ORDER NO. 07-137

ENTERED 04/10/07

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 506/ AR 510

In the Matters of	)	
	)	
Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachment Use and Safety (AR 506)	)	ORDER
	)	
and	)	
	)	
Rulemaking to Amend Rules in OAR 860, Division 028 Relating to Sanctions for Attachments to Utility Poles and Facilities (AR 510).	)	

DISPOSITION: PERMANENT RULES ADOPTED

This docket represents the culmination of more than one year of effort by Commission Staff and industry participants in revising pole attachment rules. After consideration of all of the comments and legal and policy issues, we adopt the AR 506 Division 028 rules set out in Appendix A and AR 510 rules set out in Appendix B.

Participants have submitted multiple rounds of comments and attended several sessions of workshops before docket AR 506 was officially opened, throughout phase one, and now in phase two. We consider all of the comments, submitted in writing, as well as in workshops, to be part of the record that forms the basis for this decision.

On July 1, 2006, the notice for the second phase of AR 506 was published in the Secretary of State Bulletin, signaling the start of the docket to evaluate proposed changes to several Division 028 rules. At the behest of participants, another docket was opened, AR 510, to address sanction rules and the remaining rules in Division 028. That notice was published in the October 1, 2006, Secretary of State Bulletin.

Participants in this phase included Commission Staff (Staff), the Oregon Joint-Use Association (OJUA), Portland General Electric Company (PGE), Pacific Power & Light dba PacifiCorp (PacifiCorp), the Oregon Rural Electric Cooperative Association (ORECA), Oregon Telecommunications Association (OTA), Idaho Power Company (Idaho Power), Qwest Corporation (Qwest), Verizon Northwest Inc. (Verizon), Charter Communications (Charter), Central Lincoln Peoples' Utility District (CLPUD),

Northern Wasco County Peoples' Utility District (NWCPUD), Oregon Cable Telecommunications Association (OCTA), and United Telephone Company of the Northwest, dba Embarq (Embarq). In addition, T-Mobile West Corporation, dba T-Mobile (T-Mobile), New Cingular Wireless PCS, LLC (Cingular), Sprint Spectrum L.P. (Sprint), and Nextel West Corp. (Nextel) participated in this docket (collectively "the wireless carriers").

The docket schedules proceeded in tandem, with several rounds of comments and workshops, including a workshop with Commissioners on October 12, 2006. The public comment period closed in both dockets on November 17, 2006. This order adopts permanent rules in both dockets.

In this order, we first examine applicability of the rules to wireless providers, and then access to transmission facilities. Next, we analyze rental rate formula issues for pole attachments. Then, we evaluate other issues raised in docket AR 506. Finally, we discuss sanctions rules as addressed in docket AR 510.

WIRELESS PROVIDERS

In submitting issues lists, the wireless carriers filed recommended issues that fell within the scope of this proceeding. No participant objects to the issues themselves, but several participants, including Staff and OJUA, argue that the rules in Division 028 adopted here should not apply to wireless carriers.

Staff argues that the wireless industry is an emerging industry with new challenges that should be thoroughly considered in another docket before applying the rules considered here. Staff asserts that this rulemaking has been split into two phases, at the suggestion of the OJUA, to first resolve safety issues before approaching contract issues; safety issues related to wireless attachments should also be vetted first, so that the participants can apply lessons learned from that process before analyzing contract issues. According to Staff, this rulemaking is based on the assumption that all communications attachments will be in the communications space on a pole, and not located in or above the electric supply space, as wireless attachments sometimes are. Staff points to the California commission, which is undertaking separate dockets to analyze safety issues related to wireless antennae in communications space and on top of poles. Staff states that "[n]either the wireless industry nor wireline industries * * * have submitted proposals to Staff on annual rental rates and charges that are appropriate for wireless attachments. The respective industries need to come forward with these proposals." AR 506 Staff comments, 2 (Nov 8, 2006).

The OJUA also recommends that a separate docket be opened to consider wireless issues. The OJUA expresses concern that the Commission will mandate access without full consideration of which wireless entities should be allowed to access poles, and that the Commission could mandate access to towers. The OJUA sets up its framework for consideration of the relevant issues: (1) whether the technology seeking inclusion within the rules is in need of protectionary regulation; (2) whether the

technology serves the public; and (3) whether the technology needs access to poles or towers to serve the public. *See* OJUA comments, 2 (Oct 24, 2006). The OJUA also cautions that wireless issues may not be properly noticed in this rulemaking, and that the Commission should avoid rushing into any actions that may have unintended consequences. If the Commission does include wireless issues in this docket, the OJUA requests that the timelines be extended.

PGE, PacifiCorp, and Idaho Power filed joint comments emphasizing the importance of opening a new docket to review wireless issues. *See* Joint Comments of Portland General Electric, PacifiCorp, and Idaho Power Company (Nov 17, 2006). The joint utilities review the progress of wireless pole attachment dockets around the country, noting the complexity of the technical requirements of wireless attachments and the attendant rates issues. *See id.* CLPUD and NWCPUD also support a separate rulemaking to address wireless issues, arguing that they were raised late in this proceeding. *See* CLPUD and NWCPUD comments, 15 (Nov 17, 2006).

Conclusion

Attachments by wireless carriers are covered by the federal pole attachment statute. *See National Cable & Telecommunications Assn., Inc. v. Gulf Power Co.*, 534 US 327, 340 (2002). The Supreme Court addressed arguments that only wires and cables were governed by the statute, and not antennae. *See id.* The Court noted that the statutory language did "not purport to limit which pole attachments are covered," and that the broader term "associated equipment" allowed room for regulation of wireless attachments. *See id.* at 340-341. The Court also dismissed arguments that poles are essential facilities for wireline services, but not wireless services, deferring to the FCC's decision to not distinguish between providers of telecommunications services.

The Oregon laws governing pole attachments, though passed in 1979 before the Telecommunications Act of 1996 broadened the federal law, are broad in scope. For instance, an attachment means "any wire or cable for the transmission of intelligence," supported by "any related device, apparatus, or auxiliary equipment" installed on any pole "or other similar facility" that is owned by a utility. *See* ORS 757.270(1). Similarly broad is the definition of licensee: "any person, firm, corporation, partnership, company, association, joint stock association or cooperatively organized association that is authorized to construct attachments upon, along, under or across the public ways." ORS 757.270(3). Further, the Commission has the authority to regulate the "rates, terms and conditions for attachments by licensees to poles or other facilities" of utilities. *See* ORS 757.273.

This Commission has certified to the FCC that it will regulate pole attachment matters, which could be construed to encompass wireless attachments. While the Oregon commission is not required to follow federal statutes precisely, the Commission has found that federal law is instructive. *See* Order No. 05-981. In addition, the legislature provided the Commission broad authority to regulate attachments. For these, we conclude that the pole attachment statutes, ORS 757.270 through ORS 757.290

and ORS 759.650 through ORS 759.675, give the Commission jurisdiction to regulate wireless attachments to poles, and the rules adopted here may also apply to wireless attachments that are also governed by the federal statutes. The OJUA argued that there is no clear definition of "wireless" to specify what kind of operators should have access to poles regulated by the Commission. *See* OJUA comments, 1 (Oct 24, 2006). We exercise our jurisdiction only to those wireless carriers who would be covered by federal law, to ensure that they fall within the scope of 47 USC 224, which this state has chosen to preempt. *See National Cable & Telecommunications Assn., Inc.*, 534 US at 342.

Pole owners and Staff have argued that the guidelines established here may not fit wireless carriers, and in a contested case, those arguments may effectively rebut the default provisions adopted here. The FCC acknowledged arguments that wireless attachments may use more space, fewer poles, and result in higher costs than traditional wireline attachments. However, the FCC also asserted, "If parties cannot modify or adjust the formula to deal with unique attachments, and the parties are unable to reach agreement through good faith negotiations, the Commission will examine the issues on a case-by-case basis." *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777 ¶ 42 (rel Feb 6, 1998). This Commission adopts a similar approach in this order. Ideally, the principles set forth in these rules will establish the framework for participants to negotiate their own contracts.

We will not delay application of these rules until a docket specifically related to wireless carriers is completed. However, a docket regarding wireless carriers, including safety concerns, should be opened as soon as possible. Until that time, the Commission will resolve issues on a case-by-case basis, considering the contract parameters adopted in this order.

TRANSMISSION FACILITIES

Arguments relating to transmission facilities fell into two categories: (1) should the Commission mandate access to transmission facilities? and (2) should rates for distribution poles and transmission poles be calculated separately or together? We answer each in turn.

Access

Some participants, in particular wireless carriers, recommend that the rental rate for attachments also apply to transmission towers ("towers"). These participants point to ORS 757.270(1), which applies to attachments installed upon any pole or in any telegraph, telephone, electrical, cable television or communications right of way, duct, conduit, manhole or handhole or other similar facility or facilities. *See* AR 506 Joint comments of T-Mobile, Cingular, and Sprint/Nextel ("Joint Wireless Comments"), 9 (Nov 17, 2006) (internal citations omitted). The wireless carriers acknowledge *Southern Company, et al v. FCC*, 293 F3d 1338 (11th Cir 2002), in which the court held that the federal Pole Attachment Act does not apply to transmission towers.

These participants contrast the language of the federal law with the wording of the Oregon statute, which is more broadly stated. They also point to a decision in Massachusetts, in which that commission found that it had jurisdiction to require non-discriminatory access to towers for wireless carriers under a state statute with wording similar to that in Oregon. *See In re Boston Edison Company*, 2001 Mass PUC LEXIS 69, at *165 (Mass DTE Dec 28, 2001).

PacifiCorp asserts that Oregon law was intended to supplant federal law, but only to the extent that federal law asserted jurisdiction over distribution poles. *See* PacifiCorp comments, 8 (Nov 17, 2006). To apply Oregon law only to the extent of the federal law, PacifiCorp recommends that the Commission interpret the inexact term "poles" to refer only to distribution poles. *Id.* For these reasons, PacifiCorp seeks to exclude transmission poles and towers from Commission rules defining poles and pole costs. *See id.* at 9.

CLPUD and NWCPUD (PUDs) also argue that the Commission should not mandate access to transmission towers. *See* CLPUD and NWCPUD comments, 14 (Nov 17, 2006). The PUDs interpret ORS 757.270(1) to apply only to distribution facilities. *See id.* Further, they assert that transmission towers are "megastructures," carry a much greater load, and affect electric reliability across state lines. *See id.* For these reasons, the PUDs urge the Commission to find that the pole attachment statutes do not apply to transmission towers. *See id.* at 15. In addition, the PUDs note that new technology is resulting in transmission towers that resemble poles. *See id* 10. The PUDs express concern that these new "poles" are carrying "many hundreds of kV of power," and should have higher standards for access. *See id.* To this end, the PUDs propose a definition for transmission poles that includes transmission facilities carrying less than 230 kV, and defines transmission towers as those facilities carrying 230 kV or more. *See id.*

Idaho Power argues that the Commission should not mandate access to transmission poles, as well as transmission towers. *See* Idaho Power comments, 6-7 (Nov 17, 2006). The utility notes that more than half of its transmission poles and towers are located on private property, and that other attachers will not always have easements to access transmission facilities. *See id.* at 7. With these logistical difficulties, Idaho Power expresses concern about whether it could comply with a mandate for nondiscriminatory access to transmission poles. *See id.*

Rates and Terms

Verizon argues that pole rental rates should be calculated separately for transmission poles and distribution poles. Verizon notes that transmission poles are often much higher than distribution poles, and therefore the rent is much more for transmission poles. The company asserts that blending the two kinds of poles together would inappropriately raise pole rental costs, and so they should be kept separate. In fact, Verizon argues that there should be separate pole attachment contracts for transmission poles and distribution poles. *See* AR 506 Verizon comments, 5-7 (Nov 17, 2006). Along

these lines, Verizon also proposes language to make it clear that "pole cost" refers to distribution poles. *See id.* at 11.

Charter also recommends that separate formulas be used for distribution poles and transmission poles. The company asserts that combining the two categories results in unnecessarily high carrying charges for licensees who are attached to distribution poles but not transmission poles. *See* Charter comments, 10 (Nov 17, 2006).

