



Oregon

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September 28, 2006

OREGON PUBLIC UTILITY COMMISSION
ATTENTION: FILING CENTER
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RE: **Docket No. AR 506 Phase II/AR 510** - In the Matters of a Rulemakings to Amend and Adopt Permanent Rules in OAR 860, Division 028.

Enclosed for electronic filing in the above-captioned docket is the Public Utility Commission Staff's Opening Comments. Courtesy copies are being provided to the AR 506/AR 510 service list by electronic mail and U.S. mail.

/s/ Diane Davis

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c: AR 506/AR 510 Service List

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

AR 506/AR 510

In the Matters of)	
)	
Rulemaking to Amend and Adopt)	
Permanent Rules in OAR 860,)	
Divisions 024 and 028, Regarding Pole)	OPENING COMMENTS OF
Attachment Use and Safety (AR 506))	OREGON PUC STAFF ON
)	DIVISION 028 RULES
and)	
)	SEPTEMBER 28, 2006
Rulemaking to Amend Rules in OAR 860,)	
Division 028 Relating to Sanctions for)	
Attachments to Utility Poles and Facilities)	
(AR 510))	

COMBINING AR 506 & AR 510

PUC Staff does not object to combining of AR 510 with AR 506 Phase II so long as AR 510 does not delay AR 506's hearing schedule or final adoption. The proposed rules in AR 506 have been well-evaluated by the Oregon Joint Use Association (OJUA), industry and Staff; and they are ready for formal rulemaking action by the PUC. The Commission should move forward on AR 506 Phase II rules so that they are adopted and made effective by January 1, 2007. Staff commends OJUA and the industry for its hard work in the development of better sanction principles that will improve cooperation between pole owners and occupants. Staff is supportive of this effort. However, Staff believes that some sanction issues will need further review, and that may disrupt the AR 506 schedule.

WIRELESS TELECOMMUNICATION ATTACHMENTS

At least three wireless telecommunications providers have asked the Commission to consider wireless attachment issues in AR 506. Wireless telecommunications is still an emerging industry and brings unforeseen challenges to utility pole management and to utility rights-of-way. It should be noted that Staff has not had enough time to research issues associated with how Oregon's attachment statutes (i.e., ORS 757.270 through ORS 757.290 and ORS 759.650 through ORS 759.675) apply to wireless attachments, nor have we formulated policies related to wireless communications except that they must comply with the National Electrical Safety Code and Commission safety rules. Staff agrees that wireless attachments deserve timely and thorough attention by the Commission, but Staff believes that this should be done in a forum separate from AR 506. Staff believes there are simply too

many new issues associated with the attachment pole top cluster antennas and other antennas to poles. (See Attachments A and B). By considering wireless attachment issues in a separate docket, industry and Staff can conduct workshops so that interested persons can vet their issues so that appropriate solutions can be found and new PUC rules adopted.

In 1998 the Federal Communication Commission (FCC) brought wireless attachments to the national forefront by ordering utility pole owners to provide wireless providers with access to their poles at reasonable rates pursuant the Federal Communications Act of 1996 (See 47 U.S.C. §224). In 2004, the FCC reminded pole owners that wireless providers "...are entitled to the benefits and protections of the ...[Act] for the attachment to utility poles of antennas or antenna clusters and associated equipment." The United States Supreme Court affirmed this determination in *National Cable Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002). The FCC stated that "Providing wireless carriers with access to existing utility poles facilitates the deployment of cell sites to improve the coverage and reliability of their wireless networks in a cost-efficient and environmentally friendly manner. Such deployment will promote public safety, enable wireless carriers to better provide telecommunications and broadband services and increase competition and consumer welfare in these markets."¹

Oregon is one of 18 states that has exercised its right to preempt FCC pole attachment regulations. Even though Oregon does not have to follow FCC regulations, it behooves the PUC and the industry to set sound policy and precedent for wireless antenna deployments in Oregon. In order to do that, the OJUA, PUC Staff and industry must have workshops on wireless attachment issues. It should be understood that current PUC attachment rules in OAR Chapter 860, Division 028 were not written and adopted with the wireless industry in mind. Moreover, the proposed rules in AR 506, for both new and amended safety and attachment regulations, were not evaluated by staff with consideration for wireless issues. They were intended to apply to utilities and operators with linear hard-wired conductor or cable systems. It should be emphasized that the wireless industry, to Staff's knowledge, has not until recently given input during any phase of the AR 506 proceeding.

