BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

DOCKET NO. UM 1191

QWEST CORPORATION Complainant, v. CENTRAL ELECTRIC COOPERATIVE, INC., Defendant.	QWEST'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS COMPLAINT AND REPLY IN SUPPORT OF MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM

I. INTRODUCTION

Defendant's Motion to Dismiss Qwest's Complaint (the "Motion") fails for several reasons. First, Defendant did not file the Motion within the timeframe established by the Commission's rules. Therefore, the Motion is untimely. The Commission should deny it on that basis alone.

Additionally, the Motion attacks the *validity* of Qwest's allegations, but those allegations are assumed to be true for purposes of a motion to dismiss. Accordingly, Defendants' arguments are outside the scope of a motion to dismiss and should be denied.

Finally, the Motion is without merit. Qwest has alleged facts that show that Defendant presented two versions of a joint use agreement to Qwest and demanded that Qwest sign one of the versions. Those facts by themselves are sufficient to state a claim under ORS 757.279 that Defendant "demanded" terms for a joint use agreement between the parties. Additionally, the evidence presented with the Motion, along with the substantial paper trail that Qwest submitted with its Reply to Defendant's Affirmative Defenses ("Reply"), demonstrates that Defendant has refused to negotiate in good faith despite Qwest's repeated requests, that Defendant's obstinacy forced Qwest to file its Complaint, and that Defendant has engaged in a pattern of terminating other pole occupants' joint use agreements and refusing to negotiate new terms with those

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occupants. Considering all the circumstances, it is clear that Defendant forced Qwest to involve the Commission in this dispute and cannot now complain that it wants to negotiate with Qwest. The Commission should deny Defendant's Motion in its entirety and, for the same reasons, grant Qwest's Motion to Dismiss Defendant's "counterclaim" that Qwest failed to negotiate in good faith.

II. ARGUMENT

A. Defendant's Motion is Untimely

Under OAR 860-013-0050(3)(a), a motion against a complaint, such as a motion to dismiss for failure to state a claim, must be filed within 20 days of service of the complaint. The Commission served the Complaint on Defendant on February 1, 2005. (Nusbaum Decl., Exh. 1.) Therefore, any motion against the Complaint was due no later than February 22, 2005. Defendant filed the Motion on February 24, 2005. (Nusbaum Decl., Exh. 2.) Because Defendant failed to file the Motion within the time established by the Commission's rules, the Motion is untimely and must be denied.

B. Defendant's Arguments Are Outside the Scope of a Motion to Dismiss

Although the lateness of the Motion is a sufficient basis by itself for the Commission to deny the Motion, the Motion also fails for the independent reason that it is based on arguments that are outside the scope of a motion to dismiss.

In deciding a motion to dismiss for failure to state a claim, the Commission must assume the truth of all allegations in the pleading, as well as any inferences that may be drawn from them, and view the allegations and inferences in the light most favorable to the nonmoving party. *L.H. Morris, Elec., Inc. v. Hyundai Semiconductor America*, 187 Or App 32, 35, 66 P3d 509, 510 (2003). In other words, the plaintiff must receive the benefit of all favorable inferences that may be drawn from the facts alleged. *Granewich v. Harding*, 329 Or 47, 51, 985 P2d 788, 791

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(1999). Dismissal is "only proper if the complaint shows on its face that plaintiff cannot prevail." *H&H Electric, Inc. v. City of Portland*, 92 Or App 466, 468, 758 P2d 434, 435 (1988).

Instead of demonstrating how Qwest's allegations, taken as true, fail to state a claim, Defendant argues that Qwest's Complaint is premature because Defendant has negotiated and continues to negotiate with Qwest. In support, Defendant claims that Qwest's allegations – including the allegation that Defendant demanded unjust and unreasonable terms – are *not true*. Moreover, by citing its February 2005 proposed new agreement, Defendant relies on alleged facts that are outside the pleadings. The purpose of a motion to dismiss, however, is not to test the truth of the allegations in the complaint or to consider facts outside the complaint. The inquiry is limited to whether the allegations in the complaint, which are assumed to be true, are sufficient to state a cause of action.

