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MARCH 16, 2006

**BY FEDERAL EXPRESS**

Public Utility Commission Of Oregon  
Attn: Filing Center  
550 Capitol Street N.E., Suite 215  
Salem, Oregon 97308

**Re: Charter Communications Holding Company, LLC v. Central Lincoln  
People's Utility District UM 1241**

Dear Sir/Madam:

Enclosed, for filing, are an original and one copy each of the following:

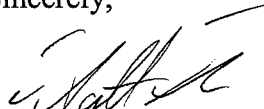
- Charter's Response In Opposition To ORCP 21 Motions Of Defendant And In Support Of Complainants' Cross-Motion For Partial Summary Judgment
- Complainants' Cross Motion For Partial Summary Judgment

Also enclosed is an additional copy of the above filing, which we request that the Commission stamp as filed and return to the below-signed via the enclosed pre-paid FedEx package.

A copy of the enclosed filing has also been electronically filed with the Commission today, and served as indicated on the accompanying certificate of service.

If you have any questions, please contact me.

Sincerely,



T. Scott Thompson

Enclosures

cc: Service List by e-mail and U.S. Mail

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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

**COMPLAINANTS’ RESPONSE IN  
OPPOSITION TO ORCP 21 MOTIONS  
OF DEFENDANT  
AND  
IN SUPPORT OF COMPLAINANTS’  
CROSS-MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

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LLC, Falcon Telecable, L.P., Falcon  
Cable Systems Company II, L.P., And  
Falcon Community Ventures I, L.P.**

OPPOSITION TO ORCP 21 MOTION  
AND IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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4 BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON  
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7 CHARTER COMMUNICATIONS  
8 HOLDING COMPANY, LLC,; FALCON  
9 TELECABLE, L.P., FALCON CABLE  
10 SYSTEMS COMPANY II, L.P., AND  
11 FALCON COMMUNITY VENTURES I,  
12 L.P.

11 Complainants,

12 v.

13 CENTRAL LINCOLN PEOPLE'S UTILITY  
14 DISTRICT,

14 Defendant.  
15

Case No. UM-1241

**COMPLAINANTS' RESPONSE IN  
OPPOSITION TO ORCP 21 MOTIONS  
OF DEFENDANT  
AND  
IN SUPPORT OF COMPLAINANTS'  
CROSS-MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

16 Charter Communications Holding Company, LLC, on its own behalf and on behalf of its  
17 subsidiaries, Falcon Telecable, L.P., Falcon Cable Systems Company II, L.P., and Falcon  
18 Community Ventures I, L.P. (jointly "Charter"), hereby submits its response in opposition to the  
19 "ORCP 21 MOTIONS OF DEFENDANT AGAINST COMPLAINANT'S COMPLAINT TO  
20 SET FAIR, JUST, REASONABLE AND NON-DISCRIMINATORY POLE ATTACHMENT  
21 RATES AND FOR REFUNDS OF OVERCHARGES, AND PETITION FOR  
22 DECLARATORY RULING" ("Motion") filed by Central Lincoln People's Utility District  
23 ("Central Lincoln" or "CLPUD"). In this brief, Charter also supports its simultaneously-filed  
24 Cross-Motion For Partial Summary Judgment.  
25  
26

Page 1 - OPPOSITION TO ORCP 21 MOTION  
AND IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

1 **I. INTRODUCTION AND SUMMARY**

2 Central Lincoln’s Motion asserts three main arguments: (1) that the Commission lacks  
3 jurisdiction to grant Charter refunds as relief for Central Lincoln’s unlawful pole rental  
4 overcharges; (2) that the Commission’s decisions in *Central Lincoln People’s Utility Dist. v.*  
5 *Verizon Northwest, Inc.*, (“UM-1087”), and the terms and conditions of attachment between  
6 Central Lincoln and Verizon are irrelevant; and (3) that Charter’s Complaint should be held in  
7 abeyance while the Commission undertakes a general rulemaking on pole attachment matters.  
8 As demonstrated below, Central Lincoln’s assertions are without merit.  
9

10 First, the Commission has jurisdiction to grant Charter refunds. Central Lincoln proposes  
11 an inappropriately narrow reading of ORS § 757.279(1). The statute clearly contemplates the  
12 Commission’s authority to remedy pole rental overcharges that were actually “collected.” In  
13 addition, ORS § 756.040(1) grants the Commission broad authority to enforce its rules, including  
14 by ordering refunds to protect Charter from overcharges.  
15

16 Second, the Commission’s decisions in UM-1087 are not only relevant, but binding on  
17 Central Lincoln. The rates, terms, and conditions of pole attachment that Charter challenge are  
18 identical to those that were actually and fully litigated by Central Lincoln in the UM-1087 case.  
19 Accordingly, Central Lincoln is precluded from relitigating the issues in this case. Moreover,  
20 even if not preclusive as a matter of law, the facts alleged by Charter regarding Central Lincoln’s  
21 actions with regard to Verizon (*e.g.*, termination of its agreement and the rates, terms, and  
22 conditions of attachment currently imposed) are highly relevant to Charter’s claims that the rates,  
23 terms, and conditions imposed on Charter are unjust, unreasonable, and discriminatory.  
24  
25  
26

