BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 506

In the Matter of a Rulemaking to Amend and Adopt Permanent Rules in OAR 860, Division 028 Regarding Pole and Conduit Attachments (Phase 2)	))))	**Closing Comments of Verizon Northwest Inc.**

Verizon Northwest Inc. ("Verizon") files these closing comments addressing the proposed rules at issue in Phase 2 of this docket. Verizon incorporates by reference its opening comments filed in this phase of this docket ("Opening Comments"), as if fully stated here. Verizon also generally supports the First Round of Comments filed by Charter Communications, Inc. ("Charter") and the Comments of the Oregon Cable Telecommunications Association ("OCTA"), both dated September 28, 2006. Finally, as explained in more detail below, Verizon opposes several of the proposed modifications to the rules that were offered in comments filed by the Staff of the Commission ("Staff") on November 8, 2006 ("November 8 Proposals").

As it did in the Opening Comments, Verizon undertakes here not only to offer comments on the Staff's proposed rules, but also to provide specific language proposals to implement those comments. As described in more detail below, Verizon's proposed language changes are consistent with Commission orders issued in Docket UM 1087[1] and relevant Oregon statutes.[2]

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[1] *Central Lincoln People's Utility District v. Verizon Northwest, Inc.*, Docket UM 1087, Order Nos. 05-0492 and 05-583, entered January 19, 2005, and May 16, 2005, respectively. These Orders are instructive as they were issued in the only case that has interpreted and applied the current Division 28 rules and the relevant statutes.

[2] ORS §§ 757.270 *et seq.*, ORS § 183.332.

GENERAL COMMENTS

The Notice of Proposed Rulemaking Hearing filed with the Secretary of State on June 15, 2006 ("Notice"), stated that the purpose for this proceeding was "to ensure that Oregon's utility lines and facilities accommodate competitive changes and are constructed, operated, and maintained in a safe and efficient manner." The Notice claimed that the proposed rules were needed to limit "[i]ncreasing issues related to unsafe practices and unfair costs between utility facility owners and occupants." The Notice also stated that the Commission sought to avoid the setting of joint use policy on an expensive dispute-by-dispute basis, preferring instead to adopt generally applicable rules.

Some pole owners and attachers face diametrically opposing incentives with regard to pole attachments: owners seek to maximize revenues and attachers seek to limit costs. For example, certain pole owners do not hide their view that they should be permitted to use their pole ownership to reap large profits. PacifiCorp has encouraged other owners to "unlock the hidden value in [their] poles."[3] Similarly, PGE has asserted that "careful management of utility pole assets can drive increased returns for a utility's bottom line."[4] Attachers, on the other hand, have few economic alternatives to using owners' poles and facilities and thus seek to avoid paying exorbitant charges for such poles and facilities. In fact, the limited number of alternatives available to attachers is recognized by pole owners. For example, PGE notes on its Utility Asset Management

[3] Joint Wire and Pole Usage, Best Practices to Maximize Revenue Opportunities and Minimize Attachment Costs, Power Point Presentation made by PacifiCorp, December 2003, attached hereto as Attachment 1.

[4] http://www.portlandgeneral.com/business/utility_services/Default.asp?bhcp=1, attached hereto as Attachment 2.

website that the number of new structures is decreasing, in large part because local jurisdictions are tightening the rules for such structures.[5]

It is with these differing incentives in mind that the Commission must view arguments raised by the parties. For example, the power companies claim repeatedly that the Commission is free to ignore the pole attachment rules established by the Federal Communications Commission ("FCC") in establishing its own rules. That may be the case, but it misses the point as the power companies never explain persuasively whether adopting a different formula from that prescribed by the FCC is sound policy. Absent substantive explanations from the power companies, we can only assume that their recommendations are designed to support their stated goal (see footnotes 3-5) of maximizing their profits, not the enactment of sound public policy.

SPECIFIC COMMENTS ON PROPOSED RULES[6]

1. Rule Number: 860-028-0020(2) - Authorized Attachment Space

Verizon generally agrees with the proposed changes to the definition of "Authorized attachment space" offered by Charter and the Oregon Joint Use Association ("OJUA") that would: insert the term "usable," change the word "licensee" to "occupant" and remove the last clause stating "pursuant to a pole attachment agreement." The definition revised with these change would thus state:

> (2) "**Authorized attachment space**" means the **USABLE** space occupied by one or more attachments on a pole by ~~a licensee~~ **AN OCCUPANT** with the pole owner's permission ~~pursuant to a pole attachment agreement~~.

[5] http://www.uam.portlandgeneral.cpm/wireless.asp.

[6] The specific comments offered in this section address the proposed rules issued with the notice dated June 15, 2006, unless otherwise noted.

These changes generally make sense for the reasons stated in Charter's First Round Comments and the comments of the OJUA.[7] Specifically, Verizon agrees with the point Charter made in the workshops that the term "usable" should be added to this definition to ensure that equipment located in "unusable" space not be considered as occupying space for rental rate purposes. If the Commission, however, decides (incorrectly) to allow pole owners to charge rents for equipment located in "unusable" space, all rental rate calculations must correspondingly include that space as "usable" space. Fundamentally, if rents are collected on space, that space must be included in the calculation of the rental rate. For example, if the space for which an owner could charge rent would increase by the 20 feet of safety clearance space above ground level, the overall rate per foot must decrease substantially. Otherwise, the pole owner's rents for the pole exceed the statutory maximum pricing outlined in ORS §§ 757.282 and 759.665.

