BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 506

PHASE II

In the Matter of	)	
Rulemaking to Amend and Adopt Permanent Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachments Use and Safety.	)	**FIRST ROUND COMMENTS OF CHARTER COMMUNICATIONS**

Charter Communications, Inc. ("Charter") respectfully submits these Comments pursuant to the Commission's Notice of Proposed Rulemaking Hearing[1] and Administrative Law Judge Christina Smith's September 5, 2006 Ruling establishing the "Issues List" for Division 028.[2] Charter supports the Commission's continuing efforts to improve Oregon's joint use environment and generally believes Staff's proposals to standardize pole attachment rates and practices represent a significant step forward in this process.

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[1] Notice of Proposed Rulemaking Hearing, filed with the Secretary of State June 15, 2006.

[2] Issues List for Division 028 Established, Ruling (September 5, 2006) (hereinafter "Issues List").

I. INTRODUCTION

A. The Need For Revised Rules

Charter is one of Oregon's largest broadband communications providers, serving approximately 173,000 subscribers in the State. Through its predecessors, Charter has been providing communications services in Oregon since the 1970's.

Over the last several years, Charter has invested more than $163 million to upgrade its plant in the State in order to bring Oregon consumers the full complement of broadband products and advance communications services they demand. Now, Charter delivers a wide array of communications services, including "traditional" cable service as well as broadband information service and high-speed cable modem service to customers in the State. In addition to these services, Charter offers state-of-the-art broadband services such as Internet Protocol ("IP") enabled communications services, including Voice over IP or "VoIP" services.

In order to provide these services, Charter must install a significant portion of its communications facilities on utility-owned poles. All tolled, Charter is attached to approximately 180,000 poles in the State of Oregon, including 92,000 PacifiCorp poles.[3] Charter possesses no joint use poles of its own. As a non-joint-use pole owning, facilities-based communications provider, effective pole attachment regulation is critical to Charter's ability to deploy and provide competitively-priced, advanced communications services to Oregon residents.

Unfortunately, since the enactment of House Bill 2271 in 1999, Charter and other attaching entities have encountered a less certain, and sometimes more contentious, pole

[3] Although Charter occupies no conduit in the State of Oregon, Charter's Comments on pole issues apply equally to conduit to the extent appropriate. *See* Charter's accompanying redline of the Staff's Proposed Pole and Conduit Attachment Rules (hereinafter "Charter's Rules Redline").

attachment environment due to perceived ambiguities in the Commission's rules and rules giving pole owners perverse enforcement incentives. Accordingly, in this proceeding, Charter seeks a comprehensive set of rules that balances the rights and responsibilities of all stakeholders, provides certainty, ensures cost-based solutions, and encourages cooperation and safe practices, while curtailing disputes. Only then, will the Commission truly fulfill its statutory mandate to regulate pole attachments in a just, fair and reasonable manner.

For these and other reasons set forth below, Charter fully supports the Commission's goals in instituting this proceeding and hopes these Comments assist the Commission in developing rules that facilitate a safe, effective and cooperative joint use environment in Oregon.[4]

B. Regulatory Background

Before undertaking pole attachment regulation, it is critical to understand why such regulation has been mandated by Congress and the Oregon legislature. Most fundamentally, utilities possess monopoly ownership of poles on which cable operators must rely to provide their services.[5] Typically, local franchises, environmental restrictions and other legal and economic barriers preclude cable operators and other attachers from placing additional poles in areas where poles already exist. Redundant aerial plant structures (*i.e.*, additional sets of utility poles) are therefore neither permissible nor feasible. Moreover, "in most instances underground installation of

[4] 47 U.S.C. § 224(c)(3) provides that "a State shall not be considered to regulate the rates, terms, and conditions of pole attachments—unless [a] State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments . . . ."

[5] "About 80 percent of the nation's poles are controlled by [electric] utility companies and the remaining 20 percent by phone companies . . . ." Ted Hearn, *Supreme Court Takes Cable Pole Case*, MULTICHANNEL NEWS, Jan. 29, 2001, at 34. Accordingly, although incumbent local exchange carriers like Qwest and Verizon own poles in Oregon, the state's electric utilities would appear to own more poles.

necessary cables is impossible or impractical. Utility company poles provide, under such circumstances, virtually the only practical physical medium for the installation of television cables."[6] The United States Congress,[7] the Supreme Court,[8] federal courts,[9] the Department of Justice[10] and the Federal Communications Commission ("FCC"),[11] have all recognized the status of poles and conduit as "essential facilities" and thus bottlenecks to facilities-based competition in telecommunications and cable television markets. Effective regulation of these bottleneck facilities is crucial to ensure access at just and reasonable rates, terms and conditions[12] and to promote facilities-based competition.[13]

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[6] *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 247 (1987) (hereinafter "*Florida Power*").

[7] *See, e.g.*, 123 CONG. REC. H35006 (1977) (statement of Rep. Broyhill, co-sponsor of the Pole Attachments Act) ("The cable television industry has traditionally relied on telephone and power companies to provide space on poles for the attachment of CATV cables. Primarily because of environmental concerns, local governments have prohibited cable operators from constructing their own poles. Accordingly, the cable operators are virtually dependent on the telephone and power companies . . .").

[8] *See Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 330 (2002) (hereinafter "*Gulf Power*") (stating that cable companies have "found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles . . . . Utilities, in turn, have found it convenient to charge monopoly rents").

[9] *See, e.g., United States v. Western Elec. Co., Inc.* 673 F. Supp. 525, 564 (D.D.C. 1987) (stating that cable television companies "depend on permission from the Regional Companies for attachment of their cables to the telephone companies' poles and the sharing of their conduit space . . . . In short, there does not exist any meaningful, large-scale alternative to the facilities of the local exchange networks . . .").

[10] *See, e.g., United States v. AT&T*, No. 74-1698, Plaintiff's First Statement of Contentions and Proof, Appendix, Tab 8 (D.D.C. filed Nov. 1, 1978) (cataloguing by the Justice Department of Bell Operating Company dominance of pole and conduit facilities).

[11] *See Common Carrier Bureau Cautions Owners of Utility Poles*, 1995 FCC LEXIS 193, *1 (1995) ("Utility poles, ducts and conduits are regarded as essential facilities, access to which is vital for promoting the deployment of cable television systems").

[12] *See Alabama Cable Telecomm. Ass'n v. Alabama Power*, 15 FCC Rcd 17346 at ¶ 6 (2000) ("By conferring jurisdiction on the Commission to regulate pole attachments, Congress sought to constrain the ability of telephone and electric utilities to extract monopoly profits from cable television systems operators in need of pole space").

[13] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034, *1045 (1998) ("Wireline video and telecommunications competition is heavily dependent on the ability of market participants to obtain access to utility poles, conduits and rights of way at reasonable rates").

This Commission's authority over pole attachments is derived from 47 U.S.C. § 224(c), which provides that the Federal Communications Commission ("FCC") has jurisdiction over the rates, terms and conditions of pole attachments *except* where an individual State certifies that it regulates such matters.[14] The State of Oregon has made the requisite certification to the FCC that it regulates the rates, terms and conditions of pole attachments.[15] Like the federal Pole Attachment Act ("PAA"), Oregon's enabling statute authorizing the Commission to regulate pole attachments also aims to protect attachers by requiring that "[a]ll rates, terms and conditions made demanded or received by any public utility . . . for any attachment . . . shall be just, fair and reasonable."[16]

Since submitting its certification to the FCC, the Commission has had few opportunities to consider what pole attachment rates, terms and conditions meet the just, fair and reasonable standard. That said, the Commission need not "reinvent the wheel," during this rulemaking. The FCC has built an extensive body of law over the course of 26 years through literally hundreds of litigated cases and rulemakings that can provide extensive guidance in this rulemaking.[17] Indeed, application of the FCC's pole rental rate formula (on which the Oregon rental rate statute is based) and the numerous other pole attachment rules and case law, developed in response to Congressional mandate, ensures that facilities-based competition proceeds on fair rates, terms and conditions,

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[14] 47 U.S.C. § 224(c).

[15] *See Public Notice, States That Have Certified That They Regulate Pole Attachments*, 7 FCC Rcd 1498 (1992).

[16] ORS 757.273.

[17] Unlike the PUC, the FCC has adjudicated numerous complaints (approximately 300). *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777 at ¶ 8, n. 37 (1998) (hereinafter "*1998 FCC Order*"). Utilities in FCC regulated states are therefore on notice that if an attacher files a complaint, the rates, terms and conditions of pole attachments will be reviewed and scrutinized administratively to ensure they are just and reasonable, as required by the PAA.

notwithstanding monopoly ownership and control of distribution facilities and utilities' "superior bargaining position in pole attachment matters."[18]

The Commission can also rely on pole attachment law from other certified states. For example, just last month, the Utah Public Service Commission ("Utah PSC"), issued comprehensive pole attachment rules,[19] augmented by a standardized "Utah Pole Attachment Agreement,"[20] following a rulemaking similar to this one involving numerous collaborative workshops and rounds of comments. Similarly, in August 2004, the New York Public Service Commission ("NY PSC") extensively reformed its pole attachment and conduit occupancy processes.[21] This reformation followed several collaborative sessions and considerable briefing by numerous utilities, facilities-based communications providers and labor unions, as well as significant staff participation. The Vermont Public Service Board also extensively revised its pole attachment rules following a proceeding a few years ago,[22] as did California in 1998.[23]

II. COMMENTS

Charter's Comments are organized by addressing each rule section in order, and within each rule section, Charter addresses first the specific Issues List questions and then

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[18] *TCA Management v. Southwestern Public Service Co.*, 10 FCC Rcd 11832, ¶ 15 (1995) (citing S. Rep. No. 95-580, 95th Cong. 1st Sess. at 13); *see also Selkirk Comm., Inc. v. Florida Power and Light Co.*, 8 FCC Rcd 387, ¶ 17 (1993) ("Due to the inherently superior bargaining position of the utility over the cable operator in negotiating the rates, terms and conditions for pole attachments, pole attachment rates cannot be held reasonable simply because they have been agreed to by a cable company").

[19] UTAH ADMIN. CODE R746-345 Pole Attachments (2006).

[20] Charter will provide a copy of the Utah Attachment Agreement upon request.

[21] *Proceeding on Motion of the Commission Concerning Certain Poles Attachment Issues,* Order Adopting Policy Statement on Pole Attachments, Case 03-M-0432 (NY Pub. Serv. Comm'n August 6, 2004) ("*New York Pole Order*").

[22] *See generally*, VT PUB. SERV. BD. R. 3.700, *et. seq.*

[23] *Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service, Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Services*, R.95-04-043, I.95-04-044, Decision 98-10-058, (Cal. Pub. Util. Comm'n Oct. 22, 1998) (jointly decided) (hereinafter "*California Order*").

general comments on Staff's proposed rules (to the extent not raised on the issues list). Charter has not commented on every item on the Issues List or on every proposed rule. To the extent Charter has not commented on a particular item on the Issues List or proposed rule, or redlined a proposed rule, Charter reserves all its rights to do so in future comments, during the workshops and in the hearing.

A. OAR 860-028-0020—Definitions For Pole and Conduit Attachment Rules[24]

1. Issues List

a. Should inflation be considered in the carrying charges?

Charter strongly disagrees that "inflation [should] be considered" when calculating the "Carrying Charges." The new rules require pole owners to calculate rent using the "owner's data from the most recent calendar year."[25] As a result, inflation will automatically be accounted for in the annual rental rate. The requirement to calculate rent using the most recent publicly filed data is an important addition to the new rules and accords with standard industry practices around the nation. In the event pole owner costs do rise from year to year, those costs will be passed to attachers indirectly in the updated carrying charges and "Pole Cost," as well as directly in the form of higher non-recurring charges, like pre-construction surveys and make-ready. Any proposal to consider inflation as a separate, automatic, tacked-on item, would be fundamentally inconsistent with Oregon's cost-based rental rate statute and should be rejected. In any event, rental rates do not necessarily rise each year and, at times, actually decrease, making any automatic inflationary add-on wholly inappropriate.

