

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1288

PUBLIC UTILITY COMMISSION OF)	
OREGON,)	
)	
Complainant,)	STATUS CONFERENCE
)	MEMORANDUM
v.)	AND
)	RULING
VCI COMPANY f/k/a STAN)	
EFFERDING and STANLEY JOHNSON,)	
dba VILAIRE, and VCI COMPANY, a)	
Washington corporation,)	
)	
Defendants.)	

RULING DISPOSITION: MOTION TO EXPEDITE RESOLUTION OF MOTION TO SET ASIDE DEFAULT ORDER DENIED; QUESTIONS RAISED BY ALL OTHER PENDING MOTIONS CERTIFIED TO COMMISSION; REQUESTS FOR ORAL ARGUMENT DENIED

Background

In 2003, Stan Efferding and Stanley Johnson registered to do business in the State of Oregon under the assumed business name of Vilaire. Later, in the same year, the Public Utility Commission of Oregon (Commission) granted the petition of Stan Efferding and Stanley Johnson, doing business as (dba) Vilaire (Vilaire) for designation as a federal and state Eligible Telecommunications Carrier (ETC) in the Oregon service territory of Qwest Corporation (Qwest). In 2004, the Commission granted a request to change the name of Vilaire to VCI Company (VCI) (hereafter, VCI is used exclusively).

The Oregon Telephone Assistance Program (OTAP) is part of the Residential Service Protection Fund (RSPF) operated by the Commission. OTAP provides reduced rates for eligible low income customers' basic telephone services. An ETC that provides services at discounted rates under OTAP may seek reimbursement for

the discounts provided. Participating ETCs are subject to reporting requirements and audit.

As an ETC, VCI participated in OTAP, providing discounted services and seeking reimbursement. Audits of VCI raised questions, however, about whether reimbursement to VCI matched discounted services provided, as duplicate billings and billings for customers not served by VCI were discovered. Consequently, on December 5, 2006, the Commission opened a formal investigation to further examine the OTAP billings, revenue and remittance reporting of VCI.

At the conclusion of the Commission's investigation, the Commission filed a Complaint seeking recovery of OTAP funds improperly paid to VCI. The Complaint charged that VCI had improperly requested, and received, reimbursement for discounted services to persons that were not VCI customers. The Complaint was supported with testimony and exhibits by Staff of the Commission. Based on a systematic sampling of VCI's billings from June 2004 through November 2006, the Commission contended that VCI received \$203,391.97 in reimbursement for OTAP services that VCI claimed to have provided, but did not. The Complaint directed VCI to remit \$203,391.97 to the Commission, or to answer the Complaint within ten days of the mailing date of the Complaint. The Complaint was mailed on September 10, 2007. On September 21, 2007, Staff moved for admission of its pre-filed testimony and exhibits.

As of September 26, 2007, VCI had not filed a verified answer. Consequently, that day, the Commission entered Order No. 07-424 (Default Order), finding VCI in default. The Default Order declared that Defendants were liable to the Commission in the amount of \$203,391.97 for improperly obtained OTAP reimbursements for customers that did not have service with the Defendants.

Motions

As of December 12, 2007, six motions have been made and are pending in this proceeding:

- 1. VCI's Motion to Set Aside the Default Order:** On September 28, 2007, VCI filed a Motion to Set Aside the Default Order, claiming that Order No. 07-424 was entered in error, before Defendants were provided the requisite amount of time to respond. VCI asserts reliance on OAR 860-013-0050, providing that unless otherwise specified by the Commission or an Administrative Law Judge, an answer to a complaint is due 20 days after service of the Complaint. The Default Order was entered on September 26, 2007, 16 days after it was filed. Defendants argue that since a shorter answer period was specified in the Complaint itself, and not by a separate Commission order or by the ruling of an Administrative Law Judge (ALJ), the shorter answer period was not effective. As Oregon Rules of Civil Procedure (ORCP) 10 governs filing deadlines, and

Defendants did not receive all attachments to the Complaint until September 13, 2007, VCI asserts that it had until October 3, 2007 to answer.¹ Defendants also contended that the Default Order represented improper *ex parte* action.

2. **VCI's Objection to the Admission of Pre-Filed Exhibits:** On October 9, 2007, Defendants filed a document entitled, "Objections to the Admission of Pre-Filed Exhibits," which objected to the admission of Staff's pre-filed exhibits. Defendants object that it was premature and unduly prejudicial to admit the pre-filed testimony and exhibits of Staff into evidence without any opportunity for Defendants to conduct discovery or examine the witnesses.
3. **Commission's Motion to Strike the Objection:** On October 11, 2007, Staff moved to strike Defendants' objections to the admission of its pre-filed testimony and exhibits. Under OAR 860-013-0050(3), Staff observed, Defendants had 15 days after service of the Commission's motion, until October 8, 2007, to file a response. As Defendants did not object until October 9, 2007, the deadline passed, asserts Staff.
4. **VCI's Motion for Disclosure of Ex Parte Communications:** On October 22, 2007, Defendants filed a Motion for Disclosure of *Ex Parte* Communications. Defendants challenge whether the Commission has maintained the proper degree of separation between its prosecutorial and adjudication roles in this proceeding. Defendants state "the same person cannot act simultaneously as the prosecutor of a claim and the adjudicator of the same claim." Defendants specifically complain that the same attorney for the Commission acted as prosecutor and adjudicator. Defendants argue that this attorney acted as an adjudicator by shortening the time period for Defendants to file an Answer. Defendants observe that this attorney only, and not any Commissioner, signed the Complaint that shortened the answer time period. Alternatively, Defendants' surmise that the Commission authorized this attorney to shorten the answer time period via *ex parte* communications.
5. **VCI's Motion to Vacate the Default Order:** On October 22, 2007, Defendants filed a Motion to Vacate Default Order and to Dismiss Claim (Motion to Vacate). Defendants argue that the Commission should vacate its order because the Commission does not have the jurisdiction to award monetary damages. Defendants assert that this proceeding involves a single claim for monetary damages based on the assertion that Complainants overpaid OTAP reimbursements to Defendants. Defendants characterize the Complaint as either a claim for breach of contract or money had and received, which are both legal causes of action. Regardless of the theory, Defendants assert that the Commission does not have the jurisdiction to award monetary damages. Defendants cite to several cases involving customer claims against utilities for overcharges in which the courts