1 Third, there is no merit to Central Lincoln’s assertion that Charter’s Complaint contains  
2 redundant, frivolous, and irrelevant materials. As a threshold matter, Central Lincoln fails to  
3 analyze and support its arguments in relation to any particular paragraph it identifies. In any  
4 event, it is clear that Charter’s Complaint is full and concise allegation of the facts supporting its  
5 claims. Indeed, the level of detail provided by Charter helps narrow the issues presented  
6 immediately, rather than providing a broad, ambiguous complaint that requires subsequent  
7 clarification and narrowing.  
8

9 Finally, there is no legal or policy reason to hold Charter’s Complaint in abeyance.  
10 Central Lincoln agreed to the schedule in this case without objection. Principles prohibiting  
11 retroactive rulemaking will prevent the Commission’s pending rulemaking in AR-506 from  
12 affecting Charter’s remedy for actions by Central Lincoln prior to the adoption of any new rules.  
13 Indeed, it is impossible to know what new rules the Commission might adopt, if any. It would  
14 prejudice Charter’s right to relief for current and past unjust and unreasonable rates, terms, and  
15 conditions, to hold its claims in abeyance.  
16

17 Accordingly, Central Lincoln’s Motion should be denied and Charter’s Cross-Motion for  
18 Partial Summary Judgment granted.  
19

20 **II. THE COMMISSION MAY GRANT CHARTER REFUNDS FOR UNLAWFUL**  
21 **POLE ATTACHMENT RENTAL OVERCHARGES**

22 Contrary to Central Lincoln’s assertion, the Commission has jurisdiction to grant Charter  
23 refund relief.<sup>1</sup> ORS § 757.279(1) provides that whenever the Commission finds, after hearing  
24

25 <sup>1</sup> As a threshold matter, Charter notes that Central Lincoln’s references to ORS §§ 759.650,  
26 759.655, and 759.660 appear to be in error. Chapter 759 deals with attachments to poles owned  
by telecommunications utilities, not People’s Utilities Districts. See ORS § 759.655 (“The  
Public Utility Commission of Oregon shall have the authority to regulate in the public interest

1 had upon complaint by a licensee, that the rates, terms or conditions “demanded, **exacted**,  
2 charged or **collected**” are unjust or unreasonable, the Commission “shall determine the just and  
3 reasonable rates, terms and conditions thereafter to be observed and in force and **shall fix the**  
4 **same by order.**” (Emphasis added). Central Lincoln focuses only on the term “thereafter” but  
5 in so doing ignores the meaning and import of the rest of the provision. The statute clearly  
6 contemplates that the Commission may hold that rates “exacted” or “collected” – *i.e.*, prior to the  
7 complaint – were unlawful. It would render that part of the provision moot if the rest of the  
8 paragraph were read to leave the Commission without authority to remedy the collection of  
9 unlawful rates. Thus, the statute allows the Commission to “fix [the unlawful rates] by order.”  
10 ORS § 757.279(1).

11  
12 Moreover, Central Lincoln, itself, identifies a provision granting the Commission broad  
13 statutory authority to order refunds. ORS § 756.040(1) (cited by Central Lincoln at page 2)  
14 provides that  
15

16 [i]n addition to the powers and duties now or hereafter transferred to or  
17 vested in the Public Utility Commission, the commission shall represent  
18 the customers of any public utility or telecommunications utility and the  
19 public generally in all controversies respecting rates, valuations, service  
20 and *all matters of which the commission has jurisdiction*. In respect  
21 thereof the commission shall make use of the jurisdiction and powers of  
22 the office to protect such customers, and the public generally, from unjust  
23 and unreasonable exactions and practices.... (Emphasis added)

24 ORS § 756.040 grants the Commission broad power, independent of any other specific grant,  
25 which includes the power to order refunds. *See, e.g., Pacific Northwest Bell Tel. Co. v. Katz*, 841  
26 P.2d 652, 656-57 (Or. Ct. App. 1992). In *Pacific Northwest Bell*, the court explained that the

---

the rates, terms and conditions for attachments by licensees to poles or other facilities of **telecommunications utilities**”) (emphasis added). In any event, Central Lincoln’s argument lacks merit.

1 Commission “has been granted ‘the broadest authority – commensurate with that of the  
2 legislature itself – for the exercise of [its] regulatory function.’” *Id.* at 656 n.5. In addition, the  
3 court explained that “the legislature has directed us to construe the provisions of the utility  
4 regulation laws liberally with a view toward the public welfare, efficient facilities and substantial  
5 justice.” *Id.* In holding that ORS § 756.040 gives the Commission authority to issue refunds in  
6 that case, the court emphasized that “[t]o hold that PUC does not have the power to order a  
7 refund . . . would be inconsistent with its regulatory role and statutory duties.” *Id.* at 656-57.

9 The same analysis applies in this case. Even if ORS § 757.279 were read narrowly to not  
10 grant the Commission explicit authority to issue refunds, ORS § 756.040(1) clearly empowers  
11 the Commission to protect Charter, as a consumer of pole attachments from Central Lincoln,  
12 from collection of unjust and unreasonable rental charges. To do otherwise, would be  
13 inconsistent with the Commission’s regulatory role of ensuring that pole owners do not abuse  
14 their unique position as the sole source of utility pole attachment space.

16 Accordingly, paragraphs regarding refunds, such as paragraph 43 and Prayer For Relief  
17 paragraph 2 of Charter’s Complaint, should not be stricken.

