PACIFIC POWER
A DIVISION OF PACIFICORP

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November 17, 2006

VIA ELECTRONIC FILING
AND OVERNIGHT DELIVERY

Oregon Public Utility Commission
550 Capitol Street NE, Ste 215
Salem, OR 97301-2551

Attention: Vikie Bailey-Goggins, Administrator
Regulatory and Technical Support

RE: **Docket No. AR 506**

PacifiCorp hereby submits for electronic filing the Company's Second Round of Comments on Division 28 dated November 17, 2006 in Docket No. AR 506. A signed original and five (5) copies will be provided via overnight delivery.

Please direct questions with respect to this filing to Laura Beane at 503-813-5542.

Very truly yours,

Andrea L. Kelly
Vice President, Regulation
Enclosures

BEFORE THE
PUBLIC UTILITY COMMISSION OF OREGON

AR 506

In the Matter of a Rulemaking to Amend and Adopt Permanent Rules in OAR 860, Division 24 and 28, Regarding Pole Attachment Use and Safety	**PACIFICORP'S SECOND ROUND OF COMMENTS ON DIVISION 28 November 17, 2006**

INTRODUCTION

As Phase II of this rulemaking draws to a close, and the Commission undertakes the challenge of reviewing and evaluating the various comments and proposed rules submitted by the parties in this docket, PacifiCorp requests that the Commission maintain its firm stance on safety while evaluating joint use policies for Oregon. PacifiCorp believes that a strong focus on safety is the best way to ensure the safe and reliable operation of the respective parties' networks, as well as ensuring the safety of those who live and work near jointly used facilities. PacifiCorp would also request that the policies adopted by the Commission create an equitable balance of the interests between the pole owners and the pole occupants.

PERMITTING

PacifiCorp seeks only to protect its service reliability and public safety by defining the circumstances under which telecommunications companies can attach to its poles. PacifiCorp believes that it is the pole owner's responsibility and fundamental right to evaluate each request and, by explicitly authorizing or rejecting a specific attachment, be ultimately accountable for the condition of the facility. Several of the proposed rules

impact the pole owner's ability to perform this due diligence and ensure that the interests of the electrical consumer are protected.

The basis for approval of an attachment on a pole begins with a permit. The definition of permit, OAR 860-028-0020 (20), as it has been proposed by the Commission Safety Staff in their November 8 comments, is unacceptable to PacifiCorp. It includes an assumption that receipt of an invoice constitutes a permit.

PacifiCorp's proposed change to OAR 860-028-0020 (20): *"Permit" means the written or electronic record ~~or invoice~~ by which an owner authorizes an occupant to attach one or more attachments on a pole or poles, in a conduit, or on support equipment.*

PacifiCorp submits it is inappropriate to allow an invoice to serve as a substitute for a permit. An invoice may be issued for any of the sanctions allowed under the rules, whether for failure to obtain a contract, failure to obtain a permit, or failure to abide by Commission Safety Rules or contractual obligations. Such invoices should not be construed as authorizing the attachments. While invoices are also submitted for activities associated with attachments that are approved, the licensee still receives a separate, distinct, permit from PacifiCorp. When time-to-market is a critical aspect of this competitive environment, allowing an invoice to serve as a substitute for a permit does not encourage the occupants to comply with the permitting process. Instead, it would allow the occupant to attach to the pole, self-report the unauthorized attachment, and receive an invoice of about the same cost as they would have received for pre-construction inspection and application processing. The permit has always been the

fundamental document demonstrating to all parties that the work is authorized, and it needs to remain completely separate from the invoicing process.

In addition to the concerns around invoicing, another proposed rule that potentially compromises the safety and reliability of the electrical system is the rule which would allow an application to be deemed approved if the pole owner fails to respond to the request in a timely manner.

PacifiCorp's proposed change to OAR 860-028-100 (3)(e): *If the owner does not provide the applicant with notice that the application is approved, approved with conditions, or denied within 45 days from its receipt, the ~~application is deemed approved and the~~ applicant must contact the owner. If the owner fails to respond to such inquiry within 10 calendar days, the applicant may begin construction, provided that such construction does not require electrical make ready work, is in compliance with the pole owner's contractual expectation and Commission Safety Rules, and that complete and satisfactory as-built pole loading analysis and measurements are given to the pole owner with the notification of installation*[1]. ~~*and will notify the owner within 30 business days of completion of construction.*~~

PacifiCorp believes that 45 days is a reasonable timeframe for the pole owner to respond as long as the "Threshold number of poles" definition remains[2] and that OAR 860-028-0100 (3)(d) is upheld with respect to the completeness of applications. Earlier this year, PacifiCorp began altering business processes to attempt to comply with a 45 day turnaround on applications because it was felt to be a reasonable goal. PacifiCorp is

[1] This is consistent with the Commission Safety Staff proposal filed on November 8th, proposed rule 860-028-0100 (3) (b) which states: "the owner may require the applicant to provide notice of work completion within 45 days."

[2] See the Commission Safety Staff's Second Round of Comments filed November 8, 2006.

confident that once this rule is in place, compliance will be manageable. However, from time to time, it is reasonable to expect that the pole owner may inadvertently miss the 45 day deadline, and the Staff has proposed language that would allow the applications in those instances to be "deemed approved". PacifiCorp believes that the statutory language contained in ORS 757.271(1) prohibits the Commission from allowing such applications to be "deemed approved", because the statute requires the applicant to have "authorization from the utility allowing the attachment", before the attachment can be established. Should there be a delay in meeting the 45 day timeframe, PacifiCorp feels that the applicant should have some recourse for ensuring the completion of their request. Adding notification language that requires the applicant to contact the pole owner, and language that allows the pole owner a 10-day window to respond, is a reasonable compromise that will also serve as a safety net for those instances where the application was never received. This concept is also consistent with proposed language in the Sanctions that allow a grace period following the expected completion date for a plan of correction before the pole owner can take action to correct or remove the violation.

One additional component that critically supports the achievability of the 45-day turnaround time is OAR 860-028-0100 (3) (e), the definition of "Threshold number of poles[3]." The November 8, 2006 proposals from Commission Safety Staff include the addition of "...over any 30 day period" to the definition, which PacifiCorp approves. PacifiCorp has always worked closely with applicants submitting requests in excess of 50 poles, and has found that applicant's expectations are generally reasonable with respect to identifying mutually agreeable timeframes for completion of the work. We encourage

[3] Proposed rule 860-028-0020 (33)

applicants to perform as much engineering analysis up-front as possible to limit any complications that may arise during the inspection process.

Several proposed changes to definitions address the pole owner's rights with respect to "... whether the application is approved, approved with modifications or conditions, or denied[4]" and the recovery of costs associated with performing those activities on behalf of a specific occupant. PacifiCorp supports the new proposed definitions of "Make-ready work[5]", "Post construction inspection[6]", "Preconstruction activity[7]", and "Special inspection[8]" as defined in the Commission Safety Staff's November 8, 2006 proposal.

There is a slight change that PacifiCorp would propose to the definition of "Support equipment."

PacifiCorp's proposed change to OAR 860-028-0020 (29): *"Support equipment" means guy wires, anchoring systems and other accessories of the pole owner used to support the structural integrity of the pole to which the ~~licensee~~ occupant is attached.*

The term "support equipment" is used in several places throughout Division 28. PacifiCorp recognizes that the Commission Safety Staff has made modifications to the definitions of "Licensee" and "Occupant" to the extent that "Licensee[9]" explicitly excludes government entities and "Occupant" includes them. PacifiCorp does not believe that "Licensee" is the appropriate term for this definition given that all entities on the pole could potentially attach to support equipment. Thus, PacifiCorp recommends that

[4] Proposed rule 860-028-0100 (3) (e)
[5] Proposed rule 860-028-0020 (12)
[6] Proposed rule 860-028-0020 (23)
[7] Proposed rule 860-028-0020 (24)
[8] Proposed rule 860-028-0020 (28)
[9] Amended rule 860-028-0020 (11)

the more inclusive term be used in this case, as well as several other cases detailed in Attachment A.

