

November 17, 2006

Via Electronic Filing and U.S. Mail

Oregon Public Utility Commission
Attention: Filing Center
550 Capitol Street, N.E., Suite 215
Salem, Oregon 97308-2148

Re: AR 510: In The Matter of a Rulemaking to Amend Rules in OAR 860, Division 028 Relating to Sanctions for Attachments to Utility Poles and Facilities

Enclosed for filing in the above-captioned docket is Verizon Northwest Inc.'s closing comments.

If you have any questions, regarding this filing, please contact me at 503-645-7909.

Sincerely,

Renee M. Willer
Verizon Regulatory Manager

c: AR 510 Service List

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 510

In the Matter of Rulemaking to Amend and)	Closing Comments of
Adopt Rules in OAR 860, Division 028)	Verizon Northwest Inc.
Relating to Sanctions Rules for Attachments)	
To Utility Poles and Facilities)	

Verizon Northwest Inc. (“Verizon”) files these closing comments addressing the Commission’s “sanctions rules,” and the proposed amendments to those rules drafted by the Oregon Joint Use Association (“OJUA”) board. Verizon incorporates, without repeating, its opening comments filed on October 2, 2006 (“Opening Comments”), as if fully stated here. With the modifications proposed in its Opening Comments and here, Verizon generally supports the proposed amendments to the sanctions rules recommended by the OJUA that were attached to the Notice of Proposed Rulemaking Hearing filed with Secretary of State on September 15, 2006 (“September 15 Notice”).¹ Moreover, although Verizon reserves its legal objections to the sanctions rules (*see* footnote 1), it supports the OJUA’s stated objectives of the proposed amendments, which are: simplifying the existing sanctions rules, providing predictability as to when sanctions

¹ Although Verizon supports the OJUA rules issued with the September 15 Notice with minor revisions, in doing so, it is not waiving the legal arguments it raised challenging the Commission’s authority to issue the current sanctions rules contained in its *Amicus Curiae* briefs filed with the Oregon Court of Appeals (Docket No. CA A 123511) and the Oregon Supreme Court (Docket SC No. S 53755) in an appeal brought by Qwest Corporation. Both of these briefs have been served upon the Commission as a party to those cases and are part of the Commission’s files. Verizon requests the Commission take administrative notice of those briefs in this proceeding.

might be applied by pole owners, and creating a safe harbor for attachers' legacy violations.²

In these closing comments, Verizon addresses the latest version of proposed amendments from the OJUA, which were dated November 16, 2006 ("OJUA November 16 Proposal"). For purposes of clarity and completeness, Verizon includes each rule from the OJUA November 16 Proposal below, with Verizon's proposed additions reflected in bolded, capital letters.³

COMMENTS ON DRAFT OJUA RULES

1. Rule Number: 860-028-0120 – Duties of Pole Occupants

Verizon has several concerns with, and proposes modifications to, new subsections 4, 5 and 6. One global concern with subsections 4, 5 and 6 is that they could impose liability on an occupant for the work of an owner. If an owner corrects any purported violations, the owner should be responsible for any fines, fees, damages or other costs incurred by the occupant as a result of the correction work. Verizon thus proposes indemnification clauses in each of these subsections, which are similar to those proposed for the benefit of owners in new rule 860-028-0050(2).

Verizon also proposes to clarify the proposal in subsection (6) that owners can shorten the 180-day correction period for corrections necessary to alleviate a significant safety risk to any operator's employees or a potential risk to the general public. Although allowing for a shortened time period in these circumstances may be warranted in certain cases, the open-ended nature of the proposed rule is too ambiguous to be implemented by

² These goals were stated by OJUA spokesman John Sullivan at the first workshop.

³ No changes were proposed to existing rules 860-028-0160, 860-028-0200, 860-028-0210, or 860-028-0220 in either the September 15 Notice or in the OJUA November 16 Proposal. Verizon does not propose to change those rules, and thus does not address them in these comments.

owners or operators. To address such an ambiguity, Verizon proposes that the shortened period not be any less than 60 days. A minimum of 60 days is appropriate because it allows occupants to correct violations on their own. It also does not create safety problems because this subsection addresses violations that do not pose imminent danger to life or property which is addressed in subsection 4.