In this case, Qwest alleges that Defendant demanded that Qwest accept unjust and unreasonable joint use terms and sets forth ultimate facts that support that claim. Compl., ¶ 15. The Commission is required to assume that the allegations are true and give Qwest the benefit of all inferences that may be drawn from the allegations. Therefore, Qwest has stated a claim under ORS 757.279 that Defendant demanded unjust and unreasonable joint use terms, and all of Defendant's assertions about the supposed negotiations between the parties are irrelevant to and outside the scope of a motion to dismiss for failure to state a claim. The Commission should deny Defendant's Motion on the ground that the facts in Qwest's Complaint are sufficient to state a claim for relief.

C. Defendant's Motion is Meritless

Although the Commission need not consider Defendant's irrelevant allegations regarding its supposed efforts to negotiate with Qwest, Qwest responds herein to Defendant's contentions for several reasons. First, the Commission may be concerned about the possibility that parties will file complaints with the Commission prematurely, before they have exhausted the alternatives to Commission resolution. In this case, as demonstrated below, Qwest's Complaint

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was not premature because Defendant effectively forced Qwest to file the Complaint to preserve Qwest's rights. Second, Defendant misrepresents the facts and law, and Qwest is compelled to correct Defendant's errors and mischaracterizations.

1. Defendant's Motion is Based on a Standard That Does Not Exist in the Statute

Defendant argues that it is premature to file a complaint under ORS 757.279 where "negotiation is ongoing and there is no agreement or any negotiated rates, terms or conditions for the Commission to review." (Def.'s Mot. at 2.) However, this argument has no basis in the statute that governs review of Qwest's Complaint.

Qwest brought this action under ORS 757.279, which provides in pertinent part:

> Whenever the Public Utility Commission of Oregon finds, after hearing had upon complaint by a licensee, a public utility, a telecommunications utility or a consumer-owned utility that the rates, terms or conditions *demanded*, exacted, charged or collected in connection with attachments or availability of surplus space for such attachments are unjust or unreasonable . . . *the commission shall determine* the just and reasonable rates, terms and conditions thereafter to be observed and in force and shall fix the same by order. (Emphasis added.)

With its motion, the Defendant is asking the Commission to interpret ORS 757.279 as requiring the parties to agree on the terms of a new contract before one of them may file a complaint to set the terms of the contract. But this interpretation is flatly contradicted by the text and context of the statute. The statute clearly states that a party may file a complaint if the other party has "demanded" unjust or unreasonable rates, as opposed to "exacted, charged or collected." A demand, by definition, occurs before the parties reach an agreement, whereas an "exaction," "charge" or effort to "collect" all address situations where a contract is already in place. "Demand" unjust and unreasonable rates is precisely what Qwest is alleging that Defendant did here, and thus the basis for Qwest's Complaint falls squarely within the statute's plain meaning. To read the statute otherwise, as Defendant suggests, would render use of the word "demanded" utterly meaningless. This tortured reading of the statute should be rejected.

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Further, Defendant's interpretation would lead to absurd results. According to Defendant, before a pole occupant can file a complaint based on a pole owner's "demand" of new unreasonable terms, the pole occupant must first agree to be bound by those terms. That interpretation would put the pole occupant in the untenable position of first agreeing to terms that it believes are unjust and unreasonable before it could avail itself of the Commission's authority to investigate and determine just and reasonable terms. Again, the plain reading of the statute makes clear that the Legislature did not intend such a result.

Finally, the Commission has already demonstrated that a party may file a complaint before reaching an agreement. For example, in *Central Lincoln People's Utility Dist. v. Verizon Northwest, Inc.*, Order No. 05-042, Docket UM 1087 (Jan. 19, 2005), Verizon filed a counter-complaint against Central Lincoln PUD under ORS 759.660, which is substantially identical to ORS 757.279. The Commission granted Verizon's counter-complaint, which alleged that Central Lincoln PUD's "*proposed* rates, terms and conditions for a new pole attachment agreement were unreasonable." Order No. 05-042 at 1 (emphasis added). In that case, the parties had not reached agreement on the terms of a joint use contract before Verizon filed its complaint and the Commission determined the terms of the joint use contract. Similarly, the parties need not have reached agreement in this case before the Commission may set the terms of their new agreement. All that was required before Qwest could file its Complaint was for Defendant to make a "demand" that Qwest accept Defendant's new contract terms. Defendant made such a demand.