Finally, the last clause of the proposed definition should be deleted because attachments made prior to the termination of a pole attachment agreement should still be authorized for some period of time after the termination. In fact, the Commission recognized as much when it approved the pole attachment agreement in Docket UM 1087, which included certain provisions dictating that terms of the agreement continue to govern pole attachment arrangements after termination of the agreement.[8]

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[7] Verizon is referring to the OJUA redlined comments issued following the October 23 OJUA Board meeting.

[8] *See, e.g.*, Section 16.1 ("Subject to the provisions of Article XV, this Agreement may be terminated by either party, so far as it concerns further granting of joint use by either party, upon sixty (60) days' notice to the other party; provided, however, that notwithstanding such termination, this agreement shall remain in full force and effect with respect to all poles jointly used under the terms of this Agreement by the parties at the time of such termination."); Section 17.1 ("This Agreement shall remain in full force and effect unless and until either party terminates it upon three hundred sixty-five (365) days' notice to the other party. * * * If this Agreement is terminated, Verizon shall remove all of its Equipment from the District's poles and the District shall remove all of its Equipment from Verizon's poles within two years after termination of this

2. **Rule Number: 860-028-0020(3) – Carrying Charge**

As stated in its Opening Comments, Verizon proposes that this rule be modified in the introductory paragraph and by the addition of new paragraphs (f), (g) and (h) to state in pertinent part:

> (3) "**Carrying Charge**" means the costs incurred by the owner in owning and maintaining **DISTRIBUTION** poles or conduits regardless of the presence of pole attachments or occupation of any portion of the conduits by licensees. The carrying charge is expressed as a percentage. The carrying charge is the sum of the percentages calculated for the following expense elements, using owner's data from the most recent calendar year and that **are publicly available to the greatest extent possible**:
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> **(f) THESE CARRYING CHARGE EXPENSE ELEMENTS INCLUDE ADMINISTRATIVE COSTS RELATED TO PROCESSING NEW ATTACHMENTS, EMPLOYEE AND CONTRACTOR EXPENSES, ROUTINE INSPECTIONS AND OTHER ADMINISTRATIVE EXPENSES RELATED TO OPERATION AND MAINTENANCE.**
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> **(g) THE CARRYING CHARGE WILL NOT INCLUDE NET INCOME AND CUSTOMER ADVERTISING, MARKETING AND SIMILAR EXPENSES.**
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> **(h) THE CARRYING CHARGE WILL BE CALCULATED USING THE FOLLOWING ACCOUNTS:**
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> **(A) FOR A UTILITY PROVIDING COMMUNICATIONS SERVICE, APPENDIX E-1 SECTION 224(D) CABLE FORMULA FOR DETERMINING MAXIMUM RATE FOR USE OF LEC UTILITY POLES USING FCC ARMIS ACCOUNTS; OR**
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> **(B) FOR UTILITY PROVIDING ELECTRIC OR POWER SERVICE, APPENDIX E-2 SECTION 224(D) CABLE FORMULA FOR DETERMINING MAXIMUM RATE FOR USE OF ELECTRIC UTILITY POLES USING FERC FORM 1 ACCOUNTS.**

Verizon's proposed addition to the introductory paragraph of 860-028-0020(3) clarifies that only costs related to *distribution* poles should be included in the carrying

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Agreement. All of the applicable provisions of this Agreement, . . . shall remain in full force and effect with respect to any and all equipment remaining upon poles of the other party until such time as all such equipment has been removed.").

charge; the costs of *transmission* poles should be excluded. Verizon's proposals take an opposite approach than that advanced by the Staff in its November 8 Proposals, which use a blended rate derived from pole costs for both distribution poles and transmission poles. As was discussed at length and agreed upon in the workshops, transmission poles are generally taller and often constructed of other, more expensive materials than that of distribution poles. Including transmission pole costs increases inappropriately the overall average pole cost for all occupants, even for those who do not attach to transmission poles. Even for those occupants that do attach to transmission poles, these attachments are far less frequent than attachments to distribution poles.

Verizon's experience from 1997 through 2003 demonstrates the actual impact of a pole owner including transmission poles in the rental rates calculated using the FCC formula. From 1997 through 2003, the relative number of wood poles in service remained relatively constant. In 1997 and 1998, only distribution poles were included in the rental rate calculation.[9] However, from 2000 through 2003, pole owners began including transmission poles in the calculations.[10] Comparing data for one pole owner from 1997 to 2003, years with a relatively constant number of poles for that owner, there were staggering increases in gross pole investment (over 79 percent) and the net cost of a bare pole (35 percent).[11]

Accordingly, attachments to transmission poles should be governed by a separate pole attachment agreement unique to transmission poles, and should not be included in

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[9] The Gross Pole Investment only referred to Account 364. FERC Account 364 only refers to distribution poles. A copy of the description of Account 364 is attached as Attachment 3.

[10] The Gross Pole Investment included Account 355. FERC Account 355 refers to transmission poles. A copy of the description of Account 355 is attached as Attachment 4.

[11] Similar increases are found when comparing data from 1998 to 2000 data, with a 42 percent increase in gross pole investment and a 21 percent increase in the net cost of a bare pole.

the carrying charge in these rules. In the alternative, if Staff's recommendation from its November 8 Proposals is (erroneously) adopted, there should be two versions of a carrying charge: one for distribution poles and another for transmission poles. Development of two carrying charges would ensure that an occupant attached only to distribution poles will not pay a higher rental rate based in part on transmission pole costs.

In addition, Verizon has highlighted the clause "are publicly available to the greatest extent possible" in the introductory paragraph that was proposed originally on June 15 and which the Staff is now apparently recommending be removed (based on the November 8 Proposals). This clause should be retained in the definition of Carrying Charge because reliance on publicly available data is essential to ensuring that attachers can verify whether the rates they are being charged are just and reasonable. In its comments filed November 8, Staff states that it "continues to support the proposed definition for Carrying Charge in 028-0020(3)." However, in the definition of "Carrying Charge" found in Attachment C to its November 8 Proposals, the phrase "are publicly available to the greatest extent possible" does not appear. Verizon hopes this omission was an oversight as Staff provides no explanation for – in fact, makes no mention of – removal of this phrase in its November 8 Proposals.

