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November 17, 2006

Via e-filing and
UPS NEXT DAY MAIL

Ms. Frances Nichols
Administrative Hearings Division
PUBLIC UTILITY COMMISSION OF OREGON
550 Capitol Street N.E., Suite 215
Salem, OR 97301-2551

Re: Docket AR 506

Dear Ms. Nichols:

Enclosed for filing in the above referenced docket is "Joint Final Round Comments of T-Mobile West Corporation, d/b/a T-Mobile, New Cingular Wireless PCS, LLC, Sprint Spectrum L.P., and Nextel West Corp." In addition, we are submitting into the record copies of a presentation made to the Commissioners entitled, "Attachment Rates, Terms and Conditions: AR 506 Phase II Presentation to Individual Commissioners by Cingular Wireless, Sprint Nextel and T-Mobile, November 16, 2006." Thank you for your assistance.

Very truly yours,

Davis Wright Tremaine LLP

Mark P. Trinchero

MPT:bl

PDX 1566845v1 48172-227
Portland

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

AR 506

PHASE II

In the Matter of **Rulemaking to Amend and Adopt Permanent Rules in OAR 860, Divisions 024 and 028 Regarding Pole Attachment Use and Safety.**	**JOINT FINAL ROUND COMMENTS OF T-MOBILE WEST CORPORATION, D/B/A T-MOBILE, NEW CINGULAR WIRELESS PCS, LLC, SPRINT SPECTRUM L.P., AND NEXTEL WEST CORP.**

INTRODUCTION

Pursuant to the schedule set forth in Administrative Law Judge ("ALJ") Hayes's Ruling issued October 10, 2006, T-Mobile West Corporation, d/b/a T-Mobile, New Cingular Wireless PCS, LLC, Sprint Spectrum L.P., and Nextel West Corp. (collectively "the Wireless Carriers") respectfully submit these joint final round comments. Consistent with the directions provided by Judge Hayes at the conclusion of the public comment hearing held November 8, 2006, these comments focus on "rate issues" in this proceeding, including non-discriminatory application of the default rate calculations to attachments by wireless carriers.

As the Wireless Carriers noted in their Joint Opening Comments,[1] Staff's Proposed Rules[2] significantly improve upon the existing rules. The primary dispute between the parties is whether the presumptively reasonable default rules in Division 28 should apply on a non-

[1] For the convenience of the Commission and the parties, appended hereto as Exhibit A are the Joint Opening Comments of the Wireless Carriers, which also address many of the issues discussed herein.
[2] *See* Staff's Proposed Pole and Conduit Attachment Rules, appended to the Second Round Comments of PUC Staff, November 6, 2006 (hereinafter "Staff's Proposed Rules").

discriminatory basis to wireless attachments. The Wireless Carriers respectfully submit that, consistent with Oregon law, the rules should apply to wireless attachments.[3]

COMMENTS

I. WIRELESS CARRIERS ARE LICENSEES AND SHOULD BE COVERED BY THE COMMISSION'S ATTACHMENT RULES ON A NON-DISCRIMINATORY BASIS

The Staff Proposed Rules incorporate the statutory definition of "Licensee."[4] Wireless carriers are "Licensees" as that term is defined by statute:

> (3) "Licensee" means any person, firm, corporation, partnership, company, association, joint stock association or cooperatively organized association that is authorized to construct attachments upon, along, under or across the public ways.[5]

Wireless carriers are authorized to construct attachments upon, along, under or across the public rights of way.[6] Furthermore, the statutory definition of "Attachment" is broad in its scope, covering "any wire or cable . . . and *any related device, apparatus, or auxiliary equipment*" used "for the *transmission of intelligence by* telegraph, telephone, or television (including cable television), light waves, or *other phenomenon*".[7] Attachments by wireless carriers of cables, wires, antennas and other equipment fall within this broad definition of "attachment." All wireless attachments include "wire or cable" (or fiber) to connect radios located on or near the base of the pole to antennas located higher on the pole, either in the communications space or above the electric space.

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[3] Applying the rules on a non-discriminatory basis to wireless carriers will allow wireless carriers to allocate resources to additional facilities to expand and improve service to Oregon residents.
[4] Staff's Proposed Rules, OAR 860-028-0020(11).
[5] ORS 757.270(3). ORS 759.650(2) contains identical language.
[6] *See e.g.,* Charter of City of Portland, Sections 10-201 through 10-218; City of Eugene Ordinance No. 20083. *See also NCTA v. Gulf Power*, 534 U.S. 327, 339-342 (wireless carriers are entitled to attach antennas and other facilities to utility poles).
[7] ORS 757.270(1) and ORS 759.650(1) (emphasis added).

In enacting these provisions, the Legislature expressed its desire to retain attachment jurisdiction at the state level and to avoid duplicative or potentially conflicting FCC jurisdiction. This intent is demonstrated in the legislative history of Senate Bill 560. Minutes from public hearings of the Senate Environment and Energy Committee indicate that the bill was designed to "preempt" FCC jurisdiction over attachments by vesting such jurisdiction in this Commission.

> 0640 . . . . The bill proposes that the Oregon Public Utility Commission be given jurisdiction to regulate pole attachment rates at the State level and that the FCC's jurisdiction be pre-empted.
>
> * * * * *
>
> 0700 . . . . SENATOR FADELY asked if the only way to have a non-FCC arbitrator would be to have state preemption. MR. DEWEY replied that the state would have to show they have jurisdiction and presently under Oregon statutes the state does not have jurisdiction. This bill would provide that.

While the focus of the debate in 1979 centered on attachments by cable companies, the minutes of the public hearings demonstrate that the Legislature desired to retain jurisdiction over ***all*** attachment matters and to comprehensively "preempt" FCC jurisdiction. Thus, the bill was drafted to include a definition of Licensee broad enough to encompass new technologies, services, and providers who may attach to utility owned structures in the future, including wireless.

The statutes further provide the Commission with "authority to regulate in the public interest the rates, terms and conditions for attachments by licensees to poles and other facilities" of public utilities, telecommunications utilities and consumer owned utilities, and that "[a]ll rates, terms and conditions made, demanded or received . . . for any attachment by a licensee shall be fair, just and reasonable."[8] The statutes, in turn, entitle Licensees to have the

[8] *See* ORS 757.273—757.276 and 759.655.

Commission hear and resolve disputes regarding attachment rates, terms, and conditions.[9] Finally, the statutes set forth the criteria underlying the determination of a just and reasonable rate for attachments.[10]

The Staff's Proposed Rules set forth a number of reasonable presumptions that will apply when parties come to the Commission with disputes over attachment rates, terms, and conditions, including default attachment rates. The Commission should apply these reasonable presumptions to *all* licensees, including wireless carriers, on a non-discriminatory basis. If the Commission fails to make these presumptively reasonable default provisions applicable to wireless carrier licensees, owners will be encouraged to continue to discriminate between cable providers and wireless carriers, between landline providers and wireless carriers, and between individual wireless carriers. Such rate discrimination is prohibited by statute.[11]

II. THE RATE PROVISIONS IN THE PROPOSED RULES SHOULD APPLY TO ALL WIRELESS ATTACHMENTS, INCLUDING EQUIPMENT PLACED OUTSIDE OF THE "COMMUNICATIONS SPACE"

As discussed above, wireless carriers are licensees entitled to the rental rate proscribed in the statute. Oregon's attachment statutes require the rental rate be based solely upon the amount of space that the licensee occupies on the utility structure. The statutes apply to all attachments on a utility structure, even attachments that are outside of the "communications space." Therefore, the statutory scheme is intended to be nondiscriminatory and does not distinguish between types of attachments or types of attachers. Accordingly, the Commission should adopt

[9] *See* ORS 757.279 and 759.660.
[10] *See* ORS 757.282 and 759.665.
[11] *See* ORS 757.310(2), 757.325, 759.260(1)(b) and 759.275.

rules implementing Oregon's attachment statutes in a manner consistent with this non-discriminatory intent and must include all wireless attachments.[12]

A. The rental rate formula must be based upon the amount of space that the licensee occupies on the structure, and only the Make Ready Charges may be set based upon the type of equipment that is installed on the structure.

Oregon's attachment statutes clearly require the Commission to adopt an annual rental rate formula that is based upon the amount of space that the licensee uses on the utility structure:

> A just and reasonable rate shall ensure the public utility . . . the recovery from the licensee of not less than all the additional costs . . . *attributable to that portion of the pole, duct or conduit used for the pole attachment* . . . 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.[13]

The italicized language in this statute requires the Commission to adopt an attachment rental rate formula that is based upon the portion of the structure that is actually used by the licensee. The statute does not authorize the Commission to take into consideration the type of equipment that the licensee installs on the structure (*e.g.*, coaxial cables, fiber optic cables, amplifiers, cross arms, repeaters, or antennas) when setting the annual rental rate formula. Therefore, the rental rate must be based upon the same "per foot of space used" formula for all attachments, including those made by wireless licensees.

The Federal Communications Commission ("FCC") has applied a similar standard under the federal Pole Attachment Act. The FCC rejected arguments by electric utilities similar to those made in this docket that the rental rate should be based upon the type of equipment that is attached to the structure. For example, electric utilities argued that due to the different sag requirements between cable television and fiber optic cables, the licensees should be required to

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[12] The Wireless Carriers have proposed a few modifications to the Staff's Proposed Rules in order to facilitate applicability of the rules to wireless attachments and to avoid uncertainty, confusion, and additional disputes. These modifications are discussed in the Wireless Carriers' Joint Opening Comments, attached as Exhibit A.

