MILLER | NASH LLP
ATTORNEYS AT LAW

Miller Nash LLP
www.millernash.com
4400 Two Union Square
601 Union Street
Seattle, WA 98101-1367
(206) 622-8484
(206) 622-7485 fax

3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, OR 97204-3699
(503) 224-5858
(503) 224-0155 fax

500 E. Broadway, Suite 400
Post Office Box 694
Vancouver, WA 98666-0694
(360) 699-4771
(360) 694-6413 fax

Brooks E. Harlow
brooks.harlow@millernash.com
(206) 777-7406 direct line

March 25, 2005

VIA ELECTRONIC MAIL & FEDERAL EXPRESS

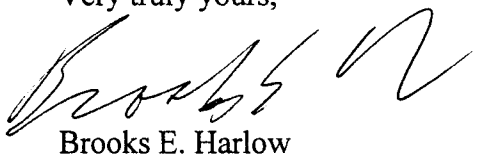
Oregon Public Utility Commission
Attn: Filing Center
550 Capitol Street N.E., Suite 215
Salem, Oregon 97301

Subject: Docket No. UM 1087

Dear Sir or Madam:

Enclosed, for filing, are an original and five copies of the Reply 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 electronic and U.S. first-class mail, properly addressed with postage prepaid, to the following parties:

Paul Davies Central Lincoln PUD P.O. Box 1126 Newport, OR 97365-0090 pdavies@cencoast.com	Rates & Regulatory Affairs Attn: Barbara W. Halle Portland General Electric Company 121 SW Salmon St. 1WTC0702 Portland, OR 97204 barbara.halle@pgn.com
Timothy J. O'Connell Stoel Rives LLP 600 University Street, Suite 3600 Seattle, WA 98101 tjoconnell@stoel.com	V. Denise Saunders Portland General Electric 121 SW Salmon St. 1WTC13 Portland, OR 97204 denise_saunders@pgn.com
Charles M. Simmons Richard S. Diaz MacPherson Gintner Gordon & Diaz P.O. Box 1270 Newport, OR 97365 charles@mggdlaw.com	Stephanie Andrus Assistant Attorney General Department Of Justice 1162 Court St. NE Salem, OR 97301-4096 Stephanie.andrus@doj.state.or.us
Renee Willer Verizon Northwest Inc. P.O. Box 1100 Beaverton, OR 97075 renee.willer@verizon.com	

DATED at Portland, Oregon this 25th day of March, 2005.

Miller Nash LLP

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

REPLY COMMENTS OF OREGON CABLE TELECOMMUNICATIONS ASSOCIATION

March 25, 2005

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

The Oregon Cable Telecommunications Association ("OCTA") submits these reply comments, pursuant to the Oregon Public Utility Commission's (hereinafter "Commission") 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

OCTA appreciates the opportunity to file reply comments in this seminal docket to aid the Commission in fully evaluating the terms and conditions of this Pole Attachment Agreement ("Agreement") for the immediate parties, Central Lincoln People's Utility District ("CLPUD") and Verizon Northwest, Inc., ("Verizon"). OCTA also urges the Commission to clarify that the Order and approved Agreement "have the force of precedent and establish parameters of acceptable joint use behavior in Oregon today," for all pole owners and attachers. [3]

To be sure, Portland General Electric Company's ("PGE") proposal that parties to pole attachment agreements should be free to include other terms, will only invite the filing of additional complaints. As the Commission has experienced first-hand, pole attachment agreements are often presented as "take-it-or-leave-it" contracts of adhesion, as a result of monopoly utility control over essential facilities. Even with fairly extensive regulation of utility pole attachments, "utilities still maintain a superior bargaining position over CATV systems in negotiating the rates, terms and conditions for pole agreements."[4] Unreasonable, lop-sided

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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* Comments of Oregon Cable Telecommunications Association, filed March 11, 2005, p. 4 (hereinafter OCTA Comments).

[4] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Report and Order*, 2 FCC Rcd 4387, ¶ 77 (1987) (hereinafter "*1987 FCC Order"). See also, Federal Communications Commission Issues Biennial Regulatory Review Report For The Year 2000*, 2001 FCC LEXIS 378, Part 1, Subpart J-Pole Attachment Complaint Procedures (2001) ("At the time of adoption of section 224, utilities enjoyed a superior bargaining position over attachers in negotiating the

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

"negotiations" occur frequently in Oregon because, until the instant pole proceeding, there have been no specific findings on what constitutes reasonable joint-use behavior.[5] OCTA members are therefore concerned that without some clarifying statement by the Commission regarding the precedential effect of this case, pole owners will continue to abuse their monopoly position.[6]

The Commission and the four participating parties—which include 2 of the state's largest pole owners and virtually the entire cable and competitive telecommunications industries—all have expended considerable time and resources on this case. There is no good reason these expenditures should not be utilized to their fullest extent. Instead, expressly encouraging other parties to adopt similar just and reasonable terms and conditions will reserve Commission and joint-use resources, and, at the same time, reduce the contentious joint use environment in Oregon and promote facilities-based competition.[7]

II. COMMENTS

Fourth WHEREAS CLAUSE

OCTA disagrees that it is up to the parties to a contract to decide whether the federal access requirements apply in Oregon, as PGE suggests.[8] Whether or not federal law applies is a

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rates, terms and conditions for pole attachments due to the utilities' monopoly position in ownership or control of these facilities. That monopoly position has not changed, hence there remains the possibility of anticompetitive practices by utilities against cable or competitive telecommunications providers in the absence of section 224.").

