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September 28, 2006

VIA ELECTRONIC MAIL & FEDERAL EXPRESS

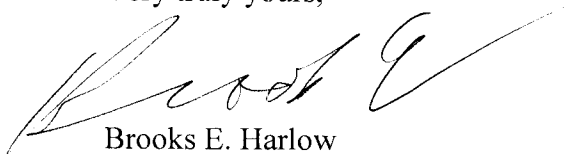
Filing Center
Public Utility Commission of Oregon
550 Capitol Street NE, Suite 215
Salem, Oregon 97308

Subject: AR 506/AR 510 - Comments of the Oregon Cable Telecommunications Association

Dear Clerk:

Enclosed, for filing, are an original and one copy of the Comments Of Oregon Cable Telecommunications Association in the above-referenced matter.

Very truly yours,



Brooks E. Harlow

CERTIFICATE OF SERVICE
Docket No. AR 506

I hereby certify that I have served a true and correct copy of the foregoing by electronic mail to the parties on the attached service list.

Dated at Seattle, Washington this 28th day of September, 2006.

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BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of Rulemaking to Amend and Adopt Permanent Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachment Use and Safety. In the Matter of Rulemaking to Amend Rules in OAR 860, Division 028 Relating to Sanctions for Attachments to Utility Poles and Facilities.	Case No. AR 506/AR 510 COMMENTS OF OREGON CABLE TELECOMMUNICATIONS ASSOCIATION ("OCTA")

I. INTRODUCTION

The Oregon Cable Telecommunications Association ("OCTA") is a trade association of cable telecommunications companies operating in Oregon. It has 22 members which provide video, high-speed cable modem, and telephone services in Oregon using their own fiber optic and/or coaxial cable lines. All of OCTA's members must attach their cable lines (either fiber or coaxial, or both) to poles owned by electric utilities/PUDs or incumbent local exchange companies ("LECs").

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The OCTA appreciates the time and resources that the Commission and Staff have devoted to revising and updating the rules in OAR 860, Division 28. In many regards, the current proposals are an improvement from the existing rules. The collaborative informal process that took place in 2005 and early this year led to a much better draft of proposed rules than would have been the case without that process.

One area of the proposed rules that still needs some revision to fully comply with Oregon law is the proposed rate rule. In particular, since the current rule sets rates at the statutory maximum allowed under ORS § 757.282, it is important to fine tune the revisions to OAR 860-28-0110 to ensure that rates set under the rule are lawful and not excessive.

OCTA has attached specific rule language to implement its comments—redlined to show its recommended changes—as Exhibit A. The rule language in Exhibit A shows OCTA's recommended changes in legislative format, with the "original" being the language as attached to the Staff's report dated February 24, 2006 (filed in this docket on March 2, 2006), and the "redlines" being OCTA's recommended changes. OCTA also provides a table, at the Conclusion of these comments, summarizing its positions, issue-by-issue.

II. SECTION-BY-SECTION COMMENTS

A. 860-028-0020

OCTA is generally in agreement with the proposed new and revised definitions. Exceptions are noted, as follows.

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1. "Carrying Charge."

Inflation should not be considered. A hypothetical and contingent future cost is not an "actual" cost and therefore cannot be included under Oregon law. *See* ORS § 757.282. *See also* ORS § 759.665.

2. "Cost of Money" for Consumer-Owned Utilities.

The current proposed definition in Section (3)(e)(B), of the "cost of money" for a consumer-owned utility must be revised to comply with Oregon law. As is discussed below in much greater detail (Section 860-28-0110) pole attachments rates cannot lawfully exceed "the **actual** capital and operating expenses, including just compensation, of the . . . consumer-owned utility attributable to that portion of the pole . . . used for the pole attachment . . . ."

ORS § 757.282 (emphasis added). *See also* ORS § 759.665. The current proposal violates this ceiling on rates by giving compensation to the consumer-owned utility based, in part, on the compensation that an investor-owned utility ("IOU") would earn. But the law limits rental rates to a portion of "actual" costs, not hypothetical costs.

Consumer-owned utilities were formed to offer certain advantages to their customers/constituents. One significant advantage is a lower cost of capital. As public entities, their cost of debt is lower, due to lower risk and tax advantages. And they eliminate entirely the cost of "equity" because they have no equity as that term is understood in capital markets. For IOUs, cost of equity is greater than cost of debt, due to the greater risk. Thus, when setting rates for an IOU, it is appropriate to use an average of debt and equity costs in determining the cost of

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money, because it is an actual cost that IOUs bear. But to allow a hypothetical cost of "equity" for consumer owned utilities would drive up rental rates based on a non-existent cost and violate the requirement that rates be based only on "actual" costs. *See* ORS § 757.282

OCTA also notes that determination of actual average capital costs for a consumer owned utility may not be practical or feasible.[1] It is particularly difficult or impossible for occupants to ascertain whether the alleged cost of money for a consumer owned utility under this proposed rule is accurate. OCTA's proposal suggests use of the utility's most recent bond issue rate. Alternatively, there are public indices that could be used to establish a current market-based rate for public entities, such as those published by the Bond Market Association (www.bondmarkets.com). Either approach would result in a much more transparent, verifiable, and simple way to establish an appropriate cost of money component.

3. "Make Ready Work".

The proposed definition of "Make ready work" in sub-section (19) also violates ORS §§ 757.282 and 759.665. Further discussion of rate-making principles under the statute is set forth below. But briefly, the proposed definition of "Make ready" states that such work includes "administrative" costs. This would, if adopted, violate the ceiling on rates that ORS §§ 757.282 and 759.665 establish. Moreover, it is inconsistent with federal precedent, which holds that costs of administering pole joint use should be recovered in the carrying charge. The legislative history of ORS § 757.282 makes it clear that the intent of the Oregon statutory

[1] Although, if adopted, the proposed addition of OAR § 860-028-070(e), which would require the pole owner to provide cost support on request, could ameliorate this problem.

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provisions on rental rates was to be consistent with the federal laws on rates. *See, e.g.,* Minutes of the Senate Committee on Environment and Energy, Exhibit E at 11 (April 5, 1979). The requirements and limitations on rental rates and direct charges is discussed in much greater detail below.

4. "Permit".

Regarding sub-section (19), OCTA supports revisions in the latest proposed definition of "Permit" which comport with industry practice. The proposal allows permits to cover attachments on multiple poles and allows for electronic records. Thus, going forward the proposed rule is consistent with industry practice and operational efficiency. However, OCTA suggest one additional revision to clarify the status of legacy attachments and to help minimize disputes between owners and attachers. Many old permits have long since been misplaced by pole owners and licensees. Accordingly, poles for which a licensee has received an invoice should be treated as permitted by the pole owner, since invoices are initially triggered by permits. Again, OCTA has proposed specific modifications to clarify these points in Exhibit A.

5. "Service Drop".

The definition of "Service drop", sub-section 25, fails to correct deficiencies in the current rule. Inexplicably, the current rule apparently limits "drops" to small residential and commercial facilities, which is not appropriate or consistent with industry practice. Cable companies and other communications providers often run numerous drops to multi-tenant dwelling units, office complexes, shopping malls, and industrial parks or facilities. The current definition is unduly restrictive and does not take into account current practice. There is no

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reason to so narrowly construe the term service drop. OCTA has proposed a simple suggested revision to this definition, in Exhibit A.

6. "Usable Space".