[13] ORS 757.282(1) (emphasis added.)

pay for more than one foot of usable space due to the type of equipment that is installed. The FCC expressly rejected these arguments, concluding that the rental rate formula will be based upon on the amount of space that is occupied on the structure unless a party rebuts the FCC's presumptions.[14]

Costs related exclusively to the type of equipment being attached are recovered through the nonrecurring make ready charges, not through the annual rental rate. For example, if a wireless licensee plans to install antennas on a pole that is not strong enough to accommodate the weight and wind load of the antennas, the utility may recover (and currently does recover in full) all of the costs to replace the pole as a part of the utility's make ready charges. Therefore, while the make ready charge may be affected by the type of equipment that is attached to the utility structure, the rental rate formula does not change and the Commission should apply the same rental rate formula to all licensees, including wireless licensees.

Some participants have nevertheless argued that wireless licensees should not be included within the scope of the proposed rules because the rules might not capture all costs related to wireless attachments. At the workshop on October 12, 2006, the Commissioners specifically requested that the participants provide evidence of such potential additional costs that would not otherwise be recovered under the rules. As discussed in the Joint Supplemental Comments of the Wireless Carriers,[15] none of the participants have provided any proof that any costs related to wireless attachments are not recovered through one of the following charges permitted under the Staff's Proposed Rules: (1) make ready charges; (2) the administrative, maintenance or

[14] *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order at 13 FCC Rcd 6777, 6815-6818, ¶¶ 83-91 (1998).

[15] A copy of the Wireless Carriers' Joint Supplemental Comments is attached as Exhibit B.

depreciation portions of the carrying charges; or (3) one time maintenance fees that the utilities charge to wireless carriers when maintenance is performed on their attachments.

Some participants have also argued that the Commission should refuse to uniformly apply the attachment statutes and Staff's Proposed Rules to all licensees, including wireless licensees, until all safety questions have been examined. It is interesting to note that after 10 years of experience with wireless attachments to utility structures, none of the participants could provide a single example of a safety concern that would affect the rental rate formula. Quite simply, the participants cannot provide any examples of a safety concern that would affect the rental rate formula because there are none. As explained above, the annual rental rate formula must be based solely upon the amount of space that the attachment occupies on the structure. The *formula* will always remain a *per-foot charge* based upon the amount of space that the attachment occupies on the structure.

The participants simply have not provided any justification for their request that the wireless carriers not be included within the rental rate formula. These arguments are nothing more than a delay tactic to allow structure owners to continue to charge what they call "market rates." These rates are in fact monopoly rents that are as much as 500 times higher than the maximum rate allowed under Oregon's attachment statutes and Staff's Proposed Rules.

B. Oregon's attachment statutes apply to all attachments on a utility structure, even attachments that are outside of the "communications space."

Staff has argued that the proposed rules apply only to attachments within the communication usable space.[16] Staff, however, does not cite any legal authority in support of its argument. In fact, Staff's position is contrary to Oregon law, and contrary to more than 30 years of industry practices.

[16] Second Round Comments of PUC Staff in AR 506 at 1, November 8, 2006 ("Staff's Second Round Comments").

Oregon's attachment statutes clearly apply to all attachments to utility structures, regardless of where the attachment in placed on the structure:

> "Attachment" means any wire or cable . . . and any related device, apparatus, or auxiliary equipment, *installed upon any pole . . . or similar facility or facilities . . ..*[17]

The plain language of the statute applies Oregon's attachment laws and regulations to any attachment, without restriction as to the location of the attachment on the structure. If the Legislature had intended to limit attachments to the space that has been historically referred to as the "communications space," the Legislature would have included language to that effect in the statute.

Taking Staff's argument to its logical conclusion, the rules would not apply to numerous existing attachments that are outside the traditional "communications space." For example, utility structure owners have, for more than 30 years, allowed the cable and wireline telecommunications industries to place attachments outside of the "communications space" under the same terms and conditions as other attachments on the structure. If the Commission were to adopt Staff's suggestion that the attachment statutes and rules should not apply to attachments outside of the "communications space," the utilities will be free to require all licensees to remove attachments outside of the communications space, or modify the rates, terms, and conditions applicable to those attachments, and the Commission will face another flood of complaint cases from the industry. Because the primary purpose of this rulemaking is to reduce or eliminate additional disputes between owners and licensees, the Commission should simply apply its rules to all attachments on utility structures, regardless of where the attachment is installed on the structure.

[17] ORS 757.270(1) (emphasis added).

III. THE RULES SHOULD APPLY TO ATTACHMENTS TO TOWERS

One of the issues in this docket is whether the rules in Division 28, should apply to attachments to electric transmission towers.[18] The definition of attachment in ORS § 757.270(1) is broad and applies to devices installed "upon any pole or in any telegraph, telephone, electrical, cable television or communications right of way, duct, conduit, manhole or handhole *or other similar facility or facilities*...."[19] The question before this Commission is whether "other similar facility or facilities" encompasses transmission towers.

In *Southern Co. v. FCC*, the 11th Circuit Court of Appeals found that the federal Pole Attachment Act does not apply to transmission towers.[20] The court held that the FCC's determination that the Act did apply to towers was contrary to the plain language of the Act, which specifically applied only to "poles, ducts, conduits, and rights-of-way owned or controlled by [utilities]."[21] In contrast to the federal Act, the statutory language in the Oregon statute is broad, extending not only to poles, ducts, conduits, and rights-of-way, but also to "other similar facility or facilities." Because of this difference between the federal and state statutes, the decision in *Southern* is not controlling, and this Commission has the authority to determine whether "other similar facility or facilities" encompasses transmission towers.

Other certified states have recognized that federal law does not prohibit a state from regulating attachments to towers. For example, the Massachusetts Department of Telecommunications and Energy has confirmed that it will hear complaints brought to it by

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[18] Ruling Establishing Issues List for Division 028 at 4 (September 5, 2006). The wireless carriers appreciate and support Staff's proposed revisions clarifying that the Division 28 rules ***do*** apply to attachments to transmission poles. *See* Staff's Proposed Rules.
[19] ORS 757.270(1) (emphasis added).
[20] *Southern v. FCC*, 293 F.3d 1338 (11th Cir., 2002).
[21] *Id.* at 1343 (citing 47 U.S.C. § 224(f)(1)).

wireless carriers for denial of access to attach facilities to transmission towers.[22] The statute upon which this jurisdiction is premised requires utilities to provide wireless carriers non-discriminatory access to "any pole or right-of-way used or useful, in whole or in part."[23]

IV. A SEPARATE PROCEEDING FOR WIRELESS IS NOT NECESSARY

Staff and the OJUA recommend that the Commission address wireless attachment topics in a separate proceeding. The Commission should reject these proposals and instead make clear in its order in this docket that the Division 28 Rules, including the presumptively reasonable default rate methodology, applies to attachments by wireless licensees.

As discussed above,[24] contrary to the unsupported claims of the owners, wireless attachments do not impose any special costs that would not be recovered through a combination of non-recurring installation charges and the annual rental rate methodology. The remaining wireless attachment topics raised by Staff and the OJUA do not relate to issues addressed in Division 28.

While Staff's and the OJUA's lists of topics are lengthy, it is unclear what "problem" is sought to be remedied by the opening of a new docket. Wireless carriers have been attaching to poles and towers in Oregon for a decade and there have been no reported issues. This is true because the owners and the wireless carriers have addressed the types of topics raised by Staff and the OJUA in their attachment contracts. Unlike other types of attachments, in Oregon wireless installations above the traditional communications space are almost exclusively performed by the owners' employees or by contractors selected or approved by the owners. Thus, contrary to Staff's contention, the safety and reliability of Oregon's electric and

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[22] *See Investigation by the Department of Telecommunications and Energy, On its Own Motion, into Boston Edison Company*, 2001 Mass. PUC LEXIS 6 at 165 (MASS DTE, Dec. 28, 2001) (available at http://www.mass.gov/dte/electric /97-95/1228finorder.pdf)

[23] Mass G.L. c. 166, §25A.

[24] *See* Wireless Carrier Joint Supplemental Comments, attached as Exhibit B.

communications lines will not be impacted by applying the Division 28 Rules to wireless attachments.[25] What will be impacted is the ability of the owners to charge unjust, unreasonable, and discriminatory rates for those attachments.

Staff recommends a micro-management approach to wireless attachments.[26] The Wireless Carriers recommend instead that the Commission follow the approach taken by the Utah Public Service Commission ("Utah PSC"), which adopted attachment rules very similar to the Staff's Proposed Rules that apply explicitly to wireless attachments, without creating detailed rules on every possible topic.[27] There have been no safety or reliability issues under the Utah rules. Taking this approach in Oregon will conserve administrative resources. The Commission should not institute a docket and expend significant resources absent a compelling need to address an actual problem.

