



**Portland General Electric Company**

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November 17, 2006

***Via Electronic Filing and U.S. Mail***

Oregon Public Utility Commission  
Attention: Filing Center  
PO Box 2148  
Salem OR 97308-2148

**Re: AR 510**

Attention Filing Center:

Enclosed for filing in the captioned dockets are an original and two copies of:

- **FINAL COMMENTS OF PORTLAND GENERAL ELECTRIC COMPANY**

This document is being filed by electronic mail with the Filing Center.

An extra copy of this cover letter is enclosed. Please date stamp the extra copy and return it to me in the envelope provided.

Thank you in advance for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Barbara W. Halle", written in a cursive style.

**BARBARA W. HALLE**

BWH:jbf  
Enclosure

cc: Service List – AR 510



**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**AR 506/AR 510**

In the Matter of ) **FINAL COMMENTS OF**  
Rulemaking to Amend and Adopt Permanent ) **PORTLAND GENERAL ELECTRIC**  
Rules in OAR 860, Divisions 024 and 028 ) **COMPANY**  
Regarding Pole Attachment Use and Safety. )

**INTRODUCTION**

Portland General Electric (“PGE”) appreciates the opportunity to file final comments in Phase II of this rulemaking. Our comments are divided into two sections. The first is a discussion of some selected issues raised in this docket to which PGE hopes the Commission will pay particular attention, or on which the Administrative Law Judge has requested that the parties specifically comment. The second is a rule-by-rule list that contains PGE’s recommendations for final language to be adopted by the Commission. PGE has also joined in a separate filing, made by itself, PacifiCorp and Idaho Power Company, that urges the Commission to address issues related to wireless attachments in a separate docket.

This has been a long process, and PGE appreciates the time taken and effort made by many parties, in particular the Board members of the Oregon Joint Use Association (“OJUA”), to achieve the difficult task of sifting through the many issues and concerns and coming up with a reasonable set of final rules. PGE hopes that the Administrative Law Judge, and the Commission, will carefully consider its comments filed in this docket as the final rules are drafted.

## DISCUSSION OF SPECIFIC ISSUES

### I. POLES VS. TOWERS

One of the questions that have been raised in this docket is whether the rules to be adopted will apply to attachments on utility transmission towers as well as utility poles. In order to answer this question, one must first look to the statutory language that these rules are intended to implement.

ORS 757.270(1), the statutory definition of “attachment” states:

"Attachment" means any 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 way, duct, conduit, manhole or handhold 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. (emphasis supplied.)

As the word “tower” is never mentioned in the statute at all, and since the rules of statutory construction dictate that one must first look to the language in the statute itself to determine legislative intent [See: *Portland General Electric Company vs. Bureau of Labor and Industries*, 859 P.2d 1143 (1993)], one must interpret the words in bold above in order to determine whether towers are included. In other words, the question is: are utility transmission towers “other similar facilities”? The most reasonable answer to that question is “no.”

Utility transmission towers, as referred to in this discussion, are physically dissimilar from poles. They are tubular steel or lattice structures, many with at least a 400 square foot footprint, unlike wood poles. Steel transmission towers are generally between 80-120 feet above ground, as opposed to utility poles, that are typically 40-75 feet above the ground. They most often carry transmission lines only (in most cases, 115 kV and above), with no distribution underbuild.

Where permitted by the utility owner, attachments to transmission towers are never made according to a cookie cutter process. Every transmission tower must be analyzed for load, both wind and ice, reliability concerns and other forces in its specific location in order to determine if an attachment is feasible and, if so, where the attachment could be located. This is complex and time-consuming. Consideration must be given to issues like grounding, radio frequency interference, system reliability and worker safety. Standard response times, like the ones being sought for the granting of permit applications and make ready work in this docket, simply could not apply.

