

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

In the Matter of )  
Rulemaking to Amend and Adopt Permanent ) AR 506  
Rules in OAR 860, Divisions 24 and 28, )  
Regarding Pole Attachment Use and Safety. )

**SUPPLEMENTAL COMMENTS OF VERIZON NORTHWEST INC.  
ON PROPOSED REVISIONS TO DIVISION 24 RULES**

Verizon Northwest Inc. (“Verizon”), through counsel and pursuant to Administrative Law Judge Christina Smith’s Memorandum dated March 10, 2006, submits the following supplemental comments on the proposed amendments and revisions to the Public Utility Commission of Oregon’s (“OPUC” or “Commission”) pole and conduit safety rules set forth in OAR, Chapter 860, Division 024 (“Division 24 Rules”).

As Verizon noted in its earlier comments, the Commission’s rules governing pole attachments are in need of revision. However, no evidence whatsoever has been proffered in the instant proceeding to substantiate or justify the onerous regulatory burdens contained in many of the proposed Division 24 Rule revisions. Moreover, no showing has been made that the proposed revisions will produce any appreciable increase in safety, or otherwise benefit Oregon consumers or telecommunications and electricity operators. Finally -- and the subject of these supplemental comments -- the Notice of Proposed Rulemaking (“NPRM”) commencing this proceeding misleadingly claims that the proposed rule revisions would “have little overall financial impact on business, industry, and the public,” while at the same time contends there was no basis for this

assertion, stating that the “exact fiscal and economic impact for every operator affected [by the proposed rules] would be extremely difficult, if not impossible, to determine.”<sup>1</sup>

In doing so, the Commission’s NPRM fails to comply with Oregon law, thereby rendering the NPRM and any rules adopted pursuant to it invalid.<sup>2</sup>

**I. THE NPRM CONTAINS DEMONSTRABLY MISLEADING STATEMENTS, IS INTERNALLY INCONSISTENT, AND FAILS TO COMPLY WITH OREGON LAW.**

As the Commission is well aware, Oregon law requires administrative agencies to include in each and every notice of proposed rulemaking a statement of the financial impact of the proposed rules. Specifically, ORS § 183.335(2)(b)(E) states that agencies must identify the “state agencies, units of local government and the public which may be economically affected by the adoption, amendment or repeal of the rule and an *estimate of that economic impact* on state agencies, units of local government and the public.”<sup>3</sup> To provide statistical support for this fiscal impact statement, “agencies shall utilize available information to *project any significant economic effect of that action on businesses* which shall include a cost of compliance effect on small businesses affected.”<sup>4</sup> The purpose of this statute is to provide “protections against arbitrary and inadequately informed governmental conduct.”<sup>5</sup>

In commencing this rulemaking, the Commission was obligated to quantify the financial impact of the proposed rules where such information was available. Here, the financial impact statement accompanying the NPRM stated that “the proposed rules will

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<sup>1</sup> Notice of Proposed Rulemaking Hearing, Statement of Need and Fiscal Impact (Mar. 22, 2006) at 3 (“NPRM”)

<sup>2</sup> See, e.g., *Dika v. Dept. of Ins. & Finance*, 312 Ore. 106, 111, 817 P.2d 287, 289 (1991) (invalid rules lack proper foundation and should be overturned by Oregon courts); see also *Planned Parenthood Assn. v. Dept. of Human Resources*, 297 Ore. 562, 565 (1984).

<sup>3</sup> ORS § 183.335(2)(b)(E) (emphasis added).

<sup>4</sup> *Id.*

<sup>5</sup> *Dika*, 312 Or. at 109, 817 P.2d at 288.

have *little overall financial impact* on the OPUC, other state agencies, units of local governments, businesses, industry, and the public... Those operators that currently comply with existing OPUC statutes, rules and policies will potentially experience *no increase in costs* associated with the implementation of these rules.”<sup>6</sup> Simultaneously, the NPRM contends that the “exact fiscal and economic impact for every operator affected [by the proposed rules] would be extremely difficult, if not impossible, to determine at this time.”<sup>7</sup> These claims are at best misleading.