Even if the Commission decides to open a separate docket, Staff and the OJUA have raised a number of concerns that are not within this Commission's jurisdiction. Staff specifically states that wireless attachments raise unique concerns related to radio frequency interference, community aesthetics, aviation safety, and property rights and easements.[28] The FCC has exclusive jurisdiction over radio frequency interference. 47 U.S.C. §§ 301 *et seq.* Community aesthetics are within the jurisdiction of local government entities enforcing state and local land use laws and regulations. *See* ORS Ch. 227 and Ch. 215. The Federal Aviation Administration has exclusive jurisdiction over aviation safety. 14 C.F.R. Part 77. Property rights and easements are governed by private agreements and state statutes, which are enforceable in state courts. The

[25] *See* Staff's Second Round Comments at 2.
[26] *See id.* at 1.
[27] The Utah PSC rules are attached as Exhibit A to the Joint Supplemental Comments of the Wireless Carriers, filed November 6, 2006, and attached hereto as Exhibit B.
[28] Staff's Second Round Comments, Attachment A at 2.

Commission should not waste valuable time and resources examining issues over which it has no jurisdiction.

CONCLUSION

For the foregoing reasons, and as discussed in their Opening and Supplemental Comments, the Wireless Carriers request the Commission adopt Staff's Proposed Rules with the proposed modifications detailed in their Opening Comments. In addition, the Wireless Carriers request that the Commission make it clear that these rules apply to all wireless attachments to utility structures, including distribution poles, transmission poles, and transmission towers, consistent with Oregon's attachment statutes.

Respectfully submitted this 17th day of November, 2006.

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 506

PHASE II

In the Matter of	)	**JOINT OPENING COMMENTS OF**
	)	**T-MOBILE WEST CORPORATION,**
Rulemaking to Amend and Adopt	)	**D/B/A T-MOBILE, NEW CINGULAR**
Permanent Rules in OAR 860,	)	**WIRELESS PCS, LLC, SPRINT**
Divisions 024 and 028 Regarding Pole	)	**SPECTRUM L.P., AND NEXTEL**
Attachment Use and Safety.	)	**WEST CORP.**

INTRODUCTION

Pursuant to the schedule set forth in Administrative Law Judge ("ALJ") Smith's Ruling issued September 5, 2006, T-Mobile West Corporation, d/b/a T-Mobile ("T-Mobile"), New Cingular Wireless PCS, LLC ("Cingular"), Sprint Spectrum L.P., and Nextel West Corp. ("Sprint Nextel") (collectively "the Wireless Carriers") respectfully submit these joint opening comments. The Wireless Carriers appreciate the opportunity to provide input regarding the Commission Staff's proposed amendments to the Commission's pole and conduit attachment

rules in Division 28 of the Oregon Administrative Code. The Commission Staff ("Staff") and the Oregon Joint Use Association ("OJUA") should be commended for their efforts to refine, clarify and improve upon the Commission's existing pole attachment rules. On the whole, Staff's Proposed Rules[1] significantly improve upon the existing rules and provide a sound basis for resolving disputes between owners and occupants by not only establishing a means for expedited Commission consideration of such disputes, but also by constructing a rational set of rights and obligations of the respective parties. The Wireless Carriers, however, respectfully submit that a few modifications of the proposed rules are necessary to ensure that the rules adequately address the entire scope of pole attachments by any Licensee (as defined *infra* at p. 5), including those made by providers of wireless services in Oregon.

Wireless Network Deployment and Utility Pole Attachments

Pursuant to licenses held with the Federal Communications Commission ("FCC"), the Wireless Carriers provide commercial mobile radio service ("CMRS") through networks of cell sites that are interconnected to the public switched network. Each cell site is designed to provide coverage in a limited geographic area. Most of the cell sites in a network are arranged in a honeycomb-shaped grid, so calls may be handed off from cell site to cell site without interruption as the user travels throughout the service area.

As more customers use wireless communications services in more areas, wireless carriers need to install more cell sites in their networks to handle the additional communications traffic. As more and more cell sites are deployed, some of the cell sites will be located in sensitive areas, such as residential neighborhoods and land subject to special land use restrictions. In order to reduce the impact of cell sites in such areas, local governments increasingly require wireless

[1] *See* Staff's Proposed Pole and Conduit Attachment Rules, appended to the Notice of Proposed Rulemaking Hearing, filed with the Secretary of State June 15, 2006 (hereinafter "Staff's Proposed Rules").

carriers to blend their cell sites and antenna designs into existing infrastructure and landscapes. There are very few locations in residential areas where wireless carriers may blend their cell sites and antennas into the existing infrastructure.

In residential and other sensitive areas, utility poles and towers are the most prevalent—and sometimes the exclusive—"existing infrastructure" that is available to wireless carriers. Therefore, utility poles and towers present a viable option for deploying cell sites in a manner that will satisfy concerns of local governments and residents who are already accustomed to utility pole infrastructure in their neighborhoods. While the specific configurations vary, the typical cell site includes (1) antennae which are attached at or near the top of the pole or tower, (2) equipment cabinets located on or near the base of the pole or tower, and (3) coaxial cable or fiber optic cables which are attached to the side of the pole or tower in order to connect the antennae to the equipment cabinets.

The Federal Pole Attachment Act and State Law

The federal Pole Attachment Act, 47 U.S.C. §224, vests authority in the FCC to establish rates, terms and conditions for attachments to utility poles by cable television systems and providers of telecommunications service. This includes attachments to utility poles by providers of wireless service, including the attachment of wires and wireless equipment (i.e., antennae).[2] The federal Pole Attachment Act also provides that the FCC will not have jurisdiction over pole attachments where such matters are governed by a State, and requires the State to certify to the FCC that it regulates such rates, terms and conditions and has issued and made effective rules and regulations implementing its pole attachment authority. 47 U.S.C. §224(c). The State of

[2] *See NCTA v. Gulf Power*, 534 U.S. 327, 339-342.

Oregon has certified to the FCC that it regulates pole attachments. Accordingly, when wireless carriers attach to utility poles in Oregon, this Commission's pole attachment rules apply.[3]

This is consistent with the broad definition of "Licensee" under Oregon law, which states:

> (3) "Licensee" means any person, firm, corporation, partnership, company, association, joint stock association or cooperatively organized association that is authorized to construct attachments upon, along, under or across the public ways.[4]

As discussed above, wireless providers are authorized to construct such attachments.[5] Accordingly, attachments made by wireless provider Licensees to utility-owned poles in Oregon are subject to this Commission's oversight pursuant to the Commission's pole attachment rules.[6]

THE PROPOSED RULES

As stated above, the Wireless Carriers believe the proposed rules as drafted are a significant improvement compared with the existing rules. The Commission should adopt the proposed rules with some relatively minor modifications to ensure that attachments by wireless providers are adequately covered. The Wireless Carriers' recommended revisions to Staff's Proposed Rules and supporting arguments are set forth in this section of the joint opening comments.

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[3] While Section 332 of the Communications Act, 47 U.S.C. §332, preempts states from regulating the entry of or rates charged by wireless carriers, the Commission's pole attachment rules in Division 28 do neither. Instead, the Commission's rules regulate the rates, terms and conditions that public utilities, telecommunications utilities, consumer-owned utilities and PUDs charge.

[4] ORS 757.270(3). ORS 759.650(2) contains identical language.

[5] *See generally* 47 U.S.C. §224; *see also NCTA v. Gulf Power*, 534 U.S. 327, 339-342.

[6] *See* ORS 757.271, *et seq.* and ORS 759.655, *et seq.*

OAR 860-028-0020
Should the following definitions be modified?
Licensee – Include wireless carriers?

The Definition of "Licensee" and the Definition of "Applicant" Should Expressly Cover Wireless Providers

As explained above, wireless providers are "Licensees" under Oregon law. The existing rules simply state that "Licensee" has the meaning given in ORS 757.270 or ORS 759.650.[7] The proposed rules would amend this definition to clarify that: "'Licensee' does not include a government entity."[8] The Wireless Carriers recommend that the rule also be clarified to expressly include wireless providers, so that there is no ambiguity regarding the scope of the rules. The Wireless Carriers propose the following revised definition of "Licensee":

> 860-028-0020 (10) "Licensee" has the meaning given in ORS 757.270 or ORS 759.650. "Licensee" *includes wireless communications service providers, but* does not include a government entity.[9]

Staff's Proposed Rules recommend adding to Division 28 an entirely new section 100, entitled "New or Modified Attachments". New section 100 uses the term "applicant", and expressly clarifies that: "'applicant' does not include a government entity." As with the definition of Licensee discussed above, the term "applicant" should be clarified to expressly include wireless providers. The Wireless Carriers propose the following revised definition of "applicant" in new section 100:

> 860-028-0100 (1): As used in this rule, "applicant" *includes wireless communications service providers, but* does not include a government entity.

[7] OAR 860-028-0020(7).
[8] Staff's Proposed Rules, page 2 of 11.
[9] Throughout the Wireless Carriers' Joint Opening Comments, underlined material reflects Staff's Proposed modifications to the existing rules, and material in italics reflects the Wireless Carriers' recommended modifications.

OAR 860-028-0020
Should the following definitions be modified?
Authorized Attachment Space – what about vertical attachment of coaxial cables from the ground to the antennae?

The Wireless Carriers recommend that Staff's Proposed Rules should be revised to clarify how Licensees will be charged for vertical attachments. A new subsection, OAR 860-028-0110(4)(d), should be added to Staff's Proposed Rules.

Summary. Licensees should be charged for a minimum of one foot of useable space, and Licensees should be charged for a vertical attachment (*e.g.*, coaxial cable) only to the extent that the vertical attachment renders the subject portion of the pole unusable by any other applicant for any other purpose.

Current and Proposed Rules. Neither the current nor Staff's Proposed Rules address how Licensees should be charged for vertical attachments.