Defendant ignores the language of the governing statute and simply makes up standards that it claims Qwest must meet before filing a complaint with the Commission. Defendant has provided no basis on which the Commission may dismiss Qwest's Complaint under ORS 757.279, so the Commission should deny the Motion.

2. Defendant Demanded That Qwest Sign Its Agreements

As Qwest set forth in detail in its Complaint and subsequently in its Reply, Defendant did "demand" unjust and unreasonable terms. Indeed, Defendant has not denied that when it

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presented both versions of its proposed joint use contract to Qwest, first in July 2004 and then in January 2005, it presented them as "take-it or leave-it" propositions. Despite Defendant's unreasonable demand, Qwest did not immediately file its Complaint with the Commission. Instead, Qwest tried to engage Defendant in negotiations of the terms of the new agreement. In response, Defendant ignored Qwest's repeated requests to negotiate and, at the very least, to indicate when Qwest could expect to receive a response to its proposed revisions. *See* Qwest's Reply to Def.'s Aff. Defs, Exs. 3-9. In light of Defendant's unreasonable and unjust demand, Qwest filed its Complaint.

Because the sequence of events described in the Complaint clearly constituted a "demand" that Qwest agree to Defendant's proposed contract terms, Qwest has alleged facts sufficient to state a claim for relief, and the Commission should deny Defendant's Motion.

3. Defendant Has Not Negotiated in Good Faith With Qwest

In an attempt to avoid accountability for its own actions, Defendant blatantly mischaracterizes the past interaction between the parties and claims that it has made "repeated and continuing efforts" to negotiate a new joint use agreement. Based on that mischaracterization, Defendant argues that the Commission is precluded from hearing Qwest's Complaint because it is premature. (Mot. at 5.) Defendant's contention is simply false.

a. Presenting a "Take It or Leave It" Contract Does Not Constitute Good Faith Negotiation

Defendant has not disputed that it presented two versions of its new agreement to Qwest for Qwest's signature and indicated that it would not discuss the terms. In fact, to this day, Defendant has *never* directly and substantively responded to Qwest's proposed revisions to Defendant's agreements. When Defendant sent Qwest a new proposed agreement in January 2005, more than five weeks after Qwest sent Defendant revisions to the July 2004 proposed agreement, Defendant did not even acknowledge Qwest's proposed changes to the prior version or invite discussions about any future changes that Qwest might have. Instead, Defendant stated

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that the changes to that version of the agreement were attributable to Defendant's negotiations with "*other companies* who have attachments to CEC's poles," (Qwest's Reply, Ex. 6 at 2 (emphasis added)), failing to explain why it apparently was willing to negotiate with others but not Qwest. Similarly, when Defendant sent its most recent version in February 2005, after Qwest filed its Complaint, Defendant stated that it had revised its agreement "to take into account our discussions with the PUC and our review of the PUC recent rulings in the CLPUD v. Verizon case." (Hansen Decl., Ex. 4.) Again, Defendant did not acknowledge Qwest's proposed changes to its prior version or indicate that it was willing to negotiate any of the terms with Qwest. Simply put, a party does not negotiate in good faith when it fails to acknowledge the other party's comments and ideas, as Defendant has done here. Thus, Defendant's contention that it has negotiated and continues to negotiate with Qwest "in good faith" is incorrect.

Indeed, rather than prove that it is negotiating in good faith, Defendant's most recent version of its new proposed joint use agreement – which it presented to Qwest and, apparently, other pole occupants only *after* Qwest filed its Complaint with the Commission – actually proves the opposite. This point was further emphasized by Martin Hansen, Defendant's counsel, in his affidavit in support of Defendant's Motion. The affidavit states that "CEC wishes in fairness to reach the same joint pole agreement with all of the companies utilizing their facilities." (Hansen Aff., ¶ 8.) In other words, as Defendant has made clear in all of its communications with Qwest, it is not interested in negotiating the terms of the agreements with the various pole occupants; it is interested in forcing every pole occupant to accept its own terms or face the prospect of penalties for having pole attachments in place without having a current joint use agreement.

