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November 15, 2004

VIA FACSIMILE, E-MAIL & FEDERAL EXPRESS

Ms. Annette Taylor
Oregon Public Utility Commission
550 Capitol Street N.E., Suite 215
Salem, Oregon 97301

Subject: Docket No. UM 1087

Dear Ms. Taylor:

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

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DATED at Seattle, Washington this 15th day of November, 2004.

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

OPENING POST-HEARING BRIEF OF OREGON CABLE TELECOMMUNICATIONS ASSOCIATION

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I. INTRODUCTION

Although this case is superficially just a complaint to remove Verizon's lines from the poles of Central Lincoln PUD ("CLPUD"), in reality it is a critically important docket from a precedential standpoint. Procedurally, it seems unavoidable that the Commission will need to deal not just with CLPUD's requested relief, but also with much broader issues relating to pole attachments, including: just and reasonable rates, terms conditions, and practices; implementation of the non-discrimination requirements of Federal and state law; and the propriety of the practice of pole owners using the threat of exorbitant sanctions to coerce execution of unreasonable contracts. In so doing, the Commission must consider and balance the interests of pole owners, such as electric utilities and telephone companies and the interests of non-pole owner attachers, such as cable companies, as well as their respective customers.

As the record in this case illustrates, the issues between pole owners and attachers can be financially significant and contentious. This case will be the first OPUC case to be decided under ORS 757.282. As such, the determinations in this docket will likely guide future negotiations between pole owners and attachers, perhaps for years to come. If this case is properly decided, the guidance it provides will hopefully lead to less contentious, more efficient, and fairer negotiations for pole attachment contracts.

The Oregon Cable Telecommunications Association ("OCTA") appreciates the opportunity to participate in this ground-breaking docket. OCTA's interests appear largely, but not totally, aligned with those of Verizon in this docket.[1] OCTA believe it can bring a complementary perspective to the issues as well as ensure that the precedents set in this docket will not prejudice the interests of cable companies in future pole dockets and negotiations.

[1] OCTA expects that it disagrees with Verizon on the question of a pole "license" agreement versus a "joint use" agreement," as discussed below. OCTA will note any other nuanced differences or outright disagreements with Verizon's positions (if any) in its reply to Verizon's post-hearing brief.

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II. DISCUSSION

A. Legal And Policy Background

1. Pole owners have monopolies, which they have abused in the past.

Pole owners hold a monopoly over poles on which cable operators and Competitive Local Exchange Carriers ("CLECs") must erect their facilities. Local franchises, environmental restrictions, and economic barriers preclude cable operators and others from placing additional poles in areas where there are existing poles. Moreover, "in most instances underground installation of the necessary cables is impossible or impracticable. Utility company poles provide, under such circumstances, virtually the only practical physical medium for the installation of . . . cables."[2]

The U.S. Congress,[3] federal district and circuit courts,[4] the Federal Communications Commission ("FCC"),[5] and the Department of Justice,[6] have documented the

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[2] *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987).

[3] *See*, *e.g.*, 123 Cong. Rec. 1-135006 (1977) (remarks of Rep. Wirth, sponsor of Pole Attachment Act) ("The cable television industry has traditionally relied on telephone and power companies to provide space on poles for the attachment of CATV cables. Primarily because of environmental concerns, local governments have prohibited cable operators from constructing their own poles. Accordingly, cable operators are virtually dependent on the telephone and power companies. . . ."); 123 Cong. Rec. H16697 (1977) (remarks of Rep. Wirth) ("Cable television operators are generally prohibited by local governments from constructing their own poles to bring cable service to consumers. This means they must rely on the excess space on poles owned by the power and telephone utilities."); S. REP. No. 580, 95th Cong., 1st Sess. 13 (1977) ("Owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles."); H.R. REP. No. 721, 95th Cong., 1st Sess. 2 (1977) ("Use is made of existing poles rather than newly placed poles due to the reluctance of most communities, based on environmental considerations, to allow an additional duplicate set of poles to be placed.").

[4] *See*, *e.g.*, *United States v. Western Elec.*, 673 F. Supp. 525, 564 (D.D.C. 1987) (cable TV companies "do depend on permission from the Regional Companies for attachment of their cables to the telephone companies' poles and the sharing of their conduit space. . . . In short, there does not exist any meaningful, large-scale alternative to the facilities of the local exchange networks. . . ."), *aff'g in part, rev'd in part*, 900 F.2d 283 (D.C. 1990); *General Tel. Co. of Southwest v. United States*, 449 F.2d 846, 851 (5th Cir. 1971) (construction of systems outside of utility poles and ducts is "generally unfeasible").

