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September 28, 2006

VIA Electronic Mail & U.S. Mail

Public Utility Commission of Oregon
Attn: Filing Center
550 Capitol St NE #215
PO Box 2148
Salem OR 97308-2148

Re: AR 506; Opening Comments of CLPUD & NWCPUD

Enclosed for filing is an original of Central Lincoln Peoples' Utility District's and Northern Wasco County Peoples' Utility District's opening comments in Phase II (Div. 28) this docket. A hard copy of these comments will follow in the U.S. Mail.

Please call me if you have any questions.

Very truly yours,

/s/ Susan K. Ackerman

Susan K. Ackerman
Attorney for CLPUD & NWCPUD

Enclosures

Certificate of Service

I certify that I have this day served the foregoing document upon all parties of record in AR 506 and AR 510 by delivering a copy in person or by mailing a copy properly addressed with first class postage prepaid, or by electronic mail pursuant to OAR 860-13-0070, to all parties or attorneys of parties listed on the Commission's service list in this matter.

Dated this 28th day of September, 2006.

/s/ Susan K. Ackerman
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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 506

In the Matter of	)
	)
Rulemaking to Amend and Adopt Permanent	)
Rules in OAR 860, Divisions 024 and 028,	)
Regarding Pole Attachment Use and Safety.	)
_____	)

OPENING COMMENTS OF CENTRAL LINCOLN PUD AND NORTHERN WASCO COUNTY PUD REGARDING DIVISION 28 RULES

Pursuant to the Administrative Law Judge's ruling of September 5, 2006, Central Lincoln Peoples' Utility District ("CLPUD") and Northern Wasco County Peoples' Utility District ("NWCPUD") (hereafter, collectively, "Utilities") submit these opening comments regarding the issues compiled by the ALJ in this Phase II of Docket AR 506.

I. BACKGROUND

CLPUD is a peoples' utility district with its principle operations on the Oregon coast in Lincoln County. Its headquarters are located in Newport, Oregon. NWCPUD is a peoples' utility district with its principle operations in northern Wasco County, Oregon. Its headquarters are located in The Dalles, Oregon. These utilities have been in operation since 1943 and 1949, respectively.

The Utilities' goals in this proceeding are to achieve rules regarding pole attachment contracts, terms, and rental rates that will minimize controversies, ease contract negotiations and enforcement, and result in efficient dispute resolution. Regarding rental rates, the Utilities seek rules that will enable pole owners to fully

recover the pole owner's costs of a non-owner's use of the poles, provide just compensation to the Utilities' customers for pole attachments, and avoid cross subsidies between and among pole users.

The Utilities address the issues raised in this docket in the order presented in the ALJ's September 5 Ruling, although not all issues listed by the ALJ are addressed. The Utilities take no position on these issues now, but reserve the right to respond to the comments of other parties.

In all instances in these comments, the Utilities begin with the Staff proposed rules in the June 15, 2006, Statement of Need and Notice of Proposed Rulemaking (hereafter, "Statement"). The Utilities show deleted text with strikethrough and added text with underlining.

II. DEFINITIONS (OAR 860-028-0020)

A. Carrying Charge

1. *860-028-0020(3): Should the carrying charge be adjusted for inflation?*

The Utilities note initially that the rules Staff proposes here are intended to be the default rates, terms, and conditions that would apply in the event of a complaint or in the event the parties cannot agree. *See*, Statement, OAR 860-028-0050(1)(a). Therefore, the question of whether carrying charges should be adjusted for inflation is a question that should be addressed in that context: the Commission is deciding upon the "default" terms because the parties cannot agree.

The Utilities support an annual adjustment to carrying charges to account for inflation. The inflation adjustment could be negotiated between parties or applied once a fair, just and reasonable rate has been established by the Commission pursuant to these

rules following a complaint. In that instance, adding an inflation adjustment to carrying charges would keep approved rental rates reasonably current over time. The Utilities support the rule proposed by the OJUA for this purpose; the OJUA rule would amend the Staff definition of carrying charges as follows:

> OAR 860-028-0020(3): "Carrying charge" means the costs incurred by the owner in owning and maintaining poles or conduits regardless of the presence of pole attachments or occupation of any portion of the conduits by licensees. The carrying charge is expressed as a percentage. The carrying charge is the sum of the percentages calculated for the following expense elements, using owner's data from the most recent calendar year <u>available</u>, <u>adjusted for inflation</u>, and that are publicly available to the greatest extent possible

2. ***860-028-0020(3): Should the carrying charge be based on FERC Account 364 plant only?*** Yes. The Utilities agree that carrying charges should be calculated based on investment in FERC Account 364 plant only. Account 364 is limited to distribution plant only, as follows:

> Account 364 Poles, towers and fixtures: This account shall include the cost installed of poles, towers, and appurtenant fixtures used for supporting overhead *distribution* conductors and service wires.