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[24] As a general comment, Charter suggests that when the definitions are used in the rules, they should always be capitalized.

[25] *See* proposed OAR 860-028-0020(3).

b. Should the [carrying charges] be based on FCC-approved 364 account only?

Charter seeks clarification on this question of whether the carrying charges "[s]hould . . . be based on FCC-approved 364 account only?" The premise of this question appears to be erroneous. Only one of the carrying charges—the depreciation carrying charge—is based solely on Account 364. The proper question, then, seems to be whether the "Pole Cost" component of the rental rate "should be based on FCC-approved 364 account only." The answer to that is, emphatically, yes. In fact, ORS § 757.282 requires that "[a] just and reasonable rate" ensures the utility the recovery from the licensee of no "more than the actual capital and operating expenses of the . . . utility . . . attributable *to that portion of the pole . . . used for the pole attachment*" in proportion to the usable space.[26] Including any other capital accounts in the "Pole Cost" would violate Oregon's pole rental rate statute.

Like the Oregon pole statute, the federal Pole Attachment Act "requires the attacher to pay a portion of the capital costs attributable to the pole. Those costs are fully captured in Account 364."[27] The FCC has rejected pole owner attempts to include additional capital accounts, including FERC Accounts 360, 365-368 and 389-399, when determining the pole cost for rental rate purposes and considers Account 364, "[e]ven with the 15% reduction for non-pole appurtenances, to be a very generous Account, including the cost of towers, transformer racks and platforms."[28] This Commission

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[26] ORS § 757.282

[27] *Amendment of Rules and Policies Governing Pole Attachments, In the Matter of Implementation of Section 703(e) of The Telecommunications Act of 1996*, 16 FCC Rcd 12103, Consolidated Partial Order on Reconsideration, ¶ 122 (2001) (hereinafter "*2001 FCC Order*").

[28] *Id.* at ¶ 121.

should also deny any attempts to unjustifiably load up the "Pole Cost" component of the rental rate in this proceeding.

c. Should the definition of "Licensee" include governmental entities?

Charter believes that governmental entities should be included in the definition of "licensee," in proposed OAR 860-028-0020(10) and should not be exempt from permitting requirements in proposed rule 860-028-0100(1). Governmental entities are increasingly entering competitive communications businesses. As a result, if governmental entities are not required to fulfill the same obligations as Charter (such as contract and permitting requirements), and similarly are not subject to costly sanctions, governmental entities will have a clear, but unwarranted, competitive advantage over Charter in customer acquisition, speed to market and the like. Moreover, if governmental entities are not required to obtain permits and can attach to any pole at their whim, their attachments might interfere with Charter's existing plant, cause safety violations or end up in Authorized Attachment Space reserved (and paid for) by Charter.[29] This raises the question of if government entities are not subject to the Commission's rules, then what rules are they subject to?

d. Make Ready Work—what does this include?

Charter generally supports the items included in the definition of "Make Ready Work" in proposed OAR 860-028-0020, with one exception. To the extent a pole owner must perform "administrative" activities in connection with Make Ready Work, any costs

[29] Indeed, Charter has already encountered such a situation. The City of Medford recently installed a fiber network to feed its traffic lights on poles owned by another utility. Because it is not a licensee and is not required to have a contract or permits, the City was able to force Charter to move from its existing position, 40" below secondary, to make room for the City's attachments—all at Charter's expense.

associated with such administrative tasks are already (and should always be) allocated to the administrative and general carrying charge that is factored into the rental rate.[30]

Make Ready Work instead should be charged on an "actual" time and materials basis. If incidental administrative costs that factor into a utility's hourly labor rates (and that are not otherwise required by FERC to be factored into the appropriate FERC Accounts) are included in the actual Make Ready Work costs, then, those costs would be reflected in the direct charges. Retaining the word "administrative" in this definition, however, will only invite double-dipping and encourage pole owners to tack on unverifiable administrative charges on each and every Make Ready Work invoice.

e. 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?

As Charter stressed above, the only proper capital account that should be included in the definition of "Pole Cost" is FERC Account 364. Some investor-owned electric utilities nevertheless continue to include FERC Account 365 (Transmission Poles) when calculating the Pole Cost, illegally inflating the annual rental rate. These pole owners argue that they are justified in including Account 365 in the Pole Cost because licensees attach to their transmission poles. These claims are without merit.

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[30] *See, e.g., Cable Tel. Ass'n of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333, ¶ 18 (2003) ("Through the annual rate derived by the Commission's formula, an attacher pays a portion of the total plant administrative costs incurred by the utility. Included in the total plant administrative expenses is a panoply of accounts that covers a broad spectrum of expenses. The allocated portion of administrative expenses covers any routine administrative costs associated with pole attachments, such as billing and legal costs associated with administering the agreement. Georgia Power has not argued persuasively that recovering these costs though direct reimbursement rather than through the annual rental rate is preferable or reasonable.") (internal citations omitted) (hereinafter "*Georgia Power*"); *see also Nevada State Cable Television Ass'n v. Nevada Bell*, Order on Recon., 17 FCC Rcd 15534, ¶ 13 (200) (stating that when calculating the administrative portion of the carrying charges, the Commission allocates the total plant administrative expenses to yield a reasonable estimate of the administrative expenses related to poles).

The vast majority of licensee attachments are located on distribution poles. For example, of the 92,000 PacifiCorp poles Charter occupies, only about 2200 (or 2.4%) of these are transmission poles. Moreover, while some pole owners insist on including Account 365 in the Pole Cost, these same pole owners fail to make an appropriate upward adjustment to pole height and usable space (the more usable space on the pole, the lower the rent), relying instead on distribution pole presumptions (*i.e.*, 40 foot poles with 10.67 feet of usable space.). Transmission poles are much taller than distribution poles and thus have more usable space. Therefore, even assuming a "blended" rate was justified (which it is not) then, a pole owner seeking to use such a methodology would have to adjust the usable space figure to account for the taller poles.

Rather than complicate the calculation of the pole rental rate with additional capital accounts and revised usable space presumptions, the Commission instead should require pole owners with attachments on their transmission poles to provide two separate rates: one for distribution poles and one for transmission poles.[31] As far as Charter can determine, there is nothing that precludes the Commission from regulating pole attachments to structures other than distribution poles, and the term "utility pole" as used in OAR 860-028-0050(1)(a) should be clarified to include other structures over which the Commission has jurisdiction.

The Commission "is vested with power and jurisdiction to supervise and regulate every public utility . . . in the state, and to do all things necessary and convenient in the

[31] In addition, the Commission should admonish pole owners that it is inappropriate to threaten denials of access to and expulsions from transmission poles unless the licensee accepts this "blended" rate methodology on a take-it-or-leave-it-it basis. Charter would be happy to suggest a transmission pole rental rate methodology upon request.

exercise of such power and jurisdiction."[32] A public utility, in turn, is defined as "[a]ny corporation, company, individual, association of individuals, or its lessees, trustee, or receivers, that owns, operates, manages or controls all or part of any plant or equipment in this state for the production, *transmission*, delivery, or furnishing of heat, light, water or power, directly or indirectly to or for the public, whether or not such plant or equipment or part thereof is wholly within any town or city."[33] Further, the Oregon pole statute defines "Attachment" as:

> [A]ny wire or cable for the transmission of intelligence by telegraph, telephone or television (including cable television), light waves, or other phenomena, or for the *transmission* of electricity for light, heat or power, and any related device, apparatus, or auxiliary equipment, installed upon any pole or in any telegraph, telephone, electrical, cable television or communications right of ay, duct, conduit, manhole or handhole *or other similar facility or facilities* owned or controlled, in whole or in part, by one or more public utility, telecommunications utility or consumer-owned utility.[34]

In this regard, proposed rule OAR 860-028-0050(1)(a), which is limited to utility poles, conduits, and support equipment, appears to conflict with the statute. Consequently, there appears to be no legitimate basis for limiting the term "Utility Pole," as used in OAR 860-028-0050(1)(a), to distribution poles. Rather, the Commission should revise rule 860-028-0050(1)(a) consistent with ORS 757.270(1) and the Commission's regulatory authority.

f. Routine inspection

There does not appear to be a definition of "Routine Inspection" in OAR 860-028-0020, but Charter supports the inclusion of the term in the rules. In the pole

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[32] ORS 756.040.
[33] ORS 757.005 (emphasis added).
[34] ORS 757.270(1) (emphasis added).

attachment vernacular, a "routine inspection" is the equivalent of a "periodic inspection" and the opposite of a "special inspection." Thus, if a "special inspection" is defined as "an owner's field visit made at the request of the licensee for all nonperiodic inspections,"[35] then, a "routine inspection" or "periodic" inspection is an inspection done at the behest of the pole owner that does not benefit one particular party. Consequently, the costs attendant to routine inspections must be recovered through the fully allocated annual rental rate, consistent with existing OAR 860-028-0110(6) and proposed rule OAR 860-028-0110(3).

This approach also accords with well-established federal law. The FCC has consistently held that "[a] rate based on fully allocated costs," such as the rental rate paid to Oregon pole owners, "by definition encompasses all pole related costs and additional charges are not appropriate."[36] As a result, the "costs attendant to routine inspections of poles, which benefit all attachers, should be included in the maintenance costs account and allocated to each attacher in accordance with the Commission's formula."[37] For example, FERC Account 593 includes the expenses for inspection and maintenance of overhead distribution lines and is factored into the carrying charges that make up an electric utility's annual rent. Likewise, ARMIS Account 6411, includes all pole related expenses and determines the maintenance carrying charge in a telecommunications utility's annual rental rate. Allowing these costs to be charged in the annual rental rate and again as a direct audit charge, would result in double-recovery.

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[35] *See* proposed OAR 860-028-0020(26).

[36] *Texas Cable & Telecom. Ass'n v. Entergy Services, Inc.*, 14 FCC Rcd 9138, ¶ 10 (1999).

[37] *See, e.g., Cable Tel. Ass'n of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333, ¶ 16 (2003).

2. Proposed Rules

a. Definition of "Authorized Attachment Space"

Charter recommends that the Commission clarify the definition of "Authorized Attachment Space" to ensure that equipment located in "*unusable space*," (*i.e.*, in the 20 feet of safety clearance space) is not considered as occupying space for rental rate purposes. Lack of clarity on this issue has emboldened some Oregon utilities to charge for several "attachments" on one pole, including equipment located in unusable space, such as power supplies and risers, leading to cost over-recovery, budgeting uncertainty and disputes.

Indeed, the assessment of multiple per pole attachment charges was a key issue in *Central Lincoln People's Utility District v. Verizon Northwest, Inc.*, UM 1087, Order NO. 05-042 (Jan. 19, 2005) (hereinafter "*CLPUD v. Verizon Order*"). As Judge Smith correctly concluded in that case, based on existing OAR 860-028-0110(3),[38] "usable space must be allocated according to the actual *usable space occupied* by Verizon's attachment points, as long as they are made in accordance with accepted industry."[39]

Judge Smith's ruling in *CLPUD v. Verizon* also comports with longstanding FCC decisions. For example, in *Capital Cities Cable, Inc. v. Mountain States Tel. and Tel. Co.*, the pole owner attempted to charge a higher rental rate by "adjust[ing] the [FCC]'s-adopted one-foot figure to account for space occupied by 'multiple attachments.'"[40] The FCC rejected this approach, explaining that attachments located in unusable space do not

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[38] Existing rule 860-028-0110(3) provides that "[a] disputed pole attachment rental rate will be computed by taking the pole cost times the carrying charge times the portion of *usable space occupied* by the licensee's attachment." (Emphasis added). Indeed, if pole owners were allowed to charge for attachments located in unusable space, that space would become "usable," thus increasing the usable space presumptions, and, in turn, reducing the rent.

