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November 17, 2006

Annette Taylor
Oregon Public Utility Commission
550 Capitol St., NE
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Re: AR 506 / AR 510

Dear Ms. Taylor:

Enclosed for filing in the above entitled matter please find an original and (5) copies of Qwest Corporation's Final Comments, along with a certificate of service.

If you have any questions, please do not hesitate to give me a call.

Sincerely,

A handwritten signature in cursive script that reads "Carla".

Carla M. Butler

CMB:
Enclosure
cc: Service List (via e-mail transmission)
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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 Attachment Use and Safety (AR 506)

Rulemaking to Amend Rules in OAR 860, Division 028 Relating to Sanctions for Attachments to Utility Poles and Facilities (AR 510)

QWEST’S FINAL COMMENTS

Qwest Corporation (“Qwest”) submits its final comments regarding the Oregon Joint Use Association’s (“OJUA”) revised proposed rules for pole attachment sanctions in Division 28 of Chapter 860 of the Oregon Administrative Rules, as well as other Division 28 proposals.

COMMENTS

I. COMMENTS REGARDING SANCTIONS RULES

As Qwest mentioned in its September 28, 2006 initial comments, Qwest appreciates the OJUA’s efforts in proposing revisions to the pole attachment sanctions rules in Division 28 of Chapter 860, including its more recent October 4, 2006 proposal and its most recent revisions on November 16, 2006. Qwest believes that most of the OJUA’s proposals are a vast improvement of the current rules. However, Qwest continues to generally oppose the OJUA’s proposal because the OJUA proposal still continues to maintain the current system under which the Commission’s rules authorize interested private parties (pole owners) to impose and collect penalties on other private parties (pole occupants). As Qwest has stated, it believes that the imposition of penalties by pole owners, who necessarily have a self-interest in recovering sanctions, is unlawful. In addition, any rules that authorize such penalties exceed the

Commission's own statutory authority, as well as violate several constitutional principles.

Further, any penalties that the Commission's rules allow must be recovered in *court*, and in the name of the State of Oregon. Further still, the only payments that may lawfully be collected by pole owners for violation of the Commission's rules or the terms of a pole attachment agreement are those that are compensatory in nature, and not based on pre-set penalties that have no relation to any harm that the pole owners have suffered or the cost that the pole occupant has caused.

Further, and without waiving its positions, Qwest believes that if the Commission continues to allow pole owners to impose penalties, it must, at a minimum, provide for additional procedural safeguards to protect the rights of parties from whom pole owners are seeking penalties. Thus, if the Commission continues to have rules that authorize pole owners to recover penalties, the Commission should provide that such pole owners must seek such penalties in court actions. At a very minimum, the Commission should take a more active role in the imposition of such penalties, and should provide parties with procedural protections that are not available under the current rules.

In essence, Qwest will not reiterate all of its comments from September 28, 2006. Rather, Qwest simply mentions that it incorporates its September 28, 2006 comments fully here.

In addition, Qwest agrees with Charter's comments that argued for the rescission or elimination of the sanctions rules. Specifically, Qwest agrees with Charter that the sanction rules undermine the very purpose of Oregon pole attachment law and allow pole owners to recover supra-compensatory rates (especially because they have created inappropriate incentives that encourage abuses and undermine pole regulation and because the non-compensatory nature of the sanctions allows for over-recovery). The sanctions rules also undermine the promotion of communications deployment in violation of the express public policies of both Oregon and federal authorities.

Qwest further agrees with Embarq's (formerly United/Sprint) comments that argued for rescission or elimination of the sanctions rules because these rules continue to be unreasonable and overly punitive and because they encourage uneconomic bureaucracies that treat sanctions as a revenue stream (instead of purely as a deterrent to unsafe pole attachment practices). Qwest further agrees with Embarq that the magnitude of the sanctions in these rules creates an environment that is anticompetitive and a barrier to entry, especially because the rules encourage pole owners to exercise monopoly power over poles, and they take away from the reason (providing the best quality services to Oregonians) for the leasing of poles to begin with. In short, the sanctions rules go well beyond their original intent to encourage safe and responsible uses of poles to provide power and telecommunications services.

Further still, Qwest notes that although several commenting parties agree to support the OJUA's proposal as a compromise proposal (including Verizon, Electric Lightwave and the Oregon Cable Telecommunications Association ("OCTA")), none of these parties supported the status quo regarding sanctions, or supported sanctions in general.¹ In fact, even Staff itself did not comment on the sanctions rules or OJUA's proposal.

