interests of third parties or the public at large.⁷ In the vast majority of instances, the Commission (not a private Complainant) was the party bringing the case, and in many cases, Staff was involved in the settlement discussions and had already approved the settlement prior to its filing with the Commission.⁸

Such is not the case here. PGE and Verizon have resolved all the outstanding issues between them. The terms of the settlement are unique to the circumstances of the underlying dispute and apply only to PGE and Verizon. Neither PGE nor Verizon has

⁵ See note 6 *infra*.

⁶ See *Kah Nee High Desert Resort and Casino v. Qwest Corp.*, Order No. 04-109, 2004 Ore. PUC LEXIS 89 (2004) (“Because the complainant no longer wishes to pursue this complaint, there is no reason to keep this docket open.”); *Harries v. Qwest Corp.*, Order No. 00-756, 2000 Ore. PUC LEXIS 433 (2000) (“The parties have settled their dispute, and there is no reason to continue this proceeding.”); *Hix v. US West Comm., Inc.*, Order No. 99-609, 1999 Ore. PUC LEXIS 8 (1999) (“US West filed a Joint Motion to Dismiss With Prejudice, which indicates that the parties have reached a settlement agreement and that no further action by the Commission is required ... Since Complainant has resolved her dispute with defendant, no reason exists for further consideration of the complaint, and the complaint should be dismissed with prejudice.”).

⁷ See *In the Matter of the Investigation into Extended Area Service (EAS) in the State of Oregon*, Order No. 98-201, 1998 Ore. PUC LEXIS 221 (1998); see also *In the Matter of Northwest Natural Gas Co.*, Application for Public Purposes Funding and Distribution Margin Normalization, Order No. 02-634, 2002 Ore. PUC LEXIS 347 (2002).

⁸ See *In the Matter of PACIFICORP, dba Pacific Power and Light Co.*, Application for an Order Authorizing a Change in Depreciation Rates Applicable to Electric Property, Order No. 03-457, 2003 Ore. PUC LEXIS 297 (2003).

sought Commission approval of the resulting agreement, nor were they required to. As Staff makes clear in its Reply to OCTA's Opposition, contracting parties are not required to file their pole attachment agreements for Commission review, as such agreements are presumed to be just, fair and reasonable.⁹

OCTA's failure to recognize these facts demonstrates a fundamental misunderstanding of the Commission's role in the instant dispute. While it is true that, under drastically different circumstances, the Commission may serve as "a public forum for the advancement of the public interest,"¹⁰ and may also "reach out and bring in utilities for investigation,"¹¹ the instant case implicates neither of those functions. Here, had the case gone forward, the Commission's only role would have been to serve as an arbiter of a private, two-party dispute. Lacking any dispute to resolve, the proper -- and, indeed, *only* -- course of action is for the Commission to dismiss PGE's Complaint with prejudice.

Acceptance of OCTA's position would have a chilling effect on the willingness of parties to enlist the Commission's assistance in resolving private disputes. The legislative history of Rule 85 makes clear that the Commission intended for the regulation to promote (as opposed to discourage) the voluntary settlement of private disputes. In adopting Rule 85, the Commission stated, "the purpose of the new settlement rules is to *encourage parties to reach agreement where possible*."¹² Acceptance of OCTA's position would severely undermine this objective. A party would not be inclined to bring a case before the Commission for resolution if, in doing so, it

⁹ See Staff Reply to OCTA's Opposition to PGE's Withdrawal of Complaint at p. 2; ORS § 757.285.

¹⁰ OCTA Opposition at p. 7.

¹¹ OCTA Opposition at p. 7.

¹² *Re Proposed Review of OAR Chapter 860, Divisions 11-15*, AR 252, Order No. 94-1127 (July 20, 1994) at *6 (emphasis added).

would effectively relinquish its ability to settle the dispute on its own. OCTA's argument -- that the Commission should start forcing parties to disclose the terms of confidential settlement in a manner not required by the courts -- is bad policy, unsupported by the law, and would discourage parties from seeking the Commission's help in resolving contested cases.

C. OCTA's Attempt to Gain Access to a Purely Private Settlement by Raising the Specter of a Nondiscrimination Claim Should Be Rejected.

OCTA's attempt to force Verizon and PGE to disclose the confidential terms of its settlement by claiming that "there are signs of possible discriminatory treatment"¹³ or that cable customers will somehow "feel the impact"¹⁴ is preposterous. OCTA does not even attempt to claim that it or its members are in a situation similar to either PGE or Verizon -- nor can they. The instant settlement resolves a dispute spanning many years and involving complex allegations of breach of contract, fraud, and unjust enrichment (to name a few). The structure of the agreement, and the terms and conditions contained therein, reflect this complexity and the bargained-for exchanges made between two parties, each of whom own poles on which the other is attached. The provisions of the settlement, which apply only to PGE and Verizon, cannot be singled out, as OCTA suggests, to support vague and unsupported allegations of *possible* discrimination against other parties not similarly positioned. OCTA must not be allowed to hijack this case and, by applying a provision that has no applicability to the instant dispute, gain access to confidential documents neither Verizon nor PGE is obligated to disclose.¹⁵

¹³ OCTA Opposition at p. 8.

¹⁴ OCTA Opposition at p. 9.

¹⁵ Verizon again notes that Joint Use Agreements are presumed to be just, fair and reasonable, and are not required to be filed, let alone approved, by the Commission.

DATED this 8th day of October, 2004.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I served a complete and true copy of the foregoing
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DATED this 8th day of October, 2004.



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