[39] *CLPUD v. Verizon Order* at p. 16 (emphasis added).

[40] 1984 FCC LEXIS 2443, ¶ 23 (1984).

increase the amount of usable space occupied by a cable operator's bolted cable attachment.[41]

During its recent rulemaking, the Utah PSC also examined this issue and adopted rules that essentially codify FCC case law, in this respect. The new Utah rule specifies that "[a]dditional equipment that is placed within an attaching entity's existing 'Attachment Space,'" (within the *usable* space) *and* "equipment place in the unusable space which is used in conjunction with the attachments, is not an additional pole attachment for rental rate purposes."[42]

In order to prevent Oregon pole owners from including attachments in unusable space in the calculation of the rental rate, Charter suggests that the Commission add the word "*usable*," to proposed rule 860-028-0020(2), between the words "the" and "space." Charter also suggests for consistency that proposed rules 860-028-0110(2) and (4)(a)-(b) capitalize the term "authorized attachment space" used in those sections. Additionally, the following language should be added to the end of 860-028-0110(4)(a): "*In no event shall licensee equipment or other Attachment located in the 20 feet of safety clearance space be considered as occupying Authorized Attachment Space for rental rate*

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[41] *Id.* ("*[T]he space deemed occupied by CATV includes not only the cable itself, but also any other equipment normally required by the presence of CATV.* Thus, the company has not met the burden of showing that CATV occupies an additional .67 feet of space because of dips and power supplies. Under the circumstances, then, it is appropriate to use the Commission's previously adopted figure of one foot occupied by CATV"); *see also Texas Cablevision Company v. Southwestern Electric Power Company*, PA-84-0007, ¶ 6 (1985) ("SWEPCO has apparently defined 'multiple attachments' to include not only attachments of multiple cables, but also attachment of facilities other than cable such as power supply cables and underground risers. SWEPCO is misguided. First, in adopting a standard of one foot for space deemed occupied by CATV, *the Commission not only included that space occupied by the cable itself, but also the space associated with any equipment normally required by the presence of the cable television attachment. Moreover, to the extent this ancillary equipment may occupy the 18-28 feet designated as 'ground clearance,' which by definition is excluded from usable space, it is to be omitted from any measurements*") (internal citations omitted) (emphasis added).

[42] UTAH ADMIN. CODE R746-345-2(C).

purposes." Finally, for further clarity and consistency, Charter recommends that proposed rule 860-028-0110(4)(c) distinguish between "additional or modified attachment[s]" in usable *versus* unusable space. Specifically, Charter suggests the following revision (proposed language in italics):

> 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 *and equipment in the 20 feet of safety clearance space* will be considered a component of the existing pole permit for rental rate determination purposes. . . .

b. Definition of "Taxes"

Charter asks that the Commission clarify the meaning of the term "in lieu of taxes," in OAR 860-028-0020(3)(d). Typically, the tax expense element of the carrying charges includes: FERC Accounts 408.1 (Taxes Other Than Income Taxes); 409.1 (Income Taxes-Federal); 409.1 (Other); 410.1 (Provision for Deferred Income Taxes); 411.1 (Provision for Deferred Income Taxes-Credit) and 411.4 (Investment Tax Credit Adjustment). For telecommunications utilities, the tax element is calculated using ARMIS Account 7200.[43]

c. Definition of "Permit"

Charter believes the definition of "Permit" in OAR 860-028-0020(19) is too narrow and fails to account for the fact that many old permits have long since been misplaced by pole owners. Accordingly, poles for which an occupant has received an invoice should be treated as permitted by the pole owner, since invoices are initially

[43] *See 2001 FCC Order* at Appendices D-1 (Section 224(d) *Cable Formula* for Determining Maximum Rate for Use of LEC Poles Using FCC ARMIS Accounts) and D-2 (Section 224(d) *Cable Formula* for Determining Maximum Rate for Use of Electric Utility Poles Using FERC Form 1 Accounts).

triggered by permits. Charter requests that the definition of "Permit" be revised accordingly.

d. Definition of "Pole Cost"

In addition to Charter's comments regarding "Pole Cost" in response to the Issues List, Charter urges the Commission to delete the reference to "support equipment," in OAR 860-028-0020(20). "Support Equipment," as defined in these rules, is already included in FERC Account 364 and a separate rental rate for "support equipment" is inappropriate.

Specifically, the term "Support Equipment," as defined in proposed OAR 860-028-0020(27) means "guy wires, anchors, anchor rods, and other accessories of the pole owner used by the licensee to support or stabilize pole attachments." FERC Account 364 already includes the cost installed of "anchors, head arm[s] and other guys, including guy guards, guy clamps, strain insulators, pole plates, etc."[44] Therefore, to the extent a licensee uses a pole owner's anchors, (which the pole owner often does not even allow—which is, in and of itself, inappropriate), the pole owner already recovers those costs in the annual pole rental rate.[45] A licensee would never use a pole owner's guys in any event, but is required to supply its own guys as necessary. Moreover, the 15% "appurtenance" deduction in the "Pole Cost" does not include a reduction for anchors and

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[44] *See* 18 C.F.R. Part 101, FERC Account 364.

[45] *See, e.g., Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Second Report and Order, 2 FCC Rcd 15, ¶ 20 (1987)("[T]he costs of the guys and anchors supplied by the utility should be included in the cost of a bare pole even if the cable operator supplied some of its own guys and anchors") (hereinafter "*1987 FCC Order*"); *Arlington Telecommunications Corp. et al. v. VEPCO*, 50 RR 2d 1152 (January 6, 1982) (disallowing separate charge for anchor attachments because it is already included in the investment component of the formula used to establish attachment rates); *Cox Cable Norfolk, Inc. et al. v. Virginia Electric and Power Co.*, 53 RR 2d 860 ¶ 33 (April 6, 1983) (finding that VEPCO could not deny right to attach to its anchors).

guys.[46] Those costs are included in the net bare pole cost. The 15% exclusion from Account 364 accounts for only non-pole related appurtenances, such as cross-arms. Finally, there is nothing in the Oregon pole rental rate statute itself that could be construed to allow pole owners to charge a separate rental rate for "support equipment."

Consequently, in order to prevent over-recovery, confusion and disputes, the Commission must revise the definition of "Pole Cost" by deleting the language: "to include support equipment of the pole owner." For the same reasons, the proposed definitions of "Support Equipment" and "Support Equipment Cost," OAR 860-028-0020(27) and (28) respectively, should be stricken.

e. Definition of "Post Construction Inspection"

While Charter agrees that a pole owner should have the right to inspect its plant, which party should be responsible for the costs incurred to perform those inspections is another question.

Charter is a well-established operator with vast plant construction experience. Like the Commission, Charter is committed to public and line worker safety and grid integrity because without a reliable, safe and secure system of poles and related facilities, Charter would be unable to serve its customers. That said, Charter does not believe it is reasonable for pole owners to charge attachers for the performance of post-construction inspections. Charter already pays to perform its own post-construction inspections to

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[46] *See, e.g., 1987 FCC Order*, at ¶ 18 ("We reject the argument that guys and anchors are solely user-related and therefore utility supplied guys and anchors should be excluded from the net cost of a bare pole. We believe that guys and anchors are required to stabilize the pole plant and are therefore pole-related within the meaning of 224(d))."); *Clear Picture v. United Telephone Co. of Ohio*, PA-81-0029, Mimeo No. 003181 (September 1, 1981), *recon. denied*, PA-81-0029, Mimeo No. 4591 (June 7, 1983) (cost of anchors and guys not subtracted from investment as appurtenances); *Teleprompter Corp. v. New England Telephone & Telegraph Co. and Public Service Co. of New Hampshire*, PA-79-0044, Mimeo No. 34556 (April 18, 1984) (cost of anchors and guys included in investment).

ensure that contractors have built to code. Charter should not have to pay directly for those inspections twice.

Consequently, if a pole owner chooses to perform routine post-construction inspections, the pole owner should incur those costs and pass them on in the rental rate, unless a violation is found. This approach is consistent with Oregon and federal pole attachment law, particularly because during such inspections, pole owners necessarily collect information about the plant that is of no benefit to the attacher.[47]

To the extent a post-construction inspection is performed by the pole owner, the inspection should occur within a reasonable time, such as 30 days after the attacher has notified the pole owner that the construction is complete. Charter considers 30 days to be a reasonable period to ensure that attachers are not held responsible for non-compliant attachments resulting from intervening conditions. The time period should begin upon notice to the pole owner that construction is complete. Once the time period has elapsed, all relevant attachments would be deemed compliant (*i.e.,* later corrections could not be charged to the attacher). Charter also believes that attachers should be given notice of

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[47] *See, e.g.*, ORS 757.271(2)("The pole owner may charge the licensee for any expenses incurred as a result of . . . any attachment that exceeds safety limits established by rule of the commission."). *See also Mile Hi Cable Partners v. Pub. Serv. Co. of Colo,* 15 FCC Rcd 11450, ¶ 8 (2000) ("The cost of an inspection of pole attachments should be borne solely by the cable company only if cable attachments are the sole attachments inspected and there is nothing in the inspection to benefit the utility or other attachers to the pole") (hereinafter "*Mile Hi Cable*"). The Vermont Public Service Board forbids utilities from charging for post-construction inspections, unless a violation is found. *See, e.g.,* Docket No. 6553, *Investigation Into Tariff Filing of Verizon New England, Inc., d/b/a Verizon Vermont, re: Revisions to its Pole Attachment Tariff,* Recommended Decision of John P. Bentley, Esq. To Vermont Public Service Board at p. 21(issued May 19, 2003) ("It is unreasonable to expect the costs of post-construction inspection to be borne by the licensee. The entities performing the required work are established cable operators that have extensive experience in construction. Even newer entities are presumptively qualified to build networks. There is no reasonable justification for charging them with Verizon's costs [sic] should Verizon wish to buy peace of mind through a post-construction inspection"), *aff'd in part, Docket No. 6553, Investigation Into Tariff Filing of Verizon New England, Inc., d/b/a Verizon Vermont,* re: Revisions to its Pole Attachment Tariff, Order (Vt. PSB Oct. 22, 2003) (ruling that attachers should only be forced to incur the cost of post-construction inspections when violations are discovered).

any post-construction inspections so they have an opportunity to participate. Following the inspection, the pole owner should be required to provide attachers with a written copy of the inspection findings for the attacher's records and in order to verify that the post-construction inspection actually occurred.[48] Charter would agree to incur the cost of a post-construction inspection to the extent any non-compliant attachments were found as a result of the inspection. Charter has revised OAR 860-028-0020(21) in accordance with these Comments.

f. Definition of "Preconstruction Activity"

Charter believes the proposed definition of "Preconstruction Activity," in OAR 860-028-0020(22), is vague and does not comport with the Commission's other proposed rules or industry vernacular. Charter therefore recommends the following revised language (proposed language in italics; deleted language in brackets):

> Preconstruction *A*[a]ctivity means engineering, survey and estimating work required to *determine whether Make Ready Work is necessary and the estimated costs attendant to such Make Ready Work* [prepare cost estimates for an attachment application].

g. Definition of "Surplus Ducts"

The definition of "surplus duct" in OAR 860-028-0020(29) is overly generous to structure owners as it permits owners to reserve space in existing duct for 5 years. This reservation of space language is unreasonable. As the FCC has found, in order to ensure nondiscriminatory access, the pole owner should only be permitted to reserve space "pursuant to a bona fide plan that reasonably and specifically projects a need for that

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[48] Charter believes that some pole owners have abused their post-construction programs. For example, while Charter often receives a bill for such activity, Charter often is not certain that such an inspection has even occurred. Therefore, if pole owners do perform post-construction inspections, attachers should receive written findings of non-compliance and compliance. These records may also help resolve future disputes over which party is responsible for a particular violation.

space in the provision of its core utility service" within a reasonable period (*e.g.*, not to exceed one year).[49] Moreover, "[t]he electric utility must permit the use of its reserved space by cable operators and telecommunications carriers until such time as the utility has an actual need for that space."[50] Indeed, "[a]llowing space to go unused when a cable operator or telecommunications carrier could make use of it is directly contrary to the goals of Congress."[51] Charter has revised the proposed rule in accordance with these Comments.