MAKE-READY WORK

PacifiCorp, as an electric utility, is very concerned by the proposed rule that addresses the right of the applicant to escalate the timeframe for work that needs to be performed before their attachment will be permitted.

PacifiCorp's proposed change to OAR 860-028-0100 (5): *If an owner can not meet the time frames established by this rule, preconstruction activity, application and make ready work may be performed by a mutually acceptable third party who will be managed by the electric supplier, or by the pole owner if no electric supplier is attached.*

The proposed language appears to require that should the pole owner not have sufficient resources available to perform the work in a timeframe that is acceptable to the applicant, that the pole owner must obtain a mutually acceptable third party to perform the work. (There is nothing in the proposed language that explicitly allows the applicant to contract for that work to be performed.) PacifiCorp agrees with this language and can support the requirement to ensure the pole owner utilizes all available resources , *provided that the pole owner is the electric service provider*. Typically, where the pole owner is not the electric service provider, the telecommunications pole owner must contract with the electric service provider to complete pole replacements or other activities involving the power contacts. The electric utility owns the electric supply infrastructure on the poles and is responsible for the safety and operational integrity of the electric supply. Accommodation work may include pole replacements, electric

facility grounding, connections to the distribution neutral, and other work that directly affects the electric utility's operational effectiveness.

The proposed language fails to take into account the serious responsibilities involved in maintaining safe and reliable operation of the electric supply, particularly when the electric supply owner *is not* the pole owner. This rule, in practice, would require the electric utility to hand over project management of this major responsibility to telecommunication entities with absolutely no guarantee of prior experience or qualifications. Additionally, the joint use agreements between pole owners do not dictate the electric supplier's construction standards for electrical facilities, leaving the electrical supplier vulnerable to alterations of their facilities that are not in compliance with the standards established to ensure worker and public safety. The telecommunications pole owner lacks the ability enforce compliance with electrical standards by the third party contractor regarding electrical operating procedures, which are critical to safe operation of the electrical system, including but not limited to: substation operations, mandatory customer notification, and communications with other workers on the electrical network.

PacifiCorp urges the Commission to fully consider the intent of this rule and whether such a rule is appropriate when there are electric facilities on the pole.

PacifiCorp would recommend that the Commission not allow third parties to replace poles that support electric facilities, nor to undertake any make-ready work outside the communications space on a pole, unless the third party is managed by the electric supplier.

ACCESS

Oregon's pole attachment statutes are unclear as to whether or not they apply to both transmission and distribution facilities. The state's pole attachment statutes refer only to "poles" in general, and do not distinguish between transmission and distribution facilities. Further, the statutes do not refer to towers or other terms associated with transmission facilities. The legislative history associated with Oregon's pole attachment laws also does not include any discussions that distinguish transmission facilities from distribution facilities. Oregon's legislative history does make it clear, however, that when those laws granting the Commission authority to exercise jurisdiction over pole attachments were adopted, the Legislature acted with the intent to preempt the Federal Communication Commission's jurisdiction, to regulate those attachments under the Pole Attachment Act. And, to the extent that "Congress intended to limit the [Pole Attachment] Act's application to local distribution facilities,"[10] logic would suggest that the Oregon Legislature intended to exert its claim to regulate that aspect of activity on distribution poles that would otherwise be retained by the FCC.

The Commission, as a governmental agency, has the power to interpret those laws, as may be necessary, in order to exercise the authority delegated to it. PacifiCorp would encourage the Commission to consider not only Oregon's legislative intent when interpreting the inexact term "poles", but to also consider the intent of Congress, and the purpose behind the Pole Attachment Act that Oregon's laws were designed to implement. PacifiCorp submits that requiring pole attachments on transmission facilities is contrary to the policy established in the Pole Attachment Act, and since Oregon's pole attachment laws were expressly adopted to implement that policy, thereby preempting the FCC's

[10] *Southern Co. v. FCC*, 293 F.3d 1338, 1345 (11th Cir. 2002).

jurisdiction, it would be reasonable to interpret Oregon's pole attachment laws to be consistent with the federal Pole Attachment Act.

In the absence of any clear legislative intent to the contrary, PacifiCorp would encourage the Commission to limit application of its pole attachment rules to exclude transmission poles and towers.

The Commission Safety Staff's recommendation to insert the word "distribution" into the definitions for "Pole[11]" and "Pole cost[12]" is appropriate, and should be adopted by the Commission. In addition, it is appropriate to limit OAR 860-028-0115 (2) to distribution poles, and remove the reference to towers. This proposed change by the Commission Safety Staff, will bring Oregon's pole attachment rules in line with the legislative intent behind the state statutes on pole attachments and Congress's intent behind the Pole Attachment Act.

SAFETY

The pole owners are ultimately responsible for ensuring that the facilities constructed upon their poles are in compliance with all applicable Commission Safety rules, NESC and any individual contractual rules. From PacifiCorp's perspective, a large amount of time has gone into revising a policy that has been working well since its inception, and has been instrumental in improving the condition of all of the facilities in the state. PacifiCorp feels that the available sanctions, under the current rules, are the primary reason why the Licensees comply with the permitting process. By establishing new

[11] Proposed rule 860-028-0020 (21)
[12] Proposed rule 860-028-0020 (22)

sanctions that do not have as strong of a deterrent to bypassing the rules, the Commission may inadvertently create the very environment that they wish to avoid.

PacifiCorp, in general, supports the proposed changes to the rules in AR 510 as proposed by the OJUA in their October 9 filing. The rules in place today are a bit cumbersome to administer. To this extent, PacifiCorp appreciates the simplification to the sanctions calculations that have been proposed by the OJUA. However, there are some minor changes that PacifiCorp would like to see within the sanction rules.

Allowing the Licensee to reduce their penalty by self reporting[13] an unauthorized attachment is one area that PacifiCorp feels will not encourage compliance.

PacifiCorp recommends restoring 860-028-0150 to its original language, and supports the additional clarifications provided by proposed subsection (4) and subsection (5).

The argument for this is similar to the argument against allowing an invoice to serve as a permit. Both proposals encourage the applicant to bypass the application permitting process, provided that they are willing to pay the penalty, and in this case they are given the option to further reduce the penalty by informing the pole owner that they have made an illegal attachment. This is equivalent to a citizen parking in the red zone in front of the pharmacy because they needed something in a hurry, pointing it out to the traffic officer, and getting a half-price ticket because they were so considerate as to let the officer know.

Another type of sanction exists for the creation of safety violations. This collection of rules differentiates between "legacy" violations that may have existed for many years

[13] Proposed rule 860-028-0140 (2) (a) allows for a sanction of "5 times the current annual rental fee per pole if the violation is reported by the occupant to the owner or discovered through a joint inspection between the owner and occupant; or"

prior to their discovery, and "post-construction" violations that occur as the result of new attachments or pole transfers or other construction activity.

PacifiCorp can support the differentiation between legacy and recent construction, , provided the conditions do not place field crews at risk, because there are many attachments with violations that were "created" solely due to changes in NESC rules or the pole owner's construction standards. However, PacifiCorp feels strongly that the incentive to build it right the first time needs to be significant enough to continue to encourage the compliant behavior that has been seen in Oregon since the original sanctions were introduced.

In the following example, the language referenced is from the OJUA Oct 9 Sanctions Draft document. Scenario: An occupant with a joint use agreement places an unauthorized attachment on the pole owner's pole, and creates a violation in the process. The occupant self-reports their unauthorized attachment, and after performing a post-inspection, the pole owner is only able to issue a $200 sanction for the safety violation. (860-028-0160 (1) contends that the pole owner may only charge one sanction). The occupant submits a plan of correction, which, under Division 24 rule 860-024-0012, may allow up to 10 years to correct the condition. The recommendation in Division 28 implies that the condition should be corrected within 180 days, but allows the occupant to provide a plan of correction in excess of 180 days for "good cause," for which they could arguably point to the Division 24 rules. The occupant has now been allowed to bypass the application process, and can leave the violation alone for up to 10 years. Meanwhile, the occupant has received all the benefits associated with early installation of whatever service is being provided via the attachment.

