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March 11, 2005

VIA FEDERAL EXPRESS

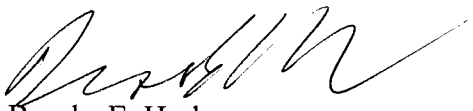
Oregon Public Utility Commission
Attn: Filing Center
550 Capitol Street N.E., Suite 215
Salem, Oregon 97301

Subject: Docket No. UM 1087

Dear Sir or Madam:

Enclosed, for filing, are an original and five copies of Comments of Oregon Cable Telecommunications Association in the above-referenced docket.

Very truly yours,



Brooks E. Harlow

cc w/enc: All Parties of Record

CERTIFICATE OF SERVICE
UM 1087

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by U.S. first-class mail, properly addressed with postage prepaid, to the following parties:

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DATED at Portland, Oregon this 11th day of March, 2005.

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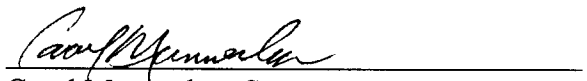

Carol Munnerlyn, Secretary

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

CENTRAL LINCOLN PEOPLE'S UTILITY DISTRICT, Complainant, v. VERIZON NORTHWEST INC., Defendant.	Case No. UM 1087

COMMENTS OF OREGON CABLE TELECOMMUNICATIONS ASSOCIATION

Date: March 11, 2005

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The Oregon Cable Telecommunications Association ("OCTA"), submits these comments, pursuant to the Commission's Order No. 05-042, in the above-referenced case,[1] and the February 4, 2005 ruling by Administrative Law Judge, Christina M. Smith, in the same docket.[2]

I. INTRODUCTION

The OCTA appreciates the opportunity to comment on the Commission's proposed Pole Attachment Agreement ("Agreement"). In Part II., OCTA suggests technical corrections to the Agreement where it is inconsistent with the decisions set forth in the Order and/or applicable law, or for other technical reasons (*e.g.,* to resolve internal inconsistencies).

OCTA supports a substantial number of the Agreement revisions the Commission has drafted. The Commission has demonstrated its commitment to leveling the playing field between pole owners and attachers by incorporating non-discriminatory access standards, equitable cost allocation requirements and inspection provisions that ensure pole plant integrity, while preventing cost over-recovery. These revisions will go a long way toward alleviating the contentious nature of joint pole use in Oregon, as OCTA had hoped when it intervened.[3] Indeed, the proposed Agreement, coupled with the findings in the Order, are

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[1] *Central Lincoln People's Utility District v. Verizon Northwest, Inc*., UM 1087, Order No. 05-042 (Jan. 19, 2005) (hereinafter "Order").

[2] *See Central Lincoln People's Utility District v. Verizon Northwest, Inc*., UM 1087, Memorandum, Schedule Reset (February 9, 2005) (memorializing ruling made during February 4, 2005 teleconference with the parties allowing for two rounds of comments on the proposed pole attachment agreement) (hereinafter "Memorandum of February 9, 2005").

[3] *See* Opening Post-Hearing Brief of OCTA, submitted November 15, 2004 at p.2 ("If this case is properly decided, the guidance it provides will hopefully lead to less contentious, more efficient and fairer negotiations for pole attachment contracts.") (hereinafter "OCTA Brief"). As the Commission knows, this was not the only pole attachment-related case filed in Oregon over the past year-and-a-half. In addition to the suit and counter-suit filed by the parties in this case, Verizon sued Portland General Electric in federal court. *Verizon v. Portland General Elec. Co*., Civ. No. 03-1286-MO, filed Sept. 17, 2003 (D. Or.), stayed, *Verizon v. Portland General Electric Co*. 2004 WL 97615 (D.Or. 2004). Those cases have since settled. Qwest has sought judicial review of the Commissions sanctions rules. *See In the Matter of the Adoption of Rules to Implement House Bill 2271 Sanction and Rental Reduction*

(FOOTNOTE CONT'D)

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major steps towards achieving "a much more balanced and certain pole attachment environment"[4] in Oregon. The Commission's efforts in this regard will foster the deployment of advanced broadband communications services, such as digital cable, video-on-demand, pay-per-view, high-speed data and voice over the Internet (Voice over Internet Protocol of "VoIP"), at competitive prices.[5]

OCTA understands that the Order pertains to the facts of this case and the Commission-approved contract that results will govern CLPUD's relationship with Verizon. Nevertheless, the Commission in this case not only addressed the parties' requested relief but also resolved "broader issues relating to pole attachments, including: just and reasonable rates, terms[,] conditions, and practices [, as well as] implementation of the non-discrimination requirements of Federal and state law. . . ."[6]

Provisions Related to Utility and Pole Attachments, *Qwest Corporation v. Public Utility Commission of Oregon*, filed January 12, 2004 (Or. Ct. App.). OCTA member Charter Communications is participating in that proceeding as an amicus. That case is pending. Even pole attachment agreement negotiations are contentious in Oregon. For example, as the record in this case demonstrated, Central Lincoln PUD forced every one of its 14 licensees, except Verizon, to sign its unreasonable pole attachment agreement under threat of the "no contract," sanctions. *See* OCTA Brief at pp. 16-17.

[4] OCTA Brief at p. 9.

[5] Indeed, "the predominant legislative goal for Congress in enacting the Pole Attachment Act was 'to establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust and unreasonable pole attachment practices on the wider development of cable television service to the public.'" *Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of The Telecommunications Act of 1996*, *Consolidated Partial Order On Reconsideration*, 16 FCC Rcd 12103, ¶ 21 (2001) (hereinafter "2001 FCC Order") (citing S. Rep. No. 95-580, 95th Cong., 1st Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 109). *See also,* OCTA Brief at pp. 5-6 (stating that the Pole Attachment Act was amended to provide mandatory access and include telecommunications providers, as well as cable systems, by the Telecommunications Act of 1996 whose main purpose was "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening al telecommunicates markets to competition."). A significant fact related to this proceeding is that the upgrade of existing plant and the addition of fiber is also a critical element of the federal Government's mission to transition from analog to digital broadcasting. Access at just and reasonable rates, terms and conditions is the key to accomplishing this goal.

[6] OCTA Brief at p. 2.

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Already, misunderstanding over the Order's precedential effect has emboldened pole owners, like CLPUD, to disregard the Commission's findings. For example, just days following a teleconference between ALJ Smith and the Oregon Joint Use Association (which included Mike Wilson of the CLPUD), during which ALJ Smith cautioned that "the precedential effect" of this litigation "*might* not apply in every case,"[7] the CLPUD issued its Annual Pole Attachment Billing invoices to OCTA members, including Charter Communications and Millennium Digital Media. These invoices contain the kind of per attachment fees (*vs*. amount of usable space occupied) that were expressly outlawed in this case by the Commission.[8] Specifically, the invoice contains: (1) a $9.93 per "Joint Pole Attachment Point" rate (or a rate that is almost $6 more than the $4.14 rate the Commission calculated for an attacher that presumptively occupies one foot of space, like Charter);[9] (2) a $2.12 per "Comm[unications] Riser" rate (*i.e*., for the conduit that is located in the *unusable* space); (3) a $3.17 per "Equip[ment in] Ground Space rate (*i.e*., unspecified equipment in *unusable* space; (4) a $3.17 per "Anchor" rate (even though attachers already pay for anchors through the annual rent)[10] and, incredibly, (5) a $3.17 per "Joint Pole No Attachment" rate (*i.e*., CLPUD is

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[7] *See* tape of February 4, 2005 Teleconference between ALJ Smith and the OJUA (emphasis added).

[8] *See* Order at 15 (finding that CLPUD may not charge a foot of space for each additional attachment point, but must assess rent based on actual usable space used, beyond the allocated one foot). Charter is one of the 13 attachers forced to sign CLPUD's pole attachment agreement under threat of sanctions. *See* OCTA Brief at 16-17 (quoting hearing transcript regarding the termination of Charter's contract and the threat of over 6 million dollars in sanctions).