18 C.F.R. Ch. 1, Part 101, Rule 364 (emphasis added). Because the carrying charge would thus calculate costs based on investment in distribution plant only, rental rates under the Commission's rule could fairly apply only to use of a pole owner's distribution plant, which is customarily defined as plant to serve electric voltage levels up to and including 34.5 kV. To the extent that applicants seek to attach to an electric utility's transmission plant (voltages greater than 34.5 kV), such attachments would require a separate agreement with the pole owner and separate transmission rental rates. Limiting carrying charges to distribution plant only should be addressed by using a definition of

"utility pole" that includes distribution poles only. *See below,* OAR 860-028-0020(34), at pp. 9-10.

The Utilities also recommend that the Commission clarify that attachments to transmission plant would require separate agreements and rental rates by adding the following language to OAR 860-028-0060, as subsection (5):

> (5) Attachments to non-distribution utility plant may require a separate contract and rental rates from those stated in these Division 28 rules.

3. ***860-028-0020(3)(e)(A): For consumer-owned utilities, should "cost of money" be the average cost of capital rate?*** Oregon's statutes, ORS 757.279 and .282, govern Commission decisions fixing rates and charges for pole attachments, and provide standards for "just and reasonable" rates, including "just compensation," for attachments. *See,* ORS 757.282(1). The question here, probably one of first impression for Oregon, is what does "just compensation" mean for a consumer-owned utility?

When the parties negotiate terms and conditions of pole attachments, their negotiated terms are presumed reasonable by statute. ORS 757.285. In other words, if the consumer-owned utility and an occupant can negotiate mutually acceptable terms and rental rates governing attachments, then this rule would have no effect. As suggested by Staff, these rules are intended to provide "fallback" or "default" provisions that govern pole attachment terms and conditions and rental rates when there is no agreement between the utility and an occupant. *See,* Statement, OAR 860-028-0050(a)(this rule "governs access to utility poles, conduits, and support equipment by occupants in Oregon, and is intended to provide just and reasonable provisions when the parties are unable to agree on certain terms.") The Utilities support Staff's concept of having

placeholder rules because these rules should help guide negotiations and provide reasonable resolutions of disputes when the parties cannot agree.

When determining what is "just compensation" for a consumer-owned utility, the Commission should consider that consumer owned utilities in Oregon occasionally have no outstanding (or unpaid) debt. There are peoples' utility districts in Oregon that today have no outstanding debt on their books.[1] CLPUD is in a position to be without outstanding debt or with minimal debt compared to total plant investment in the near future. NWCPUD is also without substantial outstanding debt on distribution plant. Therefore, using a "proxy" cost of money for a consumer owned utility that is tied to the utility's "actual" cost of debt will not meet the statutory criteria that consumer owned utilities receive "just compensation" for providing access to their utility poles. The Commission needs a rule that will provide for just compensation to the consumer owned utility's customers regardless of whether the utility has actual outstanding debt on its books.

Staff proposes a default rule that weights the consumer owned utility's embedded cost of debt with the most recent cost of equity authorized by the Commission for an Oregon investor-owned utility, as follows:

> For a consumer-owned utility, the cost of money is equal to the weighted average of the utility's 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.

See, Statement, OAR 860-028-0020 (3)(e)(C).

The Utilities agree with the Staff proposal to use the most recent OPUC-awarded return on equity for an Oregon IOU. A recently calculated and awarded IOU equity

[1] The Utilities understand that Clatskanie PUD currently has no outstanding distribution plant debt.

return would be a reasonable proxy for a consumer owned utilities' cost of money. While consumer owned utilities do not have investors in the sense that IOUs do, the consumer owners of consumer-owned utilities provide capital to invest in the utility plant that is the subject of these pole attachments rules. An IOU's equity return is a reasonable proxy for the opportunity costs to the consumer owners of the capital provided by them to their utility, the peoples' utility district. Because the purpose of developing these default rules is to provide guidance when the pole owner and pole occupant cannot agree, and because a recently awarded cost of equity is a reasonable a proxy for a consumer owned utility's investments, the Utilities support the Staff proposed rule.

B. ***860-028-0020 (11): What does the term "make ready work" include?*** The Utilities support Staff's definition of "make ready work." *See*, Statement at OAR 860-028-0020(11). The Utilities also agree that costs of make ready work are non-recurring and therefore should not be included in carrying charges or otherwise in rental rates, but rather these costs should be assessed individually to applicants as make ready work is made necessary by an applicant's request or application, as suggested in Staff's proposed OAR 860-028-0110(3).

The Utilities note that some applicants request attachments or revisions to attachments more frequently than do other occupants. To embed "make ready work" costs into general rental rates applicable to all occupants unfairly shifts costs from those with many requests to those with few. The Staff approach is more consistent with cost causation principles and therefore is fair to all users of the utility pole.

C. ***860-028-0020 (17): In the definition of "Pattern," what does "frequent" mean? Is this definition to be applied prospectively only?*** The Utilities do not

recommend that Staff attempt to define the term "frequent." The term is inherently subjective, and adding definitions may overly complicate the Commission's rules while not achieving clarity. For example, in a situation where a pole user has hundreds of permits and hundreds of attachments to hundreds utility poles, a "handful" of violations of contracts or permits would not necessarily constitute "frequent" violations given the starting point for the comparison. On the other hand, a situation in which a pole user has few permits and few attachments, the very same "handful" of violations could be "frequent," as the number of violations would constitute a greater proportion of the occupant's pole attachment activity.