19 **III. THE COMMISSION’S DECISIONS IN UM-1087, AND THE RELATIONSHIP**  
20 **BETWEEN CENTRAL LINCOLN AND VERIZON ARE DIRECTLY**  
21 **RELEVANT TO CHARTER’S CLAIMS AND BINDING ON CENTRAL**  
22 **LINCOLN**

23 Charter’s Complaint contains allegations of fact regarding Central Lincoln’s treatment of  
24 Verizon, the rates, terms and conditions of attachment Central Lincoln now affords Verizon, and  
25 regarding the litigation between Central Lincoln and Verizon in UM-1087. Recognizing their  
26 impact on its treatment of Charter, Central Lincoln argues in its Motion that Charter’s allegations



1 are irrelevant and should be stricken. Central Lincoln is wrong. The Commission's ruling in the  
2 UM-1087 case are binding on Central Lincoln under well-established principles of law, which  
3 preclude Central Lincoln from re-litigating those issues against Charter now. Moreover, even if  
4 the UM-1087 decisions were not binding on Central Lincoln, the facts alleged by Charter  
5 regarding Central Lincoln's imposition of its form agreement on Verizon and the current rates,  
6 terms, and conditions of attachment Central Lincoln affords Verizon are relevant evidence in  
7 support of Charter's claims that Central Lincoln's actions and rates, terms, and conditions  
8 imposed on Charter are unjust and unreasonable, and therefore unlawful.  
9

10  
11 **A. The Commission's Decisions In UM-1087 Are Binding On Central Lincoln,  
12 As A Matter Of Law, And Charter Is Entitled To Judgment On Its Claims  
As A Result**

13 By requesting that all allegations based on UM-1087 be stricken from the Complaint,  
14 Central Lincoln is effectively seeking to relitigate issues already found to be unreasonable in a  
15 prior, binding case involving Central Lincoln. However, under the doctrine of issue preclusion  
16 Central Lincoln is precluded from relitigating the identical issues which lead to the earlier  
17 Commission decision against it.  
18

19 Under Oregon law, "[i]ssue preclusion arises in a subsequent proceeding when an issue  
20 of ultimate fact has been determined by a valid and final determination in a prior proceeding."  
21 *Nelson v. Emerald People's Utility Dist.*, 318 Ore. 99, 103, 862 P.2d 1293 (1993). The Supreme  
22 Court of Oregon has identified five requirements for the application of issue preclusion:  
23

- 24 (1) the issue in the two proceedings is identical;  
25 (2) the issue actually was litigated and was essential to a final decision on the  
26 merits in the prior proceeding;

1 (3) the party sought to be precluded has had a full and fair opportunity to be heard  
2 on that issue;

3 (4) the party sought to be precluded was a party or was in privity with a party to  
4 the prior proceeding; and

5 (5) the prior proceeding was the type of proceeding to which this court will give  
6 preclusive effect.

7 *Id.* at 104 (internal citations omitted). Those five requirements are satisfied as to a number of the  
8 issues raised in Charter's Complaint. Accordingly, Central Lincoln's Motion should be denied,  
9 and Charter granted judgment as a matter of law on these issues.

10 **1. The Issues In This Proceeding Are Identical To Those Litigated in  
11 UM-1087**

12 Charter has raised several issues in its Complaint which are identical to issues that were  
13 determined in the *Central Lincoln v. Verizon* case. Specifically, in Docket No. UM-1087, the  
14 Commission addressed (1) Central Lincoln's maximum annual rental rate, and the costs that go  
15 into calculating it; (2) Central Lincoln's attempt to charge separate annual fees for various other  
16 attachments, such as attachments in unusable space and attachments to Central Lincoln anchors;  
17 (3) Central Lincoln's attempt to impose separate application fees; (4) Central Lincoln's charges  
18 for rearrangements; and (5) the terms of Central Lincoln's standard pole attachment agreement.  
19 *See Central Lincoln People's Util. Dist. v. Verizon Northwest, Inc.*, Order No. 05-042, 2005 Ore.  
20 PUC Lexis 36 (Jan. 19, 2005) ("Jan. 19<sup>th</sup> Order"); *Central Lincoln People's Util. Dist. v. Verizon*  
21 *Northwest, Inc.*, Order No. 05-583, 2005 Ore. PUC Lexis 241 (May 16, 2005) ("May 16<sup>th</sup>  
22 Order"). Those same issues are now at issue pursuant to Charter's Complaint.

23 In UM-1087, the Commission rejected Central Lincoln's attempt to charge attachers a  
24 pole attachment rental rate in excess of \$10.00 per pole per year and instead determined that  
25 Central Lincoln's proper pole attachment rate in Oregon is \$4.14. (January 19<sup>th</sup> Order at p. 16,  
26

1 Attachment A; May 16<sup>th</sup> Order at Attachment A). In so doing, the Commission addressed the  
2 costs that Central Lincoln was permitted to include in its annual rental rates. (Jan. 19<sup>th</sup> Order at  
3 pp. 13-16). Charter now challenges Central Lincoln's pole fee schedule as unjust and  
4 unreasonable. (*See, e.g.*, Complaint ¶¶ 29-37, 74-85). Thus, the issue under consideration is  
5 identical to that in the *Central Lincoln* proceeding. In UM-1087, the Commission also held that  
6 Central Lincoln could only imposed rental charges for attachments in useable space, and not for  
7 attachments to matters like anchors, for example. (*See, e.g.*, May 16<sup>th</sup> Order at pp. 6-7). Charter  
8 now challenges the same charges sought by Central Lincoln for attachments beyond the one foot  
9 of useable space actually occupied by Charter. (*See, e.g.*, Complaint ¶¶ 32-36, 38, 41, 86-93).

