ISSUED: April 10, 2006

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1241

CHARTER COMMUNICATIONS HOLDING COMPANY, LLC, FALCON TELECABLE, L.P., FALCON CABLE SYSTEMS COMPANY II, L.P., and FALCON COMMUNITY VENTURES I, L.P.,	)	
	)	RULING
Complainants,	)	
v.	)	
CENTRAL LINCOLN PEOPLE'S UTILITY DISTRICT,	)	
Defendant.	)	

DISPOSITION: MOTIONS DENIED

On February 27, 2006, Central Lincoln People's Utility District (CLPUD) filed a motion to strike portions of the complaint and seeking a delay in the case. On March 16, 2006, Charter Communications Holding Company, LLC; Falcon Telecable, L.P; Falcon Cable Systems Company II, L.P., and Falcon Community Ventures I, L.P. (collectively Complainants) filed a response in opposition to CLPUD's motion as well as a cross motion for partial summary judgment. On March 28, 2006, CLPUD filed an opposition to Complainant's motion for partial summary judgment. Verizon Northwest, Inc. (Verizon) also filed a response, though in support of Complainant's motion.

Commission Authority to Award Refunds

CLPUD argues that the Commission does not have the jurisdiction to award damages or refunds to a party if the Commission finds that excessive rates for pole attachments have been charged. CLPUD relies on the text of ORS 757.279(1), which provides that, whenever the Commission holds a hearing and makes a finding

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

CLPUD interprets this provision to state that the only remedy for unjust or unreasonable rates is a Commission decision setting rates on a prospective basis only.

Complainants argue that the above provision also applies to charges "exacted" and "collected." *See* Opposition, 3-4 (Mar 17, 2006). Further, Complainants assert that the statute permits the Commission to "fix [the unlawful rates] by order." *See id.* at 4. Verizon goes on to cite the Commission's general authority under ORS 756.040, which provides:

> the commission shall represent the customers of any public utility or telecommunications utility 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.

This statute has been held to provide the Commission with authority to award refunds for amounts over collected under temporary rates. *See Pacific Northwest Bell Telephone Co. v. Katz*, 116 Or App 302, 310 (1992).

CLPUD responds that ORS 756.040 states that the Commission shall represent customers and the public, but not necessarily companies in contract disputes. Moreover, CLPUD argues that the Commission does not generally have jurisdiction over people's utility districts; therefore, Complainant's reliance on ORS 756.040 is misplaced.

The Commission's general jurisdiction over complaints arises under ORS 756.500, which has been construed to provide an opportunity to seek refunds for unlawful rates. ORS 756.500(2) states:

> It is not necessary that a complainant have a pecuniary interest in the matter in controversy or in the matter complained of, but the commission shall not grant any order of reparation to any person not a party to the proceedings in which such reparation order is made.

ORS 757.276 gives the Commission specific jurisdiction over attachments to poles owned by consumer-owned utilities, and states, "All rates, terms and conditions made, demanded or received by any consumer-owned utility for any attachment by a licensee shall be just, fair and reasonable." To close the loop, ORS 757.290 provides that Commission procedures "for petition, regulation and enforcement relative to attachments * * * shall be the same as those otherwise generally applicable to the commission."

ORS 757.279 provides the Commission with the remedy (prospective rate-setting) to the violation (demand, exaction, charge, or collection of unjust or unreasonable rates).[1] Where the Oregon legislature establishes a statutory right that did not exist at common law, it also establishes the exclusive remedy. *See Gilbertson v. McLean et al*, 216 Or 629, 635-36 (1959). Therefore, the Commission does not have jurisdiction to award refunds for unjust and unreasonable rates, terms and conditions. Further, to award refunds would be contrary to the statutory scheme which presumes that a contract is reasonable unless determined otherwise after a complaint was made.[2] *See* ORS 757.285.

Despite this limitation to Commission authority, assertions related to unjust and unreasonable rates remain relevant to the complaint. The Commission still has jurisdiction to set reasonable rates, so the complaint's allegations related to unjust and unreasonable rates shall not be stricken.

Preclusive effect of Commission orders in UM 1087

CLPUD argues that the Commission decision in UM 1087 has no bearing on the current case and that paragraphs relating to that proceeding should be stricken from the complaint. In UM 1087, CLPUD filed a complaint against Verizon, for sanctions for attaching to poles without a contract, and Verizon countersued for an unjust and unreasonable contract. The Commission held that the prior contract had not been

[1] Complainants incorrectly read the Commission's authority to "fix the same by order." "The same" refers to the phrase immediately preceding it, that is, the Commission's authority to set "the just and reasonable rates, terms and conditions thereafter to be observed." This conclusion is reinforced by the next sentence which provides Commission authority to determine and fix "such rates, terms and conditions," that is, the reasonable rates, terms and conditions, in a future contract.

