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8 BEFORE THE PUBLIC UTILITY COMMISSION
9 OF THE STATE OF OREGON
10 UM 1087

11 CENTRAL LINCOLN PEOPLE'S UTILITY DISTRICT, 12 Complainant, 13 v. 14 VERIZON NORTHWEST, INC., 15 Defendant. 16	**CENTRAL LINCOLN PEOPLE'S UTILITY DISTRICT'S OPENING BRIEF**

17 **I. Introduction.**

18 **A. Background Proceedings.**

19 Complainant Central Lincoln People's Utility District (CLPUD) brings this Petition for
20 Removal of Pole Attachments and Sanctions under OAR 860-028-0130 and 860-028-0180
21 against Defendant Verizon Northwest, Inc. (Verizon) for Verizon's violation of OAR 860-028-
22 0120. The Petition, filed on May 22, 2003, seeks sanctions in the amount of $1,248 per pole
23 pursuant to OAR 860-028-0130(1)(b) and 860-028-0180(2) and an Order from the Commission
24 authorizing CLPUD to remove Verizon's pole attachments pursuant to OAR 860-028-0180. A
25 hearing on Complainant's Petition was held on October 7 and 8, 2004, at the Commission's
26 Main Hearing Room in Salem, Oregon. Complainant now submits the following Opening Brief

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in support of its Petition, testimony and exhibits.

B. Statement of Facts.

CLPUD and Verizon were parties to a General Agreement for Joint Use of Poles dated July 1, 1987 ("the Agreement"). CLPUD Ex. 1, p. 3, lines 2-8; CLPUD Ex. 3. At all times material to this proceeding, the Agreement dated July 1, 1987 has been the only agreement between CLPUD and Verizon concerning pole attachments. Article XVIII of the Agreement states that it may be terminated by either party upon six months notice in writing to the other party. CLPUD Ex. 1, p. 3, lines 9-12; CLPUD Ex. 3, p. 12. Article XVI of the Agreement provided:

> Except as otherwise provided in this Agreement, whenever notice is to be given by either party hereto to the other, such notice shall be in writing and delivered personally or mailed…to such other address as either party may from time to time designate in writing.

CLPUD Ex. 3, p. 11. On October 22, 2001, CLPUD received a letter from Verizon stating:

> Verizon is in the process of restructuring the Joint Use Department. Please send all invoices and notifications regarding Joint Use to:
>
> Verizon
> Joint Use
> MC: WA0103NP
> 1800 41st Street
> Everett, WA 98201

CLPUD Ex. 1, p. 3, line 22 to p. 4, line 3; CLPUD Ex. 4. The letterhead on which the letter was printed bore the address:

> Verizon Communications
> Northwest Region
> P.O. Box 1003 (WA0103NP)
> Everett, WA 98206

Id.

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On December 26, 2001, CLPUD sent a letter terminating the Agreement to Verizon's Beaverton, Oregon address. CLPUD Ex. 1, p. 4, lines 4-15; CLPUD Ex. 5. On January 2, 2002, CLPUD sent a second copy of the letter terminating the Agreement to Verizon at:

Joint Use
MC: WA0103NP
1800 41st Street
Everett, WA 98206

CLPUD Ex. 1, p. 4, lines 4-15; CLPUD Ex. 5.

Verizon never contacted CLPUD to negotiate a new pole attachment agreement in the six months between when Verizon received the letter terminating the Agreement and the date the Agreement terminated. On June 27, 2002, Michael Wilson, Chief Engineer and System Operation Manager for CLPUD, submitted a proposed pole occupancy license agreement to Verizon that would have allowed Verizon to continue to attach to CLPUD's poles without violating the Commission's rules. CLPUD Ex. 13. On November 22, 2002, Mr. Wilson again submitted a proposed pole occupancy license agreement to Verizon for execution. CLPUD Ex. 16.

On December 6, 2002 at 4:39 p.m., Verizon Specialist and Networking Engineer Mark Simonson sent an e-mail to Mr. Wilson stating "I originally sent you a joint use agreement to use as a boilerplate, however, you apparently rejected it without comment." Verizon Ex. 114, p. 2. Mr. Simonson did not provide any testimony in this proceeding, and there is no evidence in the record that Mr. Simonson (or any other Verizon representative) sent CLPUD any proposed agreement prior to December of 2002. On December 6, 2002 at 4:58 p.m., Mr. Wilson sent an e-mail to Mr. Simonson stating, "I did not receive your boilerplate joint use agreement." Verizon Ex. 114, p. 1.

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It was not until December 10, 2002, nearly six months after the Agreement between CLPUD and Verizon had been terminated and nearly a year after Verizon had received the notice terminating the Agreement, that Verizon submitted a proposed joint use agreement to CLPUD. Verizon Ex. 115, p. 1.

At no time did Verizon petition the Joint Use Association for relief pursuant to OAR 860-028-0220, which provides relief for a pole occupant that alleges that a pole owner is unreasonably delaying approval of a written contract or the issuance of a permit. However, after the Agreement was terminated, Verizon continued to attach to CLPUD's poles without a written contract authorizing those attachments.

Article XVII of the Agreement provides that "upon termination or such expiration, each party shall remove all of its existing attachments on poles of the other party in an orderly manner and within the period of five (5) years thereafter unless a longer period of time is agreed to in writing." CLPUD Ex. 3, p. 12. The Agreement does not authorize Verizon to establish any new attachments to CLPUD poles after termination of the Agreement.

After the Agreement was terminated, CLPUD received NJUNS applications for permits for attachments on CLPUD's poles by Verizon. CLPUD Ex. 1, p. 5, lines 18-26; CLPUD Ex. 6. The Commission's rules require that, except in the case of service drops, a pole occupant apply for and obtain a permit ***before*** the occupant establishes an attachment to another utility's pole. CLPUD Ex. 1, p. 5, lines 8-12; OAR 860-028-0120(1)(b). In the case of service drops, the occupant must apply for a permit within 7 days after installing the attachment. CLPUD Ex. 1, p. 5, lines 8-12; OAR 860-028-0120(3). CLPUD Exhibit 6 shows the pole reference numbers for

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the 144 poles to which Verizon established attachments after the Agreement was terminated.[1] CLPUD Ex. 1, p. 5, line 22 to p. 6, line 8; CLPUD Ex. 6. Because CLPUD could not legally approve the applications given Verizon's failure to have a written agreement with CLPUD authorizing the attachments, CLPUD did not respond to Verizon's applications for the 144 illegal attachments. CLPUD Ex. 1, p. 6, lines 1-12.

CLPUD sent Verizon a notice of its violation of OAR 860-028-0120(1)(a) on March 11, 2003. CLPUD Ex. 11. On April 28, 2003, CLPUD's attorney Peter Gintner received a letter from Verizon senior counsel Richard Stewart dated April 21, 2003. CLPUD Ex. 11. The letter from Mr. Stewart provided in part:

> This letter on behalf of Verizon Northwest, Inc.…is in response to your letter of March 11, 2003, to Ms. Susan Burke, regarding the joint use relationship with [CLPUD].
>
> Your letter stated, among other things that, "On December 26, 2001, [CLPUD] gave notice by written letter to Verizon of its intent to terminate the then existing General Agreement for Joint Use of Poles on June 30, 2002. On June 27, 2002, [CLPUD] sent Verizon a new Pole Occupancy License Agreement for its signature by August 30, 2002."
>
> Your letter further claims that as a result of Verizon's failure to execute the replacement agreement, [CLPUD] unilaterally proposed to Verizon on June 27, 2003, that Verizon is "in violation of OAR 860-028-0120(1)(a)," which "requires a pole occupant attaching to one or more poles of a pole owner to have a written contract with the pole owner that specifies the general conditions for attachments on the poles of the pole owner." A list of the Central Lincoln poles to which Verizon is attached purportedly without a written contract was appended to your letter.

CLPUD Ex. 11. The letter was sent more than 30 days after Verizon received CLPUD's notice of violation on March 11, 2003. The letter did not indicate that Verizon was willing to enter into a pole attachment agreement with CLPUD. The letter did not propose a suggested compliance date

[1] Although the ALJ struck CLPUD Exhibits 7 and 10, which contained condensed lists of the 144 illegal Verizon attachments, the same information contained in Exhibits 7 and 10 is contained in Exhibit 6, although in a much more burdensome form.

to correct Verizon's violation of OAR 860-028-0120(1)(a).