CLPUD and NWCPUD support language permitting pole owners to calculate and separately state distribution pole rental rates and transmission pole rental rates, provided that the "carrying charge" calculations were based on separate accounting data. *See* CLPUD and NWCPUD comments, 3 (Nov 17, 2006). ORECA supports comments by the PUDs regarding transmission poles, and argues that utilities should be able to separately negotiate rates for transmission poles. *See* ORECA comments, 3 (Nov 17, 2006).

CLPUD and NWCPUD also recommend a bifurcated application process for transmission and distribution poles. *See* CLPUD and NWCPUD comments, 10-12 (Nov 17, 2006). The PUDs state that they install distribution poles in anticipation of pole attachment requests, and build extra capacity to provide space for other attachers. *See id.* at 10-11. On the other hand, they state that transmission poles are designed and installed specifically to carry only the loading planned by the electric utility, with no extra capacity for other attachers. *See id.* at 11. For these reasons, the PUDs propose an extended application processing time for attaching to transmission poles and to not permit an automatic right of attachment to transmission poles. *See id.* at 11-12.

Conclusion

Oregon law provides for access to "any pole or in any telegraph, telephone, electrical, cable television or communications right of way, duct, conduit, manhole or handhole or other similar facility." ORS 757.270(1). In determining whether a transmission tower is an "other similar facility," we look to the earlier items for comparison. *See State ex rel OHSU v. Haas*, 325 Or 492, 503 (1997). This matter has been considered on the federal level; the Eleventh Circuit Court of Appeals noted that "'[p]oles, ducts, and conduits' are regular components of local distribution systems and not interstate transmission systems." *Southern Company et al v. FCC*, 293 F3d 1338, 1344 (11th Cir 2002). Towers that serve only transmission lines were found to be outside the purview of the federal pole attachment statute, but "local distribution facilities, festooned as they may be with transmission wires," fell within the statute and subsequent regulations. *See id.* at 1345. We therefore conclude that "other similar facilit[ies]" as that term is used in ORS 757.270(1) do not include towers that exclusively serve

electrical transmission lines, and so do not mandate that electric companies allow access to their transmission towers.[1]

This inquiry also helps define "poles" in ORS 757.270(1). We agree that the word "pole" is an inexact term, subject to various interpretations. *See Coast Security Mortgage Corp. v. Real Estate Agency*, 331 Or 348, 354 (2000). To determine the meaning, courts look to the intent of the legislature, using "indicators such as the context of the statutory term, legislative history, a cornucopia of rules of construction, and their own intuitive sense of the meaning which legislators probably intended to communicate by use of the particular word or phrase." *Springfield Education Assn. v. School Dist.*, 290 Or 217, 224 (1980). The legislative history behind the pole attachments statutes, Oregon Laws 1979, chapter 356, indicates the legislature's intent to adopt federal law, with the exception that consumer-owned utilities would also be subject to the pole attachment statute. *See* Testimony, House Committee on State Government Operation, SB 560A, June 19, 1979, Ex A (statement of Ray Gribling, representing Pacific Northwest Bell, General Telephone, Oregon Independent Telephone Association, and privately owned electric utilities). Further, the Eleventh Circuit has interpreted the term "pole" in the federal statute to be limited to distribution facilities, including those that may also carry transmission lines. Therefore, we follow suit and limit mandated access to poles that carry distribution lines, which includes poles that carry both distribution and transmission lines.

In addition to this review of federal law, we are persuaded by arguments made by CLPUD and NWCPUD, Idaho Power, and others that transmission towers are taller than distribution poles, have higher levels of voltage, are custom built to accommodate transmission lines, and are generally more dangerous than distribution poles. Their arguments support the Commission's decision to not allow access to facilities used exclusively for transmission.

In light of the decision that transmission facilities do not fall under Oregon's pole attachment statute, and for reasons cited by Verizon, rental rates and application processes for distribution facilities should be conducted separately from those

[1] The Joint Wireless Comments cite a Massachusetts commission decision in which the commission stated that, if cable companies were denied access to transmission towers, they could file a complaint with the commission pursuant to the pole attachment statue and regulations. *See* Joint Wireless Comments, 9-10 *(*citing *Investigation by the Department of Telecommunications and Energy, on its own motion, into Boston Edison Company's compliance with the Department's Order in DPU 93-97*, DPU/DTE 97-95, 2001 Mass PUC Lexis 69 (Mass DTE Dec 28, 2001)). In that case, a regulated energy utility had an affiliate in the cable and telecommunications industries. The Massachusetts commission considered whether the utility cross-subsidized the affiliated cable and communications company by giving them exclusive access to the utility's rights-of-way, in violation of state law requiring non-discriminatory access. *See id.* at *145-*182. The Massachusetts commission found that related contractual provisions were never enforced and were, in any event, "nugatory" because they were contrary to state law. *See id.* at *153. If the utility granted discriminatory access to its affiliate, and denied access to a competitor communications or cable company, the Massachusetts commission stated that the aggrieved party could file a complaint seeking equal access. *See id.* at *161. That decision does not persuade this Commission that, without the presence of that specific situation, we should require general access to transmission facilities for communications and cable companies.

related to transmission facilities. If there are poles that fall under the Oregon statute that also have distribution lines on them, but that are accounted for in the transmission accounts, then the transmission accounts should be used to calculate rental rates on those poles.

RENTAL RATES

The subject of rental rates has several elements. First, we resolve the participants' dispute as to whether to use the FCC's cable rate formula or telecommunications rate formula. As part of that dispute, participants argued as to how usable space should be measured; we address that issue separately. Next, we evaluate the components of the carrying charge, and the charges that should be broken out separately, as opposed to being rolled into the fully allocated cost. After these fundamental decisions, we consider whether inflation should be factored into rates and the cost of money for consumer-owned utilities.

Rental Rate Formula

Idaho Power argues that any rental calculation must take into consideration all of the space taken by a licensee's attachment, including the sag of the cables while maintaining minimum ground clearance in adjacent spans, clearance between multiple licensees' attachments, and safety clearance between the highest communication attachment and the lowest power attachment. *See* Idaho Power comments, 2 (Oct 25, 2006). If the licensee does not bear the full cost of the space related to its attachments, Idaho Power argues, then the pole owner is unfairly subsidizing the licensee. *See id.* Idaho Power calculates that, under the current formula, there must be at least nine licensees on a pole before the pole owner subsidy is eliminated. *See id.* at 6. To remedy this, Idaho Power proposes language for "usable space," as well as a new definition for "space used." Idaho Power asserts that its proposal closely resembles the FCC's telecommunications formula. *See* Idaho Power comments, 7-8 (Nov 17, 2006).

CLPUD and NWCPUD also support Commission adoption of the telecommunications rate formula to prevent subsidization of attachers by pole owners. *See* CLPUD and NWCPUD comments, 12-13 (Nov 17, 2006). The PUDs cite Idaho Power's comments in support of its proposition that Oregon law does not compel adoption of only the cable rate formula. *See id.* at 13.

After analyzing Oregon's rental rate statute, ORS 757.282, PacifiCorp argues that the Legislative Assembly gave the Commission broad authority to adopt a rental rate formula. *See* PacifiCorp comments, 13-16 (Nov 17, 2006). The utility asserts that this broad authority allows the Commission to adopt a rental rate formula that more closely resembles the telecommunications rate formula. *See id.*

On the other hand, OCTA argues that Oregon law precludes the Commission from adopting Idaho Power's proposed language. *See* OCTA comments,

6-7 (Nov 17, 2006). OCTA supports the FCC cable formula because it is consistent with Oregon law, and also because there has been substantial litigation, so there are many decisions to draw on as precedent; there would be greater transparency because most information is publicly available; and no additional accounting would be required because the formula would use existing accounts. OCTA expresses the concern that other proposals would be more complicated and could result in "something like rate cases." OCTA comments, 3 (Nov 17, 2006).

Charter also supports a carrying charge calculated in the same way as the FCC cable formula, because it relies on publicly available information. The company insists that any formula rely on publicly available data to verify whether rates are just and reasonable, without a full rate case. *See* Charter comments, 9 (Nov 17, 2006).

The OJUA was unable to reach any consensus on rates, but encourages the Commission to consider its three principles as applied to rates: rates should be transparent, no party should subsidize another party, and the Commission should adopt uniform methodologies in the calculation of charges. *See* AR 506 OJUA comments, 1-2 (Nov 16, 2006).

Staff notes that the FCC has two formulas for pole-attachment rental rates, one for cable operators, implemented in 1978, and another for telecommunications providers, adopted after the Telecommunications Act of 1996. *See* Staff comments, 7 (Nov 17, 2006). The telecommunications formula uses a different methodology for determining the proportion of pole space that is attributable to the attachment and allocates the cost of the "unusable" portion of the pole based on the total number of pole occupants rather than the portion of space occupied by the attachment, according to Staff. *See id.* Staff concedes that Oregon's formula is similar to the cable formula, but recommends that the Commission review the attachment rate principles that led to the telecommunications formula. Staff asserts that those principles may be more equitable in today's market, particularly as applied to wireless providers. *See id.* Staff recommends that a new docket consider the applicability of the telecommunications formula, but that for this docket, a modified cable formula should be adopted.

Conclusion

We conclude that a modified cable rate formula is the most appropriate for calculating pole rental rates under ORS 757.282. In so doing, we note the progression of legislative history behind the pole attachment statutes in Oregon. First, in 1978, Congress passed legislation governing pole attachments and establishing the range of rates that pole owners could charge for rent: "a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way." Pub L No 95-234, § 6(d). Next, in 1979, the Oregon legislature passed its own pole attachment law, which mirrored

the federal law in most respects, including the rate rental formula, but differed in that the state law applied to poles owned by publicly owned utilities, and the federal law exempted publicly owned utilities. *See* Or Laws 1979, ch 356; *see also* Testimony, Senate Committee on Environment and Energy, SB 560, Ex D (April 5, 1979) (statement of Ray Gribling). In the Telecommunications Act of 1996, Congress created a new rental rate formula which allocates the unusable space, and which has become known as the telecommunications rate formula. *See* PL 104-104, § 703(e). The FCC adopted rules implementing this formula in 1998. *See In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777 ¶¶ 43-79 (rel Feb 6, 1998). In 1999, the Oregon legislature revisited the pole attachment statutes, and in fact changed the usable space calculation to add 20 inches for compliant attachers. *See* Or Laws 1999, ch 832, § 7. However, the 1999 Oregon legislature did not adopt, nor did any party argue for, the telecommunications rate, even though it was established at the federal level.

Idaho Power and others supporting its proposal, as well as Staff, urge the Commission to consider the telecommunications formula. These participants argue that the telecommunications rate formula better considers the impact of several occupants on a pole. However, the cable formula has been found to fairly compensate pole owners for use of space on the pole. *See Alabama Power Company v. FCC*, 311 F3d 1357, 1370-71 (11th Cir 2002). In addition, use of the cable rate will allow parties to rely on the case law interpreting that rate, providing guidance in forming their contracts. Based on the legislative history, as well as consideration of the many arguments made by the participants, we conclude that we will follow the cable rate formula and the subsequent FCC and court decisions interpreting it.

Usable Space

Verizon raises the argument that pole owners should only be able to charge occupants for attachments in the usable space on a pole. If attachments in unusable space are added to the numerator, but "usable space" is still the denominator, Verizon asserts that the pole rental rate will be unduly elevated. *See* AR 506 Verizon comments, 3-4 (Nov 17, 2006). The company states that it has historically been allowed to install certain equipment, such as splice boxes and risers, in the space below the communications space at no charge and with no permit. Because the equipment supports existing attachments for which the occupant already pays rent, Verizon argues that it should not have to pay rent for the additional equipment. *See id.* at 13-14. If there is a charge for these attachments, Verizon requests that the space occupied by the attachments should be included as usable space for purposes of calculating the pole rental rate formula. *See id.* at 14.

OCTA expresses concern that some pole owners charge per attachment, and not per foot of space used by occupants, in contravention of the FCC formula and this Commission's decision in UM 1087. *See* OCTA Comments, 7 (Nov 17, 2006).

ORECA argues that any attachments made outside the usable space should be made through separate negotiations by the parties to a contract. *See* ORECA comments, 4 (Nov 16, 2006).