[9] While OCTA understands that CLPUD has the opportunity to comment on the rate calculated by the Commission in the Order, it is difficult to believe that CLPUD will be able to manipulate its financial data to the point where a $9.93 rate could be justified. Moreover, even though Charter has made three separate written requests to CLPUD seeking support for the myriad of fees contained on CLPUD's 2005 Fee Schedule, according to Charter, CLPUD has never provided any justification. Instead, once the Commission's Order was issued and CLPUD believed the ruling was limited to Verizon, it imposed its unreasonable fees on Charter and Millennium. Separate from being a violation on CLPUD's part, allowing CLPUD to impose different rates on different attachers would violate the Commission's charge to ensure nondiscriminatory and reasonable rates. ORS § 757.273.

[10] *See* Comments to section 12.1, *infra*.

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charging rent on poles that it knows Charter does not even occupy).[11] The invoices also included the type of application processing fees the Commission ruled must instead be recovered as part of the annual rent.[12]

OCTA believes it is essential that the Commission clarify that this case establishes basic norms both for reasonable pole-related conduct and agreement rates, terms and conditions. Without a clear signal from the Commission that it expects pole owners across Oregon to conduct their joint use operations consistent with this Order and approved contract, each attacher that was pressured into signing CLPUD's unreasonable agreement, and other agreements like it, will be forced to file complaints with the Commission, challenging the precise rates, terms and conditions already overruled in this case.[13] Rather than risk a clogged docket with dozens of unnecessary and duplicative cases, the Commission should clarify that its decision and resulting contract have the force of precedent and establish parameters of acceptable joint use behavior in Oregon today.[14] An unambiguous statement in this regard is

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[11] *See* CLPUD Invoice to Charter, attached hereto as Exhibit 1.

[12] *See* Exhibit 1 (charging three separate application fees for an aerial cable attachment; down guy attachment and anchor attachment). "[T]o the extent the application fees do not relate to "special inspections or preconstruction, make ready, change out, and rearrangement work," application fees may not be recovered, and administrative charges related to processing new attachments should be allocated with the carrying charge." Order at 16-17. CLPUD has never justified its application processing fees to Charter.

[13] By contrast, in states where pole attachment matters are regulated by the FCC, pole owners and attachers alike understand that utility-imposed deviations from the Pole Attachment Act, FCC rules and/or precedent, are unenforceable. Indeed, application of the FCC's rate formula and the numerous other pole attachment rules and case law, developed in response to Congressional mandate, ensures that facilities-based competition proceeds on fair rates, terms and conditions, notwithstanding monopoly ownership and control of distribution facilities and utilities' superior bargaining position in pole attachment matters.

[14] Awaiting the outcome of any future rulemaking (which could take years) is not an acceptable option, considering the current state of joint use in Oregon.

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essential to ensure that the Commission's efforts in this case mark the beginning of a more cooperative joint use environment overall, and not just between CLPUD and Verizon.[15]

To that end, OCTA offers these comments from the perspective of its members who are non-pole owning communications attachers and hopes these comments will aid the Commission in developing a reasonable agreement that facilitates joint use efforts, consistent with applicable law and standard industry practices, while maintaining the safety and integrity of Oregon's distribution facilities[16] and promoting facilities-based competition.[17]

II. TECHNICAL CORRECTIONS

Fourth WHEREAS clause

OCTA fully supports the Commission's proposed edits to the fourth WHEREAS Clause. Incorporation of the Congressionally-mandated nondiscriminatory access principles of the federal Pole Attachment Act, 47 U.S.C. § 224(f), in the Agreement, is critical to promoting advanced communications services and achieving a less contentious pole attachment environment. These principles ensure that "no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance

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[15] Moreover, permitting CLPUD to impose different rates, terms and conditions on different attachers would violate the Commission's obligation to ensure just, reasonable and nondiscriminatory access.

[16] Contrary to oft-repeated, but unsupported, claims by electric utilities that cable operators and CLECs have no regard for distribution plant safety and reliability, OCTA's members are responsible, experienced companies, committed to worker and public safety; and, like pole owners, have a vested interest in maintaining plant integrity, without which their services could not reach their customers.

[17] "In 1985, the Legislative Assembly adopted a goal for the State of Oregon 'to secure and maintain high-quality universal service at just and reasonable rates for all classes of customers and to encourage innovation within the industry by a balanced program of regulation and competition." THE STATUS OF COMPETITION AND REGULATION IN THE TELECOMMUNICATIONS INDUSTRY, PUBLIC UTILITY COMMISSION OF OREGON, Jan. 2004, at 1-4) (citing ORS § 759.015). The PUC is charged with administering "the statutes with respect to telecommunications rates and services in accordance with this policy." ORS § 759.015. *See also* Public Utilities Commission, *History Duties and Functions at* http://www.puc.state.or.us/consumer/history.htm: ("The Oregon Public Utility Commission regulates utility industries to ensure that customers receive safe, reliable services at reasonable rates, while promoting competitive markets.").

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of telecommunications and cable equipment by those seeking to compete in those fields."[18] This is particularly important in today's fiercely competitive environment, as electric utilities are poised to offer broadband over power lines (or "BPL")[19] and as incumbent LECs, such as Verizon, are preparing to offer video, high-speed Internet over fiber and like services, in direct competition with OCTA members.[20]

Equally important, access decisions based on objective criteria, like safety, reliability and generally applicable engineering standards (*e.g.*, the National Electrical Safety Code or "NESC"), help to assure attachers that any access denials are fair, just and reasonable. The application of objective criteria to access requests will also aid the Commission during any related dispute. No monopoly pole owning utility, especially a direct competitor, should have absolute discretion to deny access in its "sole judgment." Moreover, the word "economy," which was also deleted from Verizon's form agreement by the Commission, cannot be applied

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[18] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, ¶ 1123 (1996) (hereinafter "Local Competition Order").

[19] The 1996 Act not only amended the Pole Attachment Act to mandate access for both cable and telecommunications providers, Congress also granted utilities the right to enter into competitive businesses. P.L. 104-104, § 103 (1996). "Perhaps fearing that electricity companies would now have a perverse incentive to deny potential rivals the pole attachments they need, Congress made access mandatory." *FCC v. Alabama Power*, 311 F.3d. 1357, 1363 (11th Cir. 2002). Indeed, as a result of the 1996 Act, electric utilities have moved into competitive lines of businesses and must not be permitted to use their control over the pole asset to thwart competitions. *See, e.g.,* BPL TODAY, RESEARCH GROUP PREDICTS 2005 IS BPL'S YEAR, at 1 (Feb. 28, 2005), available at newsletter@bpltoday.com; *see also* James S. Granelli, SDG&E TO OFFER BROADBAND SERVICE OVER POWER LINES, latimes.com (Feb. 9, 2005). Even before BPL technology became more viable, utilities in Oregon indicated an intention to provide communication services. *See, e.g.,* JOINT WIRE AND POLE USAGE, BEST PRACTICES TO MAXIMIZE REVENUE OPPORTUNITIES AND MINIMIZE ATTACHMENT COSTS CONFERENCE held Dec. 8-9, 2003, Scottsdale, AZ, Presentation by Paul Brown, Managing Director of Distribution Support for PacifiCorp (discussing Broadband over Power Lines as a future project for PacifiCorp).

[20] *See, e.g.*, Mike Rogoway, FIBER OPTIC WAR MOVES TO PORTLAND SUBURBS, (Feb. 24, 2005) ("Verizon said that it plans to begin operating the new network late this year, making Portland's western suburbs the latest front in an escalating war between phone companies and cable TV operators that is playing out nationwide."), available at www.oregonlive.com/business/oregonian/index.ssf?/base/business/1109250467123290.xml.