Verizon has yet to correct its violation of OAR 860-028-0120(1)(a) by entering into a written pole attachment agreement with CLPUD. The 144 attachments shown in CLPUD Exhibit 6 still physically exist on CLPUD's poles. CLPUD Ex. 1, p. 6, lines 1-12. CLPUD has not billed Verizon for the 144 illegal attachments, and Verizon has not made any payments to CLPUD for the 144 illegal attachments. *Id.* The applications continue to be in pending status on the NJUNS system. *Id.*

II. The Commission Should Reverse the ALJ's Erroneous Ruling Striking the Testimony of CLPUD Witness Peter Gintner and CLPUD Exhibits 7 and 10.

At the hearing, the ALJ struck the testimony of Peter Gintner, CLPUD Exhibit 2, page 2, lines 3 to 25, because Mr. Gintner refused to answer certain questions of Verizon's counsel on the grounds that the questions sought disclosure of privileged communications between Mr. Gintner and his client, CLPUD. The ALJ's ruling striking CLPUD's evidence was erroneous and severely prejudiced CLPUD in presentation of its case.

A. Procedural Background.

On April 1, 2004, Verizon filed a Motion to Compel seeking discovery of certain information that CLPUD claimed was protected by the attorney-client privilege. *See* Motion to Compel and to Strike Portions of Testimony of CLPUD Witness Wilson ("Motion to Compel"). Verizon argued that Mr. Gintner had waived the privilege by submitting testimony in this proceeding, and that the attesting witness exception under OEC 503(4)(d) permitted the requested discovery. On April 16, 2004, CLPUD filed a Memorandum in Opposition to Verizon's Motion to Compel. CLPUD indicated in its Memorandum that it had agreed to produce some of the materials that Verizon had requested, and it accordingly served an amended

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response to Verizon's Third Set of Data Requests on the same date.

After additional proceedings, the Commission issued an Order on July 8, 2004 resolving the issues raised by Verizon's Motion to Compel. Order No. 04-379. The Commission's Order:

(1) Greatly narrowed the scope of Verizon's data requests to only that information which the Commission deemed essential to enable Verizon to cross-examine Mr. Gintner;

(2) Ordered that CLPUD respond to Verizon's data requests as narrowed in the Order; and

(3) Ordered that, if CLPUD chose not to respond to the data requests, CLPUD could withdraw the testimony of Mr. Gintner and submit substitute testimony by a non-attorney witness. Order No. 04-379, p. 2-3, 6-7.

On July 22, 2004, CLPUD served its Amended Response to Verizon's Third Set of Data Requests, and produced all of the information that had been ordered by the Commission to be produced.

At the hearing, Verizon's counsel asked Mr. Gintner questions which went beyond the narrow scope of the discovery which the Commission had ordered to be produced, questions which asked Mr. Gintner to disclose his confidential communications with representatives of CLPUD. Mr. Gintner refused to answer these questions, stating that he did not feel he could ethically disclose the information requested by Verizon's counsel without the consent of his client. The ALJ struck the testimony of Mr. Gintner (CLPUD Exhibit 2, page 2, lines 3 through 25) as a sanction for Mr. Gintner's refusal to answer the questions of Verizon's counsel.

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1 2 **B. CLPUD's Communications With Its Attorneys Are Protected By The Law Of Attorney-Client Privilege And The Oregon Ethical Rules Governing Attorneys.**

3 OEC 503 provides for the attorney-client privilege:

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> ***
> 5 (2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating 6 the rendition of professional legal services to the client:
> (a) Between the client or the client's representative and the client's lawyer or a 7 representative of the lawyer;
> (b) Between the client's lawyer and the lawyer's representative;
> 8 (c) By the client or the client's lawyer to a lawyer representing another in a matter of common interest;
> 9 (d) Between representatives of the client or between the client and a representative of the client; or
> 10 (e) Between lawyers representing the client.
> ***

11 "Confidential communication" is defined as:

12
> ...a communication not intended to be disclosed to third persons other than those 13 to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the 14 communication.

15 OEC 503(1)(b). The Oregon Supreme Court explained the purpose of the attorney-client

16 privilege in *Frease v. Glazer*, 330 Or. 364 (2000):

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> The attorney-client privilege is one of the oldest and most widely recognized 18 evidentiary privileges. *See State v. Jancsek,* 302 Or. 270, 274, 730 P.2d 14 (1986) (so stating, citing Laird C. Kirkpatrick, *Oregon Evidence,* 146 (1982)); *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) 19 (same, citing 8 J. Wigmore, *Evidence,* § 2290 (McNaughton rev 1961)). The purpose of the privilege "''is to encourage full and frank communication between 20 attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.''" *Haas,* 325 Or. at 500, 942 P.2d 21 261 (quoting *Upjohn,* 449 U.S. at 389, 101 S.Ct. 677).

22 330 Or. at 370.

23 Attorney-client communications are also protected by both statute and rule. ORS

24 25 9.460(3) imposes an affirmative duty on attorneys to protect the confidences and secrets of their

26 clients:

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> **Duties of attorneys.** An attorney shall:
> ***
> (3) Maintain the confidences and secrets of the attorney's clients consistent with the rules of professional conduct established pursuant to ORS 9.490; …

The rules of professional conduct governing attorneys also forbid attorneys from disclosing the confidences and secrets of their clients. Oregon DR 4-101 provides in part:

> **Preservation of Confidences and Secrets of a Client**
> **(A)** "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
> **(B)** Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
> (1) Reveal a confidence or secret of the lawyer's client.
> (2) Use a confidence or secret of the lawyer's client to the disadvantage of the client.
> (3) Use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.
> ***
> **(D)** A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer in connection with the performance of legal services from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

Finally, the work-product doctrine also protects an attorney from disclosing other information beyond attorney-client communications. A lawyer's mental impressions, conclusions and opinions are protected from discovery under the common-law work-product doctrine regardless of the particular form in which discovery is sought. *Lumber v. PPG Industries, Inc*., 168 F.R.D. 641 (D.Minn. 1996); *Maynard v. Whirlpool Corp.*, 160 F.R.D. 85 (S.D.W.Va. 1995); *Buford v. Holladay*, 133 F.R.D. 487 (S.D.Miss. 1990); s*ee also Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947); *Henry v. Champlain Enterprises, Inc.*, 212 F.R.D. 73 (N.D.N.Y. 2003) (unwarranted and intrusive questions probing attorneys' files and theories of the case, even by means of a deposition, are barred under work product doctrine unless there is a

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showing of substantial need).

There are some exceptions to the requirement to refrain from disclosing confidences and secrets. DR 4-101(C) provides in part:

> **(C)**A lawyer may reveal:
> (1) Confidences or secrets with the consent of the client or clients affected, but only after full disclosure to the client or clients.
> (2) Confidences or secrets when permitted by a Disciplinary Rule or required by law or court order or secrets which the lawyer reasonably believes need to be revealed to effectively represent the client.
> (3) The intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.
> ***

None of the exceptions to the Disciplinary Rule apply to Mr. Gintner's communications with CLPUD. (1) As explained below, Mr. Gintner does not have the consent of his client to disclose any information beyond what has already been produced. (2) DR 4-101(C)(2) does not apply. There is no "court order" that requires Mr. Gintner to disclose any confidences or secrets. *See Central Lincoln PUD v. Verizon,* UM 1087, Order No. 04-379 at 6 (Ore. PUC 2004) ("One exception allows production if compelled by a court order, *and this admittedly is not a court order.*") (emphasis added). There is no law or Disciplinary Rule that requires disclosure.[2] (3) CLPUD has not expressed any intention to commit a crime. (4) There is no controversy between Mr. Gintner and CLPUD or claim against Mr. Gintner regarding his representation of CLPUD. (5) No sale of a law practice is involved. Therefore, Mr. Gintner can ethically disclose CLPUD's

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[2]Verizon has also contended that the attesting witness exception of OEC 503(4)(d) applies to destroy the privilege, but it is obvious to any reasonable person that this provision is inapplicable. As the Commission stated in its Order granting Verizon's Motion to Compel:

We agree with CLPUD that the "attesting witness" exception in OEC 503(4)(d) is likely limited. …[It is] clear that an "attesting witness" is one who witnesses another's signature on a document. In that capacity, the attorney is not acting as an attorney, but as a witness, and can testify as to the signer's mental capacity and other matters.