[5] *See, e.g.*, *Twixtel Technologies, Inc.*, 5 F.C.C.R. 4547, 4548 (Com. Car. Bur. 1990), Letter from FCC Common Carrier Bureau at 4, (July 6, 1990) (basis of telco-cable cross-ownership rule is "the Commission's

(FOOTNOTE CONT'D)

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monopoly abuse of these essential facilities. One Congressman said that pole owners were in an "unholy alliance between the electric utility companies and the telephone companies" intent on limiting competition from cable.[7] Cable operators seeking to attach their facilities to the poles faced delays in installation, overcharges, restrictive tariffs forbidding competitive telecommunications, and efforts to force them into "lease-back" arrangements in which the pole owner would have sole control over the installation, maintenance, and operation of the cable attachments.[8]

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traditional concerns with carrier denial of access to essential poles and conduit"); as the FCC stated, "we know from experience that, as a practical matter, a CATV operator desiring to construct his own system must have access to those poles." *Better TV, Inc. of Dutchess Co. NY*, 31 F.C.C.2d 939, 956 (1971).

[6] *See, e.g.*, *United States v. AT&T*, No. 74-1698, Plaintiffs' First Statement of Contentions and Proof (D.D.C., filed Nov. 1, 1978) (Justice Department's cataloging of BOC dominance of pole and conduit facilities. "The cost of building a separate pole system was prohibitive, and many municipalities simply forbade this alternative").

[7] *Cable Television Regulation Oversight: Hearings Before the Subcomm. on Communications of the Comm. on Interstate & Foreign Commerce, Parts 1 & 2*, 94th Cong. (1976) ("*1976 Oversight Hearings*") at 822 (Congressman Van Deerlin).

[8] "Lease-back" arrangements provided for telephone company ownership and control of all aerial plant with the cable operator paying for "channel service" for delivering cable television programming to its subscribers over that plant as opposed to owning and deploying the coaxial cable plant itself. *See, e.g.*, *Communications Act Amendments of 1977: Hearings on S. 1547 Before the Subcomm. on Communications of the Senate Comm. on Commerce. Science, and Transportation*, 95th Cong. (1977)("S.1547 Hearings"); *1976 Oversight Hearings at 795-797*; S. Rep. No. 95-580, at 13 (1977); *Better TV, Inc.*, 31 F.C.C.2d 939, 967 (1971), *recon. denied*, 34 F.C.C.2d 142 (1972) (Independent operators "quickly took the hint about the lack of manpower to perform makeready work and accepted channel service rather than run the risk of having the competing channel service customer get such a head start as to make a grant of its request for a pole attachment agreement an empty and worthless gesture.") *Section 214 Certificates*, 21 F.C.C.2d 307, 323-29 (1970) (Cable systems "have to rely on the telephone companies for either construction and lease of channel facilities or for the use of poles for the construction of their own facilities."); *General Tel. Co. of California*, 13 F.C.C.2d 448, 463 (1968) (by control over poles, telco is in a position to preclude an unaffiliated CATV system from commencing service).

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2. Congress acted in 1978 to restraint pole owner abuses.

When negotiations failed and most state PUCs failed to intervene,[9] Congress passed the 1978 Pole Attachment Act[10] and gave the FCC an explicit mandate to regulate the rates, terms and conditions of pole attachments[11] and to provide a readily available forum for the resolution of pole complaints.[12] Pursuant to this authority, the FCC promulgated regulations to govern the pole rental rate and to address unreasonable pole practices.[13]

Although the Act permitted states to "certify" their jurisdiction and to directly regulate pole attachments, thirty-two (32) states left such regulation to FCC.[14] Those that do regulate pole attachment matters—such as Oregon—must stay within certain federal boundaries established by the Pole Act.[15] However, even with FCC and state pole regulation,

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[9] Protracted and expensive antitrust litigation was also recognized as an insufficient remedy to utility pole abuse. *See TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 462 F.2d 1256 (9th Cir. 1972); *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 617 F.2d 1302 (8th Cir. 1980); *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 49 R.R.2d 328, 1981-1 Trade Reg. Rep. (CCH) 63,944 (D.S.D. 1981) (cable operator eventually prevailed in antitrust litigation, but by that time, 12 years later, it was bankrupt).

[10] Pub. L. No. 95-234, 92 Stat. 35 (1978), *codified* at 47 U.S.C. § 224.

[11] 47 U.S.C. § 224(b)(1).

[12] S. Rep. No. 95-580, at 21 (1977), reprinted in 1978 U.S.C.C.A.N. 109, 129.