The OJUA, PUC and industry need to give adequate notice for involvement by interested parties and members of the public to attend forums and workshops about wireless issues and regulatory solutions. Staff is concerned whether adequate notice has been provided by the Commission in AR 506 to formulate wireless policy. It should be further noted that to date, the PUC has not had any complaint dockets related to disputes between wireless providers and Oregon pole owners.

In summary, staff agrees that it is important to create rules that apply to wireless providers. The rules must be crafted in a thoughtful and thorough manner. Staff understands the wireless providers will submit further comments about these matters and staff will carefully review them to see if they address staff's concerns.

¹ Public Notice of the Federal Communications Commission, DA 04-4046, December 23, 2004. See http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-04-4046A1.pdf

The following is a partial list of issues that should be considered in forums and workshops regarding wireless pole attachments.

ACCESS

- Do wireless providers (WP) have rights under the Oregon statutes to virtually all space on utility poles (including pole top, electric space, communication worker safety zone, communication space, and public space)? For example, should WPs have access to poles above the “communications space” on poles? (Oregon statutes and PUC rules, including rental rate and reduction formulas, seem to only contemplate access to limited space on the pole.²)
- Should WP be denied access only for reasons of insufficient capacity, or safety, reliability or engineering concerns? For example, what about aesthetic issues required for large and high antenna clusters?

SAFETY AND TECHNICAL STANDARDS

- Are the National Electrical Safety Code (NESC) and Commission safety rules adequate as the minimum standard for the construction, operation, and maintenance of wireless attachments?
- Who will be the qualified workers who may install and maintain pole top antennas and other antennas in the pole electric space in proximity to energized electric lines?
- What about aviation safety, RF (radio frequency) exposure, and other special safety and health issues?
- What are the responsibilities of pole owners in permitting and coordinating new wireless antenna attachments?

² Socket To Me, A Publication of Troutman Sanders LLP, Addressing Utility Telecommunications & The Law, Bulletin #67, December 29, 2004. (See website -- <http://www.troutmansanders.com/pg/pdf/Tele122904.pdf#search=%22Socket%20to%20me%20Bulletin%20%2367%22>)

PROCESSES

- What processes and schedules are appropriate for new wireless attachment applications?
- What special inspection, making ready, and acceptance processes, if any, are needed by pole owners for WP that are different from the processes for traditional pole occupants?

CONTRACT RATES, TERMS & CONDITIONS

- Are WP entitled to the same attachment rates as cable television and telecommunications providers? How would pole attachment formulas apply to pole mounted antennas and cluster antennas?

RELATIONSHIPS

- Will the PUC dispute resolution processes for pole owners and occupants (e.g., cable television, linear telecommunications operators) be appropriate for WP?
- Should the OJUA have a representative from the wireless industry on its Board? Should the OJUA encourage WP to file complaints with it?
- Should the PUC encourage WP to file complaints with it? To date, the PUC has not received any formal complaints related to disputes between pole owners and WP.

**SOCKET TO ME**
December 29, 2004**Bulletin #67**

- A Publication of Troutman Sanders LLP, Addressing Utility Telecommunications & The Law

FCC WIRELESS BUREAU DECREES THAT POLE TOPS MUST BE MADE AVAILABLE FOR WIRELESS ATTACHMENTS

In a Public Notice (DA 04-4046) released December 23, 2004, the FCC's Wireless Telecommunications Bureau decreed that wireless telecommunications carriers must be granted access to the tops of utility poles for placement of wireless antennas. In addition, the Bureau stated that wireless carriers cannot be assessed "access fees" in addition to the statutory pole rental rate and "reasonable make-ready fees."

