GARVEY SCHUBERT BARER

MEMORANDUM

TO: Greg Kopta

FROM: Judith A. Endejan

DATE: March 13, 2014

RE: Information Request – State Pole Attachment Rules

FILE NO.: 17748-00100 (GSB)

When we met with you on February 13, 2014, you mentioned that it would helpful to obtain certain information regarding pole attachment rules in Oregon, Utah, Connecticut and Ohio. This memo is intended to provide further information with regard to each of those State's rules. The FCC's pole attachment rules (47 CFR §1.1401 through 1.1424) can be found at 26 F.C.C.R. 5240, 26 FCC Rcd. 5240, 2011 WL 1341351 (F.C.C. April 7, 2011) ("FCC Order"). They are included in the attachment. Please let me know if you have any questions or comments about this memo or its attachments.

Oregon

Attached please find a matrix that compares the pole attachment rules adopted by the Oregon Public Utility Commission in 2007 (OAR 860-028-0000 through 03100) with the FCC's pole attachment rules. We have attached a copy of the Oregon rules and the OPUC's Order No. 07-137 that adopted the Oregon rules.

By way of background, in 2007 the OPUC adopted its new rules regulating pole attachments. Order No. 07-137 explains the history of pole attachment regulation in Oregon and certified to the FCC that the OPUC will regulate pole attachment matters. The 2007 Oregon rules follow then-existing FCC rules and adopted the lower or cable rate formula for pole attachments. After the OPUC adopted its rules, the Commission made some major modifications to the pole attachment rate formula that applies to telecommunications facilities, including wireless facilities in the 2011 Order cited above. The FCC modified the telecom rate formula by changing the allocation of the cost of unusable space, with the net result that the telecom formula and cable formula, although distinct, nonetheless produce similar rates. The FCC rules were challenged and upheld on appeal.[1]

The OPUC has not modified its 2007 rules, but addressed them in a waiver proceeding initiated by various incumbent local exchange carriers in Oregon in UM 1643. In June 2013 in that docket, Order No. 06-292, the OPUC closed the waiver proceeding stating that it would schedule a workshop for a status report on the 2007 pole attachment rules. It has not scheduled this workshop to date.

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[1] *See Electric Power Service Corporation v. Federal Communications Commission*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 118 (2013).

Utah

The State of Utah's pole attachment rules can be found at the Utah Public Service Commission's website[2] or generally at Utah Admin. Code R. 746-345. They are included in the attachment. In our meeting you asked if we had experience with those rules and if so any thoughts regarding the adoption of similar rules in Washington. PCIA's member, Crown Castle, provided the following feedback regarding its attempts to negotiate a pole attachment agreement under Utah's rules.

In Crown Castle's experience, the Utah pole attachment rules are problematic from a carrier's perspective for the following three reasons:

1. The rules do not require base pole owners to authorize pole top antenna installations. As we discussed in our meeting, one of the essential rulings in the FCC Order is that base pole owners must allow pole top antenna installations unless there are safety reasons on a particular pole that would impact such a deployment. Pole top access is essential for deployment of wireless broadband antennas because of the propagation characteristics of the antennas.
2. All pole attachment agreements signed with a base pole owner must also have the approval of the public utilities commission. While this procedural step is not problematic on its face, it can add significant delays to the final adoption of pole attachment agreements in Utah.
3. The Utah Commission has adopted "safe harbor" pole attachment agreements for each of the major utilities in the state. Unfortunately the safe harbor agreements contain one-sided indemnification language that requires indemnifying pole owners even for their own negligence. It is our experience that the pole owners are loathe to modify the safe harbor indemnification requirements and thus we have been unsuccessful in obtaining access to poles in Utah. The FCC Order requires pole owners to extend mutual indemnification terms to attaching entities. The FCC recognized that placing an unfair and harsher burden on attaching entities is neither just nor reasonable and not the public interest.

Connecticut

Connecticut's pole attachment rules can be found at the Connecticut Public Utilities Regulatory Authority's (PURA) website[3] or generally in Section 16-247a of the Connecticut General Statutes. The final order adopting the rate calculation methodology included within the FCC's 2011 Order is attached. The PURA has also investigated distributed antenna systems (DAS) in the public rights of way (Docket No. 08-06-19), and utility pole make ready procedures (Docket No. 07-02-13).

Despite orders to work together to resolve attachment rates, those attempts were ultimately unsuccessful. In 2011 a telecommunications company petitioned the PURA to investigate rental rates charged to telecommunications providers by utility pole owners. The petition was accepted and following two rounds of comments in September 2012 the PURA found that its formula for calculating rates charged

[2] http://www.psc.utah.gov/rulesandcode/index.html.
[3] http://www.ct.gov/pura/site/default.asp.

by utility pole owners to telecommunications service providers should be revised consistent with the FCC's 2011 Order cited above.[4]

Ohio

The State of Ohio's authority over the regulation of pole rates, terms, and conditions are included in Ohio Admin. Code 4901:1-7-23 and available on the Public Utilities Commission of Ohio's website.[5] Ohio is in the final stages of promulgating modifications or additions to its rules regarding the management of pole attachments. The State of Ohio draft rules are attached to this letter; when a final order is issued we will provide an update.

[4] *See* Petition of Fiber Technologies Networks, L.L.C. for Authority Investigation of Rental Rates Charged to Telecommunications Pole Owners, Docket No. 11-11-02, 2012 WL 4320126 (Conn. D.P.U.C.).

[5] http://www.puco.ohio.gov/puco/.

Comparison of Pole Attachment Rules

	FCC	OREGON
Source	47 C.F.R. § 1.1401-1.1424	OAR 860-028-0000-0310
Rate setting standard	"just and reasonable" (§ 1.140)	"just, fair and reasonable" (ORS 757.276; OAR 860-028-0070(8))
Rate formula:	2 formulas: Cable: space factor X cost of pole X carrying charge Telecom: a. space factor X cost or b. space factor X cost X M/A carrying charge	OAR 860-028-0110(2) adopted FCC cable formula: Pole cost X carrying charge usable space
Key differences between FCC and Oregon rate formulas	FCC telecom rate formulas use different space factor formula, allocating 2/3 of unusable space costs equally among all attachers (§ 1.1417)	Oregon has only one rate formula based on usable space
Definition of usable space	13.5 feet (§ 1.1404 (g)(xi); § 1.1418)	"all space except the portion below ground level, the 20 feet of safety clearance above ground level and safety clearance space between the communications and power circuits" (OAR 860-028-0200(34))
Definition of unusable space	24 feet (§ 1.1404(g)(xii); § 1.1418)	Not defined
Pole Height	37.5 feet (§ 1.1418)	40 feet (OAR 860-028-0200(22))
Definition of carrying charges	(§ 1.404 (g)(ix)): - depreciation - rate of return - taxes - maintenance - administrative	Same as FCC (OAR 860-028-0020 (3))

	FCC	OREGON
Attachment space per attachment	12 inches (§ 1.1418)	12 inches (OAR 860-028-110(4)(a))
Denial of access deadline	45 days (§ 1.1403(b)) (§ 1.1420(b))	45 days to reply (OAR 860-028-0100(4)) 90 days to complain (OAR 860-028-0070)
Grounds for denial	"insufficient capacity, … reasons of safety, reliability and generally applicable engineering purposes." (§ 1.1403(a))	None stated
Applies to wireless	Yes 26 FCC Rcd. 5240, 5276	Yes (Order No. 07-137)
Applies to pole tops	Yes 26 FCC Rcd. 5240, 5270	Not specified
Complaint procedure	Yes (§ 1.1404, 1409)	Yes (OAR 860-028-0070)
Applicable to poles owned by public entity	No (§ 1.1402(a)	Yes (ORS 757.270 (2) and 757.276)

OREGON

The Oregon Administrative Rules contain OARs filed through February 15, 2014

QUESTIONS ABOUT THE CONTENT OR MEANING OF THIS AGENCY'S RULES?
CLICK HERE TO ACCESS RULES COORDINATOR CONTACT INFORMATION

PUBLIC UTILITY COMMISSION

DIVISION 28

POLE AND CONDUIT ATTACHMENTS

860-028-0000

Applicability

(1) The rules contained in this Division apply to every pole or conduit owner and every pole or conduit occupant, as defined in OAR 860-028-0020.

(2) Upon request or its own motion, the Commission may waive any of the Division 028 rules for good cause shown. A request for waiver must be made in writing, unless otherwise allowed by the Commission.

Stat. Auth.: ORS 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270, 759.045 & 759.650
Hist.: PUC 6-1993, f. & cert. ef. 2-19-93 (Order No. 93-185); PUC 14-1997, f. & cert. ef. 11-20-97; PUC 3-1999, f. & cert. ef. 8-10-99; PUC 14-2000, f. & cert. ef. 8-23-00; PUC 23-2001, f. & cert. ef. 10-11-01; PUC 6-2011, f. & cert. ef. 9-14-11

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.

(4) "Commission pole attachment rules" mean the rules provided in OAR chapter 860, division 028.

(5) "Commission safety rules" has the meaning given in OAR 860-024-0001(1).

(6) "Conduit" means any structure, or section thereof, containing one or more ducts, manholes, or handholes, used for any telephone, cable television, electrical, or communications

conductors or cables, owned or controlled, in whole or in part, by one or more public, telecommunications, or consumer-owned utilities.

(7) "Consumer-owned utility" has the meaning given in ORS 757.270.

(8) "Duct" means a single enclosed raceway for conductors or cables.

(9) "Government entity" means a city, a county, a municipality, the state, or other political subdivision within Oregon.

(10) "Licensee" has the meaning given in ORS 757.270 or 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.

(14) "Notice" means written notification sent by mail, electronic mail, telephonic facsimile, or other means previously agreed to by the sender and the recipient.

(15) "Occupant" means any licensee, government entity, or other entity that constructs, operates, or maintains attachments on poles or within conduits.

(16) "Owner" means a public utility, telecommunications utility, or consumer-owned utility that owns or controls poles, ducts, conduits, rights-of-way, manholes, handholes, or other similar facilities.

(17) "Pattern" means a course of behavior that results in a material breach of a contract, or permits, or in frequent 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.

(25) "Public utility" has the meaning given in ORS 757.005.

(26) "Serious injury" means "serious injury to person" or "serious injury to property" as defined in OAR 860-024-0050.

(27) "Service drop" means a connection from distribution facilities to 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.

(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, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 - 290, 759.045 & 759.650 - 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; PUC 3-2007, f. & cert. ef. 4-16-07

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 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 - 290, 759.045 & 759.650 - 675
Hist.: PUC 3-2007, f. & cert. ef. 4-16-07

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 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 - 290, 759.045 & 759.650 - 675
Hist.: PUC 3-2007, f. & cert. ef. 4-16-07

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, division 001, 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 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 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 - 290, 759.045 & 759.650 - 675
Hist.: PUC 3-2007, f. & cert. ef. 4-16-07

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 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.279 & 759.660
Hist.: PUC 3-2007, f. & cert. ef. 4-16-07

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 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 - 290, 759.045 & 759.650 - 675
Hist.: PUC 3-2007, f. & cert. ef. 4-16-07

Pole Attachments

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 757.290 or 759.650 through 759.675.

(2) The pole attachment rental rate per foot is computed by multiplying the pole cost 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 multiplied by the licensee's authorized attachment space.

(3) 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 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 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.