New subsections (f) and (g) are based on the language cited by Verizon in its Opening Comments that is taken directly from the Commission's order in Docket UM 1087. Order 05-492 stated that pole owners could recover direct costs for specialty work, but could not recover the administrative costs related to operation and maintenance (including the salaries of the people involved with "joint use issues" or pole maintenance

and operation). Those administrative costs were to be calculated and allocated as part of the carrying charge. The Order also stated that to the extent the application fees did not relate to "special inspections or reconstruction, make ready, change out, and rearrangement work," such application fees could not be recovered, and administrative charges related to processing new attachments should be allocated with the carrying charge.

Verizon's proposed section (h) ensures that the definition of "carrying charge" is based upon the publicly available data provided to the FCC and the FERC.[12] Use of these accounts will eliminate the frequent disputes that arise between owners and occupants regarding the proper accounts and amounts to include in the rent calculation. As explained in Verizon's Opening Comments, this proposal is also consistent with the guidance expressed by the Commission in Docket UM 1087 regarding what costs should (and should not) be included in carrying charges.

The carrying charge should not include an inflation adjustment, as proposed by several pole owners. Such an adjustment is unnecessary because rates are generally adjusted annually. Moreover, precise adjustments such as one to account for inflation are not made when they would benefit an occupant. For example, there is no pro-rata adjustment for the actual period of time an occupant is attached to a pole. That is, when an occupant attaches to a pole during a calendar year, the occupant is charged the full annual rental rate, even though the attachment was installed for less than a full year. This extra compensation to a pole owner clearly exceeds any inflation impact.

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[12] Amendment of Commission's Rules and Policies Governing Pole Attachments, In the Matter of Implementation of Section 703(e) of The Telecommunications Act of 1996, Consolidated Partial Order on Reconsideration, CS Docket Nos. 97-98, 97-151, FCC 01-170, 16 FCC Rcd 12103 (2001) (hereafter "Partial Reconsideration Order"). See also, http://www.fcc.gov/wcb/armis and http://rimsweb2.ferc.fed.us/form1viewer/.

Verizon has had real experiences with the problem of improper carrying charges. For example, Verizon was charged a rental rate by one pole owner that contained an annual "escalator," as well as utility asset management overhead factor. By using these factors and blended distribution and transmission pole costs in a single rental rate, the annual rental rates for that owner increased from 1998 to 2003 by 31 percent. Pole owners should not have these profit-maximizing practices endorsed through Commission rule.

3. Rule Number: 860-028-0020(11) – Make Ready Work

Verizon proposes that this rule be modified to state:

> "**Make ready work**" means **REARRANGEMENT, CHANGE-OUT OR REPLACEMENT** ~~administrative, engineering, or construction activities~~**WORK** necessary to ~~make~~ **PREPARE** a pole, conduit, or other support ~~equipment~~ structure ~~available~~ for a new attachment, ~~modified~~ attachment modifications, or additional facilities. Make ready work ~~costs are nonrecurring costs, and are not contained in carrying charges~~ **SHALL NOT INCLUDE WORK PERFORMED TO CONDUCT A ROUTINE INSPECTION, TO PROCESS AN APPLICATION OR PERMIT OR TO PERFORM ANY OTHER WORK FOR WHICH CHARGES ARE INCLUDED IN THE CARRYING CHARGE COMPONENT OF THE POLE ATTACHMENT RENTAL RATE.**

Verizon's comprehensive proposed changes to this definition are appropriate because they are consistent with Commission and FCC orders. For example, the terms "rearrangement, change-out or replacement" that Verizon proposes to add were used by this Commission in UM 1087 orders. Moreover, in the FCC's Partial Reconsideration Order on its pole attachment rules, the references to "make-ready" costs concern the costs to replace or change-out a pole with a higher or stronger pole to either: (i) accommodate an attaching entity due to lack of adequate space on the pole for a new attachment or (ii)

satisfy NESC strength requirements.[13] That should be the focus of the definition of "make-ready" costs here as well. For example, the definition of "make ready work" should not include charges for routine work such as processing applications or permits because they are already included in the carrying charge calculation as stated in the Commission's order in Docket UM 1087, Order 05-042.

Verizon also proposes to add inspection language to the make-ready definition to clarify that routine inspection costs cannot be charged by an owner as a direct cost to an occupant. These revisions, combined with the revisions Verizon has proposed to the definition of "carrying charge," will provide much needed clarity on what owners can directly bill and what must be included in the carrying charge component of the rental rate.

4. Rule Number: 860-028-0020(17) - Pattern

On September 26, 2006, the Commission issued its Division 24 safety rules. Those rules adopt a definition of "Pattern of non-compliance" that is similar to the definition of "pattern" that was originally proposed for the Division 28 rules. However, to further conform to the Division 24 definition of "pattern of non-compliance," the definition in the Division 28 rules should also focus on "material," rather than serious, violations:

> "**Pattern**" means a course~~pattern~~ of behavior that results in a material breach of a contract, or permits, or in frequent, **MATERIAL** ~~or serious~~ violations of OAR 860-028-0120.

For purposes of the Division 28 sanctions rules, the rules also must clarify that any definition of "pattern" should apply only prospectively upon the effective date of a

[13] Partial Reconsideration Order at ¶ 24 and footnote 120 and at ¶ 77.

new definition; otherwise, parties would not be on proper notice as to what constitutes a "pattern."

