

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1087

CENTRAL LINCOLN PEOPLE’S)
UTILITY DISTRICT,)
)
Complainant,)
)
vs.)
)
VERIZON NORTHWEST INC.,)
)
Defendant.)

RULING

**DISPOSITION: ORCP 21 MOTIONS DENIED; REQUEST FOR
ORAL ARGUMENT DENIED**

On May 22, 2003, Central Lincoln People’s Utility District (CLPUD) filed a petition for the removal of pole attachments by Verizon Northwest Inc. (Verizon). On June 17, 2003, CLPUD filed a motion for an order of default because Verizon did not file a timely answer. Verizon filed its answer, counter complaint, and application for waiver on June 18, 2003, and filed a response to the motion for an order of default on June 30, 2003.

On July 3, 2003, CLPUD filed 16 ORCP 21 motions against Verizon’s answer, counter complaint, and application for waiver. On July 10, 2003, CLPUD filed a reply to Verizon’s response to the motion for default. On July 16, 2003, Verizon filed a response in opposition to CLPUD’s ORCP 21 motions and requested oral argument. On July 17, 2003, the Administrative Law Judge (ALJ) responsible for this case denied CLPUD’s motion for an order of default. On July 25, 2003, CLPUD filed a reply memorandum in support of its ORCP 21 motions.

The Commission construes pleadings liberally, in the spirit of ORCP 21. I lay out the procedural history of the case to demonstrate that this case has already generated an unusual number of motions, replies, and responses based on the pleadings. In its reply, CLPUD notes that the purpose of ORCP 21 motions is to narrow the issues in a proceeding. The more usual course of business in the Commission is to have parties meet for a prehearing conference and negotiate an issues list or, if the list cannot be negotiated at that time, arrange for parties to submit proposed issues lists and have the

ALJ circulate a final issues list to the parties. That is the procedure I propose for this case. A prehearing conference is being set. Parties should bring proposed issues lists to the conference. In the meantime I will address the ORCP 21 motions.

CLPUD's ORCP 21 Motions. CLPUD makes 16 motions against Verizon's answer, counter complaint, and application for waiver. Verizon argues that the Commission's rules provide a liberal pleading standard under which an answer and a counter complaint are judged for sufficiency and relevance (OAR 860-013-0025; OAR 860-013-0015). Because there are Commission rules on point, Verizon contends that CLPUD's ORCP 21 motions are misplaced. In any event, Verizon argues that under either the ORCP standard or the standard set forth in Division 13 of Chapter 860, Oregon Administrative Rules, its pleading should survive the motions.

I agree with Verizon that the OAR Chapter 860, Division 13, standard for pleadings is less stringent and more permissive than the ORCP standard. However, CLPUD is correct in stating that nothing in the OARs precludes a motion to strike.

On review of CLPUD's motions, I find that they fall into several groups. Several seek to resolve disputed issues by asserting that Verizon's pleading is a sham or frivolous based on certain factual or legal assumptions (Motion 1; Motion 3; Motion 4; Motion 5; Motion 6). These motions are denied. The place to resolve disputed underlying facts or assumptions is in the hearing process.

CLPUD also argues to strike Verizon's assertions that good faith is necessary in negotiations (Motions 4; Motion 7; Motion 9). CLPUD argues that OAR Chapter 860, Division 28, is the exclusive remedy for Verizon and does not require good faith negotiation. Verizon argues that all contracting implies good faith negotiation and that the Commission's statutory authority (ORS 759.660) to examine a pole owner's rates, terms, and conditions entails an examination of the parties' positions during bargaining. It is too early to say which statutes and rules apply in this case and which remedies are available. It is also too early to conclude that the usual good faith obligation is suspended here. That will depend on the factual record. Motions 7 and 9 are denied.

In Motion 2, CLPUD moves to strike the sentence in paragraph 1 of Verizon's pleading that denies that Attachment A to CLPUD's complaint identifies all of Verizon's attachments on CLPUD's poles. Verizon contends that CLPUD's petition describes that attachment as "a list of attachments which [Verizon] has established on [CLPUD's] poles or facilities." CLPUD prays for an order allowing it to remove Verizon's attachments, without a distinction as to whether the attachments were established before or after the agreement between CLPUD and Verizon was terminated. Verizon's sentence in paragraph 1 provides useful information. Motion 2 is denied.

Motion 8 seeks to strike as a legal conclusion Verizon's assertion that ORS 757.276 gives the Commission authority to regulate rates, terms, and conditions demanded by CLPUD. Verizon argues that this legal allegation forms the basis of its counter complaint and is material. Verizon is correct. Motion 8 is denied.

Motions 10-16 deal with Verizon's request for a waiver. Motion 10 is a request to strike Verizon's request for a waiver in paragraphs 15 through 20. That motion is denied. We will deal with Verizon's request in the course of processing the complaint and counter complaint.

Motions 11 and 13 argue that the agreement between Verizon and CLPUD was terminated. Verizon contends that this is a disputed fact. I agree that this is a matter for hearing. Motions 11 and 13 are denied.

Motion 12 contends that CLPUD's complaint is limited to certain pole attachments. Verizon argues that the scope of the complaint is unclear and that the relief prayed for could include all attachments. I agree. Motion 12 is denied.

Motion 14 reiterates CLPUD's position on good faith negotiation and is denied for the same reasons I denied Motions 4, 7, and 9 above. Motion 15 reiterates CLPUD's position that Verizon may not assert legal conclusions and is denied for the same reason I denied Motion 8. Motion 16 asserts that the Commission lacks authority to grant a waiver. This will be determined in the course of the proceedings in this docket, as I stated in response to Motion 10; Motion 16 is denied.

Verizon's request for oral argument. Verizon included a request for oral argument in its caption but did not elaborate on why one was needed. I do not believe that oral argument is necessary on these issues. Verizon's request is denied.

Dated at Salem, Oregon, this 6th day of August, 2003.

Ruth Crowley
Administrative Law Judge