Finally, sub-section 33, which defines "Usable space," needs revision with regard to treatment of so-called "safety clearance" space between electric and communications spaces. The space might more appropriately be termed "separation space," as the term "clearance" suggests the space is empty and not used, when in fact it is used and usable. The approach of the current proposed definition's treatment of separation space is not consistent with how the FCC and other states treat this space.

As noted above, and discussed in detail below, Oregon's law on joint use pole rental was intended to mirror federal law. The FCC treats all space above 18 feet as usable space. *See, e.g., Adoption of Rules for the Regulation of Cable Television Pole Attachments, Second Report and Order,* FCC 79-308, 72 FCC 2d 59, ¶ 24 (finding that 47 U.S.C. § 224(d)(1) precludes assigning any portion of the safety space to cable operators because Congress specifically intended that cable operators be responsible only for the one foot of space actually occupied); *Adoption of Rules for the Regulation of Cable Television Pole Attachments, Third Order*, FCC 80-90, 77 FCC 2d 187, ¶ 3-4 (1980) (reconfirming determination established in the Second Report and Order that "no portion of [the] safety space is to be considered occupied by cable television."); *Amendment of Rules and Policies Governing Pole Attachments, Report and Order,* FCC 00-116, 15 FCC Rcd. 6453, ¶ 20 (declining to reallocate the safety space as unusable space and distribute its cost between the utility pole owner and the attaching entity).

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The current draft is also not consistent with the Oregon statute, which requires that ***at most*** only a "portion" the cost of a pole be should be borne by occupants, "in proportion to the space used" and "compared to ***all*** other uses made" of the pole. *See* ORS 757.282(1) (emphasis added). Electric utilities do in fact use the separation space for other uses, most typically street lights and traffic signal wiring. The NESC specifically permits such uses.[2] And such uses in Oregon are quite common. Examples are shown in these two photographs:

Presumably the pole owner receives compensation for providing either the street light or the attachment space, the selling of electricity for the lighting, and maintenance of the street light or signal. The owner undoubtedly has the means to recover the portion of pole costs attributable to the street light or signal from those users or customers and should do so. Excluding the street light and traffic signal space from usable space unfairly puts the entire cost

[2] See Safety Code 2002, § 238 (IEEE).

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burden of that space on the electric, phone, and cable customers and would either give a free ride to the customers using the space or give the owner double recovery. Further, it fails to take into account "**all** other uses" as required by ORS 757.282(1). The so-called "clearance" space is, in the real world, unquestionably usable space and should not be excluded from the calculation of the carrying charge.

OCTA has proposed a revision to the usable space definition that would properly recognize that the space between the electric supply and telecommunications facilities is usable space, ***not*** "clearance space." The legislature made it clear that "all uses" of a pole and all "uses that remain available" to a pole owner must be taken into account in setting the fully allocated rate for pole rental. The legislature could not have intended that any users should get a free ride at the expense of other pole users.

B. 860-028-0050

OCTA is in agreement with the substance of this section. As a matter of style, the inclusion of "Owner correction" with the general statement of purpose and scope of Division 28 seems inappropriate. The Commission should consider moving sub-section (2), relating to "Owner correction" to OAR 860-028-0120 and renaming section 0120 to read "Rights And Duties Of Owners And Occupants."

C. 860-028-0060

OCTA supports this proposed new rule. OCTA believes very strongly that the provision like sub-section (4), which enables the parties to operate under an old contract while

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they are continuing to negotiate a new contract, is essential. Lacking this rule, the Commission has had to deal with several complaints involving occupants who were forced to come to the Commission for assistance in achieving a new contract with owners. The licensees were under the threat of massive sanctions for not having contracts with the pole owners and not being able to remove their facilities without going out of business in the affected areas. *See, e.g.,* Dockets UM-1087, UM-1191, and UM-1241. Indeed, in a number of instances, pole owners have ***terminated*** existing contracts as a coercive tool to create the threat of sanctions and force occupants to sign onerous or unlawful contracts. While this practice is by no means limited to the *Central Lincoln v. Verizon* case (UM-1087), that case provided an excellent illustration of this abusive tactic by pole owners:

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

Docket UM-1087, transcript at 214 (CLPUD witness Wilson).

This proposed new sub-section may do as much or more as any other rule revision to avoid the need for the Commission to step into so many pole attachment disputes. The OJUA consensus proposed revisions to sanctions rules attached hereto as Exhibit B, discussed below, will also help reduce the number of contract disputes brought before the

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Commission. Nevertheless, even if the sanctions rules are revised as recommended below, this new rule should be adopted. Even with sanctions out of the picture, parties frequently cannot negotiate a replacement contract before the prior contract expires. Thus, proposed sub-section (4) will provide a framework for continued joint use of poles on an interim basis, since termination of occupancy is never a realistic option. Without the provisions of sub-section 4, the legal rights and obligations of the parties—possibly including safety compliance—would be uncertain.

While the goal of sub-section (4) is laudable, the current proposal has some ambiguity and does not go far enough to prevent abusive pole owner tactics. OCTA suggests language to tighten this sub-section up. First, the contract would have to specifically prohibit application of this new subsection. Otherwise, an owner could assert that the mere standard term and termination provisions of the contract vitiate the rule. If that were the case, no contract would be subject to the rule. Second, OCTA proposes an amendment to discourage pole owners from attempting to require occupants in future contracts to agree to eliminate the protection of this new sub-section.

D. 860-028-0070

The OCTA generally supports this proposed new rule, in particular the proposed new sub-section 4(e). Pole owners frequently just provide an annual invoice to attachers with no backup information whatsoever. The attacher has no way to verify that the pole owner has followed the Commission's rule or the provisions of the contract, whether the proper cost inputs have been used, and whether such direct cost as are permitted have been removed from the rental

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charges. They generally have no choice but to pay the invoice, even if it seems unreasonable. If the licensee wants to protect its interests, it may have to file a complaint just to verify the accuracy and propriety of the annual rent. This new provision will enable a pole user to determine if the rent calculations are proper before filing a complaint. If the rental rate is proper the attacher may not need to pursue formal action. Thus, this provision should result in fewer commission complaints.

The only change OCTA recommends to the rule as proposed, to clarify the rule, is that the provisions regarding "30 business days" be revised to provide for "30 calendar days."

E. 860-028-0080

OCTA does not oppose this proposed rule. OCTA suggests one addition to the draft rule, which is that the Commission should provide cost estimates periodically during the course of the proceeding. Since the Commission has never assessed costs in this way (to OCTA's knowledge) parties may have no idea what their potential liability for costs might be in a case. Thus, fundamental fairness supports the provision of estimates. Moreover, as costs mount, providing estimates can give the parties added incentive to settle the dispute.

OCTA also suggests revision of the considerations regarding assessment of costs. First, the provision regarding consideration of whether a party was the complainant or respondent should be deleted. It is ambiguous which way the consideration will go. OCTA believes that respondents generally should be assessed costs, because they likely acted so unreasonably that the complainant was forced to take drastic action (an expensive step even

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without costs). But stating such a presumption could result in a "race to the courthouse," causing parties to file complaints prematurely, before negotiations have been given enough time. Rather than considering which party filed first, the Commission should focus on the reasonableness of the parties' positions before and during the litigation. OCTA suggests that sub-section 4(a) be replaced with a statement that costs will not be assessed against interveners unless they obstruct, delay, or unduly broaden the proceeding. OCTA also suggests additional language regarding consideration of pre-complaint positions and behavior, including attempts to foster negotiation and offers of alternative dispute resolution.