[5] Instead, there are only one-sided, non-compensatory sanctions (*i.e.*, OAR 860-028-0110, *et seq.*) that certain pole owners in the state have abused to bolster their superior bargaining position, contrary to the precise purpose of pole attachment regulation. *See* Opening Post-Hearing Brief of Oregon Cable Telecommunications Association, Case No. UM-1087, filed Nov. 15, 2004, pp. 17-19.

[6] Indeed, Central Lincoln PUD is not the only pole owner that has forced attachers to sign unreasonable pole attachment agreements under the threat of sanctions. In 2001, when the new sanctions became effective, PGE also forced several operators to sign their form agreement without negotiation under threat of sanctions. Charter Communications, for example, was compelled to sign PGE's pole attachment agreement under protest and with full reservation of rights because of serious concerns that PGE would impose millions of dollars in sanctions, after PGE unreasonably refused to extend the termination date of the existing pole attachment agreement. One of the issues between the parties was whether federal law was applicable.

[7] *See, e.g.,* OCTA Comments, at p. 2.

[8] *See* note 6, *supra* (explaining that PGE has refused to acknowledge that federal law is applicable in its pole attachment agreement).

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TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

legal question. As Commission Staff rightly acknowledged in its Report on joint use issued in December 2003, "[f]ederal laws set the basic principles for attachment nondiscriminatory access."[9] Section 224(c) of the Pole Attachment Act merely precludes *the Federal Communications Commission* ("FCC") from regulating pole attachments where states have otherwise certified.[10] Nothing in the Pole Attachment Act indicates, expressly or otherwise, that the federal access requirements are subject to Section 224(c). Thus, federal law applies.

As OCTA fully explained in its opening comments, basing access decisions on objective criteria such as "insufficient capacity [and] reasons of safety, reliability and generally applicable engineering purposes," ensures that denials to essential monopoly-owned utility poles are nondiscriminatory, fair, just and reasonable, and, at the same time, promotes facilities-based competition and reduces disputes.[11]

Article I

PGE also proposes that the Agreement include a definition of "attachment," or at least a reference to ORS 757.270(1). While OCTA has no objection to PGE's proposal, the Agreement must also clarify that for rental purposes, a pole owner shall not charge for each "attachment," (*i.e.*, each piece of equipment), including equipment in unusable space, as some pole owners continue to do.[12] Instead, rental rates shall be determined based on the amount of usable space used by each "attachment point" (*i.e.*, bolt). The first attachment point shall be deemed to occupy one foot of usable space.

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[9] *The Battle for the Utility Pole and the End-Use Customer*, A PUC Staff Report, Attachment E—Pole Joint Use Principles, (Dec. 15, 2003) (referring to the applicability of federal pole law, including "FCC regulations and orders"), available at: http://www.puc.state.or.us/safety/workgrp/staffrpt.pdf.

[10] *See* 47 U.S.C. § 224(c) ("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.") (emphasis added).

[11] *See* OCTA Comments, pp. 5-7.

[12] *Id.* at pp. 3-4.

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TELEPHONE (206) 622-8484
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601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

PGE further seeks clarifying language stating that the covers only "distribution facilities." To the extent its members are not charged for a pole owner's transmission facilities or other facilities that do not benefit cable attachers, like "street lighting," OCTA agrees.[13] But, pole owner rental calculations must be carefully scrutinized to ensure they do not include investments in facilities to which attachers are denied access.

Article II, Section 2.3

For the reasons stated in OCTA's opening comments,[14] OCTA fully supports the Verizon/CLPUD proposal to make the reservation of space language less "open-ended" by allowing a pole owner to reserve space only pursuant to a "*bona fide* plan" for the use of space in the provision of its core utility service "within the next twelve (12) months."[15]

Article II, Section 2.4

OCTA has no objection to Staff's proposal to relocate Section 13, which relates to safety standards, to the introductory paragraphs of the Agreement. However, OCTA reiterates its concern with Section 13.1 that if pole owners "impose requirements that are *more* stringent than the NESC, those requirements must serve a special safety need and be applied on a competitively neutral basis."[16] Moreover, the Agreement should specify that attachments that are NESC compliant when installed, are grandfathered.[17]

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[13] *See, e.g.,* Pole Rental Rate For Year 2004 For Attachments To Portland General Electric Company Combined Transmission & Distribution Poles Calculated In Conformance With FCC & Oregon PUC Rules, attached hereto as Exhibit 1, including investments in Account 355 (which contains "the cost installed of wood, steel, concrete, or other material together with appurtenant fixtures used for supporting overhead transmission conductors") and Account 373 (street lighting and signal systems), in addition to Account 364—the only appropriate Account to be used when calculating New Cost of a Bare Pole.

[14] OCTA Comments at pp. 8-9.

[15] Verizon Opening Technical Comments, proposed agreement language.

[16] OCTA Comments at p. 23.

[17] *See* NESC Section 013.B2. (providing that "[e]xisting installations, including maintenance replacements, that currently comply with prior editions of the Code, need not be modified to comply with these rules except as may be required for safety reasons by the administrative authority.").

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ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

Article III, Section 3.1

First, OCTA members do not object to Verizon and CLPUD's agreement to reference the National Joint Use Notification System ("NJUNS") throughout the Agreement. OCTA suggests, however, that because NJUNS may not be available to all cable operators, particularly the smaller operators, and is not always appropriate or efficient for certain activities, the following language be included at the end of the first sentence in Section 3.1, "*if available and agreed to by the parties. Otherwise, the Licensee shall make written application therefore*." OCTA has the same comment to the Verizon/CLPUD revisions in Sections 10.2, 11.1 and 11.2, relating to NJUNS.