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[49] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶ 1169 (1996) (hereinafter "*Local Competition Order*"), *aff'd Southern Co. v. FCC*, 293 F.3d 1338, 1348-49 (11th Cir. 2003).

[50] *Id.*

[51] *Local Competition Order* at ¶ 1168; *see also California Order* at Appendix A, Rule VII.C.: "[A]n electric utility may reserve space for up to 12 months on its support structures required to serve core utility customers where it demonstrates that (i) prior to a request for access having been made, it had a bona fide development plan in place prior to the request and that the specific reservation of attachment capacity is reasonably and specifically needed for the immediate provision (within one year of the request) of its core utility service, (ii) there is no other feasible solution to meeting its immediately foreseeable needs, (iii) there is no available technological means of increasing the capacity of the support structure for additional attachments, and (iv) it has attempted to negotiate a cooperative solution to the capacity problem in good faith with the party seeking the attachment. An ILEC may earmark space for imminent use where construction is planned to begin within nine months of a request for access. A CLC or cable TV company must likewise use space within nine months of the date when a request for access is granted, or else will become subject to reversion of its access.

B. OAR 860-028-0050--General

1. Issues List

a. Should provisions regarding owner correction and operators trimming vegetation be moved to OAR 860-028-0120?

Charter supports the relocation of OAR 860-028-0050(2)-(3) to OAR 860-028-0120.

C. OAR 860-028-0060—Attachment Contracts

1. Issues List

a. What happens if parties are not negotiating in proposed OAR 860-028-0060(4)?

Charter believes that if the parties are not negotiating a new or amended contract, in the context of proposed OAR 860-028-0060(4), the party that seeks negotiation should be able to file a complaint against the non-negotiating party in accordance with 960-028-0070.

2. Proposed Rules

a. Negotiation of Attachment Contracts

Charter recommends strengthening OAR 860-028-0060(4) to ensure that the Commission's goals of protecting licensees from unwarranted contract terminations and reducing the incidence of disputes are realized. Specifically, Charter suggests the following language revision (proposed language in italics):

> Unless otherwise provided for by contract, when the parties are negotiating a new or amended contract, the last effective contract between the parties will continue in effect until a new or amended contract between the parties goes into effect, *notwithstanding the termination date contained in the contract or any termination notice issued by the pole owner.*

D. OAR 860-028-0070—Resolution of Disputes

1. Issues List

a. What role should OJUA have in dispute resolution for contracts?

Charter does not believe that any dispute should automatically be referred to the Oregon Joint Use Association ("OJUA"). While the OJUA can offer guidance and expertise during a particular dispute, disputing parties should nevertheless have the option of seeking OJUA involvement if mutually agreed. A mandatory stop-over at the OJUA prior to the filing of a complaint is not appropriate. Indeed, the OJUA is made up of stakeholders, and is not an objective decision-maker. Moreover, parties often need to resolve disputes on an expedited basis and may not have time to seek both informal (at the OJUA) and formal (at the Commission) dispute resolution.

b. Should time for response to a complaint be lengthened from 30 days?

Thirty days is an appropriate amount of time to respond to a complaint. This is the same timeframe for responding to complaints brought pursuant to the PAA.[52] A party should be able to request leave to file for an extension of time to respond.[53]

2. Proposed Rules

Certain sections of proposed OAR 860-028-0070 seem to suggest that all pole attachment disputes involve full-blown renegotiation of the contract. This is not so. Indeed, parties have various disagreements in the field that would not involve

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[52] *See* 47 C.F.R. § 1.1407(a)("A Respondent shall have 30 days from the date the compliant was filed within which to file a response.").

[53] *Id.*

renegotiation of the contract. These may include access to particular poles, make ready costs and timeframes, inspection results and the like. Therefore, Charter suggests significant revisions to OAR 860-028-0070 to correct for this oversight. These changes are contained in Charter's attached redline of the rules.

In addition, Charter objects to the 90 day waiting period (in section (3)) before a party may file a complaint with the Commission. This timeframe is too long and could undermine the purpose of the dispute resolution process. For example, in certain cases where speed-to-market or customer service is an issue, the aggrieved party will not be able to wait 90 days prior to filing a complaint (let alone obtaining relief). In this situation, a pole owner could use the 90 day period as leverage to force a licensee to accept an unreasonable term or condition, or pay an unlawful fee. Instead, there should be no limitations on a party's ability to file a complaint.

Likewise, there are certain situations where it is evident that a party will refuse to negotiate and that such attempts would be fruitless. Charter therefore suggests that section 4(a) be revised to reflect this reality. This addition would also comport with federal rules.[54]

E. OAR 860-028-0080—Costs of Hearing

1. Proposed Rules

Along the lines of Charter's comments to OAR 860-028-0070, Charter proposes that the Commission revise OAR 860-028-0080(1) to reference pole attachment disputes in general, not just contract disputes. *See* Charter Rules Redline. In addition, Charter has proposed language in its redline that the Commission keep the parties continually updated

[54] 47 C.F.R. § 1.1403(k)("The complaint shall include a brief summary of all steps taken to resolve the problem prior to filing. If no such steps were taken, the complaint shall state the reason(s) why it believed such steps were fruitless").

on the costs of the hearing that accrue throughout the course of the dispute. Not only will the knowledge of the accumulating hearing costs permit parties to prepare for this impending financial expenditure, it may also prompt the parties to settle the dispute.

F. OAR 860-028-0100

1. Issues List

a. Should the timelines be in calendar days or business days?

The timelines should be in calendar days for ease of administration and to accord with industry and general legal standards.

b. What should applicable timelines be?

Charter is agreeable to a 45 *calendar* day period for response to an application. This timeframe comports with federal[55] and other certified state rules.[56]

c. Period between notifying the licensee of make ready and the response from licensee?

Charter considers 30 days to be a reasonable time period in which the licensee should respond to a pole owner's Make Ready Work cost and time estimates, unless otherwise mutually agreed.

d. Period between granting the permit and the licensee completing the construction and for which a permit is valid.

Charter recommends that a licensee should complete construction within 180 days of receiving its permit, unless a longer period is necessary for good cause shown. This should give a licensee adequate time to construct, while providing the pole owner with assurance that it can revoke a permit within a reasonable period of time in the event the licensee fails to build in a timely manner, except for good cause shown.

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[55] 47 C.F.R. § 1.1403(b).

[56] *California Order* at Appendix A, Rule IV.B.1.

e. Should there be an allowance for owner's estimate on time needed for make ready work, especially if there are multiple parties?

Charter believes that OAR 860-028-0100(6), which allows a mutually acceptable third party to perform work when the pole owner cannot meet applicants' timeframes, is a reasonable solution that comports with standard industry practice. Charter agrees with Commission Staff that it is essential for attachers to have the option to hire approved, third-party contractors in the event a pole owner is unable to meet the applicant's Make Ready Work timeframe. Charter must have the ability to meet customer needs and retain market share, if the pole owner is unable to perform timely work.

The FCC expressly prohibits utilities from forcing attachers to use a utility's own employees to perform make-ready, as well as other work. In establishing the rule, the FCC explained that to "[a]llow[] a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers and cable operators and would inevitably lead to disputes."[57] The NY PSC has a similar rule based on the acknowledgment that attachers require expeditious access:

[57] *Local Competition Order* at ¶ 1182 (internal citations omitted); *aff'd Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Order On Reconsideration, 14 FCC Rcd 18049, ¶ 86 (1999), *aff'd, Southern Company v. FCC*, 293 F.3d 1338, 1351 (11th Cir. 2002) (finding that the FCC's "guideline represents an attempt to balance the interests involved in a measured and reasonable way. . . .").

> Since time is the critical factor in allowing Attachers to serve new customers, it is reasonable to require the utilities either to have an adequate number of their own workers available to do the requested work, to hire outside contractors themselves to do the work, or to allow Attachers to hire approved outside contractors.[58]

Utah[59] and Vermont[60] pole attachment rules also allow attachers to hire approved, third-party contractors when a pole owner is unable to perform timely work.

f. Should there be presumptive approval if permits are not responded to within a certain period of time? Should [an] applicant be allowed to begin construction, or is there a risk to safety and reliability?

Charter supports Staff's proposal for OAR 860-028-0100(d), stating that if a pole owner fails to grant or deny a permit within 30 business days (or 45 *calendar* days, as Charter proposes), "the application is deemed approved and the applicant may begin construction. . . ." This language is not only consistent with FCC and other certified state rules, but will also provide some certainty for the licensee when competing for customers.[61]

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[58] *New York Pole Order*, Order Adopting Policy Statement at p. 3.

[59] *See* UTAH ADMIN. CODE R746-345-3(C)(8)("If the applicant rejects the make-ready estimate . . . for whatever reasons, the applicant may, at its own expense, use approved contractors to self-build the required make-ready work subject to the pole owner's inspection."). Unfortunately, following pressure from certain electric utilities, the Commission added a provision to the Utah Pole Attachment Agreement that somewhat undermines the rule by requiring attachers to seek pole owner approval of construction plans prior to building.

[60] VT PUB. SERV. BD. R. 3.708(G)("In the event that a Pole-Owning Utility cannot perform required Make-Ready work in a timely manner, the attaching entity may demand that outside contractors be sought.").

[61] *See Cavalier Telephone, LLC v. Virginia Electric and Power Company* 15 FCC Rcd 9563, ¶ 15 (2000) ("Our rules require [a utility] to grant or deny access within 45 days of receiving a complete application for a permit. We have previously stated that the Pole Attachment Act seeks to ensure that no party can use its control of facilities to impede the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields. We have interpreted the Commission's rules, 47 C.F.R. § 1.1403 (b), to mean that a pole owner "must deny a request for access within 45 days of receiving such a request or it will otherwise be deemed granted.") (internal citations omitted), *vacated by settlement, Cavalier Telephone Settlement Order*, 17 FCC Rcd 24414 (2002) (stating the vacatur did "not reflect any disagreement with or reconsideration of any of the findings or conclusions contained" in the original order issued in 2000) (hereinafter "*Cavalier*").

Presumptive approval would be meaningless, however, without a corresponding right to construct.[62] As Charter addressed above, licensees (and/or their contractors) are experienced in plant construction and, like pole owners, cannot afford to risk safety and reliability. Whether or not presumptive approval is permitted, licensees are in any case legally required to build in accordance with applicable safety codes. Pole owner concerns over safety can be alleviated by meeting the requisite application turn around timeframes or allowing licensees and approved contractors to perform the work in a timely manner.

g. Should pole owners have to provide reasons for denial of a permit? What reasons are acceptable?

Pole owners should be required to offer written reasons for denying a permit, as Staff proposal OAR 860-028-0100(4)(c) currently provides. Without such a requirement, licensees cannot know if they are receiving non-discriminatory treatment and the Commission would be unable to properly resolve access disputes.