[2] This statutory presumption of the reasonableness of rates and contract terms distinguishes this case from *Pacific Northwest Bell Telephone Co*. In that case, the court held that the Commission established a revenue requirement, but the utility overcollected that requirement in rates; therefore, the Commission was permitted to order refunds to bring the earlier rates in line with what had been required by order. In this case, rates between two parties are considered reasonable until the Commission decides that they are not, so there has been no overcollection.

properly terminated and that provisions of the contract sought by CLPUD were unjust and unreasonable as applied to Verizon. *See* Order No. 05-042.

Complainants filed a cross motion for partial summary judgment, arguing issue preclusion. That is, Complainants assert that, in Order No. 05-042, the Commission decided the correct contract rates, terms and conditions in a formal contested case proceeding in which CLPUD was a full participant. Even if the issues are not precluded as a matter of law, Complainants argue that CLPUD's actions with regard to Verizon are highly relevant to Complainants claims against CLPUD.

A party will be precluded from relitigating an issue if the identical issue was actually litigated and was essential to a final decision, and the party sought to be precluded had a full and fair opportunity to be heard and was a party or was in privity with a party to the prior proceeding. *See Nelson v. Emerald People's Utility District*, 318 Or 99, 104 (1993). Litigation in a prior administrative proceeding may qualify, if the earlier proceeding was formal, comprehensive, and trustworthy. *See Fisher Broadcasting, Inc. v Department of Revenue*, 321 Or 341, 347 (1995).

The Commission, however, has previously determined that issue preclusion does not apply from one Commission proceeding to another. *See* UA 55, Order No. 04-225, 7 n 2. The issue preclusion doctrine, which recognizes the finality of court orders, is not compatible with the Commission's authority to "rescind, suspend or amend any order," after notice and opportunity to be heard. *See* ORS 756.568. Moreover, Commission decisions related to ratemaking are legislative in nature, not judicial. *See Knutson Towboat Co v. Oregon Bd of Maritime Pilots*, 131 Or App 364, 378 n 1 (1994) (bias of decision-makers was acceptable in ratemaking proceeding because it is legislative in nature, not quasi-judicial). While the decisions made in Order Nos. 05-042 and 05-583 may be used as precedent, those decisions are not necessarily dispositive of the issues in this case. *See* Order No. 05-981, 4.

In support of Complainants' cross-motion, Verizon contends that CLPUD is violating the Commission's orders issued in UM 1087. That issue, however, is outside the scope of this proceeding. As noted in the ruling approving Verizon's petition to intervene, "this complaint focuses on the contract provisions between two parties, and only arguments regarding the merits of those provisions are relevant to this proceeding. The intervenors' participation is limited to the 'just, fair and reasonable' nature of the contract rates, terms and conditions raised by Charter Communications in its contract with CLPUD." Verizon's grievances against CLPUD must be subject to a separate complaint with the Commission or a court to enforce the Commission's order.

Accordingly, the paragraphs related to the dispute in UM 1087 shall not be stricken, and Complainants' motion for partial summary judgment is denied.

Matters Decided Between Parties

Returning to the motion to strike, CLPUD asserts that certain issues have already been decided between the parties, "such as processing permits an attaching to poles." According to CLPUD, assertions related to these matters should be stricken from the pleading. In particular, paragraph 102 of the complaint asserts several provisions and requirements that Complainants complain are unreasonable in violation of ORS 757.276. Complainants did not directly address this assertion by CLPUD, except as part of its argument that the terms and conditions approved in UM 1087 should also apply in this case. As noted above, the particular decisions made by the Commission in UM 1087 do not necessarily prevail here. However, contrary to CLPUD's claim, Complainants clearly do not agree to the contract terms that CLPUD asserts have settled these matters. This paragraph will not be stricken from the complaint.

Generally, CLPUD asserts that "irrelevant, frivolous and redundant material" should be stricken from the pleading. The Commission generally construes pleadings liberally. *See* UE 111, Order No. 00-091, 3. The motion to strike is denied.

Rulemaking Proceeding

Finally, CLPUD argues that the Commission should delay the instant proceeding until it has completed work on its current rulemaking docket, AR 506, to adopt and amend rules related to pole attachments. CLPUD argues that to decide this case at this time would be a waste of Commission resources. "Since the very facts that Charter argues are subject to imminent revisions, the Commission should wait to determine any new rental rates between Charter and CLPUD until there are concrete rules to settle such a dispute." CLPUD Motion, 6 (Feb 28, 2006). Complainants argue that "there is no legal or policy reason to hold [the complaint] in abeyance." Complainant's Opposition, 3 (Mar 17, 2006).

The rulemaking proceeding will not change the underlying facts of this complaint, only the administrative rules applicable to the facts. One source of law that will not change is the Oregon Revised Statutes framework that applies to pole attachments. ORS 757.285 provides that every contract is presumed reasonable unless a complaint is filed. That statute also provides the Commission with the jurisdiction to hear complaints and resolve contract rates, terms and conditions that are found to be unjust and unreasonable. Especially in this case, where Complainants are seeking refunds for a contract rate that it asserts is unjust and unreasonable, delay does not seem prudent.

Dated at Salem, Oregon, this 10th day of April, 2006.

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Christina M. Smith
Administrative Law Judge