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February 6, 2009

Chairman Lee Beyer
Commissioner John Savage
Commissioner Ray Baum
Public Utility Commission of Oregon
550 Capitol Street, N.E., Suite 215
Salem, Oregon 97301-2551

Re: Tillamook People's Utility District ("TPUD") – Petition for Declaratory Ruling (DR 42), TPUD's Comments in Support

Dear Chairman Beyer and Commissioners Savage and Baum:

Tillamook People's Utility District ("TPUD") hereby submits the following Comments in Support of the Petition for Declaratory Ruling ("Petition") that TPUD filed with the Public Utility Commission of Oregon ("Commission") on December 23, 2008.

TPUD's Petition asked the Commission to declare, on an expedited basis, that it is just, fair and reasonable to allocate to Charter Communications, Inc. ("Charter") certain costs incurred by TPUD to enable Charter to correct safety violations caused by Charter on utility poles owned by TPUD. TPUD's Petition sought to resolve an impasse that threatened the timely correction of Charter's violations on TPUD's system in the least burdensome manner possible.

As explained below, the Declaratory Ruling process is by far the least burdensome method to resolve this impasse, and only three undisputed facts need to be assumed for the Commission to make its ruling.

A. It Is Appropriate To Resolve This Simple But Critical Issue In A Declaratory Ruling Proceeding

The Charter violations that require TPUD to replace poles and rearrange facilities are costly to correct.¹ They are far more costly than standard corrections that Charter can correct on its own. Resolving this major issue of who is responsible for these costs will enable the parties to move forward to correct Charter's violations.

¹ As explained below, Charter offered for settlement purposes to pay for TPUD rearrangement costs but previously refused to pay for those costs. The rearrangement costs associated with correcting Charter safety violations amount to approximately one-tenth of the much higher costs of replacing poles to correct such violations.

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The facts necessary for the Commission to rule on TPUD's Petition are not in dispute. Charter does not contest that:

- (1) Charter has a number of safety violations on TPUD's poles;
- (2) Charter claims that in order to correct some of these violations, TPUD must replace poles with taller poles or rearrange existing TPUD facilities; and
- (3) The parties have disputed who should pay for such replacement and rearrangement work based upon different interpretations of their "Joint Use Agreement," Oregon's pole attachment statute and the Commission's regulations.

Given these undisputed facts, the Commission can resolve this cost recovery issue without undertaking any factual inquiry simply by affirmatively answering one or more of the following questions of law, each of which was raised in TPUD's Petition:

- (1) Does ORS § 757.271(2) require Charter to reimburse TPUD for these replacement and rearrangement costs?
- (2) When a dispute such as this comes before the Commission, is OAR § 860-028-0100(5) deemed to be "presumptively reasonable?"
- (3) Does OAR § 860-028-0100(5) require Charter to reimburse TPUD for these replacement and rearrangement costs?
- (4) Is there a Commission policy, consistent with ORS § 757.271(2), that pole owners should be reimbursed for correcting pole occupant safety violations?
- (5) To the extent the Commission looks to Federal Communications Commission regulations for guidance, do those regulations require pole owners to be reimbursed for correcting pole occupant safety violations?
- (6) Is Charter's interpretation of the Agreement contrary to other express terms of the Agreement?
- (7) If there are two different interpretations of the Agreement, can Oregon statutes and rules be used to resolve the ambiguity?
- (8) Regardless of the terms of the Agreement, does ORS § 757.271(2) require Charter to reimburse TPUD for these replacement and rearrangement costs?
- (9) Does OAR § 860-028-0110(5) allow TPUD to require Charter to prepay these replacement and rearrangement costs?
- (10) If the Commission determines that TPUD must incur these pole replacement and rearrangement costs, can TPUD recover those costs as part of Charter's annual pole attachment rental rate?

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The Commission's Declaratory Ruling process is designed to remove uncertainty surrounding legal issues,² and the Commission may issue a declaratory ruling "with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by the commission."³ That is precisely what TPUD's Petition requests – TPUD and Charter disagree on the applicability of Oregon statutes and rules to an ambiguous pole attachment agreement.

TPUD's Declaratory Ruling proceeding requires no factual findings and would resolve the single, critical legal issue that divides the parties. It may be possible for this dispute to be resolved as part of a large Complaint proceeding, but this limited legal issue is much better suited for a Declaratory Ruling proceeding.

