ORDER NO. 05-981

ENTERED 09/07/05

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1087

CENTRAL LINCOLN PEOPLE'S UTILITY DISTRICT,	)	
Complainant,	)	ORDER
v.	)	
VERIZON NORTHWEST, INC.,	)	
Defendant.	)	

DISPOSITION: APPLICATION FOR RECONSIDERATION GRANTED IN PART, DENIED IN PART

On July 15, 2005, Portland General Electric Company (PGE) filed an application for reconsideration of Order No. 05-583, setting the final terms for the contract between Central Lincoln People's Utility District (CLPUD) and Verizon Northwest, Inc. (Verizon). Verizon and the Oregon Cable Telecommunications Association (OCTA) filed responses addressing the merits of the application and urging adherence to the decision set forth in that order. The application is denied as described below.

Applicable Law

An application for reconsideration may be made by any party within 60 days of service of the order. *See* OAR 860-014-0095(1). Grounds for reconsideration include new evidence, a change in law on which the decision was predicated, an error of law or fact within the decision, or other good cause. *See id.* at (3).

Discussion

In its application, PGE makes two requests. First, PGE asks the Commission to reconsider its decision in Order No. 05-583, which PGE argues contains an error of law. Second, PGE seeks clarification as to the impact of Order No. 05-583 on other pole attachment contracts. We address each request separately.

Error of Law

PGE asserts that the order contained an error of law in fixing the terms of Section 3.5 of the contract between CLPUD and Verizon:

> CLPUD proposes a change stating that Verizon shall be responsible for costs if Verizon's equipment interferes with new CLPUD equipment to be placed on the pole. As noted by Verizon, that proposal squarely violates federal law, specifically 47 USC § 224(i).[1] CLPUD's proposal is rejected.

Order No. 05-583 at 4 (footnote added). PGE argues that the Commission erred in applying federal law, due to the provision that allows a state to regulate pole attachments to the exclusion of federal regulation, if that state has certified that it regulates pole attachments within its jurisdiction.[2]

Verizon argues that PGE cannot select which federal laws the Commission may apply to pole attachments and notes that PGE did not object to the Commission's adoption of the federally prescribed process for transitioning from a former contract to a new contract. In addition, Verizon views the Commission's use of federal law as advisory when it does not conflict with existing state law.

OCTA argues that 47 USC § 224(c)(1) only preempts regulation by the Federal Communications Commission (FCC) of pole attachments in states that have certified that they regulate pole attachments. However, it argues that other provisions of the federal statute continue to apply in all states. Following that reasoning, the statutory prohibition against charging licensees to rearrange their facilities to accommodate the facilities of the pole owner would automatically apply to this case. At a minimum, OCTA argues that the statutory requirement of nondiscriminatory access, 47 USC § 224(f), necessitates that prohibition.

[1] 47 USC § 224(i) provides: "An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way)."

[2] 47 USC § 224(c)(1) provides, in relevant part: "Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by a State." As PGE notes, Oregon has certified to the Federal Communications Commission (FCC) that it regulates pole attachments. *See FCC, States That Have Certified That They Regulate Pole Attachments*, 7 FCC Rcd 1498 (rel Feb 21, 1992).

47 USC § 224(c)(1) provides that nothing in the statute "shall be construed to apply to, *or* to give the [FCC] jurisdiction" over the terms of pole attachment agreements in a state that regulates those terms. (Emphasis added.) The plain language of the statute makes it clear that 47 USC § 224(d)-(i) do not directly apply, and are not directly enforceable, on pole attachments in Oregon, in addition to the inapplicability of further regulations set out by the FCC. *See MCI Telecommunications Corp. v. N.Y. Telephone Company,* 134 F Supp 2d 490, 503-04 (ND NY 2001).