Access decisions cannot be left to the sole discretion of the pole owner and must be transparent. Acceptable reasons for denying a permit must therefore be limited to objective criteria, such as those contained in the federal Pole Attachment Act. Specifically, section 224(f) of the PAA provides that "[a] utility . . . may deny . . . access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable

[62] *See* Utah Pole Attachment Agreement at Section 3.02 ("If notice is not received from Pole Owner within the [requisite] time frames, Licensee may proceed with installing the attachment, and such Attachment shall be deemed authorized, subject to all other terms and conditions of this agreement.").

engineering purposes." These same standards are followed by other certified states,[63] and are included in numerous pole attachment agreements that Charter has signed.

Incorporation of these Congressionally-mandated nondiscriminatory access standards is critical to promoting advanced communications services and achieving a less contentious pole attachment environment. Charter has revised proposed OAR 860-028-0100(4)(c) consistent with these comments.

2. Proposed Rules

While Charter generally supports Staff's proposed language in OAR 860-028-0100, Charter nevertheless has some concerns. In particular, Charter objects to the application of this proposed rule to "modified attachments." The meaning of "modified attachment" in section 2 is ambiguous and could be interpreted to require a separate permit application for routine maintenance projects and emergency repairs. At a minimum, these activities must be exempt from permitting requirements. Cable operators, like Charter, are obligated under federal and local customer service regulations to repair outages and ensure continuous service in an expedited fashion, and cannot be subject to permitting requirements in these circumstances.[64]

Additionally, having more than one permit per pole will lead to confusion and disputes. Instead, once a licensee has obtained a permit for a particular pole, notification of any activity within the licensee's Authorized Attachment Space (excluding routine maintenance and emergency repairs) should suffice, unless the licensee requires additional Authorized Attachment Space. Therefore, Charter recommends that the word "modified" be excluded from this rule.

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[63] *See, e.g.*, VT PUB. SERV. BD. R. 3.707(A).
[64] *See, e.g.*, 47 C.F.R. § 76.309(c)(2).

G. OAR 860-028-0110

1. Issues List

a. Should the pole rental rate be adjusted for inflation?

As set forth earlier in these Comments, Charter reiterates that if a pole owner calculates its pole rental rate in accordance with the proposed rules, then any inflation will automatically be accounted for because the rate will change annually based on the "owner's data from the most recent calendar year . . . ."[65] Indeed, if a pole owner were permitted to revise its rates annually, based on newly filed financial data, *and* tack on an inflationary loader, the pole owner would double-recover. In the event costs do rise from year to year, those costs will be passed to attachers in the rent and in the form of higher non-recurring charges, like pre-construction surveys and make-ready.

b. What costs should be included in the rental rates? What should be a direct charge, and what should be in the pole rental rate?

The Commission's primary responsibility is "to protect . . . customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate services at fair and reasonable rates."[66] Consistent with that charge, the Commission is required to ensure that the rates demanded by utilities for pole attachments "shall be just, fair and reasonable."[67] To that end, and in accordance with the basic "revenue-requirement-standard" of utility rate regulation, which allows a utility "to set rates that will both cover operating costs and provide an opportunity to earn a

[65] OAR 860-028-0020(3).
[66] ORS § 756.040.
[67] ORS § 757.273.

reasonable rate of return on the property devoted to the business,"[68] a just and reasonable *pole attachment rate* in Oregon:

> [E]nsure[s] the public utility, telecommunications utility or consumer-owned utility the recovery 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 . . . 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 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.[69]

Likewise, under the federal pole attachment rate statute, upon which the Oregon rate statute is based, a rate is just and reasonable:

> [I]f it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole . . . .[70]

In other words, **both** the Oregon and federal pole rate statutes create a similar range of allowable compensation relating to pole attachments. The low end of the range is the "incremental costs [or] those that the utility would not have incurred 'but for' the

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[68] CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES 176, (4th ed. 2003) (1993).

[69] ORS § 757.282(2). With regard to the "just compensation" reference in the Oregon rate statute, it is important to note that the FCC formula, which the Oregon rate statute is modeled after, satisfies just compensation requirements. *See Alabama Power v. F.C.C.*, 311 F.3d 1357, 1358 (11th Cir. 2002); *cert. denied*, 124 S.Ct. 50 (U.S. Oct 06, 2003) (No. 02-1474). In *Alabama Power*, the Court found that the formula provides just compensation except possibly where poles are unusually crowded and even then, the formula exceeds marginal cost sufficiently that crowded poles should not be subject to higher rentals outside of the range established by the formula. *See also FCC v. Florida Power Corp.*, 480 U.S. 245, 253-54 (1987) (upholding the FCC formula and finding that it could not be "seriously argued, that a rate providing for the recovery of fully allocated costs, including the cost of capital, is confiscatory").

[70] 47 U.S.C. § 224(d).

pole attachments in question."[71] The high end of the range is the fully-allocated "operating expenses and capital costs [including a return on investment] that a utility incurs in owning and maintaining poles that are associated with the space occupied by the pole attachments."[72]

Most utilities recover the "incremental" or out-of-pocket costs in advance of any pole attachment or conduit occupancy through the imposition of "makeready" expenses, and, in this way, receive at least the minimum required under both rate statutes (even before any pole rental is paid).[73] Anything above incremental costs is therefore a contribution to the utility's overall revenue requirements. Consequently, any fees or charges that a utility imposes on an attacher beyond the fully allocated rental rate that either (1) are also recovered in the rent or (2) do not reflect actual costs incurred for the specific benefit of the attacher, necessarily exceed the maximum cost recovery allowed under both the federal and state pole rate statutes.[74]

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[71] *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules Governing Pole Attachments,* Report and Order, 13 FCC Rcd 6777, ¶ 96 n. 303 (1998).

[72] *Id.* Although the Oregon rate statute sets a range of recoverable costs, as does the federal statute, the PUC 's existing rules only refer to the upper range of compensation in the event of a dispute. *See* OAR § 860-028-0110(2)-(3)("A disputed pole attachment rental rate will be computed by taking the pole cost times the carrying charge times the portion of the usable space occupied by the licensee's attachment"). OAR 860-028-0110(2)(a) defines "carrying charge" as "the percentage of operation, maintenance, administrative, general, and depreciation expenses, taxes, and money costs attributable to the facilities used by the licensee. The cost of money component shall be equal to the return on investment authorized by the Commission in the pole owner's most recent rate proceeding"). This is similar to the federal rule that applies in disputed cases: *i.e.,* when application of the formula reduces a contractual rental rate the FCC will only reduce the rate to the statutory maximum. *See, e.g., FCC v. Florida Power Corp.,* 480 U.S. 245, 254 (1987). Indeed, in Charter's experience most if not all utilities in FCC and certified states charge the fully allocated (maximum upper range) pole rental rate.

[73] *See, e.g., Amendment of Rules and Policies Governing Pole* Attachments, Report and Order, ¶ 7 (2000). The Commission's rules also specify that the "rental rate[] . . . do[es] not cover the costs of special inspections, or preconstruction, make ready, change out and rearrangement work. Charges for those activities shall be based on actual (including administrative) costs." OAR 860-0280110(e)6).

[74] The state and federal statutory formulas differ slightly, however. Under the FCC pole rental formula, the entire 40 inches of "clearance space" (*i.e.*, the distance required by law between the lowest electric line

With this in mind, Charter urges the Commission to specify in OAR 860-028-0110 that when calculating annual rental rates, pole owners use the same FERC and ARMIS Accounts required by the FCC when calculating the federal rate, and that those are "the costs that should be included in the rental rate." Every cost element needed to determine the rent is prescribed by the FCC formula. Obtaining these cost elements is fairly straightforward because each is already publicly available in ARMIS accounts (for telephone) and FERC Form 1 accounts (for power). "Congress did not believe that special accounting measures or studies would be necessary [in determining pole and conduit rates] because most cost and expense items attributable to utility pole, duct and conduit plant were already established and reported to various regulatory bodies. . . ."[75] Moreover, "[p]ermitting the use of non-public data would [have] contraven[ed] the [Congressional] mandate [to] provid[e] a simple and expeditious process rather than a full-blown rate case."[76]

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and the highest communications line on the pole) is considered "usable space." Under both the state and federal rental rate formulas, the more "usable space" on the pole, the lower the annual pole rent. In Oregon, however, the "clearance space" is considered "unusable." ORS 757.282(1). The more "unusable space," the higher the pole rent. In cases where an attacher is considered "compliant" and therefore entitled to a rental reduction, only 20 inches of that 40-inch clearance space gets added back to the total usable space. ORS 757.282(3). In addition, the required height to the lowest line attachment in Oregon is 20 feet. Under FCC rules (based on the NESC), the lowest line attachment is at 18 feet. Consequently, even when an attacher receives a "rental reduction" under the Commission's current rules, they are still paying more to the pole owner than they would under the FCC formula, even though the presumptive height of poles is 2.5 feet more than in FCC states (40 feet *vs.* 37.5 feet).

[75] *Alabama Cable Telecomm. Ass'n v. Alabama Power*, 15 FCC Rcd 17346 at ¶ 5 (2000).

[76] S. Rep. No. 95-580, 98th Cong., 1st Sess. (1977). FERC Form 1 does not, however, contain a record for the number of poles owned by an electric utility. That information, along with the utility's most recent rate of return, must be requested from the utility.

The permitted FERC Accounts used in the FCC formula, are set forth in several FCC Orders.[77] The FCC requires telephone utilities to report every data point necessary to calculate pole and conduit rates under the formula on one convenient Table.[78]

Specifying the FERC and ARMIS Accounts that may be used when calculating pole attachment rates not only provides a ready-made answer to the question at hand, but will also streamline the rate process in Oregon, significantly reducing the chance for future disputes. For over 25 years reliance on the simple and transparent FCC formula has allowed utility pole owners and attaching parties to resolve hundreds of rate issues on their own without FCC or state commission involvement. The FCC recognizes this as a significant benefit:

> An important attribute of the Commission's pole attachment program has been that the parties can compute the rate themselves without the necessity of filing a complaint before the Commission. This has facilitated negotiations and settlements among the parties either after complaints have been filed or before the dispute reached the level of a formal complaint since both parties knew what the Commission's determination would be.[79]

The federal formula works so well that approximately 40 states, including many certified states, including, most recently, Utah, follow the FCC's exact approach.[80]

Another considerable benefit of using the specific FERC and ARMIS Accounts relied upon in the FCC formula is that it takes the guess work out of "what should be a

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[77] *See, e.g., 2001 FCC Order* at Appendices D-2 (Section 224(d) *Cable Formula* for Determining Maximum Rate for Use of Electric Utility Poles Using FERC Form 1 Accounts) and Appendix F-2 (Formula for Determining Maximum Rate for Use of Electric Utility Conduit using FERC Form 1 Accounts).

[78] *See* FCC Report 43-01, the ARMIS Annual Summary Report, Table III-Pole and Conduit Calculation Information.

[79] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 104 FCC 2d 412, ¶ 12 (1986).

[80] Other certified states that follow the FCC formula include: California, Connecticut, Idaho, Illinois, Massachusetts, Michigan, New Jersey, New York, Ohio and Vermont.

direct charge?" The FCC has concluded that "[a] rate based upon fully allocated costs . . . by definition, encompasses all pole related costs *and additional charges are not appropriate.*"[81] Consequently, in states that follow the FCC formula, attachers may only be charged directly for the actual, non-recurring incremental costs a pole owner incurs for their sole benefit. Those charges "include pre-construction, survey, engineering, make-ready, and change-out. . . ."[82] They do not include periodic inspection charges,[83] application processing fees,[84] or administrative charges.[85] In this respect, existing OAR 860-028-0110(6), providing that "the rental rates . . . do not cover the [actual, including administrative] costs of special inspections or preconstruction, make ready, change out, and rearrangement work," appears to be consistent with this approach and the Oregon rental rate statute, ORS 757.282.