In a Declaratory Ruling proceeding, the issues are limited to those raised in the Petition. A Complaint proceeding, however, allows parties to raise any and all additional, tangential issues that they believe may be "pertinent" to the proceeding.⁴ As explained below, in a Complaint proceeding, both Charter and TPUD are likely to raise a large number of these additional issues.

Additional issues raised in a Complaint proceeding are likely to be fact-intensive and secondary to the central issue that divides the parties, which is who should pay for the pole replacement and rearrangement costs necessary to correct Charter's violations. These secondary, fact-intensive issues will consume the Commission's limited resources, take much longer to resolve, and delay the correction of Charter's safety violations.

This waste of Commission resources is unnecessary. Following the Commission's resolution of this central legal issue, the parties will be much more capable of resolving the secondary issues pertaining to Charter's safety violations, making it possible for all parties to avoid a full-blown complaint proceeding.

B. Charter's Comments In Opposition Are Not Persuasive

On or about January 21, 2008, Charter submitted "Comments in Opposition" to TPUD's Petition ("Charter's Comments"). Charter's Comments claim that a Declaratory Ruling docket should not be opened because:

² *Portland General Electric Company*, Order No. 93-117, 145 PUR 4th 113 (Or. P.U.C. 1993).

³ ORS § 756.450. *See also Portland General Elec. Co.*, Order No. 00-159, 2000 WL 562285, 1 (Or.P.U.C.); *Oregon Energy Co. LLC*, Order No. 96-137, 1996 WL 361449, 1 (Or.P.U.C.).

⁴ ORS § 756.512(1) (an answer can "tak[e] issue on such parts of the complaint as the defendant desires and [set] forth such additional matter as shall be pertinent to the matter in controversy. Such additional matter shall be deemed denied without the filing of any other pleading by the complainant.").

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- (1) TPUD is seeking to amend the Agreement and cannot do so in a Declaratory Ruling proceeding;
- (2) A Declaratory Ruling proceeding may not be used to settle a contract dispute;
- (3) Declaratory Rulings are binding only upon the Petitioner and the Commission;
- (4) There are a number of issues requiring factual determinations that cannot occur in a Declaratory Ruling proceeding;
- (5) On the merits, TPUD's Petition is without legal basis.

As explained below, none of these claims has merit.

1. TPUD Is Not Seeking To Amend Its Agreement

Charter claims that TPUD's Declaratory Ruling proceeding is an attempt to amend the Agreement without following proper procedures.⁵ According to Charter, if TPUD wanted to amend its contract, it should have negotiated for such an amendment and then filed a Complaint if the parties were unable to agree.⁶ Charter speculates that TPUD did not file a Complaint because TPUD knew the relief to be offered in a Complaint proceeding would be prospective only and not retroactive.⁷

These claims are founded on the mistaken presumption that TPUD is trying to amend its Agreement. That is not the case. Instead, as explained above, TPUD is asking the Commission to determine that the Agreement contains conflicting provisions and to apply Oregon statutes and regulations to that ambiguous Agreement. Asking the Commission to interpret the Agreement is, of course, completely different than asking the Commission to amend it.

TPUD agrees that, after this critical safety violation issue is resolved, the parties should attempt to renegotiate the Agreement. The Agreement mistakenly assumes that Charter is a pole owner, it contains provisions that are at odds with one another, and it does not fully incorporate the Commission's pole attachment regulations.

Prior to undertaking the time-consuming task of renegotiating a new Agreement, TPUD cannot be faulted for trying to resolve this fundamental issue that involves the correction of Charter safety violations. TPUD expected Charter to eventually concede that the existing agreement is at best ambiguous, and that the Agreement should be interpreted consistent with the Oregon pole attachment statute, the Commission's pole attachment regulations, the Commission safety violation correction policy, FCC regulations, other express provisions of the Agreement,

⁵ Charter's Comments, pp. 1-3, 6, 7, 9, 10.

⁶ *Id.* at 2, 6-10.

⁷ *Id.* at 2.