Order No. 04-379 at 4.

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1 confidences or secrets only if: (a) He reasonably believes the information needs to be revealed to
2 effectively represent CLPUD; or (b) CLPUD has consented after full disclosure to disclosure of
3 the protected information.
4
5 **C. CLPUD Did Not Waive the Privilege By Responding to Verizon's Third Set Of Data Requests As Ordered by Order No. 04-379.**

6
7 **1. The Large Majority Of The Information CLPUD Produced In Response to Verizon's Third Set Of Data Requests Did Not Consist Of Attorney-Client Communications.**

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OEC 511 provides for waiver of the attorney-client privilege:
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> **Waiver of privilege by voluntary disclosure.** A person upon whom ORS 40.255 to 40.295 confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication. Voluntary disclosure does not occur with the mere commencement of litigation or, in the case of a deposition taken for the purpose of perpetuating testimony, until the offering of the deposition as evidence....[3]

14
15 Mr. Gintner's opening and reply testimony did not waive the privilege in any respect
16 because the testimony did not disclose any attorney-client communication. The 1981 Conference
17 Committee Commentary to OEC 511 makes it clear that waiver will not be found unless and
18 until an actual privileged communication is disclosed:
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> Rule 511 resolves the present uncertainty by adopting a restrictive view of waiver. A person, merely by disclosing a subject which the person has discussed with an attorney or spouse or doctor, does not waive the applicable privilege; *the person must disclose part of the communication itself in order to effect a waiver.* As McCormick points out:
> "By the prevailing view, which seems correct, the mere voluntary taking the stand…and testifying to facts which were the subject of consultation…with

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[3] OEC 511 was amended in 2003 to provide that voluntary disclosure does not occur when representatives of the news media are allowed to attend executive sessions of the governing body of a public body or when representatives of the news media disclose information after the governing body has prohibited disclosure of the information.

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counsel is no waiver of the privilege for secrecy of the communications to [Bone's] lawyer. It is the communication which is privileged, not the facts." McCormick section 93.

(emphasis added).

In previous submissions, Verizon has relied on cases pre-dating the enacted of the Oregon Evidence Code (such as *State v. Sullivan*, 230 Or. 136, 368 P.2d 81 (1962)) to argue that Mr. Gintner's opening and reply testimony waived the attorney client privilege. However, as the above passage makes clear, the Oregon Evidence Code adopted a more restrictive rule of waiver than that which had previously applied. The Oregon Evidence Code does not contemplate waiver of a privilege as to confidential *communications* merely by offering the attorney as a witness; rather, the privilege is only waived when a confidential *communication* itself is disclosed.

Subsequent to the Commission's ruling granting Verizon's Motion to Compel, CLPUD disclosed certain narrowly limited information that was compelled by the Commission's Order No. 04-379. CLPUD has now disclosed the following information:

(1) Mr. Gintner has never before testified before the Oregon PUC.

(2) Mr. Gintner is a partner with Macpherson, Gintner, Gordon & Diaz.

(3) Macpherson, Gintner, Gordon & Diaz was retained by CLPUD in 1985, and has acted as general counsel to CLPUD continuously since that time.

(4) Macpherson, Gintner, Gordon & Diaz represents CLPUD as its attorneys of record in UM 1087 and provides all legal services, advice, counsel and representation to CLPUD related to the matter, including litigation of the proceeding.

(5) Mr. Gintner sent Verizon a notice of violation on January 6, 2003, demanding that Verizon sign a contract with 10 days. Veronica Mahanger spoke with Mr. Gintner by telephone on February 27, 2003, and stated that Verizon was not willing to sign CLPUD's proposed pole

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occupancy license agreement, but did not point out any specific contract terms that Verizon objected to, and did not provide an alternative draft of an agreement or otherwise indicate terms that Verizon would be willing to agree to. Mr. Gintner offered to send Ms. Mahanger a copy of CLPUD's current pole occupancy license agreement. Mr. Gintner e-mailed a copy of the proposed agreement to Ms. Mahanger on February 28, 2003. Thereafter, Ms. Mahanger did not indicate that Verizon would sign CLPUD's proposed agreement, and made no discernible effort to negotiate any specific contract terms.

(6) Mr. Gintner sent a new notice of violation on March 11, 2003.

(7) In late March, Veronica Mahanger left a voice-mail message for Mr. Gintner asking whether the provision of the Oregon Administrative Rules cited in the notice of violation was accurate. Mr. Gintner sent Veronica Mahanger an e-mail on April 2, 2003 confirming that the provision cited in the letter was accurate and explaining that Veronica Mahanger was using an outdated copy of the OAR's.

(8) Mr. Gintner's role regarding Verizon attachment(s) on CLPUD poles, CLPUD attachment(s) on Verizon poles, or the negotiation of any agreement between the parties to cover such attachments, is that he provides legal advice and counsel to CLPUD regarding Verizon attachments on CLPUD poles, CLPUD attachments on Verizon poles, and the lack of any agreement between the parties to cover such attachments, and he conveys information from CLPUD representatives to representatives of Verizon, and from Verizon representatives to representatives of CLPUD.

(9) Mr. Gintner not interpret Richard Stewart's letter as an attempt to negotiate a pole attachment contract, and accordingly did not contact Mr. Stewart in response to the letter.

(10) Mr. Gintner does not believe CLPUD is obligated, under the Commission's rules or

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any other applicable law, to negotiate in good faith an agreement with parties seeking to place attachments on CLPUD's poles. Mr. Gintner explained the legal framework justifying this belief.

None of these disclosures revealed any attorney-client communications, and accordingly none of them effected a waiver of the attorney-client privilege. (1) and (2) do not involve CLPUD at all. (3) and (4) are also not covered by the privilege. The fact of an attorney-client relationship or the identity of the attorney's client is not privileged unless revealing the client's identity would be tantamount to disclosing the substance of an otherwise protected confidential communication. *State v. Keenan/Waller,* 307 Or. 515, 522 (1989); *In re Illidge,* 162 Or. 393, 406 (1939); *Cole v. Johnson,* 103 Or. 319 (1922); *Little v. Dept. of Justice,* 130 Or.App. 668, 674, *rev. denied,* 320 Or. 492 (1994); *Tornay v. United States,* 840 F.2d 1424, 1428 (9th Cir. 1988); *Baird v. Koerner,* 279 F.2d 623 (9th Cir. 1960).

(5), (6) and (7) involve communications between Mr. Gintner and Veronica Mahanger, a Verizon representative. They do not involve any attorney-client communications, and therefore are unprotected by the attorney-client privilege and no waiver was effected by their disclosure. Indeed, the nature of the communications is such that they have already been disclosed to Ms. Mahanger, who is a representative of Verizon, an adverse party. Merely repeating these conversations has no effect on the attorney-client privilege.

(9) and (10) refer to Mr. Gintner's own opinions. These are not protected by the attorney-client privilege because they do not involve attorney-client communications. However, they may be protected by the work-product doctrine.

(8) does not disclose any attorney-client communications. Disclosure of the fact that Mr. Gintner is involved in contract negotiations is not protected by the attorney-client privilege. Absent special circumstances, merely disclosing the general nature of the services the attorney

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performs for the client does not entail any disclosure of client communications. Nor is such disclosure likely to be embarrassing or detrimental to the client under DR 4-101(A).

Mr. Gintner also stated that "he conveys information from CLPUD representatives to representatives of Verizon, and from Verizon representatives to representatives of CLPUD." While this may seem to reveal attorney-client communications, the mere fact that the attorney has communicated with the client is not protected by the privilege. *State v. Keenan/Waller,* 91 Or.App. 481, 485 (1988), *aff'd,* 307 Or. 515 (1989). It is only the substance of a protected communication that is protected by the privilege, and only a disclosure thereof will effect a waiver.

In sum, none of the disclosures made by Mr. Gintner up to this point in the discussion involve protected attorney-client communications, and hence none of them effected a waiver of the attorney-client privilege. Up to this point in the discussion, the attorney-client privilege is unaffected by the disclosures, and the analysis and course of action should proceed as in any other circumstances.

2. The Questions of Verizon's Counsel Were Not Within The Scope Of Any Waiver Of The Attorney-Client Privilege Because They Were Not Relevant To The Subject Matter Of The Information Which Mr. Gintner Disclosed.