[13] *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order*, 68 F.C.C.2d 1585 (1978); *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, Second Report and Order*, 72 F.C.C.2d 59 (1979); *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, Memorandum Opinion and Order*, 77 F.C.C.2d 187 (1980); *In the Matter of Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 F.C.C.R. 4387 (1987); *In the Matter of Amendment of Rules and Policies Governing Attachment of Cable Television Hardware to Utility Poles, Memorandum Opinion and Order*, 4 F.C.C.R. 468 (1989). FCC regulations do not apply to railroads, electric or telephone coops or government-owned utilities. Some individual states (like Washington and Louisiana) may regulate coop poles.

[14] *See* Federal Communications Commission Public Notice, "States that Have Certified that They Regulate Pole Attachments," 7 F.C.C.R. 1498, 1992 FCC LEXIS 931 (Feb. 21, 1992).

[15] A state must satisfy §§ 224(c)(2) and (3) of the Pole Act to become certified.

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as pole owners began again to diversify into fiber and telecommunications, they repeated their prior abusive pole tactics.[16]

3. Congress again sought to curb pole owner abuses in the 1996 Act.

Congress responded again to monopolistic pole owner practices in the Telecommunications Act of 1996 ("1996 Act").[17] Congress' main purpose in the Telecommunications Act of 1996 was "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . ." Cont. Rep. on S. 652, 142 Cong. Rec. H. 1078 (Jan. 31, 1996). In order to accelerate facilities-based competition, Congress expanded the FCC's authority to insure that Section 224 pole protections covered not only cable operators but also telecommunications carriers.[18] The FCC promulgated regulations to enact these new provisions. The FCC adopted implementing guidelines "intended to facilitate the negotiation and mutual performance of fair, pro-competitive access arrangements," that allow for contractual variation, and that leave for adjudication the specific disputes that often arise in such matters.[19]

The 1996 Act also allowed electric utilities to enter the telecommunications market under rules ensuring fair competition. P.L. 104-104, § 103. Congress expanded the Pole Act to include *all* competitive cable and telecommunications carriers and to grant them a

---

[16] Texas Utilities, for example, imposed a penalty for fiber optic attachments that priced the bare attachments for a cable operator higher than the rental for dark (unused) fiber that the utility already had on the poles. *See Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, 6 F.C.C.R. 7099 (1991), *aff'd sub nom. Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993) (distinguished in *Gulf Power II*, 208 F.2d at 1277 on different grounds).

[17] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[18] Conference Report on S.653, 142 Cong. Rec. H. 1078, at *H1133-34 (Jan. 31, 1996).

[19] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499 ¶ 1143 (Aug. 8, 1996); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, *Order on Reconsideration*, 14 F.C.C.R. 18049 ¶ 5 (Oct. 26, 1999).

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right of pole access.[20] Utility adherence to these expanded access rules was the "quid pro quo" for allowing the utilities into the communications market. Pub. L. 104-104, § 103 (amending the Public Utility Holding Company Act, 15 U.S.C. § 79). Very recently—on October 28, 2004—the FCC adopted rules permitting electric utilities to offer broadband over power line ("BPL") services using their existing lines.[21] This makes the likelihood that power companies will, in addition to ILECs, become a competitor to cable companies in the near future even greater. It also increases the incentives that electric utilities might have to discriminate against cable companies in pole attachment rates, terms, and conditions.

4. Both PGE and Verizon must allow cable companies to attach to their poles under non-discriminatory rates, terms, and conditions.

Federal law governs, in part, regulation of pole attachment rates and practices by "utilities." "Utilities" are defined as follows:

> The term ''utility'' means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.

47 U.S.C. § 224. Under this definition, both PGE and Verizon are "utilities" for purposes of Section 224. Although states can take on an active role in regulating pole attachments if they meet certain conditions, the federal mandate of non-discrimination in the provision of pole attachments is an overarching requirement whether the FCC or a state PUC regulates:

> A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

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[20] Pub. L. 104-104 §§ 271, 703(2)(7), *codified at* 47 U.S.C. §§ 224(a)(4), 224(f), 251(b)(4). Access rights do not extend to incumbent LECs. 47 U.S.C. § 224(a)(5).

[21] *In the Matter of Amendment of Part 15 regarding new requirements and measurement guidelines for Access Broadband over Power Line Systems Carrier Current Systems, including Broadband over Power Line Systems*, ET Docket Nos. 04-37 and 03-104, Report and Order, Adopted October 14, 2004, Rel. October 28, 2004.

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Id., (f)(1). Similarly, Oregon's statute requires the PUC "to regulate in the public interest the rates, terms and conditions for attachments" to poles. ORS 757.273. Further, it requires that "all rates, terms and conditions made, demanded or received by any public utility or telecommunications utility [for attachments] shall be just, fair, and reasonable." *See also,* ORS 757.276 (similar provision with regard to attachments to poles of a "consumer owned utility"). Moreover, the Commission is required to "consider the interests of the customers of the licensee, as well as the interest of the customers of the . . . consumer-owned utility that owns the facility upon which the attachment is made." ORS 757.279. The Commission recognized the requirement of non-discrimination in pole attachment provisions in its recent Order No. 04 653. Order, *Portland General Electric Company v. Verizon Northwest, Inc.,* at 3, Docket UM 1096 (November 8, 2004).