10  
11 In addition, Docket UM-1087 also addressed the issue of application fees and whether  
12 those fees can be charged to an attacher as a direct cost in addition to annual rental payments.  
13 (Jan. 19<sup>th</sup> Order at pp. 15-16). This is the same issue that Charter raises in its Complaint. (*See,*  
14 *e.g.*, Complaint ¶¶ 32, 67-73).

15  
16 In UM-0187, the Commission addressed and rejected Central Lincoln's attempt to charge  
17 the attacher for the cost of rearranging the facilities to accommodate the pole owner. (May 16<sup>th</sup>  
18 Order at p. 4, *as modified by Central Lincoln People's Util. Dist. v. Verizon Northwest, Inc.*,  
19 Order No. 05-981, 2005 Ore. PUC Lexis 446 (Sept. 7, 2005)). Charter has challenged the same  
20 conduct in this proceeding. (Complaint ¶¶ 60-65, 94-98).

21  
22 Finally, in UM-1087, the Commission addressed the terms of Central Lincoln's standard  
23 pole attachment agreement. (*See, e.g.*, May 16<sup>th</sup> Order). Charter now challenges certain  
24 provisions of its agreement with Central Lincoln that are identical to Central Lincoln's standard  
25 agreement, as addressed in the UM-1087 litigation. (Complaint ¶¶ 10, 12-21, 28, 101-102).

1                   **2.       The Issues Raised By Charter Were Actually Litigated and Essential**  
2                   **To The Final Decision On the Merits**

3                   The issues of pole rental charges, application fees, rearrangement costs, and contract  
4 terms were actually litigated and essential to a final decision on the merits in the *Central Lincoln*  
5 *v. Verizon* proceeding, as evidenced by the Commission’s Orders in UM-1087. Regarding  
6 Central Lincoln’s maximum lawful annual pole rental rate, in UM-1087 Verizon raised in its  
7 Counter-Complaint that Central Lincoln’s annual rental fees were unlawful. (Jan. 19<sup>th</sup> Order at  
8 p. 13). The Commission addressed the issue, and in so doing rejected Central Lincoln’s annual  
9 pole rental rate. Indeed, the Commission addressed specifically a number of elements of cost  
10 that Central Lincoln sought to include in its annual fee calculation. The Commission held that  
11 Central Lincoln’s annual rental fee amount was unlawful, rejected Central Lincoln’s attempt to  
12 include certain costs into its rate calculation, and issued an Order holding that the maximum  
13 lawful rental charge that Central Lincoln could impose on an attaching entity, based on  
14 application of Central Lincoln’s costs to the Commission’s regulations, is \$4.14 per foot per  
15 year. (January 19<sup>th</sup> Order at pp. 13-16, Attachment A; May 16<sup>th</sup> Order at Attachment A).  
16 Verizon also challenged Central Lincoln’s attempts to impose rentals on attachments not in  
17 useable space. The Commission held that rentals only applied to attachments in “useable space,”  
18 (Jan. 19<sup>th</sup> Order at pp. 14, 16), and specifically rejected Central Lincoln’s charges for  
19 attachments to Central Lincoln’s anchors, for example. (May 16<sup>th</sup> Order at pp. 6-7). The  
20 Commission’s determination of the pole attachment rental rate was essential to the Commission  
21 final decision, which determined reasonable terms and conditions of attachment. Nevertheless,  
22 Central Lincoln now claims that the \$4.14 pole rate fixed by the Commission should not apply to  
23 this case even though Central Lincoln’s pole rate is directly at issue.  
24  
25  
26

1 In addition, the issue of application fees was fully litigated and essential to the final  
2 decision in the Verizon case. The application fees Charter challenges in its Complaint are the  
3 same as those sought to be imposed by Central Lincoln in its standard fees on Verizon. (*See*,  
4 *e.g.*, Complaint ¶¶ 67-73). The Commission held in UM-1087 that “to the extent the application  
5 fees do not relate to ‘special inspections or preconstruction, make ready, change out, and  
6 rearrangement work,’ application fees may not be recovered, and administrative charges related  
7 to processing new attachments should be allocated with the carrying charge.” (January 19<sup>th</sup>  
8 Order at pp. 15-16). The Commission’s holding was not limited to the specific amount sought in  
9 the particular application fees, but rather, addressed the legality of application fees as a separate  
10 charge in addition to annual rental rates. Again, this issue was actually litigated by Central  
11 Lincoln and Verizon and was essential to establishing reasonable terms and conditions for  
12 attachment to Central Lincoln’s poles.  
13  
14

15 Likewise, the issue of rearrangement costs was actually litigated and vital to the final  
16 determination in the case. Indeed, the Commission carefully considered the issue of whether the  
17 attacher should be responsible for its rearrangement costs to accommodate any new equipment  
18 that Central Lincoln places on the poles. Using 47 U.S.C. § 224(i) as a guide, the Commission  
19 determine that it is unjust and unreasonable for Central Lincoln to require the attacher to pay for  
20 its rearrangement costs where Central Lincoln is the sole beneficiary or such rearrangement.  
21 (May 16, 2005 at p. 4, *as modified by Central Lincoln People’s Util. Dist. v. Verizon Northwest,*  
22 *Inc.*, Order No. 05-981, 2005 Ore. PUC Lexis 446 (Sept. 7, 2005)). Consequently, all of these  
23 issues Charter seeks to be precluded have been actually litigated in the UM-1087 case and used  
24 to determine reasonable rates, terms and conditions of attachment.  
25  
26