Second, Commission Staff, PGE, Verizon and CLPUD each take issue with the Commission's language requiring that all pole attachment applications be processed in 30 days. Staff suggests that instead of a 30 day turn around time, the Agreement incorporate the FCC's 45 day rule. PGE agrees. Verizon and CLPUD added language to the Agreement specifying that in the event there is a "large project," the parties would mutually agree on an alternative response time. Verizon defines "large projects" as those involving 100 or more poles. CLPUD defines "large projects" as project involving 25 or more poles.

Generally, OCTA does not object to either proposal, although OCTA does not agree that 25 poles can be considered a "large project." OCTA nevertheless believes that if the Commission adopts Verizon's (100 or more poles) proposal, there needs to be a definite, outside limitation on the amount of time a utility may take to process a "large project," such as "*no more than 90 days*." Otherwise, OCTA members will have no leverage when engaged in "mutual" discussions to reach an alternative to the 30 day timeframe. As OCTA stressed in its opening comments, expeditious access is essential for the delivery of services and, in turn, effective competition.[18] If facilities-based, competitive communications providers, like OCTA's members, are unable to ensure the timely delivery of services to prospective customers due to

[18] OCTA Comments, at pp. 9-10.

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

access delays, they will be unable to compete effectively for business. As a result competition will suffer, along with Oregon's consumers who will have fewer providers to choose from.

Additionally, if pole owners are unable to meet any applications processing deadline, due to utility labor shortages or for any other reason, attachers should have the right to hire approved contractors to perform the pre-construction survey and any necessary make-ready.[19] Attachers cannot be left to beg for prompt access, especially from competitors seeking to reach the same customers.[20] OCTA's position in this regard is consistent with actions taken by other certified state commissions in recent pole attachment proceedings.[21]

Third, for the same reasons, Staff's suggestion that if the pole owner misses the application processing deadline, then the attachers "should file a complaint," rather than proceed with the attachment, is unworkable and would result in numerous disputes that could take months to resolve. OCTA understands Staff's legitimate safety concerns. Nevertheless, if pole owners have no incentive to process applications in a timely fashion, attachers will not be able to conduct their businesses. OCTA members are committed to public and line worker safety. Indeed, attachers have a vested interest in maintaining plant integrity, because without a reliable, safe and secure system of poles and related facilities OCTA members could not serve their customers.

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[19] *See* OCTA Comments at pp. 24-25.

[20] *See, e.g.*, Matt Stump, "SBC, VERIZON EXECS SAY '05 WILL BRING BIG START IN VIDEO," Multichannel News, (1/10/2005) ("Both SBC and Verizon plan to provide standard-definition TC, HDTV, video-on-demand and DVR capabilities, in competition with cable and direct-broadcast satellite."), available at http://www.multichannel.com/article /CA493566.html; *see also* OCTA Comments at p. 6 and accompanying notes 18-20.

[21] *See* VT. PUB. SERV. BD. R. 3.708(G) (requiring Vermont utilities to hire contractors when make-ready and other tasks cannot be performed in a "timely" manner); *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Order Adopting Policy Statement On Pole Attachments, at p. 3, (NYPSC Aug. 6, 2004) ("Since time is the critical factor in allowing Attachers to serve new customers, it is reasonable to require the utilities either to have an adequate number of their own workers available to do the requested work, to hire outside contractors themselves to do the work, or to allow Attachers to hire approved contractors.") (hereinafter "New York Pole Order").

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4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

Similarly, if an attacher is unable to proceed safely with an attachment, consistent with NESC requirements, OCTA agrees the attacher should not make the attachment. Therefore, PGE's proposal that the Agreement include a timeframe for the requesting party to remove its attachment in the event the pole owner fails to approve an application within the deadline, is unnecessary. If an NESC violation does exist, OCTA agrees with Staff that there should be a process in Section 9.9 for notifying the attacher and allowing the attacher to verify that it caused the violation, and, if so, correct it. Thirty days is a reasonable verification and correction timeframe for typical NESC violations. If the violation is not corrected by the attacher, the pole owner should be permitted to correct the violation and charge the attacher the reasonable cost thereto. This solution is also consistent with PGE's request on page 1 of its comments that the Agreement include a process for addressing NESC violations.

Finally, the term "all relevant evidence," in this section is verbatim of the language in the FCC's 45 day rule.[22] If the PUC is uncomfortable with this language, OCTA proposes, as an alternative, that the Commission use language from the Vermont rules. Those rules specify that "[i]f a Pole-Owning Utility intends to deny access to poles [based on the federal access criteria] it shall state with specificity the grounds for the denial."[23] Essentially, attachers and the Commission must be assured that any access denials are nondiscriminatory, fair, just and reasonable.

Article III, Section 3.2

OCTA has no objection to Verizon/CLPUD's suggested edits to this section and agrees that the attacher should have 30 days to inform the pole owner that it has installed its attachments. OCTA similarly supports Verizon's edit to the last sentence of this section, allowing it prompt access to correct a safety violation. This is consistent with OCTA's proposal that attachers should be able to access their plant in order to perform repairs and maintenance,

[22] *See* 47 C.F.R. § 1.1403(b).

[23] VT. PUB. SERV. BD. R. 3.708(C).

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without prior permission.[24] OCTA also supports PGE's proposal that attachers should be permitted to move their attachments to a replacement facility "without having to make a separate application. . . ."[25]

Article III, Section 3.5(a)

PGE suggests that the "reference to an estimate of the cost of making changes should be eliminated, since the utility would not have this information at the time the notification is made."[26] OCTA has no objection to paying for make ready costs AFTER the make ready is performed. But, OCTA would like to clarify that the task of processing an attacher's application includes a preconstruction survey during which make ready estimates are determined. Thus, a pole owner should have at least an estimate of the make ready costs at the time of the notification referred to in this section.