Staff argues that pole owners should be permitted to charge for attachments in the unusable space on a pole. Staff reasons that "[a]ttachments such as cable television power supplies, telephone terminal boxes, and other equipment located in the support space on poles result in increased burdens and costs to pole owners and occupants," especially when poles have to be replaced or relocated. *See* Staff comments, 4 (Nov 17, 2006). Staff agrees that, with owner authorization, an occupant may put equipment in the support space on a pole, but Staff asserts that the occupant should pay appropriate rent for such attachments in proportion to the vertical space used on the pole. This is in agreement with the 1984 rulemaking on this subject, set out in Order No. 84-278, which required a licensee's attachment rate to be determined by the "total vertical space" occupied by the attachment on the pole, not by the "total vertical usable space" used. While the "unusable space" may be used for certain attachments, such as antennae, terminal boxes, power supply enclosures and the sort, Staff argues that there should be a charge for such attaching that equipment.

Conclusion

Usable space should be calculated as that which does not include the space below the minimum clearance and also excludes the 40 inches of safety clearance between communications lines and electric lines, except as provided by statute.[2] We further conclude that the rental rate formula should apply only to the wire or cable attachment in the usable space. Other standard attachments that are in the unusable space are usually small, do not interrupt the climbing space, and do not create extra load; for those attachments, there should be no extra charge. However, we also note Staff's argument that some items attached in the unusable space have become large and unwieldy, resulting in excessive pole maintenance costs. Participants may raise this matter again in a new docket to consider issues related to wireless attachments on poles. Because the Commission is reserving judgment on this issue, no provision will be adopted at this time.

Carrying Charge Components and Separate Charges

Verizon proposes that the carrying charge be based on FCC ARMIS accounts or FERC Form 1 accounts, because information regarding those accounts is also publicly available. *See* AR 506 Verizon Comment, 5, 8 (Nov 17, 2006). Verizon also argues that administrative charges related to operation and maintenance of poles should

[2] In 1999, the legislative assembly revisited the issue of whether the 40 inches of clearance between the communications lines and the electric lines should be included in usable space. As part of a larger package, including creation of the OJUA and development of a sanctions framework, the legislature decided that 20 inches would only be includable in the rental rate formula if the attacher complied with all applicable rules and contractual provisions. *See* Minutes, House Commerce Committee, HB 2271, Minutes, p 4, Tape 41A (April 23, 1999) (statement of Michael Dewey).

be folded in with the carrying charge, and not allocated separately to licensees. *See id* at 7-8 (Nov 17, 2006). Verizon also seeks to exclude separate routine inspection charges and argues that those should be calculated in the pole rental rate formula. *See id* at 10. To do so, Verizon proposes a definition for the term "routine inspection," so that when a pole owner inspects its own facilities, it also examines the occupants' attachments and folds the cost of the entire routine inspection in the carrying charge. *See id.* at 14-17. Verizon also proposes a definition of post-construction inspection that will only apply to new attachments. *See id.* at 12. The company also supports Charter's proposal that the occupant be advised of post-construction inspections so the occupant can choose to participate, such inspections must be held within 30 days of the completion of construction, the occupant must be provided with the results in writing, and the pole owner can recover all costs associated with these inspections. *See id.*

Charter expresses concern about Staff's proposed definition of "Special inspection," for which a separate charge would be allowed. *See* Charter comments, 9 (Nov 17, 2006). Charter argues that special inspections should be defined as field visits made at the request of the licensee, and not any field visit for a non-periodic inspection. *See id.* Charter asserts that Staff's definition would permit "the kind of costly, erroneous, repetitive and unnecessary inspections that attachers have complained about throughout this process." *Id.* at 9-10. Charter proposes a definition of "Periodic Inspection" that mirrors Verizon's "Routine Inspection" proposal.

CLPUD and NWCPUD argue that the rate formula should not result in cross-subsidies, even among joint users. *See* CLPUD and NWCPUD comments, 13 (Nov 17, 2006). The PUDs argue that some attachers are more "prolific" than others, resulting in many additional costs that should not be shared among all attachers. *See id.* The PUDs prefer to charge permit fees and actual costs on a separate basis, and pledge to keep clear records to show that the costs are not recovered twice in this process. *See id.* at 13-14.

PacifiCorp also expresses concern that pole owners should be permitted to charge separate costs and to not roll all costs into the fully allocated carrying charge. *See* PacifiCorp comments, 17-18 (Nov 17, 2006). The utility argues that without being able to charge separately for these costs, it will not be able to recover its costs of pole management, and some pole occupants would unwittingly subsidize others. *See id.*

PGE argues that it is able to deduct certain charges from its FERC accounts and can calculate them separately. *See* PGE comments, 7-8 (Nov 17, 2006). PGE proposes that separate, incremental costs be recorded in separate accounts and audited by independent auditors and Commission staff. *See id.*

ORECA supports Staff's recommendation that rental rates not include attachment of support equipment and permit application processes. *See* ORECA comments, 3 (Nov 17, 2006). ORECA asserts that utilities should be able to bill those costs directly to the cost-causer, and should not be rolled into the rental rate formula because pole owners would not be made whole for the costs incurred. *See id.* at 3-4.

Staff argues that a pole owner should be allowed to recover out-of-pocket costs and require reasonable advance payments from an applicant for each new attachment on a pole-by-pole basis, including all costs for administration, engineering, inspection, and construction necessary for the new attachment. *See* Staff comments, 6 (Nov 17, 2006). Application processing, preconstruction activity, make ready, and post-construction inspection for a new attachment are all considered by Staff to be one-time activities that are non-recurring. Staff supports an owner's option to recover all costs for non-recurring activities until the new attachment installation is placed in service in compliance with NESC rule 214(A)(1) and the owner accepts the attachments. Because new attachment up-front costs can vary widely depending on the quality of the installation and the specific the facilities involved, Staff argues that a licensee should have to pay for the unique costs caused by the new attachment. Further, Staff asserts that a licensee should have to pay reasonable fees with its application, to compensate the pole owner for administrative costs that may be incurred, even if an attachment is never made. *See id.* at 7.

Conclusion

In adopting the federal cable rate formula, we look to decisions interpreting that formula as guidance in deciding which costs should be factored into the carrying charge and which should be charged separately. The cable rate has been described as a range between the incremental cost of the additional attachment and the fully allocated cost. *See* Testimony, House Committee on State Government Operation, SB 560A, June 19, 1979, Ex A (statement of Ray Gribling, representing Pacific Northwest Bell, General Telephone, Oregon Independent Telephone Association, and privately owned electric utilities).

The FCC has struck down attempts to have the best of both worlds, that is, a nearly fully allocated rate and additional recurring costs added to that rate. *See In the Matter of Texas Cable & Telecommunications Association, et al v. Entergy Services, Inc.*, 14 FCC Rcd 9138, *9139 (rel June 9, 1999) ("Texas Cable"). The FCC concluded that a "rate based upon fully allocated costs * * * by definition encompasses all pole related costs and additional charges are not appropriate," in rejecting flat fees for pre-construction surveys or application processing. *Id.* at *9141. However, fees to reimburse for actual engineering costs to prepare for attachment are appropriate. *Id.* at *9144. For instance, the FCC rejected one utility's attempt to break out administrative costs separately from the fully allocated rate, stating, "A utility would doubly recover if it were allowed to receive a proportionate share of these expenses based on the fully-allocated costs formula and additional amounts for administrative expenses." *See In the Matter of the Cable Television Association of Georgia v. Georgia Power Company*, 18 FCC Rcd 16333, *16342 (rel Aug 7, 2003).

Following these decisions, we decline to adopt the recommendations that administrative costs for pole maintenance and operation be broken out separately. Separate charges may be made for new attachment activity costs, including

preconstruction activity, post-construction inspection, make ready costs, and related administrative charges, to accommodate specific changes for pole occupants. Further, only post-construction inspections and special inspections requested by pole occupants may be charged separately; all other inspection charges, including safety inspections made under Division 024 rules, should be calculated in the rental rate. *See In the Matter of the Cable Television Association of Georgia*, 18 FCC Rcd at *16341-42. For this reason, we also adopt a definition of "Periodic Inspection" to accommodate safety and other inspections. Finally, pole owners may require prepayment of costs for make ready, but the costs should be equal to a reasonable estimate of make ready costs, and any overcharge should be promptly refunded by the pole owner, or the outstanding balance should be promptly paid by the occupant.

Inflation

Verizon argues that pole owners should not be able to automatically increase pole rental rates for inflation. Instead, rental rates should be based on actual costs. *See* AR 506 Verizon comments, 8 (Nov 17, 2006). Verizon asserts that owners are more than compensated for inflation because they do not pro-rate the rent, even if the attachment is present for less than the full year. *See id.*

PGE counters that there is a lag between a rental year and the determination of actual costs. *See* PGE comments, 9-10 (Nov 17, 2006). In order to recover its "actual costs," PGE argues that it should be able to apply an inflation factor to reflect the cost of providing pole space to occupants during the relevant period.

Staff also opposes an adjustment for inflation. *See* Staff comments, 6 (Nov 8, 2006). Staff argues that a rental rate will not necessarily increase every year, and that a utility's investment in its pole plant also does not necessarily increase every year. *See id.* In addition, the depreciation rate for poles may decrease, as the Commission recently authorized for PGE. *See* Order No 06-581, Appendix A, 13. Finally, Staff argues that setting a rate based on estimated increases in costs or plant investment would not comply with the statutory rate ceiling of "not more than the actual capital and operating expenses" of the pole owner. *See* Staff comments, 6 (Nov 8, 2006) (quoting ORS 757.282.

Conclusion

We decline to adopt an inflation rate for the pole rental rate formula. Costs will not necessarily rise each year, and even if they did, they will not always rise at the same rate. We do not believe that a lag adjustment is necessary.

Cost of Money for Consumer-Owned Utilities

Consumer-owned utilities assert that, in calculating pole rental rates, they should be able to include a cost of money component that resembles the cost of equity for investor-owned utilities. These utilities argue that all equity has a cost, which "is a

function of the risk to which the equity capital is exposed and the returns available from other investment alternatives." OTEC/1, Edwards/4. OTEC characterize pole rentals to non-members as "opportunity sales, which are made at the benefit of the equity owners." *id*. (emphasis in original). To come up with an appropriate return on equity, OTEC ran a discounted cash flow model, averaged it with the result of a capital asset pricing model run; OTEC then factored it in to produce a rate of return estimate of 8.27 percent for that utility.

OCTA argues that utilities are not allowed to recover more than their actual costs under ORS 757.282(1). While OCTA does not object to consumer-owned utilities recovering their actual cost of debt, it does challenge recovery of any purported cost of equity. OCTA asserts that consumer-owned utilities lack any actual "equity" capital costs, and therefore are not entitled to recover a hypothetical cost. *See* OCTA comments, 14 (Nov 17, 2006).

On the other hand, CLPUD and NWCPUD seek a calculation for just compensation for consumer-owned utilities. *See* CLPUD and NWCPUD comments, 5 (Nov 17, 2006). The PUDs acknowledge that they do not have "equity" costs in the same way the investor-owned utilities do, but raise the issue of opportunity costs that customers invest in utility plant and request that the Commission allow compensation for those costs. *See id.* at 7. To account for those costs, the PUDs support the two proposals made by Staff, as discussed below. *See id.* at 8-9. OJUA states that it was unable to reach consensus on whether consumer-owned utilities can recover their cost of money. *See* AR 506 OJUA comments, 1 (Nov 16, 2006).

Staff recognizes a cost of money for consumer-owned utilities, but takes a different approach than OTEC. Instead, Staff uses the most recent Commission general rate order decision adopting a rate of return, then adjusts it based on several factors. *See* Staff comments, 1-3 (Nov 17, 2006). The first option proposed by Staff would use the most recent cost of equity approved by the Commission in a general rate case, then deduct 4 basis points for every 1 percent of equity that the utility has in its capital structure. For instance, if the Commission approved a 10 percent cost of equity, a consumer-owned utility with 90 percent equity would have a 6.4 percent cost of equity (ten percent cost of equity reduced by four basis points for every one percent of equity in the capital structure is expressed as (10 - (90% x 4)), and results 6.4 percent cost of equity for that hypothetical consumer-owned utility); when factored in with its cost of debt, the resulting equation, which resembles that for the overall rate of return, would produce the cost of money. *See id.* at 2. Staff's second option uses the utility's embedded cost of long-term debt plus 100 basis points as a proxy for the utility's cost of money. If the utility does not have long-term debt, Staff recommends that the rate be set at the 10-year treasury rate as of the last traded day for the relevant calendar year, plus 200 basis points. Staff asserts that this would be a simple solution and easy to apply. *See id.* at 3. ORECA supports Staff's first proposal, which values equity at close to market cost. *See* ORECA comments, 2 (Nov 17, 2006).