F. 860-028-0100

Although OCTA believes that this rule will generally help guide owners and occupants on how to submit and respond to permit applications, there are some technical issues with the latest draft. Accordingly, OCTA suggests a few changes.

First, the title of the rule should be changed, as it does not descriptive of the true scope and subject of the rule. OCTA suggests the rule be titled "Procedures for Applications and Permits for Attachments."

Second, OCTA supports Qwest's comments that the rule should apply equally to government licensees as other attachers. Pole owners cannot possibly manage attachments by multiple parties, ensure compliance with the rules, and ensure that safety standards are met if some pole users follow the Commission's rules while another set—governments—plays by its own, different, rules.

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Third, in OAR 860-028-0100(2)(b)(E), "location" should be changed to "height" for clarity. The height of the attachment is critically important. The OCTA assumes that was the intent of the drafters.

OCTA suggests several changes to sub-section (3). First, all of the provisions for "30 business days" should be revised to "30 calendar days." It is very unusual for a rule to specify business days that for a time period as long as 30 days. The practical reason for this is that the burden of counting and the potential for confusion in such a long time period is unreasonable when a time period is so long. The precision provided by a "business days" rule is not needed except when the time period is short, for example, 10 days. If the intent is to allow a longer time period, then the number of calendar days should simply be changed, *e.g.,* to 35 or 40. However, OCTA believes that 30 calendar days is more than sufficient for the provisions of sub-section (3) of this draft rule. The Commission so found in its docket UM-1087. *See* Order No. 05-042, Appendix A at 4. The same change should be made in sub-section (4).

G. 860-028-0110

1. Summary of OCTA's Comments Regarding Attachment Rates.

OCTA opposes most changes to the pole rental rate formula. Oregon adopted the federal approach to pole attachment rates over two decades ago and, with a few exceptions has followed it in the current rules and in UM 1087. OCTA supports Charter's comments regarding ratemaking and the important practical benefits of continuing to follow federal precedent in reviewing this rule. OCTA provides further background and comments in support of Charter's positions in the following sub-sections. The point of the discussion below is not to argue for a

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departure from the federal approach at this time.[3] Rather, the point is that pole owners are already recovering the maximum rental rates that Oregon law permits. If the Commission starts down the path of considering additional charges, it is truly a Pandora's Box that will increase the complexity of rate making. At one end of the spectrum, it could result in rental rates that are much lower than today's rates. At the other end of the spectrum, it would risk unlawfully high rates, due to the difficulty of properly determining and allocating the increment costs of pole attachment.

2. Background and History of the Governing Statute.

Oregon first began to regulate rates, terms, and conditions for pole attachments in 1979. In that year the legislature passed Senate Bill 560. Senate Bill 560 established the rate formula that is still in existence today, and codified at ORS§§ 757.282 and 759.665. The legislative history of Senate Bill 560 establishes that it had two overriding purposes.[4] First, the legislation was strongly supported by cable TV and telephone company interests who were, in some instances, being charged excessive, monopolistic rents for pole attachments by power companies and PUDs. *Id.* Indeed, at least one legislative witness testified that in some instances cable companies could build their own entire network of poles at the same cost as they were

[3] However, should other parties in this docket continue to push for addition of direct charges on top of a fully-allocated rental rate, then OCTA reserves the right to respond in support of rules that allow rates lower than fully allocated rates.

[4] *See,* Minutes of the Senate Committee on Environment and Energy (April 5, 1979); minutes of the Senate Committee on Environment and Energy (May 17, 1979); minutes of the House Committee on State Government Operations (June 19, 1979); House Committee on State Government Operation, Exhibit A (Ray Gribling testimony) (June 19, 1979); Senate Committee on Environment and Energy, Exhibit C (Staff summary) (April 5, 1979); Senate Committee on Environment and Energy, Exhibit D (Ray Gribling testimony) (April 5, 1979); Senate Committee on Environment and Energy, Exhibit E (statement of Harold R. Farrell) (April 5, 1979).

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being charged to use less than a foot of existing power poles. Minutes of the Senate Committee on Environment and Energy, at 5 (May 17, 1979). Second, Oregon wished to regulate its own pole attachment rates, terms, and conditions, rather than continuing to allow the FCC to regulate attachments. *See* note 4, *supra*.

As the legislative history makes clear, the intent of the rate formula passed in 1979 and still in existence today was to reduce rates for cable and telephone company attachments to a proportionate and fair share of actual cost, not to promote or support excessive pole attachment rates that subsidize pole owners' services. The legislation was passed in direct response to cable and phone company complaints about excessive, monopoly-based rates. As is discussed in more detail below, Senate Bill 560 set forth a floor and ceiling for pole attachment rates brought before the Commission for determination. During the hearings on Senate Bill 560, the range between the maximum and minimum permissible rates were referred to as the "zone of reasonableness." *See, e.g.,* House Committee on State Government Operation, Exhibit A (Gribling testimony) (June 19, 1979). As the legislative history establishes, and the statute still provides, the Commission has discretion to set pole attachment rental rates anywhere within the "zone of reasonableness" and must, in exercising its discretion, consider the impact on the customers of the attachers, such as cable and telephone companies. ORS §§ 757.279 and 759.660.

Somehow, the essential purposes of the 1979 legislation seem to have become lost in certain provisions of the proposed rules. The current rules codify the top end of the zone, or the "ceiling" as the rate that "will be" set for disputed rates. OAR § 860-028-0110(2). Since the

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Commission's current rule already sets the rate at the top end of "zone of reasonableness" that the legislature established in 1979, the provisions in the proposed rule that would allow additional charges on top of the carrying charge are plainly unlawful.

3. The proposed rule would violate Oregon law regarding the ceiling for attachment rates.

Apart from departing from the strong precedent of the very recent decisions in UM-1087, the currently proposed rules violate state law and federal precedent. While ORS 757.282(1) establishes a broad range for rates to meet the "just and reasonable" standard, the standard does have both a minimum and maximum permissible rate:

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

Id. (emphasis added). *See also*, ORS § 759.665. As the highlighted language indicates, § 282 establishes what can be termed a "floor" and a "ceiling" for compliant rates. The lowest permissible rate is equal to the incremental cost of providing and maintaining the pole attachment space for the licensee. The highest permissible rate is calculated based on a share of the total actual costs of the pole. The formula, which is very similar to the ceiling provided for

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in the federal formula for pole attachment rates, is often referred to as the "carrying charge."[5] *See* 47 U.S.C. § 224(d)(1).

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

4. Oregon Law Prohibits Pole Owners From Imposing "Direct Charges" in Addition to the Carrying Charge.

The proposed rule would actually push rates ***above*** the zone of reasonableness established by statute and allow rates that exceed the statutory ceiling. Accordingly, OCTA suggests that revisions to the proposed rule should generally follow the Commission's recent rulings in Docket UM-1087 regarding what costs and charges should be included in the carrying

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

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charge and rental rate, and what costs and charges may be billed as additional, incremental, or "direct" charges. There is no reason for the Commission to revisit the decisions made on rental issues, particularly when the Commission's final decision in the case is just a year old. *See* Order No. 05-981.

