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 FINAL COMMENTS OF OREGON CABLE TELECOMMUNICATIONS ASSOCIATION ("OCTA")

I. INTRODUCTION

The Oregon Cable Telecommunications Association ("OCTA") appreciates the opportunity to participate in these rulemaking dockets as well as the efforts of the Staff and the Administrative Law Judge to find as much common ground as possible among the numerous participants. Regardless of the outcome on the matters still at issue in this proceeding, the progress made in this rulemaking and the informal proceedings that preceded it is almost certain to result in improved rules based on revisions proposed by Staff herein on June 15, 2006

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(hereafter "Proposed Rules"). The Proposed Rules provide much needed clarity to pole owners and occupants. They will eliminate or reduce some of the most aggressive or abusive tactics of a few pole owners. That is not to say, however, that the Proposed Rules could not be further improved. Moreover, it is important that the Commission be careful to avoid any "backsliding" on some of the earlier proposals. There is no question but that the Proposed Rules would result in lower rents and much lower sanctions. The Commission should not back down from making these essential changes to resolve issues that have generated much litigation and needless expense for the Commission and parties over the last several years. Overall cost reductions for attachers are consistent with the public interest and required by Oregon law.

OCTA filed extensive comments in the initial round on September 28, 2006. Over the course of the numerous workshops and hearing in this docket, OCTA does not believe that any serious challenge has been raised to its proposals. Accordingly, OCTA stands by its opening comments and encourages the Commission to review them again as the final order is being drafted. OCTA sees no purpose in repeating its opening comments and will focus here on areas where the Commission has requested additional comments and areas that seemed to generate confusion or controversy at the workshops. Comments are organized by issue, rather than section-by-section. Again, OCTA's opening comments contained a section-by-section analysis, as well as a table summarizing OCTA's position issue-by-issue. OCTA also attached a full text of rule language to its opening comments with proposed changes, deletions, and additions.

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II. FINAL COMMENTS OF OCTA

A. Attachment Rates.

OCTA supports Charter and other commenters who urged the Commission to require pole owners in calculating annual rents to use the same FERC and ARMIS accounts as required by the FCC in calculating the carrying charge. There are numerous benefits to following the FCC approach. First, the FCC has adjudicated hundreds of pole disputes, so there is a large body of law to draw upon. Thus, following the federal approach brings certainty and will enable informed parties to avoid coming to the Commission to resolve rental rate disputes. Second, the FCC approach provides transparency. Other than the pole count, all of the necessary data is public. This will make parties' rate negotiations simple. Other approaches would become something like rate cases, involving pro forma adjustments, discovery to ensure no double recovery of special charges, and cross-examination, to ensure that the data and the subject of judgments are accurate. Third, the FCC approach is simpler and more efficient than competing proposals. Since all pole owners, including consumer-owned utilities, use FERC or ARMIS accounting, no separate accounting or auditing is required to establish pole rates. In contrast, if charges are added in or backed out, the accounting required is more difficult. The task for attachers, in reviewing rental rates, is unduly and unreasonably burdensome, if it is possible at all. Finally, and most importantly, the FCC formula and inputs are fully consistent with Oregon law. As discussed in OCTA's opening comments, the legislative history of Oregon's rate statutes reflects the legislature's intent to incorporate the federal formula in

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Oregon law. Departure from the federal formula would expose the Oregon Commission to challenges that the rate formula is inconsistent with Oregon statute.

B. "Direct" Charges In Addition To Rent Violate Oregon Law.[1]

Electric utilities proposed at the hearing and during the workshops that costs of all new attachments be allocated in full to the owner of the new attachments as "direct" charges. Their argument in favor of such "direct" charges may have a superficial appeal; that the person causing the incremental cost of the new attachment should pay for it. The argument is myopic, however, in that it focuses only on the costs and charges for a single pole. This myopic approach breaks down when one steps back and realizes that the pole owner is not just charging rent for a single pole, but rather tens or hundreds of thousands of poles. The vast majority of those poles do not have any new attachments in a given year.[2] The incremental costs of maintaining the legacy attachments on poles from year to year is very low, approaching zero. Thus, on the vast majority of its poles, each pole owner is recovering substantially in ***excess*** of its incremental cost in the rental charges for those poles. These well above cost charges allow owners to recover substantially in excess of the incremental cost of the new attachments. When pole plant costs and rent receipts are viewed in their entirety, rather than just based on a single pole that happens to have activity in a given year, it is easy to see that owners are fully recovering their incremental costs of new attachments.

