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 **MEMORANDUM IN OPPOSITION TO PLAINTIFF'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT**

Central Lincoln People's Utility District ("Defendant") replies to Charter Communications Holding Company, LLC's, Falcon Telecable, L.P.'s, Falcon Cable Systems Company II, L.P.'s, and Falcon Community Ventures I, L.P.'s ("Complainant") Cross Motion for Partial Summary Judgment ("Motion") as follows:

I. INTRODUCTION

Summary judgment is only appropriate where there is no genuine issue as to any material fact, viewed in a manner most favorable to the adverse party, so that the moving party is entitled to a judgment as a matter of law. ORCP 47 C; *Jones v. General Motors Corp.*, 325 Or. 404 (1997); *Seeborg v. General Motors Corp.*, 284 Or. 695 (1978). In a summary judgment proceeding, the Commission views the evidence and all reasonable inferences that may be drawn from the inferences in the light most favorable to the party opposing the motion. *Double Eagle Golf, Inc. v. City of Portland*, 322 Ore. 604, 606 (1996). The Commission must find that no

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"objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment," to grant such a motion. ORCP 47 C. Charter, as the moving party, has the heavy burden of showing that no genuine issue of material fact exists. Charter has not met this burden, as is apparent from their motion, and as will be explained below. Therefore, Charter's Motion for Partial Summary Judgment should not be granted because there are numerous genuine issues of material fact included in their complaint, which means that Charter is not entitled to a judgment as a matter of law. Counts 1, 2, 3, 4, and 5, all contain genuine issues of material fact that must be resolved by the Commission only after a hearing and an opportunity for both parties to be heard. Order No. 05-583, 2005 Ore. PUC Lexis 241 at *3-4 (May 16, 2005) ("*Central Lincoln II*").

II. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO GRANT CHARTER REFUNDS FOR POLE CONTACT CHARGES

Charter's assertion that ORS § 757.279(1) grants the Commission the right to order refunds is without merit and is contrary to a plain reading of the statute. Distorting the words and grammar of the statute is the only way that Charter could determine that the statute gives the Commission the authority to grant refunds. Charter's argument is disingenuous and unreasonable, as is apparent by looking at the face of the statute.

ORS § 757.279(1) states:

> "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,** or that such rates or charges are insufficient to yield a reasonable compensation for the attachment and the costs of administering the same, **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.** In determining and fixing such rates, terms and conditions, the commission shall consider the interest of the customers of the licensee, as well as the interest of the customers of the

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public utility, telecommunications utility or consumer-owned utility that owns the facility upon which the attachment is made."

First of all, as is apparent, the statute does not explicitly grant the Commission the authority to grant refunds from unreasonable pole charges. ORS § 174.010 states: " In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted…"Secondly, the statute does not implicitly grant the Commission the authority to refund pole overcharges. Central Lincoln does not base its entire argument on the word "thereafter" as Charter asserts in its motion. The statute says that when the Commission finds "the rates, terms or conditions demanded, exacted, charged or collected in connection with attachments…**are** unjust or unreasonable…" The word "are" is a word of present action, not past action. The statute does not say when the Commission finds the rates "have been" unjust and unreasonable, but "are" unjust and unreasonable. The "are" means the rates currently in effect and being collected, not rates that were collected in the past. The word "are" modifies the subject "rates" and the word "collected." Charter's argument adds language to the statute that just is not there. Charter wants to substitute the words "were" or "have been" for the word "are." Unfortunately for Charter, the legislature chose to use the word "are" and not to give the Commission the authority to grant refunds. The phrase "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," supports the proposition that the Commission cannot grant refunds. It clearly states that the Commission only has power to set the rates "thereafter" to be observed, without granting the power to retroactively issue refunds. "Fix the same by order," logically read, just modifies the sentence, which gives the Commission to set the rates "thereafter," not issue refunds. Nowhere in this statute, or any other

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statute, does the legislature give the Commission the authority to grant refunds on previously collected pole rental rates. It should also be noted that never, in its entire history, has the Commission granted refunds on pole rental charges.

Charter's motion then cites ORS § 756.040(1) and *Pacific Northwest Bell Tel. Co. v. Katz*, 116 Or. App. 302 (1992) in support of its flawed argument that the Commission has the authority to grant refunds. First of all, the *Pacific* case has no bearing on this matter. That case concerned the authority of the Commission to grant refunds to telephone company customers after rate revisions by the Commission. The statute at issue in that case was 759.185(4) which states that:

> "if the rate or rate schedule thereafter approved by the commission is for a lesser increase or for no increase, the telecommunications utility **shall refund** the amount of revenues received that exceeds the amount approved as nearly as possible to the customers from whom such excess revenues were collected, by a credit against future bills or otherwise, in such manner as the commission orders."