¹ In a footnote to the Motion to Set Aside Default Order, Defendants explain that because the Complaint contained substantive documents that were served by mail only, Defendants were allowed an additional three days under ORCP 10 to answer. Even without the extra three days, Defendants point out that an answer was not due until October 1, 2007.

have determined that the Circuit Courts, not the Commission, have jurisdiction. Even if an argument could be made that the Commission should have jurisdiction in this proceeding, Defendants state, the Commission should not exercise that jurisdiction due to the issues raised about proper due process and improper *ex parte* communications.

6. **VCI's Motion to Expedite Consideration of the Motion to Set Aside Default Order:** The last of the pleadings on these motions was filed on December 12, 2007. VCI essentially moved (via letter) for expeditious treatment of its first motion on September 28, 2007 (the sixth motion). VCI did so on the basis of ORS 756.561 providing for a party to apply for rehearing or reconsideration within 60 days of the date of the Commission's order. (The Default Order was issued on September 26, 2007, making a request for reconsideration due on November 26, 2007.) For the purpose of its motion to expedite consideration of the Motion to Set Aside Default Order, VCI characterizes that motion as a request for reconsideration. As 60 days passed since the filing of the Motion to Set Aside the Default Order, VCI is concerned that its request for reconsideration has been denied. Consequently, VCI intends to file an appeal within 60 days of December 21, 2007. If the Commission intends to reverse what VCI now considers a denial of the Motion to Set Aside the Default Order, VCI requests that the Commission do so expeditiously to save the need for the appeal.

The last of the pleadings on these motions was submitted on December 10, 2007.

Status Conference

On December 12, 2007, VCI requested a status conference to discuss the procedure for resolving the pending motions. On December 13, 2007, a telephone status conference was held.

Appearances were entered as follows: William Ohle, on behalf of VCI, and David Hatton, Julie Thompson and Jon Cray on behalf of the Commission. Sign language translators were also present.

VCI discussed its Motion to Expedite Consideration of the Motion to Set Aside Default Order. Although VCI did not object to characterization of the Motion to Set Aside Default Order as a motion made under OAR 860-013-0055, and not under OAR 860-014-0095, VCI nevertheless indicated that it would submit an appeal as if the motion was made under OAR 860-014-0095. VCI expressed concern that the Court of Appeals might consider the motion to be a request for reconsideration. VCI also renewed requests for oral argument on certain motions. Finally, parties discussed relationships among, and distinctions between, the motions.

Ruling

The Motion to Expedite Consideration of Motion to Set Aside is denied. VCI filed the Motion to Set Aside on the premise that the Motion to Set Aside is effectively a request for reconsideration that starts the timeline for an appeal ticking. VCI is concerned that because 60 days has passed since the Motion to Set Aside was filed, that the Motion to Set Aside will be deemed denied pursuant to OAR 860-014-0095(6).²

VCI's concerns are unfounded. On the face of the document VCI's Motion to Set Aside is just that, and VCI did not file an application for reconsideration under OAR 860-014-0095, nor has VCI since requested that the Motion to Set Aside be considered a request for reconsideration. If neither VCI, nor the Commission, perceive the Motion to Set Aside to be a request for reconsideration, there is no reason to think that the Court of Appeals will do so. It is, therefore, unnecessary to expedite consideration of the Motion to Set Aside for the reasons set forth by VCI.

In any case, I am not persuaded that the Motion to Set Aside is separable from the other motions. The Motion to Set Aside and the Motion to Disclose *Ex Parte* Communications are clearly entwined, as both raise questions about the role of the Staff attorney. A fundamental question regarding the nature of the action taken by the Commission in the Default Order also underpins both the Motion to Set Aside and the Motion to Vacate. Consequently, I find it appropriate, for reasons of efficiency and clarity, that the five remaining motions be considered and decided together.

Moreover, as a decision on one or more of the motions could significantly affect the parties' continued participation in this proceeding, it is appropriate that the Commission consider the motions. Consequently, pursuant to OAR 860-014-0091 and OAR 860-012-0035(1)(i), I certify all questions raised in the remaining five motions to the Commission for resolution. Doing so now, before I rule on any of these motions, speeds a final resolution of the motions.

VCI's requests for oral argument are denied. VCI asked, either in writing or orally, for the opportunity for oral argument on all four of Defendants' remaining motions. This proceeding does not automatically qualify as a "major proceeding" under OAR 860-014-0023, and VCI has not requested that it be classified as such. If a docket is not deemed to be a major proceeding, the Commission has the discretion to determine

² OAR 860-014-0095(6) provides, in pertinent part, that an application for reconsideration "is deemed denied if, by the sixtieth day after filing, the Commission has not issued an order granting the application."

whether oral argument is appropriate. In consultation with the Commission, I deem all five of the remaining motions sufficiently argued, and find that the motions are ready for the Commission's immediate consideration.

Dated this 7th day of January, 2008, at Salem, Oregon.

Traci A. G. Kirkpatrick
Administrative Law Judge