Conclusion

No party disagrees that a consumer-owned utility should be able to include its cost of debt in pole rental rates. The issue here is whether the utility's cost of money should include an equity component, and, if so, at what interest rate. We believe that capital contributed by customers through rates should be treated like equity. OTEC argues that one factor to be considered in determining the cost of equity for a consumer-owned utility is the return available from other investment alternatives. We disagree, because the utility's customers are required to contribute this equity through rates and have no ability to invest it elsewhere. We focus instead on the other factor identified by OTEC: the risk to which the equity capital is exposed. We consider that risk to be lower for consumer-owned utilities in Oregon than for investor-owned utilities, mainly because as preference customers of the Bonneville Power Administration, the publics do not face as much volatility in power costs as PGE, PacifiCorp, and Idaho Power.

Both options proposed by Staff recognize this lower risk. The first option sets the cost of equity for consumer-owned utilities 200 basis points lower than the return on equity most recently adopted by the Commission for an investor-owned utility, before any adjustment for differences in capital structure. The second option assumes a smaller difference between the cost of equity and the cost of debt for consumer-owned utilities (200 basis points at a 50-50 capital structure) than the Commission recently authorized for PGE (362 basis points with a 50-50 capital structure). *See* Order No. 07-015, 48. We adopt Staff's second option. The calculation is straightforward and does not require the consumer-owned utilities to track the Commission's cost of equity and capital structure decisions.

ADDITIONAL ISSUES IN DOCKET AR 506

Costs of Hearing

ORS 759.660(2) provides, "When the order [related to the rates, terms and conditions of a pole attachment agreement] applies to a people's utility district, the order also shall provide for payment by the parties of the cost of the hearing. The payment shall be made in a manner which the commission considers equitable." A similar provision in ORS 757.279(2) applies to consumer-owned utilities, a category which includes people's utility districts. *See* ORS 757.270(2). "The cost of the hearing" refers to the Commission's costs in processing the complaint, holding the hearing, and preparing the order. The cost provision in ORS 757.279(2) was first enacted in 1983 to compensate the Department of Commerce for hearing pole attachment complaints over consumer-owned utilities; this Commission heard complaints regarding investor-owned utilities which fund the Commission through annual fees. When the Department of Commerce was abolished by the legislature in 1987, the cost provision was amended to allow the Commission to recover costs from utilities from which the Department of Commerce would have been entitled to recover. *See generally* Order No. 05-042, 17-19.

The OJUA requests that it be permitted to act as an advisor to the Commission in any cases between a pole owner and a pole occupant without being subject to hearing costs. *See* AR 506 OJUA comments, 9 (Nov 16, 2006). The OJUA seeks to strike any limiting language, arguing that it "adds significant value to attachment contract disputes and should not be charged the costs of hearing regarding these disputes." *Id.*

ORECA refers to the statutory language "the order shall also provide for payment *by the parties* of the cost of the hearing" and argues that all parties should be liable for costs of a hearing when a consumer-owned utility is involved. *See* AR 506 ORECA comments, 3 (Nov 16, 2006) (quoting ORS 757.279(2)). ORECA expresses concern that any other interpretation would lead to the Commission billing all costs of a hearing to a consumer-owned utility, when some costs are also attributable to other parties. *See id.* Further, any other interpretation would lead to the consumer-owned utility subsidizing other carriers and their customers. *See id.* To prevent this, ORECA favors the conclusion reached in *CLPUD v. Verizon*, UM 1087, Order No. 05-042, 17-19. *See id.*

Conclusion

The Commission chose not to charge the parties for the costs of hearing in *CLPUD v. Verizon* because that case was the "first of its kind, and the cost [of hearing] provision had never been invoked," and to give a bill to the parties at the end of the case would have been an unfair "surprise." *See* Order No. 05-042, 19. In that order, the Commission did signal to parties that they may be responsible for costs in the future. *See id.* In adopting this rule, we attempt to give some guidance as to the costs that will be assessed.

We understand the statute to read that the cost of hearing should be divided among the parties in the case. The cost of hearing should be apportioned among parties according to factors such as whether a party unreasonably delayed the proceeding or burdened the record. What is less clear from the statute and its history is whether utilities that already pay fees to the Commission should be *charged* their portion of the costs of hearing because their fees already go to the Commission's budget for hearing costs. That issue should be briefed in a future proceeding.

Finally, we clarify the provision referring to the OJUA, to state that the OJUA will not be charged costs when it is acting as an advisor to the Commission. That was the intent of the original provision, but we adopt OJUA's modification to eliminate any misunderstanding.

Resolution of Disputes

The OJUA recommends that the Commission only hear challenges to new or amended contractual provisions. *See* OJUA comments, 3 (Nov 16, 2006). The OJUA believes that existing rates, terms and conditions within a contract should not be

challenged, and only new provisions may be brought to the Commission for resolution. *See id.* To bolster its argument, the OJUA points to ORS 757.285 which states that the rates, terms and conditions of pole attachment contracts are presumed reasonable unless a complaint is brought to the Commission. *See id.*

ORECA expresses a concern that the complaint process will be used to only raise one component of the contract, and not consider the contract as a whole. *See* ORECA comments, 3 (Nov 17, 2006). ORECA asserts that this "disregards the full contract negotiations," and does not consider the compromises made by both sides. *See id.*

Conclusion

Under ORS 757.279(1), as well as Commission practice and procedure, we cannot refuse to hear a complaint on a contract that has provisions asserted to be unjust or unreasonable by a pole occupant or owner. Further, following the FCC's practice, we have jurisdiction not only over the contract, but over implementation as well. *See Mile Hi Cable Partners, L.P. v. Public Service Company of Colorado*, 133 FCC Rcd 13407, 13408-09 (rel July 14, 1998). If a complaint is made by one party to contest certain provisions, the other party may respond by raising other provisions that were intended as a compromise to the contested provisions. However, we will not limit the scope of a prospective complaint at this time.

Threshold Number of Poles

CLPUD and NWCPUD recommend an extended period of time for utilities to process voluminous attachment requests. *See* CLPUD and NWCPUD comments, 3-5 (Nov 17, 2006). To allow for this extension, the "threshold number of poles" should be amended to "capture the concept that multiple applications for pole attachment can be submitted consecutively in a short period of time," and that "cumulatively the applications could request access in numbers that exceed the 'threshold.'" *See id.* at 4. To that end, the PUDs propose modifications to the definition of "threshold number of poles," in OAR 860-028-0020, as well as the treatment of the applications in OAR 860-028-0100(6). *See id.*

PacifiCorp supports Staff's modified definition of "threshold number of poles" that includes all applications submitted during any 30 day period. *See* PacifiCorp comments, 4 (Nov 17, 2006).

Conclusion

We agree with the modified definition of "threshold number of poles" that accounts for the threshold number over multiple applications submitted over a 30 day period. Staff's modified definition is adopted.

Application Process

The OJUA supports Staff's proposal, in which a pole owner may deny access for reasons of insufficient capacity, safety, reliability, and generally applicable engineering purposes, and the pole owner is required to state the reasons for denial. *See* OJUA comments, 4 (Nov 17, 2006).

PacifiCorp expresses concern that an application would be deemed approved if there is no response within 45 days, and asserts that it is contrary to ORS 757.271(1) which requires "authorization from the utility allowing the attachment." *See* PacifiCorp comments, 4 (Nov 17, 2006). The utility recommends a safety net, in which the occupant provides another notice to the pole owner and a 10-day window for response. *See id.*

Conclusion

The provision allowing a pole owner to reject an application for capacity and safety reasons conforms to federal law, and we adopt that provision. Further, in keeping with the safe harbor provisions discussed in the sanctions rules, we adopt PacifiCorp's suggestion.

Duties of Pole Owners

Charter proposes seven "essential" duties of structure owners, culled from other jurisdictions, including standard notice requirements, pole labeling, and detailed invoices. *See* Charter comments, 6-7 (Nov 17, 2006). Charter also advocates for some kind of "specific mechanism to ensure that pole owners acquire and submit accurate audit and inspection data" as well as coordinate joint use of poles. *See id.* at 7. Charter further expresses concern that pole owners pay costs related to their own service and engineering and safety requirements, particularly as pole owners begin to offer services that compete with other pole attachers. *See id.*

OJUA also recommends modification of Staff's proposed Duties of Pole Owners. *See* AR 506 OJUA comments, 4-5 (Nov 16, 2006). The modifications clarify the duties as proposed by Staff and add other duties. *See* OJUA redline draft rules, OAR 860-028-0115 (Nov 16, 2006). The additions include permission to charge an occupant for any costs incurred related to "noncompliant attachments," a requirement that inspection data be accurate before transmission to the pole occupant, and notification of what type of data will be collected during a periodic inspection if the pole owner intends to bill the occupant separately. *See id.*

Conclusion

We adopt most of the OJUA's modifications because they represent a compromise among a cross-section of industries involved in pole attachments. We decline to adopt the allowance costs incurred by a non-compliant attachment; a similar

provision is set forth under OAR 860-028-0110(3). Also, in light of our decisions regarding the rental rate formula provisions and our conclusion that periodic inspection costs of occupant's facilities should not be charged separately, we decline to adopt the OJUA's proposal regarding contact about the type of data to be collected. We do adopt the requirement that data be accurate, which mirrors Charter's suggestion. We decline to adopt the remainder of Charter's proposals because they will impose additional costs, without a full discussion of the benefits. We encourage the utilities to continue to work together on projects such as pole labeling and joint inspections to ensure greater accuracy in remedying safety violations.

Vegetation Management around Communications Lines

The OJUA favors making the "Duties of Pole Occupants" and "Duties of Owners" mandatory, and incorporating vegetation management in these provisions. *See* AR 510 OJUA comments, 2 (Nov 16, 2006). The OJUA also proposes language requiring trimming of vegetation which poses an "imminent danger to life or property," and includes an occupant duty to respond to a notice of hazardous vegetation with either a trimming program or a notice of correction within 180 days. Parallel provisions are proposed for OAR 860-028-0115, which sets forth the Duties of Structure Owners. The OJUA notes that electric pole owners are already subject to stricter vegetation trimming requirements, so the new rule would only apply to communications pole owners. *See* AR 510 OJUA comments, 3 (Nov 17, 2006).

ORECA supports Staff's proposal making operators of communication facilities responsible for vegetation management around their lines. *See* ORECA comments, 3 (Nov 17, 2006). Specifically, ORECA endorses language that would require operators to trim or remove vegetation that poses either a significant risk to its facilities or, through contact with its facilities, poses a significant risk to a structure of an operator of a jointly used system. *See id.* Further, tree-trimming should be mandatory, not an optional duty. *See id.* at 4.

At the opposite pole, Verizon recommends there be no provision for communications operators trimming vegetation around their facilities. The company notes that electricity providers have statutory immunity for liability related to trimming vegetation, but communications operators do not. *See* AR 510 Verizon comments, 18 (Nov 17, 2006).

OCTA also argues against Staff's proposal for communications attachers having the same vegetation management obligations as electric utilities. *See* OCTA comments, 13 (Nov 17, 2006). OCTA argues that vegetation around communication lines poses a much lower threat than vegetation around power lines, because communication lines have little or no voltage and are insulated and sheathed, compared to high voltage bare energized power lines. *See id.* Finally, OCTA contends that requiring communications owners to trim around their lines would substantially benefit electric owners: because trees grow from the ground up and communication lines are lower on the pole, communications trimming would result in branches never posing a

threat to electric lines. *See id.* OCTA asserts that the solution is to require the electric owner to perform all trimming and allocate the cost equitably among all attachers on the pole through the carrying charge. *See id.*

Conclusion

In consideration of the comments we have received in the first phase of this proceeding, regarding the safety risk that could be posed by vegetation around communications lines in certain situations, we adopt a requirement that vegetation around communications lines poses no risk to the pole. Vegetation around communication lines poses no risk of burning, but in stormier environments could result in a strain that jeopardizes the pole and the electric lines. *See* AR 506 Coos-Curry Electric Cooperative, Inc., comments (May 2, 2006). Communication operators have the primary responsibility to ensure that vegetation around their lines do not threaten the poles or electric facilities. However, they may contract with electric supply operators to assume the responsibility for vegetation management. By allowing electric supply operators, who have immunity from liability under ORS 758.282 and ORS 758.284, to trim vegetation, the electric operators will be better able to gauge what poses a threat to their facilities, both the pole and their lines. The electric supply operator who trims vegetation on behalf of the communication operator may then bill the communication operator the actual cost of trimming around its lines.