The only item of information CLPUD disclosed which is a protected attorney-client communication is an e-mail from Mr. Gintner to Denise Estep and Mike Wilson regarding a letter to Mr. Gintner from Verizon general counsel Richard Stewart. *See* CLPUD Exhibit 11. Where a privileged communication is disclosed, the waiver is narrowly limited to the specific subject matter revealed. *State v. Sullivan*, 230 Or. 136, 139 (1962); *Interstellar Starship Services, Ltd. v. Epix, Inc.*, 190 F.R.D. 667 (D.Or. 2000). 1981 Conference Committee Commentary to

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1 OEC 511 shows that this section was intended to adopt a restrictive view of waiver (even more
2 restrictive than at the time *Sullivan* was decided):
3
4
> ORE 511 replaces the waiver provisions of ORS 44.040(2). That statute indicated that when the holder of a privilege voluntarily testifies on a subject, any communications the holder may have had with any other person on the subject cease to be privileged. *See Patterson v. Skoglund*, 181 Or. 167, 180 P.2d 108 (1947); *Fowler v. Phoenix Insurance Co.*, 35 Or. 559, 57 P. 421 (1899). Taken literally, this would allow the prosecution to call defense counsel as a witness as soon as the accused has finished taking the stand. The rule is obviously phrased too broadly, and for this reason there is inconsistency among Oregon cases whether testimony on the same subject will waive a privilege, or whether it is necessary that there be testimony as to a particular privileged communication. *Stark Street Properties, Inc. v. Teufel*, 277 Or. 649, 658 n. 12, 562 P.2d 531 (1977), *citing Bryant v. Dukehart, supra*, and *McNamee v. First Nat. Bank of Roseburg*, 88 Or. 636, 172 P. 801 (1918).
> **Rule 511 resolves the present uncertainty by adopting a restrictive view of waiver. A person, merely by disclosing a subject which the person has discussed with an attorney or spouse or doctor, does not waive the applicable privilege; the person must disclose part of the communication itself in order to effect a waiver.** As McCormick points out:
> "By the prevailing view, which seems correct, the mere voluntary taking the stand…and testifying to facts which were the subject of consultation…with counsel is no waiver of the privilege for secrecy of the communications to [Bone's] lawyer. **It is the communication which is privileged, not the facts.**" McCormick section 93.

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15 (emphases added); *see also State v. McGrew*, 46 Or.App. 123, 127-28, *rev. den.*, 289 Or. 587
16 (1980) (Court was unable to find waiver of the privilege when there was no indication in the
17 record as to the facts to which the doctor had testified).
18
19 The questions of Verizon's counsel that Mr. Gintner refused to answer did not concern
20 any communications between Mr. Gintner and Mr. Stewart. Therefore, the questions were not
21 pertinent to the specific subject matter that Mr. Gintner had revealed in responding to Verizon's
22 data requests. Because the questions posed by Verizon's counsel concerned a matter with respect
23 to which CLPUD had not disclosed any privileged communications, Mr. Gintner's refusal to
24 answer the questions was entirely proper for the reason that the information sought remained
25 protected by the attorney-client privilege. The ALJ accordingly erred in striking Mr. Gintner's
26

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testimony as a sanction for refusing to answer these questions, since the questions sought information that was protected by the attorney-client privilege and with respect to which the privilege had not been waived.

3. No Waiver Has Occurred With Respect To Any Privileged Communications Because Disclosure Was Erroneously Compelled.

OEC 512 provides:

> **Privileged matter disclosed under compulsion or without opportunity to claim privilege.** Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was:
> (1) Compelled erroneously; or
> (2) Made without opportunity to claim the privilege.

For the reasons stated above, as well as in CLPUD's motions and memoranda previously filed herein, the Commission's Order compelling CLPUD to answer Verizon's Third Set of Data Requests was erroneous. Mr. Gintner did not disclose *any* attorney-client communications in his opening or reply testimony, and therefore there was no waiver of the privilege. There is no provision of law which allows an administrative body to compel disclosure of attorney-client communications simply so one party may gain an advantage in cross-examination. Therefore, CLPUD did not waive the attorney-client privilege by disclosing those narrowly limited matters that the Commission ordered to be disclosed.

4. Even If The Attorney-Client Privilege Has Been Waived, CLPUD's Attorneys Are Still Ethically Prohibited From Disclosing Any Protected Attorney-Client Information Unless The Client Consents.

The scope of the waiver of the privilege is not ultimately determinative in this case because the ethical duty of confidentiality still applies despite any waiver of the attorney-client privilege under the rules of evidence. CLPUD has consented to disclosure of certain limited information otherwise protected under DR 4-101 and ORS 9.460(3). However, CLPUD has not

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consented to disclosure of any additional information beyond that produced in response to Verizon's Third Set of Data Requests. Even if the privilege has been lost as to particular communications, Mr. Gintner is still bound to refrain from disclosing any embarrassing or detrimental matter unless the client consents. In addition, the client may still request that the information not be disclosed, in which case disclosure would be prohibited under DR 4-101(B).

D. Summary.

The ALJ's ruling striking the testimony of Peter Gintner and CLPUD Exhibits 7 and 10 was erroneous because the questions Mr. Gintner refused to answer sought information protected by the attorney-client privilege. That privilege had not been waived because: (a) any disclosure had been erroneously compelled; (b) the questions asked were not within the scope of the matters which Mr. Gintner had previously disclosed; and (c) in any event, Mr. Gintner was ethically prohibited from answering the questions of Verizon's counsel under DR 4-101 and ORS 9.460(3) because his client had not consented to disclosure of the requested information. The Commission should not allow its proceedings to be used to undermine the ethical rules governing attorneys by forcing CLPUD's attorneys to disclose protected attorney-client communications. The ALJ's ruling striking CLPUD's evidence seriously prejudiced CLPUD in presentation of its case. Accordingly, the Commission should reverse the ALJ's ruling and consider the evidence stricken from the record by the ALJ.

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II. CLPUD Is Entitled To Removal Of Verizon's Attachments And Sanctions Under OAR 860-028-0130 and 860-028-0180 For Verizon's Violation of OAR 860-028-0120.

A. Introduction.

ORS 757.271(1) prohibits any person from establishing an attachment to a pole of a consumer-owned utility without first executing a contract with and obtaining authorization from the utility allowing the attachment. To further the purposes of this statute, the Commission adopted OAR 860-028-0120(1)(a), which provides:

> **Duties of Pole Occupants.**
> (1) Except as provided in sections (2) and (3) of this rule, a pole occupant attaching to one or more poles of a pole owner ***shall*:**
> (a) ***Have a written contract*** with the pole owner that specifies general conditions for attachments on the poles of the pole owner;

(emphasis added). If a pole occupant violates OAR 860-028-0120(a) by attaching to a utility's poles without a written contract, the Commission's rules allow the pole owner to impose sanctions for the pole occupant's violation under OAR 860-028-0130.

Verizon has established attachments to one hundred and forty four (144) poles owned by CLPUD despite the fact that no written contract was in place between the two parties. CLPUD Ex. 1, p. 5, line 8 to p. 6, line 12. To date, there is still no written contract in existence between CLPUD and Verizon. Verizon's 144 attachments remain on CLPUD's poles. CLPUD Ex. 1, p. 6, lines 6-8. Therefore, Verizon is in violation of both ORS 757.271(1) and OAR 860-028-0120(1)(a).

B. Verizon Does Not Have a Written Contract with CLPUD for New Pole Attachments.

1. The Prior Contract Between CLPUD and Verizon Terminated No Later Than July 2, 2002.

The only contract between CLPUD and Verizon that governed joint use of poles was dated July 1, 1987. (See CLPUD/Exhibit 1, ¶ 5.) The contract (hereinafter the "Agreement") was terminated by July 2, 2002. The terms of the Agreement provide that it may be terminated by

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either party by giving 6 months written notice. The manner of service of notice is set forth in Article XVI of the Agreement. CLPUD Ex. 1, ¶¶ 5-7. Pursuant to this provision of the Agreement, CLPUD received written notice from Verizon on October 22, 2001 stating all invoices and notifications regarding Joint Use were to be sent to (See CLPUD/Exhibit 1, ¶¶8-11):

Verizon
Joint Use
MC: WA0103NP
1800 41st Street
Everett, WA, 98201

CLPUD mailed a notice of termination (hereinafter the "First Notice") to Verizon's Beaverton, Oregon address on December 26, 2001 specifying a termination date of June 30, 2002. (*See* CLPUD/Exhibit 1, ¶¶12-13.) A copy of that notice (hereinafter the "Second Notice") was then sent to the address specified in Verizon's October 22, 2001 letter on January 2, 2002. (*See* CLPUD/Exhibit 1, ¶14.) The Agreement thus terminated no later than July 2, 2002.

a. The First Notice Was Sufficient to Terminate the Agreement.