It is undisputed that the cost of the proposed rule revisions is staggering. Portland General Electric Company calculated that compliance with just a single proposed rule revision would cost it \$4.7 million annually.<sup>8</sup> The Oregon Department of Forestry similarly concluded “these proposals could have a significantly negative legal, financial, and social impact on Oregon utilities as well as Oregon’s urban forests.”<sup>9</sup> Even Commission Staff recently acknowledged that the cost of *only one* of its proposed rule revisions would be \$12.7 million per year for ten years.<sup>10</sup> There is thus no merit to the unsubstantiated assertion, contained in the NPRM, that “[t]he proposed rules will have little overall financial impact on the PUC, other state agencies, units of local government, businesses, industry, and the public.”<sup>11</sup>

Moreover, setting aside the merits of the Staff’s cost analysis,<sup>12</sup> its eleventh-hour release of this study demonstrates that Staff was in possession of the very data it needed

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<sup>6</sup> Notice of Proposed Rulemaking Hearing, Statement of Need and Fiscal Impact (Mar. 22, 2006) at 3 (“NPRM”) (emphasis added).

<sup>7</sup> NPRM at 3.

<sup>8</sup> First Round Comments of Portland General Electric Company (May 1, 2006).

<sup>9</sup> Comments of Oregon Department of Forestry (May 1, 2006) at p. 3.

<sup>10</sup> Staff’s Cost Analysis PowerPoint (circulated May 23, 2006).

<sup>11</sup> NPRM at p. 3.

<sup>12</sup> Staff’s cost analysis is not only riddled with unsupported assumptions, it betrays a fundamental lack of appreciation of the operational realities of Oregon utilities.

to quantify the financial impact of the proposed rule revisions at the time the NPRM was released.<sup>13</sup> The Oregon Supreme Court’s ruling in *Dika v. Department of Ins. & Finance*, 312 Ore. 106, 110, 817 P.2d 287, 289 (1991) is instructive. Here, the Oregon Supreme Court held that an agency’s failure to quantify projected fiscal impacts rendered a rule invalid: “the agency’s notice indicate[d] that there will be such a [fiscal] impact. However, its statement of anticipated impact [did]not provide any quantitative estimate of economic impact on anyone . . . The statement [did] not attempt to do that, nor [did] it provide any explanation for failing to do so, such as those that might be related to inadequacy of ‘available information’ or that would be appropriate where there will be no fiscal impact. The statement [fell] short of meeting the mandatory requirements of the statute.”<sup>14</sup> Being in possession of the necessary information, and having failed to quantify the fiscal impact the proposed rules will have on interested parties, the Oregon Supreme Court found that the proposed rules were invalid.

Notwithstanding the claims in the NPRM that the proposed rule revisions “will have little overall financial impact,” Staff’s cost analysis demonstrates -- in the first instance -- that sufficient information was available to quantify the financial impact of the proposed revisions consistent with *Dika*. Moreover, in the second instance, Staff’s cost analysis belies entirely the claim in the NPRM that it “would be extremely difficult, if not impossible,” to produce such a detailed quantification at the time the NPRM was released.<sup>15</sup>

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<sup>13</sup> Indeed, Staff’s cost analysis does not purport to satisfy, and indeed falls far short of, the requirements of ORS § 185.335(2)(b)(E).

<sup>14</sup> *Dika*, 312 Ore. at 110, 817 P.2d at 289.

<sup>15</sup> Oregon law makes clear that the financial impact statement must be filed *with the NPRM* in order to allow interested parties to participate fully in the regulatory process. ORS § 183.335. Courts have made clear that only by filing a fiscal impact statement with the NPRM, which includes the requisite quantification, do agencies adequately alert potentially affected parties of their interest in the rulemaking.

## II. CONCLUSION.

For the foregoing reasons, Verizon respectfully requests that the Commission reject the Division 24 rule revisions proposed in the NPRM.

Respectfully submitted,



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*See, e.g., Building Dept. v. Dept. of Consumer and Business Services*, 43 P.3d 1167 (2002); *see also Oregon Funeral Director's Association v. Oregon State Mortuary and Cemetery Board*, 888 P.2d 104, 107 (1995).

**CERTIFICATE OF SERVICE**

I, Rachael L. Cotner, certify that on June 1, 2006, caused a copy of the Supplemental Comments of Verizon Northwest Inc. on Proposed Revisions to Division 24 Rules to be successfully served by electronic and U.S. mail to each of the persons listed below.

  
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