Article III, Section 3.5(c)

In its comments, CLPUD proposes that this section be revised so that existing attachers and their customers pay to upgrade plant for the benefit of CLPUD and other pole owners. CLPUD's position is contrary to applicable law and the order in this docket. As OCTA noted in its opening brief, the "nondiscriminatory access principles included in the Pole Attachment Act" provide 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."[27] Allocating costs based on the associated benefit is an equitable solution that balances the interests of all joint users and reduces cost disputes. As OCTA further explained in its opening comments, when an Attacher needs to replace a pole for

[24] OCTA Comments, at p. 10.

[25] Comments of Portland General Electric Company, at pg. 3.

[26] *Id.*

[27] OCTA Comments at p. 11; *see also* 47 U.S.C. § 224(h)-(i).

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ATTORNEYS AT LAW
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4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

its own service needs, that "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."[28]

Other certified state Commissions have recognized that following the federal approach to the allocation of pole modification costs also promotes competition. For example, when the New York PSC repealed its "but for" rule in 1997,[29] it acknowledged that:

> substantial benefits can be gained by eliminating unnecessary regulatory differences among the jurisdictions in which competing firms operate. By simplifying our regulation of pole attachment matters and by conforming our approach to the federal one, we are eliminating any barrier to entry and any disincentive to competition that might result from adhering to a different approach.[30]

In affirming the elimination of the "but for' rule less than a year ago, after an extensive generic pole proceeding, the New York PSC stated that "[i]n fairness to all Attachers, if an attachment is legal when made, subsequent rearrangements should be paid for by the Attacher that requires the rearrangement [, including the Pole Owner,] and not previous Attachers."[31]

Retaining the benefiting party pays rule in the Agreement will also ensure that the customers of cable operators and new entrants will not be forced to subsidize the competitive businesses of pole owners.

Article V, Section 5.1

OCTA disagrees with PGW's proposal that rent should be assessed from the time the application is granted. Section 3.2 requires that attachers send a completed signed copy of the application to the pole owner no later than the close of the following business day after making

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[28] OCTA Comments at p. 13 and accompanying notes 43-44.

[29] In short, New York's "but for" rule required attachers to remain liable for subsequent relocation, modification and replacement costs that would not be incurred but for their presence on the pole. *See* New York Pole Order at p 4.

[30] *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, Opinion and Order Setting Pole Attachment Rates, Case No. 95-C-9341, Opinion 97-10, 1997 N.Y. PUC LEXIS 364 (issued and effective June 17, 1997), *recon. denied*, 1997 N.Y. PUC LEXIS 639 at **32-33 (October 7, 1997).

[31] New York Pole Order, at p. 4.

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ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

[the] attachment. Unless the rent is tied to the actual attachments that are made, rental records will be inaccurate, which would lead to unnecessary disputes.

OCTA strongly objects to CLPUD's revision to this section referring to rental rates for "Equipment," in addition to "attachment space." CLPUD's position is contrary to the Commission's ruling that to "determine[] what costs can be attributed to the facilities used by the licensee, the parties should allocate costs based on actual *usable* space."[32] Having lost on these rate issues in the underlying proceeding, CLPUD may not reargue them in the context of this Agreement.

In any case, CLPUD may not legally recover rent for Equipment placed in unusable space, as noted above.[33] Moreover, pole owners typically recover the cost of all equipment incidental to pole attachments, including guys and anchors, as part of the fully allocated rental rate charged in Oregon.[34] It is inappropriate for pole owners to recover these costs again, as a direct charge.

Article V, Section 5.2

OCTA agrees with Verizon and CLPUD that 18% interest, compounded daily is excessive and that the maximum legally allowable rate should apply. PGE's position that the more punitive rate should apply, even if that rate is considered usurious under state law, is unjust and unreasonable and should be rejected.[35]

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[32] Order at 14 (emphasis added). The Commission's ruling is consistent with FCC precedent. *See, e.g., Texas Cablevision Co., et al. v. Southwestern Elec. Power Co.*, 1985 FCC LEXIS 3818, ¶ 6 (1985)("[I]n adopting a standard one foot for space deemed occupied by the cable itself, the Commission not only included that space occupied by the cable itself, but also the space associated with any equipment normally required by the presence of the cable television attachment. . . . Moreover, to the extent that this ancillary equipment may occupy the 18-28 feet designated as "ground clearance," which by definition is excluded from the usable space, it is deemed to be omitted from any measurements.").

[33] *See* note 32, *supra*; *see also* OCTA Comments at pp. 3-4 and Exhibit 1, thereto.

[34] *See* OCTA Comments at p. 22 and notes 55-56.

[35] In the pole attachment agreement that PGE forced Charter to sign, the interest rate is 18% per annum, despite Charter's request that the term be revised as Verizon and CLPUD have suggested.

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ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

Article V, Section 5.4

Commission Staff, OCTA, Verizon and CLPUD all agree that the unauthorized attachment penalty of sixty times the rental fee is unreasonable and in excess of the OPUC's own regulations. While OCTA members believe that the "no permit" sanction of $250 or 30 times the rent is also "excessive and super compensatory," OCTA agrees with Verizon and CLPUD, that the penalty in this Agreement should certainly be no higher.[36] OCTA reiterates its suggestion that rather than reference a certain amount, "the penalty should be tied to the regulations. . . . That way, if Qwest's challenge [to the sanctions] prevails or the Commission changes its rules, the Agreement will automatically account for any" such revisions.[37] Language referring to the rules generally, would also cover Staff's proposal to include language referring to the discounted sanctions for responsible and timely corrections. The parties should also be free to negotiate lesser and alternative penalties.