The central issue is not whether the notice of termination was sent to the address specified by Verizon, but whether actual notice was received. Such a standard generally holds that actual notice will suffice regardless of whether the notice is sent in strict compliance with the terms of the contract. Oregon courts have upheld termination even though the notices did not strictly comply with the notice requirements, as long as actual notice was received and the purposes of the notice requirement have been met. For example, in *Stroh v. SAIF*, 261 Or. 117 (1972), the Court held that notice sent by ordinary mail was valid under a statute requiring notice by registered or certified mail, as long as the notice was actually received by the appropriate entity. *See Stroh* at 119-20. The Court reached the same result in *Brown v. Portland School District No. 1*, 291 Or. 77 (1981), notwithstanding that the statute in that case expressly provided that Anotice of claim...which is presented in any other manner than herein provided, is

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1 invalid....@ *See Brown* at 80, 82-83. The Court stated:

2 To deny a claim because his notice of claim was not posted correctly even though it was actually received by the very official to whom the statute requires
3 posting seems to us an absurd result which the legislature did not or would not have intended*.* *Id.* at 83.

4 Likewise, in *Webb v. Highway Division, Oregon Dept. of Transportation*, 293 Or. 645
5 (1982), the Court held that a notice sent by regular mail addressed to the Department of Justice
6 employee responsible for investigating claims, rather than to the Attorney General as required by
7 statute, was valid. *See Webb* at 650-51; *see also U.S. Broadcasting Co. Corp. v. National*
8 *Broadcasting Co., Inc.*, 439 F.Supp. 8 (D.C. Mass. 1977) (defects in contract termination notice
9 are immaterial as long as actual notice is received).

10 The Agreement was terminated on June 30, 2002 because the First Notice, even though
11 sent to Verizon's Beaverton office rather than to the address specified by Verizon gave Verizon
12 actual notice that the General Agreement for Joint Use of Poles between CLPUD and Verizon
13 was being terminated on June 30, 2002.

14 Verizon has argued that the notice was insufficient because it erroneously listed the date
15 of the Agreement as July 1, 1992, rather than July 1, 1987. However, the July 1, 1987 Agreement
16 is only agreement concerning pole attachments between CLPUD and Verizon during the relevant
17 time period, and Verizon has not argued that it was somehow mislead into believing CLPUD was
18 referring to some other agreement. CLPUD Ex. 1, p. 3, lines 6-8; cross-examination testimony of
19 Susan Schmautz. It has not been alleged that Verizon did not receive the First Notice, nor has it
20 been alleged that Verizon did not know the contract was being terminated as a result of the First
21 Notice. Only one contract for the joint use of poles between CLPUD and Verizon existed.
22 Verizon does not contend that the parties had more than one agreement governing joint use of
23 poles, nor does it point to any contract other than the 1987 agreement it believed was being
24 terminated. Verizon has not alleged that the actual notice resulting from the First Notice has
25 caused any substantial prejudice because it was sent to an address other than the one specified by
26 Verizon.

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1 2 **b. The Second Notice Terminated the Agreement No Later than July 2, 2002 Even if the First Notice was sent to an address other than that specified by Verizon.**

3 The Second Notice, sent on January 2, 2002, strictly complied with the terms of the 4 Agreement. It simply purported to terminate the Agreement two days before expiration of the 6 5 month time period.

6 A notice of termination specifying a period of time shorter than that stipulated in a 7 contract is effective after lapse of the full time required by the terms of the contract. *See Lyon v.* 8 *Pollard*, 87 U.S. 403 (1874) (where contract provides that it may be terminated upon giving 9 notice a certain time period in advance, the contract expires at the end of the specified time after 10 notice is sent, regardless of whether or not proper termination date is stated in the letter); *Shain v.* 11 *Washington Nat. Ins. Co.*, 308 F2d 611 (CA8 Iowa 1962) (same); *Music, Inc. v. Henry B. Klein* 12 *Co.*, 213 PA Super 182 (1968) (same); *G.B. Kent & Sons, Ltd. v. Helena Rubinstein, Inc.*, 47 13 NY2d 561 (1979) (same). The fact that the Second Notice states a termination date less than 6 14 months from the date of the notice does not render the termination invalid or operate to keep the 15 contract in effect. It simply extends the termination date to six months from when the notice was 16 given. In this case, and without conceding that the First Notice was insufficient to terminate the 17 Agreement on June 30, 2002, the Agreement terminated no later than July 2, 2002.

18 Verizon has argued that the second termination notice was invalid, because it was 19 addressed to the zip cope 98206, rather than the zip code 98201 as specified in Verizon's 20 October 12, 2001 letter. However, the October 12, 2001 letter was on letterhead which bore the 21 zip code 98206. Moreover, CLPUD's Petition on file herein alleges:

22 2.

23 The Respondent's name and address are as follows:

24 Verizon Northwest, Inc.
25 Mailcode: WA0103NP
P.O. Box 1003
26 Everett, WA 98206

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Petition, ¶ 2. Verizon's Answer alleges:

> 1. Answering the allegations contained in Paragraphs 1, 2, and 3 of the Petition, Respondent admits those allegations.

Answer to Petition, Counter Complaint, and Application for Waiver, ¶ 1. Therefore, it is disingenuous for Verizon to argue that the notice was invalid because it was sent to zip code 98206, since Verizon has admitted that the zip code used by CLPUD was the correct zip code. As established by the authorities discussed above, defects in a contract termination notice are immaterial as long as actual notice is received. *See Webb v. Highway Division, supra*; *Brown v. Portland School District No. 1, supra*; *Stroh v. SAIF, supra*; *U.S. Broadcasting Co. Corp. v. National Broadcasting Co., Inc., supra.* Because CLPUD sent the letter terminating the Agreement to the correct zip code, and because Verizon received that notice and was aware that CLPUD was terminating the Agreement, CLPUD's termination letter was valid and the Agreement terminated no later than July 2, 2002.

2. Verizon Has Attached to 144 Poles Owned by CLPUD Without A Written Contract Authorizing Those Attachments, In Violation Of OAR 860-028-0120 And ORS 757.271(1).

Article XVIII of the General Agreement for Joint Use of Poles between CLPUD and Verizon, dated July 1, 1987, provides that "upon termination or such expiration, each party shall remove all of its existing attachments on poles of the other party in an orderly manner and within the period of five (5) years thereafter unless a longer period of time is agreed to in writing." (*See* CLPUD/Exhibit 3.) According to this Agreement, Verizon has a period of 5 years, after the termination date, to remove any attachments made *while the agreement was still in existence*. *See id.* This means that, although the Agreement was terminated, the terms of the Agreement would arguably govern issues of maintenance and safety for the next five years for any attachment established ***before***the termination date. However, Verizon is not authorized, by

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agreement or otherwise, to establish any new attachments to CLPUD's poles after the date the agreement was terminated. Nevertheless, Verizon did establish 144 new attachments to CLPUD's poles without an agreement that would govern issues such as cost, maintenance and safety.