On the other hand, newly proposed OAR 860-028-0110(3) arguably violates ORS 757.282 by allowing for the recovery of permit application processing, post-construction inspections, *costs related to* unauthorized attachments (versus "any expenses incurred as a result of an unauthorized attachment" as ORS 757.271(2) allows (which would account for actual engineering expenses that the unauthorized attachment caused the owner to incur, if any) and unspecified "administrative costs." Charter therefore urges the

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[81] *Texas Cable & Telecom. Ass'n v. Entergy Services, Inc.*, 14 FCC Rcd 9138, ¶ 10 (1999) (emphasis added).

[82] *Texas Cable & Telecom. Ass'n v. GTE Southwest Inc.*, 14 FCC Rcd 2975, ¶ 32 (1999).

[83] *Georgia Power* at ¶ 16 ("Regardless of frequency, however, costs attendant to routine inspections of poles, which benefit all attachers, should be included in the maintenance costs account and allocated to each attacher in accordance with the Commission's formula").

[84] *1987 FCC Order* at ¶ 44 ("A separate charge or fee for items such as application processing or periodic inspections of the pole plant is not justified if the costs associated with these items are already included in the rate, based on fully allocated costs, which the utility charges the cable company since the statute does not permit utilities to recover in excess of fully allocated costs").

[85] *See* case cited *supra* note 36.

Commission to retain rule OAR 860-028-0110(6) and has revised proposed section (2) accordingly.

c. Should the calculation of the pole rental rate be amended?

Even though the Oregon formula allows pole owners to recover a larger share of pole costs than the FCC formula, due to the classification of the 40 inches of "safety clearance" to "unusable space," rather than "usable space," and the lowest line requirement at 20, not 18, feet, as noted above,[86] Charter does not advocate amending the calculation of the rental rate formula in this proceeding. In any event, without revising the pole rental *statute*, namely, ORS 757.282, Charter is uncertain how the formula could be amended in this rulemaking.

The problems with the rental rate formula in Oregon do not stem from how the legislature intended it to apply, but from how pole owners have abused it at their own discretion. That is why rather than amending the formula, a more constructive approach would be to require parties to follow the FCC formula (except for the usable space presumptions), and specify the FERC and ARMIS Accounts that should make up the pole costs and carrying charges. Only then will the Commission curtail further abuses and disputes.

d. What elements should be allowed in an existing authorized space under an existing permit?

Once a licensee has obtained a permit for a particular pole, notification of activity on the licensee's permitted attachments (exempting routine maintenance and emergency

[86] *See supra* note 74. It is important to point out that one of the primary reasons the FCC and other states consider this space to be usable is because utilities actually use and profit from this space. ("[W]e note the common practice of electric utility companies to make resourceful use of this safety space by mounting street light support brackets, step-down distribution transformers, and grounded, shielded power conductors therein."). *Second Report and Order* 72 FCC 2d 59 at ¶ 24 (1979)).

repairs) should suffice, unless the licensee requires additional Authorized Attachment Space, and thus, must pay additional rent. This is consistent with proposed OAR 860-028-0110(4)(c). Requiring two or more permits for the same pole will lead to confusion, over-charges and disputes. Therefore, to the extent equipment (including overlashed fiber, service drops, mid-span drops, guy wires, p-hooks, amplifiers, etc.) can be placed within an existing Authorized Attachment Space in accordance with applicable safety codes, the existing permit should cover that additional equipment.

e. Should prepayment be required for the work specified in OAR 860-028-0100?

First, as Charter addressed in detail above, it does not believe a pole owner may recover "directly" for permit application processing, post-construction inspections, costs related to unauthorized attachments and unspecified "administrative costs." Any costs related to those activities should be allocated to the proper FERC and ARMIS accounts that factor into the rental rate.

Second, with respect to work that pole owners may charge for directly, only Make Ready Work should be paid in advance. Make Ready Work often involves significant expenditure of time and materials. Indeed, that is why pole owners do not undertake Make Ready Work until a licensee approves the Make Ready Work estimate.

Advance payments for preconstruction surveys and special inspections, on the other hand, are inappropriate. For example, preconstruction surveys are not always necessary for every pole designated in a licensee's application. In addition, unlike Make Ready Work costs, pole owners do not prepare costs estimates prior to the performance of preconstruction surveys and special inspections (performed at the request of the

licensee), and there are no true-up mechanisms to ensure proper payment once they have occurred. Therefore, licensees should pay the actual and reasonable costs of those activities after they occur, as specified and detailed in a written invoice.

f. When is the owner required to show that certain charges were excluded from the rental rate calculations?

Rather than require a pole owner to show that certain charges are excluded from the rental rate calculations, pole owners should be required to use the same FERC and ARMIS Accounts that are used in the FCC rental rate formula. Adherence to the FCC formula in this respect would alleviate any need for such routine demonstrations and provide assurance to licensees that they are not being over-charged, thus reducing the incidence of disputes. Allowing pole owners to "back out" certain charges that should otherwise be booked to the requisite FERC or ARMIS accounts so these charges can be assessed directly, will only invite further abuses and increase the number of disputes.

H. OAR 860-028-0115

1. Issues List

a. Is section (3) redundant with other rules?

Charter considers section (3), which expressly requires pole owners to maintain their facilities in compliance with Commission Safety Rules, to be an important addition to the pole attachment rules in Oregon. Whether or not this requirement is located in other Divisions, including this requirement here sends an important message that pole owners and licensees have reciprocal rights and responsibilities.

b. Should communications protocols be mutually acceptable to owner and licensee?

Mutually acceptable communications protocols are a critical component of effective and cooperative joint use. Unilateral dictates, on the other hand, can lead to a hostile joint use environment.

c. Should an owner be required to respond to other problems with the pole, not just violations of Commission Safety Rules?

Yes. Whether or not a problem rises to the level of a violation of the Commission's rules, pole owners should correct problems with a pole in a timely manner because, for example, maintenance issues can lead to customer service outages. Maintenance costs are allocated to attachers through the maintenance component of the carrying charge.[87]

d. What are the responsibilities of structure owners related to safety, engineering practices, inter-operator communications, coordination, etc?

In addition to requiring pole owners to maintain their plant for safe and effective joint-use, Charter recommends that the Commission incorporate standardized notice, pole labeling and invoicing requirements in the rules. Pole owners must also be responsible for acquiring and submitting accurate audit and inspection data, as well as coordinating joint-use on their poles. Finally, pole owners should be required to pay all costs related to their own engineering, just as attachers are required to do.

Under FCC rules, pole owners are required to provide attachers "no less than 60 days written notice prior to: (1) removal of facilities or termination of any service to

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[87] *See Cavalier* at ¶ 13 ("Normal pole maintenance costs will be included in the pole rental fee and Complainant cannot be required to pay twice for the same costs."). The FERC Maintenance Account 593 that is factored into the rent includes "the cost of labor, materials used and expenses incurred in the maintenance of overhead distribution facilities, the book cost of which is includible in Account 364, Poles, Towers and Fixtures, account 365, Overhead Conductors and Devices, and account 369, Services. 18 C.F.R. Part 101 (Description of Account 593).

those facilities . . . (2) any increase in pole attachment rates; or (3) any modification of facilities other than routine maintenance or modification in response to emergencies."[88] Pole owners in certified states, such as California[89] and Vermont,[90] have similar responsibilities.

Pole labeling is also critical to an effective joint-use relationship. Without proper labeling, it is often difficult for an attacher to discern the owner of a particular pole. Indeed, there are many instances where pole owners argue over ownership due to inadequate labeling. Inadequate pole labeling can also lead to faulty audit results. As a result, the Utah PSC just implemented rules that require pole owners to "label poles to indicate ownership." Specifically, pole owners "shall label any new pole installed . . . immediately upon installation." Existing poles "shall be labeled at the time of routine maintenance, normal replacement, rearrangement, rebuilding, or reconstruction, and whenever practicable."[91] Utah's pole labeling requirements are similar to licensee attachment tagging requirements contained in virtually every pole attachment agreement.

Detailed invoicing is another important aspect of a cooperative joint-use environment. When attachers can easily discern the nature of assessed charges, payments proceed without dispute. Charter therefore suggests incorporating language in the rules that requires invoices to be itemized and include, at a minimum: date of work; description of work; location of work; unit cost or labor cost per hour; cost of itemized materials; and

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[88] 47 C.F.R.§ 1.1403(c)(1)-(3).
[89] *California Order* at Appendix A, Rule VIII.A.1.
[90] VT PUB. SERV. BD. R. 3.709.
[91] UTAH ADMIN. CODE R746-345-4(A). Pole Labeling.

any miscellaneous charges. Upon request, pole owners should also furnish a breakdown of their basic engineering rates.

When pole owners perform inspections and audits, the information provided to attachers is often incorrect. As the Commission is well-aware, over the last several years, attachers like Charter have expended considerable resources attempting to verify inaccurate inspection and audit data. Charter therefore urges the Commission to include a mechanism in the rules that will encourage pole owners to obtain and submit accurate inspection and audit data to licensees. Charter suggests that once a licensee receives data from a pole owner pursuant to an audit or inspection, the licensee should perform a random sampling of the data. If the sample shows that 5% or more of the information is inaccurate, the pole owner would be required to redo the audit or inspection.

To further ensure effective joint use, the rules should include a provision requiring the pole owner to coordinate necessary make-ready and other work between the parties. This important coordination function is the exclusive responsibility of the pole owner. The federal Pole Attachment Act itself requires pole owners to "notify other attachers of any pending work, which will affect their attachments."[92] According to this Congressional mandate, the FCC has ruled:

> [Although the pole owner] believes that it is not responsible for managing attachments to the pole or notifying attachers when safety violations must be corrected or when make-ready or other work which may affect the attachments is going to be performed . . . [the pole owner] cannot abrogate its duties as pole owner or force [the attacher] to accept [pole owner's] duties towards other attachers. . . . Due to the inherent disparity in the relationship of the [attacher] and the [pole owner] to the other parties that have attached to a pole, we find that [the pole owner] is responsible for coordinating and notifying the attaching parties. Any costs incurred . . . in

[92] *Cavalier* at ¶ 17 (citing 47 U.S.C. § 224(h)).

> managing and maintaining its poles is passed through . . . in the form of make-ready costs or the pole rental fee.[93]

The coordination function extends to coordinating make-ready payments between parties.[94] This function is the exclusive realm of the pole owner because attachers have no privity of contract with each other and cannot force reimbursements for work performed on behalf of another attacher. The Vermont Public Service Board also recognizes that because the pole owner has exclusive "control of the pole" it is the pole owner's responsibility to facilitate joint use and incorporated the coordination function into its rules.[95] In Utah, pole owners are required to "coordinate the relocation of existing Attachers' facilities to facilitate . . . new Attachments" of other attachers, as necessary.[96]

Finally, another important nondiscriminatory access principle included in the federal Pole Attachment Act is that once a party obtains access to a pole, that party may not be forced to incur any expense for activities undertaken that solely benefit another party, including the pole owner, unless the original party also benefits.[97] Allocating costs

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[93] *Cavalier* at ¶ 17.

[94] *Id.* at ¶ 16 (requiring pole owner to ensure proper payments are shared by parties).

[95] VT. PUB SER. BD. R. 3.708(B)("During the Make-ready process, the Pole Owner is presumed to have control of the pole and is responsible for meeting all time limits. . . .").

[96] Utah Pole Attachment Agreement at Section 3.17.