Docket UM-1087 is the only interpretation of the Commission of the existing rules and statutory provisions regarding rates and charges for pole attachments. Docket UM-1087 was fully litigated, with pre-filed testimony, hearings, cross-examination, and several rounds of extensive post-hearing briefs. The issues were well-developed and joined by the initial parties with input from interveners as well. Moreover, that decision was compelled by Oregon statutes. *See* ORS §§ 757.282 and 759.665.

The provisions of ORS §§ 757.282 and 759.665 are discussed above in terms of a rate "floor" and "ceiling." Another way to look at the statutes is "either/or." The statutes allow the pole owner or the Commission to establish rates either based on: (1) "all the additional costs of providing and maintaining pole attachment space for the licensee;" which would be the sum of all incremental costs for the attachment; or (2) "the actual capital and operating expenses, including just compensation, of the public utility, telecommunications utility or consumer-owned utility attributable to that portion of the pole . . . used for the pole attachment," which is the expression of the carrying charge formula. By using the conjunction "nor" between these two

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clauses, instead of "and," the Oregon Legislature mandated that **either** approach could be used,[6] but not **both**.

Because the carrying charge method results in the maximum rate the law allows, the addition of any other charges that are not incurred for the sole benefit of the attacher is not permitted. The Commission implicitly recognized this in UM-1087. The only additional charges the Commission allowed in that docket were for "special inspections or preconstruction, make ready, change out, and rearrangement work." Order No. 05-042 at 15. The Commission's decision was consistent with long line of FCC cases as well the Oregon statute, which tracks federal law and FCC precedent regarding attachment rates.[7] Accordingly, all attempts in this docket to add any additional charges on top of the properly calculated "carrying charge" must be rejected.

5. Other Provisions of Proposed 0110 Need Revision.

Sub-section (4)(c) should be modified to clarify that no separate rental charges may be applied to guys, anchors, anchor attachments, guard arm braces, ground wires and attachments, risers, and the like, even though they are outside of the occupant's assigned space.

OCTA is also in agreement with the principles of sub-section (5). Again, however, clarifying edits are needed. First, the rule should be clarified to ensure that pre-existing occupants also are entitled to reasonable prepayment from new occupants who require the pre-

[6] Or something in between the two.

[7] Except exclusion of clearance space from the usable space on the pole, which is discussed in greater detail above.

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existing occupant to perform make-ready work. This is consistent with federal and state law. Second, OCTA suggests using the term "make-ready" in the sub-section, to use a defined and recognized term for simplicity and clarity.

H. OAR § 860-028-0115

OCTA supports this new rule. In addition, a new subsection should be added to OAR § 860-028-0115 to ensure that owner conduct inspections and issue notices of violations in good faith and with reasonable accuracy. Currently, such is not the case. Often, over half of alleged attachment violations are in error. The prospect of lucrative sanctions for the owners may be the reason for the current problem.

The current provisions in the sanctions rule were intended, in large part, to improve the safety of Oregon pole plant. To some extent, this purpose is being served, given the strong incentive for pole owners to find safety violations of their licensees. However, there are two problems with the current regime. First, sanctions are only assessed licensees, not against owners themselves. Considering that perhaps two-thirds of all poles in Oregon are owned by electric utilities and PUDs, and that high voltage electric wires constitute the greatest potential risk to public health safety and welfare, the lack of incentives for attachers to find their own violations is a glaring deficiency of the current rules. The second problem is that the sanctions that are recoverable for safety violations, both major and minor, as well as other violations are so large that the incentive to find violations is perversely out of proportion to what the public interest requires.

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Rather than creating a legitimate incentive to ensure reasonable safety pole plant, the process of inspecting, auditing, and sanctioning attachers has become a cottage industry and a major new profit center for some pole owners. While new division 024 rules require OCTA members to keep their cable plants in compliance with applicable safety rules and contracts, the Commission needs to be aware of the undue and unreasonable burden that is being placed on cable companies by some pole owners. In particular, owners are finding numerous "violations" that do not exist. It is not at all uncommon for poles owners to send OCTA members a list of alleged violations—possibly including an invoice for sanctions—that is **more than 50% in error**. Regardless of the motivation of the owners, such poor inspection practices must be curbed.

The OCTA has no direct evidence of why owner's inspections result in such high "false positives" for violations. However, it is certain that the current sanctions provisions and amounts create strong incentives for power companies to find more sanctions than really exist. In the best case scenario for the electric utility, the licensee will simply not question the alleged violations or voluntarily pay sanctions on the entire list of allegedly non-compliant poles. In the worse case scenario, the licensee will conduct its own full and separate investigation and dispute the violations that do not really exist. After much wasted time and effort, the licensee will pay any sanctions that may be due and correct any actual deficiencies. In the real world, the owner and cable company compromise the amount of sanctions paid. Thus, the pole owner receives ***not less*** than what it is entitled to, while the licensee generally pays ***more*** to the pole owner than it is obligated for. Compounding this lopsided result in favor of the pole owners, the licensee

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currently bears the entire cost of its own inspections and a portion of the owner's inspection costs. In other words, the licensee must pay both for the pole owner's mistakes and to correct the owner's mistakes.

As discussed below, the OJUA consensus proposal on revisions to the sanctions rules should help reduce incentives for overfilling for sanctions. As an additional protection, however, OCTA urges the Commission to adopt a new sub-section in proposed Rule 0115, as set forth in Exhibit A to these comments. Specifically, the new sub-section should provide:

> An owner has a duty to assert violations of these rules, applicable safety standards, and the parties' contract in good faith and with reasonable accuracy. If an owner submits a notice or list of alleged to a licensee and the licensee, upon its own inspection of at least ten percent of the poles listed, establishes that more than five percent of the alleged violations are in error, then the notice and any associated invoice shall be deemed void and the licensee shall be entitled to return the notice to the owner and demand a reinspection; provided that the licensee shall document the errors found. Said reinspection shall be at owner's cost, unless the parties agree on a joint inspection and sharing of costs.

This proposed new subsection takes into account the fact that no inspection is going to be perfect. However, upon reaching the proposed threshold level of five percent error rate, the licensee should have to bear the cost of redoing the owner's faulty inspection. This measure is not intended to be punitive. It is simply intended to curb the current shoddy inspection practices of some pole owners.

This additional provision would, if adopted, provide incentives to pole owners to do accurate inspections. In so doing, it would eliminate the duplicative and wasteful current practice where both the owner and the licensee are forced to conduct separate inspections,

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followed by time-consuming and expensive dispute resolution processes. Accordingly, OCTA urges the Commission to include the proposed additional language in its rule.

I. OAR § 860-028-0120 THROUGH OAR § 860-028-235

The OJUA has reached a consensus on proposed revisions to the sanctions rules, OAR § 860-028-0120 through OAR § 860-028-235. The proposals, issued September 11, 2006, are attached as Exhibit B. Briefly, the consensus proposal modifies the sanctions rules to reduce the amount of sanctions, circumstances in which sanctions may be applied, and provide for a mitigation or elimination of sanctions when licensees promptly correct attachment violations. OCTA fully supports the consensus rules **as a whole**. The consensus rules are a compromise among the OJUA members. Unquestionably some members would prefer not to change the rules at all, while others would prefer to eliminate sanctions rules altogether. As a compromise however, OCTA supports the revisions and views them as an important step to improve relationships between pole owners and attachers and reduce the number of disputes regarding the pole attachments that are brought before the Commission.[8]

Since the proposed revisions to the sanctions rules are the product of consensus and presumably will receive widespread support, OCTA's comments in this round will be brief. OCTA reminds the Commission that, as discussed above, pole attachment first came under the Commission's jurisdiction in 1979. In the first 20-plus years that the Commission had

[8] Should parties comment in opposition to the proposed consensus rules, OCTA reserves the right to respond in subsequent rounds of comments. Moreover, should any OJUA participants not support the revisions, OCTA reserves the right to argue for more extensive revisions or elimination of the sanctions rules altogether.