However, the Commission has in the past used federal law as guidance in deciding disputes governed by parallel state regulation. *See* Order No. 04-355 at 7 n 2 (applying analysis from FCC decisions to Commission analysis of whether ETC designation was in the public interest). Particularly in a matter of first impression for this Commission, federal policies can be very instructive. In this instance, the Commission agreed with the federal policy that an attaching utility should not have to pay to rearrange its facilities, for which it has already submitted an application and received approval, due to a change in plan by the pole owner. We also note that policy was expressed in statute, not in a rule promulgated by the FCC. While Order No. 05-583 may have misstated the applicability of federal law, the provisions of federal law on the subject were appropriately considered and used in the Commission's determination.

In its technical comments, CLPUD argued that it "should not have to rate base costs for joint use expenses that would not occur if the pole was not a joint use pole." CLPUD comments, 3 (Mar 11, 2005). Verizon argued that the Commission should follow "the principles expressed in federal law" and act in accordance with 47 USC § 224(i). *See* Verizon comments, 7 (Mar 25, 2005). We agreed, and for the above reasons, considered the provisions in federal law in determining "the just and reasonable rates, terms and conditions." ORS 757.279. The Application for reconsideration on that point is granted. Order No. 05-583 is modified to note that federal law does not directly dictate provisions such as Section 3.5 of the contract, but can be used to guide our policies in establishing contract provisions that are just and reasonable.

Precedential Effect

PGE also seeks a clarification as to the precedential effect of Order No. 05-583 and what impact it has on other pole attachment contracts. According to PGE, some of its licensees have interpreted the order to mean that other terms are not enforceable. As a consequence, PGE requests a statement that the terms set forth in that contract are not globally applicable in the absence of a rulemaking by the Commission.

Verizon agrees that the agreement approved by the Commission is not a mandatory model for other parties, but may be referred to as precedent. OCTA also concurs that the agreement does not apply to every party, but "barring unusual factual differences, the Commission likely would pass on the same rates, terms and conditions in a similar manner." OCTA response, 5 (Aug 1, 2005).

In determining the precedential effect of any decision, an adjudicative body must first determine whether the facts of the two cases are similar enough to apply the prior decision. *See I-L Logging Co. v. Mfgrs. & Whlse Ind. Exc.*, 202 Or 277, 333 (1954). Then, in considering the doctrine of *stare decisis*, the adjudicative body must "balance two competing considerations. On one hand is the undeniable importance of stability in legal rules and decisions. * * * On the other hand, the law has a similarly important need to be able to correct past errors." *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 53 (2000). The *Stranahan* court went on to say it would "remain willing to reconsider a previous ruling * * * whenever a party presents to us a principled argument suggesting that, in an earlier decision, this court wrongly considered or wrongly decided the issue in question." *Id.* at 54.

Weighing the precedential effect of Order No. 05-583 on existing pole attachment contracts, we are faced with additional considerations. To begin, ORS 756.568 states that any time, after notice and opportunity to be heard, the Commission may "rescind, suspend or amend any order." ORS 757.285 also states that pole attachment contracts are presumptively just, fair and reasonable, unless the Commission finds otherwise after a complaint and hearing. Under this provision, new terms do not necessarily automatically apply to other parties. On the other hand, the decisions in UM 1087 give some indication as to how the Commission considers pole attachment contractual provisions, albeit in a case in which only one party to the contract made any applicable arguments. *See* Order No. 05-042 at 17 n 12.

The value of any precedent is a subject for parties to argue in the course of litigation. Each party will argue why the factual situation in its case is similar or dissimilar to the factual situation in the case already resolved by the Commission, and each party will argue why the Commission erroneously or correctly decided the last case. Other than to restate general legal principles, such as those stated above and others found by the able counsel to the parties in this case, no further clarification by the Commission would aid in illuminating the precedential weight of Order No. 05-583.

ORDER

IT IS ORDERED that:

1. The application for reconsideration is granted as to the applicability of federal law.

2. The application is denied as to the precedential effect of Order No. 05-583.

3. Order No. 05-583 is modified and adhered to as described herein.

Made, entered, and effective SEP 07 2005.

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. The application for reconsideration is denied.