PacifiCorp maintains that this is NO DETERRENT; in fact, the proposed rules actively encourage occupants to push the limits of the rules to their commercial advantage. There must be either a stiffer up-front penalty, or a simplified escalation process.

Throughout the Division 28 proceedings, PacifiCorp and other pole owners have been accused of being duplicitous with respect to the application of rules associated with violations of the Commission Safety Rules. It would appear that the pole owners are asking for leniency in the Division 24 rules while at the same time crying for the harshest possible penalties for joint use violations. However, PacifiCorp acknowledges full responsibility for our its own attachments on its poles, and acknowledges that the company is fully accountable for all the audits and fines that the Commission Safety Staff may impose with respect to the company's attachments. The primary difference between application of sanctions for third party attachments, and administration of the owner's own attachments is the owner is completely in control of its own attachments on their poles, and there is a mechanism by which the Commission Safety Staff can penalize the owner for violations of the state's safety rules. In other words, the pole owner's attachments are already policed by both the pole owner and the Commission Safety Staff. Third party attachments are altogether different in that when they are installed in such a way that increases the risk to electric service reliability and public safety but fall just short of creating an "imminent hazard," the rules would require that significant periods of time must pass before the pole owner can correct the condition at the occupant's expense.

PacifiCorp recognizes that as an occupant on poles owned by others, the company is subject to both the Commission Safety Staff inspections and the application of sanctions

by the pole owner. No duplicity is intended by the company's support of stronger deterrents through higher sanctions.

Management of condition notification and the subsequent tracking of correction plans is an administrative headache for the pole owner. The condition needs to be created; notification is prepared; the plan of correction is received, noted, agreed to, and returned; and the anticipated date of correction noted for follow up. Should the occupant fail to respond, either a phone call or post-inspection must take place, with additional administrative tasks required if the work has not been completed, and additional waiting periods before anything can be done about it. These administrative tasks are included in overheads associated with contact rental rates, at a significantly diluted percentage, and PacifiCorp is not advocating use of the sanctions to cover these administrative costs; those expenses are recoverable by statute. PacifiCorp encourages the Commission to sustain the existing penalties that have served as a substantial deterrent to new construction violations of the rules the Commission has worked so hard to implement and protect – not because PacifiCorp finds the sanction revenue desirable, but because PacifiCorp would prefer construction practices to be such that the company never to has to bill for sanctions again.

COST RECOVERY

The primary method the pole owner uses to recover its costs associated with making its distribution poles available for joint use attachments is an annual rental rate. The other method available to recover those costs not included in the annual rental rate is direct charges. Annual rental provides a means for the pole owner to recover indirect

costs related specifically to maintaining joint use space on each distribution pole. Direct charges are specifically associated with and attributed to a specific occupant as the cost causer. Direct charges could include items such as application processing fees and inspection expenses.

Speaking first to the annual rental rate, PacifiCorp believes that the most appropriate methodology to employ in calculating the annual rental rate is one that takes into consideration both usable and unusable space on a pole. As the Staff noted in its Second Round of Comments dated November 8, 2006, the FCC has a rental formula, commonly called the "telecom formula" that takes into consideration the whole pole, not just that portion of the pole that is available for telecommunication attachments. Such an approach recognizes that the usable portion of the pole cannot exist by itself, therefore, the "unusable" space is included in the rate calculation and the occupants share more equally in the costs for both the usable and unusable space. Including both usable and unusable space in the formula ensures a better balancing of the cost sharing between the utilities' rate payers and the pole occupants who are utilizing the poles, thereby inherently making the rate calculation fairer.

Both the Staff and the Administrative Law Judge have questioned whether Oregon's statute ORS 757.282 precludes the Commission from adopting a rate methodology that includes "unusable space" in the rate calculation. PacifiCorp argues that the statute does not preclude the inclusion of "unusable space" in the rate calculation. In reaching its conclusion, PacifiCorp closely examined the language of the statute and explored the legislative intent behind the statute. First, PacifiCorp found that the language in the statute establishes a floor and a ceiling for recovery of costs (via the rental rate), and then

merely establishes criteria to be considered by the Commission, in the event a complaint is filed. However, the statute falls short of dictating a specific calculation or methodology for arriving at a fair, just and reasonable rental rate. Secondly, the statute suggests that a just and reasonable rate shall recover costs "attributable to that portion of the pole . . . used for the pole attachment . . .", but it fails to define the dimensions of that portion of the pole that is "used", and PacifiCorp surmises that it is this particular ambiguity that has given rise to the Staff's and the ALJ's questions. From PacifiCorp's perspective, such ambiguity offers the Commission the opportunity to define the dimensions of "that portion of the pole . . .used for the pole attachment", and PacifiCorp would encourage the Commission to do so. The language contained in ORS 757.279 indicates that the legislature has given the Commission the latitude to consider the interest of the customers of the licensee, as well as the interest of the customers of the public utility (See ORS 757.279). Given its analysis, PacifiCorp believes the Legislature clearly intended to delegate jurisdiction and authority to the Commission, and to allow the Commission to exercise its discretion in interpreting and applying the language of the pole attachment statutes to each dispute. In 1983, when confronted with two pole attachment disputes, the Commission chose to exercise its jurisdiction and it initiated a proceeding to consider default rules for governing disputes between pole owners and licensees attaching cable or wire to poles. In its final Order, No. 84-278, the Commission adopted a number of rules, including a rate formula. Since it was the Commission's interpretation of the statute that led to the creation of the current rate formula rule, PacifiCorp would suggest that this Commission has the authority and the discretion to

change the rule as it may deem appropriate, provided such rule is not inconsistent with the statute.

In support of its argument that the Commission employ a different rate methodology that takes into consideration both usable and unusable space on a pole, PacifiCorp recommends that the Commission define the dimensions of the space "used for the pole attachment". Staff has previously advocated that the Communication Worker Safety Zone is "unusable", and with such an interpretation, the costs associated with that space are borne by all. However, Staff's depiction of the usable and unusable space (identified as Attachment B to its November 8, 2006 Comments) accurately reflects the fact that it is rebuttable. PacifiCorp would adopt the position that the Communication Worker Safety Zone remain as unusable space because the space only exists once an attachment is made to the pole. Before the attachment, the space is available for use, but, after an attachment is made, the Communication Worker Safety Zone becomes protected, and is unavailable to the pole owner or anyone else. Fairness dictates that the pole owner should be able to recover the entire costs that are incurred as a result of making its distribution poles available for telecommunications attachments. Using a methodology that considers both the usable and unusable space in the rental rate calculation is a more equitable approach and takes into consideration the whole pole. Establishing a formula that does not allow the pole owner to recover the costs for maintaining the whole pole has the effect of protecting the telecommunications industry at the expense of ratepayers who otherwise bear those costs without any guaranteed benefit from the telecommunications industry, for such use. Such an interpretation and result is not contrary to the statute.

With regard to direct costs, PacifiCorp believes the Commission should make clear that direct costs are just and reasonable and will be allowed, provided the pole owner can demonstrate that the fees it seeks to impose are for the purpose of recovering costs incurred in servicing specific pole attachment requests that, (a) are not otherwise recovered in the pole rental, and (b) would not have been incurred but for the obligation to accommodate and service pole attachment requests.

If the pole owner can satisfy these two criteria, the Commission should allow such costs to be recovered from the cost causer. Specifically, PacifiCorp would like the Commission to explicitly authorize pole owners to recover application processing fees, expenses for pre- and post-construction inspections, and periodic inspection fees.

PacifiCorp would discourage the Commission from adopting any methodology that would allow direct costs to be included in the administrative component of the carrying charge, as some have proposed. While it is not surprising that the telecommunications industry is lobbying for changes in the rules that will allow them to utilize *any* utility facility at little or no cost to their customers, it seems inappropriate for them to suggest that the pole owners will be made whole by allowing direct costs to be rolled into the administrative component of the carrying charges. Only a prorata share of administrative costs are included in the rental rates based on the ratio of investment in poles to total utility plant. For PacifiCorp this ratio is about 7%. Furthermore, Licensees only pay for about 7% of the annual pole cost. Thus, this method results in recovery of less than 1% of direct costs, when all of the direct costs should be recoverable from specific Licensees.