With these proposed changes, Verizon supports adoption of this rule as stated below:

(4) Notwithstanding the timelines provided for in OAR 860-028-0120 (5) or (6), pole occupants will immediately correct violations which MAY cause an imminent danger to life or property. This duty includes trimming vegetation which poses an imminent danger to life or property. If the pole owner performs the corrections, a pole occupant will reimburse the pole owner for the actual cost of correction of the occupant's attachments. Reimbursement charges imposed under this section will not exceed the actual cost of correction.

(a) IF THE POLE OWNER CORRECTS THE VIOLATIONS AUTHORIZED IN THIS SUBSECTION FOR THE OCCUPANT, IT WILL INDEMNIFY THE OCCUPANT FOR ANY FINES, FEES, DAMAGES OR OTHER COSTS THE OCCUPANT INCURS AS A RESULT OF THE OWNER'S CORRECTIONS.

(5) Notwithstanding OAR 860-028-0120 (4), an occupant will respond to a pole owner's notification of A COMMISSION SAFETY RULE violation within 180 days. This duty includes response to a notification of vegetation which poses a significant safety risk to life or property. If a pole occupant fails to respond within 180 days and if the pole owner performs the correction, the pole occupant will reimburse the pole owner for the actual cost of correction attributed to the occupant's attachments. Reimbursement charges imposed under this section will not exceed the actual cost of correction attributed to the occupant's non-compliant attachments.

(a) A pole occupant's response to a notification of violation will be either a submission of a plan of correction within 60 days or a correction of the violation within 180 days.

(b) Violation of the pole occupant duty to respond is also subject to sanction under OAR 860-028-150 (2).

(c) IF THE POLE OWNER CORRECTS THE VIOLATIONS AUTHORIZED IN THIS SUBSECTION FOR THE OCCUPANT, IT WILL INDEMNIFY THE OCCUPANT FOR ANY FINES, FEES, DAMAGES OR OTHER COSTS THE OCCUPANT INCURS AS A RESULT OF THE OWNER'S CORRECTIONS.

(6) For violations noticed under OAR 860-028-0120(5), a pole occupant must correct the violation in less than 180 days if the pole owner notifies an occupant that the violation must be corrected in less than 180 days in order to alleviate a significant safety risk to any operator's employees or a potential risk to the general public.

(a) A pole occupant will reimburse the pole owner for the actual cost of correction caused by the occupant's non-compliant attachments made under this section if:

(1) the owner provides reasonable notice of the violation; and

(2) the occupant fails to respond within timelines provided for in the notice.

(b) UNDER NO CIRCUMSTANCES WILL THE OWNER SHORTEN THE PERIOD OF TIME FOR THE OCCUPANT TO CORRECT A VIOLATION AUTHORIZED UNDER THIS SUBSECTION TO LESS THAN 60 DAYS.

(c) IF THE POLE OWNER CORRECTS THE VIOLATIONS AUTHORIZED IN THIS SUBSECTION FOR THE OCCUPANT, IT WILL INDEMNIFY THE OCCUPANT FOR ANY FINES, FEES, DAMAGES OR OTHER COSTS THE OCCUPANT INCURS AS A RESULT OF THE OWNER'S CORRECTIONS.

2. Rule Number: 860-028-0130 - Sanctions for Having No Contract

Verizon has no substantive modifications to the proposed amendments to this rule in the OJUA November 16 Proposal, and offers only one administrative clarification (insertion of the word "to" in subsection (2)(b)):

(1) Except as provided in sections (2) ~~and (3)~~ of this rule, a pole owner may impose a sanction on a pole occupant that is in violation of OAR 860-028-0060(2). The sanction ~~may be the higher of~~ may not exceed \$500 per pole.

