

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

AR 506

In the Matter of)
)
Rulemaking to Amend and Adopt Permanent) **RULING**
Rules in OAR 860, Divisions 024 and 028,)
Regarding Pole Attachment Use and Safety.)

DISPOSITION: ISSUES LIST FOR DIVISION 028 ESTABLISHED

This ruling is to outline issues that will be addressed in the second phase of the AR 506 rulemaking docket. This phase will address Division 028, relating to contractual provisions, rental rates, and dispute resolution.

Sanction Rules

The Notice of Proposed Rulemaking Hearing, filed for publication in the Secretary of State’s Bulletin on July 1, 2006, stated that the Commission would consider adoption of rules OARs 860-028-0050, 860-028-0060, 860-028-0070, 860-028-0080, 860-028-0100, 860-028-0115, and amendment of rules OARs 860-028-0020, 860-028-0110, and -860-028-0310. Further, the notice stated,

the second phase, will address new and amended attachment rules applicable to owners and occupants involved in the shared usage of utility poles, conduits and other facilities. This phase will address owner-occupant contract (i.e., presumptively reasonable rates, terms and conditions), dispute resolution processes, attachment installation practices and other provisions.

The Statement of Need and Fiscal Impact referred to the events leading up to this rulemaking, including prior rules implementing sanctions. The Statement of Need then stated that this rulemaking would address “mandatory dispute resolution processes and hearing costs and guidelines for owner-occupant contract provisions, attachment installation practices, and other joint use matters.”

Qwest Corporation (Qwest), Verizon Northwest, Inc. (Verizon), the Oregon Cable Telecommunications Association (OCTA), and Oregon Joint Use Association (OJUA) have requested that this docket should also cover rules related to sanctions. *See, e.g.*, Qwest filing (July 21, 2006); OJUA filing (July 21, 2006); OJUA letter (Aug 16, 2006). Sanctions are addressed in OAR 860-028-0130, 860-028-0140, 860-028-0150, 860-028-0160, 860-028-0170, and 860-028-0180, which were not included in the Notice of Proposed Rulemaking Hearing filed with the Secretary of State.

PacifiCorp argued that sanction rules should not be discussed in this rulemaking because the notice did not set out the rule numbers of the sanction rules, nor identify sanctions as a specific topic to be addressed in this rulemaking. *See* PacifiCorp filing (Aug 4, 2006). Staff agreed that sanctions should not be considered in this rulemaking: “the Notice of Proposed Rulemaking must be broad enough so that interested parties are adequately informed that their interests might be affected.” Staff’s Comments Regarding Division 28 Issues Lists (Aug 16, 2006) (citing *Bassett v. Fish & Wildlife Commission*, 27 Or App 639 (1976)).

Verizon argued that the Statement of Need referred to the events leading up to the rulemaking, including Commission adoption of sanction rules. In discussing this rulemaking, the Statement of Need and Notice of Rulemaking Hearing referred to “other joint use matters,” which Verizon asserted includes issues related to sanctions. *See* Verizon filing (Aug 16, 2006). On August 24, 2006, the OCTA filed additional arguments in support of including sanctions in this rulemaking.

ORS 183.335(2)(a)(B) requires that a notice provide an “objective, simple and understandable statement summarizing the subject matter and purpose of the intended action in sufficient detail to inform a person that the person’s interests may be affected, and the time, place and manner in which interested persons may present their views on the intended action.” *See Bassett*, 27 Or App at 641-42. The Court of Appeals struck down a rule on fines where the rulemaking notice addressed “compliance with the new requirements of the rule on drug urinalysis in the area of misconduct reports,” but not fines in disciplinary cases. *See Watson v. Oregon State Penitentiary*, 90 Or App 85, 88-89 (1988). The court held that the notice “did not state the subject matter and purpose of the intended action in ‘sufficient detail to inform a person that the person's interests may be affected.’” *See id.* In this situation, the notice dealt generally with pole attachments, but did not specify that sanctions would be part of the rulemaking docket. To ensure that the rules in this docket are upheld if they are challenged like the rules in *Watson*, sanctions will not be considered in this docket.

Discussions have been ongoing between Staff, participants, and the Commissioners about a new rulemaking docket to address other issues which may be initiated to run parallel with AR 506. If that new docket is opened, it is anticipated that the dates for filings, workshops, and hearings will coincide with the dates in this docket.