Stat. Auth.: ORS 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.270 - 290, 759.045 & 759.650 - 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; PUC 3-2007, f. & cert. ef. 4-16-07

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 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 - 290, 759.045 & 759.650 - 675
Hist.: PUC 3-2007, f. & cert. ef. 4-16-07

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 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 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, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 - 290, 759.045 & 759.650 - 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; PUC 2-2007, f. & cert. ef. 4-16-07

860-028-0130

Sanctions for Having No Contract

(1) Except as provided in section (2) of this rule, a pole owner may impose a sanction on a pole occupant that is in violation of OAR 860-028-0060(2). The sanction may not exceed $500 per pole. This rule does not apply to:

(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.

(2) Sanctions imposed pursuant to this rule will be imposed no more than once in a 365 day period.

Stat. Auth.: ORS 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 - 290, 759.045 & 759.650 - 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; PUC 2-2007, f. & cert. ef. 4-16-07

860-028-0140

Sanctions for Having No Permit

(1) Except as provided in section (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 860-028-0120 (3).

(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 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.

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

Stat. Auth.: ORS 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 - 290, 759.045 & 759.650 - 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; PUC 2-2007, f. & cert. ef. 4-16-07

860-028-0150

Sanctions for Violation of Other Duties

(1) A pole owner may impose a sanction on a pole occupant that is in violation of OAR 860-028-0120(1)(c), (1)(d), or (3). Sanctions imposed for these violations may not exceed $200 per pole.

(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.

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

Stat. Auth.: ORS 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 - 290, 759.045 & 759.650 - 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; PUC 2-2007, f. & cert. ef. 4-16-07

860-028-0160

Choice of Sanctions

(1) If a pole owner contends that an attachment of a pole occupant violates more than one rule that permits the pole owner to impose a sanction, then the pole owner may select only one such rule on which to base the sanction.

(2) If a pole owner has a contract with a pole occupant that imposes sanctions that differ from those set out in these rules, then the sanctions in the contract apply unless the pole owner and pole occupant agree otherwise.

Stat. Auth.: ORS 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270 - 290, 759.045 & 759.650 - 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 860-022-0160 & 860-034-0860

860-028-0170

Plans of Correction

(1) A plan of correction 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.

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

(3) Upon its receipt of a plan of correction that a pole occupant submits under OAR 860-028-0150(3)(a), a pole owner must give notice of its acceptance or rejection of the plan.

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

(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.

(c) If a plan of correction is divisible and if the pole owner accepts part of it, then the pole occupant 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, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270-290, 759.045 & 759.650-675
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; PUC 2-2007, f. & cert. ef. 4-16-07

860-028-0180

Removal of Occupant Pole Attachments

(1) If the pole occupant fails to meet the time limitations set out in OARs 860-028-0120, 860-028-0130, 860-028-0140, or 860-028-0150 by 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.

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

Stat. Auth.: ORS 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270-290, 759.045 & 759.650-675
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; PUC 2-2007, f. & cert. ef. 4-16-07

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 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, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270-290, 759.045 & 759.650-675
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; PUC 2-2007, f. & cert. ef. 4-16-07

860-028-0195

Time Frame for Final Action by Commission

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

Stat. Auth.: ORS 183, 756, 757 & 759, 47 USC ¦ 224(c)(3)(B)(ii)
Stats. Implemented: ORS 756.040, 757.270-290, 759.045 & 759.650-675
Hist.: PUC 9-2004, f. & cert. ef. 4-21-04

860-028-0200

Joint-Use Association

(1) Pole owners and pole occupants shall establish a Joint-Use Association (JUA). The Association shall elect a Board from the JUA, which shall include representatives of pole owners, pole occupants, and government entities. The Board shall act as an advisor to the Commission with respect to:

(a) Adoption, amendment, or repeal of administrative rules governing pole owners and pole occupants; and

(b) Settlement of disputes between a pole owner and a pole occupant that arise under administrative rules governing pole owners and pole occupants.

(2) In the event a representative is involved in a dispute under subsection (1)(b) of this rule, then the representative shall not participate in resolution of the dispute, and the JUA shall appoint a temporary representative with a similar interest.

Stat. Auth.: ORS 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270-290, 759.045 & 759.650-675
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 860-022-0200 & 860-034-0900

860-028-0210

Resolution of Disputes over Plans of Correction

(1) If a pole occupant and a pole owner have a dispute over the reasonableness of the plan of correction, then either party may request an order from the Commission to resolve the dispute. The party requesting resolution shall provide notice of its request to the Commission and to the other party:

(a) Upon receipt of a request, the Commission Staff shall, within 15 days, provide to the parties a recommended order for the Commission;

(b) Either party may, within 15 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, within 15 days, issue an order.

(2) Notwithstanding section (1) of this rule, either the pole owner or pole occupant may request a settlement conference with the Joint-Use Association. The settlement conference shall be in addition to, not in lieu of, the process set forth in section (1).

Stat. Auth.: ORS 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270-290, 759.045 & 759.650-675

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 860-022-0210 & 860-034-0910

860-028-0220

Resolution of Factual Disputes

(1) If a pole occupant and pole owner have a dispute over facts that the pole occupant and pole owner must resolve so that the pole owner can impose appropriate sanctions, or in the event that a pole occupant is alleging that a pole owner is unreasonably delaying the approval of a written contract or the issuance of a permit, then either the pole owner or the pole occupant may request a settlement conference before the Joint-Use Association (JUA). The party making the request shall provide notice to the other party and to the JUA.

(2) If the JUA does not settle a dispute described in section (1) of this rule within 90 days of the notice, then either the pole owner or the pole occupant may request a hearing before the Commission and an order from the Commission to resolve the dispute:

(a) Upon receipt of a request, the Commission Staff shall, 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, within 30 days, issue an order.

Stat. Auth.: ORS 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270-290, 759.045 & 759.650-675
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 860-022-0220 & 860-034-0920

860-028-0230

Pole Attachment Rental Reductions

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

(2) The rental reduction must be based on ORS 757.282(3) and 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 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 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 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 engaged in a pattern of failing to respond promptly to the pole owner, Commission Staff, or civil authorities in regard to emergencies, safety violations, or pole modification requests; or

(f) The licensee 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 must notify the licensee of the loss of reduction in writing. The written notice must:

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

(b) Specify the amount of the loss of rental reduction 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 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 must send its response to the pole owner, with a copy to the Commission. The licensee 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 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 must, within 30 days, issue an order.

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

Stat. Auth.: ORS 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.035, 757.270-290, 759.045 & 759.650-675
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; PUC 2-2007, f. & cert. ef. 4-16-07

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 757.290 or 759.650 through 759.675.

(2) The conduit rental rate per linear foot is computed by multiplying the percentage of conduit capacity occupied by the net linear cost of conduit and then multiplying that product by the carrying charge.

(3) A licensee occupying part of a duct is deemed to occupy the entire duct.

(4) Licensees must 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 will apply from the date the conduit owner last inspected the conduit in dispute. The last inspection date is deemed to be no more than five years before the unauthorized attachment is discovered. The conduit owner also may charge for any expenses it incurs as a result of the unauthorized attachment.

(5) The conduit owner must give a licensee 18 months' notice of its need to occupy licensed conduit and will 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.

Stat. Auth.: ORS 183, 756, 757 & 759
Stats. Implemented: ORS 756.040, 757.270 - 757.290, 759.045 & 759.650 - 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; PUC 3-2007, f. & cert. ef. 4-16-07

ELECTRONIC CODE OF FEDERAL REGULATIONS

e-CFR Data is current as of March 6, 2014

Title 47: Telecommunication
PART 1—PRACTICE AND PROCEDURE
Subpart J—Pole Attachment Complaint Procedures

§1.1401 Purpose.

The rules and regulations contained in subpart J of this part provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable. They also provide complaint and enforcement procedures for incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)) to ensure that the rates, terms, and conditions of their access to pole attachments are just and reasonable.

[76 FR 26638, May 9, 2011]

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Title 47: Telecommunication
PART 1—PRACTICE AND PROCEDURE

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SOURCE: 43 FR 36094, Aug. 15, 1978, unless otherwise noted.

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[76 FR 26638, May 9, 2011]

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§1.1402 Definitions.

(a) The term *utility* means any person that is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person that is cooperatively organized, or any person owned by the Federal Government or any State.

(b) The term *pole attachment* means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(c) With respect to poles, the term *usable space* means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the utility. With respect to conduit, the term *usable space* means capacity within a conduit system which is available, or which could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable and associated equipment for telecommunications or cable services, and which includes capacity occupied by the utility.

(d) The term *complaint* means a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not just and reasonable. It also means a filing by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable.

(e) The term *complainant* means a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, an association of telecommunications carriers, an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers who files a complaint.

(f) The term *respondent* means a cable television system operator, a utility, or a telecommunications carrier against whom a complaint is filed.

(g) The term *State* means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(h) For purposes of this subpart, the term *telecommunications carrier* means any provider of telecommunications services, except that the term does not include aggregators of telecommunications services (as defined in 47 U.S.C. 226) or incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)).

(i) The term *conduit* means a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed.

(j) The term *conduit* system means a collection of one or more conduits together with their supporting infrastructure.

(k) The term *duct* means a single enclosed raceway for conductors, cable and/or wire.

(l) With respect to poles, the term *unusable space* means the space on a utility pole below the usable space, including the amount required to set the depth of the pole.

(m) The term *attaching entity* includes cable system operators, telecommunications carriers, incumbent and other local exchange carriers, utilities, governmental entities and other entities with a physical attachment to the pole, duct, conduit or right of way. It does not include governmental entities with only seasonal attachments to the pole.

(n) The term *inner-duct* means a duct-like raceway smaller than a duct that is inserted into a duct so that the duct may carry multiple wires or cables.

[43 FR 36094, Aug. 15, 1978, as amended at 52 FR 31770, Aug. 24, 1987; 61 FR 43024, Aug. 20, 1996; 61 FR 45618, Aug. 29, 1996; 63 FR 12024, Mar. 12, 1998; 65 FR 31281, May 17, 2000; 66 FR 34580, June 29, 2001; 76 FR 26638, May 9, 2011]

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§1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice.

(a) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. Notwithstanding

this obligation, a utility may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.

(b) Requests for access to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

(c) A utility shall provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to:

(1) Removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the cable television system operator's of telecommunications carrier's pole attachment agreement;

(2) Any increase in pole attachment rates; or

(3) Any modification of facilities other than routine maintenance or modification in response to emergencies.

(d) A cable television system operator or telecommunications carrier may file a "Petition for Temporary Stay" of the action contained in a notice received pursuant to paragraph (c) of this section within 15 days of receipt of such notice. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of cable television service or telecommunication service, a copy of the notice, and certification of service as required by §1.1404(b). The named respondent may file an answer within 7 days of the date the Petition for Temporary Stay was filed. No further filings under this section will be considered unless requested or authorized by the Commission and no extensions of time will be granted unless justified pursuant to §1.46.5.

(e) Cable operators must notify pole owners upon offering telecommunications services.

[61 FR 45618, Aug. 29, 1996, as amended at 63 FR 12025, Mar. 12, 1998]

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§1.1404 Complaint.

(a) The complaint shall contain the name and address of the complainant, name and address of the respondent, and shall contain a verification (in the form in §1.721(b)), signed by the complainant or officer thereof if complainant is a corporation, showing complainant's direct interest in the matter complained of. Counsel for the complainant may sign the complaint. Complainants may join together to file a joint complaint. Complaints filed by associations shall specifically identify each utility, cable television system operator, or telecommunications carrier who is a party to the complaint and shall be accompanied by a document from each identified member certifying that the complaint is being filed on its behalf.