1                   **3. Central Lincoln Had A Full And Fair Opportunity To Be Heard**

2                   Central Lincoln, the party that Charter seeks to preclude, already had a full and fair  
3 opportunity to be heard on the aforementioned issues in its prior case with Verizon. Over the  
4 course of the 2 year proceeding, Central Lincoln filed a complaint and numerous motions,  
5 submitted testimony and briefs, and participated in two separate hearings before the  
6 Commission. *See generally Central Lincoln People’s Util. Dist. v. Verizon Northwest, Inc.*,  
7 Docket No. UM-1087. Therefore, Central Lincoln has had numerous opportunities to be heard  
8 on these issues. *See Washington County Pole Officers Association v. Washington County*, 321  
9 Ore. 430, 437, 900 P.2d 483, 487 (1995) (finding a full and fair opportunity to be heard where  
10 the legal issues are “considered and dealt with on the merits”).  
11  
12

13                   **4. Central Lincoln Was A Party To The Prior Proceeding**

14                   The Supreme Court of Oregon has established that issue preclusion will only apply if the  
15 “party sought to be precluded was a party or was in privity with a party to the prior proceeding.”  
16 *Nelson v. Emerald People's Utility Dist.*, 318 Ore. 99, 103, 862 P.2d 1293 (1993). In this case, it  
17 is clearly established that Central Lincoln was a party to the prior proceeding. Central Lincoln  
18 was Complainant in the UM-1087 case against Verizon and participated fully in the proceeding  
19 in that capacity.  
20  
21

22                   **5. The Commissions Decision in UM-1087 Is The Type Of Proceeding  
23 Which Receives Preclusive Effect**

24                   Although the *Central Lincoln v. Verizon* case was an administrative proceeding, the  
25 decision rendered is still afforded preclusive effect. Under Oregon law, whether an  
26 administrative decision has a preclusive effect depends on: (1) whether the administrative forum

1 maintains procedures that are sufficiently formal and comprehensive; (2) whether the  
2 proceedings are ‘trustworthy’; (3) whether the application of issue preclusion would facilitate  
3 prompt, orderly and fair problem resolution; and (4) whether the same quality of proceedings and  
4 the opportunity to litigate is present in both proceedings.” *Id.* The UM-1087 proceeding  
5 satisfies these requirements.  
6

7 First, the Oregon Public Utility Commission has established detailed procedural rules for  
8 the complaint and hearing process that ensure that the proceeding is sufficiently formal and  
9 comprehensive. For example, the Commission’s rules specify what information is required to be  
10 contained in a complaint and an answer. *See* OAR 860-13-0015, 860-13-0025. In addition, the  
11 rules establish the procedures for participating in hearings before the Commission. *See* OAR  
12 860-14-005 *et seq.* The enumerated procedural rules adopted by the Commission, which  
13 ultimately incorporate the Oregon Rules of Civil Procedure, assure that the proceeding is amply  
14 formal so as to protect the rights of parties participating therein.  
15

16 Second, the UM-1087 proceeding before Commission is “trustworthy” because the entire  
17 case was overseen by an impartial administrative law judge (the “ALJ”) appointed by the  
18 Commission. Throughout the proceeding, the ALJ heard and ruled on issues that arose  
19 throughout the course of the litigation. In addition, the final disposition in the *Central Lincoln*  
20 case was objectively rendered by the Commission.  
21

22 Third, the application of issue preclusion in this case would “facilitate prompt, orderly  
23 and fair problem resolution” since it would prevent the same arguments from being heard and  
24 decided again by the Commission just months after the first decision. This Commission has  
25 already determined that Central Lincoln’s pole rents, application fees, rearrangement practices,  
26

1 and contract terms are unreasonable. The same rates, terms, and conditions of attachment exist  
2 in the case presently before the Commission. Precluding Central Lincoln from reasserting the  
3 same arguments in this proceeding will significantly narrow the focus of the case and save all  
4 parties time, energy and expense.  
5

6 Finally, there is no question that the same quality of proceeding and opportunity to  
7 litigate is present in both UM-1087 and this case. Both proceedings are filed at the Oregon  
8 Public Utility Commission and are overseen by an ALJ. Both cases are conducted under the  
9 same procedural rules with identical opportunities for Central Lincoln to litigate issues at hand.  
10 There are no new avenues for argument that are present in this case that were not afforded to  
11 them in the *Central Lincoln* proceeding.  
12

13 Clearly, the UM-1087 proceeding has preclusive effect. As such, Central Lincoln should  
14 be precluded from relitigating issues determined in the Verizon case.

15 Accordingly, paragraphs 12, 22, 23, 24, 25, 26, 27, 28, 34, 37, 44, 71, 72, 73, 80, 81, 85,  
16 95, and 101, and Exhibit 5 of Charter's Complaint should not be stricken.<sup>2</sup> Indeed, as set forth in  
17 Charter's accompanying Cross-Motion For Partial Summary Judgment, for the foregoing  
18 reasons, Charter should be granted judgment on Counts 1, 2, 3, 4, and 5, in part, of its Complaint.  
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24 \_\_\_\_\_  
25 <sup>2</sup> Charter notes that paragraph 71 of the Complaint does not mention Verizon or UM-1087.  
26 Central Lincoln's identification of paragraph 71 as one that should be stricken on the grounds  
that it concerns Verizon or UM-1087 emphasizes the meritless nature of Central Lincoln's  
Motion.