CLPUD and NWCPUD believe the proposed rules in this docket should be applied prospectively only. Any violations of permits or contracts that may have occurred prior to the adoption of new rules should not be included in any assessment of whether a pole occupant or pole owner has engaged in a course of behavior that falls within the definition of "pattern."

D. ***860-028-0020 (20): Is the term "pole cost" limited to distribution poles?***

The Utilities support basing carrying charges on distribution plant only, and limiting rental rates to the recovery of costs associated with distribution plant, thus excluding the costs of transmission plant from rental rates and carrying charges. Limiting the applicability of Division 28 rules to distribution plant can be made clear by defining "utility pole" to include distribution poles only, as suggested in Staff's proposed definition in OAR 860-028-0020(34). Also as stated in section II.A.2 of these comments, above, attachments to transmission (non-distribution) poles should therefore require a separate agreement and separate rental rates.

The Utilities recommend that the Commission clarify the definition of pole cost as follows:

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

E. ***860-028-0020(26): How should "special inspection" be defined?*** The Utilities support the definition of "special inspection" proposed by Staff. Inspections should be "special" when they are pursuant to the particular request of a licensee and moreover are separate from routine or periodic inspections that the utility pole owner would otherwise undertake. Costs of special inspections should be excluded from rental rates, as Staff proposes in OAR 860-028-0110(3).

F. ***860-028-0020(31): Is the definition of "threshold number of poles" adequate in the context of its use in OAR 860-028-0100(7)?*** The Utilities generally support Staff's proposed definition of "threshold number of poles," but propose a modification to Staff's proposed definition to include a rolling 30-day period of time in which the threshold number of poles is measured. The term "threshold number of poles" is important because it defines for the utility pole owner how much time is available to the utility to process a new or modified pole attachment application. In Staff's proposed OAR 860-028-0100, utility pole owners will be required to respond to an application for pole attachments within a set period of time (Staff proposes 30 days). If, however, the utility receives an application for attachments that exceeds the threshold number of poles,

then the utility pole owner may negotiate a time to respond to the applications that differs from the time otherwise indicated in the rule.

The Utilities believe that the Staff's definition of threshold number of poles would be too easily circumvented (and the rule defeated) if the definition is not bounded by a time period For example, an entity that desires to complete many more pole attachments than the threshold would permit could simply serially submit multiple attachments applications, each application for permits below the threshold, but cumulatively exceeding the threshold. It could be difficult for a utility to respond to attachments submitted in this manner, and therefore the Utilities propose the following revisions to Staff's proposed definition:

> (31) "Threshold number of poles" means 50 poles or one-tenth of one percent (0.10 percent) of the owner's poles, whichever is less, in any 30-calendar-day period of time.

G. ***860-028-0020(34): Should a definition of "utility pole" be added that limits poles to distribution poles only?*** The Utilities support adding a definition of "utility pole" for purposes of OAR 860-028-0050(1)(a), for purposes of calculating "pole costs," and for purposes of including utility pole costs in rental rates. The Utilities propose that the following definition of utility pole be added as subsection 34 to the definitions in OAR 860-028-0020:

> (34) "Utility Pole" means a standard, non-engineered wood utility pole and shall include telecommunications utility distribution poles and electric distribution poles with electricity voltages of 34.5 kV and below.

CLPUD and NWCPUD have safety reservations about allowing attachments on transmission poles and towers under the rates, terms and conditions that will be permitted under these Division 28 Rules. Transmission plant poses a bigger safety threat because

transmission towers and poles are individually designed and engineered to carry 85 to 90% of the pole's load through its age cycle. In CLPUD's geographic area, NESC engineering requirements are more strict than for distribution poles due to high winds. In other words, transmission poles and towers simply do not ordinarily have the capacity available for attachments in the same way that distribution poles do. Because transmission plant requires individual engineering, the rules being developed in this docket should not apply on a uniform basis to transmission plant as for distribution plant.[2] The Utilities have no difficulties with allowing attachments to transmission poles and towers, but attachments to transmission plant should occur with separate agreements, separate permit specifications, and separate charges.

III. PURPOSE AND SCOPE (OAR 860-028-0050)

A. ***OAR 860-028-0050 (2) and (3): Should provisions regarding owner correction and operator vegetation trimming be moved to OAR 860-028-0120?*** Yes. The Utilities agree that the Commission's rules should be clear that pole owners should be able to correct and charge the licensee for the cost of correcting a hazard or other situation if they have given notice to a pole licensee that the hazard or situation exists and the licensee has not corrected the matter. At this time, this concept is embedded in Staff's proposed rule OAR 860-028-0050(2). Also, operators of communications equipment should be obliged to trim or remove vegetation that poses a significant risk to their facilities or poses a risk to the structure of the jointly used facility. This concept is embedded in Staff's proposed rule OAR 860-028-0050(3). The Utilities agreed to

[2] For example, requiring a utility pole owner to respond to an application for an attachment to a transmission pole within 30 business days of the application (Staff proposed OAR 860-028-0100(4) may impose unreasonable burdens on the utility pole owner, as the analysis required to determine whether an attachment may be safely permitted on a transmission pole may take longer than 30 days.

remove this last concept from the Division 24 safety rules on the condition that it would be later embedded in the Division 28 rules.