[97] 47 U.S.C. § 224(h)-(i). Specifically, subsection (h) states, in relevant part, that: "[w]henever the owner of a pole . . . intends to modify or alter such pole . . . the owner shall provide written notification of such action to any entity that has obtained an attachment to such [pole] so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole . . . accessible." Similarly, subsection (i) state, in relevant part, that: "An entity that obtains an attachment to a pole . . . shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole. . . .").

based on the associated benefit, helps to balance the interests of the parties, facilitate pole access and reduce cost disputes.[98]

Likewise, the Commission should prohibit any practice that permits a pole owner from charging attachers for pre-existing safety violations they did not cause.[99] In the event it is impossible to determine which party caused the interference or noncompliance (*i.e.*, which attachment was installed last), then, the parties should pay a *pro-rata* share of the costs to accommodate both the attacher and the pole owner, based on their respective space needs.[100]

I. OAR 860-028-0310

1. Issues List

a. Should other calculations for conduit costs be permitted to reflect variations in how owners collect and keep their system information?

To the extent a conduit owner currently keeps its conduit data in a form that differs from FERC or ARMIS accounting, the conduit owner should be required to demonstrate that its rates do not exceed a fair, just and reasonable rate pursuant to ORS 757.282. In order to avoid yearly ratemakings, however, such conduit owner should begin to standardize its conduit cost data as required by the Oregon formula.

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[98] The NY PSC agrees that "[i]f a legal attachment is made to a pole in compliance with safety standards, the legal Attacher should not be required to pay for rearrangement of its facilities for subsequent attachments," including those of the pole owner. *See New York Pole Order* at Order Adopting Policy Statement at 4; Policy Statement at 5.

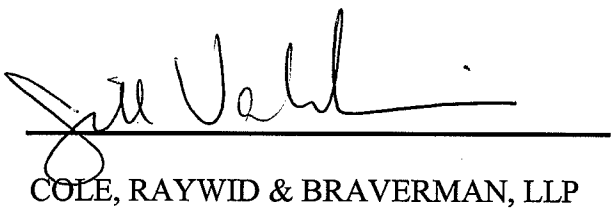
[99] *See The Battle for the Utility Pole and the End-Use Customer*, A PUC Staff Report, Attachment E—Pole Joint Use Principles, P9 (Dec. 15, 2003) ("Pole Owners shall not charge any portion of make ready or alteration costs to a pole that is attributable to correcting existing violations, unless the occupant has caused a portion of the violation."), available at: http://www.puc.state.or.us/safety/workgrp/staffrpt.pdf. *See also Cavalier*, ¶ 16 (prohibiting utility from holding attacher, Cavalier, responsible for costs arising from the correction of safety violations of attachers other than Cavalier); VT. PUB. SER. BD. R. 3.708(H)(1) ("The applicant shall not be responsible for any portion of the Make-ready expense that is attributable to the correction of pre-existing violations, unless the applicant has caused a portion of the violation").

[100] *See, e.g.*, 224(h).

III. CONCLUSION

Charter appreciates the opportunity to comment on Staff's proposals and is hopeful its Comments will aid the Commission in adopting a new set of rules that will promote effective joint use in Oregon.

Respectfully submitted this 28th day of September, 2006.



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CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the forgoing Comments of Charter Communications, Inc. upon all parties of record in AR 506 by delivering a copy in person or by mailing a copy properly addressed with First Class postage, pre-paid or by electronic mail, pursuant to OAR 860-013-0070, to all parties or attorneys of parties listed on the Commission's service list in this matter.

/s/ T. Scott Thompson
T. Scott Thompson

September 28, 2006

Charter Rules Redline

AR 506
Staff's Proposed Pole and Conduit Attachment Rules

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 Aattachment Sspace" means the usable space occupied by one or more Aattachments on a pole by a Llicensee with the ~~pole~~ Oowner's permission pursuant to a pole attachment agreement.
(3) "Carrying Ccharge" means the costs incurred by the Oowner in owning and maintaining poles or conduits regardless of the presence of pole attachments or occupation of any portion of the conduits by Llicensees. The carrying charge is expressed as a percentage. The carrying charge is the sum of the percentages calculated for the following expense elements, using Oowner's data from the most recent calendar year and that, to the greatest extent possible, 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 Ttelecommunications Uutility, the cost of money is equal to the rate of return on investment authorized by the Commission in the pole or conduit Oowner's most recent rate or cost proceeding;
(B) For a Ppublic Uutility, 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 Cconsumer-owned Uutility, the cost of money is equal to the weighted average of the utility's embedded cost of debt and the most recent cost of equity authorized by the Commission for ratemaking purposes for an electric company as defined in OAR 860-038-0005.
(4) "Commission Ppole Aattachment Rrules" mean ~~OAR 860-028-0110 through 860-028-0240~~ the rules provided in OAR Chapter 860, Division 028.
(5) "Commission Ssafety Rrules" mean ~~OAR 860-024-0010~~ the rules provided in OAR Chapter 860. Division 024.

(6) "Conduit" means any structure, or section thereof, containing one or more ducts, **~~conduits,~~** manholes, or handholes, **~~bolts, or other facilities~~** used for any **~~telegraph,~~** telephone, cable television, electrical, or communications conductors? or cables **~~rights of way,~~** owned or controlled, in whole or in part, by one or more public, telecommunications, or consumer-owned utilities.

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

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

(9) "Government Eentity" 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, and . **~~"Licensee" does not~~ includes a Ggovernment Eentity.**

(11) "Make Rready Wwork" 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 Rready Wwork costs are nonrecurring costs, and are not contained in Ccarrying Ccharges.

(12) "Net Iinvestment" 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 Llinear Ccost of Cconduit" 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 **telefax other such means.**

(15) "Occupant" means any Llicensee, Ggovernment Eentity, or other entity that constructs, operates, or maintains Aattachments on poles or within conduits.

(16) "Owner" means a Ppublic **Uutility, T**telecommunications **Uutility,** or Cconsumer-owned Uutility that owns or controls poles, ducts, **or** conduits and other similar facilities, pursuant to ORS 757.270**~~or rights of way~~.**

(17) "Pattern" means a **coursepattern** of behavior that results in a material breach of a contract, or permits, or in frequent **~~or serious~~**-violations of OAR 860-028-0120. [This definition should be addressed in the context of the sanctions rules.]

(18) "Percentage of Cconduit Ccapacity Ooccupied" 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. (I/Number of Inner Ducts (>2)) x (I/Number of Ducts in Conduit)].

(19) "Permit" means the written or electronic record by which an Oowner authorizes an Ooccupant to attach one or more Aattachments on a pole or poles, in a conduit, or on support equipment. Attachments to poles for which an Occupant has received an invoice for rent, shall be considered an authorized and permitted Attachment by the Owner and for the purpose of the Commission's Pole Attachment Rules.

(20) "Pole Ccost" 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 Cconstruction Iinspection" means work that may be performed to verify and ensure the construction complies with the Ppermit, governing agreement, and Commission Ssafety Rrules. Owner shall recover any costs associated with Post Cost Construction Inspections in the Carrying Charges. Any Post Construction Inspection performed by Owner must occur within 30 calendar days of Licensee's notice to Owner that construction is complete. Owner shall provide notice to Licensee prior to any Post Construction Inspection so that Licensee has an opportunity to participate. Following any Post Construction Inspection, the Owner shall provide Licensee with the results of the Post Construction Inspection in writing.

(22) "Preconstruction Aactivity" means engineering, survey and estimating work required to determine whether Make Ready Work is necessary and the ~~prepare cost~~ estimated costs attendant to such Make Ready Work~~s for an attachment application~~.

(23) "Public Uutility" has the meaning given in ORS 757.005.

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

(25) "Service Ddrop" means a connection from distribution facilities to a single family, duplex, or triplex residence or similar small commercial facility.

(26) "Special Iinspection" means an owner's field visit made at the request of the Llicensee for all nonperiodic inspections. A Sspecial Iinspection does not include Ppreconstruction Aactivity or Ppost Cconstruction Iinspection.

~~(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)~~**(27)"Surplus Dducts" 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 12~~60~~ months pursuant to a bona fide development plan for the use of the ducts in the provision of its core utility service.

(30) "Telecommunications Uutility" has the meaning given in ORS 759.005.

(31) "Threshold Nnumber of Ppoles" means 50 poles, or one-tenth of one percent (0.10 percent) of the owner's poles, whichever is less.

(32) "Unauthorized Aattachment" means an attachment that does not have a permit and a governing agreement.

(33) "Usable Sspace" means all the space on a pole, except; the portion below ground level, 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) Consistent with ORS 757.270(1), OAR Chapter 860 Division 028 governs access to utility poles or telegraph, telephone, electrical, cable television or communications rights of way, ducts, conduits, manholes or handholes or other similar facility or facilities owned or controlled, in whole or in part, by one or more public utilities, including ~~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 O~~o~~wner provides reasonable notice to a L~~l~~icensee of a hazard or situation requiring prompt attention, and after allowing the L~~l~~icensee a reasonable opportunity to repair or correct the hazard or situation, and if the hazard or situation remains uncorrected, the O~~o~~wner may correct the attachment deficiencies and charge the L~~l~~icensee for its costs. An Owner may charge a L~~l~~icensee for any fines, fees, damages, or other costs the L~~l~~icensee's A~~a~~ttachments cause the ~~pole~~ O~~o~~wner 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. [Charter supports relocating 0050(2)-(3) to 0120.]

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 by contract, when the parties are negotiating a new or amended contract, T~~the last effective contract between the parties will continue in effect until a new or amended contract between the parties goes into effect, notwithstanding the termination date contained in the contract or any termination notice issued by the Owner.

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 "C~~c~~omplainant." The other party ~~to the contract,~~ against whom the complaint is filed, is the "R~~r~~espondent."

(2) Before a complaint is filed with the Commission, the complaining party must make good faith efforts to resolve the dispute through negotiations, unless such efforts would be fruitless~~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 C~~c~~omplainant must specify the attempts at negotiation or other methods of dispute resolution undertaken prior to the filing of the complaint, or, if no such attempts were made, the reason(s) why it believed such attempts were fruitless~~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 C~~c~~omplainant's position on the challenged rate, term, or condition ~~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 that the specific rate, term, or condition is unjust and unreasonable:

(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 L~~l~~icensee is the party submitting the complaint, the L~~l~~icensee must request the data and information required by this rule from the O~~o~~wner. The O~~o~~wner must supply the L~~l~~icensee the information required in this rule, as applicable, within 30 calendar days of the receipt of the request. The L~~l~~icensee must submit this information with its complaint.

(C) If the O~~o~~wner does not provide the data and information required by this rule after a request by the L~~l~~icensee, the L~~l~~icensee will include a statement indicating the steps taken to obtain the information from the O~~o~~wner, including the dates of all requests.

(D) No complaint by a L~~l~~icensee will be dismissed because the O~~o~~wner 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 R~~r~~espondent will file its response to the complaint with the Commission, addressing in detail each claim raised in the complaint and a description of the R~~r~~espondent's position on the challenged rates, terms or conditions~~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.

~~(5)~~(7)The Commission may also order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust or unreasonable rate, term or condition and the amount that would have been paid under the rate, term or condition established by the Commission from the date that the complaint was filed, plus interest.

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 a ~~n attachment contract~~ dispute that applies to a C~~c~~onsumer-owned U~~u~~tility, 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 shall keep the parties apprised of the accruing costs of the hearing throughout its course on a periodic basis.
(3) The Joint-Use Association is not considered a party for purposes of this rule when participating in a case under OAR 860-028-0200(1)(b).
(4) The Commission will allocate costs in a manner that it considers equitable. The following factors will be considered in determining payment:
(a) Whether the party was a C~~c~~omplainant, R~~r~~espondent, or intervenor;
(b) Merits of the party's 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~~ Attachments

(1) As used in this rule, "applicant" ~~does not~~ includes a Ggovernment Eentity.

(2) An applicant requesting a new ~~or modified~~ Aattachment will submit an application providing the following information in writing or electronically to the Oowner:

(a) Information for contacting the applicant.