Article VI, Section 6.1

OCTA has no objection to most of the new language proposed by Verizon in this section. But OCTA wishes to preserve an attacher's right for a Commission determination on the rent, consistent with the Commission's original language, in the event one of the parties believes mediation would be fruitless. Therefore, OCTA proposes that the Commission maintain its original language but add the following phrase to the beginning of Verizon/CLPUD's proposal:

> "*Upon mutual agreement of the parties*, [p]rior to any further dispute resolution. . . ."

OCTA does not object to CLPUD's revision, giving the attacher six months prior notice of any rental rate adjustment. OCTA does object, however, to CLPUD's deletion of the language providing a mechanism to dispute CLPUD's adjusted rate. According to CLPUD's proposal, it appears that CLPUD's adjusted rate would go into effect whether or not the attacher

[36] *See* OCTA Comments at p. 14.

[37] *Id.*

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ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

disputes the increase. OCTA also does not understand CLPUD's reference to changes in OAR 860-028-110 or why that would make Commission involvement unnecessary in a rate dispute. Moreover, while OCTA does not object to using the rental rate work sheet for calculation and verification purposes, OCTA reiterates its request that this section specify that the rate itself be calculated in accordance with the Commission's pole rental formula, ORS § 757.282(2).

OCTA also disagrees with PGE's proposal that the Commission add language allowing the pole owner "to periodically adjust the rates for attachments."[38] PGE's proposal is without basis. Pole owners like PGE may only revise their rates once annually. More frequent adjustments would lead to over-recovery. For example, the Commission's formula, like the FCC formula, is a straight-forward and economic approach for determining just and reasonable rates using existing accounting measures to determine rates, based on an historical (or embedded) cost methodology, and, in the case of investor-owned utilities, publicly filed financial data. This financial data is updated and filed only once a year in the form of a FERC Form 1 for electric utilities, and as an ARMIS report, for ILECs. Therefore, if a utility were permitted to raise its rate more than once annually, it would recover more than its historical investment, which is not allowed under the Commission's formula.

Finally, OCTA disagrees with PGE that the OJUA is qualified or has the requisite authority to hear rate disputes.[39]

Article VIII, Section 8.1

OCTA supports Verizon's revision to this section, providing for a 45 day turn around time for responding to invoices and changing the interest rate to "the maximum rate permitted by law."

[38] Comments of Portland General Electric Company, at pg. 3.

[39] *See, e.g.,* OAR 860-028-0220 (providing the OJUA may resolve certain factual disputes).

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

Article IX, Section 9.1(b), (mistakenly labeled 9.1(a), by CLPUD)

OCTA does not necessarily object to CLPUD's position that it should not be required to pay the tree-trimming costs necessary for Verizon or any other attacher to establish an attachment. Nevertheless, if the Commission rewrites sections 9.1-9.7 to conform with the equitable costs allocation rules, as OCTA suggested in its opening comments, CLPUD's revision would be unnecessary.[40]

Article IX, Section 9.3

As OCTA explained in its opening comments, Section 9.3 is confusing, unnecessary and redundant of Section 9.1(b). Therefore, rather than revise section 9.3 as PGE suggests, OCTA reiterates the proposed language set forth in its original comments, which combine and simplify sections 9.1(b) and 9.3.

Article IX, Section 9.6

OCTA has no objection to deleting this section, as proposed by Verizon and CLPUD. PGE also has problems with this section.

Article IX, Section 9.7

OCTA agrees with PGE "that it is reasonable for a pole owner to include some tree trimming costs in the category 'maintenance expense' that is included in rental rates."[41] In fact, as PGE should be well-aware, FERC Account 593, which factors into the maintenance carrying charge, does indeed include the costs associated with tree-trimming.[42] Allowing PGE to tack on a separate charge for "tree-trimming" in its maintenance carrying charge, would lead to over-recovery.

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[40] OCTA Comments at p. 15.

[41] Comments of Portland General Electric Company, at pg. 4.

[42] *See* 18 C.F.R. Part 101 (describing Account 593 to include "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 . . . [including] [t]rimming trees and clearing brush.").

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

Article IX, Section 9.9

OCTA fully agrees with Verizon and CLPUD that "inspection costs are part of the routine operation of a pole owner," and, as a result, are recovered in the annual pole rent. This is consistent with the Commission's proposed Agreement language, which is based on well-established FCC precedent.[43]

PGE, on the other hand, believes that it should be able to recover the costs of routine inspections as a direct charge. PGE argues that "OAR 860-028-0110(6) and (8)[,] which permits pole owners to recover their actual costs," supports its claim. OAR 860-028-0110(6), however, only refers to the recovery of costs that are not included in the rent, such as "special inspections." Special inspections are typically considered the equivalent of "non-routine" inspections, or those inspections caused by some action of the attacher, as opposed to those that are planned and routine. Similarly, OAR 860-028-011(8), allows a pole owner to charge a licensee for any "fines, fees, damages, or other costs the licensee's attachments cause the pole owner to incur" for "attachment deficiencies." In any event, because PGE already recovers its routine inspection costs in the annual rent, it may not recover those costs again directly from attachers.

OCTA objects to Staff's proposal that the Agreement include the sanctions for non-compliant attachments. Those sanctions are optional under the OAR and should be left to the pole owner to decide whether or not to include them.[44]

Article IX, Section 9.10

OCTA has no objection to striking the occupancy survey section in its entirety, as Verizon and CLPUD have agreed to do. OCTA expects, consistent with state and federal nondiscriminatory requirements, that OCTA members that attach to Verizon and CLPUD poles

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[43] *See* OCTA Comments at pp. 18-19.

[44] *See* OAR 806-028-0160 ("Choice of Sanctions"). OCTA understands that the sanctions rules appeal by Qwest, along with Charter Communications and Verizon, as *amici curiae*, is pending. OCTA nevertheless notes here that the excessive nature of the sanctions contained in the Commission's rules is a continuous source of contention between pole owners and attachers, as the Commission well knows, and should not automatically be included in agreements, as the Staff suggests.