In its Answer to CLPUD's Petition, Verizon admits that it maintains attachments on CLPUD's poles. *See* Answer to Petition, Counter Complaint, and Application for Waiver, ¶ 2. CLPUD Exhibit 6 consists of copies of National Joint Utilities Notification System (NJUNS) Pole Attachments Tickets submitted by Verizon to the CLPUD (*See* CLPUD/Exhibit 1, ¶ 20.) As Denise Estep, Joint Pole Administrator for CLPUD, explains in her Opening Testimony, these NJUNS Pole Attachment Tickets are requests for pole attachment permits made by Verizon after the contract was terminated. (*See* CLPUD/Exhibit 1, ¶¶17-20; *see also* OAR 860-029-0120(1)(b) and (3)). These permit requests range in dates from September 15, 2002 through February 12, 2003. (*See* CLPUD/Exhibit 6.) These requests for pole attachments permits were not approved by CLPUD, as Verizon had no agreement in place permitting it to attach to CLPUD's poles. (*See* CLPUD/Exhibit 1, ¶22.) CLPUD/Exhibit 6 includes the pole reference numbers to which Verizon has attached after the termination date. Therefore, these attachments were made after the termination date without a contract in place. These reference numbers correspond to the list of 144 attachments attached to and referenced in CLPUD's Petition. *See* Petition for Removal of Pole Attachments, ¶4. This list of 144 attachments are also attached as CLPUD / Exhibit 7.[4]

Therefore, while it may be argued that any attachments established <u>before</u> July 2, 2002, were governed by the contract even after it was terminated, any attachments established <u>after</u>

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[4] Please note that the list of pole attachments, attached to CLPUD's Petition as Exhibit A, has a typographical error. Line 10 should read "AE**33**A/15/21/12/33," not "AE**22**A/15/21/12/33." (Emphasis added). A corrected list is included as CLPUD/Exhibit 7 and incorporated into the record herein as part of CLPUD's Opening Testimony. Pursuant to Oregon Rules of Civil Procedure (ORCP) Rule 23D, because Exhibit A to the Petition contains a mere clerical error, an amended petition is not required**.**

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1 July 2, 2002 were clearly not governed by any existing agreement between the parties. (*See*
2 CLPUD/Exhibit 3.)

3 **C. Oregon Public Utility Commission Rules Impose A Duty Upon The Pole**
4 **Occupant To Obtain An Agreement With The Pole Owner Before Attaching To The Pole Owner's Poles.**

5 Under the caption "**Duties of Pole Occupants**," OAR 860-028-0120(1) states

6 > (1) Except as provided in sections (2) and (3) of this rule, a pole occupant
7 > attaching to one or more poles of a pole owner ***shall*:**
> (a) Have a written contract with the pole owner that specifies the general
8 > conditions for attachments on the poles of the pole owner.

9 OAR 860-028-012(1)(a) (emphasis added).

10 Given the serious safety issues involved, it is understandable that this is an absolute duty
11 placed upon a pole occupant. Furthermore, pole occupants are required to have permits before
12 making any attachments with the exception of service drops. OAR 860-028-0120(3). However,
13 even service drops are not excepted from the requirement that the pole occupant have a contract
14 with the pole owner. Installation of a service drop violates OAR 860-028-0120(3) if the pole
15 occupant does not apply for a permit within seven days of installation. There are no exceptions
16 to these rules. Nor, should there be any exceptions to these rules, given the potential safety
17 hazard caused by unauthorized pole attachments. The common sense of these rules is apparent
18 and their message is clear. Anyone who attaches to utility poles within the State of Oregon
19 violates these rules if it attaches to a utility pole without a written contract and the appropriate
20 permits. In this case, Verizon is in violation of these rules because it attached to CLPUD's poles
21 when it was well aware of the fact that it had no existing contract with CLPUD. Despite this,
22 Verizon attached to CLPUD's poles anyway. To now find that Verizon is not in violation of
23 these rules is tantamount to rendering these rules a nullity.

24 **D. Verizon Blatantly and Knowingly Disregarded the Rules of the Oregon Public Utility Commission.**

25 As was discussed in Section I above, Verizon had six months prior notice of the
26 termination of its contract with CLPUD. Even though Verizon was aware that its contract with

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CLPUD was terminating in six months, Verizon never presented CLPUD with a proposed contract that would allow it to continue to attached to CLPUD's poles. As stated in Section III above, Verizon had an absolute duty to enter into a contract with CLPUD before it attached to any of CLPUD's poles after the termination date. The rules make it clear that it is the responsibility of the pole occupant to obtain a written contract. Oregon Public Utility Commission rules even provide a remedy for a pole occupant if it presents a proposed agreement to the pole owner and the pole owner unreasonably delays the approval of a written contract. OAR 860-028-0220 states:

> "(1) If a pole occupant and a pole owner have a dispute over facts that the pole occupant and pole owner must resolve so that the pole owner can impose appropriate sanctions *or in the event that a pole occupant is alleging that a pole owner is unreasonably delaying the approval of a written contract*, or the issuance of a permit, then either the pole owner or the pole occupant may request a settlement conference before the Joint-Use Association (JUA). The party making the request shall provide notice to the other party and to the JUA.
>
> (2) If the JUA does not settle a dispute described in Section 1 of this rule within ninety days notice, then either the pole owner or the pole occupant may request a hearing before the Commission and an order from the Commission to resolve the dispute:
>
> > (a) Upon receipt of a request, the Commission staff shall, within thirty days, provide the parties a recommended order for the Commission;
> >
> > (b) Either party may within thirty days of receipt of the recommended order, submit written comments to the Commission regarding the recommended order;
> >
> > (c) Upon receipt of written comments, the Commission shall within thirty days, issue an order." (Emphasis added)

OAR 860-028-0220.

It is important to note the italicized section of the above quote. It allows for intervention through the Joint-Use Association only "in the event that a pole occupant is alleging that a pole owner is unreasonably delaying the approval of a written contract," but not the other way around. This is consistent with the absolute duty placed upon the pole occupant to obtain a written contract *prior* to attaching to the pole owner's poles. In the case where a pole occupant is unable

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1 to obtain an agreement from the pole owner, it is incumbent upon the pole occupant to seek
2 redress through the Joint-Use Association. However, there is not a similar provision if the *pole*
3 *owner* is alleging that the *pole occupant* is unreasonably delaying approval of a written contract.
4 The logic of this rule is clear. It is unnecessary for a pole owner to resort to the Joint-Use
5 Association if a pole occupant or a potential pole occupant is unreasonably delaying approval of
6 a written contract because the pole owner is protected by the provisions of OAR 860-028-0120,
7 which forbids a potential pole occupant from attaching to its poles until such time as the pole
8 occupant enters into an agreement with the pole owner.
9 If Verizon had submitted a proposed agreement to CLPUD after it had received notice of
10 termination of the existing agreement, and CLPUD was unreasonably delaying approval of that
11 agreement, then Verizon could have resorted to the provisions of OAR 860-028-0220 to have the
12 issues resolved. Not only did Verizon fail to seek such a remedy, but Verizon also failed to even
13 submit a proposed agreement during the six months prior to the termination date. (*See*
14 CLPUD/Exhibit 12, ¶¶ 4-5.) Instead, Verizon virtually ignored the termination of the prior
15 agreement and continued to attach to CLPUD's poles after the agreement had been terminated.
16 The inappropriateness of Verizon's conduct was further exacerbated by the fact that on
17 June 27, 2002, Michael Wilson, Chief Engineer and System Operation Manager, submitted a
18 proposed occupancy license agreement[5] to Verizon which would have allowed Verizon to
19 continue to attach to CLPUD's poles without violating Oregon Public Utilities Commission's
20 rules. (*See* CLPUD/Exhibit 13.) Instead, Verizon virtually ignored its duties under Oregon
21 Public Utilities Commission Rules. On November 22, 2002, Mr. Wilson again submitted the
22 proposed pole and occupancy license agreement to Verizon for execution (*see* CLPUD/Exhibit
23 16). It was not until December 10, 2002 that Verizon finally submitted a proposed pole
24
25
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[5] Please note that the copy of the letter and agreement submitted to Verizon by Michael Wilson, attached as Exhibit 13, was Verizon's response to CLPUD's Data Request. Verizon's response only included every other page of the agreement and exhibits, apparently due to a photocopying error. However, the agreement mailed by Michael Wilson to Verizon contained all pages of the agreement and exhibits.

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1 occupancy agreement to CLPUD. This was nearly six months after the agreement between
2 CLPUD and Verizon had been terminated and nearly a year after it had received notice of
3 termination of the prior agreement. Yet, during that time, Verizon continued to attach to CLPUD
4 poles knowing full well that it had no written contract with CLPUD.[6]

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E. CLPUD Is Entitled To an Order From the Oregon Public Utility Commission (OPUC) Requiring Verizon to Pay Increased Sanctions Under OAR 860-028-0180 for Violation of OAR 860-028-0120.