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objectively to access decisions. In any event, attachers seeking access must incur all the reasonable and necessary costs associated with their requests.[21] Section 224 also obligates utilities to provide nondiscriminatory access to the "right-of-way owned or controlled by" the utility.[22] According to the Federal Communications Commission ("FCC"), that means a utility must grant access to the utility's rights-of-way, including "private easements," at no "additional payment."[23]

Article I, Section 1.1

The definition of "Agreement" should be revised to mean "this Pole *Attachment* Agreement," rather than "Pole *Use* Agreement," for consistency purposes.

Article II, Section 2.2

The scope of the Agreement should not exclude poles that "support, or are designed to support, wires with a nominal voltage higher than 34,500 volts." Such an arbitrary limitation is unnecessary and arguably conflicts with a utility's obligation to provide nondiscriminatory access to its "poles." Only transmission facilities that are interstate and not part of a local distribution system, are exempt from the FCC's jurisdiction under the Pole Attachment Act.[24] Therefore, rather than include an arbitrary cut-off based on voltage, the relevant jurisdictional inquiry is whether a particular structure is used to support distribution plant. Moreover, attachers pay rent based on a utility's investment in FERC Account 364, which includes: "the cost installed of poles, towers, and appurtenant fixtures used for

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[21] *See, e.g.,* Section 3.4 of the Agreement.

[22] 47 U.S.C. § 224(f)(1).

[23] The Cable Television Ass'n of Georgia v. Georgia Power Co., 18 FCC Rcd. 16333, ¶ 27 (rel. Aug. 8, 2003) (hereinafter "Georgia Power").

[24] *See Omnipoint Corp. v. PECO Energy Co.*, 18 FCC Rcd 5484, n.18 (rel. Mar. 25, 2003) (*citing Southern Co. v. FCC*, 293 F.3d 1338, 1345 (11th Cir. 2002)).

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supporting overhead distribution conductors and service wires."[25] Nothing in FERC Account 364 refers to voltage. Carrying charges are also allocated based on either electric or total plant investment figures, not on voltages.[26] Attachers should not be excluded from poles they pay to occupy. For these reasons, rather than set a limitation based on voltage, this section should be revised so that the scope of the Agreement extends to all the pole owner's distribution facilities, as well as intrastate (if any) transmission facilities.[27]

Article II, Section 2.3

The reservation of space language added to the Agreement by the Commission, which allows the pole owner to reserve space for its core utility service but requires the pole owner to permit use of its reserved space "until such time as it has an actual need for that space," is another critical element of nondiscriminatory access. In order to ensure this provision has its intended effect, however, the pole owner should be permitted to reserve space only "pursuant to a *bona fide* development plan that reasonably and specifically projects a need for that space in the provision of its core utility service" within a certain time period, not to exceed a year. For example, the FCC, which created the "reservation of space" rule pursuant to the 1996 Telecommunications Act, "recognized that [while] utilities enjoy the power to reserve space on their facilities for future utility-related needs . . . the [agency] must have some way of assessing whether these needs are bona fide; otherwise, a utility could arbitrarily reserve space on a pole, claiming it necessary on the basis of unsupportable 'future needs,' and proceed to deny attachers space on the basis of 'insufficient capacity.' This is clearly not what Congress

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[25] 18 C.F.R. Part 101, Account 364.

[26] *See, e.g., In the Matter of Implementation of Section 703(e) of The Telecommunications Act of 1996*, 16 FCC Rcd 12102 at Appendices D-1 and D-2 (May 25, 2001) (setting forth the cable rate formula and the ARMIS and FERC Form 1 Accounts that factor into the cable formula).

[27] *Id.* Making OCTA's suggested revisions would also appear to render Article XVIII (Procedure Involving Increases In Electric Circuit Nominal Voltages) obsolete. *See* further comments to Article XVIII, infra.

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intended when it passed the Act; such a construction would undermine the plain intent of the nondiscrimination provisions found in 224(f)(1)."[28] Moreover, "[a]llowing space to go unused when a cable operator or telecommunications carrier could make use of it is directly contrary to the goals of Congress."[29]

Article III, Section 3.1

OCTA strongly supports the Commission's revision to this section stating that if a pole owner fails to respond to a written request for access within 30 days, the application should "be deemed approved" and the attacher should be permitted to proceed with its attachment. This language is consistent with federal rules and will provide certainty for the attacher. More significantly, the addition of this language in the Agreement also helps guarantee that monopoly pole owners cannot abuse their control of the essential pole facility to deny timely access to attachers.[30] Again, the competitive landscape in which this Agreement is being considered cannot be ignored. Cable operators are competing with direct broadcast satellite providers, whose access to subscribers depends upon retailers eager to sell their equipment, not pole owners seeking to deploy their own core or competitive services.[31] While energy companies are in the process of developing BPL, ILECs now have standards for fiber to

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[28] *Southern Co. v. FCC*, 293 F.3d 1338, 1348 (affirming FCC's reservation of space rules adopted in *Local Competition Order*) (11th Cir. 2003).

[29] *Local Competition Order* at ¶ 1168.

[30] *See Cavalier Telephone, LLC v. Virginia Electric and Power Company* 15 FCC Rcd 9563, ¶ 15 (Cable Bureau 2000) ("Our rules require [a utility] to grant or deny access within 45 days of receiving a complete application for a permit. We have previously stated that the Pole Attachment Act seeks to ensure that no party can use its control of facilities to impede the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields. We have interpreted the Commission's rules, 47 C.F.R. § 1.1403 (b), to mean that a pole owner "must deny a request for access within 45 days of receiving such a request or it will otherwise be deemed granted.") (internal citations omitted), *vacated by settlement*, *Cavalier Telephone Settlement Order*, 17 FCC Rcd 24414 (2002) (stating the vacatur did "not reflect any disagreement with or reconsideration of any of the findings or conclusions contained" in the original order issued in 2000) (hereinafter "*Cavalier*").

[31] *See* notes 19-20, *supra*.

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the home and are permitted to deploy fiber-optic facilities to which CLECs will not have access at regulated rates. In this highly competitive environment, non-pole owning attachers, like OCTA's members, are concerned that structural opportunities exist for pole owners to use their control over bottleneck pole facilities to delay access. OCTA's members cannot function in today's communications environment if they are forced to beg for prompt access to poles and must have tools like this one to level the playing field so they may deploy their facilities on par with pole owning competitors.

OCTA further supports the Commission's revision requiring that denials "be in writing and describe with specificity all relevant evidence and information supporting the denial . . . ." This important requirement will not only aid attachers in determining whether access denials are reasonable, but will similarly assist the Commission in any access disputes. However, the language in the preceding sentence stating that the pole owner must "provide *oral* or written notice of the rejection of the application," appears to conflict with the written denial requirement, however, and the term "oral" should be deleted.

Article III, Section 3.2

This section requires attachers to obtain the pole owner's permission prior to "chang[ing] the position of any Equipment attached to any pole. . . ." This language could be construed to limit an attacher's ability to access its attachments for repair and maintenance activities when necessary. In accordance with long-standing industry practices, these activities must expressly be exempt from the permitting requirements in this section. Attachers must have ready access to their facilities in order to perform repairs and maintenance.

Article III, Section 3.4

The current language in this section allows pole owners to base make-ready decisions on their "sole judgment." This is inconsistent with the Commission's removal of the term "sole judgment" from the fourth "WHEREAS" clause. This language also conflicts with the nondiscriminatory access standards set forth in Section 2.3, and required by state and

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federal law, and could have a negative impact on the deployment of facilities and competition. Instead, make-ready determinations, like all access decisions, must be based on objective criteria, *i.e.,* capacity, safety, reliability, and generally applicable engineering standards, like the NESC.[32] Giving a pole owner the absolute discretion to deviate from conventional manuals of construction like the NESC, tends to drive up make-ready costs for facilities-based communications companies, like OCTA's members.