5. Rule Number: 860-028-0020(20) – Pole Cost

Verizon recommends that the rule be modified to state:

> (20) "**Pole Cost**" means the depreciated original installed cost of an average bare **DISTRIBUTION** pole ~~to include support equipment of the pole owner,~~ from which is subtracted related accumulated deferred taxes, if any. There is a rebuttable presumption that the average bare **DISTRIBUTION** pole is 40 feet and the ratio of bare **DISTRIBUTION** pole to total **DISTRIBUTION** pole for a public utility or consumer–owned utility is 85 percent, and 95 percent for a telecommunications utility.

Consistent with Verizon's comments in the definition of "Carrying Charge," this definition must focus on distribution – not transmission – poles; Verizon's proposed definition makes that clear.[14] Also, the Staff's proposed reference to "support equipment" should be deleted entirely from the Division 28 rules. Items such as guy wires, anchors and grounds are already included in the pole cost under FERC Account 364.[15] As was stated repeatedly in the workshops, inclusion of this phrase in the rules would appear to allow pole owners to recover costs that are already recovered through Account 364. In addition, occupants already pay certain support structure costs in the "make-ready" process when certain functions are necessary to make poles "attachment-ready." Thus, the Staff's proposed rule would allow for duplicative recovery of support structure costs in a multitude of ways, violating the statutory pricing outlined in ORS §

[14] If the Commission erroneously adopts Staff's recommendation that both distribution and transmission poles be considered in this definition, the proposed rebuttable presumptions about the pole sizes and bare pole/total pole ratio obviously *cannot* be applied to transmission poles, as they are much different in size than distribution poles.

[15] See Attachment 3.

757.282 and 759.665. Accordingly, Verizon urges the Commission to delete the phrase "support equipment" from this proposed definition.

6. Rule Number 860-028-0020(21) – Post Construction Inspection

Verizon continues to recommend that this rule be modified to state:

> "**Post construction inspection**" means ~~work performed~~ **INSPECTION OF NEW ATTACHMENTS** to verify and ensure the construction complies with the permit, **THE POLE ATTACHMENT** ~~governing~~ agreement, and the Commission safety rules.

Verizon has clarified this definition to ensure that it applies only to construction for new attachments, and not for existing attachments. Verizon is unaware of any objection raised to this proposed change in the workshops. Verizon also concurs in the additional language proposed for this definition by Charter in its First Round Comments that would mandate that: (i) the occupant be advised of such inspections so it can participate in the inspection, (ii) such inspections occur within 30 days after the owner has been notified by the occupant that the construction is complete, (iii) the occupant be provided the results of the inspection in writing, and (iv) the owner recover any costs associated with post-construction inspections and cost. These are all common-sense requirements that would ensure that post-construction inspections are conducted fairly and efficiently.

7. Rule Numbers: 860-028-0020(26), (27), and (28) – Special Inspections, Support Equipment and Support Equipment Costs

As Verizon advocated in its Opening Comments, the definitions and use of the terms "special inspection," "support equipment" and "support equipment cost" should be deleted throughout the proposed rules. Special inspections, which are inspections performed by one party at the request and expense of another party, are bilateral activities

that should be governed by contract between the requesting and performing parties, not addressed in the Commission's rules.[16] As discussed with regard to the definition of "pole cost," costs of support equipment are already included in Account 364; thus, all references to "support equipment" and "support equipment cost" should be deleted from the proposed rules.

8. Rule Number: 860-028-0020(32) – Unauthorized Attachment

The phrase "unauthorized attachment" should apply only to attachments made to poles: (i) without permission from the pole owner or (ii) where a pole owner is not deemed to have granted permission for an occupant to attach to a pole. A permit or the issuance of a billing invoice for the attachment clearly indicates the owner has given its authorization to the occupant to attach to its poles, and any permitted attachment should not be considered "unauthorized" simply because a governing agreement has expired or been terminated. Accordingly, Verizon proposes the following definition of "unauthorized attachment":

> "**Unauthorized attachment**" means an attachment made to a pole without a permit ~~and a governing agreement~~ or for which the occupant has not been invoiced.

9. Rule Number: 860-028-0020(33) – Usable Space

There was considerable discussion in the workshops on attachments placed in "unusable" space, and whether the owner may charge for such attachments and/or require them to be permitted. Verizon has historically been allowed to install certain equipment, such as splice boxes and risers, in the space below the communications space at no

[16] However, if a definition of "special inspections" is retained, the definition proposed originally with the Notice issued June 15 should be adopted, rather than the definition now proposed by Staff in its November 8 Proposals, because Staff's November 8 proposal places special inspections in the unfettered discretion of owners whereas the June 15 version allowed these inspections only upon request of an occupant.

charge and with no permit. This practice should be allowed to continue because such placement is ancillary to, and supports, the occupant's existing attachments. Moreover, the pole owner is not prejudiced because it already recovers the fully allocated cost of the pole in the annual rental rate.