7 OAR 860-028-0130 imposes sanctions for a violation of OAR 860-028-0120(1)(a) in the
8 amount of the higher of: (a) $500.00 per pole, or (b) sixty (60) times the owner's annual rental
9 fee per pole. This amount is decreased by sixty percent (60%) if the pole occupant complies
10 with the time frame under OAR 860-028-0170. Under OAR 860-028-0170, sanctions are
11 reduced if either: (a) the pole occupant complies with OAR 860-028-0120 and provides notice of
12 compliance to the owner within sixty (60) days or less of receipt of a notice of violation, or (b)
13 the pole occupant submits a reasonable plan of correction and thereafter complies within thirty
14 (30) days or less of its receipt of the notice of violation. If a pole occupant fails to comply with
15 the time frame established in OAR 860-028-0170 by more than 30 days, then a pole owner may
16 recover two (2) times the amount of sanctions specified in OAR 860-028-0130. *See* OAR 860-
17 028-0180(2). Furthermore, if a pole occupant fails to comply with the time limitations by more
18 than 60 days, a pole owner may request an order from the OPUC to remove the occupant's
19 attachments. *See* OAR 860-028-0180(3).

20 A notice of violation was sent to Verizon on March 11, 2003. (*See* CLPUD/Exhibit 11,
21 p. 1.) Verizon failed to comply with either the 30-day or 60-day time frames set forth and OAR

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[6] It should be noted that on December 6, 2002, Michael Wilson sent a message by email to Mark Simonson stating that he had not received Verizon's boiler plate joint use agreement. Mark Simonson, Specialist and Networking Engineer for Verizon, responded with an email message that he had sent Mr. Wilson him a "soft copy" in approximately the July timeframe. Verizon Exhibit 114, p. 1-2. However, CLPUD has no record that such a soft copy had been sent, nor has Verizon in response to CLPUD's data request, produced any evidence that such a soft copy was sent, though such evidence was requested in CLPUD's Data Request. Further, it should be noted that if such a soft copy had ever been sent, Verizon continued to attach to CLPUD poles without further inquiry regarding the proposed agreement purportedly sent in the "July timeframe." (*See* CLPUD/Exhibit 18.)

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860-028-0170. Therefore, CLPUD is entitled to an order holding Verizon liable for the maximum amount of sanctions under OAR 860-028-0130 and OAR 860-028-0180 for all 144 attachments made without a written agreement in place, as well as an order authorizing removal of Verizon's attachments from CLPUD's poles.

1. The OPUC Has the Authority to Order Verizon to Pay Sanctions for Violation of OAR 860-028-0120.

The plain meaning of the Oregon Administrative Rules and Oregon Revised Statutes give the OPUC authority to issue an order requiring payment of sanctions. *See* OAR 860-028-0220 (stating that the parties may request settlement before the Joint-Use Association (JUA), and may also request a hearing before the Commission if the dispute is not resolved by the JUA); ORS 756.160 (conferring authority upon the Commission to enforce all laws relating to public utilities); ORS 757.273 (conferring authority upon the OPUC to "regulate in the public interest the rates, terms and conditions for attachments"). If the person or entity to whom the order is directed does not comply with the order, then, and only then, does it become necessary to petition the Circuit Court for enforcement of the Commission's order. *See* ORS 756.180.

The regulations related to the imposition of sanctions were adopted by the OPUC on August 23, 2000. *See* OPUC Order No. 00-467 (Aug. 2000). Since that time, there have been no OPUC orders or cases dealing with the imposition of sanctions under OAR 860-028-0130. Therefore, the text of the regulations and the statutes control the OPUC's authority. OAR 860-028-0130 states that the pole owner shall impose and reduce sanctions based on the time limitations stated in OAR 860-028-0170. If there is a dispute over facts that the pole owner and pole occupant must resolve so that sanctions can be imposed, under OAR 860-028-0220, the pole owner or occupant may request a settlement conference before the JUA. *See* OAR 860-028-0170(2); OAR 860-028-0220(1). Furthermore, if the JUA does not resolve the dispute, the pole owner or occupant may request a hearing before the Commission and an order from the Commission to resolve the dispute. *See* OAR-860-028-0220(2). Additionally, if the pole occupant does not comply within 60 days of notice of the violation, then the regulations

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1 specifically provide the remedy of an order from the Commission authorizing removal. *See*
2 OAR 860-028-0180(3). A logical reading of these regulations indicates that the Commission has
3 the authority to order sanctions and removal of attachments.

4 The statutes also lead to the conclusion that the Commission has the authority to order the
5 payment of sanctions. *See* ORS 757.273; ORS 757.290; ORS 756.160. ORS 757.273 gives the
6 OPUC the authority to "regulate in the public interest the rates, terms and conditions for
7 attachments by licensees to poles." Additionally, ORS 756.160 states that the OPUC has the
8 authority to enforce all laws relating to public utilities. Thus, under the statutes, the OPUC
9 clearly has the authority to regulate and resolve disputes relating to pole attachments, in addition
10 to the remedy of the JUA. *See id.* Furthermore, under ORS 756.180, if the party ordered to pay
11 sanctions does not comply, the Commission can petition the Circuit Court to enforce compliance
12 "by injunction or by other processes."

13 Lastly, the doctrine of primary jurisdiction, when applied to the facts of this matter, leads
14 to the conclusion that the issue of the imposition of sanctions should be decided initially by the
15 OPUC. *See Adamson v. WorldCom Communications, Inc.*, 78 P.3d 577, 582-83 (2003). The
16 doctrine of primary jurisdiction asks "whether it is preferable, in light of concerns for the
17 efficient administration of justice, for the court to exercise its jurisdiction or to permit the agency
18 charged with the administration of the laws initially to consider the dispute." *See Adamson* at
19 582. The doctrine was further explained by the court as follows:

20 21 22 23 24 25

> There are two types of primary jurisdiction. First 'statutory' primary jurisdiction exists when a statute specifically requires courts to apply the primary jurisdiction doctrine to a class of disputes. Second, judicially created primary jurisdiction exists when, in the absence of a statute, a court determines that the administrative agency initially should decide a given matter…The Supreme Court has identified three factors that should be considered in determining whether an agency, rather than a court, is the preferable forum for initially determining the outcome of a dispute or an issue raised in a dispute: '(1) the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue, (2) the need for uniform resolution of the issue, and (3) the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities.'

26 *See id.* at 582-83 (*citing Boise Cascade Corp. v. Board of Forestry*, 325 Or. 185, 192 (1997)). In

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1 this matter, the plain language of OAR 860-028-0130 through 0220 grants authority upon the
2 Commission to enforce violations and disputes arising from pole attachments. ORS 757.273
3 reiterates this authority. However, even if the statute and regulations are considered to be
4 ambiguous and unclear regarding the enforcement of sanctions, the issue of sanctions
5 nonetheless meets the test for judicial primary jurisdiction set forth in *Boise Cascade*. In this
6 matter, Division 28 of the OARs and Chapter 757, Sections 270 through 290 specifically set
7 forth the procedure and rules relating to all pole attachments. This is an issue that is specific to
8 the expertise of the Commission. Additionally, the two issues in this Petition, namely contract
9 termination and sanctions for attaching without a contract, go hand in hand. The Commission
10 cannot decide the factual issue of contract termination and then defer the sanctions issue to the
11 courts. If they did so, there would not be uniform resolution of the issues. Additionally, the
12 legislature intended for the OPUC to be the authority on pole attachment regulations. As part of
13 its duties, the Commission must decide the issue of sanctions, which has been created by their
14 own regulations. If their order is not complied with, or not agreed with by the parties, then the
15 Circuit Court is the proper forum after a final order has been issued by the OPUC. *See* ORS
16 183.482; ORS 756.180**.**

17
18
2. CLPUD Gave Notice of its Violation to Verizon as Required Under OAR 860-028-0190, Therefore Sanctions Should be Awarded to CLPUD.

19 In order for a pole owner to receive sanctions from a pole occupant for a violation of
20 OAR 860-018-0120(1)(a), the pole owner must give notice of the violation to the occupant. *See*
21 OAR 860-028-0190. Notice is defined as "written notification sent by mail, electronic mail or
22 telefax." *See* OAR 860-028-0020(8). Under OAR 860-028-0190, the notice of violation must:
23 (1) provide the attachment(s) allegedly in violation, and (2) include the provision of the rule that
24 the attachment(s) allegedly violate(s).