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jurisdiction, to OCTA's knowledge the Commission did not have to decide a single contested case between pole owners and licensees. Owners and licensees were able to get along reasonably well and negotiate their contracts and rates, terms, and conditions under the statutory framework established in 1979. This relatively peaceful state of affairs began to break down, however, shortly after the Commission adopted the sanctions rules in 2000.

In contrast to the relative calm and peace of the first 20 years of the Commission's regulation of pole attachments, the last three years have seen a number of disputes brought before the Commission. *See e.g.,* Commission Docket Nos. UM 1087, UM 1096, and UM 1191. The sanctions rules as they currently exist create incentives and opportunities for some pole owners to demand and exact unreasonable rents, rates, terms, and conditions. As seen in Docket UM 1087, a pole owner has a strong incentive **not** to successfully conclude renewal negotiations before a contract expires, so that the owner can levy the highest possible sanction against the attacher, which is the penalty for not having a contract.

The proposed revisions to the sanctions rules, which are attached as Exhibit B, will eliminate the most common and serious abusive pole owner tactics and use of sanctions. OCTA believes that the proposed revisions strike a reasonable balance among the rights of pole owners, the interests of attachers, and the need to ensure compliance with Commission's safety rules and parties' contracts. While the revisions would curb the most aggressive improper use of sanctions, the option of sanctions still remains as a tool to help enforce the Commission's laws

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and rules and parties' contracts. The OCTA urges that the proposed sanction rule revisions be adopted in their entirety as set forth in Exhibit B to these comments.

J. 860-028-0310

OCTA understands there is OJUA consensus of revisions to this rule and therefor has no comments on this rule at this time.

III. CONCLUSION

Based on the foregoing comments, OCTA summarizes its position on the Issues in the following table:

Rule/Issue	OCTA Position
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?	No comment
Carrying Charge	
Should inflation be considered?	No
Should this be based on FCC-approved 364 account only?	Yes - OCTA supports Charter's comments
Rate of Return – is this the Return on Equity, Return on Debt, or Weighted Average Cost of Capital?	For investor-owned utilities only, not consumer-owned utilities

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Rule/Issue	OCTA Position
Cost of Money – for consumer-owned utilities, should this be the average cost of capital rate?	No – see comments
Licensee	
Include government entities?	Yes
Include wireless carriers	No comment
Make Ready Work – what does this include?	No administrative costs
Pattern	
What is "frequent"?	No comment
Is this prospective only?	No comment
Permit	See comments
Pole Cost – limited to distribution poles?	No comment
Preconstruction Activity	No comment
Service Drop	Too narrow
Special Inspection	No comment
Threshold number of poles – consider in context the use of the phrase in proposed Rule 860-28-0110(7)	No comment
Usable space.	Modify – see comments
Unauthorized attachment.	No comment
Should following definitions be added?	
Safety clearance (used in proposed OAR 860-028-0020(33)).	Equals 20 feet of ground clearance, not 40 inches

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Rule/Issue	OCTA Position
Operator (used in proposed OAR 860-028-0050(3))	No comment
Utility pole (as used in OAR 860-028-0050(1)(a) – should poles be limited to distribution poles, or include transmission poles? Towers? Other structures?	No comment
Routine inspection.	No comment
OAR 860-028-0050	Stylistic changes – see comments
Should provisions regarding owner correction and operators trimming vegetation be moved to OAR 860-028-0120?	No comment
What vegetation management standards are appropriate for communications operators?	Limited – see proposed OAR 860-028-0050(3)
OAR 860-028-0060	Support with revisions – see comments and Exhibit A
What happens if parties are not negotiating? in proposed OAR 860-028-0060(4)	No comment
OAR 860-028-0070	Support
What role should OJUA have in dispute resolution for contracts?	No comment
Should time for response to a complaint be lengthened from 30 days?	Oppose
Proposed wordsmithing of OAR 860-028-0070(4)(e)(B) for clarification.	No comment

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Rule/Issue	OCTA Position
NOTE: OJUA said it would consider timelines for Commission decision that exceed 180 days. Rule 860-028-0195, not considered in this proceeding, allows 360 days for a Commission decision.	No comment
OAR 860-028-0080	Not opposed, with revisions – see comments and Exhibit A
Are IOUs subject to payment under this rule?	No comment
What about other entities?	Not intervenors
OAR 860-028-0100	Stylistic changes; see comments
Should government entities be required to have permits for attachments?	Yes
Should the timelines be in calendar days or business days?	Calendar
What should applicable timelines be?	
45 days for response to application?	No, 30 days
Period between notifying the licensee of make ready and the response from licensee.	30 days
Period between granting the permit and the licensee completing construction.	30 days with flexibility for longer
Period for which permit is valid	Indefinite

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Rule/Issue	OCTA Position
Should there be an allowance for owner's estimates on time needed for make work, especially if there are multiple parties?	No comment
Should there be presumptive approval if permits are not responded to within a certain period of time? Should applicant be allowed to begin construction, or is there a risk to safety and reliability?	Yes, no risk to safety
Should applicant be able to have input on who performs make ready work?	Yes
Does pole owner have say on hiring and firing these workers?	No comment
What standard processes and information are required for new or modified permits?	Support 6/15/06 proposal, but change "location" to "height in 860-028-0100(2)(b)(E)
What should owner have to provide reasons for denial of permit? What reasons are acceptable?	Support 6/15/06 proposal
OAR 860-028-0110	
Should the pole rental rate be adjusted for inflation?	No – not an "actual" cost
What costs should be included in rental rates? What should be a direct charge, and what should be in the pole rental rate? *See also* Rule 860-028-0310(6).	See comments and concur with Charter's comments – no additional direct charges
Should the calculation of pole rental rate be amended? Rule 860-028-0310(3).	Only minor changes – see comments
Should rates be nondiscriminatory?	Yes

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Rule/Issue	OCTA Position
What if an attachment permit doesn't specify amount of authorized space?	12" by default
What elements should be allowed in an existing authorized space under an existing permit?	All allowed by NESC – see comments
Should prepayment be required for the work specified in Rule 860-028-0100, or all "make ready" work?	No comment
When is the owner required to show that certain charges were excluded from the rental rate calculations?	See comments and Charter comments
OJUA raised a concern that "usable space" definition was omitted from Rule 860-028-0110(3), but it was moved to proposed Rule 860-028-0020(33). Is that still a concern?	See comments re definition
OAR 860-028-0115	Support
Is section (3) redundant with other rules?	No comment
Should communication protocols be mutually acceptable to owner and licensee?	No comment
Should an owner be required to respond to other problems with the pole, not just violations of Commission Safety Rules? 860-028-0115(3)(a).	No comment
Should an owner be responsible for maintaining towers for joint-use? 860-028-0115(1).	No comment
What are the responsibilities of structure owners related to safety, engineering practices, inter-operator communications, coordination, etc.?	No comment

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Rule/Issue	OCTA Position
NOTE: OJUA proposed an issue related to a cost-recovery mechanism for licensee costs incurred when disproving sanctioned pole violations. As discussed above, this issue is not properly within the scope of this rulemaking. If another docket is opened, this issue should be addressed in conjunction with changes to OAR 860-028-0150.	Owners must provide accurate notices of violations and sanctions invoices. New language proposed that does not include cost-recovery.
OAR 860-028-0310	
Should other calculations for conduit costs be permitted to reflect variations in how owners collect and keep their system information?	No comment
Should rates be non-discriminatory?	No comment
Should charges be supported by detailed invoices?	No comment

Respectfully submitted this 28th day of September, 2006.