The Utilities believe the right location for these two concepts is OAR 860-028-0120, which generally regards the duties of pole occupants. Also, because OAR 860-028-0120 deals with the obligations of pole occupants, embedding in that rule both the occupant's obligations to trim vegetation and the owners' ability to cure a hazard and charge the occupant for the owner's costs if the occupant does not fulfill its responsibilities would assist in orderly administration of and compliance with the Commission's pole attachment rules.

The Utilities support moving these concepts to OAR 860-028-0120, as indicated above. CLPUD and NWCPUD support adding subsections (4) and (5) to OAR 860-028-0120 as proposed by OJUA in their September 12, 2006, proposed rules regarding sanctions in AR 510. The OJUA language above, if inserted into OAR 860-028-0120, would address both of the Utilities' concerns raised here.

The Statement did not list OAR 860-028-0120 as a rule that was subject to modification in this Phase II of AR 506. However, the Commission's September 15, 2006, Letter opening Docket No. AR 510 to address sanctions issues specifically cited OAR 860-028-0120 as a rule that would be addressed in the parallel docket. Whether as part of this docket (AR 506, Phase II) or as part of AR 510, the Utilities urge the Commission to adopt the referenced changes regarding curing hazards and trimming as modifications to OAR 860-028-0120 (4) and (5) rather than as modifications to OAR 860-028-0050(2) and (3).

B. ***OAR 860-028-0050(3): What vegetation management standards are appropriate for communications operators?*** The Utilities support a standard that would require vegetation to be trimmed or removed by the communications operators if the vegetation poses an imminent risk to the communications operator's facilities or to the jointly used system.

IV. ATTACHMENT CONTRACTS (OAR 860-028-0060(2))

The ALJ's issues list asks, regarding OAR 860-028-0100, "whether government entities should be required to have permits for attachments." Ruling, p. 5. As indicated below in response to that issue, the Utilities agree that government entities should be required to have permits before making an attachment. Oregon statutes do not currently require government entities to have contracts to make attachments.[3] However, Oregon statutes enable the Commission to regulate the "rates terms and conditions" for attachments by licensees to the poles or other facilities of a public utility or telecommunications utility. *See* ORS 757.273 and 759.655.

The Utilities recommend that the language of 860-028-0060(2) be amended to read as follows:

> (2) To facilitate joint use of poles, ~~entities~~ licensees must execute contracts establishing the rates, terms and conditions of pole use in accordance with 860-028-0120.

Use of the word "entities" in Rule 0060(2), as proposed by Staff, muddies the water because it could be read to suggest that government entities would be required to have

[3] ORS 757.271(1) requires "persons" to have an executed contract with the pole owner before attachments can be made. ORS 757.756.010(5) defines "persons" as "individuals, joint ventures, partnerships, corporations and associations or their officers, employees, agents, lessees assignees, trustees or receivers." As government entities such as "consumer owned utilities" or "peoples' utility districts" are not included within that definition, it follows that the Oregon Legislature did not give the OPUC authority to require government entities to have contracts before they may install attachments. The Oregon statutes governing peoples' utility districts regarding their contracting are permissive and do not mandate contracting. *See*, ORS 261.305, *et seq*. (in particular, ORS 261.350 (regarding agreements for use of excess district property)

not just a permit, but an attachment contract as well. This language should make clear that governmental entities, which are not licensees by definition pursuant to OAR 860-028-0020(10)(Staff's proposed definition, June 15 Statement), are not required to have attachment contracts to authorize attachments, but may be required to have permits.

V. DISPUTE RESOLUTION (OAR 860-028-0070)

The Utilities generally support the proposed edits to this rule (OAR 860-028-0070) that will be proposed by the OJUA, with the suggestions provided below.

A. ***OAR 860-028-0070: What role should the OJUA have in dispute resolution for contracts?*** The Utilities believe that the OJUA should have at least two potential roles in contract dispute resolutions.

1. Proposed new OAR 860-028-0070 (XX): The Utilities propose, as does OJUA, adding a provision to the dispute resolution rule included in the Statement which would give the Commission the ability to refer factual or technical disputes to the OJUA for a recommended resolution, as follows:

> New OAR 860-028-0070(XX): <u>The Commission may refer applicable factual disputes or technical tissues to the OJUA for its consideration and recommendation. The Commission shall set a reasonable time for the OJUA to consider the matter and make its recommendation. Both the complainant and the respondent shall have an opportunity to present their views and data to the OJUA on the disputed factual and technical matters before the OJUA makes its recommendation. The Commission may accept or reject the OJUA's recommendation in whole or in part in its final order in the complaint proceeding</u>.