In the event the space below the communications space is considered "authorized attachment space" for which owners can charge a rental rate, the method for calculation of the rental rate must be clarified. This clarification could be made as follows:

> "**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 the communications and power circuits~~;. There is a rebuttable presumption that six feet of a pole is buried below ground~~ **PROVIDED HOWEVER THAT IF AN OWNER CHARGES FOR ATTACHMENTS MADE IN THE SAFETY CLEARANCE SPACE ABOVE GROUND LEVEL OR BETWEEN THE COMMUNICATIONS AND POWER CIRCUITS SUCH SPACE SHALL BE INCLUDED IN THE OWNER'S RENTAL RATE CALCULATIONS FOR ALL ATTACHMENTS ON THE POLE. THERE IS A REBUTTABLE PRESUMPTION THAT SIX FEET OF A POLE IS BURIED BELOW GROUND.**

10. Rule Number: 860-028-0020(XX) – Routine Inspections

In order to avoid abusive inspection practices by pole owners, and to bring clarity to how inspections are to be conducted and how inspection costs are recovered, Verizon proposes a definition for the term "routine inspection." The proposed definition, which is consistent with its proposed revisions for the definitions of "carrying cost" and "make ready work," would read as follows:

> **"ROUTINE INSPECTION" MEANS AN INSPECTION BY AN OWNER OF POLES, DUCTS, CONDUITS OR RIGHTS-OF-WAY REQUIRED UNDER OAR 860-024-0011(1)(b) OF THE COMMISSION'S SAFETY RULES. WHILE CONDUCTING SUCH AN INSPECTION, THE OWNER SHALL ALSO INSPECT NEW LINE INSTALLATIONS AND ATTACHMENTS OF POLE OCCUPANTS. THE INSPECTION SHALL ALSO INCLUDE**

IDENTIFICATION OF UNAUTHORIZED ATTACHMENTS OF POLE OCCUPANTS ATTACHED TO THE OWNER'S FACILITIES AND INDENTIFICATION OF ANY ATTACHMENTS THAT VIOLATE THE COMMISSION SAFETY RULES. THE OWNER SHALL NOTIFY POLE OCCUPANTS OF ANY UNATHORIZED ATTACHMENTS, COMMISSION SAFETY RULE VIOLATIONS OR OTHER DEFECTS OR DETERIORATIONS WITHIN 30 DAYS AFTER COMPLETING THE INSPECTION. THE COSTS FOR THIS TYPE OF INSPECTION WILL BE INCLUDED IN THE ANNUAL RENTAL RATE CALCULATION AND WILL NOT BE CHARGED DIRECTLY TO THE POLE OCCUPANTS.

The concept of a "routine inspection" is discussed in Commission Order 05-583 issued in Docket UM 1087. Under that Order and in the contract approved by and appended to the Order, the owner is entitled to conduct an inspection of Verizon attachments and equipment at any time, but the owner is required to recover the costs for all inspections in the annual rent, not on a case-by-case basis.[17] As Verizon stated in its Opening Comments and in the workshops, certain pole owners only inspect their *own* facilities for compliance with the Commission's safety rules or other defects or deterioration during routine inspections. Those owners do not examine occupant attachments during these routine inspections to determine whether any of those attachments are unauthorized or whether they violate the Commission's safety rules. Rather, they conduct separate "bootleg" inspections to determine if there are any unauthorized occupant attachments on their poles. They also conduct yet another entirely separate inspection to determine if the pole occupants' attachments violate the Commission safety rules.

The only rational explanation for a pole owner to conduct separate investigations in this fashion is to maximize inspection cost recovery. Cost recovery maximization

[17] *Central Lincoln People's Utility District v. Verizon Northwest, Inc.*, Docket UM 1087, Order 05-583, entered on May 16, 2005, at page 6 under discussion of Section 9.9 and Section 9.8 of appended contract.

results from the system in which an owner finding a "bootleg" attachment or safety violation may assess the cost of all of these inspections upon the occupants as direct costs (to which it adds sanctions under the Commission's existing "sanctions rule"). The owner is thus awarded financially for conducting this multi-layered inspection process rather than engaging in the more efficient practice pf inspecting attachments during routine sections. To prevent such improper and wasteful activity, Verizon proposes that the two types of inspections described above (as well as costs associated with inspections to determine if attachment violations have been corrected) be included in the mandatory safety inspections required under OAR 860-024-0011(1)(b) of the Commission's safety rules. This proposal would ensure that the inspection costs are included in the carrying cost.

Verizon's proposal is based on how routine inspections can, and should, be handled. In fact, power companies appear to already use technologies that facilitate comprehensive routine inspections. For example, the PGE Utility Asset Management website touts its capability to conduct multi-faceted inspections through use of its "PoleView" technology.[18] According to its website, PoleView's built-in menus prompt field inspectors to collect pole data for: authorized and unauthorized attachments, pole condition, safety code violations, pole loading calculations, and the GPS location of each pole. PoleView is described as the "ultimate productivity tool" because of the multifaceted nature of the data that can be compiled in an inspection. The Commission should follow the lead of PGE's Utility Asset Management division in encouraging comprehensive routine inspections that are efficient and productive.

[18] http://www.uam.portlandgeneral.com/poleview.asp.

As Verizon stated at the November 8 hearing, its own experience demonstrates how the abuse of multiple pole inspections has increased significantly Verizon's inspection, audit or "program costs." Verizon's program costs relating to one investor-owned utility: increased nearly 5 times from 2000 to 2001, and were over 10 times higher in 2003 than they were in 2000.

11. Rule Number: 860-028-0050(2) - Owner Correction

The language in this proposed rule was not modified by the proponents to eliminate the ambiguities which Verizon identified in its Opening Comments. Accordingly, Verizon continues to believe that this proposed rule should be deleted as drafted.

The terms "reasonable notice" and "reasonable time" used in the proposed rule are too vague and provide unfettered discretion to the pole owner. Accordingly, pole occupants would have no objective criteria to determine when a pole owner may apply the rule. Moreover, clarity is particularly important in this context because the proposed rule would require that the pole occupant essentially indemnify the pole owner for any fines, fees, damages, or other costs incurred by the pole owner for the occupant's attachments.

The lack of well defined and objective criteria for notice and time periods is exacerbated by use of the similarly ambiguous phrase "situation requiring prompt attention" to describe when self-help remedies can be used by the pole owner. This loosely worded proposed rule must be rejected as it invites significant and serious abusive practices for implementation of self-help remedies by pole owners.[19]

[19] If the Commission insists on a rule along these lines, which it should not, it must include well-defined and objective criteria as to when an owner can correct a situation and seek indemnification from occupants.