B. <u>CLPUD's Proposed Rates Are Not Fair, Just, and Reasonable and Exceed the Rate Ceilings in State and Federal Law.</u>

1. <u>Oregon law establishes formulas that provide a range of "reasonable" attachment rental rates</u>.

ORS 757.282(1) establishes a broad range for rates to meet the "just and reasonable" standard set forth in the law:

> A just and reasonable rate shall ensure that the public utility, telecommunications utility or consumer-owned utility a recovery from the licensee **<u>of not less than</u>** all the additional costs of providing and maintaining pole attachment space for the licensee **<u>nor more than</u>** the actual capital and operating expenses, including just compensation, of the public utility, telecommunications utility or consumer-owned utility attributable to that portion of the pole, duct or conduit used for the pole attachment, including a share of the required support and clearance space in proportion to the space used for pole attachment above minimum attachment grade level, as compared to all other uses made of the subject facilities, and uses that remain available to the owner or owners of the subject facilities.

<u>Id</u>. (emphasis added). As the highlighted language indicates, § 282 establishes what can be termed a "floor" and a "ceiling" for compliant rates. The lowest permissible rate is equal to the incremental cost of providing and maintaining the pole attachment space for the licensee. Such

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incremental cost could be very low, perhaps even approaching zero. The highest permissible rate is calculated based on a share of the total cost of the pole. The formula, which is very similar to the ceiling provided for in the federal formula for pole attachment rates, is often referred to as the "carrying charge."[22] *See* 47 U.S.C. § 224(d)(1); *see also,* Exhibit Verizon/100 at 25, *et seq.*

The courts, including the United States Supreme Court, have concluded that the FCC formulas (upon which Oregon's formulas are based) provide just compensation at both the floor and the ceiling. *See, e.g., Alabama Power Co. v. FCC*, 311 F.3d 1357, 169-70 (11th Cir. 2002), *cert. denied*, 124 S. Ct. 50 (2003) (holding that, in the context of pole attachments, where FCC regulations provide for pole owners to be paid at least their marginal costs through make ready payments and an annual pole rent, the requirement of just compensation is satisfied). Indeed, the FCC "has concluded that its pole attachment formulas, together with the payment of make-ready expenses, provide compensation that *exceeds* just compensation." *Bureau Order*, ¶ 15 (citing *APCO Review Order*, ¶¶ 32-61) (emphasis added). In addition to the costs of providing access (make-ready), the Oregon formula provides for a pole rental based on all the costs associated with the operating and maintaining the pole, costs of the pole itself and a reasonable profit.

Oddly, the PUC's rule seemingly codifies the **ceiling** set forth in the statute as **the only** just and reasonable rate. OAR 860-028-0110(3) states: "A disputed pole attachment rental rate will be computed by taking the pole cost times the carrying charge times the portion of the usable space occupied by the licensee's attachment." (Emphasis added). OCTA is concerned that the Commission's rule regarding the appropriate attachment rate effectively writes out of existence the floor for rates as well as the entire range of lawful rates from the floor up to the ceiling. Moreover, by setting the rigid formula **at** the ceiling, the Commission

[22] At the FCC it is often referred to as the "fully allocated rate."

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may have precluded itself from taking into account "the interests of the customers of the licensee, as well as the interests of the customers of the public utility, telecommunications utility or consumer-owned utility that owns the facility. . . ," which is a consideration that the Commission is required to take by ORS 757.279(1).

Since Verizon seems content to follow the carrying charge formula set forth in the PUC rules, the OCTA will reserve this apparent inconsistency for argument another day. However, the fact that the "carrying charge" formula yields the maximum lawful rental rate under state and federal statutes makes it all the more important that the formula be properly applied and that extra, unwarranted charges such as those CLPUD seeks to impose be disallowed.

2. The impact of high pole attachment rates disproportionately burdens cable companies, contrary to the public interest.

As consumers increasingly rely upon cable and competitive providers for communications services and demand more advanced services, like Voice over Internet Protocol (or "VoIP"), a much more balanced and certain pole attachment environment is essential in Oregon if new services are expected to flourish. This is particularly true as electric companies are poised to become cable's next competitor, with the advent of broadband over power lines (or "BPL"). A key concern of the OCTA is that electric utilities in Oregon will exploit their monopoly control over poles, in combination with Oregon's sanctions regime, to achieve an unfair competitive advantage over OCTA's members as well as to cross-subsidize new competitive ventures.