Moreover, transmission towers are generally not located in the same places that utility poles are located. They are typically found on private rights-of-way, not public, and the basis for the utility's right to place its transmission towers in those locations is a private easement or other contractual right specific to that utility and that location (or an extended series of locations). It is highly unlikely that the rights granted to the utility include granting permission for third parties to use the space occupied by the transmission tower. And, it should be noted, the rights needed include not only the right to attach to the transmission tower, but also the right to enter the land with trucks or other vehicles carrying equipment for installation, maintenance, and repair of the equipment whose attachment is sought. The Commission does not have the authority to alter these existing contracts, or to force private parties to enter into different ones.

Perhaps most importantly, the required level of reliability for the power lines is different between poles and transmission towers. Utilities make commitments to other utilities on reliability levels, including to the local regional transmission organization. If the utility is going to take a line on a transmission tower out of service, it generally must be scheduled 45 days in advance. There are also certain times of the year where any planned outage is difficult to

arrange. Since in most cases the transmission lines must be taken out of service when an attachment is installed or adjusted or maintained or removed, one can see how mandating access to such transmission towers could cause regional power reliability problems that the Legislature probably did not intend, and certainly did not desire, to cause.

Finally, had the Legislature intended to include towers in its “laundry list” of facilities to which the attachment law applies, it certainly did not lack the information necessary to do so when the statute was passed (1979), or at the time of later enactments (1989, 1999). PGE had many transmission towers in place in 1979. A review of Oregon law reveals that the Legislature has, in fact, included “towers” specifically in other legislation. Examples of this include:

**ORS 215.283 – Uses permitted in EFUs**

(1)(d) - Utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or **transmission towers** over 200 feet in height.

**ORS 221.470 – Removal of structures on expiration of grant or franchise**

(1) – “All property and materials (including poles, posts, **towers**,....)”

**ORS 772.210 – Construction of service facilities, right of entry and condemnation of lands**

(1)(b) – “Condemn such lands not exceeding 100 feet in width for its lines (including poles, **towers**, wires, etc...)”

For all of these reasons, the appropriate conclusion should be that transmission towers are not “similar facilities” within the meaning of the statute, and therefore the rules in Division 28 do not apply to any attachments made, or desired to be made, on transmission towers. Utilities should be free to decide whether they can legally, or should from a safety, reliability or engineering perspective, grant any access to their transmission towers and, if so, under what terms and conditions.<sup>1</sup> The statute does not mandate otherwise.

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<sup>1</sup> PGE has granted access to certain transmission towers in the past, and expects to continue to evaluate and grant such requests on a case by case basis.

## II. WIRELESS ATTACHMENTS

An important question to be resolved as this docket proceeds to a final order is whether the pole attachment statutes, ORS 757.270 et seq., apply to attachments made by wireless carriers, including providers of telecommunications services and of information services. This is important because the mandate for these rules comes from the statutes; if the statutes cannot be read to apply to wireless attachments, then the rules promulgated under them should not apply to wireless attachments either.

While the definition of “attachment” in ORS 757.270(1) applies, by its terms, to “wire or cable,” and much of the equipment used by the wireless carriers is neither wire nor cable, the additional language “any related device, apparatus, or auxiliary equipment” is broad enough to encompass the antennas and other equipment they are primarily attaching to the poles. The fact is that the industry itself, and the technology it employs, did not exist when the original statute was passed, but this should not prevent the Commission from taking a modern view of the language based on the need for a regulatory scheme that addresses access to utility poles and conduits, as well as rates, terms and conditions, in a comprehensive, thorough manner.