(a) \$500 per pole; or

~~(b) 60 times the owner's annual rental fee per pole.~~

~~(2) A pole owner will reduce the sanction provided in section (1) of this rule by 60 percent if the pole occupant complies with OAR 860-028-0120 within the time allowed by OAR 860-028-0170.~~

~~(3) (2) This rule does not apply:~~

~~(a) to a pole occupant that is a government entity; or~~

~~(b) to a pole occupant operating under a contract which is expired or terminated and that is participating in good faith efforts **TO** negotiate a contract or is engaged in formal dispute resolution, arbitration, or mediation regarding the contract; or~~

~~(c) to a pole occupant operating under a contract which is expired if both pole owner and occupant are unaware that the contract has expired and carry on business relations as if the contract terms are mutually-agreeable and still apply .~~

~~(3) Sanctions imposed under this section will be applied no more than once in a 365 day period.~~

3. Rule Number: 860-028-0140 – Sanctions for Having No Permit

Verizon proposes to change the 60-day period in subsection 4 of this rule to 365 days. Sixty days is not nearly enough, as owners often provide occupants with violation invoices that include hundreds of purported unauthorized attachments (many of which turn out to be incorrect) stemming from a single inspection. For example, in a 2002 inspection, a pole owner incorrectly cited Verizon for over 850 unauthorized attachments. In fact, as Verizon stated in its closing comments in Docket AR 506, occupants are forced to inspect each and every pole for alleged violations because of extremely high inaccuracy rates of violations alleged by owners. Such inaccuracy rates range from 40 to 70 percent. Thus, 60 days does not provide an occupant sufficient time to conduct the necessary inspection to determine accuracy, file permits and take other actions. A more

appropriate time period to allow for all this work to be done is 365 days, as reflected in the proposed language below:

(1) Except as provided in sections ~~(2)~~ and (3) of this rule, a pole owner may impose a sanction on a pole occupant that is in violation of OAR 860-028-0120(1)(b), except as provided in OAR 860-028-0120(3). ~~The sanction may be the higher of:~~

~~(a) \$250 per pole; or~~

~~(b) 30 times the owner's annual rental fee per pole.~~

~~(2) A pole owner will reduce the sanction provided in section (1) of this rule by 60 percent if the pole occupant complies with OAR 860-028-0120 within the time allowed by OAR 860-028-0170.~~

(2) Sanctions imposed under this section may not exceed:

(a) 5 times the current annual rental fee per pole if the violation is reported by the occupant to the owner and is accompanied by a permit application or is discovered through a joint inspection between the owner and occupant and accompanied by a permit application; or

(b) \$100 per pole plus 5 times the current annual rental fee per pole if the violation is reported by the owner.

(3) Sanctions imposed under this section may be applied no more than once in a ~~365~~ 60 day period.

(4) Occupants may not be re-sanctioned after the initial ~~365~~ 60 day period if:

(a) the occupant has filed a permit application in response to a notice of violation; or

(b) the notice of violation involves more than the threshold number of poles, as defined in OAR 860-028-0020 (31), and the parties negotiate a mutually-satisfactory, longer timeframe to complete the permitting process.

(5) This rule does not apply to a pole occupant that is a government entity.

4. Rule Number: 860-028-0150 - Sanctions for Violation of Other Duties

Verizon supports parts of this proposed rule, but changes are required to subsections 2, 4 and 6. Subsection 2 is inappropriate because it envisions recovery of both an additional charge and sanctions for a violation of OAR 860-028-0120(5). Imposition of sanctions would go too far when the owner may already obtain an additional charge (reflecting up to 15 percent of the actual cost of work done by the owner). Accordingly, Verizon proposes to delete the reference to sanctions in subsection 2.

Verizon also proposes to add the words “materially and intentionally” to subsection 4 to establish a reasonable standard for the application of sanctions for an occupant’s failure to adhere to a correction plan. Sanctions are not appropriate for minor failures, or failures that were not done on purpose.

Verizon opposes inclusion of the proposed subsection 5. Subsection 5 would impose a draconian remedy on occupants for any and all violations involved in new construction by permitting sanctions without offering the occupant the opportunity to correct violations or submit a plan of correction for violations. Occupants must be given an opportunity to correct such violations before any sanctions are imposed, in a similar manner as to what is allowed under subsection 3.