Additionally, PacifiCorp would point out that allowing direct costs to be rolled into the administrative component of the carrying charges also results in the pole occupants

subsidizing each other, wherein a company with heavy activity or growth has a portion of their expenses paid for by other pole occupants. To the extent that a utility can separate and illustrate the specific costs incurred on behalf of a particular cost causer, the utility should be able to recover those costs directly, and outside of the annual rental rate.

Electricity consumers should not have to subsidize their neighbor's access to phone or cable services.

GOVERNMENT ENTITY EXCLUSION

Throughout the proposed rule changes in both AR506 and AR510, PacifiCorp has attempted to persuade other participating parties that the insertion of language explicitly excluding government entities is unnecessary and redundant. Government entities are already excluded from the definition of Licensee by statute. As such, by explicitly calling out in the Oregon Administrative Rules that government entities are excluded, the rules will need to be changed should the statute be altered at some point in the future. Furthermore, PacifiCorp believes that ultimately a distinction needs to be made between government entities installing attachments for their own use, such as for traffic control or communications between government buildings, and government entities or their agents engaging in telecommunications or information services commercially. PacifiCorp strongly recommends all references to "excludes government entity" be stricken from the proposed changes.

WIRELESS

All of PacifiCorp's comments so far in this document have related only to wired telecommunications attachments in the communication space on the pole.

For all pole occupants, there are a series of events that take place prior to the first application being submitted. This includes evaluating the proposed equipment and position of attachment, establishing a contract, and determining the appropriate rate treatment. Where equipment is unprecedented, such as for the new wireless or wi-fi devices currently being proposed, significant engineering evaluation may be required. In addition to understanding how the device factors into loading analysis, evaluation of the mounting, and calculation of RF exposure radius and direction, the power supply requirements of the device must also be evaluated.

Almost without exception the wireless devices require some sort of power supply, which may or may not require a special cutout on the pole, and may or may not require a meter, and may or may not require creation of a specific tariff for the electricity consumption. These types of attachments are completely different than bolting a cable messenger onto a pole. But, once the application has been conceptually approved there may be additional complexities in the occupant obtaining any additional permitting or right of way for placing of their meter base or other necessary equipment. The power supply requirement makes the process much more akin to establishing service for a residential or commercial customer than for simply authorizing a joint use attachment, with the exception that the bulk of the equipment remains attached to the pole.

PacifiCorp recently received a joint use request from a municipal entity in another state, asking to attach a number of wireless devices to the company's poles for purposes

of controlling a sprinkler system. Once the scope of items governed by joint use expands to include equipment that is not the traditional telephone or cable messenger wire, it is anyone's guess where it may end?

It is important to note that the pole owner has the right today to choose to allow such contracts and attachments to take place. Delaying the regulation of such attachments will not prohibit growth of the wireless or wi-fi industry; they may negotiate individually with pole owners in any such way as the parties find mutually agreeable. However, prematurely incorporating non-telecommunications equipment into the existing governance for joint use may have significant ramifications that are not appreciated at present. The subject requires careful review and analysis.

PacifiCorp requests the Commission defer the wireless access issue to a separate docket so that all the related safety and attachment issues can be adequately considered. A separate docket will allow the industries to fully evaluate: the unique design and loading factors associated with wireless equipment; the practicalities of accommodating wireless occupants in the context of operating the electric system; fairness to electric customers who will be impacted by potential outage scheduling; and protection for utility workers, the general public, and protected bird species from RF exposure. These are a few of the issues that PacifiCorp has identified, and believes need to be fully vetted in a separate docket.

CONCLUSION

The final rules that emerge from this proceeding will further define the pole attachment policy for the state of Oregon. While focus on the wording of the individual rules is important, PacifiCorp submits it is far more important to review and evaluate the

rules as a whole policy setting document. It is important to encourage the shared use of electric distribution infrastructure as the most reasonable means of bringing telecommunications services to the consumers. We ask only that the final rules establish a policy that allows the electric supply operator to protect its customer's interests by ensuring the safe and reliable operation of the electrical network; the safety of those who work on the facilities and the general public; and the telecommunications industry to pay its fair share of cost such that they are not subsidized by the pole owner's ratepayers. Finally, PacifiCorp believes that the wireless issue should be deferred to a separate docket to fully consider the appropriate use of infrastructure with the attachment of new devices.

ATTACHMENT "A"

PACIFICORP'S PROPOSED RULE CHANGES

860-028-0020 Definitions for Pole and Conduit Attachment Rules[1]

For purposes of this Division:

(1) "Attachment" has the meaning given in ORS 757.270 and 759.650.

(2) "Authorized attachment space" means the space occupied by one or more attachments on a pole by an occupant with the pole owner's permission.

(3) "Carrying charge" means the costs incurred by the owner in owning and maintaining poles or conduits regardless of the presence of pole attachments or occupation of any portion of the conduits by licensees. The carrying charge is expressed as a percentage. The carrying charge is the sum of the percentages calculated for the following expense elements, using owner's data from the most recent calendar year available:

(a) The administrative and general percentage is total general and administrative expense as a percent of net investment in total plant.

(b) The maintenance percentage is maintenance of overhead lines expense or conduit maintenance expense as a percent of net investment in overhead plant facilities or conduit plant facilities.

(c) The depreciation percentage is the depreciation rate for gross pole or conduit investment multiplied by the ratio of gross pole or conduit investment to net investment in poles or conduit.

(d) Taxes are total operating taxes, including, but not limited to, current , deferred, and "in lieu of" taxes, as a percent of net investment in total plant.

(e) The cost of money is calculated as follows:

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[1] Proposed rules from Commission Safety Staff November 8, 2006 comments.

(A) For a telecommunications utility, the cost of money is equal to the rate of return on investment authorized by the Commission in the pole or conduit owner's most recent rate or cost proceeding;

(B) For a public utility, the cost of money is equal to the rate of return on investment authorized by the Commission in the pole or conduit owner's most recent rate or cost proceeding; or

(C) For a consumer-owned utility, the cost of money is equal to the weighted average of the utility's embedded cost of debt and the most recent cost of equity authorized by the Commission for ratemaking purposes for an electric company as defined in OAR 860-038-0005.

(4) "Commission pole attachment rules" mean the rules provided in OAR Chapter 860, Division 028.

(5) "Commission safety rules" mean the rules provided in OAR Chapter 860, Division 024.

(6) "Conduit" means any structure, or section thereof, containing one or more ducts, manholes, or handholes, used for any telephone, cable television, electrical, or communications conductors or cables- owned or controlled, in whole or in part, by one or more public, telecommunications, or consumer-owned utilities.

(7) "Consumer-owned utility" has the meaning given in ORS 757.270.

(8) "Day" means any one day in a calendar year, unless otherwise specified.

(9) "Duct" means a single enclosed raceway for conductors or cables.

(10) "Government entity" means a city, a county, a municipality, the state, or other political subdivision within Oregon.

(11) "Licensee" has the meaning given in ORS 757.270 or ORS 759.650. ~~"Licensee" does not include a government entity.~~

(12) "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. Make ready work costs are nonrecurring costs, and are not contained in carrying charges.

(13) "Net investment" is equal to the gross investment, from which is first subtracted the accumulated depreciation, from which is next subtracted related accumulated deferred income taxes, if any. 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.

(14) "Net linear cost of conduit" is equal to net investment in conduit divided by the total length of conduit in the system.

(15) "Notice" means written notification sent by mail, electronic mail, telephonic facsimile, or other such means.

(16) "Occupant" means any licensee, government entity, or other entity that constructs, operates, or maintains attachments on poles or within conduits.

(17) "Owner" means a public utility, telecommunications utility, or consumer-owned utility that owns or controls poles, ducts, or conduits.