25 CLPUD has complied with all notice requirements set forth in OAR 860-028-0190. A
26 letter notifying Verizon of their violation of OAR 860-028-0120(1)(a) was mailed to Susan

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Burke, who is the primary contact for pole use matters for Verizon, on March 11, 2003. *See* CLPUD Ex. 9; CLPUD Ex. 11, p. 1. Attached to the notice of violation was a list specifying the particular 144 poles to which Verizon had attached without a written agreement. CLPUD Ex. 11, p. 1. The notice of violation specifically cited the rule that Verizon had violated, namely OAR 860-028-0120(1)(a). CLPUD Ex. 11.

3. Reduction in the Amount of Sanctions Is Not Appropriate Because Verizon Failed to Meet the Time Frame Under OAR 860-028-0170, Therefore Sanctions Should be Calculated According to the OAR 860-028-0130 and Doubled Under OAR 860-018-1080(2).

A pole occupant is entitled to a reduction in the amount of sanctions owed by 60% if either: (a) the occupant complies with OAR 860-028-0120 and submits notice of its compliance to the pole owner, or (b) the occupant submits a reasonable plan of correction to the owner, which the owner approves. *See* OAR 860-028-0170(1). The occupant must either comply within 60 days of receipt of the notice of violation, and provide notice of compliance to the pole owner, or submit a plan of correction to the pole owner within 30 days of receipt of the notice of violation. *See id.* Additionally, if the pole occupant fails to meet these time limitations, by 30 or more days, the sanctions imposed against it are doubled. *See* OAR 860-028-0180. If the pole occupant fails to meet the time limitations by 60 or more days, then the pole owner may also require the occupant to remove the attachments. *See* OAR 860-028-0180(3).

OAR 860-028-0170(2) allows a pole owner to shorten the time limits of 30 and 60 days specified in Section 0170(1) if there is either critical need or no field correction is necessary for the occupant to comply with OAR 860-028-0120. If the pole occupant disagrees with the reduction in the time limits imposed by the pole owner, it is not without remedy. The occupant can request a settlement conference before the Joint Use Association (JUA). *See* OAR 860-028-0220(1). If it is not resolved before the JUA, the occupant can then request a hearing before the Commission. *See* OAR 860-028-0220(2). If the occupant requests relief before the JUA, it must do so prior to the expiration of the time limitation set by the owner, or within seven days of its receipt of the notice of the reduction of the time limitation, whichever is later. *See* OAR 860-

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1 028-0170(2).

2 Because no field correction was necessary in order for Verizon to comply with OAR 860-
3 018-0120, CLPUD decreased the time frame for Verizon's compliance from 30 days to 10 days
4 in its Notice of Violation letter. This reduction in the time allowed for compliance is authorized
5 under OAR 860-028-0170(2). However, even disregarding CLPUD's shortened time frame,
6 Verizon ***never*** complied with OAR 860-028-0120(1)(a) and never submitted a plan of correction
7 as required by OAR 860-028-0170. Therefore, Verizon has failed to meet ***any*** timeframe which
8 conceivably might be applicable.

9 In order for Verizon to comply, it merely needed to sign a written agreement with
10 CLPUD. Verizon never contacted CLPUD, attorneys for CLPUD or the JUA regarding the 10-
11 day time limit imposed by CLPUD. If Verizon felt that it could not comply within 10 days, and
12 wished to contest this limitation, it should have used the remedy provided in OAR 860-028-0220
13 and contacted the JUA to settle the dispute. However, Verizon never utilized any of the remedies
14 specifically provided for in the Pole Attachment Rules.

15 Counsel for Verizon sent a reply to CLPUD's Notice of Violation letter to Peter Gintner,
16 of attorneys for CLPUD. (*See* CLPUD/Exhibit 11.) This letter was dated April 21, 2003 and
17 received on April 28, 2003, over a month after Verizon received the Notice of Violation letter
18 from CLPUD. *See id.* However, this letter did not give notice of Verizon's compliance, nor did
19 it propose a plan of compliance, as required under OAR 860-028-0170(a) and (b). To date,
20 Verizon has thus far failed to execute a signed written agreement for the use of CLPUD's poles.
21 Nevertheless, Verizon's attachments still remain on poles owned by CLPUD. Because no signed
22 agreement exists for the use of CLPUD's poles, Verizon is still in violation of ORS 757.271(1)
23 and OAR 860-028-0120(1)(a). Therefore, Verizon has far exceeded the 10-day limit imposed by
24 CLPUD, and the 30 and 60-day time limits under OAR 860-028-0170 and OAR 860-028-0180.

25 Because Verizon is still noncompliant and has failed to submit a plan of correction to
26 CLPUD, Verizon is liable for the full amount of sanctions under OAR 860-028-0130(1). The

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sanctions applied should be 60 times CLPUD's annual rental rate of $10.40 per pole. *See* OAR 860-028-0130(1). This sanction amount should then be doubled because Verizon failed to comply or submit a plan of compliance by well over 30 days. *See* OAR 860-028-0180(2).

CLPUD's standard rental rate applied to all Joint Pole Use Agreements at the time Verizon established the 144 attachments without a written agreement was $10.40. (*See* CLPUD/Exhibit 1, ¶28.) The rental rate of $10.40 per pole was also incorporated into the draft written agreement sent to Verizon for signature after the July 1, 1987 agreement was terminated. (*See* CLPUD/Exhibit 1, ¶29.) OAR 860-028-0130(1) provides for sanctions of the higher of $500 per pole or 60 times the "owner's annual rental fee per pole." Because $10.40 per pole is the rate CLPUD charges pole occupants with attachments similar to Verizon, this is the rate that should be applied in the determination of the amount of sanctions owed to CLPUD by Verizon. See OAR 860-018-0130(1).

Under the previous Joint Use Agreement between CLPUD and Verizon that has been terminated, the specified yearly rental rate per pole was $9.11. (*See* CLPUD/Exhibit 3.) This Agreement was put into effect over sixteen years ago, and is no longer in existence. At the time Verizon established its 144 attachments to CLPUD's poles, this agreement was terminated. The rate of $9.11 per pole was not the annual rental fee for any of CLPUD's pole occupants at the time Verizon established these attachments. The "annual rental fee per pole" relevant to the calculation of sanctions under OAR 860-028-0130(1) refers to the applicable rate charged by the owner at the time the occupant was in violation of OAR 860-028-0120(1)(a). Therefore, the proper rate for the sanctions calculation is $10.40 per pole. *See* OAR 860-028-0130(1)(b).

F. CLPUD Is Entitled to an Order Authorizing Removal of Verizon's Pole Attachments.

OAR 860-028-0180(3) provides that a pole owner may request an order from the Commission authorizing removal of the pole occupant's attachments if the pole occupant has failed to meet the time limitations in OAR 860-028-0170 by sixty (60) or more days. Under

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OAR 860-028-0170, the pole occupant has 60 days after notice of its violation to comply with OAR 860-028-0120 and submit notice of compliance to the pole owner, or 30 days after notice of its violation to submit a plan of correction to the pole owner. *See* OAR 860-028-0170(1).

Verizon has still not complied with OAR 860-028-0120 because it has failed to sign a written agreement with CLPUD or submit a plan of correction, yet it still maintains attachments on CLPUD's poles without a written agreement. *See* OAR 860-028-0120(1)(a). A Notice of Violation letter was mailed to Verizon on March 11, 2003. (*See* CLPUD/Exhibit 10.) Verizon replied to this letter more than 30 days after receipt of its Notice of Violation, on April 21, 2003. (*See* CLPUD/Exhibit 11.) However, this reply did not contain any plan of correction, nor did Verizon comply by signing a written agreement. *See id.* Therefore, Verizon is still in violation of OAR 860-028-0120(1)(a). Because Verizon remains in violation for well over 60 days after its receipt of the Notice of Violation letter, the Commission should issue an order authorizing removal of Verizon's attachments from CLPUD's poles. *See* OAR 860-018-0180(3).

Dated this ___ day of November, 2004.

/s/ Charles M. Simmons______________
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CERTIFICATE OF SERVICE

I hereby certify that I served a complete and true copy of the foregoing **OPENING BRIEF** on the following persons:

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by mailing a copy thereof contained in a sealed envelope, with postage paid, and deposited in the United States Post Office in Newport, Oregon on the date set forth below.

Dated this 15th day of November, 2004.

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