Recommended Change to Proposed Rules. The Wireless Carriers recommend that Staff's Proposed Rule be revised to add a new rule as follows:

> 860-028-0110(4)(d) *A wireless provider's authorized attachment space does not include the length of vertically placed cable, wire, conduit, antenna or other facility unless such attachment prevents another entity from placing an attachment on the usable space of the pole.*

Rationale for Recommended Change. The Wireless Carriers' recommended change would prevent pole owners from an unfair double-recovery of charges from pole attachment Licensees. Vertical pole attachments by wireless carriers do not necessarily prevent other entities from attaching cables or equipment to the pole or tower adjacent to the wireless carriers' vertical attachments. For example, electric utilities almost always have wires (horizontal and vertical) that are attached on the same poles and towers where wireless carriers have vertical pole attachments. In addition, it is common for telephone and/or cable providers to have horizontal pole attachments adjacent to the wireless carriers' vertical attachments. If pole owners charged wireless carriers for the full length of the vertical attachment—while also charging telephone or

cable providers for their horizontal attachments—the pole owner would double recover pole attachment charges for the same usable space. Therefore, pole owners should only charge wireless carriers for those portions of vertical attachments that prevent other entities from placing attachments in the usable space on the pole.

The Wireless Carriers' recommended change is patterned after the pole attachment rules adopted by the Utah Public Service Commission ("PSC"). The Utah PSC has adopted the following rule:

> e. The space used by a wireless provider: (i) may not include any of the length of a vertically placed cable, wire, conduit, antenna, or other facility unless the vertically placed cable, wire, conduit, antenna, or other facility prevents another attaching entity from placing a pole attachment in the usable space of the pole.[10]

Under Utah's rules, the Pole Owner may not double-recover for pole attachments where the pole may still be used by other entities, even though the pole has a vertical pole attachment by a wireless carrier. The Wireless Carriers encourage the Commission to follow Utah's lead and adopt the same "single recovery" rule for usable space.

OAR 860-028-0020
Should the following definitions be modified?
Pole Cost – limited to distribution poles?

The Wireless Carriers recommend that the definition of "Pole Cost" should include towers.

Summary. Staff's Proposed Rules appropriately include towers within the proposed regulations, and the Wireless Carriers recommend that the Proposed Rules be revised to clarify that towers are included within the meaning of "pole". In addition, the Wireless Carriers recommend that the pole owners be allowed to calculate different rental rates for attachments to towers versus attachments to poles.

[10] UAC R746-345-5.e.i.

Current Statute and Proposed Rules. As noted above, Oregon statutes define Attachment to include certain equipment that is:

> ". . . installed on any pole or in any telegraph, telephone, electrical, cable television or communications right of way, duct, conduit, manhole or handhole or *other similar facility or facilities* owned or controlled, in whole or in part, by one or more public utility, telecommunications utility or consumer-owned utility."[11]

Since a tower is a "pole . . . or other similar facility or facilities", the Oregon Revised Statutes include towers as a structure to which attachments may be made.

Likewise, Staff appropriately included towers within the scope of Staff's Proposed Rules. In the list of duties of pole owners, Staff's Proposed Rules require owners to establish construction standards for attachments to "poles, *towers*, and for joint space in conduits."[12] The remaining sections of the current rules and Staff's Proposed Rules, however, do not refer to towers. The Wireless Carriers recommend a simple revision to the definition of Pole Cost to clarify that towers are included.

In addition, Staff's Proposed Rules include detailed calculations and rebuttable presumptions for calculating pole attachment rental rates, but the Proposed Rules do not provide separate presumptions for calculating tower rental rates. Therefore, the Wireless Carriers recommend that the definition of Pole Cost be revised to clarify that the presumptions for poles will not apply to towers.

Recommended Change to Proposed Rules. The Wireless Carriers recommend simple additions to the definition of Pole Cost in Staff's Proposed Rules to clarify that towers are included within the rules, and to clarify that the presumptions for pole rental rates do not apply to tower rental rates:

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[11] ORS 757.270(1) and ORS 579.650(1). (Emphasis added.)
[12] Proposed OAR860-028-0115(1).

860-028-0020 (20) "Pole cost", *when calculating rental rates for poles,* means the depreciated original installed cost of an average bare pole to include support equipment of the pole owner, from which is subtracted related accumulated deferred taxes, if any. There is a rebuttable presumption that the average bare pole is 40 feet and the ratio of a bare pole to the total pole for a public utility or a consumer-owned utility is 85 percent, and 95 percent for a telecommunications utility. *"Pole cost", when calculating rental rates for towers, means the depreciated original installed cost of an average tower to include support equipment of the pole owner, from which is subtracted related accumulated deferred taxes, if any. The rebuttable presumptions stated above do not apply to towers.*

Rationale for Recommended Changes. First, it is common for wireless carriers to attach their communications equipment to towers. The Bonneville Power Administration ("BPA") regularly allows wireless carriers to attach equipment to the BPA's towers. In addition, wireless carriers attach equipment to towers within the state of Oregon, including towers owned by Portland General Electric. Staff's Proposed Rules should incorporate the utility industry's current practices of allowing attachments to towers.

Second, Staff's Proposed Rules recognize there is a strong public policy in favor of collocation on utility poles. Staff's Proposed Rules state:

> Any entity requiring pole attachments to serve customers should use poles jointly as much as practicable.[13]

There is no public policy reason for the Commission to encourage wireless communications companies to attach antennas to poles, but to discourage wireless communications companies and utilities from attaching antennas to towers. To the contrary, local jurisdictions and public policy strongly encourage wireless communications companies to use existing infrastructure as much as possible.[14] The proposed rules should be consistent with public policy.

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[13] Proposed OAR 860-028-0060.

[14] See, for example: Eugene City Code Section 9.5750: Telecommunications Devices–Siting Requirements and Procedures.
(1) Purpose. The provisions of this section are intended to ensure that telecommunication facilities are located, installed, maintained and removed in a manner that:
(a) Minimizes the number of transmission towers throughout the community;
(b) Encourages the collocation of telecommunications facilities;

Finally, Staff's Proposed Rules do not indicate that the rebuttable presumptions for Pole Costs do not apply to towers. The Wireless Carriers agree that the rebuttable presumptions should apply to Pole Costs for poles, but the same presumptions should not apply to Pole Costs for towers. The costs for towers and the amount of usable space and unusable space on towers are significantly different than the costs and amounts of useable and unusable space on poles. The Wireless Carriers recommend that the electric utilities be allowed to apply the rebuttable presumptions to the Pole Costs for poles, and not be required to apply the rebuttable presumptions to the Pole Costs for towers.

OAR 860-028-0110 and OAR 860-028-0310
Should rates be nondiscriminatory?
Should charges be supported by detailed invoices?

The Wireless Carriers recommend that rental rates, terms and conditions should be nondiscriminatory, and make ready charges should be cost-based, reasonable, nondiscriminatory, and supported by detailed invoices.

Summary. Pole Owners currently perform pole change outs for wireless carriers. The Commission's current rules require pole Owners to charge for pole change outs based on actual costs. Staff's Proposed Rules deleted all requirements concerning pole change outs, and deleted the requirement that make ready costs be based upon actual costs. The Wireless Carriers recommend that Staff's Proposed Rules be revised to: (1) retain the current rules' requirements that pole change outs and Make Ready Work be based upon actual costs, (2) require pole rental rates, terms and conditions be nondiscriminatory, and (3) require that the charges for Make Ready Work be reasonable and disclosed on detailed invoices.

Current and Proposed Rules. The Commission's current rules require pole Owners to perform pole change outs, and to charge for those services based upon their actual costs:

(c) Encourages the use of existing buildings, light or utility poles or water towers as proposed to construction of new telecommunications towers.

> (6) The rental rates referred to in sections (3) and (4) of this rule do not cover the costs of special inspections or preconstruction, make ready, *change out*, and rearrangement work. Charges for those activities shall be based on *actual (including administrative) costs*.[15]

Staff's Proposed Rules deleted the words "change out" from the rules. In addition, change out services are not mentioned in the new definition of Make Ready Work, and the Proposed Rules deleted the requirement that charges for Make Ready Work be based upon actual costs:

> Make ready work means administrative, engineering, or construction activates necessary to make a pole, conduit, or other support equipment available for a new attachment, attachment modifications, or additional facilities. Make Ready work costs are nonrecurring costs, and are not contained in carrying charges.[16]

Recommended Changes to Proposed Rules. The Wireless Carriers recommend that Staff's Proposed Rules be revised as follows:

> 860-028-0020 (11) "Make ready work" means administrative, engineering, or construction activities necessary to make a pole, conduit, or other support equipment available for a new attachment, attachment modifications, or additional facilities, *including pole change out and pole extension activities*. Make ready work costs are nonrecurring costs, *must be reasonable, cost based (including administrative costs), nondiscriminatory, and supported by detailed invoices,* and are not contained in carrying charges.

Rationale for Recommended Changes. The Wireless Carriers recommend that the Proposed Rules be amended to require that charges for Make Ready Work be based upon actual costs for two reasons. First, the current rules adopted the public policy that nonrecurring costs for pole attachments should be based upon actual costs, and the Commission should not change its policy in this rule making proceeding. Second, Oregon's pole attachment statutes require that pole attachment rates be set no less than "all the *additional costs* of providing and maintaining pole attachment space for the licensee" nor more than "the *actual capital and operating*

[15] OAR 860-028-0110(6). (Emphasis supplied.)
[16] Proposed OAR 860-028-0020(11).

expenses, including just compensation".[17] Therefore, the pole attachment statutes require the Commission to set rates based upon the pole Owner's costs or expenses, and the Proposed Rules should incorporate a cost-based standard for charges for Make Ready Work to remain in compliance with Oregon law.