12. Rule Number: 860-028-0050(3) – Vegetation Trimming or Removal

Verizon recommends deletion of this subsection. As Verizon explained in its Opening Comments, operators of communications facilities should not be subject to the same safety requirements as electrical providers because electrical wires are uninsulated and charged, and pose significant safety concerns not present with communications facilities. Moreover, ORS § 758.284 indemnifies electricity providers from accidents occurring when they conduct tree-trimming measures. Telecommunication providers have no such immunity when conducting the same activities, and thus would bear significantly higher and disproportionate costs in undertaking such work than electricity providers. The disparity of costs through potential liability associated with a tree-trimming requirement would be magnified by the potential trimming of trees and shrubs that are the private property of others: electricity providers are protected in such situations,[20] but telecommunications providers are not. The bottom line is that imposing tree trimming requirements on telecommunications providers would impose higher and disproportionate costs relative to those in place for electricity providers. Accordingly, the proposed rule is not equitable and should not be adopted.[21]

It also must include specific periods of time for notice and correction, so as not to invite abusive practices through standards based on reasonableness. Even the placement of this proposed rule in OAR 860-028-0050 seems strange; given that it could affect rental rates and charges for attachments, any proposed rule on this subject would be more appropriately located in OAR 860-0280-110.

[20] ORS § 758.284.

[21] Aside from being inappropriate from a cost perspective, the proposed rule has a number of administrative problems. For example, the term "operator" is used in this section but not defined. The placement of this proposed rule also seems inappropriate. A rule addressing trimming or removal of vegetation by operators of communications facilities would seem to belong in rules addressing the duties of pole owners or pole occupants.

13. Rule Number: 860-028-0060 – Attachment Contracts

Verizon supports Staff's proposed rule 860-028-0060(4) for the reasons stated in its Opening Comments, and in particular because it provides workable terms and conditions under which parties may rely and operate until such time as a new contract is negotiated and executed.

After being advised at the workshop that this rule was not designed to *mandate* joint use in lieu of an operator's desire to build its own facilities, but rather to ensure that joint use *may* be used when requested by potential pole occupants, Verizon withdraws the proposed changes it offered in its Opening Comments and instead proposes only the following changes to reflect the workshop discussions:

> Attachment Contracts
>
> (1) Any entity **DESIRING**~~requiring~~ pole attachments to serve customers **WILL BE PERMITTED TO**~~should~~ use **FACILITIES**~~poles~~ jointly as much as practicable.

14. Rule Number: 860-028-0070 – Resolution of Disputes for Proposed New or Amended Contract Provisions

During the workshop, Verizon was advised that this rule was drafted solely to address disputes for proposed new or amended contract provisions and that any other type of pole attachment dispute could be addressed under the Commission's regular complaint procedures. With that understanding, Verizon withdraws the proposed changes it offered in its Opening Comments.[22] Please note, however, that owners revise their rates annually and attachers need to retain the right to verify these changing rates. Therefore, Verizon urges the Commission to clarify that the discovery rule in OAR 860-028-0070(4)(e)(B) allows an attacher to request and receive data to verify rates in all rate

[22] Although, as indicated by OCTA's counsel, a reference to ORS 757.282 should be added to subsection 1.

disputes (not just those involving new or amended contracts). Finally, Verizon supports the 30-day response periods provided in subsections 4(e)(B) and 5 because for such disputes, time is of the essence in order for occupants to make proper attachments to serve their customers in a timely manner.

15. Rule Number: 860-028-0080 – Costs of Hearing

Verizon did not address this rule in its Opening Comments, but does so here to endorse the proposal made by the Administrative Law Judge in the workshops for an additional factor to allocate the costs of a hearing. The proposal would allocate such costs "Where the party unreasonably burdened the record or unreasonably delayed the proceedings." The workshop participants, including Verizon, also agreed that hearing costs should not be allocated based on party status (complainant, respondent or intervenor).

16. Rule Number: 860-028-0100 – New or Modified Attachments

Verizon offers the following comments on subsections (3), (4)(d) and (5) of this proposed rule.

Subsection 860-028-0100(3) - Confirmation receipt. Verizon opposes the proposed requirement that an owner provide a confirmation receipt within 10 business days. Such a requirement is unnecessary and could become extremely burdensome for pole owners, many of which receive over 100 notifications a day (including other types of notifications, such as those addressing permitting, transferring, rearrangement requests, and safety violations). Verizon believes that most pole owners and occupants in Oregon utilize the National Joint Use Notification System ("NJUNS") electronic system.

With prevalent use of the NJUNS, this proposed rule appears designed to remedy a non-existent problem.

Subsection 860-028-0100(4)(d) – Permit application deemed approved. Verizon supports this subsection as originally drafted in the proposed rules attached to the June 15 Notice. The following language, proposed by Staff in its November 8 Proposals, should not be adopted:

> If the owner does not provide the applicant with notice that the application is approved, approved with conditions, or denied within 45 days from its receipt, the applicant may begin installation.

This amended language would remove the automatic approval for an application in the event an owner did not provide the applicant with notice that the application was approved or denied within 30 business days from the owner's receipt of the application. Thus, under the revised language proposed by Staff, any commencement of construction for a technically unapproved application could cause the occupant to risk commencing construction without a permit. Without such a permit, the occupant could be accused of constructing an unauthorized or bootleg attachment subject to sanctions under the Oregon pole attachment rules. Such a situation would obviously be unfair and surely was not intended, but the proposed language could have such an effect. Accordingly, Verizon proposes that Staff's original proposal – not its November 8 Proposal – be adopted.