2. Proposed new OAR 860-028-0070 (XX): The Utilities recommend that the Commission's dispute resolution rules explicitly permit parties to take matters and disputes to the OJUA for informal dispute resolution. It is possible that many disputes could be resolved at the OJUA, and that would benefit the Commission

and parties. CLPUD and NWCPUD propose that the Commission consider the following additional subsection to OAR 860-028-0070:

> OAR 860-028-0070 (XX): By mutual agreement, parties to a potential complaint proceeding may submit a dispute to the OJUA pursuant to OAR 860-028-0220 for a recommended resolution prior to, or in lieu of, bringing a complaint to the Commission under this rule. The parties may accept or reject in whole or in part the OJUA resolution of the dispute. No resolution by the OJUA on a dispute shall be considered a decision of the Commission unless the Commission adopts the OJUA resolution as its own in a proceeding under these rules. No decision by the parties to attempt informal dispute resolution under this subsection precludes the parties from taking their matter to the Commission for final resolution.

B. ***860-028-0070: Should the time for a response to a complaint be lengthened from 30 days?*** The Utilities recommend that the time for a response to a complaint be lengthened from 30 to 60 days. The Staff's proposed rule appears to be an attempt to streamline complaint resolutions by having the complainant provide detailed information related to the dispute, including a proposed agreement that addresses resolved disputes and identifying those still in dispute. See, Statement, 860-028-0070(4)(d). Because the complainant has the freedom to take as much time as needed to compile and formulate a complaint, the time for responding should be reasonable. The Utilities support a 60 day time period for responses to complaints.

VI. COSTS OF HEARINGS (OAR 860-028-0080)

A. ***OAR 860-028-0080: Are IOUs subject to payment of hearings costs under this rule?*** The Oregon statutes authorize the Commission to recover costs of hearings "from the parties" in instances when a consumer-owned utility is involved and the order resulting from the hearing applies to the consumer owned utility. ORS 757.279(2) and 759.661(2)(in this instance, referring to a proceeding in which a

"peoples' utility district" is involved). The statutes direct the Commission to recover its costs in an "equitable" manner. *Id.* The rule that Staff proposes to implement these two statutes, OAR 860-028-0080, is consistent with the statutes as the proposed rule (1) provides for payment of Commission hearing costs by "the parties," and (2) lays out the considerations that the Commission will employ to determine an "equitable" apportionment of costs from the parties. *Id.,* OAR 860-028-0080 (1) and (4).

Nothing in the language of the statute supports excluding investor-owned electric utilities, telecommunications providers, or cable television providers from potential responsibility for the Commission's costs of a hearings in which a consumer owned utility is involved. The statute merely identifies those instances when the Commission is to apportion its hearings costs; it does not exclude any "party" from potential responsibility for those costs. The other conclusion, that investor owned electric utilities and others shall not be liable for a share of the Commission's hearings costs, would render the Legislature's language directing the Commission to apportion costs "in an equitable manner" among "the parties" superfluous. If the Legislature intended only the consumer-owned utility to bear the costs of these hearings, then that point would have been simple enough to make. The fact that the Legislature did not so limit applicability of the statute indicates that it did not intend to.

It is correct that investor owned electric utilities and telecommunications providers already pay Commission fees pursuant to ORS 756.310. However, that fact has no bearing on whether these entities would impose costs on the Commission in hearings where those entities and a consumer owned utility is involved, and therefore should have no bearing on whether they may be considered a party to which costs may be

apportioned. The Commission may in its order apportioning costs determine that the investor-owned utility's "equitable" share of the costs of a proceeding has already been effectively paid by those parties pursuant to ORS 756.310. This would mean that the Commission could apportion hearings costs among parties, including investor-owned utilities and telecommunications providers, even if no direct bill is sent to those parties that pay fees under 756.310. This approach would assure that the Commission does not bill all costs of a hearing to an involved consumer-owned utility when other parties should be responsible for some of the Commission's costs.

B. ***OAR 860-028-0080: Are other entities subject to payment under this rule?*** CLPUD and NWCPUD believe that the Oregon Joint Use Association (OJUA) should not have responsibility for hearings costs under this rule, and therefore supports Staff's proposed rule, which in subsection (3) states that the OJUA is not a "party" for purposes of cost apportionment. It is sensible to exclude OJUA from potential cost responsibility, as OJUA (1) was created by the Legislature to assist in resolving disputes among industry participants, (2) is composed of a full cross section of government entities and industry representatives who own or use utility poles, and (3) may have a potential role in dispute resolution pursuant to OAR 860-028-0070 or -0200.

Alternatively, entities such as industry trade associations who intervene in a dispute are potentially responsible "parties" for hearing cost apportionment under the Staff's rule. Trade associations often take positions in disputes before the Commission for the purposes of representing issues of general interest to their industry segment. These other "parties" can and do impose costs on the Commission, as well as on the

parties directly involved in the dispute, and therefore they also should share in defraying the Commission's costs.

VII. ATTACHMENT APPLICATION PROCESS (OAR 860-028-0100)

The Utilities have worked with OJUA on rules for the attachment application process, and believe that the rules developed by OJUA on this topic are workable and fair. The Utilities therefore generally support the OJUA resolutions, as follows.

A. ***OAR 860-028-0100(1): Should government entities be required to have permits for attachments?*** The Utilities agree that government entities should be required to have permits for attachments. *See*, Section IV of these comments, above, at pp. 12-13.