The rates, terms and conditions for all pole attachments and conduit attachments (including charges for Make Ready Work) should be nondiscriminatory. All Licensees should be entitled to be treated in a fair and nondiscriminatory manner. Pole Owners should also be required to comply with Oregon's nondiscrimination requirements for utilities.[18] The Wireless Carriers recommend that the Commission adopt the recommended rule change to ensure all Licensees that they are entitled to nondiscriminatory treatment.

The Wireless Carriers also recommend that the Charges for Make Ready Work be reasonable, and disclosed on detailed invoices. Oregon's pole attachment regulation statutes expressly require that all pole attachment rates be reasonable.[19] To avoid any confusion and to ensure that the parties and the Commission consistently apply a standard consistent with that set

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[17] ORS 757.282(1) and 759.665. (Emphasis supplied.)

[18] ORS 757.310 provides: Prohibition related to charges for service. (1) A public utility may not charge a customer a rate or an amount for a service that is different from the rate or amount prescribed in the schedules or tariffs for the public utility.
(2) A public utility may not charge a customer a rate or an amount for a service that is different from the rate or amount the public utility charges any other customer for a like and contemporaneous service under substantially similar circumstances.
(3) A difference in rates or amounts charged does not constitute a violation of subsection (2) of this section if the difference is based on:
(a) Service classification under ORS 757.230;
(b) Contracts for services under ORS 757.516; or
(c) An optional schedule or tariff for the provision of energy service that takes into account a customer's past energy usage and provides price incentives designed to encourage changes in the customer's energy usage that correspond to changes in the cost of providing energy.
ORS 757.325 provides: Undue preferences and prejudices. (1) No public utility shall make or give undue or unreasonable preference or advantage to any particular person or locality, or shall subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.
(2) Any public utility violating this section is guilty of unjust discrimination.

[19] ORS 757.273; ORS 757.282; ORS 759.655; ORS 759.665.

forth in the statute, the Wireless Carriers encourage the Commission to expressly include the "reasonable rate" statutory requirement in the Proposed Rules.

The Wireless Carriers also recommend that pole owners be required to provide detailed invoices for charges for Make Ready Work simply because without detailed invoices, Licensees cannot determine whether the charges for Make Ready Work are reasonable. The Commission should revise the Proposed Rules to require detailed invoices so the Licensees may confirm the reasonableness of the charges for Make Ready Work.

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CONCLUSION

For the foregoing reasons, the Wireless Carriers urge the Commission to clarify that the rules in Division 28 apply when wireless service providers attach to utility poles in Oregon. The Wireless Carriers further recommend that the Commission adopt the relatively minor recommended changes to the rules set forth herein, which are needed to ensure that wireless attachments to utility poles are adequately addressed in order to minimize confusion and disputes in the future.

Respectfully submitted this 28th day of September, 2006.

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CERTIFICATE OF SERVICE

AR 506

I hereby certify on this 28th day of September, 2006, Joint Opening Comments of T-Mobile West Corporation, dba T-Mobile, New Cingular Wireless PCS, LLC, Sprint Spectrum L.P., and Nextel West Corp was sent via UPS overnight mail to the Oregon Public Utility Commission.

A copy of the filing was also sent via US Mail to the service list which is attached.

DAVIS WRIGHT TREMAINE LLP

By: _____
Mark P. Trinchero

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 506

PHASE II

In the Matter of	)	**JOINT SUPPLEMENTAL COMMENTS OF**
Rulemaking to Amend and Adopt Permanent Rules in OAR 860, Divisions 024 and 028 Regarding Pole Attachment Use and Safety.	)	**T-MOBILE WEST CORPORATION, D/B/A T-MOBILE, NEW CINGULAR WIRELESS PCS, LLC, SPRINT SPECTRUM L.P., AND NEXTEL WEST CORP.**

INTRODUCTION

At the October 12, 2006 workshop, the Commissioners requested comments regarding pole owner claims that there are "additional" costs associated with wireless attachments to poles that would not be recovered through the proposed pole attachment rental rate[1] or through non-recurring charges, including make-ready work charges.[2] T-Mobile West Corporation, d/b/a T-Mobile ("T-Mobile"), New Cingular Wireless PCS, LLC ("Cingular"), Sprint Spectrum L.P., and Nextel West Corp. ("Sprint Nextel") (collectively "the Wireless Carriers") respectfully submit these joint supplemental comments in response to that request. The short answer to the question posed by the Commissioners is that, under the proposed rules, pole owners will be fully

[1] *See* Staff's Proposed Pole and Conduit Attachment Rules, appended to the Notice of Proposed Rulemaking Hearing, filed with the Secretary of State June 15, 2006 (hereinafter "Staff's Proposed Rules"), OAR 860-028-0110.
[2] *See* Staff's Proposed Rules, OAR 860-028-0020(11) and OAR 860-028-0110(3).

compensated for wireless attachments consistent with Oregon's statutory scheme.[3] There is simply no basis for applying a different rental rate to attachments made by wireless carriers.

To date, the pole owners have submitted no written evidence of "additional" costs that would warrant using a different rental rate formula for wireless attachments. When the issue was discussed at the workshop held October 26, 2006, the pole owners could only speculate that there *may* be additional costs associated with wireless attachments based on: 1) replacement of poles blown over during storms; 2) damage to poles from the introduction of insects caused by drilling; and 3) additional training for electrical workers.[4] As discussed more fully below, each of these potential costs is accounted for in the proposed rental rate. This is consistent with the approach taken in the State of Utah, which includes wireless attachments under a rental rate formula that is fundamentally identical to the rental rate methodology proposed in this docket. The Commission should, therefore, adopt rules that make clear that the proposed rental rates apply to wireless attachments.

The Wireless Carriers look forward to addressing any other "evidence" of additional costs that the pole owners may bring forward at the Rulemaking Hearing scheduled for November 8, 2006.

COMMENTS

I. The Proposed Rental Rate Formula Will Fully Compensate the Pole Owners

The proposed rules calculate the rental rate in a manner that will fully compensate pole owners for wireless attachments. The pole owners do not dispute that they currently recover *all* installation-related costs associated with wireless attachments, including the costs of changing

[3] *See* ORS 757.279 – 757.282, and 759.660-757.665.
[4] The Wireless Carriers are confident that, after ten years of experience with wireless attachments, the pole owners are familiar with the costs associated with wireless attachments and have raised all those costs they perceive may not be appropriately recovered under the proposed rental rate formula.

out poles, through non-recurring "make-ready" charges. This would continue to be true under the proposed rules.[5] Instead, the pole owners have asserted that the proposed recurring rental rate would not allow them to recover costs associated with: 1) replacement of poles blown over during storms; 2) damage to poles from the introduction of insects caused by drilling; and 3) additional training for electrical workers. This claim is simply not accurate. Each of these purported "additional" costs is accounted for in the "general and administrative" and "maintenance" components of the "carrying charge", and reflected in the proposed per foot recurring rental rate.[6]

For example, a pole owner's annual cost of replacing *all* poles knocked down as a result of storms is captured in the costs it files with the Federal Energy Regulatory Commission (hereinafter "FERC")[7]. All entities who attach to the utility's poles share in those costs on a per foot basis, whether or not a particular entity is attached to any given pole that falls during a storm.[8] The same is true regarding costs associated with insect-related pole damage. All users of poles, including the pole owners, drill holes that increase the risk of insect infestation. As with storm-related pole replacement costs, the costs associated with replacing poles damaged by insects are reflected in the utility's FERC accounts, and *all* entities who attach to the utility's poles will share in those costs on a per foot basis under the proposed rental rate. With respect to the pole owners' claims of "additional" training costs, the utilities' costs for training are captured in the related FERC accounts, and the costs are recovered through the carrying charges that are included in the per foot rental rate.

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[5] *See* Staff Proposed Rules, OAR 860-028-0110(3).
[6] *See* Staff's Proposed Rules, OAR 860-028-0020(3) and 860-028-0110(2).
[7] Though not filed with FERC, such replacement costs would similarly be appropriately included in the rental rate carrying charge when the pole owner is a telecommunications utility.
[8] Given the fact that wireless carriers typically attach to fewer poles than do wireline telecommunications providers and cable providers, wireless carriers will often be helping, through their per foot rental charges, to defray pole replacement costs for poles to which they are not attached.

In short, the hypothetical "additional" costs that the pole owners have attempted to identify will be reflected in the proposed rental rate. There is no basis for suggesting that a different recurring rental rate be applied to wireless attachments.

II. The Utah Commission Applies a Similar Rental Rate Formula To Wireless Attachments

The Utah Public Service Commission (hereinafter "Utah PSC") recently revised its pole attachment rules and has implemented a default rental rate that is fundamentally the same as that proposed in this docket.[9] While the Utah PSC's rules contain some rebuttal presumptions (e.g., average pole height, etc.) that vary slightly from those set forth in the proposed rules, the underlying methodology is the same. All attaching entities pay on a per foot basis, and the per foot rate is calculated by multiplying the pole cost by the carrying charge and dividing by the usable space on the pole.[10] The Utah PSC pole attachment rules expressly apply this formula to wireless attachments.[11] This Commission should follow the example set forth in the Utah PSC's rules. There is no reason to discriminate against wireless attachments.