High pole attachment rates have a disproportionately greater negative impact on cable companies, because cable companies do not own poles. Indeed, CLPUD effectly precludes cable companies from owning any joint use poles. TR 186-87, 191. Mathematically, as pole attachment rates increase, electric utilities always benefit, because they own the most poles. *See, e.g.,* Exhibit Verizon/112 at 1. Even if rates are reciprocal and they

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pay higher rents to ILECs, their greater costs to attach to ILEC poles are more than offset by the greater revenues they receive from ILECs and cable companies. When rates go higher, ILECs' pole costs are somewhat higher. But the higher costs are somewhat offset by higher rents the ILECs receive from cable companies. In contrast, cable companies bear the full brunt of higher pole attachment rates. Since cable companies are exclusively rent payors, there is no increased revenue from higher rents—only increased costs.

3. CLPUD's carrying charge calculations exceed the lawful per foot rate ceiling and CLPUD improperly attempts to double and triple charge pole attachers.

To call CLPUD's charges "over-reaching" would be charitable. The CLPUD's entire approach to joint pole users, including its charges, epitomizes the kinds of monopolistic abuses by pole owners that both state and federal law were intended to curb. First, CLPUD chose to establish its rental charge based on the carrying charge, which is the ceiling for its rates and the maximum it is allowed to charge pole attachers. TR 208. The law permits CLPUD to propose such a charge because, while it is at the upper limit, it is within the bounds of "reasonable." *See* ORS 757.282(1). Though the CLPUD started lawfully by first selecting the carrying charge method, it quickly got off track. Second, it committed a number of errors and omissions in calculating its carrying charge, all of which overstated the carrying charge. Third, it an effort to "double dip," CLPUD took its ***per foot*** carrying charge calculation and then applied it as a ***per attachment*** rental rate. Finally—as if double charging were not sufficiently overreaching—CLPUD imposes a smorgasbord of fees on top of the over-compensatory recurring rental charges.

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Indeed, the double charge, triple charge, and more[23] approach of CLPUD is so egregious that it can actually result in the joint users paying for more than ***entire*** cost of the pole, rather than a ***share*** based on a proration of the useable space:

> Q. Is it potentially possible that the communications attachers could end up paying for an entire – the entire cost of a pole and the electric utility wouldn't share any of the cost of the pole using Central Lincoln's approach?
>
> A. It's certainly feasible. It's also feasible that the telecommunications company could be paying more than what the cost of the pole is.

TR 271.

With regard to the first error by CLPUD—improper calculation of the carrying charge, OCTA will defer toVerizon, which provided an excellent analysis of the problems in Ms. Schmautz's testimony. *See generally,* Exhibit Verizon/100. OCTA expects that it will agree completely with Verizon's briefing on this issue as well.

The OCTA will address briefly CLPUD's improper effort to convert its per foot carrying charge into a per attachment rental rate. That effort is, quite bluntly, unlawful. The collection of rents on a per attachment basis results in more charges than CLPUD has poles. TR 201-03 and Exhibit. OCTA/6. Verizon's witness summed up how the CLPUD approach is double charging. TR 268-71.

There was actually some confusion regarding how CLPUD applies its charges. In response to discovery, CLPUD stated that pole attachment rental fees "are based on the number of points at which attachments are physically connected to the pole, not on the amount of space used by the attachments." Exhibit OCTA/5. Ms. Estep explained this in her testimony that that meant there are separate charges for every separate attachment, including

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[23] At every turn, CLPUD piles on extra charges. For example, CLPUD charges for risers and anchor attachments. Neither of those should require separate rental payments. See discussion at 13-14 and Note 25, *infra.*

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communications service "drops".[24] TR 49. However, later Mr. Wilson explained that CLPUD only bills a separate annual rental charge for a drop when the drop that is the only attachment to the pole. TR 196. However, CLPUD apparently does charge an application fee for every new service drop, regardless of where it is located on the pole. TR 203.

Mr. Wilson explained that there is no separate annual rental charge imposed for multiple attachments to a pole that all use the same "bolt." TR 197. Thus, a simple way of understanding CLPUD's rental scheme with regard to cables, drops, and guys is that every hole put in the pole results in a separate rental charge for a full foot of space, regardless of the amount of space used. *See generally* TR 196-201. However, CLPUD also charges annual rental for an anchor attachment, for risers, and for equipment, whether it is located in the rented space or in the ground space, which is considered not part of the usable space of the pole.