B. ***OAR 860-028-0100: Should timelines in the attachment application processing rule be stated in calendar days or business days?*** The Utilities support using calendar days, as opposed to business days, for purposes of computing time under the attachment application process rule. The entities involved in the attachment process are varied and will utilize different business holiday schedules from each other. For this reason, use of business days in the Staff's attachment application processing rule could result in missed deadlines and disputes, as each involved entity will have different notions of what are and are not "business" days. On the other hand, all parties understand how to count "calendar" days. CLPUD and NWCPUD support the use of "calendar" days when computing deadlines under OAR 860-028-0100.

C. ***OAR 860-028-0100: What should be the applicable timelines in the attachment application processing rule?*** The Utilities support the timelines proposed in the OJUA rule, as follows:

1. ***OAR 860-028-0100(3)*****:** The Utilities support the OJUA timeline in this subsection that requires the owner to provide notice to the applicant *within 14 calendar days* of the owner's receipt of an attachment application and stating any deficiencies with the application.

2. ***OAR 860-028-0100(4)*****:** The Utilities support the proposed language of the OJUA which requires a pole owner to reply to a completed attachment application no later than *forty-five calendar days* from the date that the pole owner receives a completed application. The Utilities also support the OJUA proposal that the owner may require an applicant to provide notice of completion of the attachment within *forty-five calendar days.*

3. ***OAR 860-028-0100(4)*****:** The Utilities support the proposed language of the OJUA that approved applications should be valid for *180 calendar days*.

D. ***OAR 860-028-0100: Should there be presumptive approval if permits are not responded to within a certain period of time? Should applicant be allowed to begin construction, or is there a risk to safety and reliability?*** The Utilities can support the concept embedded in the OJUA proposed rule on this topic, which states that the applicant may begin installation of an attachment if the owner does not provide the applicant with notice, within 45 calendar days, of the status of the application, *provided however* that the applicant has an affirmative obligation to provide notice to the owner of the applicant's decision to commence installation. The Utilities therefore support the following addition to OAR 860-028-0100(4):

> If the owner does not provide the applicant with notice that the application is approved, ~~or~~ denied, or approved with conditions within ~~30 business~~ 45 calendar days from its receipt, then ~~the application is deemed approved and the~~ the applicant may begin installation. The applicant shall provide

notice to the owner prior to the commencement of installation. Commencement of installation shall not terminate the permitting process.

E. ***OAR 860-028-0100(6): Should the applicant be able to have input on who performs the make ready work? Does the pole owner have a say on hiring and firing workers who perform make ready work?*** The Utilities believe that make ready work is the responsibility of the pole owner to accomplish, and that public safety and the integrity of the utility pole structure require that the pole owner either perform the make ready work or choose who will perform make ready work. The Utilities have no problem with the applicant providing input on who should perform make ready work, but the ultimate choice must be agreeable to the pole owner.

The Utilities could accept Staff's proposed rule, as edited below:

> (6) ~~For good cause shown, i~~If an owner cannot meet ~~an applicant's time frame for attachment or those established by this rule~~ the time frames established by this rule, application processing, preconstruction activity, ~~application,~~ and make ready work may be performed by a mutually acceptable third party.

F. ***OAR 860-028-0100(2): What standard processes and information should be required for new or modified permits?*** The Utilities believe that the rules should indicate what information may be required by a pole owner to be provided in any application for a new or modified permit. Staff has proposed a rule (OAR 860-028-0100(2)) that states eight types of information that a pole owner may require of an applicant. The Utilities support Staff's proposed rule 0100(2).

G. ***OAR 860-028-0100(4)(d): What reasons for denial of a permit application are acceptable?*** The Utilities suggest that two valid reasons for denial of a permit are (1) that the utility does not own the pole for which the permit is sought, either

due to the fact that the applicant has mis-identified the pole owner or due to the fact that the pole has been or will be removed, and (2) there is insufficient room on the pole for further attachments. In the first case, the utility cannot grant permission to attach to a pole that it does not own or that no longer exists. In the second case, the utility should not grant a permit if doing so would cause a safety hazard or jeopardize the structural integrity of the pole.

VIII. RENTAL RATES AND CHARGES (OAR 860-028-0110)

As a general matter regarding rental rates and charges, the Staff's proposed rule OAR 860-028-0110 is a necessary and valuable clarification of the existing rule on calculating rental rates. The Utilities substantially support Staff's proposed rules, as follows.

A. *OAR 860-028-0110: Should the pole rental rate be adjusted for inflation?*

As discussed previously at Section II.A.1 of these Comments, above at pages 2-3, the Utilities could support the option of an inflation adjustment in order to keep rates that have been determined to be fair, just and reasonable current. The Utilities support an inflation adjustment for rental rates.

B. *OAR 860-028-0110(3): What costs should be included in the rental rates? What should be a direct charge, and what should be in the pole rental rate?*

Staff's new proposed rule excludes from rental rates the costs of attachments to support equipment, permit application processing, special inspections, preconstruction activity, post construction inspection, make ready work, or costs related to unauthorized

attachments. Staff's proposed rule makes it clear that charges for excluded activity will be based on actual costs, and will be charged in addition to the rental rates.