Subsection 860-028-0100(5) – Approval of Make ready estimate. Verizon suggests that this proposed rule be modified as follows:

> If the owner approves an application that requires make ready work, **AND THE APPLICANT APPROVES THE ESTIMATE OF COSTS FOR SUCH MAKE READY WORK, THEN** the owner will perform such work at the applicant's expense. This work will be completed as quickly and inexpensively as is reasonably possible consistent with applicable legal, safety, and reliability requirements. Where this work requires more

than 30 business days to complete, the parties ~~must~~**WILL** negotiate a mutually satisfactory longer time frame to complete the make ready work.

The additional language is necessary to reflect that the applicant needs to approve any proposed make ready costs prior to performance of the work. Such a requirement would minimize future disputes by ensuring that work parameters are agreed upon in advance. It is Verizon's understanding from the workshops that this proposed additional language was acceptable to the parties in attendance.

17. Rule Number: 860-028-0110 – Rental Rates and Charges

Verizon generally supports this rule with certain modifications stated below. As advocated by Verizon, Charter[23] and the OCTA,[24] the Commission should rely expressly on the FCC formula for establishment of pole costs and carrying charges, as proposed in subsection 2 of this rule. The formula relies on publicly available data derived from ARMIS data filed by local telecommunications companies and from data reported on FERC Form 1, the annual report form for major electric utilities. The use of publicly available data ensures that the basis for the costs and charges are transparent and verifiable by occupants. Occupants can then independently verify whether they believe the rates satisfy ORS § 757.282, which prescribes the criteria the Commission must use in setting just and reasonable rates.[25]

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[23] *See* Charter's First Round Comments dated September 28, 2006, pp. 33-36.

[24] *See* OCTA Comments dated September 28, 2006, pp. 13-20.

[25] ORS § 757.282 provides in pertinent part: A just and reasonable rate shall ensure the public utility, telecommunications utility or consumer-owned utility the recovery from the licensee of not less than all the additional costs of providing and maintaining pole attachment space for the licensee nor more than the actual capital and operating expenses, including just compensation, of the public utility, telecommunications utility or consumer-owned utility attributable to that portion of the pole, duct or conduit used for the pole attachment, including a share of the required support and clearance space in proportion to the space used for pole attachment above minimum attachment grade level, as compared to all other uses made of the subject facilities, and uses that remain available to the owner or owners of the subject facilities.

Use of the FCC formula is appropriate because it mirrors the Oregon standard for determining just, fair and reasonable rates, and thus presents an ideal situation to implement the Oregon Legislature's stated preference for adopting rules that correspond with equivalent federal laws (*see* ORS § 183.332). Moreover, use of the FCC formula is predictable and thus will avoid future disputes as to whether rental rates are just, fair and reasonable. It also will be easy to implement, as many of the pole occupants in this proceeding are national companies that regularly use the FCC formula in other states and at the FCC.

In light of the benefits of using the FCC formula to set rates, Verizon opposes the Staff's proposed omission (in the November 8 Proposal) of a direct reference in the rules to the FCC formula. Staff's stated expectations about how the Commission may make use of the FCC formula fall short of a requirement that owners use such a formula to set rates, and thus are insufficient.

18. Rule Number: 860-028-0110(3)

This proposed subsection should be deleted. All costs incurred by the owner are either included in the components of the annual pole attachment rental rate or in the recovery of make ready work charges. Verizon's recommended revisions to the definition of "make ready work" include all allowable direct charges in a manner consistent with the Commission's Order 05-492 in Docket UM 1087. Moreover, Subsection 2 of this rule already specifically describes how pole attachment rental rates are to be set, and thus this subsection would add nothing but confusion as to how the rates should be set.

19. Rule Number: 860-028-0110(4)

Verizon opposes Staff's proposed deletion of the last sentence in this subsection. That sentence should remain because it provides clarity as to what attachments could be placed in authorized attachment space, and considered for rental rate determination purposes. It is also consistent with the definition of "authorized attachment space," which includes "one or more" attachments. Accordingly, the only changes that should be made to this rule are administrative, changing "licensee" references to "occupant":

> An additional or modified attachment by the ~~licensee~~ **OCCUPANT** that meets the Commission safety rules and is placed within the ~~licensee's~~ **OCCUPANT'S** existing authorized attachment 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, guy wires, vertical risers, or cable over-lashings.

20. Rule Number: 860-028-0110(6)

Verizon proposes that the following language be inserted at the beginning of this rule to clarify that all costs incurred by the owner that are included in the annual pole attachment rental rate not be included in the recovery of make-ready work charges:[26]

> (6) **AN OWNER MAY NOT ASSESS A FEE OR CHARGE TO AN OCCUPANT IN ADDITION TO THE ANNUAL POLE ATTACHMENT RATE FOR ANY COST INCLUDED IN THE CALCULATION OF ITS POLE ATTACHMENT RENTAL RATE.** The owner must be able to demonstrate that charges under sections ~~(3) and~~ (5) of this rule have been excluded from the rental rate calculation.

This clarification is required to avoid double recovery of costs by pole owners, all of whom agreed at the workshops that such double recovery would be inappropriate. This common sense addition is supported by the Commission's Order 05-492 entered in Case UM 1087 by ensuring that the costs are properly allocated between the annual rental rate

[26] Verizon also proposes to delete the reference to subsection (3), which Verizon proposes elsewhere in this document to be deleted.

and make ready work as described on pp. 15 and 16 of that Order, thereby, precluding double recovery of such costs which already included in the annual rental rate.