(b) The complaint shall be accompanied by a certification of service on the named respondent, and each of the Federal, State, and local governmental agencies that regulate any aspect of the services provided by the complainant or respondent.

(c) In a case where it is claimed that a rate, term, or condition is unjust or unreasonable, the complaint shall contain a statement that the State has not certified to the Commission that it regulates the rates, terms and conditions for pole attachments. The complaint shall include a statement that the utility is not owned by any railroad, any person who is cooperatively organized or any person owned by the Federal Government or any State.

(d) The complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable system operator or telecommunications carrier and the utility. If there is no present pole attachment agreement, the complaint shall contain:

(1) A statement that the utility uses or controls poles, ducts, or conduits used or designated, in whole or in part, for wire communication; and

(2) A statement that the cable television system operator or telecommunications carrier currently has attachments on the poles, ducts, conduits, or rights-of-way.

(e) The complaint shall state with specificity the pole attachment rate, term or condition which is claimed to be unjust or unreasonable.

(f) In any case, where it is claimed that a term or condition is unjust or unreasonable, the claim shall specify all information and argument relied upon to justify said claim.

(g) For attachments to poles, where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said claim.

(1) The data and information shall include, where applicable:

(i) The gross investment by the utility for pole lines;

(ii) The investment in crossarms and other items which do not reflect the cost of owning and maintaining poles, if available;

(iii) The depreciation reserve from the gross pole line investment;

(iv) The depreciation reserve from the investment in crossarms and other items which do not reflect the cost of owning and maintaining poles, if available;

(v) The total number of poles:

(A) Owned; and

(B) Controlled or used by the utility. If any of these poles are jointly owned, the complaint shall specify the number of such jointly owned poles and the percentage of each joint pole or the number of equivalent poles owned by the subject utility;

(vi) The total number of poles which are the subject of the complaint;

(vii) The number of poles included in paragraph (g)(1)(vi) of this section that are controlled or used by the utility through lease between the utility and other owner(s), and the annual amounts paid by the utility for such rental;

(viii) The number of poles included in paragraph (g)(1)(vi) of this section that are owned by the utility and that are leased to other users by the utility, and the annual amounts paid to the utility for such rental;

(ix) The annual carrying charges attributable to the cost of owning a pole. The utility shall submit these charges separately for each of the following categories: Depreciation, rate of return, taxes, maintenance, and administrative. These charges may be expressed as a percentage of the net pole investment. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court that determines the treatment of accumulated deferred taxes if it is at issue in the proceeding and shall note the section that specifically determines the treatment and amount of accumulated deferred taxes.

(x) The rate of return authorized for the utility for intrastate service. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court which establishes this authorized rate of return if the rate of return is at issue in the proceeding and shall note the section which specifically establishes this authorized rate and whether the decision is subject to further proceedings before the state regulatory body or a court. In the absence of a state authorized rate of return, the rate of return set by the Commission for local exchange carriers shall be used as a default rate of return;

(xi) The average amount of usable space per pole for those poles used for pole attachments (13.5 feet may be in lieu of actual measurement, but may be rebutted);

(xii) The average amount of unusable space per pole for those poles used for pole attachments (a 24 foot presumption may be used in lieu of actual measurement, but the presumption may be rebutted); and

(xiii) Reimbursements received from CATV operators and telecommunications carriers for non-recurring costs.

(2) Data and information should be based upon historical or original cost methodology, insofar as possible. Data should be derived from ARMIS, FERC 1, or other reports filed with state or federal regulatory agencies (identify source). Calculations made in connection with these figures should be provided to the complainant. The complainant shall also specify any other information and argument relied upon to attempt to establish that a rate, term, or condition is not just and reasonable.

(h) With respect to attachments within a duct or conduit system, where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said claim.

(1) The data and information shall include, where applicable:

(i) The gross investment by the utility for conduit;

(ii) The accumulated depreciation from the gross conduit investment;

(iii) The system duct length or system conduit length and the method used to determine it;

(iv) The length of the conduit subject to the complaint;

(v) The number of ducts in the conduit subject to the complaint;

(vi) The number of inner-ducts in the duct occupied, if any. If there are no inner-ducts, the attachment is presumed to occupy one-half duct.

(vii) The annual carrying charges attributable to the cost of owning conduit. These charges may be expressed as a percentage of the net linear cost of a conduit. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court which determines the treatment of accumulated deferred taxes if it is at issue in the proceeding and shall note the section which specifically determines the treatment and amount of accumulated deferred taxes.

(viii) The rate of return authorized for the utility for intrastate service. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court which establishes this authorized rate of return if the rate of return is at issue in the proceeding and shall note the section which specifically establishes this authorized rate and whether the decision is subject to further proceedings before the state regulatory body or a court. In the absence of a state authorized rate of return, the rate of return set by the Commission for local exchange carriers shall be used as a default rate of return; and

(ix) Reimbursements received by utilities from CATV operators and telecommunications carriers for non-recurring costs.

(2) Data and information should be based upon historical or original cost methodology, insofar as possible. Data should be derived from ARMIS, FERC 1, or other reports filed with state or federal regulatory agencies (identify source). Calculations made in connection with these figures should be provided to the complainant. The complainant shall also specify any other information and argument relied upon to attempt to establish that a rate, term, or condition is not just and reasonable.

(i) With respect to rights-of-way, where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said claim. The data and information shall include, where applicable, equivalent information as specified in paragraph (g) of this section.

(j) If any of the information and data required in paragraphs (g), (h) and (i) of this section is not provided to the cable television operator or telecommunications carrier by the utility upon reasonable request, the cable television operator or telecommunications carrier shall include a statement indicating the steps taken to obtain the information from the utility, including the dates of all requests. No complaint filed by a cable television operator or telecommunications carrier shall be dismissed where the utility has failed to provide the information required under paragraphs (g), (h) or (i) of this section, as applicable, after such reasonable request. A utility must supply a cable television operator or telecommunications carrier the information required in paragraph (g), (h) or (i) of this section, as applicable, along with the supporting pages from its

ARMIS, FERC Form 1, or other report to a regulatory body, within 30 days of the request by the cable television operator or telecommunications carrier. The cable television operator or telecommunications carrier, in turn, shall submit these pages with its complaint. If the utility did not supply these pages to the cable television operator or telecommunications carrier in response to the information request, the utility shall supply this information in its response to the complaint.

(k) The complaint shall include a certification that the complainant has, in good faith, engaged or attempted to engage in executive-level discussions with the respondent to resolve the pole attachment dispute. Executive-level discussions are discussions among representatives of the parties who have sufficient authority to make binding decisions on behalf of the company they represent regarding the subject matter of the discussions. Such certification shall include a statement that, prior to the filing of the complaint, the complainant mailed a certified letter to the respondent outlining the allegations that form the basis of the complaint it anticipated filing with the Commission, inviting a response within a reasonable period of time, and offering to hold executive-level discussions regarding the dispute. A refusal by a respondent to engage in the discussions contemplated by this rule shall constitute an unreasonable practice under section 224 of the Act.

(l) Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(m) In a case where a cable television system operator or telecommunications carrier as defined in 47 U.S.C. 224(a)(5) claims that it has been denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section 47 U.S.C. 224(f), the complaint shall include the data and information necessary to support the claim, including:

(1) The reasons given for the denial of access to the utility's poles, ducts, conduits, or rights-of-way;

(2) The basis for the complainant's claim that the denial of access is unlawful;

(3) The remedy sought by the complainant;

(4) A copy of the written request to the utility for access to its poles, ducts, conduits, or rights-of-way; and

(5) A copy of the utility's response to the written request including all information given by the utility to support its denial of access. A complaint alleging unlawful denial of access will not be dismissed if the complainant is unable to obtain a utility's written response, or if the utility denies the complainant any other information needed to establish a prima facie case.

[43 FR 36094, Aug. 15, 1978, as amended at 44 FR 31649, June 1, 1979; 45 FR 17014, Mar. 17, 1980; 52 FR 31770, Aug. 24, 1987; 61 FR 43025, Aug. 20, 1996; 61 FR 45619, Aug. 29, 1996; 63 FR 12025, Mar. 12, 1998; 65 FR 31282, May 17, 2000; 65 FR 34820, May 31, 2000; 76 FR 26638, May 9, 2011]

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§1.1405 File numbers.

Each complaint which appears to be essentially complete under §1.1404 will be accepted and assigned a file number. Such assignment is for administrative purposes only and does not necessarily mean that the complaint has been found to be in full compliance with other sections in this subpart. Petitions for temporary stay will also be assigned a file number upon receipt.

[44 FR 31650, June 1, 1979]

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§1.1406 Dismissal of complaints.

(a) The complaint shall be dismissed for lack of jurisdiction in any case where a suitable certificate has been filed by a State pursuant to §1.1414 of this subpart. Such certificate shall be conclusive proof of lack of jurisdiction of this Commission. A complaint against a utility shall also be dismissed if the utility does not use or control poles, ducts, or conduits used or designated, in whole or in part, for wire communication or if the utility does not meet the criteria of §1.1402(a) of this subpart.

(b) If the complaint does not contain substantially all the information required under §1.1404 the Commission may dismiss the complaint or may require the complainant to file additional information. The

complaint shall not be dismissed if the information is not available from public records or from the respondent utility after reasonable request.

(c) Failure by the complainant to respond to official correspondence or a request for additional information will be cause for dismissal.

(d) Dismissal under provisions of paragraph (b) of this section above will be with prejudice if the complaint has been dismissed previously. Such a complaint may be refiled no earlier than six months from the date it was so dismissed.

[43 FR 36094, Aug. 15, 1978, as amended at 44 FR 31650, June 1, 1979]

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§1.1407 Response and reply.

(a) Respondent shall have 30 days from the date the complaint was filed within which to file a response. Complainant shall have 20 days from the date the response was filed within which to file a reply. Extensions of time to file are not contemplated unless justification is shown pursuant to §1.46. Except as otherwise provided in §1.1403, no other filings and no motions other than for extension of time will be considered unless authorized by the Commission. The response should set forth justification for the rate, term, or condition alleged in the complaint not to be just and reasonable. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts and exhibits shall be verified by the person who prepares them. The response, reply, and other pleadings may be signed by counsel.

(b) The response shall be served on the complainant and all parties listed in complainant's certificate of service.

(c) The reply shall be served on the respondent and all parties listed in respondent's certificate of service.

(d) Failure to respond may be deemed an admission of the material factual allegations contained in the complaint.

[44 FR 31650, June 1, 1979]

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§1.1408 Number of copies and form of pleadings.

(a) An original and three copies of the complaint, response, and reply shall be filed with the Commission.

(b) All papers filed in the complaint proceeding must be drawn in conformity with the requirements of §§1.49, 1.50 and 1.52.

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§1.1409 Commission consideration of the complaint.

(a) In its consideration of the complaint, response, and reply, the Commission may take notice of any information contained in publicly available filings made by the parties and may accept, subject to rebuttal, studies that have been conducted. The Commission may also request that one or more of the parties make additional filings or provide additional information. Where one of the parties has failed to provide information required to be provided by these rules or requested by the Commission, or where costs, values or amounts are disputed, the Commission may estimate such costs, values or amounts it considers reasonable, or may decide adversely to a party who has failed to supply requested information which is readily available to it, or both.

(b) The complainant shall have the burden of establishing a *prima facie* case that the rate, term, or condition is not just and reasonable or that the denial of access violates 47 U.S.C. §224(f). If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the statutory minimum just and reasonable rate. In a case involving a denial of access, the utility shall have the burden of proving that the denial was lawful, once a *prima facie* case is established by the complainant.