Otherwise, occupants could be sanctioned for anything but flawless construction. Perfection is not the proper standard for imposition of sanctions, particularly when – in other contexts (e.g., inspections) – owners advocate that accuracy standards applicable to them should be as low as 20 percent. Moreover, the only plausible reason for not providing an occupant an opportunity to correct any violations before imposition of

sanctions would seem to be motivation to maximize revenues for pole owners. As such, the proposed subsection 5 should not be included.

~~(1) Except as provided in sections (2) and (3) of this rule, a A pole owner may impose a sanction on a pole occupant that is in violation of OAR 860-028-0120(1)(c), (1)(d), or (3). Sanctions imposed under OAR 860-028-0120 (1)(c) or (1)(d), or (3) may not exceed the higher of: \$200 per pole.~~

~~(b) Twenty times the pole owner's annual rental fee per pole; or~~

~~(2) A pole owner will reduce the sanction provided in section (1) of this rule by 70 percent if the pole occupant complies with OAR 860-028-0120 within the time allowed by OAR 860-028-0170.~~

~~(2) A pole owner may impose an additional charge, exclusive of any sanctions imposed under section 1 of this rule, on a pole occupant that is in violation of OAR 860-028-0120 (5). Charges imposed under this section will not exceed 15 percent of the actual cost of corrections caused by the occupant's non-compliant attachments.~~

(3) Sanctions imposed under 860-028-0150 (1) and (2) do not apply if:

(a) the occupant submits a plan of correction in compliance with OAR 860-028-0170 within 60 days of notification of a violation; or

(b) the occupant corrects the violation and provides notification of the correction to the owner within 180 days of notification of the violation.

(4) If a pole occupant submits a plan of correction in compliance with OAR 860-028-0170 and **MATERIALLY AND INTENTIONALLY** fails to adhere to all of the provisions of that plan within the dates provided for within the plan, the pole owner may impose sanctions for the uncorrected violations documented within the plan.

~~(5) Notwithstanding the timelines provided for in OAR 860-028-0150 (3), a pole owner may immediately impose sanctions for violations occurring on attachments which are newly constructed and newly permitted by the occupant or are caused by the occupant's transfer of currently permitted facilities to new poles.~~

~~(a) Sanctions may be imposed under this section only if the pole occupant has provided to the pole owner a notice of completion which is no more than 90 days old.~~

~~(b) Sanctions under this section will not be charged to the pole occupant if the violation is discovered in a joint post construction inspection between the pole owner and pole occupant or their respective representatives and is corrected by the pole occupant within 60 days of the joint post construction inspection or within a mutually agreed upon time.~~

~~(c) If the pole occupant has performed an inspection and requests a joint post construction inspection, pole owner consent to such inspection will not be unreasonably withheld.~~

~~(3)(6) This rule does not apply to a pole occupant that is a government entity.~~

5. **Rule Number: 860-028-0170 - Plans of Correction**

Verizon supports the proposed amendments to this rule as set forth in the OJUA November 16 Proposal.

~~Time Frame for Securing Reduction in Sanctions Plans of Correction~~

~~(1) Except as provided in section (2) of this rule, a pole owner will reduce the sanctions provided in these rules, if the pole occupant:~~

~~(a) On or before the 60th day of its receipt of notice, complies with OAR 860-028-0120 and provides the pole owner notice of its compliance; or~~

~~(b) On or before the 30th day of its receipt of notice, submits to the pole owner a reasonable plan of correction, and thereafter, complies with that plan, if the pole owner accepts it, or with another plan approved by the pole owner.~~

~~(2) Notwithstanding section (1) of this rule, a pole owner may, if there is a critical need, or if there is no field correction necessary to comply with OAR 860-028-0120, shorten the times set forth in section (1). A pole occupant that disagrees with the reduction must request relief under OAR 860-028-0220 prior to the expiration of the shortened time period, or within seven days of its receipt of notice of the reduction, whichever is later.~~

~~(3) (1) A plan of correction will, at a minimum, set out:~~

~~(a) Any disagreement, as well as the facts on which it is based, that the pole occupant has with respect to the violations alleged by the pole owner in the notice;~~

(b) The pole occupant's suggested compliance date, as well as reasons to support the date, for each pole that the pole occupant agrees is not in compliance with OAR 860-028-0120.