(18) "Pattern" means a course of behavior that results in a material breach of a contract, or permits, or in frequent violations of OAR 860-028-0120.

(19) "Percentage of conduit capacity occupied" means the product of the quotient of the number "one" divided by the number of inner ducts multiplied by the quotient of the number "one" divided by the number of ducts in the conduit [i.e. (1/Number of Inner Ducts (≥2)) x (1/Number of Ducts in Conduit)].

(20) "Permit" means the written or electronic record ~~or invoice~~ by which an owner authorizes an occupant to attach one or more attachments on a pole or poles, in a conduit, or on support equipment.

(21) "Pole" means a ~~transmission pole or~~ a distribution pole owned or controlled by a public utility, telecommunications utility or a consumer owned utility.

(22) "Pole cost" 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 distribution pole is 40 feet and the ratio of bare pole to total pole for a public utility or consumer-owned utility is 85 percent, and 95 percent for a telecommunications utility.

(23) "Post construction inspection" means work performed to verify and ensure the construction complies with the permit, governing agreement, and Commission safety rules.

(24) "Preconstruction activity" means engineering, survey and estimating work required to prepare cost estimates for an attachment application by which the applicant may use to permit or re-route. Pre-construction activity includes costs incurred as a result of a occupant request up to but not including make-ready or carrying charges.

(25) "Public utility" has the meaning given in ORS 757.005.

(26) "Serious injury" means "serious injury to person" or "serious injury to property" as defined in OAR 860-024-0050.

(27) "Service drop" means the overhead conductors between electric distribution supply or communication distribution line and the building or structure being served, not to exceed 1,000 feet and not using a separate supporting messenger.

(28) "Special inspection" means an owner's field visit for all nonperiodic inspections. A special inspection does not include preconstruction activity or post construction inspection.

(29) "Support equipment" means guy wires, anchoring systems and other accessories of the pole owner used to support the structural integrity of the pole to which the occupant ~~licensee~~ is attached.

(30) "Support equipment cost" means the average depreciated original installed cost of support

equipment.

(31) "Surplus ducts" means ducts other than:

(a) those occupied by the conduit owner or a prior occupant ~~licensee~~;

(b) an unoccupied duct held for emergency use; or

(c) other unoccupied ducts that the owner reasonably expects to use within the next 60 months.

(32) "Telecommunications utility" has the meaning given in ORS 759.005.

(33) "Threshold number of poles" means 50 poles, or one-tenth of one percent (0.10 percent) of the owner's poles, whichever is less, over any 30 day period.

(34) "Unauthorized attachment" means an attachment that does not have a permit ~~and a governing agreement subject to the provisions of 860-028-0120(1)~~.

860-028-0050 General[2]

(1) Purpose and scope of this Division:

(a) OAR Chapter 860 Division 028 governs access to utility poles, conduits, and support equipment by occupants in Oregon, and it is intended to provide just and reasonable provisions when the parties are unable to agree on certain terms.

(b) Except where otherwise provided, the following rules contained in this Division are mandatory: OAR 860-028-0050 through OAR 860-028-0080, OAR 860-028-0115 and OAR 860-028-0120.

(c) Except for the rules specified in subsection (b) of this rule, parties may mutually agree on terms that differ from those provided in the rules contained in this Division. However, in the event of a dispute submitted for Commission resolution, the Commission will deem the terms and conditions specified in the rules contained in this

[2] Proposed rules from Commission Safety Staff November 8, 2006 comments.

Division as presumptively reasonable. In the event of a dispute that is submitted to the Commission for resolution, the burden of proof is on any party advocating a deviation from the rules in this Division to show the deviation is just, fair and reasonable.

(2) After the owner provides reasonable notice to a licensee of a hazard or situation requiring prompt attention, and after allowing the licensee a reasonable opportunity to repair or correct the hazard or situation, and if the hazard or situation remains uncorrected, the owner may correct the attachment deficiencies and charge the licensee for its costs. An Owner may charge an occupant ~~licensee~~ for any fines, fees, damages, or other costs the licensee's attachments cause the pole owner to incur.

(3) An owner or occupant that is an operator of communication facilities must trim or remove vegetation that poses a significant risk to its facilities or through contact with its facilities poses a significant risk to a structure of an operator of a jointly used system.

860-028-0060 Attachment Contracts or Agreements[3]

(1) Any entity requiring pole attachments to serve customers should use poles jointly as much as practicable.

(2) To facilitate joint use of poles, entities must execute contracts or agreements establishing the rates, terms, and conditions of pole use in accordance with OAR 860-028-0120.

(3) Parties must negotiate pole attachment contracts and agreements in good faith.

(4) Unless otherwise provided for by contract or agreement, when the parties are negotiating a new or amended contract or agreement, the last effective contract or agreement between the parties will continue in effect until a new or amended contract or agreement between the parties goes into effect.

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[3] Proposed rules from Commission Safety Staff November 8, 2006 comments.

860-028-0070 Resolution of Disputes for Proposed New or Amended Contractual Provisions[4]

(1) This rule applies to a complaint alleging a violation of ORS 757.273, 757.276, 757.279, 759.655, 759.660, or 759.665. Except as otherwise required by this rule, the procedural rules generally applicable to proceedings before the Commission also apply to such complaints. The party filing a complaint under this rule is the "complainant." The other party to the contract, against whom the complaint is filed, is the "respondent."

(2) Before a complaint is filed with the Commission, one party must request, in writing, negotiations for a new or amended attachment agreement from the other party.

(3) Ninety (90) calendar days after one party receives a request for negotiation from another party, either party may file a complaint with the Commission for a proceeding under ORS 757.279 or ORS 759.660.

(4) The complaint must contain each of the following:

(a) Proof that a request for negotiation was received at least 90 calendar days earlier. The complainant must specify the attempts at negotiation or other methods of dispute resolution undertaken since receipt of the request date and indicate that the parties have been unable to resolve the dispute.

(b) A statement of the specific attachment rate, term, and condition provisions that are claimed to be unjust or unreasonable.

(c) A description of the complainant's position on the unresolved provisions.

(d) A proposed agreement addressing all issues, including those on which the parties have reached agreement and those that are in dispute.

(e) All information available as of the date the complaint is filed with the Commission that the complainant relied upon to support its claims:

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[4] Proposed rules from Commission Safety Staff November 8, 2006 comments.

(A) In cases in which the Commission's review of a rate is required, the complaint must include all data and information in support of its allegations, in accordance with the administrative rules set forth to evaluate the disputed rental rate.

(B) ~~If the licensee is the complainant,~~ The complainant must request ~~the~~ all publicly available data and information required by this rule from the respondent. The respondent must provide the Commission and the complainant the information required in this rule, as applicable, within 30 calendar days of the receipt of the request. The complainant must submit this information with its complaint.

(C) If the respondent does not provide the data and information required by this rule after a request by the complainant, the complainant will include a statement indicating the steps taken to obtain the information from the respondent, including the dates of all requests.

(D) No complaint will be dismissed because the respondent has failed to provide the applicable data and information required under subsection (4) (e) (C) of this rule.

(5) Within 30 calendar days of receiving a copy of the complaint, the respondent will file its response to the complaint with the Commission, addressing in detail each claim raised in the complaint and a description of the respondent's position on the unresolved provisions.

(6) If the Commission determines after a hearing that a rate, term, or condition that is the subject of the complaint is not just, fair, and reasonable, it may reject the proposed rate, term or condition and may prescribe a just and reasonable rate, term, or condition.

860-028-0080 Costs of Hearing in Attachment Contract Disputes[5]

(1) When the Commission issues an order in an attachment contract dispute that applies to a consumer-owned utility, as defined by ORS 757.270, the order will also provide for payment by the parties of the cost of the hearing process.

(2) The cost of the hearing process includes, but is not limited to, the cost of Commission employee time, the use of facilities, and other costs incurred. The rates will be set at cost.

(3) The Joint-Use Association is not considered a party for purposes of this rule when participating in a case under OAR 860-028-0200(1)(b).