Respectfully submitted,

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Pole and Conduit Attachments

860-028-0020
Definitions for Pole and Conduit Attachment Rules
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 a licensee with the pole owner's permission pursuant to a pole attachment agreement.
(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 and that are publicly available to the greatest extent possible:
(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:
(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 interest rate for 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.~~'s most recent bond issue.
(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) "Duct" means a single enclosed raceway for conductors or cables.
(9) "Government entity" means a city, a county, a municipality, the state, or other political subdivision within Oregon.
(10) "Licensee" has the meaning given in ORS 757.270 or ORS 759.650. ~~"Licensee" does not include a government entity.~~
(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. Make ready work costs are nonrecurring costs~~,~~ and are not contained in carrying charges.
(12) "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.
(13) "Net linear cost of conduit" is equal to net investment in conduit divided by the total length of conduit in the system multiplied by the number of ducts in the system.
(14) "Notice" means written notification sent by mail, electronic mail, telephonic facsimile, or other such means.
(15) "Occupant" means any licensee, government entity, or other entity that constructs, operates, or maintains attachments on poles or within conduits.
(16) "Owner" means a public utility, telecommunications utility, or consumer-owned utility that owns or controls poles, ducts, ~~or~~ conduits, or rights-of-way.
(17) "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.
(18) "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)].
(19) "Permit" means the written or electronic record by which an owner authorizes ~~an~~a licensee or occupant to attach one or more attachments on a pole or poles, in a conduit, or on support equipment. An owner's invoice to an occupant for rental for attachment to a pole is prima facie evidence of the issue of a permit to the occupant for that attachment.
(20) "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 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.
(21) "Post construction inspection" means work performed to verify and ensure the construction complies with the permit, governing agreement, and Commission safety rules.
(22) "Preconstruction activity" means engineering, survey and estimating work required to prepare cost estimates for an attachment application.
(23) "Public utility" has the meaning given in ORS 757.005.

(24) "Serious injury" means "serious injury to person" or "serious injury to property" as defined in OAR 860-024-0050.
(25) "Service drop" means a connection from distribution facilities to ~~a single family, duplex, or triplex residence or similar small commercial facility.~~ the building or structure being served.
(26) "Special inspection" means an owner's field visit made at the request of the licensee for all nonperiodic inspections. A special inspection does not include preconstruction activity or post construction inspection.
(27) "Support equipment" means guy wires, anchors, anchor rods, and other accessories of the pole owner used by the licensee to support or stabilize pole attachments.
(28) "Support equipment cost" means the average depreciated original installed cost of support equipment.
(29) "Surplus ducts" means ducts other than: (a) those occupied by the conduit owner or a prior 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.
(30) "Telecommunications utility" has the meaning given in ORS 759.005.
(31) "Threshold number of poles" means 50 poles, or one-tenth of one percent (0.10 percent) of the owner's poles, whichever is less.
(32) "Unauthorized attachment" means an attachment that does not have a permit and a governing agreement.
(33) "Usable space" means all the space on a pole, except: the portion below ground level~~,~~ and 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.

Stat. Auth.: ORS Ch. 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 through 757.290, 759.045 & 759.650 through 759.675
Hist.: PUC 15-2000, f. 8-23-00 & ef. 1-01-01 (Order No. 00-467); renumbered from OARs 860-022-0110 and 860-034-0810; PUC 23-2001, f. & ef. 10-11-01 (Order No. 01-839).

860-028-0050
General
(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) With the exceptions of OAR 860-028-0060 through OAR 860-028-0080, parties may mutually agree on terms that differ from those in this Division, but in the event of disputes submitted for Commission resolution, the Commission will deem the terms and conditions

specified in this 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) Owner correction: 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 a licensee for any fines, fees, damages, or other costs the licensee's attachments cause the pole owner to incur.
(3) Each operator of communication facilities must trim or remove vegetation that ~~poses a significant risk to its their facilities, or through contact with its facilities~~ poses a significant risk to a structure of an operator of a jointly used system.

Stat. Auth.: ORS Ch. 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 through 757.290, 759.045 & 759.650 through 759.675
Hist.: NEW

860-028-0060
Attachment Contracts
(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 establishing the rates, terms, and conditions of pole use in accordance with OAR 860-028-0120.
(3) Parties must negotiate pole attachment contracts in good faith.
(4) Unless ~~otherwise provided for~~expressly prohibited by ~~contract, when the parties are negotiating a new or amended~~the contract, the last effective contract between the parties will continue in effect until a new ~~or amended~~ contract between the parties goes into effect. In a dispute before the Commission subject to OAR 860-028-0070, a proposed contract provision that would prohibit the continuation of the contract as provided in this subjection shall be deemed presumptively unreasonable.

Stat. Auth.: ORS Ch. 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 through 757.290, 759.045, 759.650 through 759.675
Hist.: NEW

860-028-0070
Resolution of Disputes for Proposed New or Amended Contractual Provisions
(1) This rule applies to a complaint alleging a violation of ORS 757.273, 757.276, 757.279, 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 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:
(A) In cases in which the Commission's review of a rate is required, the complaint must provide 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 party submitting the complaint, the licensee must request the data and information required by this rule from the owner. The owner must supply the licensee the information required in this rule, as applicable, within 30 calendar days of the receipt of the request. The licensee must submit this information with its complaint.
(C) If the owner does not provide the data and information required by this rule after a request by the licensee, the licensee will include a statement indicating the steps taken to obtain the information from the owner, including the dates of all requests.
(D) No complaint by a licensee will be dismissed because the owner has failed to provide the applicable data and information required under subsection (4)(d)(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.

Stat. Auth.: ORS Ch. 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 through 757.290, 759.045, 759.650 through 759.675
Hist.: NEW

860-028-0080
Costs of Hearing in Attachment Contract Disputes
(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.
(2) The cost of the hearing 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. The Commission will provide the parties with the estimates of total costs incurred to date monthly while the docket is pending.
(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. Costs will not be allocated to an intervenor, unless the intervenor obstructs, delays, or unduly expands the scope of the proceeding. The following factors will be considered in determining payment:
~~(a)Whether the party was a complainant, respondent, or intervenor;~~
(a) The reasonableness of the pre-complaint positions of the parties and any efforts by a party to seek alternative dispute resolution or foster good faith negotiations;
(b) Merits of the ~~party's~~partys' positions throughout the course of the proceeding; and
(c) Other factors that the Commission deems relevant.