In addition, the sorts of services provided by wireless carriers that have been described in this docket are generally the same sorts of services that are being provided by the other entities that qualify as “licensees” under the statutory language. ORS 757.270(3). In order to operate, they must have been granted certificates to provide telecommunications services in the state of Oregon by the Commission. One can also construe that the wireless carriers have been “authorized to construct attachments upon, along, under or across the public ways” in that they have been granted permission to operate their systems in public rights of way by governmental entities. Finally, as the state of Oregon has certified to the FCC that it regulates the rates, terms

and conditions of pole attachments, the Commission should view its jurisdiction broadly to avoid questions about the meaning and extent of the self-certification.<sup>2</sup>

However, the Commission is not required, by statute or otherwise, to apply all of these rules to attachments made by wireless carriers, particularly if the attachments are being made outside of the communications space and in close proximity to high voltage power lines. As has been noted by Staff, these wireless attachments, both from the perspective of location and of types of equipment to be attached, present some very different and varied issues that have not been addressed in this docket so far. To allow such attachments to be covered by the rules, in anything like the form proposed by Staff, the OJUA, or other, non-wireless participants, would likely lead to confusion and litigation in front of the Commission. Moreover, PGE believes it would be irresponsible to ignore the many safety and other concerns raised by Staff in an effort to finally bring this docket to a close by the original deadline. To achieve the statutory mandate in section (1) of ORS 757.282, only a thorough development and discussion of all of the issues presented by wireless attachments will do.<sup>3</sup>

Finally, the Commission should not be misled by arguments that failure to apply these rules to wireless carriers would run afoul of the prohibition against unjust discrimination under ORS 757.325. What is prohibited by the statute is “undue or unreasonable” prejudice or disadvantage against any particular person, or an undue or unreasonable preference or advantage to any particular person. ORS 757.325(1). A failure of a utility to apply a rule to a person where the Commission has expressly reserved time for further rulemaking and evaluation with regard to such persons is anything but “undue or unreasonable” – it is completely reasonable and

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<sup>2</sup> Of course, jurisdiction of the Commission regarding those aspects of pole attachments related to safety can be separately derived from ORS 757.035.

<sup>3</sup> Please see the Joint Comments of PGE, PacifiCorp and Idaho Power for more discussion on this subject.

appropriate. Further, the charges, terms and conditions applied by pole owners to such pole occupants are presumed just and reasonable where set by private agreement, as they currently are. ORS 757.285.<sup>4</sup> ORS 757.020, therefore, should not be a concern either.

While PGE does not recommend such a decision, should the Commission decide to apply any of the rules proposed in this docket to wireless carriers, particularly with regard to the rental rates under OAR 860-028-0110, it should limit such application to attachments made in the communications space. This is a type of location of attachment that Staff originally intended to cover, the issues related to such attachments have at least been thoroughly discussed and aired in AR 506 and AR 510.

### III. RENTAL RATE CALCULATION

#### A. Double Counting Costs.

As a preliminary matter, with regard to OJUA's proposed language for OAR 860-025-0020 and 860-028-0110 in general, and PGE's rate calculation methodology in particular, there is no basis for assertions made that rental rates would or do involve double counting of costs. In PGE's case, all components within the proposed rate include costs from specific, distinct FERC accounts. Under the proposed rule, as in the past, the following will be true: (1) PGE's costs will be recorded individually to these FERC accounts and not applied to more than one FERC account. (2) Any administrative costs that PGE applies to its pole attachment rate will be recorded in FERC accounts other than those included in the base calculation, as PGE cannot charge such costs simultaneously to two separate FERC accounts. (3) Separate billings for all incremental costs identified in 860-028-0110(3) (e.g., for permit application processing, special

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<sup>4</sup> This presumption could only be defeated where a complaint had been filed in accordance with ORS 757.285, and to date no wireless carrier has done so against PGE, or to any other pole owner in Oregon, to the best of PGE's knowledge.



inspections, preconstruction activity, post construction inspection, make ready work, etc.) will be applied to the FERC account in which the original charges were incurred and will directly offset those costs. (4) To verify the accuracy of PGE's books and records, they are audited each year by independent external auditors and the OPUC Staff also reviews significant numbers of PGE costs and transaction listings during audits and rate cases. (5) All PGE billings for pole attachment revenues will be recorded in FERC account 454, Rent from Electric Property. These rents are applied as an offset to PGE's revenue requirement in all general rate cases. Consequently, the rental revenue PGE receives from pole attachments reduces the retail rates PGE charges to its electric utility customers, and not double recovered, as has been alleged.