(4) The Commission will allocate costs in a manner that it considers equitable. The Commission will consider the following factors in determining payment:

(a) Merits of the party's positions throughout the course of the proceeding; and

(b) Other factors that the Commission deems relevant.

860-028-0100 Application Process for New or Modified Attachments[6]

(1) An applicant requesting a new or modified attachment will submit an application providing the following information in writing or electronically to the owner:

(a) Information for contacting the applicant.

(b) The pole owner may require the applicant to provide the following technical information:

(A) Location and identifying pole or conduit for which the attachment is requested;

(B) The amount of space required;

(C) The number and type of attachment for each pole or conduit;

(D) Physical characteristics of attachments;

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[5] Proposed rules from Commission Safety Staff November 8, 2006 comments.

(E) Attachment location on pole;

(F) Description of installation;

(G) Proposed route; and

(H) Proposed schedule for construction.

(2) The owner will provide notice to the applicant within 14 days of the application receipt date confirming receipt and listing any deficiencies with the application, including missing information. If required information is missing, the owner may suspend processing the application until the missing information is provided.

(3) Upon receipt of a completed application, the owner will provide notice to the applicant no later than 45 days from the date the completed application is received. The owner's reply must state whether the application is approved, approved with modifications or conditions, or denied.

(a) An approved application will be valid for ~~180~~ 90 days unless extended by owner.

(b) The owner may require the applicant to provide notice of work completion within 45 days.

(c) If the owner approves an application that requires make ready work, the owner will provide a detailed list of the make ready work needed to accommodate the applicant's facilities, an estimate for the time required for the make ready work, and the cost for such make ready work.

(d) The owner may deny access for the following reasons: insufficient capacity, safety, reliability, and generally applicable engineering purposes. In denying the application, the owner will state in detail the reasons for its denial.

(e) If the owner does not provide the applicant with notice that the application is approved, approved with conditions, or denied within 45 days from ~~its~~ receipt of a completed application, the applicant must contact the owner. If the owner fails to

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[6] Proposed rules from Commission Safety Staff November 8, 2006 comments.

respond to such inquiry within 10 calendar days, the applicant may begin ~~installation~~ construction, provided that such construction does not require electrical make ready work, is in compliance with the pole owner's contractual expectation and Commission Safety Rules, and that complete and satisfactory as-built pole loading analysis and measurements are given to the pole owner with the notification of installation. ~~and will notify the owner within 30 business days of completion of construction.~~

(4) If the owner approves an application that requires make ready work, the owner will perform such work at the applicant's expense. This work will be completed in a timely manner and at a reasonable cost. Where this work requires more than 45 days to complete, the parties must negotiate a mutually satisfactory longer period to complete the make ready work.

(5) If an owner can not meet the time frames established by this rule, preconstruction activity, application and make ready work may be performed by a mutually acceptable third party who will be managed by the electric supplier or by the pole owner if no electric supplier is attached.

(6) If the application involves more than the threshold number of poles, the parties must negotiate a mutually satisfactory longer time frame to complete the approval process.

860-028-0110 Rental Rates and Charges for Attachments by Licensees to Poles Owned by Public Utilities, Telecommunications Utilities, and Consumer-Owned Utilities[7]

(1) This rule applies whenever a party files a complaint with the Commission pursuant to ORS 757.270 through ORS 757.290 or ORS 759.650 through ORS 759.675.

(2) The pole attachment rental rate per foot is computed by multiplying the space factor by the pole cost by the carrying charge. ~~and then dividing the resultant product by the usable space per pole multiplied by the licensee's authorized attachment space~~.

(a) Usable space means all the space on a pole, except: the portion below ground level,

[7] Proposed rules from Commission Safety Staff November 8, 2006 comments.

the 20 feet of safety clearance space above ground level, and the safety clearance space between the communications and power circuits. There is a rebuttable presumption that six feet of a pole is buried below ground.

(b) Unusable space means all the space on a pole that is not considered usable.

(c) Space factor is 2/3 of the unusable space divided by the number of attaching entities. The space occupied is added to this product. This is then divided by the pole height.

(3) The rental rate per pole is computed as the rental rate per foot multiplied by the licensee's authorized attachment space.

(4) The rental rates referred to in section (2) of this rule do not include the costs of attachment to support equipment, permit application processing, special inspections, preconstruction activity, post construction inspection, make ready, change out, and rearrangement work; or the costs related to unauthorized attachments. Charges for those activities are based on actual costs, including administrative costs, and will be charged in addition to the rental rate. The owner must be able to demonstrate that charges under this section of this rule have been excluded from the rental rate calculation.

(5) Authorized attachment space for rental rate determination must comply with the following:

(a) The initial authorized attachment space by a licensee's attachment on a pole must not be less than 12 inches. The owner may authorize additional attachment space in increments of less than 12 inches.

(b) For each attachment permit, the owner will specify the authorized attachment space on the pole that is to be used for one or more attachments by the licensee. This authorized attachment space will be specified in the owner's attachment permit or may be specified as an average amount of space used per pole in the individual agreement between the pole owner and the occupant.

(c) An additional or modified attachment by the ~~licensee~~ occupant that meets the

Commission safety rules and that is placed within the ~~licensee~~ occupant's existing authorized attachment space will be considered a component of the existing pole permit for rental rate determination purposes.

(6) The owner may require prepayment from a licensee of the owner's estimated costs for any of the work allowed by OAR 860-028-0100. The owner's estimate will be adjusted to reflect actual costs less any prepayment. The owner must be able to demonstrate that charges under this section of the rule have been excluded from the rental rate calculation.

(7) The owner must provide notice to the occupant of any change in rental rate or fee schedule a minimum of 90 days prior to the effective date of the change. The occupant has 60 days from the date of the notice to dispute the rate or fee schedule. If no dispute is filed, with the owner, the rate and fee schedule shall be deemed effective for the term of the rental period. This subsection shall become effective January 1, 2008.

860-028-0115 Duties of Electric Supply and Communication Pole Owners[8]

(1) An owner shall install, maintain, and operate its facilities in compliance with Commission safety rules.

(2) An owner must establish, maintain, and make available to occupants its joint-use construction standards and practices for attachments to its distribution poles. Standards for attachment must apply uniformly to attachments by all operators, including the owner.

(3) An owner must establish and maintain mutually agreeable protocols for communications between the owner and its occupants.

(4) A pole owner must respond to a pole occupant's notice request for assistance to make corrections within 45 days.

(5) A pole owners will ensure the accuracy of inspection data prior to transmitting information

[8] Proposed rules from Commission Safety Staff November 8, 2006 comments.

to a pole occupant.

860-028-0120 Duties of Pole Occupants[9]

(1) Except as provided in section (3) of this rule, a pole occupant attaching to one or more poles of a pole owner shall:

(a) Have a written contract with the pole owner that specifies general conditions for attachments on the poles of the pole owner;

(b) Have a permit issued by the pole owner for each pole on which the pole occupant has attachments;

(c) Install and maintain the attachments in compliance with the written contracts required under subsection (1)(a) of this rule and with the permits required under subsection (1)(b) of this rule; and

(d) Install and maintain the attachments in compliance with Commission safety rules.

~~(2) A pole occupant that is a government entity is not required to enter into a written contract required by subsection (1)(a) of this rule, but when obtaining a permit from a pole owner under subsection (1)(b) of this rule, the government entity shall agree to comply with Commission safety rules.~~

(~~3~~2) A pole occupant may install a service drop without the permit required under subsection (1)(b) of this rule, but the pole occupant must:

(a) Apply for a permit within seven days of installation;

(b) ~~Except for a pole occupant that is a government entity, i~~Install the attachment in compliance with the written contract required under subsection (1)(a) of this rule; and

(c) Install the service drop in compliance with Commission safety rules.