(c) The Commission shall determine whether the rate, term or condition complained of is just and reasonable. For the purposes of this paragraph, 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.

(d) The Commission shall deny the complaint if it determines that the complainant has not established a *prima facie* case, or that the rate, term or condition is just and reasonable, or that the denial of access was lawful.

(e) When parties fail to resolve a dispute regarding charges for pole attachments and the Commission's complaint procedures under Section 1.1404 are invoked, the Commission will apply the following formulas for determining a maximum just and reasonable rate:

(1) The following formula shall apply to attachments to poles by cable operators providing cable services. This formula shall also apply to attachments to poles by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services until February 8, 2001:

$$\text{Maximum Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate}$$

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$$\text{Where Space Factor} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}}$$

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(2) With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by paragraphs (e)(2)(i) or (e)(2)(ii) of this section.

(i) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph 1.1409(e)(2)(ii) of this section:

Rate = Space Factor × Cost

Where Cost

in Urbanized Service Areas = 0.66 × (Net Cost of a Bare Pole × Carrying Charge Rate)

in Non-Urbanized Service Areas = 0.44 × (Net Cost of a Bare Pole × Carrying Charge Rate).

$$\text{Where Space Factor} = \left[\frac{\left(\frac{\text{Space}}{\text{Occupied}}\right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}}\right]$$

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(ii) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph 1.1409(e)(2)(i) of this section:

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[\frac{\text{Maintenance and Administrative}}{\text{Carrying Charge Rate}}\right]$$

$$\text{Where Space Factor} = \left[\frac{\left(\frac{\text{Space}}{\text{Occupied}}\right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}}\right]$$

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(3) The following formula shall apply to attachments to conduit by cable operators and telecommunications carriers:

$$\frac{\textit{Maximum Rate per Linear ft./m.}}{\text{(Percentage of Conduit Capacity)}} = \underbrace{\left[\frac{1}{\textit{Number of Ducts}} \times \frac{1\text{ Duct}}{\textit{No. of Inner Ducts}}\right]}_{\text{(Percentage of Conduit Capacity)}} \times \underbrace{\left[\frac{\textit{No. of Ducts}}{} \times \frac{\textit{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}}\right]}_{\text{(Net Linear Cost of a Conduit)}} \times \text{Carrying Charge Rate}$$

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simplified as:

$$\textit{Maximum Rate Per Linear ft./m.} = \frac{1\text{ Duct}}{\textit{No. of Inner Ducts}} \times \frac{\textit{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}} \times \text{Carrying Charge Rate}$$

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If no inner-duct is installed the fraction, "1 Duct divided by the No. of Inner-Ducts" is presumed to be ½ .

(f) Paragraph (e)(2) of this section shall become effective February 8, 2001 (*i.e.*, five years after the effective date of the Telecommunications Act of 1996). Any increase in the rates for pole attachments that results from the adoption of such regulations shall be phased in over a period of five years beginning on the effective date of such regulations in equal annual increments. The five-year phase-in is to apply to rate increases only. Rate reductions are to be implemented immediately. The determination of any rate increase shall be based on data currently available at the time of the calculation of the rate increase.

[43 FR 36094, Aug. 15, 1978, as amended at 52 FR 31770, Aug. 24, 1987; 61 FR 43025, Aug. 20, 1996; 61 FR 45619, Aug. 29, 1996; 63 FR 12025, Mar. 12, 1998; 65 FR 31282, May 17, 2000; 66 FR 34580, June 29, 2001; 76 FR 26639, May 9, 2011]

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§1.1410 Remedies.

If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

(a) If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

(1) Terminate the unjust and/or unreasonable rate, term, or condition;

(2) Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission;

(3) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission, plus interest, consistent with the applicable statute of limitations; and

(b) If the Commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully denied or delayed, it may order that access be permitted within a specified time frame and in accordance with specified rates, terms, and conditions.

(c) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission from the date that the complaint, as acceptable, was filed, plus interest.

[44 FR 31650, June 1, 1979, as amended at 76 FR 26639, May 9, 2011]

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§1.1411 Meetings and hearings.

The Commission may decide each complaint upon the filings and information before it, may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute, or may, in its discretion, order evidentiary procedures upon any issues it finds to have been raised by the filings.

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§1.1412 Enforcement.

If the respondent fails to obey any order imposed under this subpart, the Commission on its own motion or by motion of the complainant may order the respondent to show cause why it should not cease and desist from violating the Commission's order.

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§1.1413 Forfeiture.

(a) If any person willfully fails to obey any order imposed under this subpart, or any Commission rule, or

(b) If any person shall in any written response to Commission correspondence or inquiry or in any application, pleading, report, or any other written statement submitted to the Commission pursuant to this subpart make any misrepresentation bearing on any matter within the jurisdiction of the Commission, the Commission may, in addition to any other remedies, including criminal penalties under section 1001 of Title 18 of the United States Code, impose a forfeiture pursuant to section 503(b) of the Communications Act, 47 U.S.C. 503(b).

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§1.1414 State certification.

(a) If the Commission does not receive certification from a state that:

(1) It regulates rates, terms and conditions for pole attachments;

(2) In so regulating such rates, terms and conditions, the state has the authority to consider and does consider the interests of the subscribers of cable television services as well as the interests of the consumers of the utility services; and,

(3) It has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available in the state), it will be rebuttably presumed that the state is not regulating pole attachments.

(b) Upon receipt of such certification, the Commission shall give public notice. In addition, the Commission shall compile and publish from time to time, a listing of states which have provided certification.

(c) Upon receipt of such certification, the Commission shall forward any pending case thereby affected to the state regulatory authority, shall so notify the parties involved and shall give public notice thereof.

(d) Certification shall be by order of the state regulatory body or by a person having lawful delegated authority under provisions of state law to submit such certification. Said person shall provide in writing a statement that he or she has such authority and shall cite the law, regulation or other instrument conferring such authority.

(e) Notwithstanding any such certification, jurisdiction will revert to this Commission with respect to any individual matter, unless the state takes final action on a complaint regarding such matter:

(1) Within 180 days after the complaint is filed with the state, or

(2) Within the applicable periods prescribed for such final action in such rules and regulations of the state, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

[43 FR 36094, Aug. 15, 1978, as amended at 44 FR 31650, June 1, 1979; 50 FR 18659, May 5, 1985]

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§1.1415 Other orders.

The Commission may issue such other orders and so conduct its proceedings as will best conduce to the proper dispatch of business and the ends of justice.

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§1.1416 Imputation of rates; modification costs.

(a) A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(b) The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. Each party described in the preceding sentence shall share proportionately in the cost of the modification. A party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification as provided in subpart J of this part, it adds to or modifies its attachment. Notwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party. If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.

[61 FR 43025, Aug. 20, 1996; 61 FR 45619, Aug. 29, 1996]

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§1.1417 Allocation of Unusable Space Costs.

(a) With respect to the formula referenced in §1.1409(e)(2), a utility shall apportion the cost of providing unusable space on a pole so that such apportionment equals two-thirds of the costs of providing unusable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(b) All attaching entities attached to the pole shall be counted for purposes of apportioning the cost of unusable space.

(c) Utilities may use the following rebuttable presumptive averages when calculating the number of attaching entities with respect to the formula referenced in §1.1409(e)(2). For non-urbanized service areas (under 50,000 population), a presumptive average number of attaching entities of three (3). For urbanized service areas (50,000 or higher population), a presumptive average number of attaching entities of five (5). If any part of the utility's service area within the state has a designation of urbanized (50,000 or higher population) by the Bureau of Census, United States Department of Commerce, then all of that service area

shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities.

(d) A utility may establish its own presumptive average number of attaching entities for its urbanized and non-urbanized service area as follows:

(1) Each utility shall, upon request, provide all attaching entities and all entities seeking access the methodology and information upon which the utilities presumptive average number of attachers is based.

(2) Each utility is required to exercise good faith in establishing and updating its presumptive average number of attachers.

(3) The presumptive average number of attachers may be challenged by an attaching entity by submitting information demonstrating why the utility's presumptive average is incorrect. The attaching entity should also submit what it believes should be the presumptive average and the methodology used. Where a complete inspection is impractical, a statistically sound survey may be submitted.

(4) Upon successful challenge of the existing presumptive average number of attachers, the resulting data determined shall be used by the utility as the presumptive number of attachers within the rate formula.

[63 FR 12026, Mar. 12, 1998, as amended at 66 FR 34581, June 29, 2001]

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§1.1418 Use of presumptions in calculating the space factor.

With respect to the formulas referenced in §1.1409(e)(1) and §1.1409(e)(2), the space occupied by an attachment is presumed to be one (1) foot. The amount of usable space is presumed to be 13.5 feet. The amount of unusable space is presumed to be 24 feet. The pole height is presumed to be 37.5 feet. These presumptions may be rebutted by either party.

[66 FR 34581, June 29, 2001]

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§1.1420 Timeline for access to utility poles.

(a) The term "attachment" means any attachment by a cable television system or provider of telecommunications service to a pole owned or controlled by a utility.

(b) All time limits in this subsection are to be calculated according to §1.4.

(c) *Survey.* A utility shall respond as described in §1.1403(b) to a cable operator or telecommunications carrier within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days, in the case of larger orders as described in paragraph (g) of this section). This response may be a notification that the utility has completed a survey of poles for which access has been requested. A complete application is an application that provides the utility with the information necessary under its procedures to begin to survey the poles.

(d) *Estimate.* Where a request for access is not denied, a utility shall present to a cable operator or telecommunications carrier an estimate of charges to perform all necessary make-ready work within 14 days of providing the response required by §1.1420(c), or in the case where a prospective attacher's contractor has performed a survey, within 14 days of receipt by the utility of such survey.

(1) A utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 14 days after the estimate is presented.

(2) A cable operator or telecommunications carrier may accept a valid estimate and make payment anytime after receipt of an estimate but before the estimate is withdrawn.

(e) *Make-ready.* Upon receipt of payment specified in paragraph (d)(2) of this section, a utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready.

(1) For attachments in the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 60 days after notification is sent (or 105 days in the case of larger orders, as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State that if make-ready is not completed by the completion date set by the utility (or, if the utility has asserted its 15-day right of control, 15 days later), the cable operator or telecommunications carrier requesting access may complete the specified make-ready.

(vi) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(2) For wireless attachments above the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 90 days after notification is sent (or 135 days in the case of larger orders, as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(f) For wireless attachments above the communications space, a utility shall ensure that make-ready is completed by the date set by the utility in paragraph (e)(2)(ii) of this section (or, if the utility has asserted its 15 -day right of control, 15 days later).

(g) For the purposes of compliance with the time periods in this section:

(1) A utility shall apply the timeline described in paragraphs (c) through (e) of this section to all requests for pole attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in a state.

(2) A utility may add 15 days to the survey period described in paragraph (c) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(3) A utility may add 45 days to the make-ready periods described in paragraph (e) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(4) A utility shall negotiate in good faith the timing of all requests for pole attachment larger than the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(5) A utility may treat multiple requests from a single cable operator or telecommunications carrier as one request when the requests are filed within 30 days of one another.

(h) A utility may deviate from the time limits specified in this section:

(1) Before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.

(2) During performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete the make-ready work within the prescribed time frame. A utility that so deviates shall immediately notify, in writing, the cable operator or telecommunications carrier requesting attachment and other affected entities with existing attachments, and shall include the reason for and date and duration of the deviation. The

utility shall deviate from the time limits specified in this section for a period no longer than necessary and shall resume make-ready performance without discrimination when it returns to routine operations.