B. Usable Space.

PGE supports the OJUA's proposed language in 860-028-0110: "The pole attachment rental rate per foot is computed by multiplying the pole cost by the carrying charge and then dividing the resultant product by the usable space per pole." The Commission should recognize, however, that by formally adopting this rule, the pole attachment rate effectively represents a subsidy from pole owners (i.e., primarily electric utility customers) to pole attaching entities (i.e., primarily telecom and cable customers). This occurs because the calculation is essentially the FCC cable rate that unitizes the pole cost by usable space. As usable space increases, the rental rate decreases for individual pole attachments. Consequently, if the Commission chooses to adopt the proposed rate formula, it should follow Staff's recommendation and not consider increasing the usable space in these rules. Ultimately, this formula has the effect of attributing only the portion of the pole used for the attachment (as a fraction of usable space) to determine the attachment rate and attributes the remainder, and vast majority of the pole, to the pole owner and its customers. An alternative rate (as an example, the FCC telecom rate) would reflect the

fact that the entire pole supports all attachments, and more of the pole cost, both the usable and the unusable portions that benefit all occupants, would be applied more equitably to all attachments.

C. Inflation.

PGE believes that an “inflation” rate adjustment factor is appropriate for use in determining the pole attachment rate because historical costs are used to calculate rental rates for future years. We disagree with OJUA that the “inflation” factor should apply only to the carrying charge and we disagree with the OPUC Staff’s comments that there should be no adjustment for inflation in carrying charges or rates.

If pole costs and O&M costs are increasing, as they historically have been for PGE, then precluding an “inflation” factor would mean that PGE is lagging in the recovery of its current costs in the pole attachment rate. For example, pole attachment rates for 2007 cannot use 2007 costs because they are as yet unknown. Also, PGE cannot use 2006 costs for 2007 rates because the 2006 books will not be closed until sometime in the first quarter of 2007 (i.e., the 2006 Form 10-K will not be issued until March of 2007 and FERC Form 1 for 2006 will not be issued until April of 2007). Consequently, 2005 costs are the latest costs available with which to calculate 2007 rates. From 2005 through 2007, however, new poles will: 1) be added to the system for new service areas, and 2) replace old poles that are retired due to age or damage. In both cases, recent history supports the conclusion that the new poles will cost significantly more than either the depreciated net book value of average existing poles or the net book value of old poles to be retired. In addition, although some components of the carrying charge decline or remain flat from year to year, overall, PGE’s carrying charge has been increasing over time.

ORS 757.282 defines the maximum “just and reasonable rate” as “not more than the

actual capital and operating expenses, including just compensation,” of the pole owner. Staff has suggested that setting a rate based on estimated increases in costs or net plant would not comply with the statute. (2<sup>nd</sup> Round Comments of PUC Staff in AR 506, page 6 of 7). On the contrary, PGE’s experience shows that if an “inflation” factor is not permitted by the rule, pole owners are likely to be precluded from collecting their “actual capital and operating expenses” for the year that the rental rates apply. This is true because there is a minimum of two years that transpire from the year actual cost information is available until such costs are recovered in rental rates, and costs typically increase over that time. If an “inflation” factor is authorized, moreover, it should apply to the entire pole attachment rental rate and not just the carrying charge, in order to capture all of the underlying costs that have increased historically over time. PGE has suggested language to be added to the definitions of “Pole Cost” and “Carrying Charge” to appropriately deal with this issue, below.