CONCLUSION

The Commission should reject arguments by the pole owners that the rental rate formula in the proposed rules is inappropriate for wireless attachments. The examples of "additional" costs that the pole owners have raised are red herrings. As demonstrated above, the proposed rental rate compensates the pole owners for any such costs. The Commission should follow the approach taken by the Utah PSC in its recently revised pole attachment rules. The Wireless

[9] Appended hereto as Attachment A is a copy of the Utah PSC's pole attachment rules.
[10] *See* Utah Admin. Code R746-345-5.
[11] Utah Admin. Code R746-345-1(B)(1). The Utah PSC rules make clear that a wireless carrier is charged for the amount of space the attachment renders unusable, excluding vertical attachments that do not render the space unavailable for other attachments. Utah Admin. Code R746-345-5(A)(2)(d)(v) – (e)(vi). The same result is reached under the definition of "authorized attachment space" under the proposed rules.

Carriers look forward to the opportunity to address any other "additional" costs that the pole owners may raise at the November 8, 2006 Rulemaking Hearing in this docket.

Respectfully submitted this 6th day of November, 2006.

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Rule R746-345. Pole Attachments.

As in effect on October 1, 2006

Table of Contents

R746-345-1. Authorization.

A. Authorization of Rules -- Consistent with the Pole Attachment Act, 47 U.S.C. 224(c), and 54-3-1,54-4-1, and 54-4-13, the Public Service Commission shall have the power to regulate the rates, terms and conditions by which a public utility, as defined in 54-2-1(15)(a) including telephone corporations as defined in 54-2-23(a), can permit attachments to its poles by an attaching entity.

B. Application of Rules -- These rules shall apply to each public utility that permits pole attachments to utility's poles by an attaching entity.

1. Although specifically excluded from regulation by the Commission in 54-2-1(23)(b), solely for the purpose of any pole attachment, these rules apply to any wireless provider.

2. Pursuant to these rules, a public utility must allow any attaching entity nondiscriminatory access to utility poles at rates, terms and conditions that are just and reasonable.

C. Application of Rate Methodology -- The rate methodology described in Section R746-345-5 shall be used to determine rates that a public utility may charge an attaching entity to attach to its poles for compensation.

R746-345-2. General Definitions.

A. "Attaching Entity" -- A public utility, wireless provider, cable television company, communications company, or other entity that provides information or telecommunications services that attaches to a pole owned or controlled by a public utility.

B. "Attachment Space" -- The amount of usable space on a pole occupied by a pole attachment as provided for in Subsection R746-345-5(B)(3)(d).

C. "Distribution Pole" -- A utility pole, excluding towers, used by a pole owner to support mainly overhead distribution wires or cables.

D. "Make-Ready Work" -- The changes to be made to a pole owner's poles, its own pole attachments, the existing pole attachments of other attaching entities, or the existing additional equipment associated with such attachments, which changes may be needed to accommodate a proposed additional pole attachment. Such make-ready work is coordinated by the pole owner and is performed by the owners of the poles or owners of the pole attachments and additional equipment or as otherwise agreed to by these owners.

E. "Pole Attachment" -- All equipment, and the devices used to attach the equipment, of an attaching entity within that attaching entity's allocated attachment space. A new or existing service wire drop pole attachment that is attached to the same pole as an existing attachment of the attaching entity is considered a component of the existing attachment for purposes of this rule. Additional equipment that is placed within an attaching entity's existing attachment space, and equipment placed in the unuseable space which is used in conjunction with the attachments, is not an additional pole attachment for rental rate purposes. All equipment and devices shall meet applicable code and contractual requirements. Pole attachments do not include items used for decorations, signage, barriers, lighting, sports equipment, or cameras.

F. "Pole Owner"-- A public utility having ownership or control of poles used, in whole or in part, for any electric or telecommunications services.

G. "Secondary Pole" -- A pole used solely to provide service wire drops, the aerial wires or cables connecting to a customer premise.

H. "Secondary Pole Attachment" -- A pole attachment to a secondary pole.

I. "Wireless Provider" -- A corporation, partnership, or firm that provides cellular, Personal Communications Systems (PCS), or other commercial mobile radio service as defined in 47 U.S.C. 332 that has been issued a covering license by the Federal Communications Commission.

R746-345-3. Tariffs and Contracts.

A. Tariff Filings and Standard Contracts -- A pole owner shall submit a tariff and standard contract, or a Statement of Generally Available Terms (SGAT), specifying the rates, terms and conditions for any pole attachment, to the Commission for approval.

1. A pole owner must petition the Commission for any changes or modifications to the rates, terms, or conditions of its tariff, standard contract or SGAT. A petition for change or modification must include a showing why the rate, term or condition is no longer just and reasonable. A change in rates, terms or conditions of an approved tariff, standard contract or SGAT will not become effective unless and until it has been approved by the Commission.

2. The tariff, standard contract or SGAT shall identify all rates, fees, and charges applicable to any pole attachment. The tariff, standard contract, and SGAT shall also include:

a. a description of the permitting process, the inspection process, the joint audit process, including shared scheduling and costs, and any non-recurring fee or charge applicable thereto;

b. emergency access provisions; and

c. any back rent recovery or unauthorized pole attachment fee and any applicable procedures for determining the liability of an attaching entity to pay back rent or any non-recurring fee or charge applicable thereto.

B. Establishing the Pole Attachment Relationship -- The pole attachment relationship shall be established when the pole owner and the attaching entity have executed the approved standard contract, or SGAT, or other Commission-approved contract.

1. Exception -- The pole owner and attaching entity may voluntarily negotiate an alternative contract incorporating some, all, or none of the terms of the standard contract or SGAT. The parties shall submit the negotiated contract to the Commission for approval. In situations in which the pole owner and attaching entity are

unable to agree following good faith negotiations, the pole owner or attaching entity may petition the Commission for resolution as provided in Section R746-345-6. Pending resolution by the Commission, the parties shall use the standard contract or SGAT.

C. Make-Ready Work, Timeline and Cost Methodology -- As a part of the application process, the pole owner shall provide the applicant with an estimate of the cost of the make-ready work required and the expected time to complete the make-ready work as provided for in this sub-section. All applications by a potential attacher within a given calendar month shall be counted as a single application for the purposes of calculating the response time to complete the make-ready estimate for the pole owner. The due date for a response to all applications within the calendar month shall be calculated from the date of the last application during that month. As an alternative to all of the time periods allowed for construction below, a pole owner may provide the applicant with an estimated time by which the work could be completed that is different than the standard time periods contained in this rule with an explanation for the anticipated delay. Pole owners must provide this alternative estimate within the estimate timelines provided below. Applicants that wish to consider self-building shall inform the pole owner at the time of application that they are considering the self-build option, if available, and they would like a two-alternative make-ready bid. The pole owner and each existing attaching entity are responsible to determine what portion, if any, of the make-ready work their facilities require which may be performed through a self-build option and what conditions, if any, are associated with such self-build option. In the first alternative, the pole owner and attaching entities would be responsible for all necessary make-ready work. For the second alternative, the pole owner and attaching entities will identify what make-ready work they will perform, if any, with an associated cost estimate, and also identify what make-ready work, if any, the owner is agreeable to have performed through a self-build option and the conditions, if any, for such self-build option.

1. For applications up to 20 poles, the pole owner shall respond with either an approval or a rejection within 45 days. At the same time as an approval is given, a completed make-ready estimate must be provided to the applicant explaining what make-ready work must be done, the cost of that work, and the time by which the work would be finished, that is no later than 120 days from receiving an initial deposit payment for the make-ready work.

2. For applications that represent greater than 20 poles, but equal to or less than .5% of the pole owner's poles in Utah, or 300 poles, whichever is lower, the time for the pole owner's approval and make-ready estimate shall be extended to 60 days, and the time for construction will remain at a maximum of 120 days.

3. For applications that represent greater than the number of poles calculated in section 3(2)(C)(2) above, but equal to or less than 5% of the pole owner's poles in Utah, or 3,000 poles, whichever is lower, the time for the approval and make-ready estimate shall be extended to 90 days, and the time for construction will be extended to 180 days.

4. For applications that represent greater than 5% of the pole owner's poles in Utah, or 3,000 poles, whichever is lower, the times for the above activities will be negotiated in good faith. The pole owner shall, within 20 days of the application, inform the applicant of the date by which the pole owner will have the make-ready estimate and make-ready construction time lines prepared for the applicant. If the applicant believes the pole owner is not acting in good faith, it may appeal to the Commission to either resolve the issue of when the make-ready estimate and construction period information should be delivered or to arbitrate the negotiations.

5. If the pole owner rejects any application, the pole owner must state the specific reasons for doing so. Applicants may appeal to the Commission if they do not agree that the pole owner's stated reasons are sufficient grounds for rejection.

6. For all approved applications, the applicant will either accept or reject the make-ready estimate. If it accepts the make-ready estimate and make-ready construction time line, the work must be done on schedule and for the estimated make-ready amount, or less, and the applicant will be billed for actual charges up to the bid amount.

7. Applicants must pay 50% of the make-ready estimate in advance of construction, and pay the remainder in two subsequent installment payments: an additional 25 percent payment when half of the work is done and the balance after the work is completed. Applicants may elect to pay the entire amount up front.