(2) If a pole occupant suggests a compliance date of more than ~~60~~ 180 days following receipt of a notice of violation, then the pole occupant must show good cause.

(3) Upon its receipt of a plan of correction that a pole occupant has submitted under subsection (1)~~(b)~~ of this rule, a pole owner will give notice of its acceptance or rejection of the plan.

~~(a) If the pole owner accepts the plan, then the pole owner will reduce the sanctions to the extent that the pole occupant complies with OAR 860-028-0120 and provides the pole owner notice of its compliance, on or before the dates set out in the plan;~~

~~(b)~~(a) If the pole owner rejects the plan, then it will set out all of its reasons for rejection and, for each reason, will state an alternative that is acceptable to it;

~~(c)~~(b) Until the pole owner accepts or rejects a plan of correction, the pole occupant's time for compliance with OAR 860-028-0120 is tolled; The pole occupant's time for compliance with the timelines provided for within the plan of corrections is not commenced until a plan of correction has been mutually agreed upon by both the pole owner and the occupant.

~~(d)~~(c) If a plan of correction is divisible and if the pole owner accepts part of it, then the pole occupant will carry out that part of the plan.

(d) If a pole occupant submits a plan, the pole occupant must carry out all provisions of that plan unless the pole owner consents to a submitted plan amendment.

(4) Pole occupants submitting a plan of correction must report to the pole owner all corrections completed within the timelines provided for within the plan.

6. Rule Number: 860-028-0180 - Removal of Occupant Pole Attachments

Verizon supports the proposed amendments to this rule as set forth in the OJUA

November 16 Proposal.

~~Progressive Increases in Sanctions~~ Removal of Occupant Pole Attachments

~~(1) Except as provided in sections (2) and (3) of this rule, if the pole occupant fails to comply with OAR 860-028-0120 within the time allowed under OAR 860-028-0170, then the pole owner may sanction the pole occupant 1.5 times the amount otherwise due under these rules.~~

~~(2) If the pole occupant has failed to meet the time limitations set out in OAR 860-028-0170 by 30 or more days, then the pole owner may sanction the pole occupant 2.0 times the amount otherwise due under these rules.~~

~~(3)~~(1) If the pole occupant has failed to meet time limitations set out in OAR 860-028-120, OAR 860-028-130, OAR 860-028-140, or OAR 860-028-150 by ~~60~~ 180 or more days, then the pole owner may request an order from the Commission authorizing removal of the pole occupant's attachments. Nothing in this section precludes a party from pursuing other legal remedies.

~~(4)~~(2) This rule does not apply to a pole occupant that is a government entity.

7. Rule Number: 860-028-0190 - Notice of Violation

Verizon proposes the following non-substantive changes to this proposed rule for purposes of clarity. With these changes, Verizon supports adoption of this rule.

A pole owner that seeks, under these rules, any type of relief against a pole occupant for violation of OAR 860-028-0120 will provide the pole occupant notice of each attachment allegedly in violation of the rule, including ~~the~~ a provision and explanation of the rule each attachment allegedly violates, the pole number and a description of the location of the pole sufficient to locate the pole. ~~THE Pole owner will PROVIDE TO THE OCCUPANT make available maps and GPS coordinates if AVAILABLE possible.~~

8. Rule Number: 860-028-0195

Verizon supports adoption of this rule.

The Commission will issue its final order within 360 days of the date a complaint is filed in accordance with these rules. This rule does not apply to a complaint involving the attachment(s) of an "incumbent local exchange carrier" (as that phrase is defined in 47 U.S.C. Section 251(h) (2002)).