(b) The ~~pole o~~Owner may require the applicant to provide the following technical information:

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

(B) The amount of space required;

(Q The number and type of Aattachment for each pole or conduit;

(D) Physical characteristics of Aattachments;

(E) Attachment location on pole;

(F) Description of installation;

(G) Proposed route; and

(H) Proposed schedule for construction.

(3) The Oowner will provide written or electronic notification to the applicant within ten calendar~~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 Oowner may suspend processing the application until the missing information is provided.

(4) An Oowner will reply in writing or electronically to the applicant as quickly as possible, but no later than 45~~30~~ calendar~~business~~ days from the date the application is received. The Oowner's reply must state whether the application is approved, approved with modifications or conditions, or denied.

(a) If the Oowner approves an application without requiring Mmake Rready Wwork, the applicant may begin construction and will notify the Oowner within 30 calendar ~~business~~ days of completion of construction.

(b) If the Oowner approves an application that requires Mmake Rready Wwork, the Oowner will provide a detailed list of the Mmake Rready Wwork needed to accommodate the applicant's facilities, an estimate for the time required for the Mmake Rready Wwork, and the cost for such Mmake Rready Wwork.

(c) Any Owner may deny an application on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering standards. If the Oowner denies the application, the Oowner will state in detail the reasons for its denial and how the reasons relate to insufficient capacity and reasons of safety, reliability and generally applicable engineering standards.

(d) If the Oowner does not provide the applicant with notice that the application is approved or denied within 45~~30~~ calendar~~business~~ days from its receipt, the application is deemed approved and the applicant may begin construction and will notify the Oowner within 30 calendar~~business~~ days of completion of construction.

(5) If the Oowner approves an application that requires Mmake Rready Wwork, the Oowner 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 45~~30~~ calendar~~business~~ days to complete, the parties must negotiate a mutually satisfactory longer period to complete the Mmake Rready Wwork.

(6) For good cause shown, if an Oowner can not meet an applicant's time frame for attachment or those established by this rule, Ppreconstruction Aactivity and Mmake Rready Wwork may be performed by a mutually acceptable third party, at Licensee's request.

(7) If the application involves more than the Tthreshold Nnumber of Ppoles, 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) In this rule:~~
~~(a) "Carrying Charge" means the percentage of operation, maintenance, administrative, general, and depreciation expenses, taxes, and money costs attributable to the facilities used by the licensee. The cost of money component shall be equal to the return on investment authorized by the Commission in the pole owner's most recent rate proceeding.~~
~~(b) "Pole Cost" means the depreciated original installed cost of an average bare pole of the pole owner.~~
~~(c) "Support Equipment" means guy wires, anchors, anchor rods, grounds, and other accessories of the pole owner used by the licensee to support or stabilize pole attachments.~~
~~(d) "Support Equipment Cost" means the average depreciated original installed cost of support equipment.~~
~~(e) "Usable Space" means all the space on a pole, except the portion below ground level, the 20 feet of safety clearance space above ground level, and the safety clearance space between communications and power circuits. There is a rebuttable presumption that six feet of a pole are buried below ground level.~~
~~(3)~~ (2) A disputed ~~The A disputed~~ pole attachment rental rate per foot ~~will be~~ is computed by ~~taking~~ multiplying the ~~P~~pole ~~C~~cost by the ~~C~~carrying ~~C~~charge and then dividing the resultant product by the ~~U~~usable ~~S~~space per pole. The rental rate per pole is computed as the rental rate per foot ~~times~~ multiplied by the ~~L~~licensee's ~~A~~authorized ~~A~~attachment ~~S~~space, ~~portion of the usable space occupied by the licensee's attachment.~~

~~(4) A disputed support equipment rental rate will be computed by taldng the support equipment cost times the carrying charge times the portion of the usable space occupied by the licensee's attachment.~~
~~The minimum usable space occupied by a licensee's attachment is one foot.~~

A disputed rental rate, including Pole Cost and Carrying Charge, shall be calculated in accordance with Federal Communications Commission rules, pursuant to 47 U.S.C. § 224(d), except as otherwise revised by the Commission with regard to Usable Space presumptions and safety clearance space.
(3) The rental rates referred to in sections ~~(3) and~~ (4)(2) of this rule do not include the costs ~~of attachment to support equipment, permit application processing,~~ ~~S~~special ~~I~~inspections, ~~P~~preconstruction ~~A~~activity, ~~post construction inspection,~~ or ~~M~~make ~~R~~read ~~ange out, and rearrangement~~ ~~W~~work and any expenses actually incurred as a result of an ~~; or the costs related to~~ unauthorized attachments. Charges for those activities ~~shall be~~are based on actual (including administrative) ~~(including administrative)~~ costs, ~~including administrative costs~~, and will be charged in addition to the rental rate.
~~Licensees shall report all attachments to the pole owner. A pole owner may impose sanctions for violations of OAR 860-028-0120. A pole owner may also charge for any expenses it incurs as a result of an unauthorized attachment.~~
~~All attachments shall meet state and federal clearance and other safety requirements, be adequately grounded, guyed, and anchored, and meet the provisions of contracts executed between the pole owner and the licensee. A pole owner may, at its option, correct any attachment deficiencies and charge the licensee for its costs. Each licensee shall pay the~~

~~pole owner for any fines, fees, damages, or other costs the licensee's attachments cause the pole owner to incur.~~

(4) Authorized Aattachment Sspace for rental rate determination must comply with the following:

(a) The initial Aauthorized Aattachment Sspace by a Llicensee's Aattachment on a pole must not be less than 12 inches. The owner may authorize additional Authorized Aattachment Sspace in increments of less than 12 inches. In no event shall licensee equipment or other Attachment located in the 20 feet of safety clearance space be considered as occupying Authorized Attachment Space for rental rate purposes.

(b) For each attachment Ppermit, the owner will specify the Aauthorized Aattachment Sspace on the pole that is to be used for one or more Aattachments by the Llicensee. This Aauthorized Aattachment Sspace will be specified in the owner's attachment permit.

(c) An additional or modified Aattachment by the Llicensee that meets the Commission safety rules and that is placed within the Llicensee's existing Aauthorized Aattachment Sspace and equipment in the 20 feet of safety clearance space 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, service drops, guv wires, vertical risers, or cable over-lashings.

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

(6) The Oowner must be able to demonstrate that charges under sections (3) and (5) 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 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 Oowner must establish, maintain, and make available to Ooccupants its joint-use construction standards for attachments to its poles, towers, and for joint space in conduits. Standards for attachment must apply uniformly to Aattachments by all operators, including
the Oowner.
(2) An Oowner must establish and maintain mutually acceptable protocols for communications between the Oowner and its Ooccupants.
(3) An Oowner must maintain its facilities in compliance with Commission Safety Rules for occupants.
(4) An Owner shall also have the following duties:

(a) ~~(a)~~ **An Oowner must promptly respond with a reasonable plan of correction for any violation of the Commission Safety Rules and otherwise resolve structure maintenance issues if notified in writing of a violation or maintenance issue** ~~**requested**~~ **by an Ooccupant.**

(b) An Owner shall provide an Occupant no less than 60 days written notice prior to: (1) removal of facilities or termination of any service to those facilities; (2) any increase in pole rental rates; or (3) any modification of facilities, other than routine maintenance or modification in response to emergencies.

(c) An Owner shall label any new pole installed immediately upon installation. Existing poles shall be labeled at the time of routine maintenance, normal replacement, rearrangement, rebuilding, or reconstruction, and, whenever practicable.

(d) When Owner provides any invoice under these rules, for Make Ready Work or other work, the invoice at a minimum shall include: date of work; description of work, location of work, unit cost or labor cost per hour, cost of itemized materials, and any miscellaneous charges. Upon Licensee request, an Owner shall provide a breakdown of its basic engineering rates.

(e) If an Owner performs an audit of poles to determine the number of Licensee's Attachments or performs any other inspection, the Owner shall provide the results to the Licensee in writing. If following a sampling of the audit or inspection data, the Licensee determines that 5% or more of the data is erroneous, the Licensee shall notify the Owner in writing and the Owner shall be required to re-perform the audit or inspection.

(f) An Owner is presumed to have control of its facilities and is responsible for coordinating all activities on its facilities.

(g) Whenever the Owner of facilities intends to modify or alter such facilities, the Owner shall provide written notification of such action to any Occupant that has obtained an Attachment to such facilities so that such Occupant may have a reasonable opportunity to add to or modify its existing Attachment. Any Occupant that adds to or modifies its existing Attachment after receiving such notification shall bear a proportionate share of the costs incurred by the Owner in making such facility accessible.

(h) An Occupant that obtains an Attachment to an Owner facility shall not be required to bear any of the costs in rearranging or replacing its Attachment, if such rearrangement or replacement is required as a result of an additional Attachment or the modification of an exiting

Attachment sought by any other Occupant or Owner.

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) As **used in this rule:**

(a) "Annual Carrying Charge" shall be equal to the return on investment authorized by the Commission in the conduit owner's most recent rate proceeding times the conduit cost.

(b) "Annual Operating Expense" means annual operating maintenance, administrative, general, depreciation, income tax, property tax, and other tax expenses attributable, on a per-duct basis, to the section of conduit occupied by the licensee.

(c) "Conduit Cost" means the depreciated original installed cost, on a per duct basis, of the section of conduit occupied by the licensee.

(d) "Duct" means a single enclosed raceway for conductors or cable.

(e) "Surplus Ducts" means ducts other than those occupied by the conduit owner or a prior licensee, one unoccupied duct held as an emergency use spare, and other unoccupied ducts that the owner reasonably expects to use within the next 18 months. **(32) A disputed The A disputed** conduit rental rate **per linear foot shall w4H be is computed by adding the annual operating expense to the annual carrying charge and then multiplying by the number of ducts occupied by the lieenseemultiplving the percentage of conduit capacity occupied by the net linear cost of conduit and then multiplying that product by the carrying charge.**

(43) A licensee occupying part of a duct **shall beis** deemed to occupy the entire duct.

(54) Licensees **shaHmust** 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 **shaHwill** apply from the date the conduit owner last inspected the conduit in dispute. The last inspection **date shall beis** deemed to be no more than **tbreefive** years before the unauthorized attachment is discovered. The conduit owner also **shaHmay** charge for any expenses it incurs as a result of the unauthorized attachment.

(65) The conduit owner **shaHmust** give a licensee 60 days 18 months' notice of its need to occupy reserved licensed conduit and in order to maintain its Attachment, **shaHwill** propose that the Ll icensee maytake the first feasible action listed:

(a) Pay Make Ready Work revised conduit rent designed to recover for 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)(b)Vacate reserved ducts that are no longer surplus;

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

(7) When two or more licensees occupy a section of conduit, the last licensee to occupy the conduit shall be the first to vacate or construct new conduit. When conduit rent is revised because of retrofitting of space saving technology or construction of new conduit, all licensees shall bear the increased cost.

(8) All conduit attachments shall meet local, state, and federal clearance and other safety requirements, be adequately grounded and anchored, and meet the provisions of contracts

~~executed between the conduit owner and the licensee. A conduit owner may, at its option, correct any attachment deficiencies and charge the licensee for its costs. Each licensee shall pay the conduit owner for any fines, fees, damages, or other costs the licensee's attachments cause the conduit owner to incur.~~

(6) The rental rates referenced in section (2) of this rule do not include the costs of ~~permit application processing,~~ Sspecial Iinspections, Ppreconstruction Aactivity, ~~post construction inspection,~~ Mmake Rready Wwork, and the actual expenses ~~costs~~ caused by Licensee's ~~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 Oowner may require reasonable prepayments from a Llicensee of Oowner's estimated costs for any of the work allowed by OAR 860-028-0100. The Oowner's estimate will be adjusted to reflect the owner's actual cost upon completion of the work. The Oowner will promptly refund any overcharge to the Llicensee.

(8) The Oowner 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)

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