¹ For example, "Electric Lightwave believes that monetary sanctions are not necessary and should be eliminated entirely" and that there is a "perverse incentive" for "pole owners to terminate joint use contracts that have been in place for years solely to maximize the amount of penalties they may recover." Qwest further agrees with Electric Lightwave about a "potential significant windfall that has been available to pole owners recently [that] has resulted in an increase in the number of joint use disputes and [that] has generally harmed the tradition of cooperative joint use in the state." Likewise, Verizon notes that "the sanctions rules have been used by some owners to try to force occupants into entering into unfair pole attachment agreements based on the occupants' fear that if no agreement is reached, they would face sanctions unilaterally imposed by the owners," and that "[t]he rules also appear to have encouraged owners to conduct duplicitous 'special' audits or inspections in the hopes of finding purported attachment violations that would allow the owners to impose sanctions." Finally, Qwest agrees with OCTA's comments about sanctions rules, including the cooperative 20-year history of no contested cases between pole owners and licensees before the Commission adopted its sanctions rules in 2000 and the number of disputes brought before the Commission in the past few years. Qwest further agrees with OCTA that the sanctions rules create incentives and opportunities for some pole owners to demand and exact unreasonable rents, terms, and conditions and that a pole owner has a strong incentive not to successfully conclude renewal negotiations before a contract expires so that the owner can levy the highest possible sanction against the attacher (under the rules for penalties for not having a contract).

Indeed, the *only parties* that filed comments in support of sanction rules were PacifiCorp in its October 4, 2006 comments a week after Qwest's comments and the joint comments of Central Lincoln PUD and Northern Wasco County PUD. However, while purporting to justify its position in favor of sanctions on various grounds (such as safety reasons and contractual breaches for non-compliance, and now, more recently, based on arguments about "financial incentives" to insure compliance), PacifiCorp itself does not address any of the legal, policy and operational concerns that Qwest raised the week before in its September 28, 2006 comments.²

Finally, Qwest notes that if the Commission determines to retain sanctions rules, but is willing to adopt the OJUA proposal, and without waiving Qwest's general objections to and suggestions about the penalty rules, Qwest continues to support the comments it made on September 28, 2006 on some of OJUA's specific rule proposals. Specifically, Qwest continues to supports the comments it made with respect to OAR 860-028-0130 (sanctions for having no contract), OAR 860-028-0140 (sanctions for having no permit), OAR 860-028-0150 (sanctions for violation of other duties), OAR 860-028-0180 (removal of occupant pole attachments) and OAR 860-028-0220 (resolution of factual disputes).

II. COMMENTS REGARDING DIVISION 28 (NON-SANCTIONS) RULES

Finally, Qwest agrees with and joins in the OJUA's comments in response to the Commission Staff's new proposed language on vegetation management for telecommunications pole owners and occupants. First, Qwest specifically agrees with the OJUA that the language for vegetation management for telecommunications pole owners and occupants should be in the rules regarding duties for pole owners (OAR 860-028-0115) and duties for pole occupants (OAR 860-028-0120). Further, Qwest supports the OJUA's proposed rules because they establish

² In addition, the PUDs seem to tie sanctions solely as a *quid pro quo* for rental rate reductions. The PUDs likewise do not address any of the legal, policy and operational arguments that Qwest raised in its initial comments.

occupant duties to correct violations or to create a plan of correction. Finally, Qwest agrees with and supports the OJUA's proposal because it ties a mandatory duty of vegetation trimming of pole occupants and owners to appropriate safety levels by requiring the immediate trimming of vegetation that causes imminent danger, and by requiring the trimming of vegetation that causes a significant safety risk no later than 180 days (or that vegetation trimming be included within a plan of correction acceptable to both the pole owner and occupant within 60 days).

CONCLUSION

Accordingly, Qwest respectfully submits that the Commission should rescind or eliminate its pole attachment sanctions rules, or, at a very minimum, that it should substantially revise them consistent with Qwest's comments. Qwest further submits that the Commission should adopt the OJUA's Division 28 proposals regarding non-sanction rules, including the OJUA's recent proposed rules for vegetation management.

Respectfully submitted,

DATED: November 17, 2006



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CERTIFICATE OF SERVICE VIA E-MAIL TRANSMISSION

AR 506/AR 510

I hereby certify that on the 17th day of November, 2006, a true and correct copy of the foregoing QWEST CORPORATION'S FINAL COMMENTS, in the above entitled docket, was served upon the following persons via means of e-mail transmission to the e-mail addresses listed on the following pages.

Dated this 17th day of November, 2006.

Qwest Corporation



by: _____

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