Wireless Providers

New Cingular Wireless PCS, LLC (Cingular), Sprint Spectrum L.P., and Nextel West Corp. (Sprint Nextel) filed additional issues for consideration in this docket:

- 1. OAR 860-028-0020(2)** – The definition of “authorized attachment space” should clarify how the licensee will be charged for the vertical attachment of coaxial cables from the ground up to the antennas.
- 2. OAR 860-028-0020(10)** – The definition of “licensee” should include wireless communications companies.
- 3. OAR 860-028-0020** – The definition of “pole” should include distribution and transmission poles and towers.
- 4. OAR 860-028-0110** – Pole rental rates, terms and conditions should be nondiscriminatory. The charges for make ready work, preconstruction activity, and pole replacements should be reasonable, nondiscriminatory and supported by detailed invoices.
- 5. OAR 860-028-0310** – Conduit rental rates should be nondiscriminatory. The charges for make ready work and preconstruction activity should be reasonable, nondiscriminatory and supported by detailed invoices.

Cingular and Sprint Nextel filing (Aug 4, 2006). T-Mobile filed in agreement with the comments of Cingular and Sprint Nextel. *See* T-Mobile filing (Aug 4, 2006).

Staff argues that the issues raised by Cingular and Sprint Nextel are new and not contemplated by the notice. Further, Staff asserts that the wireless industry is still an emerging industry with new challenges that should be carefully considered in another docket. Finally, Staff contends that the relevant statutes do not cover wireless operators or their facilities on utility poles. *See* Staff filing (Aug 16, 2006).

A response was filed by Cingular and Sprint Nextel argued that it has the right to address pole rental rates raised in the notice as they relate to wireless carriers. Cingular and Sprint Nextel filing (Aug 18, 2006). They contended that they are “licensees” under the definition in ORS 757.270(3) and therefore are affected by this rulemaking. *See id.* at 2. T-Mobile also filed in opposition to “Staff’s unprecedented attempt to exclude an entire category of parties from providing input regarding the Commission’s pole attachment rules.” T-Mobile filing (Aug 18, 2006). T-Mobile asserted that all operators concerned should be allowed to weigh in on issues related to rental rates in order to ensure complete consideration of all of the issues involved. *See id.*

Cingular and Sprint Nextel raise five very specific issues that, as phrased in the initial filings, are within the notice for this rulemaking. The Commission certainly cannot exclude comments by any participant. However, as arguments are more thoroughly argued and evaluated in the course of this proceeding, it may become evident that wireless issues should be considered in a separate docket. At this point, the issues raised by wireless providers in the August 4 filing are not excluded, as they pertain to pole attachment issues on a general basis.

Issues List

In the initial ALJ memorandum setting forth the schedule in this docket, the OJUA was charged with establishing an issues list. That issues list was to be submitted on July 21, 2006, so that other participants who wanted to submit additional issues could do so. The OJUA submitted its consolidated issues list on August 21, 2006. The issues list set forth below considers issues raised by the OJUA as well as other participants, to establish the scope of this proceeding. This does not preclude comments on other issues not set forth in this list, but encompassed by the notice; however, participants are expected to adhere to this list as much as possible in submitting their comments.

OAR 860-028-0020

- ◇ Should the following definitions be modified?
 - Authorized Attachment Space – what about vertical attachment of coaxial cables from the ground to the antennae
 - Carrying Charge
 - ◇ Should inflation be considered?
 - ◇ Should this be based on FCC-approved 364 account only?
 - ◇ Rate of Return – is this the Return on Equity, Return on Debt, or Weighted Average Cost of Capital?
 - Cost of Money – for consumer-owned utilities, should this be the average cost of capital rate?
 - Licensee
 - ◇ Include government entities?
 - ◇ Include wireless carriers
 - Make Ready Work - what does this include?
 - Pattern
 - ◇ What is “frequent”?
 - ◇ Is this prospective only?
 - Permit
 - Pole Cost – limited to distribution poles?
 - Preconstruction Activity
 - Service Drop
 - Special Inspection
 - Threshold number of poles – consider in context of the use of the phrase in proposed Rule 860-28-0100(7)

OAR 860-028-0020

- Usable space
- Unauthorized Attachment
- ◇ Should the following definitions be added?
 - Safety Clearance (used in proposed OAR 860-028-0020(33))
 - Operator (used in proposed OAR 860-028-0050(3))
 - Utility pole (as used in OAR 860-028-0050(1)(a)) – should poles be limited to distribution poles, or include transmission poles? Towers? Other structures?
 - Routine inspection

OAR 860-028-0050

- ◇ Should provisions regarding owner correction and operators trimming vegetation be moved to OAR 860-028-0120?
- ◇ What vegetation management standards are appropriate for communications operators?

