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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

AR 474

In the Matter of a Rulemaking to Adopt a)
Time Period for Final Action in Pole) ORDER
Attachment Complaints.)

DISPOSITION: RULE ADOPTED AS MODIFIED

At its Regular Public Meeting on October 30, 2003, the Commission adopted a temporary rule that prescribed a time period for final action in pole attachment complaints.

47 U.S.C. § 224(c)(3) provides:

For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments *** (B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter –

- (i) within 180 days after the complaint is filed with the State, or
- (ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

Faced with a number of complex pole attachment complaints that would require longer than 180 days to complete, the Commission adopted the temporary rule in docket AR 473. The temporary rule prescribed a time period of 360 days for final action in pole attachment complaints. At the same meeting, the Commission voted to initiate a

permanent rule in docket AR 474. The wording of the proposed rule was identical to the temporary rule, as follows:

Upon receipt of a complaint regarding any individual matter under these rules, the Commission shall, within 360 days, issue a final order.

The proposed rule was published in the Secretary of State's Oregon Bulletin, along with a deadline for comments and requests for hearing. Verizon Northwest Inc. (Verizon) filed comments on December 22, 2003, and Portland General Electric Company (PGE) filed comments on February 2, 2004. No requests for hearing were received.

Verizon's comments. Verizon does not object to the proposed rule with respect to nonincumbent local exchange carriers, but suggests a modification that would exclude complaints involving the pole attachment(s) of an incumbent local exchange carrier (ILEC). According to Verizon, the Federal Communications Commission (FCC) has no jurisdiction over ILEC pole attachments because ILECs are specifically excluded from the definition of "telecommunications carriers" with rights as pole attachers (referring to 47 U.S.C. § 224(a)(5), which states, "For purposes of this section, the term 'telecommunications carrier'...does not include any incumbent local exchange carrier[.]"). As a result, Verizon adds, time limitations under 47 U.S.C. § 224 are inapplicable to complaints involving ILECs. Verizon states that the language of the proposed rule thus unnecessarily includes ILECs and restricts the Commission and the parties with respect to the resolution of pole attachment complaints involving ILEC attachments. Verizon suggests the proposed rule be rewritten to provide:

Upon receipt of a complaint regarding any individual matter under these rules, **other than a complaint involving the attachment(s) of an incumbent local exchange carrier (as defined in Section 251(h) of the Communications Act of 1934, as amended)**, the Commission shall, within 360 days, issue a final order.

PGE's comments. PGE opposes Verizon's modification of the proposed rule because, PGE states, the proposed rule as modified creates an exemption for ILECs, but 47 U.S.C. § 224 creates no parallel exemption from subsection (c) of the Act.¹ PGE contends that if Congress intended "telecommunications carriers" to be excluded from subsection (c), it could have used that term in the definition of "pole attachment," but it chose instead to use the broader term "provider of telecommunications service."² PGE is concerned that an argument might be made that ILECs are included in the definition of "providers of telecommunications service," and are therefore subject to pole attachment

¹ PGE Letter of February 2, 2004, at 2.

² *Id.* at 3.

regulation under 47 U.S.C. § 224(c). PGE also states that the rule, without Verizon's proposed modifications, preserves the Commission's regulatory authority over rates, terms, and conditions or access to poles.³

PGE recommended that more time be taken to study the effect of including Verizon's proposed language in the rule adopted in this docket.

At its Regular Public Meeting on February 3, 2004, the Commission heard discussion from Staff, Verizon, and PGE regarding the proposed rule. The Commission postponed a decision to provide additional time for Staff to study the legal effect of the proposed language.

Staff reviewed the legal effect of the language and believes that Verizon's exclusion of complaints involving pole attachments of ILECs as pole attachers is consistent with Oregon law and 47 U.S.C. § 224. Staff believes, however, that the proposed language could be clarified with respect to this exclusion. Staff recommends modifying the proposed rule as follows:

The Commission shall issue its final order within 360 days of the date a complaint is filed in accordance with these rules. This rule does not apply to a complaint involving the attachment(s) of an "incumbent local exchange carrier" (as that phrase is defined in 47 U.S.C. Section 251(h) (2002)).