(i) If a utility fails to respond as specified in paragraph (c) of this section, a cable operator or telecommunications carrier requesting attachment in the communications space may, as specified in §1.1422, hire a contractor to complete a survey. If make-ready is not complete by the date specified in paragraph (e)(1)(ii) of this section, a cable operator or telecommunications carrier requesting attachment in the communications space may hire a contractor to complete the make-ready:

(1) Immediately, if the utility has failed to assert its right to perform remaining make-ready work by notifying the requesting attacher that it will do so; or

(2) After 15 days if the utility has asserted its right to perform make-ready by the date specified in paragraph (e)(1)(ii) of this section and has failed to complete make-ready.

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§1.1422 Contractors for survey and make-ready.

(a) A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space on its utility poles in cases where the utility has failed to meet deadlines specified in §1.1420.

(b) If a cable operator or telecommunications carrier hires a contractor for purposes specified in §1.1420, it shall choose from among a utility's list of authorized contractors.

(c) A cable operator or telecommunications carrier that hires a contractor for survey or make-ready work shall provide a utility with a reasonable opportunity for a utility representative to accompany and consult with the authorized contractor and the cable operator or telecommunications carrier.

(d) The consulting representative of an electric utility may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

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§1.1424 Complaints by incumbent local exchange carriers.

Complaints by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable shall follow the same complaint procedures specified for other pole attachment complaints in this part, as relevant. In complaint proceedings where an incumbent local exchange carrier (or an association of incumbent local exchange carriers) claims that it is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system for purposes of obtaining comparable rates, terms or conditions, the incumbent local exchange carrier shall bear the burden of demonstrating that it is similarly situated by reference to any relevant evidence, including pole attachment agreements. If a respondent declines or refuses to provide a complainant with access to agreements or other information upon reasonable request, the complainant may seek to obtain such access through discovery. Confidential information contained in any documents produced may be subject to the terms of an appropriate protective order.

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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 cables~~ 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.
(~~12~~5) "Public utility" has the meaning given in ORS 757.005.
(~~13~~26) "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~~) The~~A disputed~~ conduit rental rate per linear foot ~~will be~~is 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.

(~~4~~3) A licensee occupying part of a duct ~~shall be~~is deemed to occupy the entire duct.

(~~5~~4) Licensees ~~shall~~must 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 ~~shall~~will apply from the date the conduit owner last inspected the conduit in dispute. The last inspection date ~~shall be~~is deemed to be no more than ~~three~~five years before the unauthorized attachment is discovered. The conduit owner also ~~shall~~may charge for any expenses it incurs as a result of the unauthorized attachment.

(~~6~~5) The conduit owner ~~shall~~must give a licensee 18 months' notice of its need to occupy licensed conduit and ~~shall~~will 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 sections (2) ~~and (3)~~ of this rule, a pole owner may impose a sanction on a pole occupant that is in violation of OAR 860-028-~~0120(1)(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 sections ~~(2) and~~ (3) of this rule, a pole owner may impose a sanction on a pole occupant that is in violation of OAR 860-028-0120(1)(b), except as provided in OAR 860-028-0120(3). ~~The sanction may be the higher of:~~
~~(a) $250 per pole; or~~
~~(b) 30 times the owner's annual rental fee per pole.~~

~~(2) A pole owner 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 OARs 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 does 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

F.C.C.

47 CFR 1.1401 - Purpose.

There are 5 Updates appearing in the Federal Register for *47 CFR 1*. View below or at eCFR (GPOAccess)

- CFR
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§ 1.1401 Purpose.

The rules and regulations contained in subpart J of this part provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable. They also provide complaint and enforcement procedures for incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)) to ensure that the rates, terms, and conditions of their access to pole attachments are just and reasonable.

[76 FR 26638, May 9, 2011]

47 CFR 1.1402 - Definitions.

There are 5 Updates appearing in the Federal Register for *47 CFR 1*. View below or at eCFR (GPOAccess)

- CFR
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§ 1.1402 Definitions.

(a) The term *utility* means any person that is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person that is cooperatively organized, or any person owned by the Federal Government or any State.

(b) The term *pole attachment* means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(c) With respect to poles, the term *usable space* means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the utility. With respect to conduit, the term *usable space* means capacity within a conduit system which is available, or which could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable and associated equipment for telecommunications or cable services, and which includes capacity occupied by the utility.

(d) The term *complaint* means a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not just and reasonable. It also means a filing by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable.

(e) The term *complainant* means a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, an association of telecommunications carriers, an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers who files a complaint.

(f) The term *respondent* means a cable television system operator, a utility, or a telecommunications carrier against whom a complaint is filed.

(g) The term *State* means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(h) For purposes of this subpart, the term *telecommunications carrier* means any provider of telecommunications services, except that the term does not include aggregators of telecommunications services (as defined in 47 U.S.C. 226) or incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)).

(i) The term *conduit* means a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed.

(j) The term *conduit* system means a collection of one or more conduits together with their supporting infrastructure.

(k) The term *duct* means a single enclosed raceway for conductors, cable and/or wire.

(l) With respect to poles, the term *unusable space* means the space on a utility pole below the usable space, including the amount required to set the depth of the pole.

(m) The term *attaching entity* includes cable system operators, telecommunications carriers, incumbent and other local exchange carriers, utilities, governmental entities and other entities with a physical attachment to the pole, duct, conduit or right of way. It does not include governmental entities with only seasonal attachments to the pole.

(n) The term *inner-duct* means a duct-like raceway smaller than a duct that is inserted into a duct so that the duct may carry multiple wires or cables.

[43 FR 36094, Aug. 15, 1978, as amended at 52 FR 31770, Aug. 24, 1987; 61 FR 43024, Aug. 20, 1996; 61 FR 45618, Aug. 29, 1996; 63 FR 12024, Mar. 12, 1998; 65 FR 31281, May 17, 2000; 66 FR 34580, June 29, 2001; 76 FR 26638, May 9, 2011]

47 CFR 1.1403 - DUTY TO PROVIDE ACCESS; MODIFICATIONS; NOTICE OF REMOVAL, INCREASE OR MODIFICATION; PETITION FOR TEMPORARY STAY; AND CABLE OPERATOR NOTICE.

There are 8 Updates appearing in the Federal Register for *47 CFR 1*. View below or at eCFR (GPOAccess)

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§ 1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice.

(a) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. Notwithstanding this obligation, a utility may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.

(b) Requests for access to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

(c) A utility shall provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to:

(1) Removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the cable television system operator's of telecommunications carrier's pole attachment agreement;

(2) Any increase in pole attachment rates; or

(3) Any modification of facilities other than routine maintenance or modification in response to emergencies.

(d) A cable television system operator or telecommunications carrier may file a "Petition for Temporary Stay" of the action contained in a notice received pursuant to paragraph (c) of this section within 15 days of receipt of such notice. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of cable television service or telecommunication service, a copy of the notice, and certification of service as required by § 1.1404(b). The named respondent may file an answer within 7 days of the date the Petition for Temporary Stay was filed. No further filings under this section will be considered unless requested or authorized by the Commission and no extensions of time will be granted unless justified pursuant to § 1.46.5.

(e) Cable operators must notify pole owners upon offering telecommunications services.

[61 FR 45618, Aug. 29, 1996, as amended at 63 FR 12025, Mar. 12, 1998]

47 CFR 1.1404 - Complaint.

There are 5 Updates appearing in the Federal Register for *47 CFR 1*. View below or at eCFR (GPOAccess)

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§ 1.1404Complaint.

(a) The complaint shall contain the name and address of the complainant, name and address of the respondent, and shall contain a verification (in the form in § 1.721(b)), signed by the complainant or officer thereof if complainant is a corporation, showing complainant's direct interest in the matter complained of. Counsel for the complainant may sign the complaint. Complainants may join together to file a joint complaint. Complaints filed by associations shall specifically identify each utility, cable television system operator, or telecommunications carrier who is a party to the complaint and shall be accompanied by a document from each identified member certifying that the complaint is being filed on its behalf.

(b) The complaint shall be accompanied by a certification of service on the named respondent, and each of the Federal, State, and local governmental agencies that regulate any aspect of the services provided by the complainant or respondent.

(c) In a case where it is claimed that a rate, term, or condition is unjust or unreasonable, the complaint shall contain a statement that the State has not certified to the Commission that it regulates the rates, terms and conditions for pole attachments. The complaint shall include a statement that the utility is not owned by any railroad, any person who is cooperatively organized or any person owned by the Federal Government or any State.

(d) The complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable system operator or telecommunications carrier and the utility. If there is no present pole attachment agreement, the complaint shall contain:

(1) A statement that the utility uses or controls poles, ducts, or conduits used or designated, in whole or in part, for wire communication; and

(2) A statement that the cable television system operator or telecommunications carrier currently has attachments on the poles, ducts, conduits, or rights-of-way.

(e) The complaint shall state with specificity the pole attachment rate, term or condition which is claimed to be unjust or unreasonable.

(f) In any case, where it is claimed that a term or condition is unjust or unreasonable, the claim shall specify all information and argument relied upon to justify said claim.

(g) For attachments to poles, where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said claim.

(1) The data and information shall include, where applicable:

(i) The gross investment by the utility for pole lines;

(ii) The investment in crossarms and other items which do not reflect the cost of owning and maintaining poles, if available;

(iii) The depreciation reserve from the gross pole line investment;

(iv) The depreciation reserve from the investment in crossarms and other items which do not reflect the cost of owning and maintaining poles, if available;

(v) The total number of poles:

(A) Owned; and

(B) Controlled or used by the utility. If any of these poles are jointly owned, the complaint shall specify the number of such jointly owned poles and the percentage of each joint pole or the number of equivalent poles owned by the subject utility;

(vi) The total number of poles which are the subject of the complaint;

(vii) The number of poles included in paragraph (g)(1)(vi) of this section that are controlled or used by the utility through lease between the utility and other owner(s), and the annual amounts paid by the utility for such rental;

(viii) The number of poles included in paragraph (g)(1)(vi) of this section that are owned by the utility and that are leased to other users by the utility, and the annual amounts paid to the utility for such rental;

(ix) The annual carrying charges attributable to the cost of owning a pole. The utility shall submit these charges separately for each of the following categories: Depreciation, rate of return, taxes, maintenance, and administrative. These charges may be expressed as a percentage of the net pole investment. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court that determines the treatment of accumulated deferred taxes if it is at issue in the proceeding and shall note the section that specifically determines the treatment and amount of accumulated deferred taxes.

(x) The rate of return authorized for the utility for intrastate service. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court which establishes this authorized rate of return if the rate of return is at issue in the proceeding and shall note the section which specifically establishes this authorized rate and whether the decision is subject to further proceedings before the state regulatory body or a court. In the absence of a state authorized rate of return, the rate of return set by the Commission for local exchange carriers shall be used as a default rate of return;

(xi) The average amount of usable space per pole for those poles used for pole attachments (13.5 feet may be in lieu of actual measurement, but may be rebutted);

(xii) The average amount of unusable space per pole for those poles used for pole attachments (a 24 foot presumption may be used in lieu of actual measurement, but the presumption may be rebutted); and

(xiii) Reimbursements received from CATV operators and telecommunications carriers for non-recurring costs.

(2) Data and information should be based upon historical or original cost methodology, insofar as possible. Data should be derived from ARMIS, FERC 1, or other reports filed with state or federal regulatory agencies (identify source). Calculations made in connection with these figures should be provided to the complainant. The complainant shall also specify any other information and argument relied upon to attempt to establish that a rate, term, or condition is not just and reasonable.

