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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

CHARTER COMMUNICATIONS HOLDING  
COMPANY, LLC.; 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

**ORCP 21 MOTIONS OF DEFENDANT  
AGAINST COMPLAINANT’S  
COMPLAINT TO SET FAIR, JUST,  
REASONABLE AND NON-  
DISCRIMINATORY POLE  
ATTACHMENT RATES AND FOR  
REFUNDS OF OVERCHARGES, AND  
PETITION FOR DECLARATORY  
RULING**

Pursuant to ORCP 21 and OAR 860-011-0000(3), Defendant, Central Lincoln People’s Utility District, moves the Commission for an order striking: (a) certain allegations in paragraphs 12 through 102 of the Complaint, all as designated in Exhibit 1 attached hereto, and Charter’s Exhibit 5 attached hereto, and by this reference incorporated. This Motion is based on the records and files herein and the following Points and Authorities.

**INTRODUCTORY POINTS AND AUTHORITIES**

OAR 860-011-0000(3) provides:

(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.

There are no rules in Chapter 860 governing the level of specificity or permissible allegations in pleadings. Therefore, a pleading may be moved against on the grounds stated in ORCP 21.

ORCP 21E provides, in part:

1 “Upon motion made by a party\*\*\* the court may order stricken: (1) any sham, frivolous, or  
2 irrelevant pleading or defense or any pleading containing more than one claim or defense not  
3 separately stated; (2) any insufficient defense or any sham, *frivolous, irrelevant, or redundant*  
4 matter inserted in a pleading”.

5 Pleadings must also comply with ORCP 18, which provides, in pertinent part,:

6  
7 **CLAIMS FOR RELIEF.** A pleading which asserts a claim for relief, whether an  
original claim, counterclaim, cross-claim, or third party claim, shall contain:

8 **A** A plain and concise statement of the ultimate facts constituting a claim for relief  
without unnecessary repetition.

9 **B** A demand of the relief which the party claims; if recovery of money or damages is  
10 demanded, the amount thereof shall be stated; relief in the alternative or of several  
different types may be demanded.

11 As explained in more detail below, the Complaint filed herein by Complainant Charter  
12 Communications Holding Company, LLC, Falcon Telecable, L.P., Falcon Cable Systems  
13 Company II, L.P., and Falcon Community Ventures I, L.P. contains substantial matter  
14 other than “[a] plain and concise statement of the ultimate facts constituting a claim for  
relief;” therefore, it is subject to an appropriate motion.

15 **ORCP 21 MOTION TO STRIKE CERTAIN PORTION’S OF CHARTER’S**  
16 **COMPLAINT**

17 One of the purposes of a motion to strike is to narrow the issues and make discovery  
18 simpler and less expensive. The allegations Charter brings up in its complaint are largely  
19 irrelevant to this proceeding before the Commission, as well as being frivolous and redundant.  
20 CLPUD is filing this motion to clarify the issues involved, save the time and money of all parties  
21 involved (including the public), shorten the proceedings, and further the efficient administration  
22 of justice.

23 Under the Oregon Revised Statutes, the Commission has the authority to set “just, fair  
24 and reasonable” rates pursuant to ORS § 756.040, § 759.655 and § 759.660. The Commission  
25 also has the authority to “regulate in the public interest the rates, terms and conditions for  
26 attachments.” § 759.650. After a hearing, the Commission “shall determine the just and