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[1] The only exception is make ready costs, which both Oregon and federal cases have historically recognized as appropriately charged separately from the carrying charge.

[2] For example, PacifiCorp, which has about 400,000 poles in Oregon, asserts that it has received requests for attachment to 4,000 poles so far this fiscal year. PacifiCorp "Talking Points," filed November 13, 2006. Thus, the incremental costs of the new attachments affect only about 1% of PacifiCorp's poles.

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PacifiCorp's argument that the Commission must choose between a "struggling low-income electricity consumer" and subsidizing premium cable channels is a complete red herring.[3] Moreover, the argument is devoid of any citation to evidence or legal authorities.[4] There is simply no basis to claim or even infer that communications attachments are subsidized in Oregon. To the contrary, there is overwhelming legal authority from numerous states and at the federal level that rates paid by attachers to pole owners are compensatory, whether at the floor of incremental costs, or at the ceiling of fully distributed costs. A sampling of these authorities are cited in OCTA's and Charter's opening comments filed on September 28, 2006. Thus, the argument fails on its essential premise, because such subsidy exists.

In truth, pole owners are better off with communications attachers, because under the Oregon formula the attachers have paid for a share of the entire pole, not merely for the incremental space and costs of their attachments. If a subsidy exists, at all, it is flowing from communications customers to electric customers. And that would be true only if the Commission were vigilant about ensuring that the revenues provided by attachers to utilities are properly accounted for in electric rate cases.

Finally, the trade off is not about premium cable channels. It is about new and innovative services, such as high speed internet. It is about competition for voice telecommunication services. It is about bringing the same kinds of competitive and

[3] PacifiCorp "Talking Points," filed November 13, 2006.

[4] *See, Id.* and PacfiCorp's First Set of Comments Regarding Division 28 (Sept. 28, 2006). Both sets of comments lack any legal citations in support of their rate recommendations.

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technologically advanced offerings not just to urban residents in the state of Oregon but also to rural customers. Increasing the rates for pole attachments by communications companies will only hinder such beneficial developments.

Under the Oregon statute, which allows for use of incremental costs as a price floor, pole owners are certainly free to adopt the incremental cost approach. OCTA does not advocate that this approach be encouraged or mandated, due to challenges of accounting for all such incremental costs, the lack of transparency, and the lack of certainty, even though rates would go down substantially from the fully allocated rates that most utilities currently charge. Regardless, if a pole owner chooses to use the incremental cost approach, they are not permitted to charge the fully allocated carrying charge on top of selected incremental costs. Such an approach would cause rates to be higher than the ceiling set in Oregon statute, as is discussed in OCTA's opening comments at 16 - 17. Thus, the Commission should not permit the addition of any direct charge on top of the carrying charge, ***except*** for make ready charges for costs that are directly related to actual costs incurred exclusively for a specific attacher's request.[5]

C. Idaho Power's Proposed Rent Formula Is Unlawful**.**

Finally, OCTA notes that no party other than Idaho Power seems to be advocating for Idaho Power's unique approach to rental rates. There is a good reason for this, as the approach would clearly violate Oregon statute. Idaho Power's proposed pole formula would allocate pole costs based upon actual uses of a pole, rather than available usable space. The

[5] Which would include costs such as engineering and special inspections, but exclude general administration on such activities.

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motivation behind this proposal is obvious. Idaho Power serves a small and extremely rural portion of the eastern edge of the state. Accordingly, Idaho Power is likely to have a number of poles with only one (or at most two) communications attachers. Because Oregon's pole attachment formula allocates pole costs on a per foot of use basis, poles with few utilities sharing them will have more of the cost allocated to the pole owner. [6] The wisdom of this approach is not for the PUC or the parties to determine, it is mandated by the Oregon statute. ORS § 757.282(2) provides that the cost of the pole be shared "in proportion to the space used for pole attachment . . . as compared to all other uses made of the subject facilities, <u>and uses that remain available to the owner or owners" of the poles</u>. (Emphasis added). Thus, the Commission is precluded by statute from adopting Idaho Power's suggested rental formula.