(h) With respect to attachments within a duct or conduit system, where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said claim.

(1) The data and information shall include, where applicable:

(i) The gross investment by the utility for conduit;

(ii) The accumulated depreciation from the gross conduit investment;

(iii) The system duct length or system conduit length and the method used to determine it;

(iv) The length of the conduit subject to the complaint;

(v) The number of ducts in the conduit subject to the complaint;

(vi) The number of inner-ducts in the duct occupied, if any. If there are no inner-ducts, the attachment is presumed to occupy one-half duct.

(vii) The annual carrying charges attributable to the cost of owning conduit. These charges may be expressed as a percentage of the net linear cost of a conduit. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court which determines the treatment of accumulated deferred taxes if it is at issue in the proceeding and shall note the section which specifically determines the treatment and amount of accumulated deferred taxes.

(viii) The rate of return authorized for the utility for intrastate service. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court which establishes this authorized rate of return if the rate of return is at issue in the proceeding and shall note the section which specifically establishes this authorized rate and whether the decision is subject to further proceedings before the state regulatory body or a court. In the absence of a state authorized rate of return, the rate of return set by the Commission for local exchange carriers shall be used as a default rate of return; and

(ix) Reimbursements received by utilities from CATV operators and telecommunications carriers for non-recurring costs.

(2) Data and information should be based upon historical or original cost methodology, insofar as possible. Data should be derived from ARMIS, FERC 1, or other reports filed with state or federal regulatory agencies (identify source). Calculations made in connection with these figures should be provided to the complainant. The complainant shall also specify any other information and argument relied upon to attempt to establish that a rate, term, or condition is not just and reasonable.

(i) With respect to rights-of-way, where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said claim. The data and information shall include, where applicable, equivalent information as specified in paragraph (g) of this section.

(j) If any of the information and data required in paragraphs (g), (h) and (i) of this section is not provided to the cable television operator or telecommunications carrier by the utility upon reasonable request, the cable television operator or telecommunications carrier shall include a statement indicating the steps taken to obtain the information from the utility, including the dates of all requests. No complaint filed by a cable television operator or telecommunications carrier shall be dismissed where the utility has failed to provide the information required under paragraphs (g), (h) or (i) of this section, as applicable, after such reasonable request. A utility must supply a cable television operator or telecommunications carrier the information required in paragraph (g), (h) or (i) of this section, as applicable, along with the supporting pages from its ARMIS, FERC Form 1, or other report to a regulatory body, within 30 days of the request by the cable television operator or telecommunications carrier. The cable television operator or telecommunications carrier, in turn, shall submit these pages with its complaint. If the utility did not supply these pages to the cable television operator or telecommunications carrier in response to the information request, the utility shall supply this information in its response to the complaint.

(k) The complaint shall include a certification that the complainant has, in good faith, engaged or attempted to engage in executive-level discussions with the respondent to resolve the pole attachment dispute. Executive-level discussions are discussions among representatives of the parties who have sufficient authority to make binding decisions on behalf of the company they represent regarding the subject matter of the discussions. Such certification shall include a statement that, prior to the filing of the complaint, the

complainant mailed a certified letter to the respondent outlining the allegations that form the basis of the complaint it anticipated filing with the Commission, inviting a response within a reasonable period of time, and offering to hold executive-level discussions regarding the dispute. A refusal by a respondent to engage in the discussions contemplated by this rule shall constitute an unreasonable practice under section 224 of the Act.

(l) Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(m) In a case where a cable television system operator or telecommunications carrier as defined in 47 U.S.C. 224(a)(5) claims that it has been denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section 47 U.S.C. 224(f), the complaint shall include the data and information necessary to support the claim, including:

(1) The reasons given for the denial of access to the utility's poles, ducts, conduits, or rights-of-way;

(2) The basis for the complainant's claim that the denial of access is unlawful;

(3) The remedy sought by the complainant;

(4) A copy of the written request to the utility for access to its poles, ducts, conduits, or rights-of-way; and

(5) A copy of the utility's response to the written request including all information given by the utility to support its denial of access. A complaint alleging unlawful denial of access will not be dismissed if the complainant is unable to obtain a utility's written response, or if the utility denies the complainant any other information needed to establish a prima facie case.

[43 FR 36094, Aug. 15, 1978, as amended at 44 FR 31649, June 1, 1979; 45 FR 17014, Mar. 17, 1980; 52 FR 31770, Aug. 24, 1987; 61 FR 43025, Aug. 20, 1996; 61 FR 45619, Aug. 29, 1996; 63 FR 12025, Mar. 12, 1998; 65 FR 31282, May 17, 2000; 65 FR 34820, May 31, 2000; 76 FR 26638, May 9, 2011]

EFFECTIVE DATE NOTE 1:

At 63 FR 12025, Mar. 12, 1998, § 1.1404 was amended by redesignating paragraphs (g)(12) and (h) through (k) as (g)(13) and (k) through (n) and adding new paragraphs (g)(12) and (h) through (j). The added text contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

EFFECTIVE DATE NOTE 2:

At 65 FR 31282, May 17, 2000, § 1.1404 was amended by removing paragraph (k), redesignating paragraphs (l), (m), and (n) as (k), (l), and (m), respectively, and revising paragraphs (g), (h), and the third sentence of paragraph (j). The revised text contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

47 CFR 1.1405 - File numbers.

There are 5 Updates appearing in the Federal Register for *47 CFR 1*. View below or at eCFR (GPOAccess)

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§ 1.1405File numbers.

Each complaint which appears to be essentially complete under § 1.1404 will be accepted and assigned a file number. Such assignment is for administrative purposes only and does not necessarily mean that the complaint has been found to be in full compliance with other sections in this subpart. Petitions for temporary stay will also be assigned a file number upon receipt.

[44 FR 31650, June 1, 1979]

47 CFR 1.1406 - Dismissal of complaints.

There are 5 Updates appearing in the Federal Register for *47 CFR 1*. View below or at eCFR (GPOAccess)

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§ 1.1406Dismissal of complaints.

(a) The complaint shall be dismissed for lack of jurisdiction in any case where a suitable certificate has been filed by a State pursuant to § 1.1414 of this subpart. Such certificate shall be conclusive proof of lack of jurisdiction of this Commission. A complaint against a utility shall also be dismissed if the utility does not use or control poles, ducts, or conduits used or designated, in whole or in part, for wire communication or if the utility does not meet the criteria of § 1.1402(a) of this subpart.

(b) If the complaint does not contain substantially all the information required under § 1.1404 the Commission may dismiss the complaint or may require the complainant to file additional information. The complaint shall not be dismissed if the information is not available from public records or from the respondent utility after reasonable request.

(c) Failure by the complainant to respond to official correspondence or a request for additional information will be cause for dismissal.

(d) Dismissal under provisions of paragraph (b) of this section above will be with prejudice if the complaint has been dismissed previously. Such a complaint may be refiled no earlier than six months from the date it was so dismissed.

[43 FR 36094, Aug. 15, 1978, as amended at 44 FR 31650, June 1, 1979]

47 CFR 1.1407 - Response and reply.

There are 5 Updates appearing in the Federal Register for *47 CFR 1*. View below or at eCFR (GPOAccess)

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§ 1.1407Response and reply.

(a) Respondent shall have 30 days from the date the complaint was filed within which to file a response. Complainant shall have 20 days from the date the response was filed within which to file a reply. Extensions of time to file are not contemplated unless justification is shown pursuant to § 1.46. Except as otherwise provided in § 1.1403, no other filings and no motions other than for extension of time will be considered unless authorized by the Commission. The response should set forth justification for the rate, term, or condition alleged in the complaint not to be just and reasonable. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts and exhibits shall be verified by the person who prepares them. The response, reply, and other pleadings may be signed by counsel.

(b) The response shall be served on the complainant and all parties listed in complainant's certificate of service.

(c) The reply shall be served on the respondent and all parties listed in respondent's certificate of service.

(d) Failure to respond may be deemed an admission of the material factual allegations contained in the complaint.

[44 FR 31650, June 1, 1979]

47 CFR 1.1408 - Number of copies and form of pleadings.

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§ 1.1408Number of copies and form of pleadings.

(a) An original and three copies of the complaint, response, and reply shall be filed with the Commission.

(b) All papers filed in the complaint proceeding must be drawn in conformity with the requirements of §§ 1.49, 1.50 and 1.52.

47 CFR 1.1409 - Commission consideration of the complaint.

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§ 1.1409Commission consideration of the complaint.

(a) In its consideration of the complaint, response, and reply, the Commission may take notice of any information contained in publicly available filings made by the parties and may accept, subject to rebuttal, studies that have been conducted. The Commission may also request that one or more of the parties make additional filings or provide additional information. Where one of the parties has failed to provide information required to be provided by these rules or requested by the Commission, or where costs, values or amounts are disputed, the Commission may estimate such costs, values or amounts it considers reasonable, or may decide adversely to a party who has failed to supply requested information which is readily available to it, or both.

(b) The complainant shall have the burden of establishing a *prima facie* case that the rate, term, or condition is not just and reasonable or that the denial of access violates 47 U.S.C. § 224(f). If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the statutory minimum just and reasonable rate. In a case involving a denial of access, the utility shall have the burden of proving that the denial was lawful, once a *prima facie* case is established by the complainant.

(c) The Commission shall determine whether the rate, term or condition complained of is just and reasonable. For the purposes of this paragraph, 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.

(d) The Commission shall deny the complaint if it determines that the complainant has not established a *prima facie* case, or that the rate, term or condition is just and reasonable, or that the denial of access was lawful.

(e) When parties fail to resolve a dispute regarding charges for pole attachments and the Commission's complaint procedures under Section 1.1404 are invoked, the Commission will apply the following formulas for determining a maximum just and reasonable rate:

(1) The following formula shall apply to attachments to poles by cable operators providing cable services. This formula shall also apply to attachments to poles by any telecommunications carrier (to the extent such carrier is not a party to a pole

attachment agreement) or cable operator providing telecommunications services until February 8, 2001:

$$\frac{\textit{Maximum}}{\textit{Rate}} = \textit{Space Factor} \times \frac{\textit{Net Cost of}}{\textit{a Bare Pole}} \times \frac{\textit{Carrying}}{\textit{Charge Rate}}$$

$$\textit{Where Space Factor} = \frac{\text{Space Occupied by Attachment}}{\textit{Total Usable Space}}$$

(2) With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by paragraphs (e)(2)(i) or (e)(2)(ii) of this section.

(i) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph 1.1409(e)(2)(ii) of this section:

Rate = Space Factor × Cost
Where Cost
in Urbanized Service Areas = 0.66 × (Net Cost of a Bare Pole × Carrying Charge Rate)
in Non-Urbanized Service Areas = 0.44 × (Net Cost of a Bare Pole × Carrying Charge Rate).

$$\text{Where Space Factor} = \left[\frac{\left(\frac{\text{Space}}{\text{Occupied}}\right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}}\right]$$

(ii) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph 1.1409(e)(2)(i) of this section:

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[\frac{\text{Maintenance and Administrative}}{\text{Carrying Charge Rate}}\right]$$

$$\text{Where Space Factor} = \left[\frac{\left(\frac{\text{Space}}{\text{Occupied}}\right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}}\right]$$

(3) The following formula shall apply to attachments to conduit by cable operators and telecommunications carriers:

$$\frac{\textit{Maximum}}{\textit{Rate per}} = \underbrace{\left[\frac{1}{\textit{Number of Ducts}} \times \frac{1\,\text{Duct}}{\textit{No. of Inner Ducts}}\right]}_{\text{(Percentage of Conduit Capacity)}} \times \underbrace{\left[\frac{\textit{No. of}}{\text{Ducts}} \times \frac{\textit{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}}\right]}_{\text{(Net Linear Cost of a Conduit)}} \times \frac{\text{Carrying}}{\text{Charge Rate}}$$

simplified as:

$$\frac{\textit{Maximum Rate}}{\text{Per } \textit{Linear} \text{ ft./m.}} = \frac{1\,\text{Duct}}{\textit{No. of Inner Ducts}} \times \frac{\textit{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}} \times \frac{\text{Carrying}}{\text{Charge Rate}}$$

If no inner-duct is installed the fraction, "1 Duct divided by the No. of Inner-Ducts" is presumed to be 1/2.