The Utilities support the Staff proposed rule (OAR 860-028-0110(3)) as written. The experience of CLPUD regarding pole attachment applications is that applicants vary greatly in the number of applications they submit, the number of special inspections they request, and the incidence of unauthorized attachments, among other things. Excluding these categories of costs from rental rates and specifically charging the actual costs of these activities to the responsible applicant will help assure that cost causation principles are recognized in pole rental rates and in special charges.

C. ***OAR 860-028-0110(2): Should the calculation of the pole rental rate be amended?*** Yes. The Utilities note that the Staff's proposed rule OAR 860-028-0110 contains a re-written rental rate calculation rule at subsection (2). The Utilities believe the Staff proposed rental rate calculation rule is an improvement over the existing rule, and therefore support the Staff rule.

D. ***OAR 860-028-0110(3): Should the rates be non-discriminatory?*** It's hard to argue against non-discriminatory rates. However, in the context of these rules, inserting a "non-discrimination" standard, which is not included in the Attachments Regulation provisions of the Oregon Statutes (ORS 757.270-.290 and ORS 759.660-.675), may add disputes to the Commission's agenda, rather than help avoid them.

These rules are intended as "default" rules that the Commission may apply when the parties cannot agree among themselves and a complaint is brought. *See,* Staff's proposed OAR 860-028-0110(1). The normal operating procedure for pole attachments will thus continue to be that the parties should negotiate mutually acceptable contracts

and terms and conditions of service to govern their interactions. It is likely that in private negotiations, parties may bargain for a complete set of terms, conditions, and rates that address the particular needs of those parties. For example, an owner can trade off a lower overall rental rate for one party in exchange for having that party package their applications in a certain way to ease the pole owner's attachments administration for that applicant. If the directly involved parties are able to agree to these sorts of bargains, and the entire package of terms, conditions, and rate are "just," then the Commission should not entertain complaints that the lower rental rate is "discriminatory" as to a second applicant which is not a party to the total contractual package but yet wants the lower rental rate. While it is true that the Commission may distinguish between discrimination that is undue and mere discrimination, and thus resolve complaints of the type just discussed, inserting a "non-discrimination" standard into these rules appears to be a solution in search of a problem in the context of this rulemaking.

The Utilities do not support inserting a "non-discrimination" standard in the Commission's rule because it appears adding that standard would invite rather than reduce complaints and controversy. If the Commission determines to have a standard regarding discrimination, the Commission should at least clarify that the standard is one of "not unduly discriminatory" rental rates.

E. ***OAR 860-028-0110(4)(b): What if an attachment permit does not specify the amount of authorized space?*** The Utilities recommend that the Staff proposed rule (at subsection 4(b)) be modified to state that if no amount of authorized attachment space is specified in the attachment permit, then the applicant may assume that the authorized attachment space is twelve inches.

> OAR 860-028-0110(4)(b): For each attachment permit, the owner will specify the authorized attachment space on the pole that is to be used for one or more attachments by the licensee. This authorized attachment space will be specified in the owner's attachment permit, or if no authorized attachment space is specified in the permit, then the authorized attachment space is twelve inches.

D. ***OAR 860-028-0110(4)(c): What elements should be allowed in an existing authorized space under an existing permit?*** The Utilities support Staff's proposed rule OAR 860-028-0110(4)(c), which provides clarity about what may be allowed in an authorized space under an existing permit. Staff's proposal states that additional or modified attachments that are safety compliant and placed within the licensee's exiting authorized attachment space may be considered part of the original permit for rental rate purposes. Staff also provides a non-exclusive list of additions that are permissible, which also adds clarity. However, the important standards for allowing additional or modified attachments under an existing permit are the first two: does it comply with safety requirements, and does it fit in an existing authorized attachment space? The Utilities support the Staff rule.

E. ***OAR 860-028-0110(5): Should prepayment be required for the work specified in Rule 860-028-0100, or all "make ready" work?*** Staff has proposed a permissive rule which permits pole owners to require prepayment of work allowed by OAR 860-028-0100, Statement, p. 9. The Utilities support the version of this rule proposed by the OJUA, as follows:

> The owner may require ~~reasonable~~ prepayment ~~from a licensee~~ of the owner's estimated costs for any of the work allowed by OAR 860-028-0100. ~~The owner's estimate will be adjusted to reflect the owner's actual costs upon completion of the work. The owner will promptly refund any overcharge to the licensee.~~ The final invoice will reflect actual costs less any prepayment.

F. ***OAR 860-028-0110(6): When is the owner required to show that certain charges were excluded from the rental rate calculation?*** The Utilities prefer a version of this concept that was negotiated among the parties at through OJUA, with the addition of the final sentenced. The OJUA rule reads as follows:

> (6) ~~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~~. The owner shall provide notice to the occupant of any change in rental rate or fee schedule a minimum of ninety days prior to the effective date of the change. The occupant has 60 days from the date of the notice to dispute the rate or fee schedule. If no dispute is filed, the rate and fee schedule shall be deemed effective for the term of the rental period. If a dispute is filed then the most recently effective rental rates and fee schedules shall remain in effect until the dispute is resolved.