Exemption for Idaho Power Company

Idaho Power seeks exemption from the rules considered in this phase of the AR 506 rulemaking. It notes that only four percent of its customers reside in Oregon, and less than five percent of its revenues come from Oregon customers. It has a similar percentage of its pole attachments in Oregon, and two-thirds of those Oregon attachments are with a single cable operator. The company asserts that all of the licensees on its Oregon poles also have attachments on its Idaho poles, and the attachments in Idaho often substantially outweigh the number of Oregon attachments. For this reason, the company believes that it makes more sense to have just one set of requirements apply to its contracts with these licensees, and that the requirements should be of the jurisdiction with the most attachments, that is, Idaho. *See* Idaho Power comments, 2-3 (Sept 28, 2006). Idaho Power compares its proposed exemption to that provided in the net metering statute, ORS 757.300(9). The company suggests language which would exempt "an electric utility serving fewer than 25,000 customers in Oregon that has its headquarters located in another state" from OAR 860-028-0020 through 860-028-0310. *See* Idaho Power comments, 7 (Oct 25, 2006).

Staff does not agree with Idaho Power's request to be exempted from the Division 028 guidelines. *See* Staff comments, 3 (Nov 8, 2006). First, Staff does not believe that the Commission has the statutory authority to exempt Idaho Power from the rules. *See id.* Second, even if Idaho Power were exempt from the rules, the Commission would still have jurisdiction over any complaint brought under the rules. *See id.*

Conclusion

The pole attachment statutes do not give the Commission the authority to exempt Idaho Power from its requirements, as certain other statutes do. Utilities with fewer than 25,000 customers in this state are exempt from net metering requirements, under ORS 757.300(9), and from direct access requirements, under ORS 757.601(3). Based on those statutes, the Commission adopted OAR 860-038-0001, which also exempted utilities with fewer than 25,000 customers. In contrast, the pole attachment statutes have no such exemption, and the Commission is aware of no authority which would permit it to adopt such an exemption. However, any argument by Idaho Power as to why the presumptions adopted here should not apply to attachments on its poles will be considered if a complaint involving Idaho Power is filed. The exemption language proposed by Idaho Power is not adopted.

AR 510: SANCTIONS

Docket AR 510 was opened at the request of participants in AR 506. AR 506 phase II did not include reference to sanctions, and the participants believed that sanctions were an integral part of the contractual provisions considered in AR 506. For that reason, the docket was opened and processed in tandem with AR 506. AR 510 included rules on the duties of occupants and sanctions. The topics are discussed below.

Duties of Occupants

Verizon proposes indemnification clauses to protect occupants from any damages arising from a pole owner's correction of an occupant's safety violation. *See* AR 510 Verizon comments, 2-4 (Nov 17, 2006). In addition, Verizon proposes that in no instance should the time for correction be shortened to less than 60 days. *See id.*

The OJUA recommends adding three duties for occupants: requiring a pole occupant to immediately correct safety violations which cause imminent danger to life or property; requiring a pole occupant to correct certain violations which may pose a serious safety risk within 60 days, if requested by the pole owner; and requiring a pole occupant to respond to a pole owner's notification of a violation within 180 days. *See* OJUA comments, 2 (Oct 4, 2006). An occupant would have 60 days to submit a plan of correction, or 180 days to correct any violation. *See id.*

Conclusion

The OJUA's recommendations are part of its comprehensive proposal regarding sanctions, discussed below, and have been developed through a cooperative effort by the pole owners and occupants. We adopt its proposal.

Sanctions

OJUA took the lead in developing revisions to the sanction rules. In proposing revised rules, the OJUA sought to achieve four goals: (1) elimination of escalations and reductions to ensure predictability of sanction costs; (2) institution of a flat fee system, rather than a per-pole system of fees; (3) allowance of pole owners' cost recovery in circumstances where they are serving as the policing agent of the Commission; and (4) allowance of a percentage-based punitive sanction where it serves the public interest. *See* AR 510 OJUA comments, 1 (Oct 4, 2006).

With an eye towards these goals, the OJUA proposed the following modification to rules:

- OAR 860-028-0120: Sanction rules should require a pole occupant to immediately correct violations that pose an imminent danger to life or property, and allow a pole occupant 60 days to correct violations that pose a serious safety risk if requested by the pole owner. Further, an occupant would have 60 days to propose a plan of correction or 180 days to correct other violations.

- OAR 860-028-0130: The OJUA proposed a flat sanction of $500 per pole for licensees without a contract, with an exception for participants with a recently expired contract that are participating in good faith efforts to negotiate a new contract.

- OAR 860-028-0140: Where a licensee does not have a permit, the OJUA recommends a sanction of five times the current annual rental fee if the violation is self-reported or found through a joint inspection process. An additional sanction of $100 per pole will be levied if the violation is found by the pole owner.

- OAR 860-028-0150: For violation of duties regarding the installation and maintenance of attachments, OJUA recommends a flat sanction of $200 per pole and allowing a pole owner to recover the actual costs of correcting a violation that could cause imminent danger to life or property or pose a safety risk to employees or the general public. OJUA also seeks to allow recovery of the cost of repair plus 15 percent if the licensee does not repair the violation within a particular period of time; that sanction would not apply if the licensee provided a plan of correction within 60 days or actually corrects the violation within 180 days. Finally, the proposed rule would allow the pole owner to immediately sanction a licensee for newly-constructed and newly-permitted attachments; this would be an exception to the 60-180 day "safe harbor" discussed above.

- OAR 860-028-0170: The OJUA recommended changes in the plans of correction: there should be 180 days for compliance after the receipt of a notice of violation; pole owners must consent to any plan amendments; and the occupant must report to the owner when it has finished corrections.

- OAR 860-028-0180: The OJUA recommends eliminating the reductions and escalations of sanctions, in support of the simplified proposal set forth above.

- OAR 860-028-0190: Pole owners should provide the pole number and the description of the pole's location in a notice of violation.

- OAR 860-028-0230: A rental reduction should not be permitted if the occupant has a pattern of delaying payment of sanctions more than 45 days after the billing date.

PacifiCorp urges the Commission to, for the most part, retain the sanction rules as they currently stand. The utility encourages simplification of the rules, and suggests "establishing a single, but stiff, flat rate penalty, in lieu of the progressive increases." PacifiCorp comments, 3 (Oct 4, 2006). The company does not support reduced penalties for self-reporting of violations or allowing an invoice to serve as a permit. *See* PacifiCorp comments, 10 (Nov 17, 2006). PacifiCorp also emphasizes that legacy violations should be treated differently from violations created by new construction; legacy violations may have been created by changes in the NESC, while new construction violations were created by faulty attachment. *See id.* at 11. When coupled with the new prioritization of repairs rule, OAR 860-024-0012, PacifiCorp argues that lenient treatment of new construction will force repairs to be delayed for years. *See id.* at 12. The utility states that management of a violations and sanctions process is an "administrative headache," and that it would prefer to not have to bill for sanctions. *See id.* at 13.

ORECA also does not wish to water down sanction rules that it asserts has reduced violations and brought its pole attachment program into improved compliance. *See* ORECA comments, 4 (Nov 17, 2006). Without significant financial incentives, ORECA is concerned that licensees will simply budget for sanctions rather than repair safety violations. *See id.* The statute requiring rental reductions for compliant licensees will stay in place, so ORECA recommends that sanctions not be diminished. *See id.*

Qwest continues to assert that the sanction rules, in which private parties impose and collect penalties on other private parties and have a strong self-interest to do so, are unlawful. *See* Qwest comments, 1 (Nov 17, 2006). Qwest contends that any penalties must be recovered in court, in the name of the state of Oregon, and for compensation of breaches in contract, not pre-set penalties that are unrelated to the harm actually caused by the violations. *See id.* at 2. Qwest also supports comments by Charter, which contends that sanctions violate state and federal policies in favor of

deployment of telecommunications technologies, and the comments by Embarq, which denounces sanctions as creating perverse incentives for pole management and producing an inappropriate revenue stream on which some pole owners rely. *See id.* at 2-3.

Embarq supports reform of the sanction rules and suggests additional modifications. *See* Embarq comments (Nov 3, 2006). Referring to duties of occupants, Embarq recommends that "emergency" situations be clarified, and that only "actual direct costs" be recoverable. The company recommends that certain sanctions be eliminated, such as failure to have a contract and failure to comply with other duties, arguing that there are already sanctions for unauthorized contacts, and that the Commission should narrowly delegate owners' ability to sanction, within the authority given by the legislature. *See id*. Embarq further recommends that punitive sanctions not be permitted; instead, Embarq relies on an FCC decision which allowed up to five years of back rent, plus interest, for attachments without permits, but no additional punitive sanctions. *See id*. at 2.

OTA supports OJUA's proposals for modifying the sanctions rules. *See* AR 510 OTA comments (Sept 28, 2006). However, OTA proposes that punitive sanctions should go to educational efforts and not the pole owner. *See id.* at 2. OTA also questions how sanctions are levied against pole owners, and where those funds are directed. *See id.* The association also prefers that all occupants and owners have an equal ability to sanction and be sanctioned. *See id.*

OCTA supports the OJUA's efforts to reform the sanction rules. The initial sanction rules were intended to be used to reign in "rogue" attachers, not a source of profit-making for pole owners. *See* OCTA comments, 8 (Nov 17, 2006). To this end, OCTA supports OJUA's September 11 draft, and expresses the concern that later efforts represent "backsliding" toward the flaws in the sanction rules currently in effect. *See id.* at 9-10. In particular, OCTA objects to the OJUA's proposal for immediate sanctions on new construction. *See id.* The group also objects to sanctions that could result in pole owners recovering more than the allowable pole rental rate. *See id.* at 11.

Staff did not comment directly on proposed changes to the sanction rules, but "supports those changes to the Sanction rules that are clear and simple [and] that will improve the cooperation and coordination between owners and occupants and that will promote 'safe and efficient poles, installation practices and rights of way.'" Staff comments, 1 (Nov 17, 2006).

Conclusion

We note Qwest's arguments were considered and rejected by the Oregon Court of Appeals, *Qwest Corp. v. Public Utility Commission*, 205 Or App 370, *rev den*, 342 Or 46 (2006). The court held that the Commission acted within the scope of its delegated authority. *See id.* at 379. Further, the court held that private parties were permitted to levy the sanctions, within the parameters set forth by the Commission. *See id.* at 384-85. In its comments, Qwest continued to make similar arguments; the

Supreme Court denied review on November 21, 2006, after the close of the public comment period in this docket. For the reasons set forth by the Court of Appeals, we decline to revisit Qwest's arguments that the sanction rules are unlawful.

In addition, we decline to rely on federal decisions related to sanctions. We note that the sanctions provisions in Oregon stem from a law passed by the Oregon legislative assembly in 1999. *See* Or Laws 1999, ch 832. While the pole attachment statutes generally are based on the 1978 federal law, the sanctions law was passed separately and is not based on federal law. From this perspective, the FCC's decision on sanctions, *see Mile Hi Cable Partners, L.P. v. Public Service Company of Colorado*, 15 FCC Rcd 11450 (rel June 30, 2000), *pet for rev den*, *Public Serv. Co. v. FCC*, 328 F3d 675 (DC Cir 2003), provides interesting context, but we decline to follow FCC precedent on sanctions.

Pole owners have argued that sanctions are essential to prompting compliance with safety rules and contractual provisions on the part of pole occupants; pole occupants have asserted that sanctions rules have been abused as sources of revenue by pole owners. In modifying the sanctions rules, we attempt to navigate between these two extremes, allowing sanctions to provide an incentive for compliance without allowing for possible abuses.

For these reasons, we adopt the majority of the OJUA's proposal, which was the product of compromise and negotiation among members of varying industries. In so doing, we praise the proposal for balancing the concerns of pole owners and pole occupants through the use of grace periods and safe harbor provisions.