(f) Paragraph (e)(2) of this section shall become effective February 8, 2001 (*i.e.*, five years after the effective date of the Telecommunications Act of 1996). Any increase in the rates for pole attachments that results from the adoption of such regulations shall be phased in over a period of five years beginning on the effective date of such regulations in equal annual increments. The five-year phase-in is to apply to rate increases only. Rate reductions are to be implemented immediately. The determination of any rate increase shall be based on data currently available at the time of the calculation of the rate increase.

[43 FR 36094, Aug. 15, 1978, as amended at 52 FR 31770, Aug. 24, 1987; 61 FR 43025, Aug. 20, 1996; 61 FR 45619, Aug. 29, 1996; 63 FR 12025, Mar. 12, 1998; 65 FR 31282, May 17, 2000; 66 FR 34580, June 29, 2001; 76 FR 26639, May 9, 2011]

47 CFR 1.1410 - Remedies.

There are 5 Updates appearing in the Federal Register for *47 CFR 1*. View below or at eCFR (GPOAccess)

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§ 1.1410Remedies.

If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

(a) If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

(1) Terminate the unjust and/or unreasonable rate, term, or condition;

(2) Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission;

(3) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission, plus interest, consistent with the applicable statute of limitations; and

(b) If the Commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully denied or delayed, it may order that access be permitted within a specified time frame and in accordance with specified rates, terms, and conditions.

(c) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission from the date that the complaint, as acceptable, was filed, plus interest.

[44 FR 31650, June 1, 1979, as amended at 76 FR 26639, May 9, 2011]

47 CFR 1.1411 - Meetings and hearings.

There are 5 Updates appearing in the Federal Register for *47 CFR 1*. View below or at eCFR (GPOAccess)

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§ 1.1411 Meetings and hearings.

The Commission may decide each complaint upon the filings and information before it, may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute, or may, in its discretion, order evidentiary procedures upon any issues it finds to have been raised by the filings.

47 CFR 1.1412 - Enforcement.

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§ 1.1412Enforcement.

If the respondent fails to obey any order imposed under this subpart, the Commission on its own motion or by motion of the complainant may order the respondent to show cause why it should not cease and desist from violating the Commission's order.

47 CFR 1.1413 - Forfeiture.

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§ 1.1413Forfeiture.

(a) If any person willfully fails to obey any order imposed under this subpart, or any Commission rule, or

(b) If any person shall in any written response to Commission correspondence or inquiry or in any application, pleading, report, or any other written statement submitted to the Commission pursuant to this subpart make any misrepresentation bearing on any matter within the jurisdiction of the Commission, the Commission may, in addition to any other remedies, including criminal penalties under section 1001 of Title 18 of the United States Code, impose a forfeiture pursuant to section 503(b) of the Communications Act, 47 U.S.C. 503(b).

47 CFR 1.1414 - State certification.

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§ 1.1414State certification.

(a) If the Commission does not receive certification from a state that:

(1) It regulates rates, terms and conditions for pole attachments;

(2) In so regulating such rates, terms and conditions, the state has the authority to consider and does consider the interests of the subscribers of cable television services as well as the interests of the consumers of the utility services; and,

(3) It has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available in the state), it will be rebuttably presumed that the state is not regulating pole attachments.

(b) Upon receipt of such certification, the Commission shall give public notice. In addition, the Commission shall compile and publish from time to time, a listing of states which have provided certification.

(c) Upon receipt of such certification, the Commission shall forward any pending case thereby affected to the state regulatory authority, shall so notify the parties involved and shall give public notice thereof.

(d) Certification shall be by order of the state regulatory body or by a person having lawful delegated authority under provisions of state law to submit such certification. Said person shall provide in writing a statement that he or she has such authority and shall cite the law, regulation or other instrument conferring such authority.

(e) Notwithstanding any such certification, jurisdiction will revert to this Commission with respect to any individual matter, unless the state takes final action on a complaint regarding such matter:

(1) Within 180 days after the complaint is filed with the state, or

(2) Within the applicable periods prescribed for such final action in such rules and regulations of the state, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

[43 FR 36094, Aug. 15, 1978, as amended at 44 FR 31650, June 1, 1979; 50 FR 18659, May 5, 1985]

47 CFR 1.1415 - Other orders.

There are 5 Updates appearing in the Federal Register for *47 CFR 1*. View below or at eCFR (GPOAccess)

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§ 1.1415 Other orders.

The Commission may issue such other orders and so conduct its proceedings as will best conduce to the proper dispatch of business and the ends of justice.

47 CFR 1.1416 - Imputation of rates; modification costs.

There are 5 Updates appearing in the Federal Register for *47 CFR 1*. View below or at eCFR (GPOAccess)

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§ 1.1416Imputation of rates; modification costs.

(a) A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(b) The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. Each party described in the preceding sentence shall share proportionately in the cost of the modification. A party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification as provided in subpart J of this part, it adds to or modifies its attachment. Notwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party. If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.

[61 FR 43025, Aug. 20, 1996; 61 FR 45619, Aug. 29, 1996]

47 CFR 1.1417 - Allocation of Unusable Space Costs.

There are 5 Updates appearing in the Federal Register for *47 CFR 1*. View below or at eCFR (GPOAccess)

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§ 1.1417Allocation of Unusable Space Costs.

(a) With respect to the formula referenced in § 1.1409(e)(2), a utility shall apportion the cost of providing unusable space on a pole so that such apportionment equals two-thirds of the costs of providing unusable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(b) All attaching entities attached to the pole shall be counted for purposes of apportioning the cost of unusable space.

(c) Utilities may use the following rebuttable presumptive averages when calculating the number of attaching entities with respect to the formula referenced in § 1.1409(e)(2). For non-urbanized service areas (under 50,000 population), a presumptive average number of attaching entities of three (3). For urbanized service areas (50,000 or higher population), a presumptive average number of attaching entities of five (5). If any part of the utility's service area within the state has a designation of urbanized (50,000 or higher population) by the Bureau of Census, United States Department of Commerce, then all of that service area shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities.

(d) A utility may establish its own presumptive average number of attaching entities for its urbanized and non-urbanized service area as follows:

(1) Each utility shall, upon request, provide all attaching entities and all entities seeking access the methodology and information upon which the utilities presumptive average number of attachers is based.

(2) Each utility is required to exercise good faith in establishing and updating its presumptive average number of attachers.

(3) The presumptive average number of attachers may be challenged by an attaching entity by submitting information demonstrating why the utility's presumptive average is incorrect. The attaching entity should also submit what it believes should be the presumptive average and the methodology used. Where a complete inspection is impractical, a statistically sound survey may be submitted.

(4) Upon successful challenge of the existing presumptive average number of attachers, the resulting data determined shall be used by the utility as the presumptive number of attachers within the rate formula.

[63 FR 12026, Mar. 12, 1998, as amended at 66 FR 34581, June 29, 2001]

EFFECTIVE DATE NOTE:

At 63 FR 12026, Mar. 12, 1998, § 1.1417 was added. The section contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

47 CFR 1.1418 - Use of presumptions in calculating the space factor.

There are 5 Updates appearing in the Federal Register for *47 CFR 1*. View below or at eCFR (GPOAccess)

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§ 1.1418Use of presumptions in calculating the space factor.

With respect to the formulas referenced in § 1.1409(e)(1) and § 1.1409(e)(2), the space occupied by an attachment is presumed to be one (1) foot. The amount of usable space is presumed to be 13.5 feet. The amount of unusable space is presumed to be 24 feet. The pole height is presumed to be 37.5 feet. These presumptions may be rebutted by either party.

[66 FR 34581, June 29, 2001]

47 CFR 1.1420 - Timeline for access to utility poles.

There are 5 Updates appearing in the Federal Register for *47 CFR 1*. View below or at eCFR (GPOAccess)

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§ 1.1420Timeline for access to utility poles.

(a) The term "attachment" means any attachment by a cable television system or provider of telecommunications service to a pole owned or controlled by a utility.

(b) All time limits in this subsection are to be calculated according to § 1.4.

(c)*Survey.* A utility shall respond as described in § 1.1403(b) to a cable operator or telecommunications carrier within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days, in the case of larger orders as described in paragraph (g) of this section). This response may be a notification that the utility has completed a survey of poles for which access has been requested. A complete application is an application that provides the utility with the information necessary under its procedures to begin to survey the poles.

(d)*Estimate.* Where a request for access is not denied, a utility shall present to a cable operator or telecommunications carrier an estimate of charges to perform all necessary make-ready work within 14 days of providing the response required by § 1.1420(c), or in the case where a prospective attacher's contractor has performed a survey, within 14 days of receipt by the utility of such survey.

(1) A utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 14 days after the estimate is presented.

(2) A cable operator or telecommunications carrier may accept a valid estimate and make payment anytime after receipt of an estimate but before the estimate is withdrawn.

(e)*Make-ready.* Upon receipt of payment specified in paragraph (d)(2) of this section, a utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready.

(1) For attachments in the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 60 days after notification is sent (or 105 days in the case of larger orders, as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State that if make-ready is not completed by the completion date set by the utility (or, if the utility has asserted its 15-day right of control, 15 days later), the cable operator or telecommunications carrier requesting access may complete the specified make-ready.

(vi) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(2) For wireless attachments above the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 90 days after notification is sent (or 135 days in the case of larger orders, as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(f) For wireless attachments above the communications space, a utility shall ensure that make-ready is completed by the date set by the utility in paragraph (e)(2)(ii) of this section (or, if the utility has asserted its 15-day right of control, 15 days later).

(g) For the purposes of compliance with the time periods in this section:

(1) A utility shall apply the timeline described in paragraphs (c) through (e) of this section to all requests for pole attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in a state.

(2) A utility may add 15 days to the survey period described in paragraph (c) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(3) A utility may add 45 days to the make-ready periods described in paragraph (e) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(4) A utility shall negotiate in good faith the timing of all requests for pole attachment larger than the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(5) A utility may treat multiple requests from a single cable operator or telecommunications carrier as one request when the requests are filed within 30 days of one another.

(h) A utility may deviate from the time limits specified in this section:

(1) Before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.

(2) During performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete the make-ready work within the prescribed time frame. A utility that so deviates shall immediately notify, in writing, the cable operator or telecommunications carrier requesting attachment and other affected entities with existing attachments, and shall include the reason for and date and duration of the deviation. The utility shall deviate from the time limits specified in this section for a period no longer than necessary and shall resume make-ready performance without discrimination when it returns to routine operations.