1 reasonable rates, terms and conditions *thereafter* to be observed and in force and shall fix the  
2 same by order.” § 759.660(1). Nowhere, however, in the Oregon Revised Statutes or the Oregon  
3 Administrative Rules, is the Commission authorized to take *remedial* action and award refunds  
4 to entities that believe that they are being charged too much rent on the poles they are attached  
5 to. The statute’s use of the word “thereafter” makes it clear that the Commission is authorized to  
6 prospectively set rates, not to retroactively issue refunds, and Charter’s complaint should be  
7 conformed to reflect that fact. If the Commission was to begin issuing such refunds despite such  
8 a lack of authority, it could be faced with numerous refund requests from pole occupiers,  
9 something the statute was logically written to avoid. The Commission does have the authority,  
10 however, to set just, fair and reasonable rental rates. Therefore, Charter’s complaint should be  
11 narrowed down to allegations of ultimate facts relevant to a request for the Commission to  
12 *prospectively* establish reasonable rates. Narrowing Charter’s complaint down to a request for  
13 the Commission to set reasonable rates, terms and conditions would allow Charter to present its  
14 complaint, clarify the issues involved, allow the Commission to act within its authority, present  
15 the issues the utility commission statutes are meant to address and further the interests of  
16 everyone involved by saving money, time and energy by shortening the proceedings. The  
17 Commission should strike all unnecessary allegations that do not constitute ultimate facts  
18 relevant to setting just, fair and reasonable rates as irrelevant, frivolous, redundant, sham  
19 pleadings or outside the Commission’s authority. The Commission should also strike paragraphs  
20 that repeat allegations already made in previous paragraphs in the complaint, and issues that have  
21 already been decided between the parties, such as processing permits and attaching to poles, as  
22 redundant and a waste of time. Paragraphs that contain such irrelevant, frivolous and redundant  
23 material include 15, 16, 17, 18, 19, 21, 34, 37, 43, 45, 45, 48, 49, 51, 53, 54, 55, 56, 58, 59, 60,  
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1 61, 63, 65, 66, 67, 74, 77, 82, 83, 84, 85, 86, 89, 90, 91, 92, 93, 94, 97, 98, 99, 100, 102 and  
2 Exhibit 5. Striking all of these needless allegations would be the fairest and most logical way for  
3 the parties to present their arguments and for the Commission to make its decision. It would also  
4 be more efficient and cost effective, while still preserving Charter's right to have this  
5 Commission set reasonable rates.  
6

7 Charter's complaint also contains requests for the Commission to grant it the same pole  
8 attachment rental rates that Verizon was granted in *Central Lincoln People's Util. Dist. v.*  
9 *Verizon Northwest, Inc.*, Order No. 05-042, 2005 Ore. PUC Lexis 36 (Jan. 19, 2005) ("*Central*  
10 *Lincoln I*"); Order No. 05-583, 2005 Ore. PUC Lexis 241 (May 16, 2005) ("*Central Lincoln II*");  
11 and Order No. 05-981, 2005 Ore. PUC Lexis 446 (Sept. 7, 2005) ("*Central Lincoln III*").  
12 However, the Commission noted in *Central Lincoln People's Util. Dist. v. Verizon Northwest,*  
13 *Inc.*, Order No. 05-981, 2005 Ore. PUC Lexis 446, \*8 (Sept. 7, 2005) that ORS § 757.285 "states  
14 that pole attachment contracts are presumptively just, fair and reasonable, unless the Commission  
15 finds otherwise after a complaint and a hearing. Under this provision, new terms do not  
16 necessarily automatically apply to other parties." It is irrelevant what happened between Verizon  
17 and Central Lincoln in their completely separate dispute. The Commission refused to decide the  
18 precedential effect of these decisions. *Central Lincoln III*, 2005 Ore. PUC Lexis 446 at \*6-9. All  
19 of the orders specifically applied to Verizon and Central Lincoln alone. *Central Lincoln II*, 2005  
20 Ore. PUC Lexis 241 at \*6. The Verizon cases have nothing to do with Charter's allegations that  
21 its agreement with Central Lincoln is unjust, unfair, and unreasonable; that Central Lincoln has  
22 imposed unlawful application fees; or that Central Lincoln has refused to allow Charter to attach  
23 or refused to process Charter's permit applications.  
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26 Rental rates change over time as the cost maintaining poles change. What rate one pole