8. An applicant may, at its own discretion, exercise any of the self-build options given for the required make-ready work subject to the conditions made.

9. An applicant may reject a make-ready estimate if it wishes to contest, before the Commission, that the make-ready estimate or make-ready construction time line is not prepared in good-faith, or is unreasonable or not in the public interest.

D. Pole Attachment Placement -- All new copper cable attachments shall be placed at the lowest level permitted by applicable safety codes. In cases where an existing copper attachment has been placed in a location higher than the minimum height the safety codes require, the pole owner shall determine if the proposed attachment may be safely attached either above or below the existing copper attachment taking account of midspan clearances and potential crossovers. If these attachment locations, above or below the copper cable, comply with the applicable safety code, the

attacher may attach to the pole without paying to move the copper cable. The owner of the copper cable may elect to pay the costs of having the cable moved to the lowest position as part of the attachment process, or it may elect to move the cable themselves prior to the attaching entity's attachment. If the copper cable must be moved in order for the attacher to be able to safely make its attachment, the attacher shall pay the costs associated with moving the existing copper cable.

R746-345-4. Pole Labeling.

A. Pole Labeling -- A pole owner must label poles to indicate ownership. A pole owner shall label any new pole installed, after the effective date of this rule, immediately upon installation. Poles installed prior to the effective date of this rule, shall be labeled at the time of routine maintenance, normal replacement, change-out, or relocation, and whenever practicable. Labels shall be based on a good faith assertion of ownership.

B. Pole Attachment Labeling -- An attaching entity must label its pole attachments to indicate ownership. Pole attachment labels may not be placed in a manner that could be interpreted to indicate an ownership of the utility pole. An attaching entity shall label any new pole attachment installed, after the effective date of this rule, immediately upon installation. Pole Attachments installed prior to the effective date of this rule shall be labeled at the time of routine maintenance, normal replacement, rearrangement, rebuilding, or reconstruction, and whenever practicable.

C. Exception -- Electrical power pole attachments do not need to be labeled.

R746-345-5. Rental Rate Formula and Method.

A. Rate Formula -- Any rate based on the rate formula in this Subsection shall be considered just and reasonable unless determined otherwise by the Commission. A pole attachment rental rate shall be based on publicly filed data and must conform to the Federal Communications Commission's rules and regulations governing pole attachments, except as modified by this Section. A pole attachment rental rate shall be calculated and charged as an annual per attachment rental rate for each attachment space used by an attaching entity. The following formula and presumptions shall be used to establish pole attachment rates:

1. Formula:

Rate per attachment space = (Space Used x (1/Usable Space) x Cost of Bare Pole x Carrying Charge Rate)

2. Definitions:

a. "Carrying Charge Rate" means the percentage of a pole owner's depreciation expense, administrative and general expenses, maintenance expenses, taxes, rate of return, pro-rated annualized costs for pole audits or other expenses that are attributable to the pole owner's investment and management of poles.

b. "Cost of Bare Pole" can be defined as either "net cost" or "gross cost." "Gross cost" means the original investment, purchase price, of poles and fixtures, excluding crossarms and appurtenances, divided by the number of poles represented in the investment amount. "Net cost" means the original investment, purchase price, of poles and fixtures, excluding crossarms and appurtenances, less depreciation reserve and deferred federal income taxes associated with the pole investment, divided by the number of poles represented in the investment amount. A pole owner may use gross cost only when its net cost is a negative balance. If using the net or gross cost results in an unfair or unreasonable outcome, a pole owner or attaching entity can seek relief from the Commission under R746-345-5 C.

c. "Unusable Space" means the space on a utility pole below the usable space including the amount required to set the depth of the pole.

d. "Usable Space" means the space on a utility pole above the minimum grade level to the top of the pole, which includes the space occupied by the pole owner.

3. Rebuttable presumptions:

a. Average pole height equals 37.5 feet.

b. Usable space per pole equals 13.5 feet.

c. Unusable space per pole equals 24 feet.

d. Space used by an attaching entity:

(i) An electric pole attachment equals 7.5 feet;

(ii) A telecommunications pole attachment equals 1.0 foot;

(iii) A cable television pole attachment equals 1.0 foot; and

(iv) An electric, cable, or telecommunications secondary pole attachment equals 1.0 foot.

(v) A wireless provider's pole attachment equals not less than 1.0 foot and shall be determined by the amount of space on the pole that is rendered unusable for other uses, as a result of the attachment or the associated equipment. The space used by a wireless provider may be established as an average and included in the pole owner's tariff and standard contract, or SGAT, pursuant to Section R746-345-3 of this Rule.

e. The space used by a wireless provider:

(i) may not include any of the length of a vertically placed cable, wire, conduit, antenna, or other facility unless the vertically placed cable, wire, conduit, antenna, or other facility prevents another attaching entity from placing a pole attachment in the usable space of the pole;

(ii) may not exceed the average pole height established in Subsection R746-345-5(A)(3)(a).

(iii) In situations in which the pole owner and wireless provider are unable to agree, following good faith negotiations, on the space used by the wireless provider as determined in Subsection R746-345-5(A)(3)(d)(v), the pole owner or wireless provider may petition the Commission to determine the footage of space used by the wireless provider as provided in Subsection R746-345-3(C).

f. The Commission shall recalculate the rental rate only when it deems necessary. Pole owners or attaching entities may petition the Commission to reexamine the rental rate.

4. A pole owner may not assess a fee or charge in addition to an annual pole attachment rental rate, including any non-recurring fee or charge described in Subsection R746-345-3(A)(2), for any cost included in the calculation of its annual pole attachment rental rate.

B. Commission Relief -- A pole owner or attaching entity may petition the Commission to review a pole attachment rental rate, rate formula, or rebuttable presumption as provided for in this rule. The petition must include a factual showing that a rental rate, rate formula or rebuttable presumption is unjust, unreasonable or otherwise inconsistent with the public interest.

R746-345-6. Dispute Resolution.

A. Mediation -- Except as otherwise precluded by law, a resolution of any dispute concerning any pole attachment agreement, negotiation, permit, audit, or billing may be pursued through mediation while reserving to the parties all rights to an adjudicative process before the Commission.

1. The parties may file their action with the Commission and request leave to pursue mediation any time before a hearing.

2. The choice of mediator and the apportionment of costs shall be determined by agreement of the parties. However, the parties may jointly request a mediator from the Commission or the Division of Public Utilities.

3. A party need not pay the portion of a bill that is disputed if it has started a dispute proceeding within 60 days of the due date of the disputed amount. The party shall notify the Commission if the dispute process is not before the Commission.

B. Settlement -- If the parties reach a mediated agreement or settlement, they will prepare and sign a written agreement and submit it to the Commission. Unless the agreement or settlement is contrary to law and this rule, R746-345, the Commission will approve the agreement or settlement and dismiss or cancel proceedings concerning the matters settled.

1. If the agreement or settlement does not resolve all of the issues, the parties shall prepare a stipulation that identifies the issues resolved and the issues that remain in dispute.

2. If any issues remain unresolved, the matter will be scheduled for a hearing before the Commission.

KEY

public utilities, rules and procedures, telecommunications, telephone utility regulation

Date of Enactment or Last Substantive Amendment

August 29, 2006

Notice of Continuation

August 8, 2003

Authorizing, Implemented, or Interpreted Law

54-4-13

Rule converted into HTML by the Division of Administrative Rules.

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CERTIFICATE OF SERVICE

AR 506

Phase II

I hereby certify on this 6th day of November, 2006, Joint Supplemental Comments of T-Mobile West Corporation, d/b/a T-Mobile, New Cingular Wireless PCS, LLC, Sprint Spectrum L.P., and Nextel West Corp were sent via UPS overnight mail to the Oregon Public Utility Commission.

A copy of the filing was also sent via US Mail to the service list which is attached.

DAVIS WRIGHT TREMAINE LLP

By: _____
Mark P. Trinchero

Public Utility Commission

eDockets

Docket Summary

Docket No: AR 506 **Docket Name:** JOINT USE AND SAFETY RULES

Print Summary

See also: AR 510

In the Matter of a Rulemaking to Amend and Adopt Permanent Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachment Use and Safety.

Filing Date: 1/30/2006

Case Manager: JERRY MURRAY **Phone:** (503) 378-6626 **Email:** jerry.murray@state.or.us

Law Judge: CHRISTINA HAYES **Phone:**

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How to participate in this rulemaking.

ACTIONS | SERVICE LIST | SCHEDULE

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Attachment Rates, Terms and Conditions

AR 506 Phase II

Presentation to Individual Commissioners by

Cingular Wireless, Sprint Nextel and T-Mobile

November 16, 2006

WHY ARE WE HERE?

