

IN THE COURT OF APPEALS OF THE STATE OF OREGON

PUBLIC UTILITY COMMISSION
OF OREGON,

Complainant-Respondent,

v.

VCI COMPANY f/k/a STAN
EFFERDING and STANLEY
JOHNSON d/b/a VILAIRE and
VCI COMPANY, a Washington
corporation,

Defendants-Petitioners.

PUBLIC UTILITY COMMISSION
OF OREGON

CA No. A

PETITION FOR
JUDICIAL REVIEW

1.

Petitioners seek judicial review of the final order of the Oregon Public Utility Commission (“OPUC”) dated September 19, 2011, including the denial of petitioners’: (1) Motion to Set Aside Default Order; (2) Objections to the Admission of Pre-Filed Exhibits; (3) Motion to Vacate Default Order and To Dismiss Claim; and (4) Motion for Disclosure of Ex Parte Communications, in OPUC Docket No. UM 1288.

2.

The parties to this review are:

VCI Company
Stan Efferding
Stanley Johnson
Vilaire and VCI Company

Oregon Public Utility Commission

Petitioners on Review

Respondent on Review

3.

The names, bar numbers, email addresses, addresses, and telephone numbers of the attorneys for the parties are:

William J. Ohle, OSB #913866
whole@schwabe.com
Schwabe, Williamson & Wyatt P.C.
1211 SW 5th Ave., Suite 1900
Portland, OR 97204
Telephone: 503-222-9981

Of Attorneys for Petitioners on
Review

John Kroger
John.Kroger@doj.state.or.us
Mary Williams
Mary.Williams@doj.state.or.us
Michael A. Casper
Michael.Casper@doj.state.or.us
David B. Hatton, OSB #75151
David.Hatton@doj.state.or.us
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
Telephone: 503-378-4400

Of Attorneys for Respondent on
Review

4.

Attached to this petition is a copy of the September 19, 2011 Order for which judicial review is sought.

5.

Petitioners were parties to the administrative proceeding which resulted in the order for which review is sought.

6.

Petitioners are not willing to stipulate that the agency record may be shortened.

DATED this 10th day of October, 2011.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: /s/ William J. Ohle

William J. Ohle, OSB #913866
Schwabe, Williamson & Wyatt P.C.
1211 SW 5th Ave., Suite 1900
Portland, OR 97204
Telephone: 503-222-9981

Of Attorneys for Petitioners on Review

CERTIFICATE OF FILING

I certify that on 10th of October, 2011, I caused an original Petition for Judicial Review to be filed with the State Court Administrator via the Oregon Judicial Department's eFiling system.

/s/ William J. Ohle
William J. Ohle, OSB #913866
Schwabe, Williamson & Wyatt P.C.
Of Attorneys for Petitioners on Review

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of October 2011, I caused to be served the Petition for Judicial Review of Administrative Rule on the following parties at the following addresses by U.S. First-Class Mail and by registered mail:

John Kroger
Mary Williams
Michael A. Casper
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096

David B. Hatton
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096

Carol Hulse
Public Utility Commission
of Oregon
550 Capitol St NE #215
P.O. Box 2148
Salem, OR 97308-2148

Carolyn G. Wade
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096

/s/ William J. Ohle
William J. Ohle, OSB #913866
Schwabe, Williamson & Wyatt P.C.
Of Attorneys for Petitioners on Review

ORDER NO. 11 349

ENTERED: SEP 19 2011

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1288

PUBLIC UTILITY COMMISSION OF
OREGON,

Complainant,

v.

VCI COMPANY f/k/a STAN
EFFERDING and STANLEY JOHNSON,
dba VILAIRE, and VCI COMPANY, a
Washington corporation,

Defendants.

ORDER

DISPOSITION: MOTION TO REOPEN DOCKET GRANTED; ALL OTHER
MOTIONS DENIED; OBJECTIONS TO THE ADMISSION OF PRE-FILED
EXHIBITS OVERRULED; DOCKET CLOSED.