Stat. Auth.: ORS Ch. 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.279, and 759.660
Hist.: NEW

860-028-0100
~~New or Modified~~Procedures for Applications and Permits for Attachments
(1~~) As used in this rule, "applicant" does not include a government entity.(2~~) 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;
(E) Attachment ~~location~~height on pole;
(F) Description of installation;
(G) Proposed route; and
(H) Proposed schedule for construction.
(~~3~~2) The owner will provide written or electronic notification to the applicant within ten business 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.
(~~4~~3) An owner will reply in writing or electronically to the applicant as quickly as possible, but no later than 30 ~~business~~calendar days from the date the application is received. The owner's reply must state whether the application is approved, approved with modifications or conditions, or denied.
(a) If the owner approves an application without requiring make ready work, the applicant may begin construction and will notify the owner within 30 ~~business~~calendar days of completion of construction.
(b) 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.
(c) If the owner denies the application, the owner will state in detail the reasons for its denial.
(d) If the owner does not provide the applicant with notice that the application is approved or denied within 30 ~~business~~calendar days from its receipt, the application is deemed approved and the applicant may begin construction and will notify the owner within 30 ~~business~~calendar days of completion of construction.
(~~5~~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 as quickly and inexpensively as is reasonably possible consistent with applicable legal, safety, and reliability requirements. Where this work requires more than 30 ~~business~~calendar days to complete, the parties must negotiate a mutually satisfactory longer period to complete the make ready work.
(~~6~~5) For good cause shown, if an owner can not meet an applicant's time frame for attachment or those established by this rule, preconstruction activity and make ready work may be performed by a mutually acceptable third party.
(~~7~~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.

Stat. Auth.: ORS Ch. 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 through 757.290, 759.045 & 759.650 through 759.675
Hist.: NEW

860-028-0110
Rental Rates and Charges for Attachments by Licensees to Poles Owned by Public Utilities, Telecommunications Utilities, and Consumer-Owned Utilities
(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 maximum pole attachment rental rate per foot is computed by multiplying the pole cost by the carrying charge and then dividing the resultant product by the usable space per pole. The rental rate per pole is computed as the rental rate per foot multiplied by the licensee's authorized attachment space.
(3) The rental rates referred to in section (2) of this rule ~~do not~~ include the costs of attachment to support equipment and grounds, permit application processing, ~~special inspections, preconstruction activity, post construction inspection, make ready work; or the costs related to unauthorized attachments. Charges for those activities~~, routine inspections, and all other cost that are included or may be included in calculation of the carrying charge; but do not include make ready work or special inspections, which are based on actual costs, ~~including~~excluding administrative costs, and will be charged in addition to the rental rate.
(4) 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.
(c) An additional or modified attachment by the licensee that meets the Commission safety rules and that is placed within the licensee's existing authorized attachment space, vertical usable and non-usable space, or on support equipment will be considered a component of the existing pole permit for rental rate determination purposes. Such attachment additions or modifications may include, but are not limited to, cabinets, splice boxes, load coil cases, bonding wires and straps, ground wires, service drops, guy wires, anchor attachments, guard arm braces, vertical risers, or cable over-lashings.
(5) The owner and any affected pre-existing occupant may require reasonable prepayment from a licensee of the owner's or pre-existing occupant's estimated costs for any of ~~the~~make-ready work allowed by OAR 860-028-0100. The owner's or occupant's estimate will be adjusted to reflect

the owner's or occupant's actual cost upon completion of the ~~work~~requested tasks. The owner and occupant will ~~promptly~~ refund any overcharge to the licensee.
(6) The owner must be able to demonstrate that charges under sections (3) and (5) of this rule as charges in addition to the rental charge have been excluded from the rental rate calculation.

Stat. Auth.: ORS Ch. 183, 756, 757 & 759 Stats. Implemented: ORS 756.040, 757.270 through 757.290, 759.045 & 759.650 through 759.675 Hist.: PUC 9-1984, f. & ef. 4-18-84 (Order No. 84-278); PUC 16-1984, f. & ef. 8-14-84 (Order No. 84-608); PUC 9-1998, f. & ef. 4-28-98 (Order No. 98-169); PUC 15-2000, f. 8-23-00 & ef. 1-01-01 (Order No. 00-467); renumbered from OARs 860-022-0055 and 860-034-0360; PUC 23-2001, f. & ef. 10-11-01 (Order No. 01-839).

860-028-0115
Duties of Structure Owners
(1) An owner must establish, maintain, and make available to occupants its joint-use construction standards for attachments to its poles, towers, and for joint space in conduits. Standards for attachment must apply uniformly to attachments by all operators, including the owner. (2) An owner must establish and maintain protocols for communications between the owner and its occupants.
(3) An owner must maintain its facilities in compliance with Commission Safety Rules for occupants.
(a) An owner must promptly respond with a reasonable plan of correction for any violation of the Commission Safety Rules if notified in writing of a violation requested by an occupant.
(4) An owner has a duty to assert violations of these rules, applicable safety standards, and the parties' contract in good faith and with reasonable accuracy. If an owner submits a notice or list of alleged to a licensee and the licensee, upon its own inspection of at least ten percent of the poles listed, establishes that more than five percent of the alleged violations are in error, then the notice and any associated invoice shall be deemed void and the licensee shall be entitled to return the notice to the owner and demand a reinspection; provided that the licensee shall document the errors found. Said reinspection shall be at owner's cost, unless the parties agree on a joint inpection and sharing of costs.

Stat. Auth.: ORS Ch. 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 through 757.290, 759.045 & 759.650 through 759.675
Hist.: NEW

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

Stat. Auth.: ORS Ch. 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.270 through 757.290, 759.045 & 759.650 through 759.675
Hist.: PUC 2-1986, f. & ef. 2-7-86 (Order No. 86-107); PUC 9-1998, f. & ef. 4-28-98 (Order No. 98-169); renumbered from OARs 860-022-0060 and 860-034-0370; PUC 23-2001, f. & ef. 10- 11-01 (Order No. 01-839)

EXHIBIT B TO 9/28/06 COMMENTS OF OCTA

OAR 028 – Relating to Sanctions

860-028-0120
Duties of Pole Occupants
(1) Except as provided in sections (2) and (3) of this rule, a pole occupant attaching to one or more poles of a pole owner shall:
(a) Have a written contract with the pole owner that specifies general conditions for attachments on the poles of the pole owner;
(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) 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 **calendar** days of installation;
(b) Except for a pole occupant that is a government entity, 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)Failure of an Occupant to Promptly Respond to a Notification of Violation: If an occupant fails to respond to a notification of violation of the Commission Safety Rules within 60 calendar days after notification, the pole owner may perform the corrections or have the corrections performed by a third party. Such corrections shall be performed at the occupant's expense and shall be charged to the occupant at cost, plus an additional 15%. An occupant's response to a notification of violation shall consist of either a submission of a plan of correction or actual correction of the violation.

(5) Failure of Occupant to Promptly Repair, Disconnect or Isolate Hazardous Conditions: A pole owner may correct deficiencies which cause hazardous conditions and charge the costs of the correction to the occupant if:
(a) the owner provides reasonable notice of a hazard or situation requiring prompt attention, including vegetation posing an imminent threat to the supporting structure; and
(b) the occupant is allowed a reasonable opportunity to repair or correct the hazard or situation.

(c) In the event of an emergency, notice or pre-authorization shall not be required.

Stat. Auth.: ORS 183, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 4-2001, f. & cert. ef. 1-24-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0120 & 860-034-0820

860-028-0130

Sanctions for Having No Contract

(1) Except as provided in section~~s~~ (2)~~ and (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)(a). The sanction ~~may be the higher of~~ shall be $500 per pole. ~~:~~

~~(a) $500 per pole; or~~

~~(b) 60 times the owner's annual rental fee per pole.~~

~~(2) A pole owner shall reduce the sanction provided in section (1) of this rule by 60 percent if the pole occupant complies with OAR 860-028-0120 within the time allowed by OAR 860-028-0170.~~

~~(3)~~ (2) This rule does not apply to a pole occupant that is a government entity or to entities operating under a recently expired or terminated contract who are participating in good faith efforts to renegotiate a contract.