(~~4~~3) Notwithstanding the timelines provided for in OAR 860-028-0120 (~~5~~4) or (~~6~~5), pole

[9] Proposed rules from OJUA October 9 2006 comments.

occupants shall immediately correct violations which cause an imminent danger to life or property. If the pole owner performs the corrections, a pole occupant shall reimburse the pole owner for the actual cost of correction caused by the occupant's non-compliant attachments. Reimbursement charges imposed under this section shall not exceed the actual cost of correction (~~5~~4) Notwithstanding OAR 860-028-0120 (43), an occupant must respond to a pole owner's notification of violation within ~~180~~60 days. If a pole occupant fails to respond within ~~180~~60 days and if the pole owner performs the correction, the pole occupant shall reimburse the pole owner for the actual cost of correction attributed to the occupant's attachments. Reimbursement charges imposed under this section shall not exceed the actual cost of correction caused by the occupant's non-compliant attachments.

(a) A pole occupant's response to a notification of violation shall be either a submission of a plan of correction ~~within 60 days~~ or a correction of the violation within ~~180~~60 days.

(b) Violation of this pole occupant duty to respond is also subject to sanction under OAR 860-028-0150 (2).

(~~6~~5) For violations noticed under OAR 860-028-0120(~~5~~4), a pole occupant must correct the violation in less than 180 days, if the pole owner notifies an occupant that the violation must be corrected in less than 180 days in order to alleviate a significant safety risk to any operator's employees or a potential risk to the general public.

(a) A pole occupant shall reimburse the pole owner for the actual cost of corrections caused by the occupant's non-compliant attachments made under this section if:

(~~1~~A) the owner provides reasonable notice of the violation; and

(~~2~~B) the occupant fails to respond within timelines provided for in the notice.

860-028-0130 Sanctions for Having No Contract[10]

[10] Proposed rules from OJUA October 9 2006 comments.

(1) Except as provided in section (2) of this rule, a pole owner may impose a sanction on a pole occupant that is in violation of OAR 860-028-0060(2). The sanction will be ~~may not exceed~~ $500 per pole.

(2) This rule does not apply:

~~(a) to a pole occupant that is a government entity; or~~

(~~b~~a) to a pole occupant that is operating under a contract which is expired or terminated and that is participating in good faith efforts negotiate a contract or are engaged in formal dispute resolution, arbitration, or mediation regarding the contract; or

(~~c~~b) to a pole occupant that is operating under a contract which is expired if both pole owner and occupant carry on business relations as if the contract terms are mutually-agreeable and still apply ; or

(3) Sanctions imposed under this section shall be applied no more than once in a 365 day period.

860-028-0140 Sanctions for Having No Permit[11]

(1) Except as provided in section (3) of this rule, a pole owner may impose a sanction on a pole occupant that is in violation of OAR 860-028-0120(1)(b), except as provided in OAR 860-028-0120(3).

(2) Sanctions imposed under this section are ~~may not exceed~~:

~~(a) 5 times the current annual rental fee per pole if the violation is reported by the occupant to the owner or discovered through a joint inspection between the owner and occupant; or~~

(~~b~~a) $100 per pole plus 5 times the current annual rental fee per pole ~~if the violation is reported by the owner~~.

[11] Proposed rules from OJUA October 9 2006 comments.

(3) Sanctions imposed under this section shall not be applied more than once in a 180 day period

(4) Sanctions imposed under this section shall not be re-applied to an occupant once the occupant files a permit application in response to a notice of violation under this section.

~~(5) This rule does not apply to a pole occupant that is a government entity.~~

860-028-0150 Sanctions for Violation of Other Duties[12]

(1) A pole owner may impose a sanction on a pole occupant that is in violation of OAR 860-028-0120 (1) (c), (1) (d), or (3). The sanction is $200 per pole.

(2) A pole owner may impose a sanction on a pole occupant that is in violation of OAR 860-028-0120 (5). Sanctions imposed under this section shall not exceed 115 percent of the actual cost of corrections caused by the occupant's non-compliant attachments.

(3) Sanctions imposed under 860-028-0150 (1) and (2) do not apply if:

(a) The occupant submits a plan of correction in compliance with OAR 860-028-0170 within 60 days of notification of a violation; or

(b) The occupant corrects the violation and provides notification of the correction to the owner within 180 days of notification of the violation;

(4) If a pole occupant submits a plan of correction in compliance with OAR 860-028-0170 and fails to adhere to all of the provisions of that plan within the dates provided for within the plan, the pole owner may impose sanctions for the uncorrected violations documented within the plan.

(5) Notwithstanding the timelines provided for in OAR 860-028-0150 (3), a pole owner may immediately impose sanctions for violations:

(a) Occurring on attachments which are newly-constructed and newly-permitted by the occupant; or

(b) Caused by the occupant's transfer of currently-permitted facilities to new poles; and

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[12] Proposed rules from OJUA October 9 2006 comments.

(c) If the pole occupant has provided to the pole owner a notice of completion and the notice of completion is no more than 180 days old.

~~(4) This rule does not apply to a pole occupant that is a government entity.~~

860-028-0160 Choice of Sanctions[13]

(1) If a pole owner contends that an attachment of a pole occupant violates more than one rule that permits the pole owner to impose a sanction, then the pole owner may select only one such rule on which to base the sanction.

(2) If a pole owner has a contract with a pole occupant that imposes sanctions that differ from those set out in these rules, then the sanctions in the contract apply unless the pole owner and pole occupant agree otherwise.

860-028-0170 Plans of Correction[14]

(1) A plan of correction shall, at a minimum, set out:

(a) Any disagreement, as well as the facts on which it is based, that the pole occupant has with respect to the violations alleged by the pole owner in the notice;

(b) The pole occupant's suggested compliance date, as well as reasons to support the date, for each pole that the pole occupant agrees is not in compliance with OAR 860-028-0120.

(2) If a pole occupant suggests a compliance date of more than 180 days following receipt of a notice of violation, then the pole occupant must show good cause.

(3) Upon its receipt of a plan of correction that a pole occupant has submitted under subsection (1) of this rule, a pole owner shall give notice of its acceptance or rejection of the plan.

(a) If the pole owner rejects the plan, then it shall set out all of its reasons for rejection and, for each reason, shall state an alternative that is acceptable to it;

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[13] Proposed rules from OJUA October 9 2006 comments.

(b) The pole occupant's time for compliance with the timelines provided for within the plan of corrections is not commenced until a plan of correction has been approved by both the pole owner and the occupant.

(c) If a plan of correction is divisible and if the pole owner accepts part of it, then the pole occupant shall carry out that part of the plan.

(d) If a pole occupant submits a plan, the pole occupant must carry out all provisions of that plan unless the pole owner consents to a plan amendment.

(4) Pole occupants submitting a plan of correction must report to the pole owner all corrections completed within the timelines provided for within the plan.

860-028-0180 Removal of Occupant Pole Attachments[15]

(1) If the pole occupant has failed to meet time limitations set out in OAR 860-028120, OAR 860-028-130, OAR 860-028-140, or OAR 860-028-150 by ~~60~~ 180 or more days, then the pole owner may request an order from the Commission authorizing removal of the pole occupant's attachments. Nothing in this section precludes a party from pursuing other legal remedies.

~~(2) This rule does not apply to a pole occupant that is a government entity.~~

860-028-0190 Notice of Violation[16]

A pole owner that seeks, under these rules, any type of relief against a pole occupant for violation of OAR 860-028-0120 shall provide the pole occupant notice of each attachment allegedly in violation of the rule, including a provision and explanation of the rule each attachment allegedly violates, the pole number and a description of the location of the pole sufficient to locate the pole. Pole owner shall make available maps and GPS coordinates if

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[14] Proposed rules from OJUA October 9 2006 comments.
[15] Proposed rules from OJUA October 9 2006 comments.
[16] Proposed rules from OJUA October 9 2006 comments.

possible.

860-028-0195 Time Frame for Final Action by Commission[17]

The Commission shall issue its final order within 360 days of the date a complaint is filed in accordance with these rules. This rule does not apply to a complaint involving the attachment(s) of an "incumbent local exchange carrier" (as that phrase is defined in 47 U.S.C. Section 251(h) (2002)).