When make-ready costs are artificially high, cable operators and CLECs are often forced to reassess or cancel deployment plans. OCTA members have also experienced situations where pole owners unfairly impose stricter construction standards in order to renew and restore distribution facilities at the cable operator or CLEC's expense. Moreover, such unlimited discretion allows pole owners to restrict deployment of cable and CLEC facilities altogether while allowing for the expeditious construction of their own competitive facilities. The "sole judgment" language should be removed and if pole owners are permitted to deviate from widely accepted, objective engineering standards at all, the Agreement must also include language ensuring that any stricter standards must be justified for safety purposes and applied in a competitively neutral and non-discriminatory manner.

Article III, Section 3.5

Another important nondiscriminatory access principle included in the Pole Attachment Act is that once a party obtains access to a pole, that party may not be forced to incur any expense for activities undertaken that solely benefit another party, including the pole owner, unless the original party also benefits.[33] Allocating costs based on the associated

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[32] Indeed, "the rules of the NESC give the basic requirements of construction that are necessary for safety. If the responsible party wishes to exceed these requirements for any reason, he may do so for his own purpose, but need not do so for safety purposes." NESC HANDBOOK, 5TH EDITION, Purpose 010.

[33] *See* 47 U.S.C. §§ 224(h)-(i). Specifically, subsection (h) states, in relevant part, that: "[w]henever the owner of a pole . . . intends to modify or alter such pole . . . the owner shall provide written notification of such action to any entity that has obtained an attachment to such [pole] so that such entity may have a

(FOOTNOTE CONT'D)

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benefit, helps to balance the interests of the parties, facilitate pole access and reduce cost disputes. Section 3.5, as currently written, violates this important principle and should be revised accordingly.[34]

First, if an attacher's existing equipment "interferes" with the pole owner's existing equipment, the attacher should not be required to incur the cost of rearranging or transferring existing equipment and/or replacing a pole *unless* the attacher's equipment was placed *after* the pole owner's equipment. Otherwise, the attacher would have to pay for the correction of a non-compliant condition caused by the pole owner. As currently written, the attacher must incur all the costs whether or not it is responsible for the interference. This is not permitted under nondiscriminatory access principles. Indeed, Commission Staff has recognized the prohibition against charging attachers for pre-existing safety violations they did not cause.[35] In the event it is impossible to determine which party caused the interference or noncompliance (*i.e.*, which attachment was installed last), then, the parties should pay a *pro-rata* share of the

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reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole . . . accessible." Similarly, subsection (i) state, in relevant part, that: "An entity that obtains an attachment to a pole . . . 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. . . .").

[34] *See also*, comments to Article IX (suggesting revisions consistent with Section 3.5).

[35] *See The Battle for the Utility Pole and the End-Use Customer*, A PUC Staff Report, Attachment E—Pole Joint Use Principles, P9 (Dec. 15, 2003) ("Pole Owners shall not charge any portion of make ready or alteration costs to a pole that is attributable to correcting existing violations, unless the occupant has caused a portion of the violation."), available at: http://www.puc.state.or.us/safety/workgrp/staffrpt.pdf. *See also Cavalier*, ¶ 16 (prohibiting utility from holding attacher, Cavalier, responsible for costs arising from the correction of safety violations of attachers other than Cavalier); VT. PUB. SER. BD. R. 3.708(H)(1) ("The applicant shall not be responsible for any portion of the Make-ready expense that is attributable to the correction of pre-existing violations, unless the applicant has caused a portion of the violation.").

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costs to accommodate both the attacher and the pole owner, based on their respective space needs.[36]

Second, if an attacher has an existing attachment and the pole owner seeks to make a new attachment or modify its existing attachment, the attacher should not be required to incur any costs to accommodate the pole owner's new or modified attachment, unless the attacher uses the opportunity to modify its own attachment.[37] Otherwise, attachers essentially would be paying the cost to modernize pole owner plant for the pole owner's sole benefit, possibly even for the delivery of competitive services. While subsection (c) currently provides that the pole owner will be responsible for the costs to accommodate its own attachment, reference to subsection (b), which allows the attacher to perform the work to maintain its own attachment, makes subsection (c) somewhat confusing as to which costs the pole owner and attacher are required to incur.

Third, the Agreement should include language specifying that an existing licensee will be reimbursed for any costs it incurs to accommodate another licensee.[38]

Fourth, although OCTA has no objection to the notice requirements currently contained in Section 3.5, rather than allow the pole owner to completely remove an attacher's existing attachments in the event the attacher fails to respond to a work request, the Agreement should provide that the owner will be permitted to rearrange and/or transfer the attacher's equipment either at the request of the attacher or if the attacher fails to respond. The costs for such rearrangement and/or transfer would be allocated depending on who benefits from the work, as described above.

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[36] *See, e.g.*, 224(h).

[37] *See id.*

[38] *See id.* at 224(i).

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Last, for the reasons discussed above, the term "sole judgment" in the first sentence of 3.5 is unreasonable and should be replaced with the following language (in italics): "if, *based on generally applicable safety standards.*"

Article V, Section 5.4

At "sixty (60) times the rental fee for that year," the "unauthorized attachment charge" added by the Commission in this section is even higher than the unauthorized attachment penalty set forth in the Commission's regulations, the excessive and super-compensatory nature of which is currently being challenged by Qwest Corporation in the Court of Appeals.[39] Specifically, those regulations allow a pole owner to assess a per pole penalty of $250 or 30 times the annual rent.[40] At a rental rate of $6.21 per pole, times 60 years, for example, Verizon's per pole unauthorized attachment charge would be $372.60! OCTA suggests that rather than set a specific charge, the penalty should be tied to the regulations, *i.e.*, the pole owner "may assess . . . an unauthorized attachment charge for unpermitted attachments, *in accordance with the Commission's regulations*." That way, if Qwest's challenge prevails or the Commission changes its rules, the Agreement will automatically account for any revisions in the Commission's regulations. This section should also include a provision allowing the parties to negotiate a charge that is less than what the regulations currently or may eventually provide.[41]

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[39] *See In the Matter of the Adoption of Rules to Implement House Bill 2271 Sanction and Rental Reduction Provisions Related to Utility and Pole Attachments*, *Qwest Corporation v. Public Utility Commission of Oregon*, filed January 12, 2004 (Or. Ct. App.).

[40] OAR 860-028-0140(1)(a)-(b). Like Verizon, OCTA member Charter Communications also filed an *amicus* brief in the appeal, to give a non-pole owning attacher's perspective. *Qwest Corp. v. Public Utility Commission of Oregon*, Docket Nos. AR 386 and 401, Case A123511, *Amicus Curiae* Brief of Charter Communications, Inc. (filed June 7, 2004). Charter's brief is also instructive with respective to the issues being considered in the instant case.

[41] For example, the Commission's regulations provide that parties can agree to a different sanction. OAR 860-028-0160 (Choice of Sanctions).

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Article V, Section 6.1

This section should clarify that any rental rate adjustment will be calculated in accordance with the Commission's pole rental formula, ORS § 757.282(2).

Article IX, Sections 9.1-9.7

Sections 9.1 through 9.7 of this Article, which address the division of costs between the pole owner and attacher for pole replacements, and the like, are unnecessarily complicated and should be consolidated and rewritten to conform with equitable cost allocation rules, consistent with OCTA's proposed changes to Section 3.5.

First, subsection 9.1(a) can be revised to state:

> Poles *shall* be erected at the sole expense of the Licensor, *except as otherwise provided herein*.