We modify the proposal as it relates to new construction, to provide a five day period to cure a violation before sanctions take effect. This brief grace period fits the basic framework of the OJUA proposal by providing a window to remedy inadvertent violations in new construction, while also requiring prompt compliance.

We commend the OJUA for coordinating comments from the various industries that have widely divergent views on sanctions and for proposing and revising their recommended rules throughout the process. Their advice, and willingness to broker a compromise, has been indispensable in this process, and we look forward to continued leadership by the OJUA in the future.

ORDER

IT IS ORDERED that:

1. The rules attached as Appendix A are adopted for docket AR 506.

2. The rules attached as Appendix B are adopted for docket AR 510.

3. The rules set forth in Appendix B shall apply to all violations discovered on or after the date of this order. The previous version of the rules amended by Appendix B shall apply to all violations discovered before the date of this order.

4. The new rules and amended rules will become effective upon filing with the Secretary of State.

5. A new docket shall be opened to consider issues specific to wireless carriers.

Made, entered, and effective APR 1 0 2007.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may petition the Commission for the amendment or repeal of a rule pursuant to ORS 183.390. A person may petition the Court of Appeals to determine the validity of a rule pursuant to ORS 183.400.

Pole and Conduit Attachments

860-028-0020
Definitions for Pole and Conduit Attachment Rules
For purposes of this Division:
(1) "Attachment" has the meaning given in ORS 757.270 and 759.650.
(2) "Authorized attachment space" means the usable space occupied by one or more attachments on a pole by an occupant with the pole owner's permission.
(3) "Carrying charge" means the costs incurred by the owner in owning and maintaining poles or conduits. The carrying charge is expressed as a percentage. The carrying charge is the sum of the percentages calculated for the following expense elements, using owner's data from the most recent calendar year and that are publicly available to the greatest extent possible:
(a) The administrative and general percentage is total general and administrative expense as a percent of net investment in total plant.
(b) The maintenance percentage is maintenance of overhead lines expense or conduit maintenance expense as a percent of net investment in overhead plant facilities or conduit plant facilities.
(c) The depreciation percentage is the depreciation rate for gross pole or conduit investment multiplied by the ratio of gross pole or conduit investment to net investment in poles or conduit.
(d) Taxes are total operating taxes, including, but not limited to, current, deferred, and "in lieu of" taxes, as a percent of net investment in total plant.
(e) The cost of money is calculated as follows:
(A) For a telecommunications utility, the cost of money is equal to the rate of return on investment authorized by the Commission in the pole or conduit owner's most recent rate or cost proceeding;
(B) For a public utility, the cost of money is equal to the rate of return on investment authorized by the Commission in the pole or conduit owner's most recent rate or cost proceeding; or
(C) For a consumer-owned utility, the cost of money is equal to the utility's embedded cost of long-term debt plus 100 basis points. Should a consumer-owned utility not have any long-term debt, then the cost of money will be equal to the 10-year treasury rate as of the last traded day for the relevant calendar year plus 200 basis points.
(**~~2~~4**) "Commission pole attachment rules" mean **~~OAR 860-028-0110 through 860-028-0240~~ the rules provided in OAR Chapter 860, Division 028**.
(**~~3~~5**) "Commission safety rules" **~~mean OAR 860-024-0010~~ has the meaning given in OAR 860-024-0001(1).**
(**~~4~~6**) "Conduit" means any structure, or section thereof, containing one or more ducts, **~~conduits,~~** manholes, or handholes, **~~bolts, or other facilities~~** used for any **~~telegraph,~~** telephone, cable television, electrical, or communications conductors**~~,~~** or cable**~~s rights of~~**

~~way~~, owned or controlled, in whole or in part, by one or more public, telecommunications, or consumer-owned utilities.
(~~5~~**7**) "Consumer-owned utility" has the meaning given in ORS 757.270.
(8) "Duct" means a single enclosed raceway for conductors or cables.
(~~6~~**9**) "Government entity" means a city, a county, a municipality, the state, or other political subdivision within Oregon.
(~~7~~**10**) "Licensee" has the meaning given in ORS 757.270 or ORS 759.650. **"Licensee" does not include a government entity.**
(11) "Make ready work" means engineering or construction activities necessary to make a pole, conduit, or other support equipment available for a new attachment, attachment modifications, or additional facilities. Make ready work costs are non-recurring costs and are not contained in carrying charges.
(12) "Net investment" means the gross investment, from which is first subtracted the accumulated depreciation, from which is next subtracted related accumulated deferred income taxes, if any.
(13) "Net linear cost of conduit" is equal to net investment in conduit divided by the total length of conduit in the system.
(~~8~~**14**) "Notice" means written notification sent by mail, electronic mail, **telephonic facsimile,** or ~~telefax~~ **other means previously agreed to by the sender and the recipient**.
(~~9~~**15**) "Occupant" means any licensee, government entity, or other entity that constructs, operates, or maintains attachments on poles or within conduits.
(1~~0~~**6**) "Owner" means a public **utility**, telecommunications **utility**, or consumer-owned utility that owns or controls poles, ducts, conduits, ~~or~~ rights-of-way, **manholes, handholes, or other similar facilities.**
(1~~1~~**7**) "Pattern" means a ~~pattern~~ **course** of behavior that results in a material breach of a contract, or permits, or in frequent ~~or serious~~ violations of OAR 860-028-0120.
(18) "Percentage of conduit capacity occupied" means:
(a) When inner ducts are used, the product of the quotient of the number "one," divided by the number of inner ducts, multiplied by the quotient of the number "one," divided by the number of ducts in the conduit [i.e., (1/Number of Inner Ducts (≥2)) x (1/Number of Ducts in Conduit)]; or
(b) When no inner ducts are used, the quotient of the number "one," divided by the number of ducts in the conduit [i.e., (1/Number of Ducts in Conduit)].
(19) "Periodic Inspection" means any inspection done at the option of the owner, including a required inspection pursuant to Division 024, the cost of which is recovered in the carrying charge. Periodic inspections do not include post construction inspections.
(20) "Permit" means the written or electronic record by which an owner authorizes an occupant to attach one or more attachments on a pole or poles, in a conduit, or on support equipment.

(21) "Pole" means any pole that carries distribution lines and that is owned or controlled by a public utility, telecommunications utility, or consumer-owned utility.
(22) "Pole cost" means the depreciated original installed cost of an average bare pole to include support equipment of the pole owner, from which is subtracted related accumulated deferred taxes, if any. There is a rebuttable presumption that the average bare pole is 40 feet and the ratio of bare pole to total pole for a public utility or consumer-owned utility is 85 percent, and 95 percent for a telecommunications utility.
(23) "Post construction inspection" means work performed to verify and ensure the construction complies with the permit, governing agreement, and Commission safety rules.
(24) "Preconstruction activity" means engineering, survey and estimating work required to prepare cost estimates for an attachment application.
(**~~1~~**2**5**) "Public utility" has the meaning given in ORS 757.005.
(**~~13~~2****6**) "Serious injury" means "serious injury to person" or "serious injury to property" as defined in OAR 860-024-0050.
(~~14~~27) "Service drop" means a connection from distribution facilities to **~~a single family, duplex, or triplex residence or similar small commercial facility~~ the building or structure being served**.
(28) "Special inspection" means an owner's field visit made at the request of the licensee for all nonperiodic inspections. A special inspection does not include preconstruction activity or post construction inspection.
(29) "Support equipment" means guy wires, anchors, anchor rods, and other accessories of the pole owner used to support the structural integrity of the pole to which the licensee is attached.
(30) "Surplus ducts" means ducts other than:
(a) those occupied by the conduit owner or a licensee;
(b) an unoccupied duct held for emergency use; or
(c) other unoccupied ducts that the owner reasonably expects to use within the next 60 months.
(**~~15~~31**) "Telecommunications utility" has the meaning given in ORS 759.005.
(32) "Threshold number of poles" means 50 poles, or one-tenth of one percent (0.10 percent) of the owner's poles, whichever is less, over any 30 day period.
(33) "Unauthorized attachment" means an attachment that does not have a valid permit and a governing agreement subject to OAR 860-028-0120.
(34) "Usable space" means all the space on a pole, except the portion below ground level, the 20 feet of safety clearance space above ground level, and the safety clearance space between the communications and power circuits. There is a rebuttable presumption that six feet of a pole is buried below ground.
Stat. Auth.: ORS 183, ORS 756, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - ORS 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675

Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 4-2001, f. & cert. ef. 1-24-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0110 & 860-034-0810

860-028-0050
General
(1) OAR Chapter 860 Division 028 governs access to utility poles, conduits, and support equipment by occupants in Oregon.
(2) OAR Chapter 860, Division 028 is intended to provide just and reasonable provisions when the parties are unable to agree on certain terms.
(3) With the exceptions of OARs 860-028-0060 through 860-028-0080, 860-028-0115, and 860-028-0120, parties may mutually agree on terms that differ from those in this Division. In the event of disputes submitted for Commission resolution, the Commission will deem the terms and conditions specified in this Division as presumptively reasonable. If a dispute is submitted to the Commission for resolution, the burden of proof is on any party advocating a deviation from the rules in this Division to show the deviation is just, fair and reasonable.

Stat. Auth.: ORS Ch. 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 - 757.290, 759.045 & ORS 759.650 - 759.675
Hist.: NEW

860-028-0060
Attachment Contracts
(1) Any entity requiring pole attachments to serve customers should be allowed to use utility poles, ducts, conduits, rights-of-way, manholes, handholes, or other similar facilities jointly, as much as practicable.
(2) To facilitate the joint use of poles, entities must execute contracts establishing the rates, terms, and conditions of pole use in accordance with OAR 860-028-0120. Government entities are not required to execute contracts.
(3) Parties must negotiate pole attachment contracts in good faith.
(4) Unless expressly prohibited by contract, the last effective contract between the parties will continue in effect until a new contract between the parties goes into effect.

Stat. Auth.: ORS Ch. 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 - 757.290, 759.045 & 759.650 - 759.675
Hist.: NEW

860-028-0070
Resolution of Disputes for Proposed New or Amended Contractual Provisions

(1) This rule applies to a complaint alleging a violation of ORS 757.273, 757.276, 757.279, 757.282, 759.655, 759.660, or 759.665.
(2) In addition to the generally applicable hearing procedures contained in OAR Chapter 860, Divisions 011 through 014, the procedures set forth in this rule shall apply to a complaint that an existing or proposed contract is unjust and unreasonable.
(3) The party filing a complaint under this rule is the "complainant." The other party to the contract, against whom the complaint is filed, is the "respondent."
(4) Before a complaint is filed with the Commission, one party must request, in writing, negotiations for a new or amended attachment agreement from the other party.
(5) Ninety (90) calendar days after one party receives a request for negotiation from another party, either party may file with the Commission for a proceeding under ORS 757.279 or ORS 759.660.
(6) The complaint must contain each of the following:
(a) Proof that a request for negotiation was received at least 90 calendar days earlier. The complainant must specify the attempts at negotiation or other methods of dispute resolution undertaken since the date of receipt of the request and indicate that the parties have been unable to resolve the dispute.
(b) A statement of the specific attachment rates, terms and conditions that are claimed to be unjust or unreasonable.
(c) A description of the complainant's position on the unresolved provisions.
(d) A proposed agreement addressing all issues, including those on which the parties have reached agreement and those that are in dispute.
(e) All information available as of the date the complaint is filed with the Commission that the complainant relied upon to support its claims:
(A) In cases in which the Commission's review of a rate is required, the complaint must provide all data and information in support of its allegations, in accordance with the administrative rules set forth to evaluate the disputed rental rate.
(B) If the licensee is the party submitting the complaint, the licensee must request the data and information required by this rule from the owner. The owner must supply the licensee the information required in this rule, as applicable, within 30 calendar days of the receipt of the request. The licensee must submit this information with its complaint.
(C) If the owner does not provide the data and information required by this rule after a request by the licensee, the licensee must include a statement indicating the steps taken to obtain the information from the owner, including the dates of all requests.
(D) No complaint by a licensee will be dismissed because the owner has failed to provide the applicable data and information required under paragraph (6)(e)(B) of this rule.

(7) Within 30 calendar days of receiving a copy of the complaint, the respondent must file its response with the Commission, addressing in detail each claim raised in the complaint and a description of the respondent's position on the unresolved provisions.
(8) If the Commission determines after a hearing that a rate, term or condition that is the subject of the complaint is not just, fair, and reasonable, it may reject the proposed rate, term or condition and may prescribe a just and reasonable rate, term or condition.