Cable plant is "assumed" to occupy one foot, but sometimes uses more. TR 204. One foot is considered the "best practice" for cable. TR 205. As an example of the fallacy of the CLPUD's charging method, suppose a cable company has a cable at a pole where the route turns 90°, and two bolts, six inches apart are required to support the two cables. *See* TR 198-99. One or two down guys to anchors could also be required. CLPUD would charge a full annual rental for one foot for each of the two bolts for the cables, resulting in a double charge for the six inches of space actually used by the cable company (or one foot of "assumed" space). If for some reason the down guys could not be attached to the same bolts, there would be additional full one foot rental charges for each of the two down guys. If the two down guys could be attached to the same bolts as the cables, there would not be extra charges for attachments to the pole, but CLPUD would charge $3.71 each for attachments to the anchors themselves at the ground. TR 201; Exhibit CLPUD/18 at 3. If there were any

[24] A drop is the wire or cable from the pole or line on the public right-of-way to the house, office, or other customer premise.

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equipment attached to the pole, it would be charged at the full rate if it were in the communications one foot or the "administrative rate" of $3.71 if it were in the ground space. *Id.* Further, if there were risers, for example to support underground service "drops" to nearby residences or businesses, each of those would be charged at $3.71.[25] TR 199-200.

Thus, in this example, CLPUD could easily be charging up to than $39.35[26], ***or more,*** even though the cable company would be using less than one foot. Based on an "assumed" one foot of use, the maximum rate allowed under the statute in this example should be $10.40.[27] Thus, CLPUD's charge is almost 400% greater than the law allows.

As Ms. Schmautz explained, CLPUD's charging method totally defeats the purpose of the formula set forth in the statute and greatly exceeds the maximum allowable charge for pole attachments under both state and federal law. Exhibit Verizon/100; TR 268-71. The reason is that everything associated with the pole, including the space used on the pole by the various attachments, the increased maintenance and replacement costs resulting from the holes drilled through the pole, the pole anchor itself, the increased maintenance cost on the pole anchor, the costs of administration, as well as any other cost, are all included in the carrying charge formula. *Id.* The statute ensures that all such costs are included and then determines the maximum that can be allocated to cable companies on a per foot basis. *See* ORS 757.282(1).

Even putting aside, for sake of argument, the problems in the CLPUD's calculation of the $10.40 rate, that is the maximum that should be charged to the cable company in the example above. Indeed, given the multiple charges that CLPUD imposes, it is

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[25] CLPUD charges separately for risers. TR 185, 199-200. The riser charge is one-third of the per foot rate. TR 200. There should not be a separate riser charge because the communications riser is in the ground space of the pole, which is considered non-usable. TR 185-86. Moreover, unlike an attachment in the communications space, the riser space in not exclusive. It can be used simultaneously for power, telephone, and cable. TR 186.

[26] Two pole attachments, plus two anchor attachments, plus equipment in the ground space, plus two risers.

[27] At the 2003 rates. *See* CLPUD/8 at 3.

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quite easy to imagine a situation similar to the example above that, with the addition of similar facilities attached by a telephone company, would result in the telephone company and cable company more than paying for the entire cost of the pole and the PUD getting a "free ride."

4. CLPUD's application fees are unlawful.

An attaching party may not lawfully be assessed administrative surcharges. One of the central theories underlying pole rate regulation is that the carrying charge formula compensates the pole owner for the annual costs it incurs in carrying the pole as an asset. All administrative costs are reflected in the carrying-charge component of the pole-rental formula. Therefore, contract set-up charges, undefined paperwork processing charges, line-extension fees, *etc.*, are prohibited. *Texas Cable and Telecommunications Ass 'n v. Entergy Services*, Order 14 F.C.C.R. 9138 (CSB 1999); *Texas Cable and Telecommunications Ass 'n v. GTE Southwest, Inc.*, Order, 14 F.C.C.R. 2975 ¶ 32 (CSB 1999). There should be no charge associated with pole applications because the pole owner's administrative costs related to pole attachments are included in state and federal pole rental formulas. *Id.*

The fundamental problem with CLPUD's imposition of fees on top of rental charges based on the carrying charge formula is that the carrying charge itself reflects the ceiling, or maximum permissible, rate that can be charged to the joint uses. The fees, on the other hand, are an attempt (albeit imprecise and unsupported by any study or analysis) to recover the incremental costs of CLPUD's pole attachment program. Such incremental costs are the ***floor*** for permissible rates. *See* ORS 757.282(1). Rather than establishing a rate somewhere ***between*** the rate floor and ceiling, CLPUD has effectively ***added*** the floor rate to the ceiling rate. The net result is a scheme of charges that far exceeds what the law allows.

C. CLPUD Imposes Other Contract Terms and Conditions That Are Unreasonable.

Apart from excessive charges, CLPUD imposes other terms and conditions that unnecessarily and unduly burden pole attachers. OCTA will address two particularly

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troublesome examples. The first is that CLPUD requires the pole attachers to submit detailed engineering data for service drops. TR 174; Exhibit OCTA/4. The only reason that engineering should be required would be if it were necessary to calculate load data. *See* TR 174. However, as the industry has agreed, the addition of service drops on an existing pole attachment point or a midspan drop should not even require notification to the pole owner, let alone permitting and engineering. Exhibit OCTA/9, column 4.