D. <u>The Proposed Rules Should And Will Reduce Costs For Attachers.</u>

The Proposed Rules should lead to overall rental reductions for pole attachers. If all pole owners were following the Oregon statutory formula as interpreted by the Commission in Docket UM 1087 and a long line of FCC cases, then the Proposed Rules would not make much change in rates. However, even after the Commission's ruling in UM 1087, some pole owners are still attempting to improperly charge on a "per attachment" basis rather than per foot, as well as to charge numerous extra or direct charges, including permit application fees, anchor attachment charges, and other improper charges that exceed the statutory ceiling.

[6] This approach follows the federal formula, which federal courts have held are fully compensatory to pole owners. *E.g., Alabama Power Co. v. FCC*, 311 F.3d 1356 (11th Cir. 2002), *cert. denied*, 124 S. Ct. 501 (2003).

By bringing clarity and establishing a rule that is clearly applicable to all joint users, the Proposed Rules will reduce rates in the real world. Reductions are appropriate and in the public interest. They are appropriate, because in some instances the statute has been violated. This has lead to some complaints, but often the costs of litigation is too high a barrier and attachers simply pay unlawfully high rates. Violations of Oregon law and shifting of undue extra costs from pole owners to other users of the pole (or worse--creating monopoly profits for utilities that flow to shareholders and not ratepayers) is not in the public interest. Imposing monopoly rents on communications companies drives up their rates, thereby hindering development of competitive alternatives and promotion of new and advanced services, and--for services that receive universal service subsidies--increasing the burden on state and federal universal service funds.

Some utilities in this docket have been candid about their desire to recover higher rents and other charges from pole attachers. However, their comments lack any substantive legal argument in support of those desires. The Commission should reject these attempts to turn the clock back to the era of monopoly rents that existed before enactment of ORS § 757.282.

E. Current Sanctions Rules Must Be Revised For The Industry To Return To Self-Administration.

The current sanctions rules were a well-intentioned attempt to give pole owners a better ability to reign in "rogue" attachers that were causing safety concerns at the time the sanctions rules were adopted. No one—certainly not the Commission and attachers—anticipated that sanctions would become a source of substantial profits to some utilities. Indeed, the OCTA did not oppose the sanctions rules that have since become a huge burden on OCTA's members. It is clear that the existing sanctions rules lead to consequences that were not intended.

1. <u>To Remedy The Unintended Consequences, Sanctions Rules Should Be Amended Per The OJUA September 11 Draft.</u>

From the Commission's perspective, sanctions have lead to numerous complaints and a significant drain on the Commission's dispute resolution resources. A majority, if not all, of these disputes can be eliminated by limiting instances in which sanctions can be imposed. Specifically, OCTA supports the OJUA's September 11th draft of the revised sanctions rules.[7] The draft that OCTA supports is attached as Exhibit B to OCTA's September 28th comments in Docket AR 510. The version that the OJUA initially released, in early September, strikes the appropriate middle ground between elimination of sanctions, which could cause the pole owners to lose the ability to police rogue attachers, and the current situation, where sanctions have lead to abuses and enormous windfall profits for some pole owners.

2. <u>Recent OJUA Sanctions Proposals Reflect "Backsliding" That Should Be Rejected.</u>

The Commission should not adopt subsequent OJUA-proposed revised sanctions rules. The subsequent OJUA drafts reflect electric utilities reasserting their dominance of OJUA and would give pole owners opportunities to collect sanctions more quickly than the September 11th version. The recent OJUA revisions are not necessary to ensure compliance with contracts or Commission rules.

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[7] To be clear, OCTA supports the proposal as a compromise that appeared, at the time, to be a consensus. Absent a compromise OCTA would advocate repeal of the sanctions rules.