OAR 860-028-0060

- ◇ What happens if parties are not negotiating? in proposed OAR 860-028-0060 (4)

OAR 860-028-0070

- ◇ What role should OJUA have in dispute resolution for contracts?
- ◇ Should time for response to a complaint be lengthened from 30 days?
- ◇ Proposed wordsmithing of OAR 860-028-0070(4)(e)(B) for clarification.
- ◇ NOTE: OJUA said it would consider timelines for Commission decision that exceed 180 days. Rule 860-028-0195, not considered in this proceeding, allows 360 days for a Commission decision.

OAR 860-028-0080

- ◇ Are IOUs subject to payment under this rule?
- ◇ What about other entities?

OAR 860-028-0100

- ◇ Should government entities be required to have permits for attachments?
- ◇ Should the timelines be in calendar days or business days?
- ◇ What should applicable timelines be?
 - 45 days for response to application?
 - Period between notifying the licensee of make ready and the response from licensee
 - Period between granting the permit and the licensee completing construction
 - Period for which permit is valid
- ◇ Should there be an allowance for owner's estimates on time needed for make work, especially if there are multiple parties?

OAR 860-028-0100

- ◇ Should there be presumptive approval if permits are not responded to within a certain period of time? Should applicant be allowed to begin construction, or is there a risk to safety and reliability?
- ◇ Should applicant be able to have input on who performs make ready work? Does pole owner have say on hiring and firing these workers?
- ◇ What standard processes and information are required for new or modified permits?
- ◇ What should owner have to provide reasons for denial of permit? What reasons are acceptable?

OAR 860-028-0110

- ◇ Should the pole rental rate be adjusted for inflation?
- ◇ What costs should be included in rental rates? What should be a direct charge, and what should be in the pole rental rate? See also Rule 860-028-0310(6)
- ◇ Should the calculation of pole rental rate be amended? Rule 860-028-0310(3)
- ◇ Should rates be nondiscriminatory?
- ◇ What if an attachment permit doesn't specify amount of authorized space?
- ◇ What elements should be allowed in an existing authorized space under an existing permit?
- ◇ Should prepayment be required for the work specified in Rule 860-028-0100, or all "make ready" work?
- ◇ When is the owner required to show that certain charges were excluded from the rental rate calculation?
- ◇ OJUA raised a concern that "usable space" definition was omitted from Rule 860-028-0110(3), but it was moved to proposed Rule 860-028-0020(33). Is that still a concern?

OAR 860-028-0115

- ◇ Is section (3) redundant with other rules?
- ◇ Should communication protocols be mutually acceptable to owner and licensee?
- ◇ Should an owner be required to respond to other problems with the pole, not just violations of Commission Safety Rules? 860-028-0115 (3)(a)
- ◇ Should an owner be responsible for maintaining towers for joint-use? 860-028-0115 (1)
- ◇ What are the responsibilities of structure owners related to safety, engineering practices, inter-operator communications, coordination, etc?
- ◇ NOTE: OJUA proposed an issue related to a cost-recovery mechanism for licensee costs incurred when disproving sanctioned pole violations. As discussed above, this issue is not properly within the scope of this rulemaking. If another docket is opened, this issue should be addressed in conjunction with changes to OAR 860-028-0150.

OAR 860-028-0310

- ◇ Should other calculations for conduit costs be permitted to reflect variations in how owners collect and keep their system information?
- ◇ Should rates be non-discriminatory?
- ◇ Should charges be supported by detailed invoices?

Due to the delay in the issuance of this list, the deadline for the first round of comments in AR 506 is moved to September 28, 2006. Participants are urged to develop consensus proposals on rule language and raise issues that are still contested at the October workshops.

Dated at Salem, Oregon, this 5th day of September, 2006.

Christina M. Smith
Administrative Law Judge