- Statutory, cost-based rates
  - Statute requires per-foot rate based upon costs
  - Current "market" rates for wireless attachments are as much as 500x the cost-based rate required by Oregon law
- Discriminatory rates by owners

WIRELESS-SPECIFIC COSTS DO NOT IMPACT THE ANNUAL RENTAL RATE FORMULA

- Wireless-specific costs are recovered through make ready charges:
  - Pole changeout fees
  - Engineering fees
  - Maintenance expenses
- Annual per-foot rate formula is not impacted by type of attachment
- Owners' wireless-specific arguments are merely an attempt to protect their unlawful revenue stream

Proposed Rules are Rebuttable Presumptions

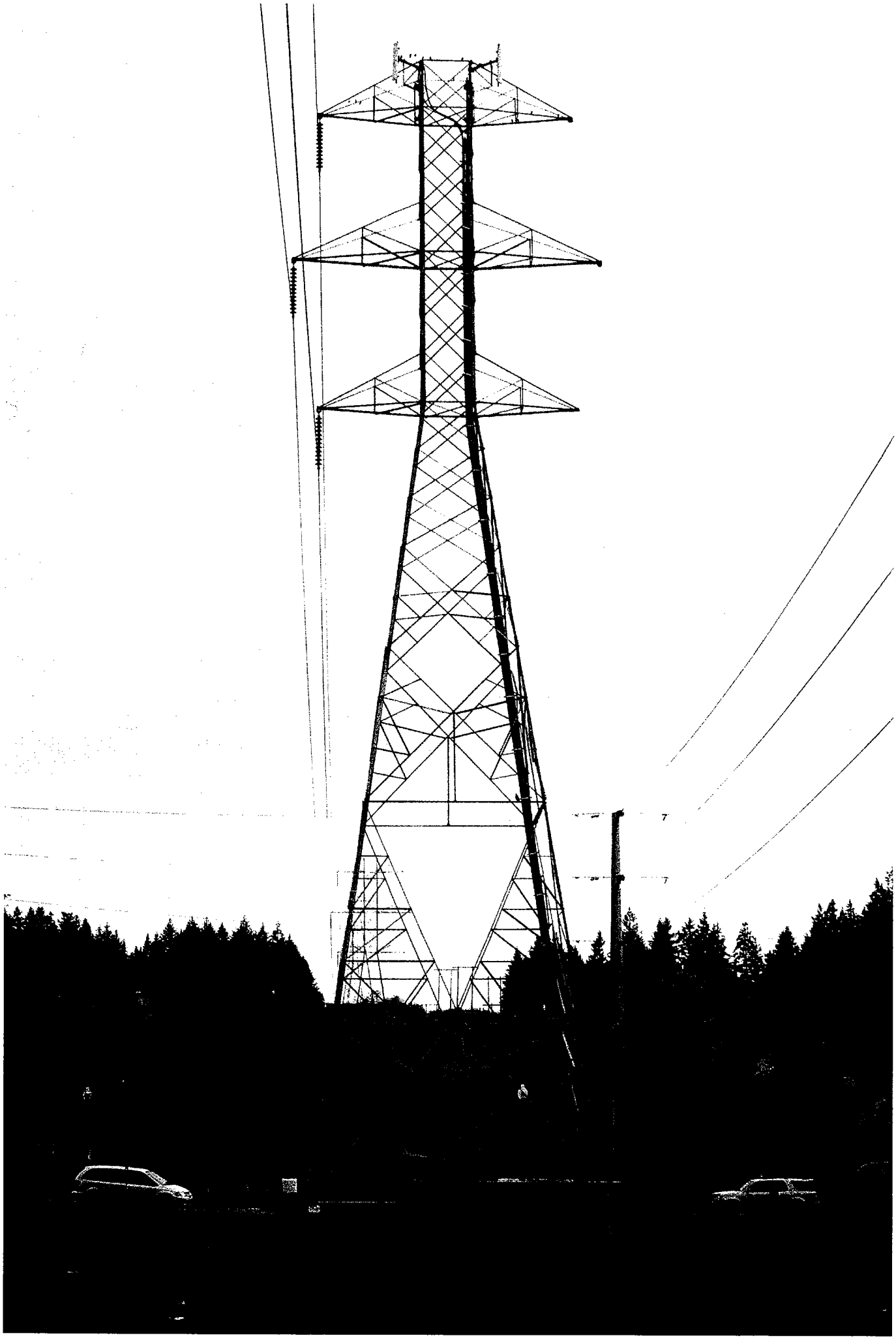
- Commission doesn't need to cover every item in the proposed rules
  - Broad default rules based on rebuttable presumptions
  - Parties are free to agree to different terms and conditions
- If dispute is brought before Commission, parties have opportunity to rebut the default presumptions in the rules

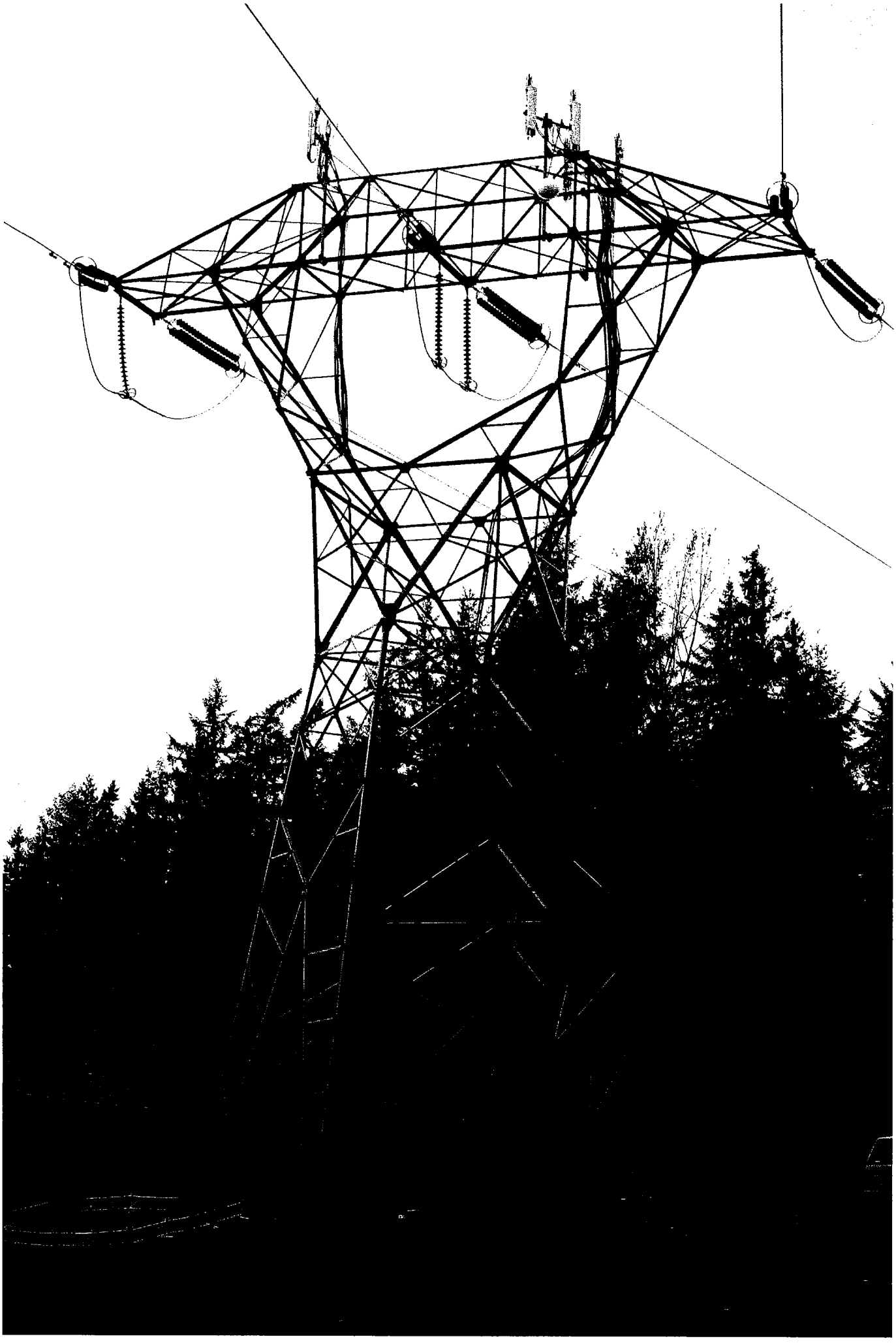
WIRELESS CARRIERS ARE LICENSEES

- Wireless carriers are Licensees under state statute
- Rules should apply to all licensees in nondiscriminatory manner
- Owners will continue to unlawfully discriminate against wireless until Commission expressly includes wireless
- If rules are not applied to wireless licensees, Commission may face another series of disputes with no guidelines

THE REAL ISSUE

- Successful cooperation for 10 years
- No complaints about installations
- Owner or its contractors perform work on facilities in or above electrical space
- Now that wireless carriers are seeking lawful rates, owners suddenly assert that their widely accepted practices are a serious concern
- The real issue is the owners' desire to maintain discriminatory pricing practices indefinitely



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AR 506

Phase II

I hereby certify on this 17th day of November, 2006, "Joint Final Round Comments of T-Mobile West Corporation, d/b/a T-Mobile, New Cingular Wireless PCS, LLC, Sprint Spectrum L.P., and Nextel West Corp." were sent via UPS overnight mail to the Oregon Public Utility Commission. In addition, a copy of a presentation entitled "Attachment Rates, Terms and Conditions: AR 506 Phase II Presentation to Individual Commissioners by Cingular Wireless, Sprint Nextel and T-Mobile, November 16, 2006" was submitted into the record.

A copy of the filing and the presentation was also sent via US Mail to the service list which is attached.

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eDockets

Docket Summary

Docket No: AR 506 **Docket Name:** JOINT USE AND SAFETY RULES

Print Summary

See also: AR 510

In the Matter of a Rulemaking to Amend and Adopt Permanent Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachment Use and Safety.

Filing Date: 1/30/2006

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