According to the February 11 letters to the pole occupants, Defendant does not just notify the occupants that Defendant wants to begin negotiating a new joint use agreement. Rather, Defendant *terminates* the old agreements, thereby subjecting the pole occupant to potential penalties, without even notifying the pole occupant that it may be subject to such penalties if it does not agree to Defendant's terms. (Hansen Decl., Exs. 6-10.) Pole occupants outside the

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industry, such as the Jefferson County School District or Tumalo State Park, may not even be aware that they may be subject to penalties upon termination of their agreements. Defendant does not tell them, yet Defendant undoubtedly would seek to collect such penalties once the contracts expire.

In sum, Defendant's own "evidence" demonstrates that it does not engage in good faith negotiations with pole occupants. Instead, it tries to force occupants to accede to its terms without negotiations, as it attempted to do with Qwest.

b. Qwest Attempted to Negotiate in Good Faith With Defendant

In contrast with Defendant's refusal to negotiate, Qwest has attempted numerous times since early December to negotiate with Defendant, or at least have Defendant commit to when it would provide comments on Qwest's proposed revisions. (*See* Qwest's Reply, Exs. 6-10.) Defendant just stonewalled Qwest.

Defendant tries to distract from its refusal to negotiate by arguing that Qwest did not immediately respond to Defendant's July 20 letter[1] and did not provide comments on Defendant's July 2004 draft of a new agreement until early December 2004. It is true that Qwest did not provide comments to Defendant's July draft until early December. However, Qwest was taking its cue from Defendant, which stated in its cover letter enclosing the July draft that: "We plan to implement this agreement *by January 1, 2005*." (Qwest's Compl., Ex. 2 at 1 (emphasis added).) This letter did not indicate to Qwest that Defendant was in a hurry to negotiate a new agreement. Accordingly, Qwest responded to Defendant with its comments on the new agreement in early December, after Defendant first gave Qwest notice that Defendant considered Qwest to be in violation of the Commission's rules because Qwest allegedly did not have a current joint use

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[1] Defendant incorrectly states that it sent the agreement to Qwest on July 7, 2004. The actual date was July 20, 2004. (Qwest's Answer, Ex. 2.)

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agreement with Defendant.[2] Defendant was seeking penalties for 2004, despite not having made any contact with Qwest regarding a new agreement until July 2004, or following up with Qwest on the July draft before sending the penalty notice. After refusing to respond to Qwest's comments throughout December, Defendant then explicitly used penalties as leverage in an attempt to get Qwest to sign its new joint use agreement when it stated in its January 13 letter: "As Qwest now enters its second year without a Joint Pole Agreement in place, and now that Qwest is facing CEC's claim for sanctions and penalties for its past trespass, I would strongly suggest you advise your client to execute this agreement to mitigate the damages that are already subject to our claim." (Qwest's Reply, Ex. 6 at 2.)

Qwest, however, did not capitulate to Defendant's threats. In response to Defendant's assertion that Qwest was liable for penalties, Qwest preserved its right to cure the alleged violation as permitted by the Commission's rules.[3] Because the alleged violation in this case was the supposed lack of a current joint use agreement, Qwest submitted a plan of correction that included negotiating a new joint use agreement within sixty days of the initial notice of the supposed violation, or by January 28, 2005.[4] Qwest's Reply, Ex. 3 at 4. Despite the requirement

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[2] Defendant has filed a lawsuit in the United States District Court for the District of Oregon against Qwest that alleges that Qwest is subject to penalties for alleged violation of the Commission's rules for having pole attachments in place without having a joint use agreement in place after January 1, 2004. Qwest denies Defendant is entitled to relief because the parties have a current joint use agreement in place, among other reasons. The question of penalties is not before the Commission in this docket. The following information is provided *solely* to respond to Defendant's allegation that Qwest did not negotiate in good faith. The Commission need not consider Qwest's motivation for filing its Complaint in order to determine that Qwest has stated a claim against Defendant.

[3] As the Commission is aware, Qwest is currently challenging the validity of the Commission's pole attachment penalty rules in a case before the Oregon Court of Appeals.

[4] OAR 860-028-0170 permits a pole occupant to secure a reduction in sanctions by submitting a plan of correction and complying with it or curing the alleged violation within 60 days.

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in the Commission's rules that the pole owner accept or reject the plan of correction, Defendant *never responded* to Qwest's plan of correction.