1           **B.     Even If The Commission’s Decisions Do Not Resolve Charter’s Claims As A**  
2           **Matter Of Law, The Facts Alleged Regarding Central Lincoln’s Treatment**  
3           **Of Verizon And The Terms And Conditions Afforded Verizon Are Relevant**  
4           **To Charter’s Claims That Central Lincoln’s Rates, Terms And Conditions**  
5           **Are Unjust And Unreasonable**

6           Central Lincoln argues that a variety of paragraphs and one exhibit of Charter’s  
7           Complaint should be stricken because they concern claims for relief based on the *Central*  
8           *Lincoln* case. The thrust of Central Lincoln’s argument appears to be that all pole agreements  
9           are distinct and unrelated. Central Lincoln’s argument, however, is grossly over stated and over  
10          simplified. As discussed in detail below, when the Commission analyzes the rates, terms, and  
11          conditions **imposed by Central Lincoln** on Charter, the contemporaneous rates, terms, and  
12          conditions of attachment imposed on Verizon, **by Central Lincoln, for attachment to the same**  
13          **poles**, are highly relevant to whether the rates, terms, and conditions imposed on Charter are just  
14          and reasonable. Central Lincoln cannot stick its head in the sand and pretend that the  
15          Commission did not rule on these very same rates, terms, and conditions just months ago.

16                           **1.     Facts Regarding The Background Leading To The Agreement Are**  
17                           **Relevant**

18          Many of the paragraphs that Central Lincoln identifies contain allegations regarding the  
19          background leading to the execution of the agreement at issue between Charter and Central  
20          Lincoln. (*See, e.g.*, Complaint ¶¶ 12, 15-19, 21-25). Charter has included those allegations for a  
21          reason. ORS § 757.285 creates a presumption that pole attachment agreements are just and  
22          reasonable unless the Commission finds otherwise after filing of a complaint. Accordingly,  
23          Charter has included in its Complaint allegations of fact demonstrating the background leading  
24          to Central Lincoln’s imposition of rates, terms, and conditions on Charter. In particular, Charter  
25          alleges facts that demonstrate how Central Lincoln undertook a scheme and pattern of behavior  
26

1 whereby it cancelled all of its pole attachment agreements at the same time, including its  
2 agreements with Verizon and Charter, then sought to impose a new, unjust and unreasonable  
3 agreement on attaching parties under the threat of sanction. Charter's allegations explain how, in  
4 the course of attempting to negotiate with Central Lincoln, Charter objected to unlawful  
5 provisions, and how Charter ultimately had no choice but to sign the agreement but did so under  
6 protest. (Complaint ¶¶ 10-21). Charter's allegations demonstrate that Charter was under a threat  
7 of millions of dollars in sanctions and had no choice but to sign the agreement, even though the  
8 terms were unjust and unreasonable. Therefore, the allegations are relevant to rebut the  
9 presumption that the rates, terms, and conditions of the agreement between Charter and Central  
10 Lincoln are just and reasonable. *See* ORS § 757.285.

11  
12 Accordingly, paragraphs 12, 15-19, 22, 23, 24, 25, 26, 27, 28, 34, 37, 44, 71, 72, 73, 80,  
13 81, 85, 95, and 101, and Exhibit 5 of Charter's Complaint should not be stricken.  
14

15 **2. The Rates Set In UM-1087 For 2005 Are Based On The Same Central**  
16 **Lincoln Costs That Would Dictate The Rates Central Lincoln Can**  
17 **Charge Charter**

18 In support of its argument that all allegations regarding the rates afforded Verizon should  
19 be stricken, Central Lincoln also asserts that “[r]ental rates change over time as the cost[sic]  
20 maintaining poles change. What rate one pole occupier was charged in a previous year is not  
21 determinative of what rate another pole occupier should be charged in future years.” (Motion at  
22 4). While it may be true that a utility's costs may vary, slightly, from year to year, in this case,  
23 the rates at issue for Charter are for the same billing periods as the rates calculated in the UM-  
24 1087 case.  
25  
26

1 In its January 19, 2005 decision in UM-1087, the Commission calculated the annual per  
2 useable foot rental rate based on Central Lincoln’s costs to be \$4.14. (Jan. 19<sup>th</sup> Order at  
3 Attachment A). The rates at issue in this current case were established by Central Lincoln as part  
4 of its “Fee Schedule” for 2005 and imposed on Charter via invoices from Central Lincoln on  
5 February 8, 2005. (Complaint ¶¶ 29, 35, Exhibits 3 & 4). Thus, the time frame is the same –  
6 2005. The Central Lincoln costs that were the basis for the calculation of the 2005 rental rate for  
7 Verizon are identical to the costs that would be used to calculate the 2005 annual rate for  
8 Charter.  
9

10  
11 **3. The Rates, Terms, And Conditions Of Attachment Afforded Verizon**  
12 **Are Relevant To Demonstrate That The Rates, Terms, And**  
13 **Conditions Imposed On Charter Are Not Just And Reasonable**