Second, subsection 9.1(b) and section 9.3 seem to be somewhat redundant (*i.e.*, a pole would normally be "prematurely replaced" for the benefit of an attacher only when the existing pole was not large enough to accommodate the attacher's request for access or in the event the attacher's existing attachment caused a safety violation) and confusing. OCTA suggests these two sections be combined and simplified to provide that:

> In the event a pole must be replaced to accommodate the Equipment of the Licensee only, the Licensee shall pay the Licensor a sum equal to the difference between the cost installed of the new pole and the existing pole. The Licensee shall also pay the licensor the remaining life value of the old pole, plus the cost of removal, less the salvage value. The Licensor will retain or dispose of the existing pole.

Third, subsection 9.1(c) should be redrafted so that attachers are only required to pay the cost of a larger pole if they request additional space in the event a larger pole is necessary due to "the requirements of public authorities or of property owners." The current language, which requires the attacher to pay "a sum equal to one-half the difference between the cost, in place, of such pole and the cost, in place, of the existing pole," is a vestige of Verizon's "Joint Use" Agreement and is not appropriate in a license agreement. Further, rather than divide the cost of such pole replacements equally, as this subsection currently provides,

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each party that requires a taller pole under this subsection should only be responsible for its *pro rata* share, based on the amount of space needed to accommodate its attachments.[42] OCTA has no objection to Section 9.2. OCTA agrees that it is standard industry practice that in the event a cable operator or CLEC pays to change out a pole, such payment does not entitle the attacher to any ownership of any part of the pole, even though such pole replacement upgrades the plant and creates excess capacity that the pole owner can either use itself, at no additional cost, or rent out for additional fees.[43] Considering that OCTA members also pay fully allocated rental rates to pole owners, any argument that the electric utility ratepayer subsidizes communication attachers, as some pole owners argue, may readily be dismissed.[44] Indeed, utility assertions that the fully allocated (FCC) formula subsidizes the activities of attaching parties is entirely without merit and has been rejected by the Supreme Court,[45] Circuit Courts,[46] state courts (reviewing certified state commission decisions)[47] and state commissions.[48]

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[42] *See* note 33, *supra*, quoting 47 U.S.C. § 224(h).

[43] *See, e.g., Alabama Cable Telecomm. Ass'n v. Alabama Power Co*., 16 FCC Rcd 12103 at ¶¶ 58 (2001) ("In instances where attachers pay the costs of a replacement pole, the attacher actually increases the utility's asset value and defers some of the costs of the physical plant the utility would otherwise be required to construct as part of its core service.").

[44] *See, e.g.* February 4, 2005 transcript of Telephone Conference Call with Oregon Joint Use Members and ALJ Smith, at p.8. (alleging that communications companies do not pay their share of pole costs and that those "costs should [not] be subsidized by the electric utility ratepayer.").

[45] *FCC v. Florida Power Corp*., 480 U.S. 245, 253-54 (1987) (finding that it could not be "seriously argued, that a rate providing for the recovery of fully allocated cost, including the cost of capital, is confiscatory.").

[46] *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1358 (11th Cir. 2002) (finding that the FCC formula provides just compensation), *cert. denied*, 124 S.Ct. 50 (2003). In fact, the Oregon formula allows pole owners to allocate even more pole costs to attachers. Under the FCC pole rental formula, the entire 40 inches of "clearance space" (*i.e*., the distance required by law between the lowest electric line and the highest communications line on the pole) is considered "usable space." Under both the state and federal rental rate formulas, the more "usable space" on the pole, the lower the annual pole rent. In Oregon, however, the "clearance space" is considered "unusable." OAR 757.282(1). The more "unusable space," the higher the pole rent. In cases where an attacher is considered "compliant" and entitled to the rental reduction under the PUC's rules, only 20 inches of that 40-inch clearance space gets added to the total usable space. Consequently, even when an attacher receives a "rental reduction" under the PUC's

(FOOTNOTE CONT'D)

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Section 9.4, which provides that "[e]ach Party shall place, maintain, rearrange, transfer, and remove its own attachments at its own expense, except as otherwise expressly

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rules, they are still paying more to the pole owner than the fully compensatory rate that the pole owner would receive under the FCC formula.

> [47] In affirming the Michigan PSC's adoption of the FCC cable formula in Michigan, the Court of Appeals of the State of Michigan rejected identical arguments made by Detroit Edison: Edison asserts, in a conclusory fashion, that the rate adopted by the PSC is unjust and unreasonable because it would require Edison's customers to subsidize the activities of the attaching parties. However, instead of explaining why the PSC's embedded costs method fails to provide adequate compensation, Edison merely states, as if it were a matter of fact . . . that the embedded costs method results in an unfair subsidy. . . . In any event, our review of the record reveals that there was competent, material, and substantial evidence to support the PSC's conclusion that a rate based on the embedded costs method would enable Utilities to recover their historical investment.

Detroit Edison Co. v. Michigan Public Serv. Comm'n, Nos, 203421, 203480, slip op., at 3-4 (Mich. Ct. App. Nov. 24, 1998) *affirming Consumers Power Co., Detroit Edison Co., Setting Just and Reasonable Rates for Attachments to Utility Poles, Ducts and Conduits*, Case Nos. U-010741, U-010816, U-010831, Opinion and Order (Mich. Pub. Serv. Comm'n Feb. 11, 1997), *aff'd Detroit Edison v. Michigan Pub Service Comm'n*, No.s 203421, 203480, slip op. (Mich Ct. App. Nov. 24, 1998), *appeal denied*, 602 N.W.2d 386 (Mich. 1999).

[48] According to the California PUC, which codified the FCC cable formula in California, at Cal. Pub. Util. Code § 767.5:

> [T]he formula does not result in a subsidy since the formula is based upon the costs of the utility. A subsidy would require that the rate be set below cost. The fact that the rate is below the maximum amount that the utility could extract for its pole attachment through market power absent Commission intervention does not constitute a subsidy. The embedded cost formula prescribed in § 767.5 applies to capital costs, net of accumulated depreciation, and also allows for recovery of the annual operating expenses of the utility's poles and support structures. This formula will therefore reasonably compensate incumbent Utilities for their ongoing operating expenses related to providing access to their support structures.

Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service, Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Services, R.95-04-043, I.95-04-044, Decision 98-10-058, at 55-56 (Cal. Pub. Util. Comm'n Oct. 22, 1998) (jointly decided).

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provided," would become obsolete if the Commission incorporates OCTA's suggestions to this Article, as well as its requested revisions in Section 3.5. Similarly, Sections 9.5 and 9.6, which allocate costs based on which party benefits, would also be unnecessary and redundant if the Commission incorporates OCTA's proposed revisions.

Article IX, Section 9.9

OCTA strongly supports the Commission's revision requiring that the costs for"periodic, routine" inspections be recovered in the annual rent. This language is consistent with the Commission's findings in the Order that "[o]nly certain other direct costs may be charged in addition to the annual rental rate," namely "special inspections or preconstruction, make ready, change out, and rearrangement work;"[49] and "[t]he salaries of the people involved in 'joint use issues' or pole maintenance and operation must be calculated and allocated as part of the carrying charge."[50] Allowing a pole owner to recover both fully allocated rent and the costs associated with routine inspections, would lead to over-recovery in violation of the Commission's rental rate statute. Indeed, the FCC has long held that by definition, fully allocated rent, such as that paid to pole owners in Oregon, encompasses all pole related costs.[51]

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[49] Order at 15.

[50] *Id*.

[51] *Texas Cable & Telecom. Ass'n v. Entergy Services, Inc*., 14 FCC Rcd 9138, ¶ 10 (1999). For example, FERC Account 593, which is used to calculate the maintenance carrying charge and gets factored into the annual pole attachment rent for electric utilities, includes "the cost of labor, materials used and expenses incurred in the maintenance of overhead distribution line facilities, the book cost of which is includible in account 364, Poles, Towers and Fixtures, account 365, Overhead Conductors and Devices, and account 369, Services." 18 C.F.R. Part 101, Account 593. Likewise, FERC Accounts 920-931 and 935, which are used to calculate the administrative carrying charges for electric utilities, together include such administrative costs as office supplies and expenses, travel, supervision fees, premiums payable to insurance companies, payment of certain employee pensions, to name a few items. *See id*. at Accounts 920-931 and 935. ILECs book similar costs into corresponding ARMIS accounts that in turn get factored into their pole attachment rates.

