

March 29, 2006

VIA ELECTRONIC AND OVERNIGHT MAIL

Public Utility Commission of Oregon
Attn: Filing Center
550 Capital Street NW, Suite #215
Salem, Oregon 97308-2148

**Re: Charter Communications Holding Company, LLC, et al., v.
Central Lincoln People's Utility District – Case No. UM 1241**

Dear Sir/Madam:

Enclosed please find the original and one copy of Verizon Northwest Inc.'s Reply to Charter Communications Holding Company L.L.C.'s Cross Motion for Partial Summary Judgment for filing in the above-referenced proceeding. Please date stamp the copy and return it in the self-addressed Federal Express envelope provided. By telephone yesterday, Verizon requested the permission of Administrative Law Judge Christina Smith to file its Reply this morning, which will not prejudice any party to this proceeding.

Please contact me with any questions or concerns. Thank you for your assistance.

Sincerely,



Christopher S. Huther

cc: Service List

Enclosure

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

CHARTER COMMUNICATIONS HOLDING)
COMPANY, L.L.C., FALCON TELECABLE,)
L.P., FALCON CABLE SYSTEMS)
COMPANY II, L.P., and FALCON)
COMMUNITY VENTURES I.L.P.)
Complainants,)
v.)
CENTRAL LINCOLN PEOPLE’S UTILITY)
DISTRICT,)
Defendant.)

Case No. UM 1241

**VERIZON NORTHWEST INC.’S REPLY TO CHARTER
COMMUNICATIONS HOLDING COMPANY L.L.C.’S
CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT**

I. INTRODUCTION AND SUMMARY.

Intervenor Verizon Northwest Inc. (“Verizon”) supports Charter Communications Holding Company, L.L.C.’s (“Charter”) Cross Motion of for Partial Summary Judgment (“Motion”).¹ Charter’s Motion simply asks the Public Utility Commission of Oregon (“Commission”) to apply its prior holdings against Central Lincoln Public Utility District (“Central Lincoln”) in a recent proceeding (“UM 1087”),² which involved Verizon, to the virtually identical current dispute between Charter and Central Lincoln. In its Response supporting its Motion (“Response”),³ Charter illustrates that Central Lincoln sets out no concrete

¹ Before the Public Utility Commission of Oregon, Docket UM 1241, *Complainants’ Cross Motion for Partial Summary Judgment* (Mar. 16, 2006) at 2 (“Motion”).

² Before the Public Utility Commission of Oregon, In the Matter of Central Lincoln People’s Utility District vs. Verizon Northwest Inc. Petition for Removal of Pole Attachments, Docket UM 1087.

³ Before the Public Utility Commission of Oregon, Docket UM 1241, *Complainants’ Response in Opposition to ORCP 21 Motions of Defendant and in Support of Complainants’ Cross-Motion for Partial Summary Judgment* (Mar. 16, 2006) at 2 (“Response”).

basis on which Charter's claims differ materially from Verizon's claims in UM 1087. Instead, Central Lincoln incorrectly asserts that the Commission's UM 1087 Order (the "Order")⁴ is "irrelevant" to this proceeding, and asks that references to the Order be stricken from Charter's Complaint.⁵ Central Lincoln further asks that Charter's Complaint be stayed indefinitely pending the completion of the Commission's recently instituted pole attachment rulemaking proceeding.⁶

Verizon respectfully submits that it would be very harmful, both to the orderly processes of the Commission and to the parties who rely on the Commission's enforcement of its pole attachment rules, to proceed as Central Lincoln suggests by striking any reference to the Order in this proceeding. As the Commission and Administrative Law Judge Christina Smith are aware, the Order was issued after a full hearing and upon careful consideration, and resolves a number of issues that arise in pole attachment proceedings generally. Central Lincoln's position would require Charter, and potentially other parties (such as Verizon) that rely on this Commission's oversight of pole attachments, to reopen and relitigate matters already advisedly decided by the Commission, as if the Commission had never previously considered or dealt with these matters. Being forced to relitigate matters squarely decided by the Commission would greatly increase the burden on those parties following the Commission's rules and processes, irreparably delay relief from non-compliance with those rules, and preclude predictability and consistency in Oregon pole attachment agreements. Moreover, Central Lincoln would compound the problem of ignoring binding Commission decisions by asking that no action be taken on Charter's

⁴ Before the Public Utility Commission of Oregon, Docket UM 1087, *Order No. 50-042* (Jan. 19, 2005) ("Order").

⁵ Before the Public Utility Commission of Oregon, Docket UM 1241, *ORCP 21 Motions of Defendant Against Complainant's Complaint to Set Fair, Just, Reasonable and Nondiscriminatory Pole Attachment Rates and for Refunds of Overcharges, and Petition for Declaratory Ruling* (Feb. 28, 2006) at 2 ("ORCP 21 Motion").