I. BACKGROUND

The Oregon Telephone Assistance Program (OTAP) is part of the Residential Service Protection Fund (RSPF) operated by the Public Utility Commission of Oregon (Commission). The OTAP provides reduced rates for basic telephone services delivered to eligible low-income customers. An Eligible Telecommunications Carrier (ETC) that delivers basic telephone services to OTAP customers at OTAP-approved rates may seek reimbursement for discounts provided, subject to reporting requirements and audits. Defendants participated as an ETC in the OTAP.

Audits of Defendants' reporting indicated that reimbursements under the OTAP were higher than warranted due to reimbursement requests for duplicate billings or billings to non-existent customers. Following that audit, the Commission filed a complaint that alleged that, during the time period from June 2004 through November 2006, Defendants received \$203,391.97 in reimbursements for OTAP services that Defendants claimed to provide but did not. The complaint was supported with pre-filed testimony and exhibits

by Staff of the Commission (Staff). The complaint directed Defendants to immediately remit \$203,391.97 to the Commission, or to answer the complaint within 10 days of the mailing date of the complaint. The complaint was mailed, as well as electronically transmitted, on September 10, 2007. On September 21, 2007, Staff moved for admission of its pre-filed testimony and exhibits.

As of the close of business on September 20, 2007, Defendants had not filed a verified answer and were in default. On September 26, 2007, the Commission entered Order No. 07-424 (Default Order), admitting the pre-filed testimony and exhibits and documenting Defendants' default. The Default Order directed Defendants to pay \$203,391.97.

Following the Default Order, Defendants did not request reconsideration, but instead filed various motions and objections summarized as follows:

1. Motion to Set Aside Default Order: Defendants claimed the Default Order was entered before the requisite amount of time had passed to respond, thereby depriving Defendants of due process to meaningfully participate. Defendants claimed that, under Commission rules, they had 20 days—not 10 days—to file an answer. Defendants also claimed that under ORCP 69(1), the Commission should have provided 10 days' notice of the Default Order.
2. Objections to the Admission of Pre-Filed Exhibits: Defendants objected to the admission of the pre-filed testimony and exhibits of Staff into evidence. Defendants asserted the admission was premature and unduly prejudicial because Defendants did not have an opportunity to conduct discovery or examine the witnesses prior to admission.
3. Motion to Vacate Default Order and to Dismiss Claim: Defendants challenged the Commission's jurisdiction to enter the Default Order. Characterizing the complaint as a claim for monetary damages to recover overpaid OTAP funds based on the legal theories of breach of contract or money had and received, Defendants argued that the circuit court is the proper forum.
4. Motion for Disclosure of Ex Parte Communications: Defendants requested disclosure of *ex parte* communications that occurred among Commissioners, Staff and the Office of the Attorney General to draft a complaint that shortened the time to file an answer, and to execute the default order. Defendants also asserted that shortening the answer period within the complaint made the complaint function as an order, thereby rendering the attorney that filed the complaint on behalf of the Commission both prosecutor and adjudicator and questioned whether there was sufficient separation.

On January 7, 2008, the administrative law judge certified all questions raised by Defendants' motions to the Commission for resolution. Before the Commission could act on the motions, however, Defendants filed a petition with the Oregon Court of Appeals,

ORDER NO. 11 349

on January 24, 2008, for judicial review of Order No. 07-424, thereby transferring jurisdiction to the Court of Appeals.¹

On November 4, 2009, the Court of Appeals dismissed the petition for review, finding it did not have jurisdiction to review the petition due to its untimely filing.² With no activity in the docket since the Court of Appeals' ruling—Defendants never requested that the Commission resume jurisdiction—the docket was administratively closed with notice on May 4, 2011. On May 9, 2011, notice was filed by Defendants' attorney to withdraw from representation. On May 22, 2011, however, Defendants (represented by the same attorney) filed for judicial review with the Court of Appeals of the administrative closure of the docket.

Subsequently, on July 5, 2011, Defendants filed a motion requesting the Commission reopen UM.1288 in order to rule on two prior motions by Defendant, the motion to set aside the default and the motion for disclosure of *ex parte* communications. Defendants also moved the Commission to stay collection efforts under the Default Order on the basis that the default order was entered without due process, and that collection actions were initiated *ex parte*. Defendants requested oral argument.