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The FCC recently reaffirmed this fundamental tenet of pole attachment cost recovery theory in relation to routine inspections, in the *Georgia Power* case.[52]

Although OCTA agrees with the Commission's overall revisions here, OCTA suggests that for clarification and consistency purposes, the second to last sentence be revised as follows (addition in italics, deletion in brackets): "The District shall recover the costs for all periodic, routine inspections that benefit *all attachers* [Verizon] in the annual rent." Periodic, routine inspections are typically conducted on the entire pole and encompass all attachments, including the pole owner's. Also, rather than allow the pole owner to charge for the "pro-rata" expense of any "non-routine inspection," the pole owner should be allowed to recover only those costs associated with inspecting the licensee's non-compliant attachments. The term "pro-rata" is ambiguous in this context. Additionally, the trigger for non-routine inspections should be for suspected safety code violations, rather than for non-compliance with the Agreement, as this section currently provides. The current language is too broad and could subject attachers to retaliatory inspections for issues wholly unrelated to safety.[53]

Finally, in order to ensure that attachers and pole owners are equally responsible for their actions, consistent with the spirit of the Order and the Commission's other revisions to the Agreement, OCTA proposes that the last sentence be made reciprocal so that neither party is relieved of any "responsibility, obligation or liability assumed under this Agreement," when the pole owner fails to conduct an inspection.

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[52] *Georgia Power* at ¶ 16. (finding that while Georgia Power could inspect its poles freely, a provision requiring cable operators to pay for routine inspections is unreasonable because "costs attendant to routine inspections of poles, which *benefit all attachers*, should be included in the maintenance costs account and allocated to each attacher in accordance with the Commission's formula.") (emphasis added).

[53] The FCC struck similar language from the pole attachment agreement offered by Georgia Power. *See Georgia Power* at ¶ 15 ("Rather than allowing inspections upon the discovery of a 'safety violation,' [the contract] provides for inspections when there is '*any* violation of this Agreement.' While Georgia Power seeks to justify this provision based solely on safety concerns, this provision is far broader and, in our view, unreasonable.").

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Article IX, Section 9.10

OCTA supports the Commission's revisions to the "Occupancy Survey" section. Again, the costs associated with routine inspections of poles that benefit all attaching parties, like occupancy surveys, should be included in the carrying charges and recovered in the annual rent, not as a direct cost. There are several internal inconsistencies in this section, however.

First, although the second to last sentence requires the costs of any occupancy survey to be recovered in the annual rent, consistent with the Commission's Order, the preceding sentence states that "[t]he Parties shall jointly select an independent contractor for conducting the inventory and agree on the scope and *extent of the Occupancy Survey reimbursable by Verizon*." This contradiction must be rectified so that pole owners do not over-recover in violation of the Commission's Order and the rental rate statute.

Second, this section states that the pole owner shall give the licensee "at least thirty (30) days prior notice of such Occupancy Survey." The licensee, however, must advise the pole owner of the licensee's desire to participate in the survey no "less than ninety (90) days prior to the scheduled date of such Occupancy Survey." To resolve this inconsistency, the pole owner should be required to give ninety days prior notice so that the attacher has ample time to decide whether to participate and for the parties to "jointly select an independent contractor for conducting the inventory." At that same time, the attacher should be required to give the owner notice of its intention to participate, "no less than sixty (60) days prior to the inventory."

Finally, OCTA suggests that the contractor's "detailed report" include not only any tagged pole number that resides on the pole (which often does not exist or is inaccurate), but also the municipality/township and street address of the pole. That will simplify verification of any unauthorized attachments for all parties.

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Article X, Sections 10.2, 10.3, 10.5; Article XI, Section 11.1; Article XV, Section 15.1; and Article XVI, Section 16.1

Section 10.2 should be clarified to explain that the replacements, relocations or resets referred to in this section, would be for maintenance purposes only, consistent with this "Maintenance of Poles" Article. Otherwise, the pole owner could use this section to require an attacher to incur the costs to transfer its attachments even if the pole replacement, reset, etc., was necessary for the pole owner's service requirement (*i.e.*, for the pole owner's sole benefit), rather than for maintenance purposes (*i.e.*, for the benefit of all attachers). That would violate the equitable cost allocation principles that are part and parcel of state and federal nondiscriminatory access requirements.[54]

Additionally, although the Commission decided that this Agreement would be a "license agreement," there are vestiges of "joint use" language in these sections. For example, timeframes for transferring Verizon's attachments and/or Verizon's assumption of ownership (Section 10.3), under this section, are subject to the removal of "third party attachments." Section 10.5 refers to "jointly used poles owned by Verizon which support the District conductors. . . ." Section 11.1 similarly extends the time frame for Verizon to decide whether to purchase an abandoned pole, subject to third party removals. Section 15.1, governing default, also refers to "joint use," and should be corrected consistent with the Commission's Order. Finally, Section 16.1, entitled "Right to Terminate Further Granting of Joint Use," is inappropriate in a "license agreement" and also conflicts with the Commission's revisions to Section 17.1, governing termination of the agreement.

Article XII, Section 12.1

An attacher that pays fully allocated rent (as Oregon attachers do) may not rightfully be excluded from using a pole owner's anchors. Pole owners include their

[54] *See* comments to Section 3.5; 47 U.S.C. § 224(h)-(i).

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investment in anchors in the calculation of annual pole attachments rates, based on the assumption that anchors are available for use by attaching entities.[55] Similarly, no separate surcharge for anchor attachments should be permitted,[56] as CLPUD seeks to do.[57] Consequently, the mandatory language requiring the licensee to "attach its guys only to its own anchors," must be deleted. Non-discriminatory access to Licensor's anchors should be permitted except in cases where there is insufficient capacity or for reasons of safety and reliability, based on generally applicable engineering standards.

Article XII, Section 12.2

This Section requires that "to prevent galvanic corrosion of anchor rods, all down guys should be insulated." The insulation of down guys, however, is **not** required by the NESC. NESC Rule 279 A.2.a. provides that insulation is not necessary if the system is effectively grounded, which is the practice in Oregon.

Article XIII, Section 13.1

This Section states that the construction specifications of the parties "shall be no less stringent than the requirements of the" NESC. This requirement is unnecessary because

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[55] FERC Account 364, which investor-owned utilities use to calculate their net pole investment to determine the annual pole rent, includes "anchors." 18 C.F.R. Part 101, Account 364 ("This account shall include the cost installed of poles, towers, and appurtenant fixtures used for supporting overhead distribution conductors and service wires . . . [including] anchors. . . . ."). *See also Cox Cable Norfolk, Inc. et al. v. Virginia Electric and Power Co.*, 53 RR 2d 860 ¶ 33 (April 6, 1983) (finding that VEPCO could not deny right to attach to its anchors).

[56] *Arlington Telecommunications Corp. et al. v. VEPCO*, 50 RR 2d 1152 (January 6, 1982) (disallowing separate charge for anchor attachments because it is already included in the investment component of the formula used to establish attachment rates); *Clear Picture v. United Telephone Co. of Ohio*, PA-81-0029, Mimeo No. 003181 (September 1, 1981), *recon. denied*, PA-81-0029, Mimeo No. 4591 (June 7, 1983) (cost of anchors and guys not subtracted from investment as appurtenances); *Teleprompter Corp. v. New England Telephone & Telegraph Co. and Public Service Co. of New Hampshire*, PA-79-0044, Mimeo No. 34556 (April 18, 1984) (cost of anchors and guys included in investment unless cable operator provides its own).

[57] *See* Exhibit 1.