A communications drop is typically lower on the pole, smaller, and lighter than the electric facilities, all of which contribute to very low stresses on the pole. *See* TR 179. CLPUD's engineering witness, Mr. Wilson, was not aware of any instance where a pole broke due to the stress of a drop. TR 175. Moreover, CLPUD's witness Ms. Estep was not aware of a single instance where the calculated load caused by a drop required a guy wire to support it. TR 55-56.

A related condition that CLPUD unnecessarily imposes is the departure from the standardized forms and interface the industry uses to apply for permission to make pole attachments and to notify of pole attachments. The ***national*** industry standard is the NJUNS form. *See* TR 44. This form for notification and permitting of attachments is designed to be efficient by standardization and electronic submission. *See* TR 44-45. The NJUNS form does not require that load data be submitted for drops, which is a non-standard requirement that the CLPUD decided to adopt. So, CLPUD developed its own form, which it requires in addition to the NJUNS form. TR 52-54.

CLPUD should not be allowed to require its own separate, specialized form for permitting and notification regarding pole attachments. Customized or "one off" application procedures are extremely inefficient in an industry where attachers and pole owners alike deal with dozens, hundreds, or potentially even thousands of other parties regarding attachments to millions of poles. Having to keep track of and comply with specialized requirements of multiple pole owners is inefficient and not justified by the record in this case. Plus, in this case,

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CLPUD imposes its form on top of the NJUNS form, thus more than doubling the workload of the pole attacher.

D. Verizon's Request For a "License" Form of Agreement Should Be Rejected.

As used in this docket, a joint use agreement refers to a single reciprocal agreement that covers the attachment by two parties to each others' poles. TR 187-88, 267. CLPUD proposes two agreements in which each party licenses the other to use its own poles. TR 268. OCTA supports CLPUD on this issue.

It is very typical that cable companies do not own poles. TR 186, 268; Exhibit OCTA/6, Response 8(b). Thus, cable companies are incapable of obtaining a joint use agreement with pole owners, as Verizon's witness admitted. TR 268. *See also* TR 188. As a practical matter, if Verizon were to obtain a license agreement, rather than a reciprocal joint use agreements with CLPUD, that would give Verizon a huge advantage that cable companies do not, and cannot enjoy.

As the record in this case reflected, 13 out of CLPUD's 14 joint users signed the form of agreement that CLPUD under the threat of sanctions that the CLPUD created by terminating their contracts.

> Q Were you in the room when we talked to Mr. Gintner about the cancellation of – excuse me, the termination of Charter's contract and the consequence [*sic,* should be "consequent"], threat, of six and three-quarters million dollars in sanctions?
>
> A Yes.
>
> Q Do you know how many of these 13 entities that have signed pole license agreement were under the same threat of sanctions?
>
> A Every one.

TR 214. Only Verizon was able to hold out against CLPUD's purported termination of its attachment agreement and risk litigation with the PUD. There could be several reasons for this, but one clear advantage that Verizon had was that its prior agreement with the PUD was in the form of a mutual license. *See* Exhibit Verizon/102. Thus, as a practical matter, when the

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CLPUD terminated Verizon's agreement, the CLPUD effectively terminated its ***own*** license to use a thousand of Verizon's poles. Exhibit Verizon/112 at 1. As is discussed below, the threat of sanctions, along with the threat of dismantling of a network due to the lack of a pole attachment agreement is a serious problem for all users of poles. Sanctions, in particular, can be used as leverage.

If Verizon succeeds in obtaining a joint use agreement, CLPUD cannot terminate Verizon's agreement without also exposing itself to counterclaim for sanctions by Verizon. The cable companies cannot have that counter veiling threat. Accordingly, the PUC should approve CLPUD's request for reciprocal license agreements.

E. CLPUD Has Abused The PUC's Sanctions Rule And The Commission Should Send A Strong Message To Pole Owners Against Abuse of Sanctions.

The constant threat of excessive utility sanctions shadowing communications companies, creates a hostile market overhang to cable companies efforts to deploy and innovate. Today's cable operators provide many services beyond the predominantly "entertainment" services offered in the early days of cable television. Many Oregon residents rely on cable operators to receive important services like news and information programming, high-speed data and important new Internet-Protocol services, including, eventually voice services.[28] But because communications attachers, like OCTA's members, have been (and will

[28] Contrary to Staff's characterization of the cable industry as simply "a premium entertainment service," White Paper at 7, federal rules require cable television operators to carry Emergency Alert System audio and video signals. Cable systems are the primary delivery system for local noncommercial television broadcast states (generally, public broadcast stations) and local commercial television stations (generally, local network affiliates and independent stations). Certificates of Public Good require cable operators to carry local public, educational and governmental access channels, over which citizens express views, schools transmit distance learning and citizens watch their City Council in action, as well as the United States House of Representatives and Senate over the cable-industry-funding C-SPAN networks. The shared responsibility between cable and broadcasters for the nation's emergency alert system is further evidence that the nation has come to rely upon cable for far more than entertainment.