II. RESOLUTION

In the interest of efficiency and to eliminate any confusion, the Commission has decided to issue an order explicitly ruling on the allegedly pending motions. Accordingly, to the extent that the administrative closure of the docket is an "order", the Commission withdraws the "order" closing the docket by administrative action on May 4, 2011, and grants Defendant's motion to reopen the record. This action renders Defendants' pending appeal of the docket closure moot.

As requested by Defendants, we resume consideration of the issues in this docket. For the sake of clarity, we address all motions and requests, particularly since the motion for a stay of the default order is based on due process concerns inherent to certain prior motions. In so doing, we consider all pleadings.³

A. Motion to Set Aside Default Order

We deny Defendants' Motion to Set Aside the Default Order No. 07-424. Defendants challenged the default order on the ground that it was entered before expiration of the time to file an answer period. That is incorrect. Under ORS 756.500, we are authorized to file a complaint on our own initiative. Although our administrative rules permit the answer period for such a complaint to be as long as 20 days, it allows us to reduce the period to the minimum of 10 days as provided in ORS 756.512.⁴

¹ *OPUC v. YCI*, 231 Or App 653, 220 P3d 745 (2009).

² *OPUC v. YCI et al.*, 231 Or App 653, 220 P3d 745 (2009).

³ Staff filed motions to strike certain filings by Defendants on various grounds. These motions are denied.

⁴ At the time of the complaint, OAR 860-013-0050 governed the filing of an answer to a complaint. That rule has since been renumbered as OAR 860-001-0400(4).

In this case, the complaint expressly provided Defendants 10 days to answer the complaint. Because the Default Order was issued after that 10-day period, the order was not premature. Because the applicable statutes and rules specific to the answer period for complaints filed by or before the Commission exist, Defendants' discussion of more general rules of civil procedure are inapposite.

In addition, we find Defendants' due process rights were not violated by notice of the shortened answer period within the complaint itself. Signed by an Assistant Attorney General representing the Commission, the complaint properly directed Defendants to file an answer within 10 days of service of the complaint. We do not discern a separate requirement, as Defendants infer, that an answer period of less than 20 days be fixed by an order or ruling separate from the complaint.

B. Objection to Pre-Filed Testimony and Exhibits

Defendants' objections to the admission of pre-filed testimony and exhibits on grounds of inability to conduct discovery and cross-examine witnesses are overruled. Contrary to Defendants' assertion, default begins as of the failure to answer. If a defendant fails to answer a complaint in a timely manner, the party is in default, the complaint's allegations are deemed admitted, the hearing is waived, and the proceeding may be disposed of without further notice to the defaulting party.

Accordingly, if the complaint's allegations are deemed admitted by default, then it was neither premature nor unduly prejudicial for the Default Order to admit in evidence the pre-filed testimony and exhibits supporting the complaint's allegations. OAR 860-013-0055(1) provides for waiver of a hearing upon default, thereby denying the defaulting party any opportunity to cross-examine witnesses who sponsored pre-filed testimony and exhibits.⁵

C. Motion to Vacate Default Order and to Dismiss Claim

We find that the Default Order is within our subject matter jurisdiction and deny Defendant's motion to vacate the Default Order and to Dismiss Claim made on that basis. The default order does not impose monetary damages, nor is it based on either the legal theory of breach of contract, or money had and received. Rather, it is an accounting order that identifies an amount overpaid to Defendants under the OTAP program and requests remittance. If Defendants refuse to return the excessive OTAP reimbursements, then the Commission must pursue enforcement of the Default Order in circuit court, with the assistance of the Attorney General, pursuant to ORS 756.160.

Defendants mistakenly analogize the Default Order to cases involving the recovery of charges paid in excess of lawfully-filed rates. In such cases, a court calculates the difference between the rate filed by a utility and the amount actually paid by a customer

⁵ Given our decision to overrule Defendants' objections, Staff's motion to strike the objections is denied as a matter of course.

to award damages. In contrast, the Default Order's identification of excessive OTAP payments is the result of a thorough investigation and a systematic sampling of Defendants' billings over a two-year-plus period of time. This computation relies on the Commission's OTAP expertise, both regulatory and administrative, and cannot be compared to the calculation of charges paid in excess of tariff rates.