The statute at issue in *Pacific* explicitly granted the Commission the power to issue refunds to telephone company customers after rate revisions. The only issue was whether refunds could also be issued after non-interim rate increases. 116 Or. App. at 306. This statute has nothing to do with the power of the Commission to issue refunds to cable companies for pole rental overcharges. The Court in *Pacific* did also rely on ORS § 756.040(1) as a second method for granting refunds. ORS § 756.040(1) states:

> "..the commission shall represent the **customers** of any public utility, telecommunications utility, railroad, air carrier or motor carrier and the public generally in all controversies respecting rates, valuations, service **and all matters of which the commission has jurisdiction.** In respect thereof the commission shall make use of the jurisdiction and powers of the office to **protect such customers, and the public generally,** from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates."

However, as noted by the Attorney General of the State of Oregon in an official opinion, "The

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PUC's regulatory authority, as established by the legislature, generally does not encompass publicly controlled utilities, such as municipal utilities, **people's utility districts**, and utility cooperatives in which the customers served have reasonable opportunities to influence the governance and operation of the utility: in other words, opportunities to protect themselves with respect to the provision of utility service. See, e.g., ORS chs 225 and 261; ORS 757.005(1)(b)(A), 758.470, 758.505(6), and 758.535(2)(b) and (c)." 1988 Ore. AG LEXIS 72, *2-3 (November 23, 1988). CLPUD is a people's utility district, which is not a public utility under ORS § 756.040(1), as noted in the Attorney General's opinion above. In addition, in *Springfield Util. Bd. v. Emerald People's Util. Dist.*, the Oregon Court of Appeals stated, "…that would be contrary to the PUC's consistent position that PUDs, like other publicly-owned utilities, are outside of its regulatory authority except when statutes specifically grant the PUC authority over them, such as the authority to allocate their territory. *See* ORS 758.400-758.475. " 191 Or. App. 536, 548 (Or. App. 2004). Therefore, it is apparent from previous Oregon judicial opinions and decisions that Charter is not covered by § 756.040(1).

Besides this explicit lack of regulatory authority, the *Pacific* case dealt with refunds to telephone company customers that were provided for under a specific statute, which gave the Commission jurisdiction to order refunds to such customers. In this case, there is no specific grant of power for the Commission to grant refunds for pole rental rate overcharges, which means that there is no separate grant of jurisdiction to the Commission to order such refunds. ORS § 756.040 does broaden the Commission's powers in matters under which it **already has jurisdiction,** as it had in the *Pacific* case. In this case, the Commission has no jurisdiction to broaden. Since the Commission has no specific statutory jurisdiction to grant refunds in pole contract disputes, ORS § 756.040(1) cannot be used to broaden its jurisdiction. As the Court in

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Pacific noted,

> "it is well settled that an agency **has such implied powers as are necessary to enable the agency to carry out the powers expressly granted to it**. *See SAIF v. Wright*, 312 Or 132, 137, 817 P2d 1317 (1991); *Ochoco Const. v. DLCD*, 295 Or 422, 426, 667 P2d 499 (1983); *Warren v. Marion County et al*, 222 Or 307, 320, 353 P2d 257 (1960). 116 Or. App. at 309-10.

Since there is no express grant of power to the Commission to issue refunds for pole rental overcharges, there can be no implied power to do so. In *Citizens' Util. Bd. v. PUC*, 154 Ore. App. 702 (1995), the Court stated that,

> "PUC points to our statement in *Pacific Northwest Bell Telephone Co. v. Katz*, 116 Ore. App. 302, 309 n 5, 841 P.2d 652 (1929), *rev den* 316 Ore. 528 (1993), that ORS 756.040 and other general empowering statutes have given PUC "the broadest authority -- commensurate with that of the legislature itself -- for the exercise of [its] regulatory function" (quoting *Pacific N.W. Bell v. Sabin*, 21 Ore. App. 200, 214, 534 P.2d 984, *rev den* (1975)). However, we added in *Katz* that, "of course, PUC's exercise of its authority is limited by the boundaries of the legislature's delegation." 116 Ore. App. at 309 n 5."