14 Even if the Commission holds that the UM-1087 decisions are not preclusive as a matter  
15 of law, the rates, terms, and conditions of attachment afforded Verizon are nonetheless highly  
16 relevant to whether the rates, terms, and conditions of attachment imposed on Charter are just  
17 and reasonable. For example, the Federal Communications Commission has held that evidence  
18 regarding prevailing industry custom and practice is relevant to whether particular rates, terms,  
19 and conditions are just and reasonable. *See, e.g., Mile Hi Cable Partners, LP v. Public Service*  
20 *Co. of Colorado*, 17 FCC Rcd 6268, ¶ 8 (2002) (“In setting reasonable terms and conditions in  
21 pole attachment cases, we consider the prevailing industry practices”); *Alert Cable TV of North*  
22 *Carolina, Inc. v. Carolina Power & Light Co.*, 1985 LEXIS 3679 ¶ 5 (C.C.B. 1985). Thus, if  
23 general industry custom is relevant, then it is highly relevant what rates, terms, and conditions  
24 Central Lincoln affords Verizon for attachment. Indeed, it cannot be overlooked that the Verizon  
25  
26

1 attachments involve similar or identical facilities as, in close proximity to, and on the very same  
2 poles as Charter's.

3  
4 In addition, Verizon has made very public its immediate plans to enter the cable  
5 television market in competition with Charter and other operators. *See, e.g.*, Press Release,  
6 Verizon Communications, Inc., Verizon Launches Aggressive Plan to Bring FiOS Services to  
7 Apartments, Condos and Other Multi-Dwelling-Unit Sites (March 8, 2006), *available at*:  
8 <http://newscenter.verizon.com>. It would not be just and reasonable for Verizon to operate under  
9 a more favorable set of pole attachment rates, terms, and conditions than those imposed on  
10 Charter. Nor is such discrimination lawful under state or federal law.

11 Although states can take on an active role in regulating pole attachments if they meet  
12 certain conditions, the federal mandate of non-discrimination in the provision of pole  
13 attachments is an overarching requirement whether the FCC or a state PUC regulates:

14 A utility shall provide a cable television system or any telecommunications carrier  
15 with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned  
or controlled by it.

16 47 U.S.C. § 224(f)(1). Similarly, Oregon's statute requires the PUC "to regulate in the public  
17 interest the rates, terms and conditions for attachments" to poles. ORS 757.273. Further, it  
18 requires that "all rates, terms and conditions made, demanded or received by any public utility or  
19 telecommunications utility [for attachments] shall be just, fair, and reasonable." *See also*,  
20 ORS 757.276 (similar provision with regard to attachments to poles of a "consumer owned  
21 utility"). Moreover, the Commission recognized the requirement of non-discrimination in pole  
22 attachment provisions in its recent Order No. 04 653. Order, *Portland General Electric*  
23 *Company v. Verizon Northwest, Inc.*, at 3, Docket UM 1096 (November 8, 2004).

24 The annual rates imposed on Charter alone are more than double those charged Verizon,  
25 and Verizon is free from application fees, and the myriad other "attachment" fees held unlawful  
26 in UM-1087 but still imposed on Charter. Even if not legally binding, the Commission's

1 determination that a particular rate, term, or condition is unjust and unreasonable when applied to  
2 Verizon must be relevant to whether the same rate, term, or condition is just and reasonable  
3 when applied to Charter’s attachment to the same poles by the same utility.  
4

5 Accordingly, paragraphs 12, 22, 23, 24, 25, 26, 27, 28, 34, 37, 44, 71, 72, 73, 80, 81, 85,  
6 95, and 101, and Exhibit 5 of Charter’s Complaint should not be stricken.

7 **IV. CHARTER’S ALLEGATIONS ARE NOT REDUNDANT OR MOOT**

8 Central Lincoln asserts that Charter’s Complaint contains allegations that are  
9 “redundant.” (Motion at 3). However, Central Lincoln provides no analysis of which  
10 paragraphs are allegedly redundant, or to what extent they are redundant. Indeed, Central  
11 Lincoln lumps the allegedly redundant paragraphs in with a list of allegedly “irrelevant” and  
12 “frivolous” paragraphs, and apparently expects the Commission to go through paragraph by  
13 paragraph to figure out which ones allegedly are redundant. (Motion at 3). The burden is on  
14 Central Lincoln, as the movant, and it has not met that burden. Regardless, Central Lincoln’s  
15 assertion is meritless. All of the allegations in Charter’s Complaint are independently relevant  
16 and specific. There is no inappropriate redundancy. Charter has certainly not simply repeated  
17 paragraphs in multiple places in the Complaint.<sup>3</sup>  
18  
19

20 Central Lincoln also argues that the Commission should strike paragraphs that raise  
21 “issues that have already been decided between the parties, such as processing permits and  
22 attaching to poles. . . .” (Motion at 3). Again, Central Lincoln provides no further explanation or  
23

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24 <sup>3</sup> Central Lincoln identifies paragraphs 67, 74, 86, 94, and 99 of Charter’s Complaint as  
25 objectionable. These paragraphs are standard pleading paragraphs in which, at the beginning of  
26 each “Count,” Charter incorporates by reference all prior paragraphs in order to clearly  
incorporate the prior factual allegations into the Count, rather than repeat them. This is standard  
pleading practice, and is certainly not objectionable under Rule 21(E).

1 analysis of the paragraphs that it identifies – which are fairly random and scattershot.<sup>4</sup>

2 Notwithstanding Central Lincoln’s failure to meet its burden, there is no basis for striking  
3 paragraphs of Charter’s Complaint regarding issues that have allegedly been “decided between  
4 the parties.”