Stat. Auth.: ORS Ch. 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 - 757.290, 759.045 & 759.650 - 759.675
Hist.: NEW

860-028-0080
Costs of Hearing in Attachment Contract Disputes
(1) When the Commission issues an order in an attachment contract dispute that applies to a consumer-owned utility, as defined by ORS 757.270, the order must also provide for payment by the parties of the cost of the hearing.
(2) The cost of the hearing includes, but is not limited to, the cost of Commission employee time, the use of facilities, and other costs incurred. The rates will be set at cost. Upon request of a party, and no more than once every 60 days, the Commission will provide to the parties the costs incurred to date in the proceeding.
(3) The Joint-Use Association is not considered a party for purposes of this rule when participating in a case as an advisor to the Commission.
(4) The Commission will allocate costs in a manner that it considers equitable. The following factors will be considered in allocating costs:
(a) Whether the party unreasonably burdened the record or delayed the proceeding;
(b) Merits of the party's positions throughout the course of the proceeding; and
(c) Other factors that the Commission deems relevant.

Stat. Auth.: ORS Ch. 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.279 & 759.660
Hist.: NEW

860-028-0100
Application Process for New or Modified Attachments
(1) As used in this rule, "applicant" does not include a government entity.
(2) An applicant requesting a new or modified attachment must submit an application providing the following information in writing or electronically to the owner:

(a) Information for contacting the applicant.
(b) The pole owner may require the applicant to provide the following technical information:
(A) Location of identifying pole or conduit for which the attachment is requested;
(B) The amount of space requested;
(C) The number and type of attachment for each pole or conduit;
(D) Physical characteristics of attachments;
(E) Attachment location on pole;
(F) Description of installation;
(G) Proposed route; and
(H) Proposed schedule for construction.
(3) The owner must provide written or electronic notice to the applicant within 15 days of the application receipt date confirming receipt and listing any deficiencies with the application, including missing information. If required information is missing, the owner may suspend processing the application until the missing information is provided.
(4) Upon receipt of a completed application, an owner must reply in writing or electronically to the applicant as quickly as possible and no later than 45 days from the date the completed application is received. The owner's reply must state whether the application is approved, approved with modifications or conditions, or denied.
(a) An approval will be valid for 180 calendar days unless extended by the owner.
(b) The owner may require the applicant to provide notice of completion within 45 calendar days of completion of construction.
(c) If the owner approves an application that requires make ready work, the owner must provide a detailed list of the make ready work needed to accommodate the applicant's facilities, an estimate for the time required for the make ready work, and the cost for such make ready work.
(d) If the owner denies the application, the owner must state in detail the reasons for its denial.
(e) If the owner does not provide the applicant with notice that the application is approved, denied, or conditioned within 45 days from its receipt, the applicant may begin installation. Applicant must provide notice prior to beginning installation. Commencement of installation by the occupant will not be construed as completion of the permitting process or as final permit approval. Unpermitted attachments made under this section are not subject to sanction under OAR 860-028-0140.
(5) If the owner approves an application that requires make ready work, the owner will perform such work at the applicant's expense. This work must be completed in a timely manner and at a reasonable cost. Where this work requires more than 45 days to complete, the parties must negotiate a mutually satisfactory longer period to complete the make ready work.

(6) If an owner cannot meet the time frame for attachment established by this rule, preconstruction activity and make ready work may be performed by a mutually acceptable third party.
(7) If an application involves more than the threshold number of poles, the parties must negotiate a mutually satisfactory longer time frame to complete the approval process.

Stat. Auth.: ORS Ch. 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 - 757.290, 759.045 & 759.650 - 759.675
Hist.: NEW

860-028-0110
Rental Rates and Charges for Attachments by Licensees to Poles Owned by Public Utilities, Telecommunications Utilities, and Consumer-Owned Utilities
(1) This rule applies whenever a party files a complaint with the Commission pursuant to ORS 757.270 through ORS 757.290 or ORS 759.650 through ORS 759.675.
~~(2) In this rule:~~
~~(a) "Carrying Charge" means the percentage of operation, maintenance, administrative, general, and depreciation expenses, taxes, and money costs attributable to the facilities used by the licensee. The cost of money component shall be equal to the return on investment authorized by the Commission in the pole owner's most recent rate proceeding.~~
~~(b) "Pole Cost" means the depreciated original installed cost of an average bare pole of the pole owner.~~
~~(c) "Support Equipment" means guy wires, anchors, anchor rods, grounds, and other accessories of the pole owner used by the licensee to support or stabilize pole attachments.~~
~~(d) "Support Equipment Cost" means the average depreciated original installed cost of support equipment.~~
~~(e) "Usable Space" means all the space on a pole, except the portion below ground level, the 20 feet of safety clearance space above ground level, and the safety clearance space between communications and power circuits. There is a rebuttable presumption that six feet of a pole are buried below ground level.~~
(~~3~~**2**) **The~~A disputed~~** pole attachment rental rate **per foot ~~will be~~ is** computed by **~~taking~~multiplying** the pole cost **~~times~~by** the carrying charge **and then dividing the product by the usable space per pole. The rental rate per pole is computed as the rental rate per foot ~~times~~ multiplied ~~the portion of the usable space occupied~~** by the licensee's **authorized** attachment **space**.
~~(4) A disputed support equipment rental rate will be computed by taking the support equipment cost times the carrying charge times the portion of the usable space occupied by the licensee's attachment.~~

~~(5) The minimum usable space occupied by a licensee's attachment is one foot.~~
(**~~6~~3)** The rental rates **~~referred to~~referenced** in section**~~s~~** (**2~~3 and 4~~**) of this rule do not **~~cover~~ include** the costs of**~~special inspections or~~ permit application processing,** preconstruction **activity, post construction inspection**, make ready**~~, change out, and rearrangement~~** work**, and the costs related to unauthorized attachments**. Charges for **~~those~~**activities **not included in the rental rates ~~shall~~will** be based on actual **costs, ~~(~~**including administrative**~~)~~** costs**, and will be charged in addition to the rental rate.**
(4) Authorized attachment space for rental rate determination must comply with the following:
(a) The initial authorized attachment space on a pole must not be less than 12 inches. The owner may authorize additional attachment space in increments of less than 12 inches.
(b) For each attachment permit, the owner must specify the authorized attachment space on the pole that is to be used for one or more attachments. This authorized attachment space will be specified in the owner's attachment permit.
(5) The owner may require prepayment from a licensee of the owner's estimated costs for any of the work allowed by OAR 860-028-0100. Upon completion of the work, the owner will issue an invoice reflecting the actual costs, less any prepayment. Any overpayment will be promptly refunded, and any extra payment will be promptly remitted.
(6) A communication operator has primary responsibility for trimming vegetation around its communication lines in compliance with OAR 860-028-0115(7) and 860-028-0120(7). If the communication operator so chooses, or if the communication operator is sanctioned or penalized for failure to trim vegetation in compliance with OAR 860-028-0115(7) or OAR 860-028-0120(7), the electric supply operator may trim the vegetation around communication lines that poses a foreseeable danger to the pole and electric supply operator's lines. If the electric supply operator trims the vegetation around communication lines, it shall do so contemporaneously with trimming around its own facilities. If the electric supply operator is the pole owner, it may bill the communication operators for the actual cost of trimming around the communication lines. If the electric supply operator is the pole occupant, it may offset its pole rent by the vegetation trimming cost.
(7) The owner must provide notice to the occupant of any change in rental rate or fee schedule a minimum of 60 days prior to the effective date of the change. This section will become effective on January 1, 2008.
~~(7) Licensees shall report all attachments to the pole owner. A pole owner may impose sanctions for violations of OAR 860-028-0120. A pole owner may also charge for any expenses it incurs as a result of an unauthorized attachment.~~
~~(8) All attachments shall meet state and federal clearance and other safety requirements, be adequately grounded, guyed, and anchored, and meet the provisions of contracts executed between the pole owner and the licensee. A pole owner may, at its option, correct any attachment deficiencies and charge the licensee~~

~~**for its costs. Each licensee shall pay the pole owner for any fines, fees, damages, or other costs the licensee's attachments cause the pole owner to incur.**~~

Stat. Auth.: ORS 183, ORS 756, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.270 - ORS 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 9-1984, f. & ef. 4-18-84 (Order No. 84-278); PUC 16-1984, f. & ef. 8-14-84 (Order No. 84-608); PUC 6-1993, f. & cert. ef. 2-19-93 (Order No. 93-185); PUC 9-1998, f. & cert. ef. 4-28-98; PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 4-2001, f. & cert. ef. 1-24-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0055 & 860-034-0360

860-028-0115
Duties of Structure Owners
(1) An owner must install, maintain, and operate its facilities in compliance with Commission Safety Rules.
(2) An owner must establish, maintain, and make available to occupants its joint use construction standards for attachments to its poles, towers, and for joint space in conduits. Standards for attachment must apply uniformly to attachments by all operators, including the owner.
(3) An owner must establish and maintain mutually agreeable protocols for communications between the owner and its occupants.
(4) An owner must immediately correct violations that pose imminent danger to life or property. In the event that a pole occupant performs the corrections, a pole owner must reimburse the pole occupant for the actual cost of corrections. Charges imposed under this section must not exceed the actual cost of corrections.
(5) An owner must respond to a pole occupant's request for assistance in making a correction within 45 days.
(6) An owner must ensure the accuracy of inspection data prior to transmitting information to the pole occupant.
(7) Vegetation around communications lines must not pose a foreseeable danger to the pole and electric supply operator's facilities.

Stat. Auth.: ORS Ch. 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 - 757.290, 759.045 & 759.650 - 759.675
Hist.: NEW

Conduit Attachments

860-028-0310
Rental Rates and Charges for Attachments by Licensees to Conduits Owned by Public Utilities, Telecommunications Utilities, and Consumer-Owned Utilities
(1) This rule applies whenever a party files a complaint with the Commission pursuant to ORS 757.270 through ORS 757.290 or ORS 759.650 through ORS 759.675.
(2) **As used in this rule:**
(a) "Annual Carrying Charge" shall be equal to the return on investment authorized by the Commission in the conduit owner's most recent rate proceeding times the conduit cost.
(b) "Annual Operating Expense" means annual operating maintenance, administrative, general, depreciation, income tax, property tax, and other tax expenses attributable, on a per-duct basis, to the section of conduit occupied by the licensee.
(c) "Conduit Cost" means the depreciated original installed cost, on a per-duct basis, of the section of conduit occupied by the licensee.
(d) "Duct" means a single enclosed raceway for conductors or cable.
(e) "Surplus Ducts" means ducts other than those occupied by the conduit owner or a prior licensee, one unoccupied duct held as an emergency use spare, and other unoccupied ducts that the owner reasonably expects to use within the next 18 months.
(3) **TheA disputed** conduit rental rate **per linear foot will beis** computed by **adding the annual operating expense to the annual carrying charge and then** multiplying **by** the **number of ducts occupied by the licensee percentage of conduit capacity occupied by the net linear cost of conduit and then multiplying that product by the carrying charge.**
(**43**) A licensee occupying part of a duct **shall beis** deemed to occupy the entire duct.
(**54**) Licensees **shallmust** report all attachments to the conduit owner. A conduit owner may impose a penalty charge for failure to report or pay for all attachments. If a conduit owner and licensee do not agree on the penalty and submit the dispute to the Commission, the penalty amount will be five times the normal rental rate from the date the attachment was made until the penalty is paid. If the date the attachment was made cannot be clearly established, the penalty rate **shallwill** apply from the date the conduit owner last inspected the conduit in dispute. The last inspection **date shall beis** deemed to be no more than **threefive** years before the unauthorized attachment is discovered. The conduit owner also **shallmay** charge for any expenses it incurs as a result of the unauthorized attachment.
(**65**) The conduit owner **shallmust** give a licensee 18 months' notice of its need to occupy licensed conduit and **shallwill** propose that the licensee take the first feasible action listed:

(a) Pay revised conduit rent designed to recover the cost of retrofitting the conduit with multiplexing, optical fibers, or other space-saving technology sufficient to meet the conduit owner's space needs;
(b) Pay revised conduit rent based on the cost of new conduit constructed to meet the conduit owner's space needs;
(c) Vacate ducts that are no longer surplus;
(d) Construct and maintain sufficient new conduit to meet the conduit owner's space needs.