In addition, the Court in *Pacific* relied on this statute to grant refunds to **customers** of a body regulated by the Commission. Charter is not a "customer" as contemplated by *Pacific* or ORS § 756.040(1). The court noted that,

> "to hold that PUC does not have the power to order a refund of amounts over collected under temporary rates that failed to comply with an ordered revenue reduction would be inconsistent with its regulatory role and statutory duties. Such a holding would deprive PUC of much of its power to protect customers from abusive delay tactics or, as in this case, unexpectedly long delays in implementing an ordered revenue reduction." 116 Or. App. at 311.

It is apparent from the language of the case that the Court was not considering refunds on contracts between two business entities, but was looking to protect customers from unfair telephone company rates, in which a specific statute granted the Commission the power to issue refunds. ORS § 756.040(1). The *Pacific* case obviously has no bearing on the resolution of the current case. Charter is correct on Page 5 of its motion when it states that the Commission has

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the authority to protect it from unjust and unreasonable rental charges under ORS § 757.279(1). However, it is not correct in inferring that this implies refunds may be granted, absent any specific statutory authority.

Besides the fact that the Commission has no statutory authority to issue refunds for pole attachment rental rate overcharges, it would also be completely impracticable and disastrous for the Commission to do so, as the legislature probably recognized when it withheld the power. Since there are no statutory guidelines for the issuing of refunds, there are no standards for the Commission to go by. It is unknown how far back rental rates could be refunded, if there would be a maximum amount for such refunds, how to determine when refunds could be granted, who could be granted refunds, and for what refunds could be granted. It would send all utility companies, especially the larger ones, into a fiscal quagmire. The Commission would be engulfed in a never ending revolving door of refund requests, leaving it minimal time and money to deal with the issues it was created to deal with. Once such a Pandora's Box was opened, there would be no closing it.

III. THE COMMISSION'S DECISIONS IN UM-1087 ARE NOT BINDING IN THE CONTRACTUAL DISPUTE BETWEEN CHARTER AND CLPUD

As has already been discussed in previous filings with the Commission, the Commission did address issues similar, but not identical, to those of the ones in this case in *Central Lincoln People's Util. Dist. v. Verizon Northwest, Inc.,* Order No. 05-042, 2005 Ore. PUC Lexis 36 (Jan. 19, 2005) ("*Central Lincoln I*"); Order No. 05-583, 2005 Ore. PUC Lexis 241 (May 16, 2005) ("*Central Lincoln II*"); Order No. 05-981, 2005 Ore. PUC Lexis 446 (Sept. 7, 2005) ("*Central*

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Lincoln III"). However, the Commission refused to decide the precedential effect of these decisions. *Central Lincoln III,* 2005 Ore. PUC Lexis 446 at *6-9. All of the orders specifically applied to Verizon and Central Lincoln alone. *Central Lincoln II,* 2005 Ore. PUC Lexis 241 at *6. The Commission noted that ORS § 757.285 "states that pole attachment contracts are presumptively just, fair and reasonable, unless the Commission finds otherwise after a complaint and a hearing. Under this provision, new terms do not necessarily automatically apply to other parties." ORS § 757.279 says the same thing. *Central Lincoln III*, 2005 Ore. PUC Lexis 446 at *8. A hearing on Charter's complaint must be granted before the contract is determined to be unjust, unfair, or unreasonable. The Commission cannot establish a new agreement until "after hearing had upon complaint by a licensee…that the rates, terms or conditions demanded, executed, charged or collected in connection with attachments or availability are unjust or unreasonable…" *Central Lincoln II*, 2005 Ore. PUC Lexis 241 at *3-4. In addition, ORS § 756.568 states that at any time, after notice and opportunity to be heard, the Commission may "rescind, suspend or amend any order." *Central Lincoln III*, 2005 Ore. PUC Lexis 446 at *8. The Commission also made a point to say that, "The value of any precedent is a subject for parties to argue in the course of litigation." *Id.* at *9. Verizon and OCTA also agreed that the order did not apply to any other parties. *Id.* at *7. It is clear from the statutes and the Commission's opinion in *Central Lincoln III*, that the rates deemed to be reasonable in the Verizon case are not automatically deemed to be reasonable for other parties, and summary judgment cannot be granted on these issues.