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

would also not be subject to such surveys "on a regular basis." OCTA nevertheless believes that it is the pole owner's ultimate responsibility to keep accurate records of attachments made to their poles, as part of their permitting and billing processes, whether or not the pole owner conducts regular surveys; and that an attacher should never be required to bear the cost to update a pole owner's records.

OCTA strongly disagrees with PGE that an occupancy survey should ever be done for an individual licensee, unless it has a reasonable basis for doing so, "*e.g.*, when a pattern of non-compliance has been observed and documented."[45] In this regard, Staff's suggested edit to this section, adding the words "except for cause," should suffice.[46] Moreover, if there was an occasion to audit a particular attacher "for cause," OCTA believes that would be considered a "special inspection," under OAR 860-028-0110(6); and thus, those costs could be recovered. Otherwise, OCTA believes that any system-wide must be performed simultaneously for all attachers. In turn, audit costs must be recovered in the annual rental rate, as the Agreement currently provides.

Article X, Section 10.1

OCTA has no objection to striking the last sentence in this section requiring the pole owner to reimburse the licensee in the event the licensee paid to replace a pole damaged in a storm or by a vehicle.

Article X, Section 10.2

First, OCTA agrees with CLPUD and Verizon that in the event a licensee assumes ownership of a pole, "remaining life value" is a more reasonable determination of fair market

[45] Staff Comments Re: Contract, at p. 5.

[46] OCTA notes that "a five-year period between occupancy surveys" is very common in the industry, despite Staff's concerns. In fact, many pole attachment agreements in FCC-regulated states and elsewhere contain a five year back rent penalty for unpermitted attachments because many utilities audit on a five year cycle.

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

value than "salvage value." But "salvage value" should be used when the pole is fully depreciated.

Second, OCTA has no objection to including the word "topping" in the fifth sentence of this section. This addition will help ensure that licensees get reimbursed for any work they undertake for the pole owner in emergencies.

Last, OCTA reiterates its overall concerns that Section 10.2 be clarified to explain that the replacements, relocations and resets, etc., referred to in this section, would be for maintenance purposes only, *i.e.*, those situations where all parties benefit. Otherwise, this section could be interpreted to allow the pole owner to force an attacher to incur such costs to accommodate pole owner or third party access requests. "That would violate the equitable cost allocation principles that are part and parcel of state and federal nondiscriminatory access requirements."[47]

Article X, Section 10.4

OCTA agrees with Verizon and CLPUD that a notice period is appropriate in this section. OCTA does not understand PGE's proposal that it be able to recover costs for resetting the pole in the same hole, as well as in a different hole. This section does not allow the pole owner to recover its maintenance pole replacement costs from the licensee. Indeed, the pole owner books the "cost installed of poles, towers, and appurtenant fixtures used for supporting overhead distribution conductors and services wires . . . [including] anchors. . . ." to FERC Account 364, which is factored into the annual pole attachment rent.[48]

Article X, Sections 10.5 and 10.6

OCTA has no objection to the proposals made by the 3 pole owners to delete Sections 10.5 and 10.6, which, in any event, are vestiges of Verizon's original "joint use" agreement.

[47] OCTA Comments at p. 21.

[48] 18 C.F.R. Part 101, Account 364.

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ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

Article X, Section 10.7

It is unreasonable to allow a pole owner to specify which chemicals shall be used to treat and plug holes, as PGE proposes. A better solution is to add language requiring that the treatment of unused holes be consistent with standard industry practices.

Article XI, Section 11.1

PGE's request to include language specifying that the pole owner "should also be indemnified by the licensee if a governmental entity assesses costs, damages and penalties against the pole owner that arise from a licensee's failure to move its equipment in timely manner," seems unnecessary. The indemnity provision contained in this section is broad enough to cover this situation.

Article XI, Section 11.2

PGE seeks to revise this section to say that the attacher will be liable for rent until "*all of its* equipment," is removed. OCTA has no objection.

Article XI, Section 11.3

OCTA has no objection to PGE's proposal to delete all of the second sentence after the word "procedures."

Article XII, Section 12.1

Verizon and CLPUD have agreed that attachment to pole owner anchors be processed as a new attachment application. OCTA members believe this is an unreasonable and onerous requirement. Instead, anchor attachments should be considered in the same application as the pole attachment. Having separate applications for poles and anchors will lead to record-keeping problems and disputes. Moreover, as OCTA has stressed, a pole owner may not charge rent for anchor attachments, in addition to pole rent.[49]

[49] *See, e.g.*, OCTA Comments at pp. 21-22, and accompanying notes 55-56.

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

Article XII, Section 12.2

Although OCTA does not understand CLPUD's reference to "vestiges of a reciprocal joint pole use agreement," in this section, OCTA does agree that all such references should be deleted. OCTA also agrees with CLPUD that the NESC does not require the insulation of down guys if the system is effectively grounded. But OCTA members do not understand CLPUD's proposed language for this section and would prefer language requiring NESC compliance instead.

In any event, access to pole owner anchors should not be based on a pole owner's "sole determination," as proposed by CLPUD. Instead, decisions relating to anchor use must be reviewed under the same access standards for poles; *i.e*., insufficient capacity and safety, reliability and generally applicable engineering standards. Furthermore, the costs installed of guys and anchors are recovered in the annual rental rate. Allowing a pole owner to charge directly for them again would result in over-recovery and is inconsistent with the Commission's Order.[50]

Article XIII, Section 13.2

OCTA agrees with PGE that this section, which relates to making attachments "in accordance with a reasonable aesthetic criteria, [sic]" is inappropriate in this Agreement. As OCTA argued in its opening comments, the "aesthetic criteria" language contained in this section would be difficult to enforce and conflicts with objective, nondiscriminatory access standards.[51] If a local governing authority requires that attachments be maintained in some particular way, attachers will follow such requirements to the extent they are legally imposed.