The Bureau's pronouncement was not made in the context of any adjudication or rule making. Rather, it was presented as a "reminder" to utility pole owners, as if this question were already a matter of settled law. The precedent cited by the Bureau is the 1999 *Order on Reconsideration of the Local Competition Order*, a document that does not even mention wireless antenna attachments. Ironically, in the *Order on Reconsideration* the Commission acknowledged the traditional distinction between the "electric" space on a pole and the "communications" space and ruled that electric utilities *may* reserve pole capacity in the electric space, which lies above the communications space, for communications facilities needed to support their core business. Having so ruled, the Commission saw no need to establish a presumption that electric utilities may reasonably reserve pole capacity above the communications space. The Wireless Bureau, however, interprets the Commission's refusal to adopt the presumption as a ruling that the space above the communications space *cannot* be reserved for utility use only.

The Public Notice seems intended to promote the deployment of wireless networks by ruling in general on the terms and conditions of access to pole tops by wireless carriers. Yet the Public Notice may create more disputes than it settles, considering that:

- The Public Notice "encourages" wireless telecommunications carriers to file complaints.
- The Wireless Bureau's premise is questionable and may not be valid.
- The Public Notice may be used by cable companies and linear telecommunications carriers to argue that *they too* should have access to pole capacity above the "communications space" in light of the Bureau's declaration that the only limits on access are those contained in the Pole Attachments Act, namely, insufficient capacity, or safety, reliability or engineering concerns.
- The logical effect of the Public Notice is to create a right of access to virtually all space on the pole, yet the FCC's pole rental rate formulas contemplate access to limited space on the pole, raising the prospect of inadequate cost recovery by the pole owner.
- The Public Notice sets up a dispute over who may install and maintain the pole top attachments (or attachments in the electric space) in proximity to energized electric lines and for what compensation.
- The Public Notice speaks of "reasonable make-ready fees," which opens a debate about the means by which a utility can recover its actual out-of-pocket expenses for make-ready work.
- The Public Notice is silent about aviation safety and rf exposure concerns that may be raised when a pole becomes an antenna support structure.

This matter would have been better addressed in a notice-and-comment proceeding.

FCC REVISES ITS 800 MHZ REBANDING ORDER



Telecommunications & Technology

The FCC, on its own motion, made significant changes to the 800 MHz rebanding order (WT Docket 02-55). They include providing \$452 million in additional credits for the spectrum that Nextel will return to the FCC. The FCC also altered its plan for addressing interference concerns by adopting Nextel's interim interference protection standard. Specifically, the FCC's revisions include:

- Clarifying that mobile-only systems operating on a secondary basis on former General Category Channels 1-120 may continue to operate on said channels on a secondary basis.
- Clarifying when public safety and Critical Infrastructure Industry (CII) licensees gain exclusive access to channels vacated by "Enhanced Specialized Mobile Radio" (ESMR) licensees as a part of band reconfiguration.
- Specifying that non-public safety and non-CII incumbents operating on Channels 231-260 may continue to operate on these channels.
- Declining to impose a two percent limit on administrative costs associated with incumbent relocation.
- Modifying the rules affecting the "freeze" on 800 MHz license modification applications during reconfiguration of a given National Public Safety Planning Advisory Committee (NPSPAC) region.
- Setting interim received power level thresholds that non-cellular systems must maintain in order to claim protection against unacceptable interference during band reconfiguration.
- Setting out provisions for abating interference to public safety systems that do not meet the interim received power level thresholds.
- Clarifying which Economic Area (EA) licensees are eligible for relocation to channels above 817 MHz/ 862 MHz.
- Declining to afford relocating licensees their choice of channels, if they are relocated to comparable facilities.
- Defining the parameters governing the voluntary relocation of CMRS licensees to the Guard Band.
- Prohibiting "high site" systems above 817 MHz/862 MHz.