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the Commission already mandates compliance with the NESC.[58] More importantly, as addressed earlier in comments to Section 3.4, in order to ensure just, fair and nondiscriminatory access to poles and promote deployment of advanced communications services, this section should instead provide that in the event the pole owner imposes requirements that are *more* stringent than the NESC, those requirements must serve a special safety need and be applied on a competitively neutral and nondiscriminatory basis. As noted, "the rules of the NESC give the basic requirements of construction that are necessary for safety. If the responsible party wishes to exceed these requirements for any reason, he may do so for his own purpose, but need not do so for safety purposes."[59]

Article XIII, Section 13.2

This section currently provides that the licensee's "attachments . . . shall be made and maintained in accordance with a reasonable aesthetic criteria [sic] mutually agreed to by both Parties." This type of "aesthetic criteria" requirement will be difficult to enforce and is inappropriate in the pole attachment context. As long as attachments are maintained in accordance with applicable safety codes, attachers should not be subject to additional, arbitrary, "aesthetic" requirements. OCTA therefore believes this section is unreasonable, conflicts with the nondiscriminatory access standards and the Commission's Order, and should be deleted from the Agreement.

Article XIII, Section 13.3OCTA members agree with the Commission that it is essential for attachers to have the option to hire outside, qualified contractors in the event a pole owner is "unable to install . . . grounding within thirty (30) days of the date requested. . . ." OCTA members must have the ability to otherwise serve their customers and/or deal with service outages in a timely manner in order to retain market share, if the pole owner is unable

[58] OAR § 860-024-0010.

[59] NESC HANDBOOK, 5TH EDITION, Purpose 010.

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to perform work within a reasonable timeframe. The right to use outside contractors, in the event a pole owner is unable to meet a requested deadline, should not be limited to the grounding context, however. For the same reasons, attachers should also be permitted to use qualified contractors for make-ready, when the utility is unable to perform the work in a timely fashion.[60]

OCTA's proposal is founded on an FCC rule, affirmed by the 11th Circuit Court of Appeals, that is designed to level the playing field between pole owners and attachers and thus is an important tool in promoting robust competition and the expeditious deployment of advanced communications services to Oregon's consumers. The FCC expressly prohibits utilities from forcing attachers to use a utility's own employees to perform make-ready, as well as other work. In establishing the rule, the FCC explained that to "[a]llow[] a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers and cable operators and would inevitably lead to disputes."[61]

Affirming its pro-competitive rule on reconsideration, the FCC further stated:

> We have been presented with no facts or arguments that necessitate modification of the Commission's decision that otherwise, qualified, third-party workers may perform pole attachment and related activities, *such as make-ready work*, in the proximity of electric lines. . . . We reiterate that a utility may require individuals who will work attaching or *making ready attachments* of telecommunications or cable system facilities to utility poles, in the proximity of electric lines, have the same

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[60] *See, e.g., Cavalier*, ¶ 18. *Local Competition Order* at ¶ 1182 [Id. (internal citations omitted.)] Specifically, the FCC expressly prohibits utilities from forcing attachers to use a utility's own employees to perform make-ready, as well as other work. In establishing the rule, the FCC explained that to "[a]llow[] a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers and cable operators and would inevitably lead to disputes."

[61] *Local Competition Order* at ¶ 1182 (internal citations omitted).

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> qualifications, in terms of training, as the utility's own workers, but the party seeking access will be able to use any individual workers who meet these criteria. Thus, utilities may ensure that individuals who work in proximity to electric lines to perform pole attachments and related activities meet utility standards for the performance of such work, but the utilities may not dictate the identity of the workers who will perform the work itself. As we stated in the *Local Competition Order*, allowing a utility to dictate that only specific employees or contractors be used would impede access and lead to disputes over rates to be paid to the workers.[62]

Including language in the Agreement that permits attachers to hire qualified electrical contractors to perform necessary make-ready in the event a pole owner cannot timely perform, is necessary to achieve the Commission's goals of promoting nondiscriminatory access and competition, and reducing disputes.Article XIV, Section14.1

This section, entitled "Existing Contracts" provides, *inter alia*, that "any rental obligations of the Parties currently in arrears under any prior agreement shall be recalculated according to the terms of this Agreement as of the effective date hereof." While the precise meaning of that provision is unclear, OCTA members object that any accumulated rental obligations be "recalculated" except as provided by the Commission's formula, using the specific financial data associated with the year for which rent is owed. Any tardy rental payments are already subject to interest. Consequently, that ambiguous provision should be either clarified or deleted from the Agreement.

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[62] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Order On Reconsideration, 14 FCC Rcd 18049, ¶ 86 (1999) (emphasis added and internal citations omitted). The FCC's third- party worker rule was upheld on appeal as "measured and reasonable" by the United States Court of Appeals for the Eleventh Circuit, in *Southern Company v. FCC*, 293 F.3d 1338, 1351 (11th Cir. 2002) (finding that the FCC's "guideline represents an attempt to balance the interests involved in a measured and reasonable way. . . .").

In the *Cavalier* case, the FCC admonished Virginia Power over its make-ready delays and reminded the utility of the third-party worker rule. *Cavalier*, 15 FCC Rcd 9563 at ¶ 18 (internal citations omitted). Although the FCC did not force Virginia Electric to use outside contractors in the *Cavalier* case, it strongly urged the electric company to "consider that alternative," and cautioned Virginia Power that "[it] cannot use its control of its own facilities to impede [Cavalier's] deployment of telecommunications facilities." *Id.*

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Article XV, Section 15.3; Article XX, Sections 20.1-20.2.

Section 15.3 permits the prevailing party in any collections or enforcement action to "recover its reasonable attorneys' fees." Pole owners already recover their attorneys' fees in the annual pole rent, however, and should not be permitted to recover them again, directly in the event of a lawsuit.[63] The indemnity provisions allowing for the recovery of attorneys' fees associated with any claim for liability or damages, must similarly be excluded from the Agreement.

Article XVIII

Revising Section 2.2 as OCTA proposed above, (*i.e.*, extending the scope of the Agreement to distribution facilities, rather than poles that support a particular voltage) would appear to make Article VXIII ("Procedure Involving Increases In Electric Circuit Nominal Voltages") obsolete. Again, attachers must have access to any pole within a utility's distribution system, except for reasons of capacity, safety, reliability or generally applicable engineering reasons. Article XVIII also seems designed to accommodate joint pole owners, and is not appropriate in a license agreement. Finally, because it appears that the pole owner requests the increase in voltage to fulfill its own service needs, under this section, any costs associated with "protecting" the attacher's equipment, should be borne by the pole owner not the attacher, consistent with the nondiscriminatory cost allocation requirements discussed in comments to Section 3.5 and contrary to what this section currently provides.

[63] *See Georgia Power* at ¶ 18 (finding unreasonable a provision in a pole attachment agreement allowing the utility to recover for the "reasonable costs and expenses in the enforcement of this agreement;" and stating that "[t]hrough the annual rate derived by the Commission's formula, an attacher pays a portion of the total plant administrative costs incurred by the utility. Included in the total plant administrative expenses is a panoply of accounts that covers a broad spectrum of expenses. A utility would doubly recover if it were allowed to receive a proportionate share of these expenses based on the fully-allocated costs formula and additional amounts for administrative expenses. The allocated portion of the administrative expense covers any routine administrative costs associated with pole attachments, such as billing and legal costs associated with administering the agreement.").

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Article XXIII, Section 23.1

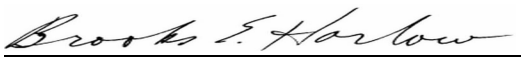
Currently, Section 23.1 states "that this Agreement shall be interpreted in accordance with the laws of the State of Oregon." For consistency with the introductory paragraphs of this Agreement and the Order, OCTA proposes that the following language be added to the end of this section: "*and applicable federal law*."