Article XIII, Section 13.3

OCTA does not object to PGE's proposal that pole owners provide a list of approved, qualified contractors to attachers in the event the pole owner cannot perform work for the

[50] *Id*.

[51] *Id*. at p. 23.

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

attacher. Nevertheless, attachers need some mechanism to have their own contractors qualified to work on a pole owner's facilities. Indeed, attachers cannot be forced to rely on electrical contractors that may be more expensive than their own or partial to a particular pole owner. 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."[52]

Article XIV, Section 14.1

OCTA does not agree that CLPUD is free to impose illegal rates on Verizon or other attachers simply because the unlawful rates are set forth in an existing pole attachment agreement. For example, in rulemaking proceedings implementing the pole attachment provisions of the 1996 Act, the FCC considered and rejected utility arguments that negotiated agreements are "inviolate," even if they conflict with the 1996 Act's amendments.[53] The FCC has repeatedly affirmed that "where onerous terms or conditions are found to exist on the basis of the evidence, [an attacher] may be entitled to a rate adjustment or the term or condition may be invalidated."[54]

In this regard, OCTA supports the Commission's language providing that "any rental obligations . . . currently in arrears under any prior agreement shall be calculated according to the

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[52] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd. 15499, ¶ 1182 (1996).

[53] *See In re Amendment of the Commission Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103, ¶¶ 12-14 (2001) (finding that utility pole owners still maintained monopoly control over essential pole facilities).

[54] *See Teleport Communications Atlanta, Inc. v. Georgia Power Co.,* 17 FCC Rcd. 19859, ¶ 2 (2002), *aff'd sub nom. Georgia Power Co. v. Teleport Communications Atlanta, Inc*., 346 F.3d 1033 (11th Cir. 2003). *See also Alabama Cable Telecommunications Ass'n v. Alabama Power Co*., 16 FCC Rcd. 12209, *aff'd sub nom. Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002); *WB Cable Assocs. Ltd v. Florida Power & Light Co*., 8 FCC Rcd. 383, ¶ 17 (Comm. Car. Bur. 1993); *Selkirk Communications, Inc. v. Florida Power & Light Co.*, 8 FCC Rcd. 387, ¶ 17 (Comm. Car. Bur. 1993); *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Memorandum Order and Opinion on Reconsideration*, 4 FCC Rcd. 468 at ¶ 25 (1989).

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

terms of this Agreement as of the effective date thereof." The problem with that provision, as OCTA pointed out in its opening comments, is that a pole owner could use that language to *raise* rental rates in arrears from existing agreements. To resolve that internal inconsistency, OCTA suggests the following revision: (brackets signify deleted language, italics, proposed language):

> [A]ny rental obligations . . . currently in arrears under any prior agreement shall be calculated according to [the terms of this Agreement] *ORS § 757.282 using the financial data associated with the year for which the rent is owed,* as of the effective date [thereof] *this Agreement*.

Similarly, PGE argues that Attachment A (Rental Rate Worksheet) is not applicable to its circumstances. While OCTA agrees that Attachment A may not be appropriate for an investor-owned utility like PGE, all pole owners must be required to calculate their pole attachment rates pursuant to ORS § 757.282. Indeed, pole owners, like PGE, must be admonished that it is unlawful to include the costs they believe should be recovered, as is often the case, rather than those permitted under the Commission's formula.[55]

PGE's also argues, on pages 6-7 of its comments, that it should be able to recover directly from attachers certain costs "such as the salaries of the people involved with 'joint use issues' or pole maintenance and operation," contrary to the Commission's Order.[56] PGE's claim is without merit. First, PGE had the opportunity to argue this issue in the underlying case and failed to do so. Second, and more importantly, the Commission's reasonable rate provisions do not provide for the direct recovery of such costs, as the Commission correctly established.

Article XV, Section15.2

OCTA agrees with Verizon/CLPUD's revision to this section, allowing a defaulting party to have 45, rather than 30, days to pay invoices in the event the either party performs work for the other.

[55] *See* Exhibit 1, including a $1.63 add on for "Total Overhead per Attachment," as well as an additional $1.67 for the "Annual Rate Escalated at 2.5% per year."

[56] Order at 15-16.

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

Article XV, Section 15.4

OCTA has no objection to including a reasonable process to handle disputed invoices, as PGE proposes. Any such process, however, must enable an attacher to withhold *bona fide* disputed sums until the dispute is resolved. This is consistent with the language in Section 9.10 allowing the attacher to pay only "undisputed amounts" in the event of a disputed audit invoice. The Agreement should also include a provision prohibiting a pole owner from using a dispute as an excuse to halt attacher projects or for other retaliatory purposes. For example, disputes often involve what make ready is necessary and who should pay for the make ready. Rarely do unresolved issues cause a threat to public or worker safety. Nevertheless, pole owners often pressure attachers to pay disputed bills, or risk a work stoppage.

Article XVIII, Section 18.4

PGE proposes that any dispute over what constitutes an equitable apportionment of the costs for work to reestablish electric circuits "be handled by whatever dispute resolution process the parties choose for the contract generally." Although OCTA does not necessarily object to that specific request, OCTA believes that because the increased voltage needs contemplated under Article XVIII appear to benefit the electric utility alone, the attacher should never be required to pay any amount.[57]

Article XX, Section 20.4

OCTA has no objection to the specific insurance requirements added to the Agreement by Verizon and CLPUD, to cover CLPUD's obligations. OCTA, however, believes that insurance requirements should be tied to the particular needs of the contracting parties. For example, the required amounts set forth in this Agreement may be considered excessive for a small operator or new entrant.

