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November 3, 2006

Public Utility Commission of Oregon  
Attn: Filing Center  
P.O. Box 2148  
550 Capital Street NW, Suite #215  
Salem, Oregon 97308-2148

RE: OPUC Docket AR 510 – Phase II Supplemental Comments

Enclosed please find the Comments of United Telephone Company of the Northwest  
d/b/a EMBARQ on the proposed rules in the above-captioned docket.

Sincerely,

*Nancy L. Judy*  
Nancy L. Judy

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**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

In the Matter of	)	
Rulemaking to Amend and Adopt	)	
Permanent Rules in OAR 860, Division	)	AR 510 Phase II
24 and 28, Regarding Pole Attachment	)	Second Round of Comments
Use and Safety	)	of United Telephone Company of the
_____	)	Northwest d/b/a Embarq
	)	

**COMMENTS OF EMBARQ**

Having read the parties first round of comments and participated in several workshops, United Telephone Company of the Northwest d/b/a Embarq (“Embarq”) respectfully submits the following supplemental comments regarding the OJUA’s revision of Proposed Rules issued on October 9, 2006. These comments are in addition to the comments filed by Embarq on October 4, 2006 except as modified herein.

**1. 860-028-0120 Duties of Pole Occupants**

Embarq supports the modifications proposed by Verizon which clarify that “costs” means “actual direct costs,” and defines “emergency” to clarify when pre-authorization is not required. These changes are consistent with the language addressing safety violations in the Commission’s Order No. 06-547 in the Division 24 rules.

**2. 860-028-0130 Sanctions for Having No Contract**

Embarq agrees with Charter and other parties who argue that this rule should be eliminated. There is no basis for sanctions for having no contract. Any attachment made without a contract would constitute an unauthorized contact for which the pole owner would apply a sanction. The statutes for attachments regulation specifically provide for

penalty charges or sanctions for unauthorized attachments but make no reference to sanctions for no contract or permit.<sup>1</sup>

### 3. **Rule 860-028-0140 Sanctions for Having No Permit**

Embarq changes its initial recommendation on this rule. Embarq agrees with Charter and Qwest that sanctions for unauthorized contacts should be compensatory. Embarq favors Qwest's slightly modified proposal to incorporate the penalties that the FCC adopted in *Mile Hi Cable Partners v. Pub. Serv. Co. of Colo.*, as cited by Charter. Specifically, in the event the parties cannot determine when the attachment was made, the penalty should go back to the last audit, or for 5 years, whichever is less, plus interest.

Embarq proposes the following language:

- (1) If a pole occupant installs an attachment on a pole without obtaining a permit as required by OAR 860-028-0120(1)(b), the pole owner may charge the pole occupant past-due rent measured as follows:
  - a. Rental charges shall be in the per-foot amounts set forth in the parties' agreement or, if they do not have an agreement, calculated according to OAR 860-028-0110.
  - b. Such rental charges shall apply from the date the pole owner issues a notice of unauthorized attachment back to the date the pole occupant made the unauthorized attachment. In the event neither party can establish the date the pole occupant made the unauthorized attachment, the pole owner is entitled to recover back rent from the time of the last inventory or for 5 years, whichever is less, plus interest.

### 4. **860-028-0150 Sanctions for Violation of Other Duties**

Embarq believes this proposed rule should be deleted for the same reasons that sanctions for having no contract should be deleted. There is no statutory basis for this

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<sup>1</sup> ORS 757.271 states that a pole owner may impose on a licensee a penalty charge for failing to report an attachment and may also charge the licensee for any expenses incurred as a result of an unauthorized attachment or any attachment that exceeds safety limits established by rule of the commission. Section 9, chapter 832, Oregon Laws 1999, refers to sanctions the OJUA may propose for unauthorized attachments.

sanction. Under ORS 757.271, the pole owner is entitled to a penalty charge for an unauthorized attachment, which is covered in 860-028-0140, and to any expenses incurred as a result of an authorized attachment or any attachment that exceeds safety limits under 860-028-0120(4) and (5). If the Commission disagrees and decides to adopt the OJUA's recommendation, it should clarify which sanctions would apply to service drops. As written, it appears both 860-028-150 and 860-028-140 would apply to service drops.

**5. 860-028-0160 Choice of Sanctions**

If the commission adopts Embarq's recommendations and limits sanctions to unauthorized attachments, there would be no need for this rule.

**6. 860-028-0180 Progressive Increases in Sanctions**

Embarq endorses the OJUA's recommendation that progressive increases in sanctions be eliminated.

**7. 860-028-0230 Pole Attachment Rental Reductions**

CLPUD and NWCPUD's assertion that changes to the sanctions rules are somehow a violation of ORS 757.282(2) is baseless. Nothing in this statute conditions the rental rate reductions on a fixed rate that is set by the legislature. On the contrary, ORS 757.273 and 757.276 authorize the Commission to regulate the rates for attachments to ensure they are fair, just and reasonable. It is only logical to assume the Commission would use this authority to order rate changes when they determine that such rates do not meet the legal standard, and that the rental deduction would apply to the new rates.

Respectfully submitted this 3rd day of November, 2006.

By *Nancy L. Judy*

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