The text of the FCC's Order can be found here: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-294A1.doc

UTAH PSC UPHOLDS PENALTY CHARGES FOR UNAUTHORIZED POLE ATTACHMENTS

On December 21, 2004, the Utah Public Service Commission ("PSC") ruled that PacifiCorp, dba Utah Power ("PacifiCorp") is entitled to \$3.8 million from Comcast Cable Communications ("Comcast") for pole attachment rent, penalties for unauthorized pole attachments and out-of-pocket expenses related to PacifiCorp's audit of pole attachments in Utah.

Comcast filed its complaint in October of 2003, challenging the right of PacifiCorp to impose penalties for unauthorized pole attachments and to impose a share of the costs of conducting an audit of pole attachments (STM #62). In its decision, the PSC found that Comcast had made attachments to some 39,000 distribution poles, for which it was unable to produce evidence of authorization to make such attachments. The PSC upheld the validity of a contract provision permitting PacifiCorp to impose a \$60 per pole penalty for unauthorized attachments and also required Comcast to pay back rent for these attachments. In addition the PSC held Comcast responsible for almost \$900,000 as its share of the cost of an audit of pole attachments conducted by PacifiCorp.



Telecommunications & Technology

This decision is the only decision in the country that we know of where a substantial penalty for unauthorized attachments, in addition to back rent, has been approved in a case where the penalty was challenged by a cable company or telecommunications company. In states where pole attachments are regulated by the FCC, the remedy for unauthorized pole attachments is limited to back rent. Utah, however, has exercised its right to pre-empt FCC pole attachment jurisdiction and the PSC rejected Comcast's argument that the PSC ought to follow FCC precedent.

Although the body of pole attachment law in the 32 states where the FCC regulates pole attachments is relatively settled, that is not the case in the other 18 states (plus the District of Columbia) where policy and precedent are still being developed. The text of the PSC's decision can be found here:

<http://www.psc.utah.gov/elec/04orders/Dec/0303528RO.htm>

FILING DEADLINE ANNOUNCED FOR MULTIPLE ADDRESS SYSTEMS AUCTION

The FCC has announced the procedures and minimum opening bids for the upcoming auction of 4,226 Multiple Address Systems ("MAS") licenses in the 928/959 and 932/941 MHz bands. MAS licenses are available for the terrestrial point-to-multipoint and point-to-point fixed and mobile transmissions of a licensee's products or services, excluding video entertainment material, to a licensee's customer or for its own internal communications.

Pre-Auction Dates and Deadlines

- The FCC's Short-Form Application (FCC Form 175) must be filed between **February 23, 2005 (12:00 p.m. ET) and March 4, 2005 (6:00 p.m. ET)**.
- Upfront Payments (via wire transfer) are due **April 1, 2005 (6:00 p.m. ET)**.
- Mock Auction held **April 21, 2005**.
- Auction begins **April 26, 2005**.

Companies desiring to take advantage of this rare opportunity must begin preparing now for this auction. The specific MAS auction information can be found here: [MAS Auction Procedures](#)

TROUTMAN SANDERS LLP "ON THE ROAD"

Richard Keck, a partner in our Atlanta, GA office, discussed how to deal with BPL to state regulators and staff at a pre-conference workshop conducted by the Quello Center prior to the 36th annual Michigan State University Public Utilities Institute Conference in Charleston, South Carolina on December 5, 2004.

FOR MORE INFORMATION

For more information on these topics, please contact any of the attorneys found at the link below: [Troutman Sanders LLP Telecommunications & Technology Practice Group](#)

The Troutman Sanders LLP Newsletter is intended to provide general information about legal and regulatory utility developments which may be of interest. It is not intended to be comprehensive nor to provide specific legal advice and should not be acted or relied upon as doing so. If you would like further information or specific advice, please contact our office.

PUBLIC UTILITY COMMISSION

CERTIFICATE OF SERVICE

AR 506/AR 510

I, DIANE DAVIS, of the Regulatory Operations Division, Public Utility Commission of Oregon, hereby certify that on the 28th day of September, 2006, I served a copy of PUC Staff's Opening Comments upon all persons as indicated on the attached listing, by electronic mail and by depositing in the United States Mail at Salem, Oregon, with postage prepaid.

PUBLIC UTILITY COMMISSION



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