9. Rule Number: 860-028-0230 - Pole Attachment Rental Reductions

The OJUA appears to have accepted Verizon’s proposal (from its Opening Comments) that subsection 3(f) be modified to note that only “undisputed” fees be considered as part of a “pattern of delay.” Thus, this proposed rule is vastly improved in Verizon’s eyes. Yet another change, related to the effective date of any new definition of a “pattern of delay,” is necessary. As stated in Verizon’s Closing Comments in Docket AR 506, for purposes of implementation of the Division 28 sanctions rules, any definition of “pattern” can apply only prospectively upon the effective date of a new definition of pattern. Otherwise, parties would not be on proper notice as to what constitutes a “pattern” that could lead to sanctions. Verizon proposes to add subsection 3(g) to this rule as set forth below to address this concern:

(1) Except as provided in section (3), a licensee will receive a rental reduction.

(2) The rental reduction will be based on ORS 757.282(3) and OAR 860-028-0110.

(3) A pole owner or the Commission may deny the rental reduction to a licensee, if either the pole owner or the Commission can show that:

(a) The licensee has caused serious injury to the pole owner, another pole joint-use entity, or the public resulting from non-compliance with Commission safety rules and Commission pole attachment rules or its contract or permits with the pole owner;

(b) The licensee does not have a written contract with the pole owner that specifies general conditions for attachments on the poles of the pole owner;

(c) The licensee has engaged in a pattern of failing to obtain permits issued by the pole owner for each pole on which the pole occupant has attachments;

(d) The licensee has engaged in a pattern of non-compliance with its contract or permits with the pole owner, Commission safety rules, or Commission pole attachment rules;

(e) The licensee has engaged in a pattern of failing to respond promptly to the pole owner, PUC Staff, or civil authorities in regard to emergencies, safety violations, or pole modification requests; or

(f) The licensee has engaged in a pattern of delays, each delay greater than 45 days from the date of invoice, in payment of undisputed fees and charges filed in a timely manner and due the pole owner.

(g) A COURSE OF BEHAVIOR ONLY CONSTITUTES A PATTERN IF ALL OF THE EVENTS COMPRISING THE PATTERN BEGAN AFTER JANUARY 1, 2007.

(4) A pole owner that contends that a licensee is not entitled to the rental reduction provided in section (1) of this rule will notify the licensee of the loss of reduction in writing. The written notice will:

(a) State how and when the licensee has violated either the Commission's rules or the terms of the contract;

(b) Specify the amount of the loss of rental reduction which the pole owner contends the licensee should incur; and

(c) Specify the amount of any losses that the conduct of the licensee caused the pole owner to incur.

(5) If the licensee wishes to discuss the allegations of the written notice before the Joint-Use Association (JUA), the licensee may request a settlement conference. The licensee will provide notice of its request to the pole owner and to the JUA. The licensee may also seek resolution under section (6) of this rule.

(6) If the licensee wishes to contest the allegations of the written notice before the Commission, the licensee will send its response to the pole owner, with a copy to the Commission. The licensee will also attach a true copy of the written notice that it received from the pole owner.

(a) Upon receipt of a request, the Commission Staff will, within 30 days, provide to the parties a recommended order for the Commission;

(b) Either party may, within 30 days of receipt of the recommended order, submit written comments to the Commission regarding the recommended order;

(c) Upon receipt of written comments, the Commission will, within 30 days, issue an order.

(7) Except for the rental reduction amount in dispute, the licensee will not delay payment of the pole attachment rental fees due to the pole owner.

10. Rule Number: 860-028-0240 - Effective Dates

Verizon has no recommended modifications to this proposed rule and supports its adoption as stated below.

(1) Except as provided in section (2) of this rule, OARs 860-028-0120 through 860-028-0230 are effective on January 1, 2004~~7~~.

Dated: November 17, 2006

VERIZON NORTHWEST INC.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of Verizon's Northwest Inc.'s closing comments in Docket AR 510, by US Mail and electronic mail, to the parties on the attached service list.

Dated this 17th day of November, 2006

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