D. Conduit Rental Rate Component.

As PGE has submitted in comments in the past, and restates for the record in these Final Comments, there needs to be an expansion of what is a permissible basis for rental rate calculation in OAR 860-028-0310 if a pole owner does not keep data in the form of “total length of conduit in the system”. (OAR-860-028-0020, definition of “Net linear cost of conduit.”) While it may be reasonable to set out a methodology for establishing a just and reasonable rate for conduit attachments per the rule, there should be no inference that an owner that does not keep records that allow a calculation to be made in that precise manner must invest in expense tracking systems or labor-intensive work to establish such records. It should be clear from the language in the rule that alternative methodologies may be used and that there is no presumption that such alternative methodologies would not lead to just and reasonable rates. PGE has

proposed such language in its comments, below.

### **PROPOSED LANGUAGE FOR DIVISION 28 RULES**

Below is a compilation of PGE's comments to the proposed rules as modified and filed by the Oregon Joint Use Association ("OJUA") on November 17, 2006:

#### **860-028-0020**

PGE supports OJUA's version except for the following:

(3) "Carrying Charge" – Delete the words "adjusted for inflation" and add the following sentence at the end of the definition: "The Carrying Charge may be adjusted for inflation if historical costs over a year old are used to calculate future rates."

(7.1) "Day" – delete the word "a."

(19) "Permit" – delete the words "or invoice" and add at the end of the sentence "or, if an owner has already begun charging rent for the attachments prior to issuing such written or electronic record, the invoice for such rental charges."

(21) "Pole" – PGE supports Staff's addition of a definition for "Pole" and supports Staff's language for such definition. (using Staff's numbering)

(22) "Pole cost" – (using Staff's numbering) PGE supports Staff's language for this definition, with the following sentence added after the first sentence: "The Pole cost may be adjusted for inflation if historical costs over a year old are used to calculate future rates."

(27) "Support equipment" – the word "licensee" should be changed to "occupant."

(33) "Usable space" – PGE supports moving this definition to 860-028-0110, as Staff has proposed, and supports Staff's language as well.

#### **860-028-0050**

PGE supports OJUA's version except for the following:

(2) should be eliminated (see changes to 860-028-0120(4), (5) and (6), below, for treatment of these issues).

(3) should be moved to 860-028-0115(9).

#### **860-028-0060**

PGE does not support the addition of the words "or agreements" or "and agreements" to the

earlier proposed rule because they are redundant and unnecessary.

**860-028-0070**

PGE supports the OJUA version of the rule.

**860-028-0080**

PGE supports the OJUA version except that the following section should be added:

(5) This rule does not apply to owners or licensees to which ORS 756.310 applies.

**860-028-0100**

PGE supports OJUA's version of the rule except for the following:

(3)(d) The first sentence from Staff's version of (3)(d) should be added to the end of OJUA's version: "The owner may deny access for the following reasons: insufficient capacity, safety, reliability, and generally applicable engineering purposes."

(4) The third sentence should read: "Where this work requires more than 45 calendar days to complete, the parties must negotiate a mutually acceptable longer period to complete the make ready work."

(5) The first sentence should read: "If an owner cannot meet the time frames established by this rule, and the parties cannot agree on a longer period of time, application, preconstruction activity and make ready work may be performed by a mutually acceptable third party."

**860-028-0110**

PGE supports OJUA's version of the rule except for the following:

(4) The second sentence should read: "Costs associated with attachments to support equipment and permit applications, if not recovered in the annual rent, shall be recovered separately based on actual costs, including administrative costs."

**860-028-0115**

PGE supports OJUA's version of the rule except for the following:

(5) The second sentence should read: "This duty includes compliance with OAR 860-024-0012(1) and 0016."

(7) the word "ensure" should be changed to "verify."

(9) this section should be added – formerly section (3) in 860-028-0050.

### **860-028-0120**

PGE supports OJUA's version of the rule, except for the following:

(4) The first sentence should read, in its entirety, as follows: "Pole occupants shall immediately correct violations that cause an imminent danger to life or property." The last two sentences in section (4) should have the following language added to the end of each: "and any fines, fees, damages or other costs the pole occupant's attachments cause the pole owner to incur."