[57] OCTA Comments at p. 26.

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

Article XXV, Section 25.3

Verizon, CLPUD and PGE all agree that a new section should be added to "deal with potential changes in the law." OCTA has no objection and supports Verizon's proposed new language for this section.

III. CONCLUSION

OCTA hopes its opening and reply comments will aid the Commission in developing a just and reasonable Agreement not only for Central Lincoln and Verizon, but for all of Oregon's joint users.

Respectfully submitted this 25th day of March, 2005.

MILLER NASH LLP

Brooks E. Harlow
OSB No. 03042

Attorneys for Intervenor
Oregon Cable Telecommunications Association

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

EXHIBIT 1

9-Jul-03

POLE RENTAL RATE FOR YEAR 2004
FOR ATTACHMENTS TO
PORTLAND GENERAL ELECTRIC COMPANY
COMBINED TRANSMISSION & DISTRIBUTION POLES CALCULATED
IN CONFORMANCE WITH FCC & OREGON PUC RULES

1.	NET COST OF A BARE POLE	
	A. Gross Pole Investment Accts. 355 & 364 & 373	$193,694,166
	B. Depreciation Reserve-Poles	113,814,343
	C. Accum. Def. Income Taxes	3,502,806
	D. Net Pole Investment (A-B-C)	76,377,017
	E. X-arms, Etc. = (Distr. Pole Invest*15%+Trans Pole Inves	9,766,574
	F. Net Pole Inv. Less X-arms (D-E)	66,610,443
	G. Total Poles in Service	256,473
	H. Net Cost of Bare Pole (F/G)	259.72
2.	DEPRECIATION RATE ADJUSTED TO REFLECT NET INVESTMENT	
	A. Depreciation Rate For Gross Pole Investment	6.18%
	B. Gross Pole Investment	$193,694,166
	C. Net Pole Investment	76,377,017
	D. Gross Pole/Net Pole Investment Ratio Equals (B/C)	2.536
	E. Depreciation Rate Net Investment (A*D)	15.68%
3.	ADMINISTRATIVE & GENERAL EXPENSE FACTOR	
	A. Total Admin. & Gen. Exp	$84,062,640
	B. Gross Plant Investment	3,595,886,940
	C. Plant Depreciation Reserve	1,643,176,740
	D. Accum. Def. Income Taxes	181,409,250
	E. Net Plant Investment (B-C-D)	1,771,300,950
	F. Admin & Gen Expense Factor (A/E)	4.75%
4.	MAINTENANCE EXPENSE FACTOR	
	A. Overhead Line Maint Exp.	$18,819,990
	B. Gross Pole Investment	167,778,634
	C. Gross OH Conductor Invest.	273,883,857
	D. Gross Services Invest.	229,348,061
	E. Depreciation Reserves Acct's	331,641,561
	F. Accum Def. Income Taxes	17,161,603
	G. Net Invest in Poles and OH cond. (B+C+D-E-F)	322,207,388

	H. Maintenance Expense Factor (A/G)		5.84%
5.	NORMALIZED TAX FACTOR (Expressed as % of Net Plant Invest)		
	A. Taxes other than Income, Acct 408.1		$64,466,911
	B. Income Taxes, Acct 409.1		33,188,877
	C. Income Taxes - Other, Acct 409.1		3,857,496
	D. Deferred Income Taxes, Acct410.1		165,560,566
	E. Def. Income Tax Credit, Acct 411.1		(104,612,604)
	F. Investment Tax Credits, Acct 411.4		(1,480,129)
	G. Total (A thru F)		160,981,117
	H. Net Plant Investment		1,771,300,950
	I. Normalized Tax Factor (G/H)		9.09%
6.	COST OF CAPITAL = AUTHORIZED RATE OF RETURN		
	A. Authorized Rate of Return		9.08%
7.	COMBINED CARRYING CHARGE FACTOR - POLES		
	A. Depreciation Exp Factor		15.68%
	B. Admin & Gen Exp Factor		4.75%
	C. Maintenance Exp Factor		5.84%
	D. Tax Normalization Factor		9.09%
	E. Authorized Rate of Return		9.08%
	F. Total Carrying Charge Factor (A thru E)		44.44%
8.	AMOUNT OF REQUESTED SPACE / USABLE SPACE		
	A. Usable space on 40' pole = 10.67' (1)	10.67	
	B. Requested space	1	0.09375
9.	ANNUAL RENTAL RATE PER POLE ATTACHMENT		
	A. Net cost of Bare Poles (1H)		$259.72
	B. Total Carrying Charge Factor (7F)		0.4444
	C. Percentage of Requested Space (8B)		0.0938
	D. 2001 Basic Rental Rate (A*B*C)		$ 10.82
	E. 2004 Basic Pole Attachment Rental Rate (2001 Annual Rate Escalated at 2.5% per Year) =		$ 11.65
	F. UAM Overhead not in Carrying Charges		$354,606
	G. Number of Attachments to PGE Poles		217,199
	H. Total Overhead per Attachment (9F/9G)		$ 1.63
	I. 2004 Total Overhead per Attachment		

(2003 Annual Rate Escalated at 2.5% per Year) =	$	1.67
J. 2004 Annual per Pole Attachment Rental Rate (9E+9I)	$	13.33

(1) Despite pole-height variability between distribution and transmission poles, 40' poles still predominate on a combined basis. Also, according to PGE engineering, the first 34' above ground consist of the same usable-space dimensions, regardless of pole type.