Central Lincoln I-III applied only to Charter's contract with Verizon. Any rate determinations and schedules apply only to that agreement, contrary to Charter's arguments on which it bases its complaint. *Central Lincoln II,* 2005 Ore. PUC Lexis 241 at *6. The rates for that agreement were determined using set calculations that may be applied to different parties, but not set dollar amounts that apply to anyone other than Verizon and Central Lincoln. The same rate formulas may apply to both parties, however any specific rate amount would

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necessarily be different due to changes in time and circumstance. Any specific dollar amounts between Charter and Central Lincoln would have to be separately calculated and determined by the Commission after a hearing in which both sides would be heard. Specific dollar amounts change over time, and a determination of certain amounts in one Commission order that applied to two specific parties cannot be haphazardly applied to every other party that has a contract with Central Lincoln. The *Verizon* cases may have determined that CLPUD's rate formula is incorrect, but they did not determine what those rates should be for any party other than Verizon. The *Verizon* cases may provide evidence for this dispute, but they do not determine as a matter of law what Charter's rate should be. All of the facts from the *Verizon* cases are just impeachment evidence that should be brought up at the hearing. Therefore, Charter is not entitled to summary judgment on these issues.

Charter, as the moving party in a summary judgment motion, also has the burden of proof, as discussed earlier in this memorandum. Charter has provided no evidence to support its assertion that Verizon is currently paying the rate that the Commission determined in the previous *Verizon* cases. Summary judgment is only appropriate where there is no genuine issue as to any material fact, viewed in a manner most favorable to the adverse party, so that the moving party is entitled to a judgment as a matter of law. ORCP 47 C; *Jones v. General Motors Corp.,* 325 Or. 404 (1997); *Seeborg v. General Motors Corp.,* 284 Or. 695 (1978). Charter may have shown that that was what the Commission ordered Verizon to pay at the time, but it produced no evidence to show that that is what Verizon is paying today. Charter argues that it is entitled to the same rental rate that the Commission ordered Verizon to pay, however Charter has not shown what rental rate Verizon is actually paying. Since it has not shown what rental rate it is entitled to, Charter's motion for summary judgment cannot be granted.

IV. ISSUE PRECLUSION DOES NOT APPLY TO THIS PROCEEDING

Charter is correct in setting forth the standards for issue preclusion in Oregon. The Oregon Supreme Court has identified five requirements for the application of issue preclusion.

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See Nelson v. Emerald People's Utility Dist., 318 Or. 99, 104 (1993). However, Charter is incorrect in asserting that issue preclusion applies in this proceeding.

A. The Issues in the *Verizon* Cases and the Current Proceeding Are Not Identical

First of all, the issues in the *Verizon* cases and the current proceeding are similar, as stated above. However, they are far from identical. Charter is not asking for a just and reasonable rate to be determined, but is asking for a specific rate. Verizon did not ask for a set amount in their proceedings, just for the Commission to set a just, fair and reasonable rate. The formula the Commission deemed appropriate was the relevant issue in that case, not the actual pole rental rate, which Charter has made one of the central issues in this case. In the *Verizon* cases, the Commission determined that the rates CLPUD were charging Verizon were unjust and unreasonable. *Central Lincoln People's Util. Dist. v. Verizon Northwest, Inc.*, Order No. 05-042, 2005 Ore. PUC Lexis 36 (Jan. 19, 2005) ("*Central Lincoln I*"). The Commission decided that the rate formula CLPUD used to calculate Verizon's rental rate was unjust and unreasonable. *Central Lincoln I*, 2005 Ore. PUC Lexis 36 at *36-37. However, it did not set a specific dollar amount that CLPUD was allowed to charge; it just outlined the formula which CLPUD was to follow in setting their rental rate. Order No. 05-583, 2005 Ore. PUC Lexis 241 (May 16, 2005) ("*Central Lincoln II*"). Charter is incorrect in asserting on their motion on p. 7 that the Commission "determined that Central Lincoln's proper pole attachment rate in Oregon is $4.14." The Commission deemed that rate to be the "ANNUAL RATE THE DISTRICT WILL CHARGE VERIZON," based on the pole rental formula outlined in the case from January 19, 2005. *Central Lincoln I*, 2005 Ore. PUC Lexis 36 at *85; *Central Lincoln II*, 2005 PUC Lexis 241 at *54. Charter's assertion that the Commission determined that that was the "pole attachment rate in Oregon" is blatantly false. Charter's own motion makes it apparent that the issues in this proceeding are not identical to those in the *Verizon* cases.