⁶ Before the Public Utility Commission of Oregon, Docket AR 506, *In the Matter of the Rulemaking to Amend and Adopt Permanent Rules in OAR 860, Divisions 24 and 28, Regarding Pole Attachment Use and Safety* (March 10, 2006).

Complaint (and presumably any others that might be filed), until the Commission completes AR 506.

Central Lincoln's positions are contrary to law and sound policy. The Order provides reliable and well-reasoned guidelines that must be applied to implement current rules. Central Lincoln had a full and fair opportunity to litigate the issues raised in its Complaint against Verizon and adjudicated in the Order (which found that Central Lincoln had acted unreasonably by charging Verizon fees that were unjust and unfair),⁷ and has presented no basis on which the Order should be wholly ignored in this proceeding. As described briefly below, Central Lincoln's attempts to ignore the Order are not limited to this proceeding. Indeed, Central Lincoln refuses to comply with the Order even with respect to Verizon. The Commission must stand by its orders to ensure that entities like Central Lincoln conduct their business in full accord with the Commission's supervisory authority.

II. THERE IS NO BASIS FOR CENTRAL LINCOLN'S ASSERTION THAT THE ORDER IS IRRELEVANT TO THIS PROCEEDING.

Central Lincoln's position that the Order is irrelevant to Charter's Complaint is demonstrably false through a simple comparison of certain assertions made in the Complaint to decisions rendered in the Order:

- Count One states that Central Lincoln required application fees for attachments on its poles.⁸ The Order, addressing Verizon's claim against Central Lincoln, states that "application fees may not be recovered, and administrative charges related to processing new attachments should be allocated with the carrying charge."⁹
- Count Two alleges that Central Lincoln included customer and net income expenses in its annual rental rates.¹⁰ The Order holds that "[Central Lincoln]

⁷ Before the Public Utility Commission of Oregon, Docket UM 1241, *Complaint to Set Fair, Just and Reasonable and Non-Discriminatory Pole Attachment Rates and for Refunds of Overcharges, and Petition for Declaratory Ruling* (Jan. 26, 2006) ("Complaint").

⁸ Complaint at 12.

⁹ Order at 19-20.

¹⁰ Complaint at 13.

justifies its charge for... ‘net income’ as a ‘contribution to reserves for pole replacement’ on the basis that depreciation does not cover its expenses for the poles. However, the rules do not provide for that cost in the carrying charge. Nor do they provide for ‘customer expense.’”¹¹

- Count Three states that Central Lincoln charged rent for anchors and risers.¹² In the Order, the Commission held that “the parties should allocate costs based on actual usable space,” and expressly excluded anchors and risers from the Commission’s ‘usable space’ definition.¹³
- Count Four alleges that Central Lincoln rearranged Charter’s pole attachments for its own purposes and then charged Charter.¹⁴ In the Order, the Commission excluded rearrangement fees from its carrying charge formula: “[c]osts that do not fall into one of the categories set out in the carrying charge may not be added into the rental rate.”¹⁵
- Count Five claims that Verizon receives better rates from Central Lincoln as a result of the Order, and that this difference results in discriminatory treatment.¹⁶

That many of the issues raised in Charter’s Complaint were directly addressed in UM 1087 is obvious from this simple comparison. Moreover, Charter’s Complaint cannot be decided without reference to UM 1087 and the resulting Order, since it expressly claims discrimination based on the Order’s findings with respect to Verizon. Central Lincoln’s request that the Commission simply ignore the matters at issue in UM 1087 and the regulating Order is thus plainly inappropriate.

III. CHARTER IS ENTITLED TO JUDGMENT ON THE CLAIMS IDENTIFIED IN ITS RESPONSE.

The Commission must grant summary judgment where there is no genuine issue of material fact.¹⁷ Charter’s Response establishes that Central Lincoln raises no genuine issues of

¹¹ Order at 15-16.

¹² Complaint at 14.

¹³ Order at 14 (internal citations omitted).

¹⁴ Complaint at 15-16.

¹⁵ Order at 14 (stating “[t]he carrying charge is ‘the percentage of operation, maintenance, administrative, general and depreciation expenses, taxes, and money costs attributable to the facilities used by the licensee’” quoting OAR 860-028-0220(2)(a)).

¹⁶ Complaint at 17.

material fact or matters not previously litigated in UM 1087, and that the issues Central Lincoln now raises satisfy the five factor test used by the Oregon Supreme Court to preclude an issue from litigation.¹⁸ Accordingly, Charter’s Motion should be granted.