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continue to be) forced to divert limited resources to pay unfair penalties and other unreasonable costs, facilities-based communications competition and innovation may suffer, along with the competitive goals of the Commission and the interests of Oregon's consumers.[29]

This case is a classic example of the risks and abuses of the sanctions regime in Oregon. In this case, the CLPUD terminated Charter Communication's pole attachment agreement, thereby creating a "violation" by Charter for having attachments on CLPUD's poles without a contract. TR 106-07. CLPUD then threatened to pursue sanctions from Charter between $6.7 million to $10 million if Charter refused to sign CLPUD's proposed contract. Exhibits OCTA/1-3 and TR 107-08. This scheme to coerce Charter into signing an unfair, unreasonable, unlawful, and grossly overreaching contract was not limited to Charter. Indeed, all 14 of CLPUD's attachers (including Verizon) were threatened with sanctions in the same way as was Charter. TR 214-15.

It is important to emphasize that because the sanctions give electric utilities increased and untoward leverage over attachers—although pole attachment regulation is supposed to temper not enhance such leverage[30]—their continued and threatened application

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[29] "In 1985, the Legislative Assembly adopted a goal for the State of Oregon 'to secure and maintain high-quality universal service at just and reasonable rates for all classes of customers and to encourage innovation within the industry by a balanced program of regulation and competition.'" THE STATUS OF COMPETITION AND REGULATION IN THE TELECOMMUNICATIONS INDUSTRY, PUBLIC UTILITY COMMISSION OF OREGON, January 2004, at 1-4 (citing ORS 759.015).

[30] *See, e.g., FCC v. Florida Power Corp*., 480 U.S. 245, 247 (1987) (finding that Congress enacted the Pole Attachment Act "as a solution to a perceived danger of anticompetitive practices by utilities in connection with cable television service."). *See also National Cable and Telecom*. Ass'n v. *Gulf Power*, 122 S. Ct. 782, 784 (2002) (finding that cable companies have "found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. . . . Utilities, in turn, have found it convenient to charge monopoly rents."); *Alabama Cable Telecomm Ass'n v. Alabama Power*, 15 FCC Rcd 17346 at ¶ 6 (2000) ("By conferring jurisdiction on the Commission to regulate pole attachments, Congress sought to constrain the ability of telephone and electric utilities to extract monopoly profits from cable television systems operators in need of pole space."); Common Carrier Bureau Cautions Owners of Utility Poles, 1995 FCC LEXIS 193, *1 (Jan. 11, 1995) ("Utility poles, ducts and conduits are regarded as essential facilities, access to which is vital for promoting the deployment of cable television systems.").

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violates the Commission's mandate to ensure that "[a]ll rates, terms and conditions made, demanded or received by any . . . utility for any attachment . . . shall be just, fair and reasonable."[31]

Ultimately, it may be that the Commission will wish to change its sanctions rules to temper this unfair leverage that electric utilities can exercise over cable companies and other joint users. Such relief is likely beyond the scope of this proceeding. However, in this docket the Commission can begin to send a message to electric utilities and other pole owners that sanctions authority should not be abused. In particular, CLPUD should be denied all requests for sanctions in this docket. Further, as a matter of policy the Commission should declare that sanctions will be denied when the reason for sanctions is that the attacher refuses to sign an agreement that is unlawful or unreasonable.

III. CONCLUSION

Based on the foregoing and Verizon's arguments, the Commission should find that CLPUD's pole attachment rates, terms, conditions, and practices are unfair, unjust, and unreasonable. The Commission should establish fair, just, and reasonable rates, terms, conditions, and practices that CLPUD should charge, observe, and follow. In particular, CLPUD's per foot rental rate should be reduced as the evidence indicates, CLPUD should charge by the space used and not per attachment, there should be no separate charges for risers and anchor attachments, CLPUD should not be allowed to charge any administrative fees, CLPUD should require only the NJUNS form for permits and notifications for attachments, and CLPUD should not be allowed to assess any sanctions against Verizon. Finally, Verizon's

[31] ORS § 757.273.

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request for a joint use agreement should be denied. Instead, CLPUD and Verizon should enter into reciprocal licence agreements.

Respectfully submitted this 15th day of November, 2004.

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