Staff agrees with Verizon that all complaints involving the attachments of ILECs as pole attachers are excluded from the timing requirement of 47 U.S.C. § 224. This is consistent with Congress's intent for 47 U.S.C. § 224 to promote competition by ensuring the availability of access to new telecommunications entrants. Excluding complaints involving the attachments of ILECs from the proposed rule is consistent with the language in 47 U.S.C. § 224.

Staff reviewed PGE's comments, but believes that the proposed rule preserves Commission jurisdiction over pole attachments while reflecting Congress's intent to exclude ILECs from 47 U.S.C. § 224's regulation of pole attachments regarding rights as pole attachers. While Congress employed the term "provider of telecommunications service" in 47 U.S.C. § 224(a)(4), it defines the term "telecommunications carrier" as "*any provider of telecommunications services[.]*"⁴ Staff does not believe the term "provider of telecommunications services" in 47 U.S.C. § 224(a)(4) was meant to limit state regulatory authority over pole attachments of ILECs.

³ *Id.* at 1.

⁴ Reply Comments of Verizon Northwest Inc., February 11, 2004, at 5-6, citing 47 U.S.C. § 153(44) (2002) (emphasis added).

The legislative history of 47 U.S.C. § 224 reveals that Congress expressly granted authority for pole attachment regulation to the states, if they want it.⁵ The express exclusion of pole attachment complaints involving the attachments of ILECs from 47 U.S.C. § 224 was intended to clarify that ILECs had no rights as pole attachers⁶ under Section 224, even if the States themselves failed to regulate pole attachment policies. Therefore, Staff does not agree with Verizon that without the exclusionary language, the rule may restrict the Commission's discretion regarding pole attachments involving ILECs.

The legislative history of 47 U.S.C. § 224 illustrates that the powers of the States to regulate pole attachments are secure.

Any State which chooses to regulate pole attachments may do so at any time, and will preempt the Commission's involvement in pole attachment arrangements in that State simply by notifying the FCC that it regulates the rates, terms, and conditions for such attachments. *S. 1547 in no way limits or restricts the powers of the several States to regulate pole attachments.*⁷ (Emphasis added.)

Since the proposed rule applies only to 47 U.S.C. § 224, and 47 U.S.C. § 224 clearly excludes ILECs, the proposed language excluding complaints involving the pole attachments of ILECs is arguably redundant. However, the language of the proposed rule reflects Congress's language in 47 U.S.C. § 224 and clarifies that the 360-day rule is not applicable to complaints involving ILECs as pole attachers.

⁵ Communications Act Amendments of 1978, Legislative History, P.L. 95-234, 92 Stat. 33, Senate Report No. 95-580 (Senate Report), p. 2. ("Any State which chooses to regulate pole attachments may do so at any time, and will preempt the Commission's involvement in pole attachment arrangements....")

⁶ See In the Matter of the Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments, 13 FCC Rcd 6777, *Report and Order* (1998) at paragraph 5.

⁷ Senate Report, at 2.

ORDER

IT IS ORDERED that:

1. The proposed modified rule, OAR 860-028-0195, attached as Appendix A, is adopted.
2. The rule shall be effective upon filing with the Secretary of State.
3. The temporary rule adopted in AR 473, OAR 860-028-0195, is repealed upon the rule in this docket becoming effective.

Made, entered, and effective _____.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A person may petition the Commission for the amendment or appeal of a rule pursuant to ORS 183.390. A person may petition the Court of Appeals to determine the validity of a rule pursuant to ORS 183.400.

860-028-0195

Time Frame for Final Action by Commission

The Commission shall issue its final order within 360 days of the date a complaint is filed in accordance with these rules. This rule does not apply to a complaint involving the attachment(s) of an "incumbent local exchange carrier" (as that phrase is defined in 47 U.S.C. Section 251(h) (2002)).

Stat. Auth.: ORS Ch. 183, 756, 757 & 759, 47 USC § 224(c)(3)(B)(ii)

Stats. Implemented: ORS 756.040, ORS 757.270 through 757.290, ORS 759.045, and ORS 759.650 through 759.675

Hist.: New