(5) The first sentence should read as follows: Except where OAR 860-028-0120(4) or (6) applies, an occupant shall respond to a pole owner's notification of violation within 180 days." The second sentence should read as follows: "This duty includes, but is not limited to, response to a notification that contact between the occupant's facilities and vegetation poses a significant risk to the safety of workers or the public, or damage to property including the structures of the pole owner, where the occupant receiving the notice is an operator of communications facilities." The last two sentences in section (5) should have the following language added to the end of each: "and any fines, fees, damages or other costs the pole occupant's attachments cause the pole owner to incur."

(5)(a) After "60 days" insert the words "in compliance with OAR 860-028-0170."

(6)(a) The following words should be added after the word "section": "and any fines, fees, damages or other costs the pole occupant's attachments cause the pole owner to incur."

(7) This section should be added – formerly section (3) in 860-028-0050.

### **860-028-0130**

PGE supports OJUA's version of the rule, except for the following:

(2)(b) – the word "to" should be inserted after the word "efforts."

### **860-028-0140**

PGE supports OJUA's version of the rule, except for the following:

(1) This section should read: "A pole owner may impose a sanction on a pole occupant that is in violation of OAR 860-028-120(1)(b), except as provided in OAR 860-028-0120(3)."

### **860-028-0150**

PGE supports OJUA's version of the rule, except for the following:

(2) The first sentence of this section should read: "If a pole occupant is in violation of OAR 860-028-0120(5) or (6), a pole owner may impose a charge on the pole occupant in

addition to any sanctions imposed under this rule and any costs recoverable under OAR 860-028-0120(5) and (6).”

**860-028-0160, 860-028-0170, 860-028-0180, 860-028-0190, 860-028-0195, 860-028-0200**

PGE supports OJUA’s version of the rule.

**860-028-0210**

PGE suggests that the time frames for (a) and (b) be changed to 30 days. Otherwise, PGE support the rule as currently written.

**860-028-0220, 860-028-0230**

PGE supports the rule as currently written.

**860-028-0240**

PGE supports OJUA’s version of the rule (date change).

**860-028-0310**

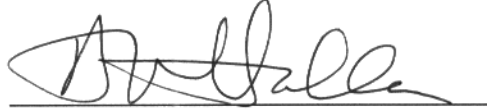
PGE supports OJUA’s version of the rule, except for the following:

(2) should read as follows: “A conduit rental rate is computed by multiplying the percentage of conduit capacity occupied by the net linear cost of conduit and then multiplying that product by the carrying charge. In the event a utility does not have all the information necessary to calculate the conduit rental rate based on this formula, the utility may propose a substitute formula. A permissible substitute formula consists of multiplying the percentage of conduit capacity occupied times the marginal cost of installing conduit and associated vaults per linear foot (reduced by the net to gross ratio of conduit plant investment) and then multiplying that product by the carrying charge.”

(5) should read as follows: “The conduit owner must give a licensee 12 months’ notice of its need to occupy licensed conduit and the licensee must take one of the following four actions listed, subject to approval by the owner:” Subsections (a) through (d) to remain as already proposed.

DATED this 17th day of November 2006.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Barbara W. Halle', written over a horizontal line.

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## CERTIFICATE OF SERVICE

I certify that I have caused to be served the foregoing **FINAL COMMENTS OF PORTLAND GENERAL ELECTRIC COMPANY** in OPUC Docket No AR 506 and AR 510, by electronic mail, and for the parties who have not waived paper service, by First Class US Mail, postage prepaid and properly addressed, upon each party on the attached service list, pursuant to Oregon Administrative Rule 860-013-0070.

DATED this 17<sup>th</sup> day of November 2006.



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Barbara W. Halle

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