5 Charter and Central Lincoln have not settled the merits of any of Charter’s claims.  
6 Charter and Central Lincoln merely reached an interim agreement whereby Charter is able to  
7 undertake pole work during the pendency of this litigation. Pursuant to that agreement, Charter  
8 withdrew its Motion for Emergency Interim Relief, *without prejudice*. However, the facts  
9 alleged in the Complaint regarding Central Lincoln’s demands and actions continue to be  
10 relevant to support Charter’s claims. For example, Charter’s allegations support its argument  
11 that Central Lincoln holds and exercises unreasonable unilateral power over pole attachments in  
12 a manner that leads to the imposition of unjust and unreasonable terms and conditions of  
13 attachment. (*See, e.g.* Complaint ¶¶ 49-66). They are, therefore, ultimately relevant to the issue  
14 of whether the terms and conditions of the attachment agreement that Central Lincoln purported  
15 to enforce in taking the alleged actions are just and reasonable. Moreover, there is certainly still  
16 a live controversy regarding Central Lincoln’s demand that Charter pay application fees and  
17 Central Lincoln’s various fees for attachments in unusable space. Central Lincoln’s retaliatory  
18 actions, in which it refused to permit Charter to undertake necessary work in response to Charter  
19 challenging Central Lincoln’s fees, are relevant to demonstrate that the rates, terms, and  
20 conditions of attachment are not just and reasonable.  
21  
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24 <sup>4</sup> For example, Central Lincoln identifies many, but not all, of the paragraphs in Charter’s  
25 Complaint that address Central Lincoln’s unreasonable actions and demands with regard to  
26 Charter’s projects in Yachats. For example, it identifies paragraphs 49, 51, and 53-56, but does  
not identify as problematic paragraphs 50, 52, 57, and 62, which otherwise all appear to concern  
the same issues and events.

1           Accordingly, paragraphs 15, 16, 17, 18, 19, 21, 34, 37, 43, 45, 48, 49, 51, 53-56, 58-61,  
2 63, 65, 66, 67, 74, 77, 82-86, 89-94, 97-100, 102 and Exhibit 5 of Charter's Complaint should  
3 not be stricken.  
4

5 **V.     THE COMMISSION'S CONSIDERATION OF AMENDMENTS TO THE**  
6 **GENERAL POLE ATTACHMENT RULES IS NOT GROUNDS TO STAY**  
7 **CHARTER'S COMPLAINT**

8           Central Lincoln's final argument is that Charter's Complaint should be held in abeyance  
9 because the Commission is initiating a rulemaking to address general pole attachment issues.  
10 (Motion at 5-6). There is no merit to Central Lincoln's assertion.

11           First, Central Lincoln agreed to the current schedule in this case without requesting that  
12 the case held in abeyance. Second, Central Lincoln's assertion appears to be based on the  
13 unspoken premise (or hope) that the Commission is going to adopt rules that depart from the  
14 holdings in UM-1087. Yet, there is no basis for such an assumption. It is just as likely, if not  
15 more likely, that the Commission will adopt rules that further confirm the approach taken in UM-  
16 1087 and conform the Oregon rules to those adopted by commissions around the country and at  
17 the FCC. It is possible that the Commission may choose to adopt no new rules. The outcome of  
18 the rulemaking may even be a conclusion that the current rules are adequate (although Charter  
19 does not agree that the current rules are adequate). In any event, it would not be appropriate to  
20 prevent Charter from obtaining necessary relief based on a potential for rule changes, the timing  
21 of which are completely uncertain. Based on the current schedule in this case, and the schedule  
22 set by the Commission on March 10, 2006 for the rulemaking in AR 506, the Commission will  
23 not adopt any new rule before the completion of this case.<sup>5</sup>

24 \_\_\_\_\_  
25  
26 <sup>5</sup> This case is scheduled for hearing on September 27, 2006, while AR 506 will not have its final  
hearing on Division 28 of the Commission's rules until November 1, 2006.

1 Third, even if the Commission changes the rules, that decision will not impact Charter's  
2 entitlement to relief for the period prior to any new rules going into effect. Any new rules  
3 adopted by the Commission would presumptively apply prospectively. *See, e.g., Electric*  
4 *Lightwave, Inc. v. US West Communications, Inc.*, 1999 Ore. PUC Lexis 184, at \*21-22 (Apr.  
5 26, 1999) ("Retroactivity is not favored in the law, and generally administrative rules will not be  
6 construed to have a retroactive effect"). Charter's entitlement to relief is based on the rules in  
7 effect at the time when the complained-of rates, terms, and conditions were imposed and  
8 enforced. Accordingly, its complaint should not be held in abeyance.  
9

## 10 VI. CONCLUSION

11 Based on the foregoing, Central Lincoln's Motion should be denied, and Charter's Cross-  
12 Motion For Partial Summary Judgment granted.  
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1  
2 DATED this 16th day of March, 2006.  
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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.

Case 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:

- Complainants’ Response In Opposition To ORCP 21 Motions Of Defendant  
And In Support Of Complainants’ Cross-Motion For Partial Summary Judgment

was served this day via e-mail transmission, and by U.S. Mail in sealed envelopes upon the  
following:

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Dated this 16th day of March, 2006, at Washington, D.C.

/s/ T. Scott Thompson