D. Motion for Disclosure of Ex Parte Communications

We also deny Defendants' Motion for Disclosure of Ex Parte Communications. On December 10, 2007, the Commission Staff filed a response to Defendant's ex parte motion. In that response, the Assistant Attorney General described his communications between staff acting on the Commission's behalf with regard to the complaint as follows:

[W]hile I was preparing to file a complaint against the Defendants, Commission employee Rick Willis contacted me. Mr. Willis indicated that the Commission learned that the Federal Communications Commission (FCC) issued a NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER (FCC 07-148 Order). In that order the FCC found that VCI Company had apparently repeatedly and willfully violated rules governing federal universal service fund support mechanisms and found that VCI is apparently liable for a total forfeiture of \$1,047,500. Mr. Willis indicated that the FCC proposed forfeiture and its ongoing investigation of VCI practices in other states raised serious questions regarding the Commission's ability to recover any overpayment resulting from this administrative action. Mr. Willis indicated that the Commission wanted the Defendants to receive the minimum amount of time allowed by statute to respond to the complaint to expedite the completion of the case. I never made any communications to the Commission or the presiding ALJ regarding the Commission's instructions.⁶

When Defendants failed to timely answer, the Assistant Attorney General moved for the Default Order, which we entered to memorialize the default and request remittance.

We find no *ex parte* communications occurred to draft the complaint, or to execute the Default Order, and thereby deny the motion. Nevertheless, we find that Staff, by providing an explanation of the nature of the communications that occurred between counsel and other staff acting on the Commission's behalf with regard to the Complaint, accomplished the substance of Defendants' request—that is, to make Defendants aware of how the complaint and Default Order were processed.

With regard to the proper degree of separation between the Commission's prosecutorial and adjudication roles, we observe that the Commission was never called upon to adjudicate the proceeding. We filed a complaint and Defendants defaulted. The only function of the Default Order was to memorialize the default.

⁶ Staff Response to Defendants' Reply in Support of its Motion for Disclosure of Ex Parte Communications at 1 (Dec 10, 2007).

E. Request for Oral Argument

We deny Defendants' request for oral argument. The pleadings have been extensive in this docket and we received sufficient information to consider the motions without oral argument. Pursuant to OAR 860-001-0660, we must provide oral argument upon request only if a docket is defined as a major proceeding pursuant to ORS 756.518(2), and this docket does not meet that definition, nor does it involve issues or consequences of public import that merit treating it as such.

F. Motion to Stay Execution of Order No. 07-424

Defendants' motion to stay execution of Order No. 07-424 is denied. This order resolves all outstanding issues and rejects all challenges to the Default Order. Consequently, we close this docket. This order also withdraws the administrative notice of closure of this docket, thereby rendering Defendants' appeal of the docket closure moot. As there is no pending review of the Default Order, there is no need to stay its execution. In any case, Defendants did not show sufficient cause pursuant to ORS 183.482(3) to justify a stay.

III. CONCLUSION

In closing, we observe that although Defendants were permitted to request reconsideration of the Default Order by statute and under our rules, Defendants did not do so, as verified by the Court of Appeals in its opinion. Rather, Defendants challenged the Default Order in the various ways identified above. For the reasons discussed above, we deny all Defendants' motions and objections. This order conclusively determines all outstanding issues. Consequently, we close this docket.

IV. ORDER

IT IS ORDERED that:

1. The Motion to Reopen the Docket is granted.
2. The Motion to Set Aside Default Order is denied.
3. Defendants' Objections to the Admission of Pre-Filed Exhibits are overruled.
4. All Motions to Strike by Staff of the Public Utility Commission of Oregon are denied.
5. Defendants' Motion to Vacate Default Order and Dismiss Claim is denied.
6. Defendants' Motion for Disclosure of *Ex Parte* Communications is denied.
7. Defendants' Request for Oral Argument is denied.
8. Defendants' Motion to Stay the Execution of Order No. 07-424 is denied.
9. This docket is hereby closed.

Made, entered, and effective SEP 19 2011


John Savage
Commissioner


Susan Ackerman
Commissioner