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Charter's own course of dealings, standard industry practice, and basic common sense. Instead, Charter's unreasonable position has not changed.⁸

As for Charter's repeated claim that TPUD is avoiding Complaint proceedings because Complaint proceedings offer only prospective, not retroactive, relief,² TPUD is unaware of any such limitation. Quite the opposite, TPUD would fully expect that, in a Complaint proceeding, the Commission would order reimbursement relief for TPUD's correction of Charter's violations, in accordance with the Commission's Rules. Mandatory OAR § 860-028-120(5)(b) allows TPUD to correct those Charter violations that are not subject to a Plan of Correction and that have not been corrected within 180 calendar days of receiving TPUD's Notification of Violation. In such a case, Charter then would be required to "reimburse the pole owner for the actual cost of correction." Should Charter fail to reimburse TPUD in accordance with this mandatory rule, TPUD would fully expect the Commission to require Charter, following a Complaint proceeding, to reimburse TPUD for any such unpaid amounts.

2. Interpreting An Ambiguous Contract In Accordance With Oregon Statutes and Regulations Is Well Within The Commission's Declaratory Ruling Jurisdiction

Charter categorizes this dispute as a simple contract dispute and claims, without support, that the Declaratory Ruling process may not be used to resolve a contract interpretation dispute.¹⁰

Charter is mistaken for several reasons. This matter is not simply a contract dispute. Instead, TPUD is asking the Commission to apply its rules to the conflicting provisions of the Agreement and to allocate the costs incurred in correcting Charter's safety violations accordingly. In other words, the Commission is being asked to issue a declaratory ruling "with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by the commission."¹¹ This matter is precisely the type of dispute that the Declaratory Ruling statute envisions.

Even if this matter were simply a contract dispute, the Commission would still be able to interpret the Agreement as part of a Declaratory Ruling proceeding, as it has in other proceedings.

⁸ As explained below, Charter apparently has reconsidered its position to pay for the rearrangements necessary to correct its violations, but not for much more expensive pole replacements.

² Charter's Comments at 2.

¹⁰ *Id.* at 2, 6-7.

¹¹ ORS § 756.450. See also *Portland General Elec. Co.*, Order No. 00-159, 2000 WL 562285, 1 (Or.P.U.C.); *Oregon Energy Co. LLC*, Order No. 96-137, 1996 WL 361449, 1 (Or.P.U.C.).

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For example, in previous Declaratory Ruling proceedings, the Commission interpreted a power sales agreement to rule that a Petitioner's sales of electricity were sales for resale and subject to FERC's exclusive jurisdiction,¹² and later interpreted an option agreement and an operating agreement to make a similar determination.¹³

The contract interpretation the Commission must perform is minimal in any event. The Commission must simply determine, as a legal matter, that the Agreement contains conflicting provisions with respect to whether TPUD should be reimbursed for the correction of Charter's safety violations. Once that legal determination is made, the Commission can apply its statute, regulations and public policy to reach a just, fair and reasonable resolution of these conflicting provisions.

3. A Declaratory Ruling Would Provide Guidance to Both TPUD and Charter

Charter claims a Declaratory Ruling by the Commission would be binding only upon the Commission and TPUD.¹⁴

A Declaratory Ruling in this proceeding would apply the Commission's statutes and rules to the ambiguous Agreement of both TPUD and Charter. By explaining the rights of both TPUD and Charter, Charter would be in no position thereafter to refute TPUD's reliance upon that ruling. As a result, even if Declaratory Rulings were somehow technically "binding" only upon TPUD, the ruling in effect would resolve this issue for both TPUD and Charter.¹⁵

4. There Are No Factual Issues To Be Resolved In This Proceeding

Charter claims that TPUD has tried to "misrepresent" Charter's positions and to "conceal the lengthy background of the parties' dispute and other facts unfavorable to its Petition."¹⁶ Charter claims that several of TPUD's statements are "disputed, as well as misleading," and

¹² See, *Re Hermiston Generating Company, L.P.*, DR 12, Order No. 94-1570 (Or. P.U.C. Oct. 21, 1994).

¹³ See, *Re Hermiston Generating Company, L.P.*, DR 16, Order No. 96-141 (Or. P.U.C. Jun. 4, 1996).

¹⁴ Charter's Comments, p. 8.

¹⁵ This conclusion is consistent with the Commission's position that a final declaratory ruling issued by the Commission can be relied upon by third parties with similar facts. See, *In the Matter of the Petition of NW Natural Gas Company for a Declaratory Ruling Pursuant to ORS 756.450 Regarding Whether Joint Bypass to Two or More Industrial Customers Violates ORS 758.400 et seq.*, DR 23 (on recon.), Order No. 01-719, p. 10 (Or. PUC 2001). (Other entities with similar facts may rely upon the Commission's declaratory ruling order).