860-028-0200 Joint-Use Association[18]

(1) Pole owners and pole occupants shall establish a Joint-Use Association (JUA). The Association shall elect a Board from the JUA, which shall include representatives of pole owners, pole occupants, and government entities. The Board shall act as an advisor to the Commission with respect to:

(a) Adoption, amendment, or repeal of administrative rules governing pole owners and pole occupants; and

(b) Settlement of disputes between a pole owner and a pole occupant that arise under administrative rules governing pole owners and pole occupants.

(2) In the event a representative is involved in a dispute under subsection (1)(b) of this rule, then the representative shall not participate in resolution of the dispute, and the JUA shall appoint a temporary representative with a similar interest.

860-028-0210 Resolution of Disputes over Plans of Correction[19]

(1) If a pole occupant and a pole owner have a dispute over the reasonableness of the plan of correction, then either party may request an order from the Commission to resolve the dispute.

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[17] Proposed rules from OJUA October 9 2006 comments.
[18] Proposed rules from OJUA October 9 2006 comments.

The party requesting resolution shall provide notice of its request to the Commission and to the other party:

(a) Upon receipt of a request, the Commission Staff shall, within 15 days, provide to the parties a recommended order for the Commission;

(b) Either party may, within 15 days of receipt of the recommended order, submit written comments to the Commission regarding the recommended order;

(c) Upon receipt of written comments, the Commission shall, within 15 days, issue an order.

(2) Notwithstanding section (1) of this rule, either the pole owner or pole occupant may request a settlement conference with the Joint-Use Association. The settlement conference shall be in addition to, not in lieu of, the process set forth in section (1).

860-028-0220 Resolution of Factual Disputes[20]

(1) If a pole occupant and pole owner have a dispute over facts that the pole occupant and pole owner must resolve so that the pole owner can impose appropriate sanctions, or in the event that a pole occupant is alleging that a pole owner is unreasonably delaying the approval of a written contract or the issuance of a permit, then either the pole owner or the pole occupant may request a settlement conference before the Joint-Use Association (JUA). The party making the request shall provide notice to the other party and to the JUA.

(2) If the JUA does not settle a dispute described in section (1) of this rule within 90 days of the notice, then either the pole owner or the pole occupant may request a hearing before the Commission and an order from the Commission to resolve the dispute:

(a) Upon receipt of a request, the Commission Staff shall, within 30 days, provide to the parties a recommended order for the Commission;

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[19] Proposed rules from OJUA October 9 2006 comments.
[20] Proposed rules from OJUA October 9 2006 comments.

(b) Either party may, within 30 days of receipt of the recommended order, submit written comments to the Commission regarding the recommended order;

(c) Upon receipt of written comments, the Commission shall, within 30 days, issue an order.

860-028-0230 Pole Attachment Rental Reductions[21]

(1) Except as provided in section (3), a licensee shall receive a rental reduction.

(2) The rental reduction shall be based on ORS 757.282(3) and OAR 860-028-0110.

(3) A pole owner or the Commission may deny the rental reduction to a licensee, if either the pole owner or the Commission can show that:

(a) The licensee has caused serious injury to the pole owner, another pole joint-use entity, or the public resulting from non-compliance with Commission safety rules and Commission pole attachment rules or its contract or permits with the pole owner;

(b) The licensee does not have a written contract with the pole owner that specifies general conditions for attachments on the poles of the pole owner;

(c) The licensee has engaged in a pattern of failing to obtain permits issued by the pole owner for each pole on which the pole occupant has attachments;

(d) The licensee has engaged in a pattern of non-compliance with its contract or permits with the pole owner, Commission safety rules, or Commission pole attachment rules;

(e) The licensee has engaged in a pattern of failing to respond promptly to the pole owner, PUC Staff, or civil authorities in regard to emergencies, safety violations, or pole modification requests; or

(f) The licensee has engaged in a pattern of delays, each delay greater than 45 days from the date of invoice, in payment of undisputed fees and charges filed in a timely manner and due

the pole owner.

(4) A pole owner that contends that a licensee is not entitled to the rental reduction provided in section (1) of this rule shall notify the licensee of the loss of reduction in writing. The written notice shall:

(a) State how and when the licensee has violated either the Commission's rules or the terms of the contract;

(b) Specify the amount of the loss of rental reduction which the pole owner contends the licensee should incur; and

(c) Specify the amount of any losses that the conduct of the licensee caused the pole owner to incur.

(5) If the licensee wishes to discuss the allegations of the written notice before the Joint-Use Association (JUA), the licensee may request a settlement conference. The licensee shall provide notice of its request to the pole owner and to the JUA. The licensee may also seek resolution under section (6) of this rule.

(6) If the licensee wishes to contest the allegations of the written notice before the Commission, the licensee shall send its response to the pole owner, with a copy to the Commission. The licensee shall also attach a true copy of the written notice that it received from the pole owner.

(a) Upon receipt of a request, the Commission Staff shall, within 30 days, provide to the parties a recommended order for the Commission;

(b) Either party may, within 30 days of receipt of the recommended order, submit written comments to the Commission regarding the recommended order;

(c) Upon receipt of written comments, the Commission shall, within 30 days, issue an order.

(7) Except for the rental reduction amount in dispute, the licensee shall not delay payment of the

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[21] Proposed rules from OJUA October 9 2006 comments.

pole attachment rental fees due to the pole owner.

860-028-0240 Effective Dates[22]

(1) Except as provided ~~in section (2) of this rule,~~ all OAR's ~~860-028-0120 through 860-028-0230~~ are effective on January 1, 200~~7~~.

860-028-0310 Rental Rates and Charges for Attachments by Licensees to Conduits Owned by Public Utilities, Telecommunications Utilities, and Consumer-Owned Utilities[23]

(1) This rule applies whenever a party files a complaint with the Commission pursuant to ORS 757.270 through ORS 757.290 or ORS 759.650 through ORS 759.675.

(2) The conduit rental rate per linear foot is computed by multiplying the percentage of conduit capacity occupied by the net linear cost of conduit and then multiplying that product by the carrying charge.

(3) A licensee occupying part of a duct is deemed to occupy the entire duct.

(4) Licensees must report all attachments to the conduit owner. A conduit owner may impose a penalty charge for failure to report or pay for all attachments. If a conduit owner and licensee do not agree on the penalty and submit the dispute to the Commission, the penalty amount will be five times the normal rental rate from the date the attachment was made until the penalty is paid. If the date the attachment was made cannot be clearly established, the penalty rate will apply from the date the conduit owner last inspected the conduit in dispute. The last inspection date is deemed to be no more than five years before the unauthorized attachment is discovered. The conduit owner also may charge for any expenses it incurs as a result of the unauthorized attachment.

(5) The conduit owner must give a licensee 18 months' notice of its need to occupy licensed conduit

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[22] Proposed rules from OJUA October 9 2006 comments.

and will propose that the licensee take the first feasible action listed:

(a) Pay revised conduit rent designed to recover the cost of retrofitting the conduit with multiplexing, optical fibers or other space-saving technology sufficient to meet the conduit owner's space needs;

(b) Pay revised conduit rent based on the cost of new conduit constructed to meet the conduit owner's space needs;

(c) Vacate ducts that are no longer surplus;

(d) Construct and maintain sufficient new conduit to meet the conduit owner's space needs.

(6) The rental rates referenced in section (2) of this rule do not include the costs of permit application processing, special inspections, preconstruction activity, post construction inspection, make ready work, and the costs related to unauthorized attachments. Charges for activities not included in the rental rates will be based on actual costs, including administrative costs, and will be charged in addition to the rental rate.

(7) The owner may require reasonable prepayments from a licensee of owner's estimated costs for any of the work allowed by OAR 860-028-0100. The owner's estimate will be adjusted to reflect the owner's actual cost upon completion of the work. The owner will promptly refund any overcharge to the licensee.

(8) The owner must be able to demonstrate that charges under sections (6) and (7) of this rule have been excluded from the rental rate calculation.

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[23] Proposed rules from Commission Safety Staff November 8,2006 comments.