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**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

UM 1096

PORTLAND GENERAL ELECTRIC	)
COMPANY,	)
	)
Complainant,	)
	)
v.	)
	)
VERIZON NORTHWEST INC.,	)
	)
Defendant.	)

ORDER

DISPOSITION: COMPLAINT DISMISSED WITHOUT PREJUDICE.

On July 15, 2003, Portland General Electric Company (PGE) filed this complaint against Verizon Northwest Inc. (Verizon) for violations of state law regulating attachments to utility poles. After negotiation and settlement with Verizon, PGE withdrew its complaint on September 9, 2004. The complaint is dismissed without prejudice.

**Procedural Background**

PGE alleged that Verizon violated state and federal law in that it did not have a written agreement that specified conditions for attachments on PGE’s poles and that Verizon made additional attachments without being covered by an agreement. Further, PGE asserted that some of Verizon's pole attachments violated the Commission's safety rules and that Verizon failed to inspect and repair its attachments on a regular basis. Finally, PGE argued that Verizon improperly denied PGE a rate reduction for attaching to Verizon's poles. PGE requested a declaratory ruling that its proposed contract and rates were just, fair and reasonable.

Verizon contested the complaint and a docket was opened with the Commission. Central Lincoln People's Utility District (CLPUD) and the Oregon Cable Telecommunications Association (OCTA) intervened in the proceeding. After a brief flurry of activity to establish the scope and forum of the docket, PGE moved to suspend the procedural schedule for six months to allow time for negotiation. Three subsequent motions to suspend the schedule were received and granted while PGE and Verizon negotiated.

In a conference call on September 3, 2004, PGE stated that it had resolved its complaint with Verizon. OCTA stated that it had concerns regarding a settlement being reached without review by the other parties in the case. A schedule was set for PGE to file its withdrawal and for OCTA to file a brief, if it could not reach an agreement with PGE and Verizon to review the settlement agreement. In addition, a briefing schedule was set in case the settlement failed.

On September 9, 2004, PGE withdrew its complaint against Verizon. On September 24, 2004, OCTA filed its opposition to withdrawal of the complaint. OCTA claims that the case had been settled under OAR 860-014-0085, and therefore the parties were required to submit their stipulation and settlement to the Commission for review. OCTA asserts that PGE and Verizon established a contract with a confidential Exhibit J, which supersedes certain terms in the contract. OCTA is concerned that the new contract terms between PGE and Verizon will be more favorable than those afforded to others attaching to utility poles. Cable companies compete with other utilities to provide communications services, and OCTA is concerned that cable companies will be disadvantaged by discriminatory terms for attaching to utility poles, in violation of state and federal law. *See* 47 USC § 224(f)(1); ORS 757.310; ORS 757.325. The Commission has "the authority to regulate in the public interest the rates, terms and conditions for attachments by licensees to poles or other facilities of public utilities and telecommunications utilities." ORS 757.273. Further, the Commission must consider, "after hearing had upon complaint by a licensee," the impact of pole attachment agreements on customers of the companies. *See* ORS 757.279. The Commission also has the ability to investigate utilities to ensure that their rates are fair and reasonable. ORS 756.040. For these reasons, OCTA concludes that the Commission should review the settlement and make it available to other parties in the docket under OAR 860-014-0085.

PGE then filed a motion to strike OCTA's response. It argues that Commission rules do not address withdrawal of a complaint, so the Oregon Rules of Civil Procedure apply. Rule 54 A governs withdrawal of a complaint in court. Under the rule, withdrawal is automatic, and there is no ongoing Commission proceeding in which OCTA may file its motion. The contract between PGE and Verizon is presumed to be "just, fair and reasonable" under ORS 757.285. If OCTA has concerns about whether the contract is discriminatory, OCTA should file its own complaint with the Commission.

Verizon supported PGE's reply with its own brief. It cited numerous cases in which the Commission dismissed complaint cases because the complaining party failed to pursue the case or withdrew its complaint. Verizon also emphasized the private nature of the contract, stating that the Commission is only the arbiter of a two-party dispute in this case, not a regulatory body, and that the terms in this contract do not affect OCTA or change the rates paid by other users of the utility poles.

Staff also filed a brief, agreeing with PGE that contracts are presumed to be "just, fair and reasonable" under ORS 757.285. The Commission can initiate an investigation under ORS 757.273 if necessary, and OCTA can file its own complaint.

Even if a stipulation is filed, there is no requirement under the rules to file the contract that OCTA seeks.

OCTA responded to PGE's motion to strike by comparing withdrawal of this complaint to a situation in which there is a class action lawsuit and court approval is required. *See* ORCP 32 D. OCTA also notes that the complaint cases cited by Verizon did not appear to include a third party intervenor, nor did they implicate the public interest in the same way that this case does. OCTA is willing to waive Commission review of the settlement agreement, as long as OCTA is able to examine the full agreement. If, after review, OCTA is still concerned about discriminatory treatment, it will commence negotiations with the other parties before filing a complaint with the Commission. PGE and Verizon filed another response to OCTA's filing, reiterating their statements from previous briefs.

### **Applicable Law**

"The Oregon Rules of Civil Procedure shall govern in all cases except as modified by these rules, by order of the Commission, or by ruling of the ALJ." OAR 860-011-0000. Commission rules provide for submission of a stipulation or settlement with accompanying testimony. OAR 860-014-0085(4). Parties may file objections to the settlement or request a hearing. *Id.* at (5). The Commission is not bound by the terms of a settlement or stipulation. There is no rule regarding withdrawal of a complaint.

Oregon Rule of Civil Procedure 54 A applies to withdrawal of a complaint in court cases: "an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal with the court and serving such notice on the defendant not less than five days prior to the day of trial if no counterclaim has been pleaded." The rule provides exceptions in the case of a counterclaim, or a class action lawsuit as provided for in ORCP 32 D.

### **Conclusions**

Although pole attachment agreements need not be filed with the Commission as tariffs do, the agreements are important in establishing a level playing field among competing communications companies. As OCTA notes, PGE and Verizon are utilities, subject to regulation, and not mere private parties as depicted by Verizon. Utility pole owners are required to provide rates, terms and conditions that are fair and reasonable. ORS 757.273. Further, as cable companies compete with telephone companies, state and federal law require nondiscriminatory terms to facilitate competition. *See* 47 USC § 224(f)(1); ORS 757.273.

Pole attachment agreements are presumed to be "just, fair and reasonable" under ORS 757.285: "Agreements regarding rates, terms and conditions of attachments shall be deemed to be just, fair and reasonable, unless the Public Utility Commission finds upon complaint \* \* \* and after hearing, that such rates, terms and conditions are adverse to the public interest and fail to comply with the provisions hereof." Because the complaint has been withdrawn, the agreement is presumed to be reasonable, and the docket is closed. OCTA retains its right to file a complaint to ensure that cable companies are being provided with nondiscriminatory access.

**ORDER**

IT IS ORDERED that Portland General Electric Company's complaint against Verizon Northwest Inc. is dismissed without prejudice.

Made, entered, and effective \_\_\_\_\_.

\_\_\_\_\_  
**Lee Beyer**  
Chairman

\_\_\_\_\_  
**John Savage**  
Commissioner

\_\_\_\_\_  
**Ray Baum**  
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.