¹⁶ Charter's Comments at 3.

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cannot form the basis of any Commission decision.¹⁷ Charter claims that “critical, relevant facts” are missing from TPUD’s allegations and that relying solely upon TPUD’s facts would create a “gross injustice.”¹⁸

These claims have no merit. As explained above, TPUD’s Petition is based entirely upon three simple, undisputed facts, and can be resolved by assuming the accuracy of these undisputed facts:

- (1) Charter has a number of safety violations on TPUD’s poles;
- (2) Charter claims that in order to correct some of these violations, TPUD must replace poles with taller poles or rearrange existing TPUD facilities; and
- (3) The parties have disputed who should pay for such replacement and rearrangement work based upon different interpretations of their “Joint Use Agreement,” Oregon’s pole attachment statute and the Commission’s regulations.

Charter concedes that it has some safety violations on TPUD’s poles. The exact number does not matter; it only matters that “some” exist. Charter also concedes that to correct some of these violations, TPUD must replace poles with taller poles or rearrange existing TPUD facilities. Again, the exact number of these violations does not matter.

Charter also recognizes that the parties have disputed who should pay for such replacement and rearrangement work based upon different interpretations of the Agreement, the pole attachment statute and the Commission’s regulations.

It appears that Charter has reversed its position and now believes that TPUD is entitled after all to recover at least the relatively minor “rearrangement” costs necessary to correct Charter’s violations. Charter’s new position is expressed in its Comments, which state that “Charter agreed it would pay TPUD’s rearrangement costs over 5 months ago.”¹⁹

This “agreement” by Charter to pay TPUD’s rearrangement costs was in reality part of an “offer” by Charter regarding the correction of Charter’s violations,²⁰ and represents a complete reversal from Charter’s earlier legal position that the Agreement does not require Charter to

¹⁷ *Id.*

¹⁸ *Id.* at 9.

¹⁹ *Id.*

²⁰ See the letter cited in Charter’s Comments at n.29, which lists this “agreement” to pay rearrangement costs are part of a “Charter Proposal” to correct its safety violations.

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reimburse TPUD for any rearrangement costs at all.²¹ In any event, if Charter wishes to concede at this point that Charter must reimburse TPUD for the rearrangement work necessary to correct Charter's safety violations, TPUD will welcome that concession as part of this Declaratory Ruling proceeding.

5. Investigating Irrelevant Factual Issues Pertaining To The Charter/TPUD Relationship Would Waste The Commission's Resources

For numerous reasons spanning several years, TPUD considers Charter's actions (and inactions) with respect to the correction of Charter's safety violations on TPUD's system to be reprehensible. A large amount of factual information supports this belief. None of this information, however, has any relevance to the narrow legal issue raised by TPUD's Petition, and for that reason were not included as part of that Petition.

The issues that Charter claims are important to raise likewise have no relevance. For example, it is not necessary for the Commission to determine why the parties entered into a "Joint Use Agreement," or why TPUD never terminated it.²² All that is relevant is that the Agreement says two different things about who should pay for the disputed pole replacement and rearrangement costs. That is a legal determination that the Commission can easily make.

It is not necessary to determine whether Charter has agreed to reimburse TPUD for rearrangement costs.²³ Instead, it is only necessary to recognize that Charter has previously disputed such payments, so that resolving that issue will provide the parties with certainty regarding that issue going forward.

It is not necessary to determine the extent to which Charter has disputed some of the thousands of violations reported by TPUD, the extent to which TPUD's inspection data may be faulty and unclear, the amount of money Charter has spent to correct its safety violations, or whether other parties reimburse TPUD for such expenses.²⁴ It is only necessary to recognize that among the thousands of safety violations reported by TPUD: (1) there are some that Charter does not dispute; (2) some of these require TPUD to replace poles and rearrange facilities; and (3) the parties have disagreed about who should bear the replacement and rearrangement costs.

²¹ See, e.g., Charter's Comments at n.11, in which Charter quotes its own February 12, 2008 letter that references "the parties' long-unresolved dispute involving cost allocations for pole replacements and *power facility rearrangement work*." (Emphasis added).

²² See Charter's Comments at 9.