III. CONCLUSION

Virtually all of the issues addressed in these comments arise in every pole owner-attacher relationship. OCTA therefore hopes these detailed comments will assist the Commission in developing a reasonable agreement not only for the parties, but as an example of what a lawful, fair, just, and reasonable license agreement should be. Adopting an Agreement that is consistent with applicable law and industry standards will reduce disputes, and, at the same time, promote plant integrity and robust competition.

Respectfully submitted this 11th day of March, 2005.

MILLER NASH LLP



Brooks E. Harlow
OSB No. 03042

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Oregon Cable Telecommunications Association

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EXHIBIT 1

Central Lincoln P.U.D.
REMIT TO: ACCOUNTING, PO BOX 1126
NEWPORT OR 97365
(541) 265-3211
********** INVOICE **********

Page Number- 1
Date - 02/08/05
Customer - 11475
Brn/Plt - 20
Related PO -
Order Nbr - 3066 SN
Invoice - 2094 RI

Sold To: CHARTER COMMUNICATIONS
ATTN STEPHEN LAMORA
1400 NEWMARK AVE
COOS BAY OR 97420-2913

Ship To: CHARTER COMMUNICATIONS
ATTN STEPHEN LAMORA
1400 NEWMARK AVE
COOS BAY OR 97420-2913

Tax ID:
NJUNS #:

Request Date	Customer P.O.	F.O.B.	JO # :
02/08/05			

Ln/Rq Dt	Description	Item Number	UM	Quantity	Price	Extended Price	Tax
ANNUAL POLE ATTACHMENT BILLING FOR THE PERIOD OF 01/01/04 TO 12/31/04 RETURN COPY OF INVOICE WITH REMITTANCE							
1.000 02/08/05	Pole Attach-Anchor	APANC	EA	73	3.1700 Per EA	231.41	N
2.000 02/08/05	Pole Attachment - Comm Riser	APCRA	EA	249	2.1200 Per EA	527.88	N
3.000 02/08/05	Pole Attach-Equip Ground Space	APEGS	EA	33	3.1700 Per EA	104.61	N
4.000 02/08/05	Joint Pole Attachment Point	APACARR	EA	1806	9.9300 Per EA	17,933.58	N
5.000 02/08/05	Joint Pole No Attachment	APNOA	EA	58	3.1700 Per EA	183.86	N
6.000 02/08/05	Joint Pole Attachment Non Inv	APNINVAR	EA	484	9.9300 Per EA	4,806.12	N

CHARTER HSD GROUP

Central Lincoln P.U.D.
REMIT TO: ACCOUNTING, PO BOX 1126
NEWPORT OR 97365
(541) 265-3211
********** INVOICE **********

Page Number- 1
Date - 02/08/05
Customer - 11474
Brn/Plt - 20
Related PO -
Order Nbr - 3067 SN
Invoice - 2095 RI

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ATTN STEPHEN LAMORA
1400 NEWMARK AVE
COOS BAY OR 97420-2913

Ship To: CHARTER COMMUNICATIONS
ATTN STEPHEN LAMORA
1400 NEWMARK AVE
COOS BAY OR 97420-2913

Tax ID:
NJUNS #:

Request Date	Customer P.O.	F.O.B.	JO # :
02/08/05			

Ln/Rq Dt	Description	Item Number	UM	Quantity	Price	Extended Price	Tax
ANNUAL POLE ATTACHMENT BILLING FOR THE PERIOD OF 01/01/04 TO 12/31/04 RETURN COPY OF INVOICE WITH REMITTANCE							
1.000 02/08/05	Pole Attach-Anchor	APANC	EA	202	3.1700 Per EA	640.34	N
2.000 02/08/05	Pole Attachment - Comm Riser	APCRA	EA	136	2.1200 Per EA	288.32	N
3.000 02/08/05	Pole Attach-Equip Ground Space	APEGS	EA	57	3.1700 Per EA	180.69	N
4.000 02/08/05	Joint Pole Attachment Point	APACARR	EA	2089	9.9300 Per EA	20,743.77	N
5.000 02/08/05	Joint Pole No Attachment	APNOA	EA	53	3.1700 Per EA	168.01	N
6.000 02/08/05	Joint Pole Attachment Non Inv	APNINVAR	EA	1202	9.9300 Per EA	11,935.86	N

Central Lincoln P.U.D.
REMIT TO: ACCOUNTING, PO BOX 1126
NEWPORT OR 97365
(541) 265-3211

********** INVOICE **********

COPY

Page Number- 1
Date - 02/08/05
Customer - 11473
Brn/Plt - 20
Related PO -
Order Nbr - ~~3868 SN~~
Invoice - 2096 RI

Sold To: CHARTER COMMUNICATIONS
ATTN ACCOUNTS PAYABLE
1344 NE HIGHWAY 101
LINCOLN CITY OR 97367-3339

Ship To: CHARTER COMMUNICATIONS
ATTN ACCOUNTS PAYABLE
1344 NE HIGHWAY 101
LINCOLN CITY OR 97367-3339

Tax ID:
NJUNS #:

Request Date	Customer P.O.	F.O.B.	JO # :
02/08/05			

Ln/Rq Dt	Description	Item Number	UM	Quantity	Price	Extended Price	Tax
ANNUAL POLE ATTACHMENT BILLING FOR THE PERIOD OF 01/01/04 TO 12/31/04 RETURN COPY OF INVOICE WITH REMITTANCE							
1.000 02/08/05	Pole Attach-Anchor	APANC	EA	143	3.1700 Per EA	453.31	N
2.000 02/08/05	Pole Attachment - Comm Riser	APCRA	EA	383	2.1200 Per EA	811.96	N
3.000 02/08/05	Pole Attach-Equip Ground Space	APEGS	EA	26	3.1700 Per EA	82.42	N
4.000 02/08/05	Joint Pole Attachment Point	APACARR	EA	3123	9.9300 Per EA	31,011.39	N
5.000 02/08/05	Joint Pole No Attachment	APNOA	EA	418	3.1700 Per EA	1,325.06	N
6.000 02/08/05	Joint Pole Attachment Non Inv	APNINVAR	EA	3717	9.9300 Per EA	36,909.81	N

Central Lincoln P.U.D.
REMIT TO: ACCOUNTING, PO BOX 1126
NEWPORT OR 97365
(541) 265-3211
********** INVOICE **********

Page Number - 1
Date - 02/10/05
Customer - 11473
Brn/Plt - 20
Related PO -
Order Nbr - 3078 SN
Invoice - 2106 RI

Sold To: CHARTER COMMUNICATIONS
ATTN ACCOUNTS PAYABLE
1344 NE HIGHWAY 101
LINCOLN CITY OR 97367-3339

Ship To: CHARTER COMMUNICATIONS
ATTN ACCOUNTS PAYABLE
1344 NE HIGHWAY 101
LINCOLN CITY OR 97367-3339

Tax ID:
NJUNS #: PA 33821

Request Date	Customer P.O.	F.O.B.	JO # :
02/10/05			

Ln/Rq Dt	Description	Item Number	UM	Quantity	Price	Extended Price	Tax
FOR QUESTIONS CALL DENISE ESTEP (541)574-2011.							
1.000							
	App Fee-Aerial Cable Attach	AFACA	EA	1	62.0000	62.00	N
02/10/05							
	POLE F08L095				Per EA		
2.000							
	App Fee-Down Guy Attach	AFDG	EA	1	15.0000	15.00	N
02/10/05							
	POLE F08L095				Per EA		
3.000							
	App Fee-Anchor Attach	AFAA	EA	1	19.0000	19.00	N
02/10/05							
	POLE F08L095				Per EA		

System #	83416
Dept #	
GL #	
PO's Attached (if necessary)	
Yes	No
	M. Beaulieu
Department Manager Signature	
General Manager Signature	

Total Order

Terms Net 10.1.5% after 90 days Net Due Date 02/20/05

96.00

FEB 11 2005