1 occupier was charged in a previous year is not determinative of what rate another pole occupier  
2 should be charged in future years. Any specific rental rate deemed to have been reasonable  
3 between Verizon and CLPUD in prior year should not necessarily apply to any contract between  
4 Charter and CLPUD. Because specific dollar amounts change over time, a determination of a  
5 fixed rate in one Commission order that applied to two specific parties cannot be haphazardly  
6 applied to every other party that has a pole contract with CLPUD. All rates are to be determined  
7 by the Commission, specific to each party that comes before it in a hearing. The Commission  
8 cannot establish a new agreement until “after hearing had upon complaint by a licensee...that the  
9 rates, terms or conditions demanded, executed, charged or collected in connection with  
10 attachments or availability are unjust or unreasonable...” *Central Lincoln II*, 2005 Ore. PUC  
11 Lexis 241 at \*3-4. Therefore, all allegations that base Charter’s relief on the Verizon cases, and  
12 rental rates based on those cases, should be stricken from the complaint as irrelevant, frivolous or  
13 sham pleadings. Those allegations that should be stricken are in Paragraphs 12, 22, 23, 24, 25,  
14 26, 27, 28, 37, 44, 71, 72, 73, 80, 81, 85, 95, 101 and Exhibit 5.

17 Finally, the Commission has acknowledged the fact that there are gaps in the  
18 administrative rules dealing with pole contact issues. *Central Lincoln People’s Util. Dist. v.*  
19 *Verizon Northwest, Inc.*, Order No. 05-042, 2005 Ore. PUC Lexis 36, \*46-47. (Jan. 19, 2005).  
20 The Commission stated that they “anticipate opening a rulemaking docket after the close of [the  
21 *Verizon* cases] to clarify our rules relating to how contractual disputes should be brought before  
22 the Commission, how costs of such disputes should be allocated, the role of the JUA, and other  
23 issues to better implement ORS 757.270 through 757.290.” *Central Lincoln I*, 2005 Ore. PUC  
24 Lexis at \*47. The Commission has not yet released the results of the new rulemaking process.  
25 Any case such as this one that concerns rules subject to possible significant revisions should not  
26

1 be heard by the Commission until the new rules are released, so that it is clear what rules the  
2 parties have to abide by. If the case was heard right now, it is unclear by what rules the facts  
3 would be judged, and any rates that were determined under the old rules would become quickly  
4 out of date. This would be a waste of time and money for everyone involved, including the  
5 public. Since the very facts that Charter argues are subject to imminent revisions, the  
6 Commission should wait to determine any new rental rates between Charter and CLPUD until  
7 there are concrete rules to settle such a dispute. Therefore any hearing on this motion should be  
8 held in abeyance until the Commission announces the results of its rulemaking process.  
9

10  
11 **CONCLUSION**

12 For the foregoing reasons, Defendant respectfully requests that the Commission strike the  
13 enumerated allegations of the Complainant's Complaint as set-forth above.

14  
15 DATED this 24 day of February, 2006.

16 MACPHERSON, GINTNER, GORDON & DIAZ

17  
18 By \_\_\_\_\_  
19 Richard Diaz, OSB # 86031  
20 Of Attorneys for Central Lincoln People's Utility  
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COMMUNITY VENTURES I, L.P.

No. UM 1241

Complainants,

v.

CENTRAL LINCOLN PEOPLE’S UTILITY  
DISTRICT,

Defendant.

**CERTIFICATE OF SERVICE**

I hereby certify that true and correct copies of the following pleading

- ORCP 21 Motion of Defendant Against Complainant’s Complaint to Set Fair, Just, Reasonable, and Non-Discriminatory Attachment Rates and for Refunds of Overcharges, and Petition for Declaratory Ruling

were served via e-mail transmission, and by FedEx in sealed envelopes upon the following:

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DATED this 24 day of February, 2006.

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Defendant.

**AMENDED CERTIFICATE OF SERVICE**

I hereby certify that true and correct copies of the following pleading

- ORCP 21 Motion of Defendant Against Complainant’s Complaint to Set Fair, Just, Reasonable, and Non-Discriminatory Attachment Rates and for Refunds of Overcharges, and Petition for Declaratory Ruling

were sent February 24, 2005 via first class mail in sealed envelopes, and sent via email on February 28, 2005, upon the following:

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- ORCP 21 Motion of Defendant Against Complainant's Complaint to Set Fair, Just, Reasonable, and Non-Discriminatory Attachment Rates and for Refunds of Overcharges, and Petition for Declaratory Ruling

were sent February 28, 2005 via first class mail in sealed envelopes, and sent via email on February 28, 2005, upon the following Intervenors:

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2  
3 DATED this 28 day of February, 2006.

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