Central Lincoln initiated UM 1087. The well-developed record in that proceeding confirms that Central Lincoln had a full and fair opportunity to be heard, and also establishes that the issues raised here – which are, again, identical to those raised in UM 1087 – were decided on the merits in the previous case.¹⁹ Having initiated UM 1087, Central Lincoln now argues that the Order lacks value as binding precedent and should be irrelevant to the adjudication of this dispute. Administrative orders, however, are given preclusive effect when the five-factor test set out by the Supreme Court is met, as it is here.²⁰ Preclusive treatment by the Commission of its orders in appropriate circumstances also serves its legislative mandate of ensuring that “safe and reliable utility services are provided to consumers at just and reasonable rates while fostering the use of competitive markets to achieve these objectives.”²¹

UM 1087 was adjudicated subject to Oregon’s “comprehensive” administrative rules, under “trustworthy” and “fair” procedures and before a neutral decisionmaker.²² Denial of Charter’s Response would risk stigmatizing and weakening future orders and relegating the

¹⁷ Before the Public Utility Commission of Oregon, Docket UM 1241, *Complaints’ Cross Motion for Partial Summary Judgment* (Mar. 16, 2006) at 2, citing *Jones v. General Motors Corp.*, 325 Or. 404 (1997).

¹⁸ Response at 6. These factors are: (1) the issue in the initial proceeding is identical to the issue sought to be raised in the second matter; (2) the issue actually was litigated and was essential to a final decision on the merits; (3) the party sought to be precluded has had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which this court will give preclusive effect. *Nelson v Emerald People’s Utility Dist.*, 318 Ore. 99, 104, 862 P.2d 1293 (1993).

¹⁹ See generally the Order.

²⁰ Administrative court decisions are granted precedential authority in Oregon when: (1) the administrative forum maintains procedures that are sufficiently formal and comprehensive; (2) the proceedings are ‘trustworthy’; (3) the application of issue preclusion would facilitate prompt, orderly and fair problem resolution; and (4) the same quality of proceedings and the opportunity to litigate is present in both proceedings. *Nelson*, 318 Ore. at 104, 862 P.2d at 1293.

²¹ The Commission’s legislative mandate is available at http://www.puc.state.or.us/PUC/commission/operating_guidelines.shtml.

²² *Supra* note 19.

Commission to repeated adjudication of the same pole attachment disputes. In contrast, proper application of principles of issue preclusion, as set out in Charter's Response, would promote the efficient and effective adjudication of pole attachment disputes, and prevent unnecessary expense, confusion and delay for Oregon utilities and consumers.

IV. EVEN IF THE ORDER IS NOT PRECLUSIVE, ITS METHODOLOGY IS APPLICABLE.

Central Lincoln argues vaguely that Charter's claims are distinguishable because time has elapsed since the Order was issued, but offers no evidence or specific argumentation to support this claim. Should the Commission nonetheless decline to hold that the Order precludes Central Lincoln from relitigating the issues identified in Charter's Response, which it should not do, the Commission must still apply the principles of the Order to ensure that just, fair and reasonable results are reached in this case.

The Order provides sound guidance to pole owners to assess relevant costs and determine what charges they can pass through to pole attachers. Thus, even if the Commission decides that the actual costs determined in the Order cannot simply be adopted in this case because of specific facts peculiar to Charter's situation, it must rely on the cost methodology utilized in that Order, which is relied upon by Oregon operators as providing parameters for just, fair and reasonable attachment rates.

V. CENTRAL LINCOLN CANNOT BE PERMITTED TO IGNORE THE ORDER.

Central Lincoln's apparent displeasure with the Order does not provide sufficient grounds for Central Lincoln to simply ignore it in proceedings presenting similar or identical issues. Indeed, Verizon is concerned that Central Lincoln's refusal to comply with the Order extends not only to its legal arguments in this proceeding, but also to its dealings with Verizon that are governed by that Order. Verizon recently received correspondence from Central Lincoln in

which it refuses to recognize the Order's effect on its pole attachment contracts with Verizon and maintains pricing formulas that are inconsistent with the Order.²³

Thus, Central Lincoln's request that the Order be ignored in this proceeding becomes more than mere legal argumentation: it reflects a refusal to abide by the Commission's decisions. To protect the integrity of its own orders, as well as the expectations of parties such as Verizon that litigate before it, the Commission must prevent Central Lincoln from ignoring the Order and engaging in the type of results-shopping that issue preclusion is designed to prevent.

Central Lincoln's suggestion that the Commission suspend litigation arising from pole attachment disputes until conclusion of scheduled rulemaking proceedings also must be rejected. It is well-settled that agency rulings of general applicability can be announced in administrative orders as well as adopted through rulemaking procedures.²⁴ The recently initiated formal rulemaking process will provide additional guidance to pole owners and attachers in Oregon, and will consider input from interested parties such as Central Lincoln. However, the Order remains binding law until changed in the rulemaking or otherwise, and the Commission must rely on its rulings in that case to further the predictability and consistency of its regulatory process.