Stat. Auth.: ORS 183, ORS 756, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - ORS 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0130 & 860-034-0830

860-028-0140

Sanctions for Having No Permit

(1) Except as provided in sections (2) and (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 860-027-0120(3). The sanction ~~may be the higher of:~~ shall be

~~(a) $250 per pole; or~~

~~(b) 30 times the owner's annual rental fee per pole.~~

~~(2) A pole owner shall reduce the sanction provided in section (1) of this rule by 60 percent if the pole occupant complies with OAR 860-028-0120 within the time allowed by OAR 860-028-0170.~~

(2) Sanctions imposed under this section shall be:

(a) 5 times the owner's current annual rental fee per pole for each violation which is self-reported by the occupant or discovered through a joint, cooperative inspection between the pole owner and pole occupant; or

(b) 5 times the owner's current annual rental fee per pole in addition to a sanction of $100 per pole for each violation which is reported by the pole owner.

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

Stat. Auth.: ORS 183, ORS 756, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - ORS 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0140 & 860-034-0840

860-028-0150

Sanctions for Violation of ~~Other Duties~~ Commission Safety Rules and Terms of Contract (1) ~~Except as provided in sections (2) and (3) of this rule, a~~ 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 shall be ~~the higher of~~: $200 per pole.

~~(b) Twenty times the pole owner's annual rental fee per pole.~~

~~(2) A pole owner shall reduce the sanction provided in section (1) of this rule by 70 percent if the pole occupant complies with OAR 860-028-0120 within the time allowed by OAR 860-028-0170.~~

(2) A pole occupant is not liable for sanctions under this section if :

(a) the violation is corrected by the pole occupant within 180 days of notification of the violation; or

(b) the pole occupant submits a plan of correction, as provided for in OAR 860-028-0170, within 60 days of notification of a violation.

(3) If a pole occupant submits a plan of correction, as provided for in OAR 860-028-0170, the pole occupant must adhere to the provisions of that plan unless the pole owner consents to a plan amendment.

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

Stat. Auth.: ORS 183, ORS 756, ORS 757 & OSR 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - ORS 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 4-2001, f. & cert. ef. 1-24-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0150 & 860-034-0850

860-028-0160

Choice of Sanctions

(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.

Stat. Auth.: ORS 183, ORS 756, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - ORS 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0160 & 860-034-0860

860-028-0170

~~**Time Frame for Securing Reduction in Sanctions**~~ **Plans of Correction**

~~(1) Except as provided in section (2) of this rule, a pole owner shall reduce the sanctions provided in these rules, if the pole occupant:~~

~~(a) On or before the 60th day of its receipt of notice, complies with OAR 860-028-0120 and provides the pole owner notice of its compliance; or~~

~~(b) On or before the 30th day of its receipt of notice, submits to the pole owner a reasonable plan of correction, and thereafter, complies with that plan, if the pole owner accepts it, or with another plan approved by the pole owner.~~

~~(2) Notwithstanding section (1) of this rule, a pole owner may, if there is a critical need, or if there is no field correction necessary to comply with OAR 860-028-0120, shorten the times set forth in section (1). A pole occupant that disagrees with the reduction must request relief under OAR 860-028-0220 prior to the expiration of the shortened time period, or within seven days of its receipt of notice of the reduction, whichever is later.~~

~~(3)~~ (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.

(4) If a pole occupant suggests a compliance date of more than ~~60~~ 180 days following receipt of notice, then the pole occupant must show good cause.

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

~~(a) If the pole owner accepts the plan, then the pole owner shall reduce the sanctions to the extent that the pole occupant complies with OAR 860-028-0120 and provides the pole owner notice of its compliance, on or before the dates set out in the plan;~~

~~(b)~~ (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;

~~(c)~~ (b) ~~Until the pole owner accepts or rejects a plan of correction, the pole occupant's time for compliance with OAR 860-028-0120 is tolled;~~ Until the pole owner accepts or rejects a plan of correction, the pole occupant's time for compliance with the timelines dictated by the plan of corrections is not commenced.

~~(d)~~ (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.

Stat. Auth.: ORS 183, ORS 756, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - 757.290, ORS 759.045 & 759.650 - 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 4-2001, f. & cert. ef. 1-24-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0170 & 860-034-0870

~~860-028-0180~~

~~Progressive Increases in Sanctions~~ Removal of Pole Occupant Attachments

~~(1) Except as provided in sections (2) and (3) of this rule, if the pole occupant fails to comply with OAR 860-028-0120 within the time allowed under OAR 860-028-0170, then the pole owner may sanction the pole occupant 1.5 times the amount otherwise due under these rules.~~

~~(2) If the pole occupant has failed to meet the time limitations set out in OAR 860-028-0170 by 30 or more days, then the pole owner may sanction the pole occupant 2.0 times the amount otherwise due under these rules.~~

~~(3)~~ (1) If the pole occupant has failed to meet the time limitation set out in OAR 860-028-~~0170~~ 0150 by 60 or more days, then the pole owner may request an order from the Commission authorizing removal of the pole occupant's attachments.

~~(4)~~ (2) This rule does not apply to a pole occupant that is a government entity.

Stat. Auth.: ORS ORS 183,ORS 756, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - ORS 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0180 & 860-034-0880

860-028-0190

Notice of Violation

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 ~~the~~ a provision and explanation of the rule each attachment allegedly violates~~.~~ ,the pole number and location, including pole owner maps and GPS coordinates if available.

Stat. Auth.: ORS 183, ORS 756, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - ORS 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 4-2001, f. & cert. ef. 1-24-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0190 & 860-034-0890

860-028-0195

Time Frame for Final Action by Commission

Notwithstanding the timelines provided for in OAR 860-028,0070, t ~~T~~he Commission shall issue its final order within 180 ~~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)).

Stat. Auth.: ORS 183, 756, 757 & 759, 47 USC ¦ 224(c)(3)(B)(ii)
Stats. Implemented: ORS 756.040, 757.270-290, 759.045 & 759.650-675
Hist.: PUC 9-2004, f. & cert. ef. 4-21-04

860-028-0200

Joint-Use Association

(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.

Stat. Auth.: ORS 183, ORS 756, ORS 757 & OSR 759
Stats. Implemented: ORS 756.040, OSR 757.035, ORS 757.270 - ORS 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 4-2001, f. & cert. ef. 1-24-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0200 & 860-034-0900

860-028-0210

Resolution of Disputes over Plans of Correction

(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. 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).

Stat. Auth.: ORS 183, ORS 756,ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - ORS 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 4-2001, f. & cert. ef. 1-24-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0210 & 860-034-0910

860-028-0220

Resolution of Factual Disputes

(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;

(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.

Stat. Auth.: ORS 183, ORS 756, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 4-2001, f. & cert. ef. 1-24-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0220 & 860-034-0920

860-028-0230

Pole Attachment Rental Reductions

(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 60 days from the date of billing, in payment of fees and charges 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 pole attachment rental fees due to the pole owner.

Stat. Auth.: ORS 183, ORS 756, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - ORS 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 4-2001, f. & cert. ef. 1-24-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0230 & 860-034-0930