

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

DOCKET NO. UM 1191

QWEST CORPORATION,)	
)	
Complainant,)	ANSWER
)	(Unjust, Unfair and Unreasonable
vs.)	Pole Attachment Contract Term
)	Under ORS 756.500 and 757.279
CENTRAL ELECTRIC COOPERATIVE,)	
INC.,)	
)	EXPEDITED CONSIDERATION
Defendant.)	REQUESTED
_____)	

For its Answer, Defendant, Central Electric Cooperative (“CEC”) hereby alleges as follows:

1.

Admits Paragraphs 1, 2, 3, 4, 5, 6, 7, and 19 and denies each and every remaining allegation contained in Complainant’s Complaint.

AFFIRMATIVE DEFENSES AND COUNTERCLAIM

For its affirmative defense and counterclaim, CEC alleges as follows:

2.

In 1949, Qwest and CEC entered into a written joint pole agreement whereby CEC allowed Qwest to attach to CEC’s poles conditioned upon Qwest notification, obtaining a permit, and payment for such attachments.

3.

During the course of the 1949 agreement, Qwest had a long and extensive history of bootleg attachments on CEC's poles. Bootleg attachments were those attachments for which Qwest had received no permission for the attachment and for which Qwest was paying no rent despite the requirements of the 1949 contract.

4.

In the late 1990's when CEC performed an audit of its entire pole system, hundreds of bootleg contacts made by Qwest were discovered. When Qwest refused to pay for those bootleg contacts as required by the 1949 agreement, suit was instituted against Qwest for that payment.

5.

In May of 2001, a settlement of that lawsuit was reached. As a condition of that settlement, Qwest had until December 31, 2003 within which to negotiate and obtain a new joint pole agreement with CEC. As a portion of that settlement agreement both Qwest and CEC acknowledge that the 1949 agreement was fully completely and forever terminated on the effective date of the settlement, May 10, 2001.

6.

As a condition of the settlement agreement, a joint pole audit was performed by both CEC and Qwest to identify any new bootlegs that had occurred on behalf of Qwest during the pendency of the lawsuit. In the summer of 2004, 627 additional bootleg contacts by Qwest were discovered. Qwest initially protested but finally in November of 2004, made the payment for these additional bootlegs pursuant to the original settlement agreement.

7.

As of December 31, 2003, Qwest had not honored its obligation to negotiate and obtain a new joint pole agreement. In fact, Qwest had failed entirely to even propose a joint pole agreement during the two years following the settlement agreement mentioned above. When CEC discovered that Qwest had breached its obligation to obtain a joint pole agreement, CEC proposed its own joint pole agreement to Qwest in July of 2004.

8.

Following Qwest's receipt of the new joint pole agreement in July of 2004, Qwest took absolutely no action to respond to CEC's request for a new joint pole agreement. Qwest did not acknowledge its receipt of the agreement even though it, in fact, now has acknowledged it did receive the agreement in July of 2004. Qwest did not contact CEC and did not make any attempt to negotiate a new joint pole agreement for over five months following its receipt of that joint pole agreement.

9.

During December of 2004 into early January 2005, CEC was negotiating joint pole agreements with other companies who had attachments to CEC's poles. During this process, CEC made certain revisions to its joint pole agreement so it would have one uniform pole agreement for all companies attaching to CEC's poles. That revised agreement was sent to all parties including Qwest. During this late December 2004 timeframe, Qwest sent letters through its attorneys arguing that Qwest was challenging in the Oregon Court of Appeals the legality of PUC's rules and regulations concerning penalties for bootleg contacts. One of Qwest's complaints was the use of CEC of the PUC

rules and regulations for penalties as a portion of the joint pole agreement. Qwest cited its Court of Appeals challenge to the PUC rules and regulations that had been pending for nearly a year but appears to be stalled in the Court of Appeals. Qwest used that Court of Appeals challenge as an additional reason not to negotiate in good faith its joint pole agreement.

10.

On January 19, 2005, the PUC issued an Order in Docket Number UM 1087. That Order has an impact on joint pole agreements in Oregon. Certain provisions of that Order impact the inspection fees and other fees charged in CEC's joint pole agreement. CEC did not obtain a copy of that Order until the week of January 24, 2005. During the week of January 24, 2005, CEC's chief operating officer contacted the PUC to inquire regarding the impact of certain provisions of that Order on CEC's joint pole agreement.

11.

CEC's general counsel was in depositions and court hearings throughout the week of January 24, 2005. On January 28, 2005, upon learning of the PUC Order in UM 1087 and the contact between CEC and the PUC concerning that Order, CEC's general counsel began notifying companies who contact CEC's poles that certain revisions to the fee and rate schedule may be made to CEC's joint pole agreement in light of the PUC Order. One of the companies being contacted on January 28, 2005 was Qwest.

12.

Despite Qwest's failure for nearly three years to honor its obligation under the settlement agreement to negotiate a new joint pole agreement, and despite Qwest's refusal to even respond to the initial joint pole agreement proposed by CEC, Qwest

precipitously filed the complaint in this case in an attempt, in bad faith, to extort a negotiating advantage against CEC.

13.

Quest is improperly utilizing the PUC through the complaint process to attempt to extort an unfair negotiating advantage with CEC on a joint pole agreement. No other companies negotiating joint pole agreements with CEC have attempted such bad faith conduct.

14.

CEC has now notified Qwest that CEC believes this complaint has been filed in bad faith and that Qwest should withdraw the complaint. Qwest has refused to withdraw this complaint.

15.

Qwest acknowledges that, in light of the PUC ruling just a few days prior, Qwest itself has made revisions to its proposed joint pole agreement. Qwest is attempting to prevent CEC from making its own revisions to its joint pole agreement in light of the PUC Order in UM 1087 by filing this complaint and asking the PUC to take over the negotiations between these two companies. Such action by Qwest, given its long history of bootleg contacts and refusal to negotiate a joint pole agreement, can only be seen as further demonstration of Qwest's bad faith.

16.

The complaint of Qwest in this case should be dismissed and Qwest instructed to negotiate this time in good faith for a joint pole agreement.

WHEREFORE, Defendant CEC prays as follows:

1. That Complainant take nothing by reason of his complaint;
2. That Complainant's complaint be dismissed;
3. That Complainant be instructed by the PUC to negotiate a new pole agreement in good faith.

DATED this 1st day of February, 2005.

FRANCIS HANSEN & MARTIN, LLP

Martin E. Hansen, OSB #80052
Of Attorneys for Plaintiff

CERTIFICATE OF TRUE COPY

I hereby certify that the foregoing **ANSWER** is a true, exact and full copy of the original thereof.

DATED: February 1, 2005

Martin E. Hansen, OSB #80052
Of Attorneys for Defendant
Central Electric Cooperative, Inc.

CERTIFICATE OF MAILING

I certify that I served the foregoing document(s) by depositing a true, full and exact copy thereof in the United States Post Office at Bend, Oregon, on February 1, 2005, enclosed in a sealed envelope with postage thereon, addressed to:

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