In particular, the Commission should reject the OJUA's more recent proposals to allow for immediate sanctions on new construction. Sanctioning new construction immediately only serves the purpose of providing windfall profits to pole owners. It is not necessary for compliance, as the attacher must bring new construction into compliance within a reasonable time to avoid sanctions under the September 11 proposal. Also, under the recent OJUA proposal, attachers are subject to immediate sanctions for defects that may be beyond their control. In the real world, wires get loose and other problems are created by exposure to the elements, vandals, and other pole users. Second, the Commission should reject any attempts to allow multiple sanctions billings for the same defect. The sanctions of a few hundred dollars may not seem like a lot, but in the real world attachers get billed for hundreds or thousands of sanctions at a time. A single bill for each sanction at the rates in the current rules and proposed revisions are more than adequate to provide incentives for attachers to cure any defects that truly exist. "Piling on" multiple sanctions only creates windfall profits for owners.

3. The September 11 OJUA proposal is essential to curtail otherwise endless litigation and challenges to the Commission's rules.

Again, as discussed with rents, the revisions to sanctions rules will significantly reduce the sanctions paid to pole owners. This result is not only desirable, it is essential. The current sanctions rules are already subject to a challenge by Qwest at the Oregon Supreme Court. Even assuming that the Supreme Court upholds the current rules against Qwest's challenges, if sanctions continue to put a huge and undue burden on pole attachers, new challenges based on new arguments will continue to be raised. For example, to the extent sanctions have become a

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significant source of revenue for some pole owners, then sanctions revenues have a material impact on pole owners' cost recovery. Since sanctions are unquestionably far in excess of their incremental costs, the addition of sanctions revenues on top of a rental rate that recovers fully allocated costs would exceed the ceiling under ORS § 757.282. If sanctions continue to be used as profit maximizers by some pole owners, then rental rates would have to be reduced.[8] Another challenge that could be asserted against sanctions would be based on federal law, which requires that all attachers be treated on a non-discriminatory basis. See 47 U.S.C. § 224(f). Since only pole owners can assess sanctions, and pole attachers only pay sanctions, this lopsided scheme would seem, on its face, to violate the non-discrimination provisions in federal law.

The potential challenges to even an amended sanctions rule would still exist, of course. However, if the Commission makes sufficient modifications to the sanctions rules to bring them in line with the original intent--which was to secure compliance not to create an additional source of monopoly profits for pole owners--the likelihood of such a challenge being asserted will be reduced substantially. As the Commission heard in the workshops and hearing, sanctions of tens of millions of dollars have been asserted by pole owners against attachers. In some cases sanctions were based solely on the pole attacher's unwillingness to execute a replacement contract that was unlawful. The September 11th draft strikes the right balance. It would enable the pole attachers who were operating in good faith to eliminate exposure to such massive sanctions which would eliminate their incentive to challenge sanctions.

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[8] In extreme cases, it is possible that some utilities may be recovering more in sanctions than their lawful maximum rate, so that even a rental rate of zero would result in over-recovery of the costs of pole attachments.

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OCTA believes that adoption of the September 11th revisions would bring an end to all the litigation that has sprung up in recent years. Owners and attachers would once again work together cooperatively.

F. Accuracy Of Inspections, Notices Of Violations, And Sanctions Billings**.**

OCTA reiterates its comments and recommendation that the Commission adopt the proposed additions to OAR 860-028-0115 set forth in the September 28th comments of OCTA or Charter.[9] The comments in the workshops established a range of inaccuracy between 40% and 75% as being common when attachers inspect poles and send notices of violations. These remarkably high error rates were not challenged by any of the pole owners. There are two likely reasons for such high error rates. First, is the current sanctions regime. Inclusion of the cure opportunity as proposed in the OJUA September 11th revisions (proposed § 860-028-0170) would eliminate that. The second motivation is simply the lack of consequences to the pole owner for erroneous inspections. The attacher has no ability to sanction or bill the pole owner for its wasted effort in re-doing grossly inaccurate inspection results.

OCTA's and Charter's proposals would at least provide some consequence for a pole owner to provide appropriate incentives to conduct a reasonably accurate inspection. The public interest benefits from accurate inspections are considerable, too. Rather than wasting months on arguing about and correcting inaccurate inspections, the attacher can immediately

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[9] OCTA Sept. 28, 2006 comments at 20-23 and Exhibit A, § 860-028-0115(4); Charter Sept. 28, 2006 comments at 41.

focus its resources on correcting actual deficiencies. Corrections will be more timely, costs will be reduced, and the public will benefit.