Central Lincoln is, of course, free to attempt to reshape the pole attachment pricing methodology in the rulemaking process, but it cannot use the pendency of that process to escape its responsibilities under the Commission's existing rules and orders. No changes have yet occurred as a result of the scheduled rulemaking, and the guidelines set forth in the Order continue to apply to Central Lincoln. Therefore, the Commission must reject Central Lincoln's attempt to thwart the application of relevant rules, as these rules are designed specifically to protect entities against the type of behavior engaged in by Central Lincoln.

²³ Correspondence from Denise Estep (Joint Pole Administrator) to Susan Burke (Spec. Netwk. Engr.) dated Feb. 1, 2006, attached hereto as Exhibit A.

²⁴ *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

VI. CONCLUSION.

For the foregoing reasons, Verizon respectfully submits that Charter's Cross Motion for Partial Summary Judgment should be granted.



Christopher S. Huther
Kristin Cleary
Preston Gates Ellis &
Rouvelas Meeds LLP
1735 New York Avenue, N.W., Suite 500
Washington, D.C. 20006
Tel: (202) 628-1700
Fax: (202) 331-1024

Richard G. Stewart
Verizon
600 Hidden Ridge
Mailcode: HQEO3J28
Irving, Texas 75038
Tel: (972) 718-7713
Fax: (972) 719-2146

DATED: March 29, 2005

The

PUD

General Office • 2129 North Coast Highway • P.O. Box 1126 • Newport, OR 97365 • (541) 265-3211 • FAX: (541) 265-5208

February 1, 2006

Ms. Susan Burke, Spec-Ntwk Engr.
Verizon NW, Incorporated
1800 41st
Everett, Washington 98206

CERTIFIED MAIL: 7004 0750 002 4263 2109

Dear Licensee:

This letter is to notify your company of several changes affecting the 2006 billing date of annual pole attachment rental and application fee charges for new pole attachments for the current year.

The Oregon Public Utility Commission, with the assistance of the Oregon Joint Use Association is currently in the process of revising the Oregon Administrative Rules of Division 24, Construction and Safety Standards and Division 28, Pole and Conduit Attachments. The final rulings, when adopted may have an impact on how Central Lincoln PUD presently calculates annual rental fees as well as application fees for new attachments. Based upon these circumstances and until such time that these rules are formally adopted by the OPUC; the District will make the following changes:

- 1 Annual pole rental statements will be issued no earlier than May 1, 2006.
- 2 Pole attachment counts were captured on January 3, 2006 and will be the basis for calculation of the rental rate for the 2006 statement. A detailed report of your attachments on Central Lincoln PUD-owned poles will be issued to your company at least one month prior to the annual billing for your review.

Exhibit A

- 3 With the exception of large attachment projects and fees associated for expediting the request*, all application fees for attachments will be tabulated and recorded for the calendar year of 2006 during the rule-making period. These tabulated fees shall be billed in accordance of the rules adopted by the OPUC at the time of final adoption.
- 4 All attachment application fees billed since January 1, 2006 to present will be reversed and tabulated for future billing as defined in item 3 above.

The application process will remain unchanged with the exception of the above listed items. Electronic notification of new attachments and removals via NJUNS will continue to be the preferred method for processing requests. Load data forms will be required for all new attachments.

Should you have any questions regarding these changes, please contact this office.

Sincerely,



Denise Estep
Joint Pole Administrator

*Joint Pole Occupancy License Agreement; Section 3.1.3, Large Attachment Projects.

CERTIFICATE OF SERVICE

I hereby certify that I have this 29th day of March 2006, served Verizon Northwest Inc.'s Reply to Charter Communications Holding Company L.L.C.'s Cross Motion for Partial Summary Judgment upon all the following parties of record in this proceeding by electronic and US Mail:

Paul Davis
Manager
PO Box 1126
Newport, Oregon 97365-0090

Scott Thompson
Cole Rayid & Braverman LLP
1919 Pennsylvania Avenue, NW Ste 200
Washington, D.C. 20006

Michael T. Weirich
Assistant Attorney General
Department of Justice
Regulated Utility and Business Section
1162 Court Street NE
Salem, Oregon 97301-4096

Peter Gintner
MacPherson, Gintner, Gordan and Diaz
PO Box 1270
Newport, Oregon 97365

Brooks Harlow
Miller Nash LLP
601 Union Street, Ste. 440
Seattle, Washington 98101-2352

Barbara Halle
Portland General Electric
Rates & Regulatory Affairs
121 SW Salmon Street
1 WTC0702
Portland, Oregon 97204

Bob Sipler
Oregon Public Utility Commission
PO Box 2148
Salem, Oregon 97308-2149

Public Utility Commission of Oregon
Attn: Filing Center
550 Capitol St NE #215
Salem OR 97308-2148

(served via overnight mail)



Rachael L. Cotner