Nevertheless, to preserve its rights, Qwest set out to negotiate a new agreement within sixty days. Defendant, however, refused to negotiate and stalled Qwest until the time period expired. Qwest repeatedly attempted to negotiate the terms of a new agreement, or at least to make some progress, before the deadline set forth in the plan of correction. Defendant refused.

As the sixty-day deadline approached, Qwest warned Defendant that Qwest would be required to further protect its rights by filing a complaint if the parties could not agree on a new joint use agreement before the deadline. *See* Qwest's Reply Exs. 5, 7, 8. Qwest stated several times in correspondence leading up to the filing of its Complaint that it desired to negotiate with Defendant, that Qwest was filing its Complaint to protect its rights given Defendant's continued assertion that Qwest was in violation of the Commission's rules for allegedly not having a contract, and that Qwest would continue to negotiate after it filed its Complaint. Defendant was silent, so Qwest was forced to file the Complaint.

Defendant's contention that Qwest failed to negotiate is inconsistent with the ample record. Defendant cannot now complain that Qwest's actions were precipitous or that Qwest manufactured an emergency when Defendant knew all along that Qwest had set out to preserve its rights to cure the alleged violation by January 28 and Defendant ignored Qwest's repeated requests to negotiate and warnings that Qwest would be required to file a complaint if Defendant did not negotiate.

Interestingly, Qwest apparently is not the only pole occupant that Defendant has tried to force into an unjust contract using the threat of penalties. In his letter to counsel for Bend Cable, Mr. Hansen states: "We need to get this agreement signed soon. Remember your permit is expiring." (Hansen Decl., Ex. 5.) Defendant is putting pole occupants, which apparently include a school district and a state park, in the indefensible position of being required to sign the agreement provided by Defendant or being subject to potential penalties under the PUC rules.

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Defendant clearly seeks to use the prospect of penalties, or actual litigation involving penalties in Qwest's case, to refuse to negotiate and to demand unjust and unreasonable new contract terms from pole occupants.

4. The Commission Should Grant Qwest's Motion to Dismiss Defendant's "Counterclaim"

Defendant previously filed a "counterclaim" that was based on Qwest's alleged bad faith in filing its Complaint and that asked the Commission to dismiss the Complaint. The purported counterclaim relies on essentially the same allegations that Defendant makes in its Motion – which Qwest has demonstrated herein are false – and asks for the same relief. It is clear that the "counterclaim" is not really a counterclaim at all but instead was a precursor to, and is redundant with, the Motion and should be dismissed. Moreover, Defendant *still* has not provided any explanation as to the basis for the "counterclaim." There simply is no counterclaim, and it should be dismissed.

Interestingly, both the Motion and the "counterclaim" assert that Qwest is using the Commission's procedures as "leverage," a "bargaining tactic," and to "extort an unfair negotiating advantage with CEC." Motion at 5; Answer at 5. Yet, Defendant also claims that its proposed terms are consistent with the Commission's decisions. Defendant's strenuous protestations against the Commission's ability to hear Qwest's Complaint invite the question: If Defendant believes its proposed agreement complies with Commission decisions, why is Defendant so opposed to the Commission's overview? If the terms proposed by Defendant are just and reasonable, how can Qwest possibly use the Commission procedures to "extort an unfair negotiating advantage?" According to Defendant, it should have no reason to fear Commission involvement. Yet it does. The Commission's procedures were designed for exactly this type of situation, where the parties clearly disagree on the terms of a new agreement and one party has demanded that the other accept certain terms, so the Commission should deny the Motion and dismiss the "counterclaim."

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III. CONCLUSION

By its words and actions, Defendant demanded that Qwest accede to Defendant's contract terms and refused to negotiate in good faith with Qwest. Nothing more is required to state a claim under ORS 757.279. The Commission should deny Defendant's Motion. For the same reasons, the Commission should grant Qwest's Motion to Dismiss Defendant's Counterclaim.

DATED: March 10, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2005 I served the foregoing **QWEST'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS COMPLAINT AND REPLY IN SUPPORT OF MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM** on the following person by causing to be emailed and mailed a full, true and correct copy thereof contained in a sealed envelope with postage prepaid addressed to said to person at the following addresses and deposited in the post office at Portland, Oregon:

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