Besides the false assertion that the issue of pole rental rates has been determined, Charter is asserting another issue that was not brought up in the *Verizon* cases. Verizon never asked the

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Commission for refunds from CLPUD, and the Commission did not rule or discuss such an issue. For Charter to assert that the issues in the two proceedings are identical, therefore, is disingenuous. They are obviously different. One of the major issues in this proceeding is the question of refunds. That issue was never even discussed in the *Verizon* cases. There is no possible way, therefore, for the issues in the current proceeding to be identical to those in the *Verizon* cases, and issue preclusion cannot apply because it fails the first standard outlined by the Oregon Supreme Court. *See Nelson v. Emerald People's Utility Dist.*, 318 Or. 99, 104 (1993).

B. The Issues in this Proceeding Were Not Actually Litigated and Were Not Essential to a Final Decision on the Merits in the Prior Proceeding

For the same reasons as outlined in Section A above, the issues in this proceeding were not actually litigated and were definitely not essential to a final decision on the merits in the *Verizon* proceedings. As stated above, the issues in this proceeding are different than the ones in the *Verizon* cases. In this proceeding, Charter is asking for a specific rental rate to be applied to them, which was not an issue in the *Verizon* cases. Also, Charter is asking for refunds from pole rental overcharges, which was also not an issue in the *Verizon* cases. Since these were not issues in the *Verizon* proceedings, they obviously were not actually litigated and were not essential to a final decision on the merits. Therefore, issue preclusion cannot apply in this proceeding.

C. CLPUD Has Not Had a Full and Fair Opportunity to Be Heard on These Issues

CLPUD has not had a full and fair opportunity to be heard on the issues of a specific rental rate applied to Charter (and according to Charter all rental agreements in Oregon), and the issue of the Commission's authority to grant refunds to Charter (and apparently all of the other companies it has a rental rate agreement with in Oregon). These issues have never been litigated or argued by CLPUD in front of the Commission in a previous case. CLPUD, therefore, has obviously not had a full and fair opportunity to be heard on these specific issues.

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D. Central Lincoln Was a Party to the Prior Proceeding

CLPUD admits that it was a party in the *Verizon* cases. However, as shown above, this is not enough for issue preclusion to apply.

E. The Commission Decisions in the *Verizon* Cases Are the Type of Proceedings Which Can Receive Preclusive Effect

CLPUD agrees with Charter that the Commission decisions can have a preclusive effect. However, for the reasons stated above, issue preclusion cannot apply in this proceeding.

V. THE COMMISSION'S CONSIDERATION OF AMENDMENTS TO THE POLE ATTACHMENT RULES IS RELEVANT EVIDENCE IN THIS PROCEEDING

CLPUD has agreed to the schedule in this case, as Charter states in its motion on Page 20. CLPUD believes, however, that the rulemaking docket anticipated by the Commission should be considered by the Commission in its order in this proceeding. The Commission has acknowledged the fact that there are gaps in the administrative rules dealing with pole contact issues. *Central Lincoln People's Util. Dist. v. Verizon Northwest, Inc.*, Order No. 05-042, 2005 Ore. PUC Lexis 36, *46-47. (Jan. 19, 2005). The Commission stated that they "anticipate opening a rulemaking docket after the close of [the *Verizon* cases] to clarify our rules relating to how contractual disputes should be brought before the Commission, how costs of such disputes should be allocated, the role of the JUA, and other issues to better implement ORS 757.270 through 757.290." *Central Lincoln I*, 2005 Ore. PUC Lexis at *47. The Commission has not yet released the results of the new rulemaking process. Any case such as this one that concerns rules subject to possible significant revisions should be carefully considered by the Commission in light of the upcoming rulemaking revisions, so that it is clear by what rules the parties have to abide. If the case is heard right now, it is unclear by what rules the facts would be judged, and

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any rates that were determined under the old rules would become quickly out of date. This could entail a large waste of time and money for everyone involved, including the public. Since the very facts that Charter argues are subject to imminent revisions, the Commission should carefully consider deciding on any new rental rates between Charter and CLPUD in light of the upcoming rulemaking docket. Charter mentions in its motion on Page 20 that the Commission will not have its final hearing on Division 28 of the Commission's rules until November 1, 2006. However, according to the schedule set in this case, the hearing is not scheduled until September 27, 2006. That leaves barely a month's gap in the time between the hearing on this case and the final hearing in the rulemaking proceeding. Therefore, rates determined in a decision in this proceeding may be valid for a little over a month's time, depending on the changes the Commission makes to its rules.

CONCLUSION

Based on the foregoing, Charter's Motion for Partial Summary Judgment should be denied.

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DATED this 28 day of March, 2006.

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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

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CERTIFICATE OF SERVICE

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

- Memorandum in Opposition of Plaintiff's Motion for Summary Judgment

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