G. The Staff's Last-Minute Proposal Regarding Trimming Of Vegetation Should Be Rejected**.**

Although the specifics are unclear, Staff seems to be arguing in its final comments that communications attachers should have the same vegetation management obligations as electric utilities. Absent clear and specific language in Staff's comments, it is difficult to know exactly what staff advocates. However, it there is no question that communications facilities are vastly different in character from electric facilities. Communications lines have low or no voltage, compared to tens of thousands of volts. Communications facilities are insulated and sheathed, compared to bare energized wires. Accordingly, communications facilities need less protection from trees, and vegetation contact with communications lines poses no hazard to the public except in the extreme and unusual case where collapse of a pole is threatened.

Finally, there is the issue of equity and cost allocation. If communications operators keep their facilities totally clear of vegetation, they bear almost the entire cost of trimming, even though they substantially benefit the electric utility (trees grow from the ground up, reaching communications lines first) and even though they have little or no need for vegetation clearance. In contrast, if the pole owner (usually electric) trims the trees, the cost is allocated among all users through the carrying charge, and the greater part of the cost is borne by party with the greatest need for clearance—the electric utility.

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H. <u>The Cost Of Money For Consumer-Owned Utilities Must Be Based On Actual Costs</u>.

It is not uncommon in rate cases of investor-owned utilities for regulators to adopt a hypothetical cost of capital structure. Such hypothetical capital structures are usually created with the recognition that monopolies may not adopt the most efficient and least expensive capital structure. Accordingly, regulators adopt a different, hypothetical, capital structure to mimic the result that would be expected in a competitive environment. In order words, hypothetical capital structures are adopted to keep rates **<u>down</u>** to protect the ratepayer from paying monopoly rents.

Some of the consumer-owned utilities in this docket have turned the traditional use of hypothetical capital structures on its head, advocating for a hypothetical cost of capital structure to <u>raise</u> rates above their actual costs. Such an approach is not in the public interest. Moreover, it violates the specific statutory directive for the costs to be allocated among the owner and joint users of the pole based on "<u>[not]</u> <u>more</u> than the <u>actual</u> capital . . . expenses" of the pole owner. ORS 757.282(2) (emphasis added). Some consumer-owned utilities actually have debt, the actual cost of which can be determined. These consumer-owned utilities are entitled to recover that actual cost, and OCTA does not object to that. Other consumer-owned utilities may not have any debt. Lacking any actual capital costs, they have no reason to recover capital costs and may not recover hypothetical costs under the law. <u>Id</u>.

Finally, consumer-owned utilities do not operate for profit and do not have "equity" capital in the traditional sense. There are no dividends paid in order to attract private capital. Again, lacking any actual "equity" capital costs, consumer-owned utilities are not entitled to recover a hypothetical cost.

Consumer-owned utilities do in fact have lower capital costs, the benefits of which flow through to their ratepayers and members. There is no statutory or public interest justification for imposing a hypothetical extra cost on a limited class of customers, i.e. pole joint users.

III. CONCLUSION

For the foregoing reasons, OCTA urges the Commission to adopt the Proposed Rules with the suggested clarifications and revisions as contained in Exhibit A to OCTA's comments filed in these dockets on September 28, 2006.

Respectfully submitted this 17th day of November, 2006.

Respectfully submitted,

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November 17, 2006

VIA ELECTRONIC MAIL & FEDERAL EXPRESS

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Subject: AR 506 – Final Comments of the Oregon Cable Telecommunications Association

Dear Clerk:

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

Very truly yours,

Brooks E. Harlow

cc w/enc.: Parties of Record

CERTIFICATE OF SERVICE
Docket No. AR 506

I hereby certify that I have served a true and correct copy of the Final Comments Of Oregon Cable Telecommunications Association by electronic mail to the parties on the attached service list.

Dated at Seattle, Washington this 17th day of November, 2006.

Carol Munnerlyn

Carol Munnerlyn
Secretary

CERTIFICATE OF SERVICE
AR 506 and AR 510

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