(6) The rental rates referenced in section (2) of this rule do not include the costs of permit application processing, preconstruction activity, post construction inspection, make ready work, and the costs related to unauthorized attachments. Charges for activities not included in the rental rates must be based on actual costs, including administrative costs, and will be charged in addition to the rental rate.
(7) The owner may require prepayment from a licensee of the owner's estimated costs for any of the work allowed by OAR 860-028-0100. Upon completion of the work, the owner will issue an invoice reflecting the actual costs, less any prepayment. Any overpayment will be promptly refunded, and any extra payment will be promptly remitted.
(8) The owner must be able to demonstrate that charges under sections (6) and (7) of this rule have been excluded from the rental rate calculation.
~~**(7) When two or more licensees occupy a section of conduit, the last licensee to occupy the conduit shall be the first to vacate or construct new conduit. When conduit rent is revised because of retrofitting of space-saving technology or construction of new conduit, all licensees shall bear the increased cost.**~~
~~**(8) All conduit attachments shall meet local, state, and federal clearance and other safety requirements, be adequately grounded and anchored, and meet the provisions of contracts executed between the conduit owner and the licensee. A conduit owner may, at its option, correct any attachment deficiencies and charge the licensee for its costs. Each licensee shall pay the conduit owner for any fines, fees, damages, or other costs the licensee's attachments cause the conduit owner to incur.**~~

Stat. Auth.: ORS 183, ORS 756, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.270 - ORS 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 2-1986, f. & ef. 2-7-86 (Order No. 86-107); PUC 6-1993, f. & cert. ef. 2-19-93 (Order No. 93-185); PUC 9-1998, f. & cert. ef. 4-28-98; PUC 12-1998, f. & cert. ef. 5-7-98; PUC 4-2001, f. & cert. ef. 1-24-01; PUC 23-2001, f. & cert. ef. 10-11-01. Renumbered from 860-022-0060 & 860-034-0370

860-028-0120
Duties of Pole Occupants
(1) Except as provided in sections (2) and (3) of this rule, a pole occupant attaching to one or more poles of a pole owner **~~shall~~must**:
(a) Have a written contract with the pole owner that specifies general conditions for attachments on the poles of the pole owner;
(b) Have a permit issued by the pole owner for each pole on which the pole occupant has attachments;
(c) Install and maintain the attachments in compliance with the written contracts required under subsection (1)(a) of this rule and with the permits required under subsection (1)(b) of this rule; and
(d) Install and maintain the attachments in compliance with Commission safety rules.
(2) A pole occupant that is a government entity is not required to enter into a written contract required by subsection (1)(a) of this rule, but when obtaining a permit from a pole owner under subsection (1)(b) of this rule, the government entity **~~shall~~must** agree to comply with Commission safety rules.
(3) A pole occupant may install a service drop without the permit required under subsection (1)(b) of this rule, but the pole occupant must:
(a) Apply for a permit within seven days of installation;
(b) Except for a pole occupant that is a government entity, install the attachment in compliance with the written contract required under subsection (1)(a) of this rule; and
(c) Install the service drop in compliance with Commission safety rules.
(4) A pole occupant must repair, disconnect, isolate, or otherwise correct any violation that poses an imminent danger to life or property immediately after discovery. If the pole owner performs the corrections, a pole occupant must reimburse the pole owner for the actual cost of correction. Reimbursement charges imposed under this section must not exceed the actual cost of correction.
(5) Upon receipt of a pole owner's notification of violation, a pole occupant must respond either with submission of a plan of correction within 60 calendar days or with a correction of the violation within 180 calendar days.
(a) If a pole occupant fails to respond within these deadlines, the pole occupant is subject to sanction under OAR 860-028-0150(2).
(b) If a pole occupant fails to respond within these deadlines and if the pole owner performs the correction, the pole occupant must reimburse the pole owner for the actual cost of correction attributed to violations caused by the occupant's non-compliant attachments. Reimbursement charges imposed under this section must not exceed the actual cost of correction attributed to the occupant's attachments.
(6) A pole occupant must correct a violation in less than 180 days if the pole owner notifies an occupant that the violation must be corrected within that time to alleviate a significant safety risk to any operator's employees or a potential risk to the general public. A pole occupant must reimburse the pole owner for the actual cost of correction caused by the occupant's non-compliant attachments made under this section if:
(a) The owner provides reasonable notice of the violation; and

(b) The occupant fails to respond within timelines set forth in the notice.
(7) Vegetation around communications lines must not pose a foreseeable danger to the pole and electric supply operator's facilities.

Stat. Auth.: ORS 183, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 4-2001, f. & cert. ef. 1-24-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0120 & 860-034-0820

860-028-0130
Sanctions for Having No Contract
(1) Except as provided in section~~s~~ (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)(a)**~~**0060(2)**. The sanction may ~~**be the higher of:**~~ **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 shall 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)**~~ This rule does not apply to**:**
(a) ~~**a**~~**A** pole occupant that is a government entity~~**.**~~**; or**
(b) A pole occupant operating under an expired or terminated contract and participating in good faith efforts to negotiate a contract or engaged in formal dispute resolution, arbitration, or mediation regarding the contract; or
(c) A pole occupant operating under a contract that is expired if both pole owner and occupant are unaware that the contract expired and both carry on business relations as if the contract terms are mutually-agreeable and still applicable.
(3) Sanctions imposed pursuant to this rule will be imposed no more than once in a 365 day period.

Stat. Auth.: ORS 183, ORS 756, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - ORS 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0130 & 860-034-0830

860-028-0140
Sanctions for Having No Permit
(1) Except as provided in section~~s **(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 shall 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 rule may not exceed:
(a) Five 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 five times the current annual rental fee per pole if the violation is reported by the owner in an inspection in which the occupant has declined to participate.
(3) Sanctions imposed ~~under~~ pursuant to this rule may be imposed no more than once in a 60 day period.
(4) A pole owner may not impose new sanctions for ongoing violations after the initial 60 day period if:
(a) The occupant 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(32), and the parties agree to a longer time frame to complete the permitting process.
(~~3~~5) This rule does not apply to a pole occupant that is a government entity.

Stat. Auth.: ORS 183, ORS 756, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - ORS 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0140 & 860-034-0840

860-028-0150
Sanctions for Violation of Other Duties
(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). ~~**The sanction may be the higher of:**~~**Sanctions imposed for these violations may not exceed** ~~**(a)**~~ $200 per pole~~**; or.**~~
~~**(b) Twenty times the pole owner's annual rental fee per pole.**~~
~~**(2) A pole owner shall 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 a sanction on a pole occupant that is in violation of OAR 860-028-0120(5). Sanctions imposed under this section must not exceed 15 percent of the actual cost of corrections incurred under OAR 860-028-0120(5).
(3) Sanctions and charges imposed under sections (1) and (2) of this rule do not apply if:
(a) The occupant submits a plan of correction in compliance with OAR 860-028-0170 within 60 calendar days of receipt of notification of a violation; or

(b) The occupant corrects the violation and provides notification of the correction to the owner within 180 calendar days of receipt of notification of the violation.
(4) If a pole occupant submits a plan of correction in compliance with OAR 860-028-0170 and fails to adhere to all of the provisions and deadlines set forth in that plan, the pole owner may impose sanctions for the uncorrected violations documented within the plan.
(5) Notwithstanding the timelines provided for in section (3) of this rule, a pole owner must notify the occupant immediately of any violations occurring on attachments that are newly-constructed and newly-permitted by the occupant or are caused by the occupant's transfer of currently-permitted facilities to new poles. The occupant must immediately correct the noticed violation. If the violation is not corrected within five days of the notice, the pole owner may immediately impose sanctions.
(a) Sanctions may be imposed under this section only within 90 calendar days of the pole occupant providing the pole owner with a notice of completion.
(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 calendar days of the joint post-construction inspection or within a mutually-agreed upon time.
(c) If the pole occupant performs an inspection and requests a joint post construction inspection, the pole owner's consent to such inspection must not be unreasonably withheld.
(~~3~~**6**) This rule does not apply to a pole occupant that is a government entity.

Stat. Auth.: ORS 183, ORS 756, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - ORS 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 4-2001, f. & cert. ef. 1-24-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0150 & 860-034-0850

860-028-0170
~~**Time Frame for Securing Reduction in Sanctions**~~ **Plans of Correction**
(1)~~**Except as provided in section (2) of this rule, a pole owner shall 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)**~~ A plan of correction ~~**shall**~~**must**, 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.
~~**(4)**~~**(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.
~~**(5)**~~**(3)** Upon its receipt of a plan of correction that a pole occupant ~~**has submitted**~~**submits** under ~~**subsection (1)(b) of this rule**~~**OAR 860-028-0150(3)(a)**, a pole owner ~~**shall**~~**must** give notice of its acceptance or rejection of the plan .
(a) ~~**If the pole owner accepts the plan, then the pole owner shall 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)**~~ If the pole owner rejects the plan, then it ~~**shall**~~**must** set out all of its reasons for rejection and, for each reason, ~~**shall**~~**must** state an alternative that is acceptable to it;
~~**(c) 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.**~~
(b) The pole occupant's time for compliance set forth in the plan of correction begins when the plan of correction is 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 ~~**shall**~~**must** 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.

Stat. Auth.: ORS 183, ORS 756, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - 757.290, ORS 759.045 & 759.650 - 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 4-2001, f. & cert. ef. 1-24-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0170 & 860-034-0870

860-028-0180
~~**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)**~~ If the pole occupant ~~**has failed**~~ **fails** to meet the time limitations set out in OAR**s** 860-028-~~**0710**~~ **0120, 860-028-0130, 860-028-0140, or 860-028-0150** 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.

Stat. Auth.: ORS 183, ORS 756, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - ORS 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0180 & 860-034-0880

860-028-0190
Notice of Violation
A pole owner that seeks, under these rules, any type of relief against a pole occupant for violation of OAR 860-028-0120 ~~**shall**~~**must** provide the pole occupant notice of each attachment allegedly in violation of the rule, including the provision of the rule each attachment allegedly violates~~.~~**; an explanation of how the attachment violates the rule; and the pole number and location, including pole owner maps and GPS coordinates, if available.**

Stat. Auth.: ORS 183, ORS 756, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - ORS 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 4-2001, f. & cert. ef. 1-24-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0190 & 860-034-0890

860-028-0230
Pole Attachment Rental Reductions
(1) Except as provided in section (3), a licensee ~~**shall**~~**must** receive a rental reduction.
(2) The rental reduction ~~**shall**~~**must** be based on ORS 757.282(3) and ~~**OAR 860-028-0110**~~ **applicable administrative rules**.
(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~~ **Commission** 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 billing**, in payment of fees and charges **that were not disputed in good faith, that were filed in a timely manner, and are** due the pole owner.
(4) A pole owner that contends that a licensee is not entitled to the rental reduction provided in section (1) of this rule ~~shall~~**must** notify the licensee of the loss of reduction in writing. The written notice ~~shall~~**must**:
(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~~**that** 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 ~~shall~~**must** 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 ~~shall~~**must** send its response to the pole owner, with a copy to the Commission. The licensee ~~shall~~**must** 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 ~~shall~~**must**, 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 ~~shall~~**must**, within 30 days, issue an order.
(7) Except for the rental reduction amount in dispute, the licensee ~~shall~~**must** not delay payment of the pole attachment rental fees due to the pole owner.

Stat. Auth.: ORS 183, ORS 756, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - ORS 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 4-2001, f. & cert. ef. 1-24-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0230 & 860-034-0930

~~**860-028-0240**~~
~~**Effective Dates**~~
(1) ~~**Except as provided in section (2) of this rule, OARs 860-028-0120 through 860-028-0230 are effective on January 1, 2001.**~~
~~**(2) OAR 860-028-0150 des not apply to attachments installed on or before December 31, 2000, until January 1, 2003.**~~

Stat. Auth.: ORS 183, ORS 756, ORS 757 & ORS 759
Stats. Implemented: ORS 756.040, ORS 757.035, ORS 757.270 - ORS 757.290, ORS 759.045 & ORS 759.650 - ORS 759.675
Hist.: PUC 15-2000, f. 8-23-00, cert. ef. 1-1-01; PUC 23-2001, f. & cert. ef. 10-11-01, Renumbered from 860-022-0240 & 860-034-0940