21. Rule Number: 860-028-0115 – Duties of Structure Owners

Verizon proposes that this rule be modified as follows:[27]

Duties of Structure Owners

(1) An owner ~~must~~ **WILL** install, maintain, and make available to occupants its joint-use construction standards and practices for attachments to its poles, towers, and for joint space in conduits. Standards for attachment ~~must~~ **WILL** apply uniformly to all operators, including the owner **AND ITS AFFILIATES.**

(2) An owner ~~must~~ **WILL** establish and maintain mutually agreeable protocols for communications between the owner and occupants.

(3) An owner ~~must~~ **WILL** maintain its facilities in compliance with Commission Safety Rules for occupants.

~~(a)~~(4) An owner ~~must~~ **WILL** promptly respond with a reasonable plan of correction for any violation of that Commission Safety Rule if notified in writing of a violation requested by an occupant.

(5) OWNERS AND OPERATORS SHALL NOT PLACE POLES IN OR NEAR AN EXISTING POLE OR POLE LINE OF ANOTHER COMPANY.

6) A Pole owner ~~must~~ WILL respond to a pole occupant's notice request for assistance to make corrections within 45 days.

(7) A Pole owners will ensure the accuracy of inspection data prior to transmitting information to a pole occupant.

(a) "ACCURACY" MEANS THAT THE RESULTS OF THE INSPECTION AND THE UNDERLYING DATA SUPPORTING THE INSPECTION ARE AT LEAST 95 PERCENT CORRECT.

(b) IF THE INSPECTION DOES NOT MEET THE 95 PERCENT ACCURACY REQUIREMENT, THE OWNER CANNOT ASSESS ANY OF THE COSTS OF THE INSPECTION

[27] Verizon's proposed changes to this rule include recommendations of nomenclature, and of an administrative nature. For example, Verizon substitutes use of the word "will" for "must" based on advice from the Staff Attorney. Verizon also changed what was marked under subsection (3) as subsection "(a)" to "(4)."

ON ANY OCCUPANT OR ITS RENTAL RATE AND CANNOT IMPOSE ANY SANCTIONS FOR ANY VIOLATIONS ALLEGED TO HAVE BEEN DISCOVERED IN AN INSPECTION THAT IS LASS THAN 95 PERCENT CORRECT.

Verizon's proposed new subsection 5 was addressed previously by Verizon in its Opening Comments under Rule 860-028-0060, but should instead be included under this rule since it addresses duties of pole owners. At the insistence of certain electric company pole owners, Verizon repeatedly has been directed to transfer its communications lines from Verizon-owned poles in the following situations:

- To a new pole placed inter-span in Verizon's pole line and
- To a new "double" pole placed within feet of Verizon's existing pole

These demands are often coupled with notices that Verizon is allegedly in violation of a contract, permit or safety rules. As discussed extensively in its Opening Comments, however, Verizon has found that the "violation" was created entirely by the placement of new poles by the pole owners. To avoid this problem of invented violations, Verizon's proposed language would prohibit pole placement in or near an existing pole or pole line of another company.

Subsection (6) and (7) were added by Staff in its November 8 Proposals. Verizon agrees with the need for the proposed subsections, but does not believe they go far enough to ensure accuracy. The most prudent way to ensure accuracy is through establishment of an objective standard. To that end, Verizon proposes that an accuracy rate of 95 percent be satisfied before an owner can assess inspection, audit or program costs on a pole occupant. A number of statements have been made in this docket to the effect that it is not unusual for owners' inspections to be anywhere from 40 to 70 percent inaccurate when occupants are assessed inspection costs and sanctions. These errors

include identification of the wrong pole (which, in some cases, is not even owned by the pole owner) or wrong occupant, as well as inaccurate claims that an attachment is unauthorized or violates safety standards. Verizon, as a pole owner, understands that a small number of errors are inevitable but believes that a 95% standard is appropriate.

Suggestions at the workshops by other pole owners supporting *de minimis* accuracy standards involved rates so low (e.g., 20 percent) that they would have no effect on improving accuracy. Pole owner aversion to accuracy standards is difficult to understand from the vantage point of an occupant, who must incur significant inspection costs and could face sanctions for every violation alleged by a pole owner. It is patently unfair to tacitly let owners perform inspections that are horribly inaccurate and then allow them to collect the costs of such inaccurate inspections and, worse yet, sanctions from occupants.

22. Rule 860-028-0310(6)

This subsection should be deleted for the same reasons discussed in Verizon's comments on proposed rule 860-028-0110(3). As stated above, all costs incurred by the owner are either included in the components of the annual rental rate or in the recovery of make ready work charges (which Verizon proposes to clarify include all allowable direct charges).

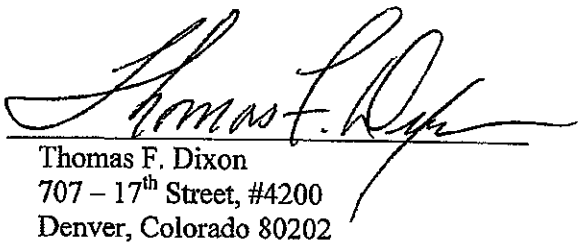
CONCLUSION

Verizon offers these specific comments with the aim of ensuring that rules enacted by the Commission are clearly and precisely written to result in just, fair and reasonable rates, terms and conditions for pole attachments. With Verizon's suggestions, such rules can provide appropriate direction to minimize future disputes in the industry,

and to ensure that poles and pole attachments are constructed, operated, and maintained in a safe and efficient manner.

Dated: November 17, 2006

VERIZON NORTHWEST INC.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of Verizon's Northwest Inc.'s Second Round of Comments in Docket AR 506 Phase II/AR 510, by US Mail and electronic mail, to the parties on the attached service list.

Dated this 17th day of November, 2006

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