²³ See *id.*

²⁴ See *id.*

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In a Complaint proceeding, TPUD would take issue with Charter's version of these and other facts. TPUD would be prepared, as Charter claims it should, to "defend its other actions during the parties' 3 year-long dispute under cross-examination."²⁵ TPUD would add many of its own facts as evidence of Charter's deplorable behavior, and TPUD would require Charter to provide a similar comprehensive defense. In addition, the parties may very well find themselves analyzing the thousands of violations reported by TPUD to verify who caused what violation and to determine the (very small) extent to which TPUD's Notices of Violation may have been inaccurate.

These and other unanticipated, fact-intensive issues could be raised in a Complaint proceeding, but they are all irrelevant to TPUD's Declaratory Ruling request, as explained above. The list of potential issues that Charter already has identified would alone expand this proceeding far beyond the simple legal issues raised by TPUD's Petition and would result, as explained above, in a considerable waste of the Commission's and the parties' resources. As explained above, once the critical reimbursement issue raised in TPUD's Petition is resolved, the parties can much more easily resolve the secondary issues pertaining to Charter's violations.

Charter claims that if the Commission assumes a set of facts that do not mirror a real world set of facts, Charter will be harmed.²⁶ This claim is mistaken. The three relevant facts upon which TPUD's relief is based do, in fact, mirror the real world, and Charter does not dispute them. Indeed, even if these facts were disputed, Charter could not be harmed. The Commission has made clear that petitioners like TPUD may only enforce a favorable declaratory judgment against another entity if the real world set of facts under which the petitioner seeks to enforce the Commission's ruling mirror the facts relied on by the Commission in reaching its judgment.²⁷

²⁵ See *id.* at 3.

²⁶ *Id.* at 8-9.

²⁷ *In the Matter of the Petition of NW Natural Gas Company for a Declaratory Ruling Pursuant to ORS 756.450 Regarding Whether Joint Bypass to Two or More Industrial Customers Violates ORS 758.400 et seq.*, DR 23 (on recon.), Order No. 01-719, p. 3 (Or. PUC 2001). This case was cited by Charter to support its claim of potential harm. See Charter's Comments at 8. Although this case involved disputed facts, the Commission issued a ruling anyway based upon the assumed set of facts presented by the petitioner (as required by statute), and issued a ruling without assuming the accuracy of any of the factual claims. See also Charter's Comments at 8 and n.25, in which Charter itself recognizes that Declaratory Rulings may be based upon alleged, hypothetical, or actual facts (citing *In re Portland General Elec. Co.*, Order No. 00-159, 2000 WL 562285, at 3 (Or.P.U.C.)).

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6. TPUD Will Respond To Charter's Arguments On The Merits Of TPUD's Petition After This Proceeding Has Been Docketed

Charter claims that: (1) TPUD's Petition should be denied because it fails on the merits;²⁸ (2) Charter's potential bankruptcy is irrelevant;²⁹ (3) a hearing is required before the Commission may modify Charter's annual pole rental payments;³⁰ and (4) if the Commission grants TPUD's Petition, it should do so on a prospective basis only.³¹

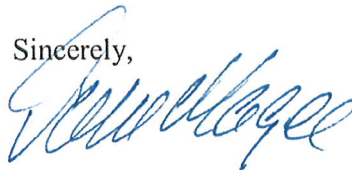
TPUD reserves the right to address each of these arguments once this proceeding has been docketed and Charter submits its arguments as part of that docket.

C. Conclusion

TPUD's Petition seeks a Commission ruling on a very narrow issue that is based upon undisputed facts, and resolution of this issue will enable the parties to work toward the correction of Charter's safety violations in a timely manner.

For these and other reasons explained above, TPUD respectfully requests that the Commission commence a Declaratory Ruling proceeding to resolve TPUD's Petition.

Sincerely,



Thomas B. Magee
Attorney (*pro hac vice* pending) for
TILLAMOOK PEOPLE'S UTILITY DISTRICT

Cc: Michael Weirich
J.R. Gonzalez
Jerry Murray
Jill Valenstein

²⁸ Charter's Comments at 10-13.

²⁹ *Id.* at 13.

³⁰ *Id.* at 14.

³¹ *Id.*

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **LETTER REGARDING
COMMENTS IN SUPPORT OF TILLAMOOK PUD'S PETITION FOR
DECLARATORY RULING** via electronic mail and/or First Class Mail on the Service

List below:

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DATED this 6th day of February, 2009.

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