The Utilities prefer the OJUA approach, with the addition of the last sentenced proposed by CLPUD and NWCPUD. The OJUA approach places time boundaries around disputes about rental rates and fee charges: proposed rental rates and fee charges must be challenged within the period stated, or they are deemed final for the rental period. This approach should minimize controversies for the Commission and result in more certainty for the pole owners and pole users. The last sentence clarifies that when there is a challenge, the most recent effective rental rates and schedules remain in effect until the dispute is resolved.

IX. DUTIES OF POLE OWNERS (OAR 860-028-0115)

The OJUA has proposed an alternate rule governing the duties of pole owners, as follows:

> Duties of Electric Supply and Communication Pole Owners
> (1) An owner shall install, maintain, and operate its facilities in compliance with Commission Safety Rules.

(2) An owner must establish, maintain, and make available to occupants its joint-use construction standards and practices for attachments to its poles and for joint space in conduits. Standards for attachment must apply uniformly to all operators, including the owner.
(3) An owner must establish and maintain **[[~~mutually agreeable~~]]** [4] protocols for communications between the owner and occupants.
(4) The owner may charge the occupant actual costs for any fines, fees **[[<u>or</u>]]**[5] damages the occupant's noncompliant attachments cause the pole owner to incur.

The Utilities support the OJUA proposed Rule OAR 860-028-0115 in lieu of the Staff proposed rule, with the exceptions and comments noted below.

A. ***OAR 860-028-0115(3): Is subsection (3) redundant with other rules?***

Staff's proposed rule at subsection (3) states that "an owner must maintain its facilities in compliance with the Commission Safety Rules for occupants." OJUA also retains this rule as subsection (1). The Utilities think this subsection is redundant of similar obligations imposed on pole owners in Division 24, but think the redundancy is not harmful.

B. ***OAR 860-028-0115: Should communications protocols be mutually acceptable to owner and licensee?*** The Utilities generally support communications protocols that are as standardized and widely used in the industry as is possible. Adding a standard in the rule that requires each owner and each licensee to agree to communications protocols may add confusion, however, as often the owner is dealing with multiple licensees on the same utility pole. The communication protocols should be those that are workable for as many entities as possible. This may mean that some owners and licensees may not agree on the communication protocol. Therefore, the

[4] The bolded phrase "mutually agreeable" is contained in the OJUA paragraph, but CLPUD and NWCPUD propose deleting these words, as indicated at section IX.B, below
[5] The bolded word "or" is not included in the OJUA paragraph, but it should be added as an edit of their language.

Utilities do not support adding a rule that requires mutual agreement on protocols in all cases.

However, the Utilities support a rule that requires the pole owner to establish communications protocols that are as broadly useable as possible, and make those protocols known to all occupants, but the pole owner should not be required to adopt protocols that are "mutually agreeable." The Utilities support the following rule as an alternative both to the Staff rule and the OJUA rule:

> OAR 860-028-0115(3) An owner must establish and maintain protocols for communications between the owner and occupants that are useable by the majority of occupants on the owner's utility poles.

C. ***OAR 860-028-0115(3)(a): Should an owner be required to respond to other problems with the pole, not just violations of Commission Safety Rules?*** The Utilities believe that Division 24 rules already impose obligations on the pole owner to manage and repair safety violations, and the new Division 24 rules resulting from this rulemaking proceeding will surely cover these obligations as well. The Utilities therefore believe it is not necessary to have a rule in Division 28 regarding curing safety violations. The Utilities do not support adding a further requirement that pole owners respond to "other" problems associated with a pole. It is difficult to imagine what "other" problems should require a rule mandating a response from the pole owner other than safety. OJUA has proposed to delete subsection (3)(a) of Staff's rule, and the Utilities support OJUA's position.

D. ***OAR 860-028-0115(1): Should an owner be responsible for maintaining towers for joint-use?*** These rules should not contain a specific rule that requires owners to maintain towers for joint use. These Division 28 rules regard distribution plant only,

and not towers, which the Utilities assume means electric transmission structures. OJUA has not included this obligation in its proposed rules regarding the duties of pole owners, and the Utilities would not support adding it.

E. ***OAR 860-028-0115: What are the responsibilities of structure owners related to safety, engineering practices, inter-operator communications, and coordination?*** The Utilities believe that structure owners do have responsibilities for safety, proper engineering practices, and inter-operator communications and coordination. However, the Utilities think it would be a difficult task to state these responsibilities in an administrative rule, as proper safety and engineering practices could well vary by geographic location. OJUA has proposed two subsections in this rule (OAR 860-028-0115(2) and (3)) which address generally the structure owner's responsibilities in these areas. The Utilities believe the OJUA proposal is adequate and support it.

X. CONCLUSION

For all the reasons provided in these comments, CLPUD and NWCPUD urge the Commission to adopt Division 28 rules regarding attachment terms, conditions and rental rates consistent with these comments.

DATED this 28th day of September, 2006.

Respectfully submitted,

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