(i) If a utility fails to respond as specified in paragraph (c) of this section, a cable operator or telecommunications carrier requesting attachment in the communications space may, as specified in § 1.1422, hire a contractor to complete a survey. If make-ready is not complete by the date specified in paragraph (e)(1)(ii) of this section, a cable operator or telecommunications carrier requesting attachment in the communications space may hire a contractor to complete the make-ready:

(1) Immediately, if the utility has failed to assert its right to perform remaining make-ready work by notifying the requesting attacher that it will do so; or

(2) After 15 days if the utility has asserted its right to perform make-ready by the date specified in paragraph (e)(1)(ii) of this section and has failed to complete make-ready.

[76 FR 26640, May 9, 2011]

47 CFR 1.1422 - Contractors for survey and make-ready.

There are 5 Updates appearing in the Federal Register for *47 CFR 1*. View below or at eCFR (GPOAccess)

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§ 1.1422Contractors for survey and make-ready.

(a) A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space on its utility poles in cases where the utility has failed to meet deadlines specified in § 1.1420.

(b) If a cable operator or telecommunications carrier hires a contractor for purposes specified in § 1.1420, it shall choose from among a utility's list of authorized contractors.

(c) A cable operator or telecommunications carrier that hires a contractor for survey or make-ready work shall provide a utility with a reasonable opportunity for a utility representative to accompany and consult with the authorized contractor and the cable operator or telecommunications carrier.

(d) The consulting representative of an electric utility may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

[76 FR 26640, May 9, 2011]

47 CFR 1.1424 - Complaints by incumbent local exchange carriers.

There are 5 Updates appearing in the Federal Register for *47 CFR 1*. View below or at eCFR (GPOAccess)

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§ 1.1424Complaints by incumbent local exchange carriers.

Complaints by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable shall follow the same complaint procedures specified for other pole attachment complaints in this part, as relevant. In complaint proceedings where an incumbent local exchange carrier (or an association of incumbent local exchange carriers) claims that it is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system for purposes of obtaining comparable rates, terms or conditions, the incumbent local exchange carrier shall bear the burden of demonstrating that it is similarly situated by reference to any relevant evidence, including pole attachment agreements. If a respondent declines or refuses to provide a complainant with access to agreements or other information upon reasonable request, the complainant may seek to obtain such access through discovery. Confidential information contained in any documents produced may be subject to the terms of an appropriate protective order.

[76 FR 26641, May 9, 2011]

UTAH

UTAH ADMINISTRATIVE CODE

The Utah Administrative Code is the body of all effective administrative rules as compiled and organized by the Division of Administrative Rules (Subsection 63G-3-102(5); see also Sections 63G-3-701 and 702).

NOTE: For a list of rules that have been made effective since March 1, 2014, please see the codification seque page.

NOTE TO RULEFILING AGENCIES: Use the RTF version for submitting rule changes.

Download the RTF file

R746. Public Service Commission, Administration.

Rule R746-345. Pole Attachments.

As in effect on March 1, 2014

Table of Contents

R746-345-1. Authorization.

A. Authorization of Rules -- Consistent with the Pole Attachment Act, 47 U.S.C. 224(c), and 54-3- 1,54-4-1, and 54-4-13, the Public Service Commission shall have the power to regulate the rates, terms and conditions by which a public utility, as defined in 54-2-1(15)(a) including telephone corporations as defined in 54-2-23 (a), can permit attachments to its poles by an attaching entity.

B. Application of Rules -- These rules shall apply to each public utility that permits pole attachments to utility's poles by an attaching entity.

1. Although specifically excluded from regulation by the Commission in 54-2-1(23)(b), solely for the purpose of any pole attachment, these rules apply to any wireless provider.

2. Pursuant to these rules, a public utility must allow any attaching entity nondiscriminatory access to utility poles at rates, terms and conditions that are just and reasonable.

C. Application of Rate Methodology -- The rate methodology described in Section R746-345-5 shall be used to determine rates that a public utility may charge an attaching entity to attach to its poles for compensation.

R746-345-2. General Definitions.

A. "Attaching Entity" -- A public utility, wireless provider, cable television company, communications company, or other entity that provides information or telecommunications services that attaches to a pole owned or controlled by a public utility.

B. "Attachment Space" -- The amount of usable space on a pole occupied by a pole attachment as provided for in Subsection R746-345-5(B)(3)(d).

C. "Distribution Pole" -- A utility pole, excluding towers, used by a pole owner to support mainly overhead distribution wires or cables.

D. "Make-Ready Work" -- The changes to be made to a pole owner's poles, its own pole attachments, the existing pole attachments of other attaching entities, or the existing additional equipment associated with such attachments, which changes may be needed to accommodate a proposed additional pole attachment. Such make-ready work is coordinated by the pole owner and is performed by the owners of the poles or owners of the pole attachments and additional equipment or as otherwise agreed to by these owners.

E. "Pole Attachment" -- All equipment, and the devices used to attach the equipment, of an attaching entity within that attaching entity's allocated attachment space. A new or existing service wire drop pole attachment that is attached to the same pole as an existing attachment of the attaching entity is considered a component of the existing attachment for purposes of this rule. Additional equipment that is placed within an attaching entity's existing attachment space, and equipment placed in the unuseable space which is used in conjunction with the attachments, is not an additional pole attachment for rental rate purposes. All equipment and devices shall meet applicable code and contractual requirements. Pole attachments do not include items used for decorations, signage, barriers, lighting, sports equipment, or cameras.

F. "Pole Owner"-- A public utility having ownership or control of poles used, in whole or in part, for any electric or telecommunications services.

G. "Secondary Pole" -- A pole used solely to provide service wire drops, the aerial wires or cables connecting to a customer premise.

H. "Secondary Pole Attachment" -- A pole attachment to a secondary pole.

I. "Wireless Provider" -- A corporation, partnership, or firm that provides cellular, Personal Communications Systems (PCS), or other commercial mobile radio service as defined in 47 U.S.C. 332 that has been issued a covering license by the Federal Communications Commission.

R746-345-3. Tariffs and Contracts.

A. Tariff Filings and Standard Contracts -- A pole owner shall submit a tariff and standard contract, or a Statement of Generally Available Terms (SGAT), specifying the rates, terms and conditions for any pole attachment, to the Commission for approval.

1. A pole owner must petition the Commission for any changes or modifications to the rates, terms, or conditions of its tariff, standard contract or SGAT. A petition for change or modification must include a showing why the rate, term or condition is no longer just and reasonable. A change in rates, terms or conditions of an approved tariff, standard contract or SGAT will not become effective unless and until it has been approved by the Commission.

2. The tariff, standard contract or SGAT shall identify all rates, fees, and charges applicable to any pole attachment. The tariff, standard contract, and SGAT shall also include:

a. a description of the permitting process, the inspection process, the joint audit process, including shared scheduling and costs, and any non-recurring fee or charge applicable thereto;

b. emergency access provisions; and

c. any back rent recovery or unauthorized pole attachment fee and any applicable procedures for determining the liability of an attaching entity to pay back rent or any non-recurring fee or charge applicable thereto.

B. Establishing the Pole Attachment Relationship -- The pole attachment relationship shall be established when the pole owner and the attaching entity have executed the approved standard contract, or SGAT, or other Commission-approved contract.

1. Exception -- The pole owner and attaching entity may voluntarily negotiate an alternative contract incorporating some, all, or none of the terms of the standard contract or SGAT. The parties shall submit the negotiated contract to the Commission for approval. In situations in which the pole owner and attaching entity are unable to agree following good faith negotiations, the pole owner or attaching entity may petition the Commission for resolution as provided in Section R746-345-6. Pending resolution by the Commission, the parties shall use the standard contract or SGAT.

C. Make-Ready Work, Timeline and Cost Methodology -- As a part of the application process, the pole owner shall provide the applicant with an estimate of the cost of the make-ready work required and the expected time to complete the make-ready work as provided for in this sub-section. All applications by a potential attacher within a given calendar month shall be counted as a single application for the purposes of calculating the response time to complete the make-ready estimate for the pole owner. The due date for a response to all applications within the calendar month shall be calculated from the date of the last application during that month. As an alternative to all of the time periods allowed for construction below, a pole owner may provide the applicant with an estimated time by which the work could be completed that is different than the standard time periods contained in this rule with an explanation for the anticipated delay. Pole owners must provide this alternative estimate within the estimate timelines provided below. Applicants that wish to consider self-building shall inform the pole owner at the time of application that they are considering the self-build option, if available, and they would like a two-alternative make-ready bid. The pole owner and each existing attaching entity are responsible to determine what portion, if any, of the make-ready work their facilities require which may be performed through a self-build option and what conditions, if any, are associated with such self-build option. In the first alternative, the pole owner and attaching entities would be responsible for all necessary make-ready work. For the second alternative, the pole owner and attaching entities will identify what make-ready work they will perform, if any, with an associated cost estimate, and also identify what make-ready work, if any, the owner is agreeable to have performed through a self-build option and the conditions, if any, for such self-build option.

1. For applications up to 20 poles, the pole owner shall respond with either an approval or a rejection within 45 days. At the same time as an approval is given, a completed make-ready estimate must be provided to the applicant explaining what make-ready work must be done, the cost of that work, and the time by which the work would be finished, that is no later than 120 days from receiving an initial deposit payment for the make-ready work.

2. For applications that represent greater than 20 poles, but equal to or less than .5% of the pole owner's poles in Utah, or 300 poles, whichever is lower, the time for the pole owner's approval and make-ready estimate shall be extended to 60 days, and the time for construction will remain at a maximum of 120 days.

3. For applications that represent greater than the number of poles calculated in section 3(2)(C)(2) above, but equal to or less than 5% of the pole owner's poles in Utah, or 3,000 poles, whichever is lower, the time for the approval and make-ready estimate shall be extended to 90 days, and the time for construction will be extended to 180 days.

4. For applications that represent greater than 5% of the pole owner's poles in Utah, or 3,000 poles, whichever is lower, the times for the above activities will be negotiated in good faith. The pole owner shall, within 20 days of the application, inform the applicant of the date by which the pole owner will have the make-ready estimate and make-ready construction time lines prepared for the applicant. If the applicant believes the pole owner is not acting in good faith, it may appeal to the Commission to either resolve the issue of when the make-ready estimate and construction period information should be delivered or to arbitrate the negotiations.

5. If the pole owner rejects any application, the pole owner must state the specific reasons for doing so. Applicants may appeal to the Commission if they do not agree that the pole owner's stated reasons are sufficient grounds for rejection.

6. For all approved applications, the applicant will either accept or reject the make-ready estimate. If it accepts the make-ready estimate and make-ready construction time line, the work must be done on schedule and for the estimated make-ready amount, or less, and the applicant will be billed for actual charges up to the bid amount.

7. Applicants must pay 50% of the make-ready estimate in advance of construction, and pay the remainder in two subsequent installment payments: an additional 25 percent payment when half of the work is done and the balance after the work is completed. Applicants may elect to pay the entire amount up front.

8. An applicant may, at its own discretion, exercise any of the self-build options given for the required make-ready work subject to the conditions made.

9. An applicant may reject a make-ready estimate if it wishes to contest, before the Commission, that the make-ready estimate or make-ready construction time line is not prepared in good-faith, or is unreasonable or not in the public interest.

D. Pole Attachment Placement -- All new copper cable attachments shall be placed at the lowest level permitted by applicable safety codes. In cases where an existing copper attachment has been placed in a location higher than the minimum height the safety codes require, the pole owner shall determine if the proposed attachment may be safely attached either above or below the existing copper attachment taking account of midspan clearances and potential crossovers. If these attachment locations, above or below the copper cable, comply with the applicable safety code, the attacher may attach to the pole without paying to move the copper cable. The owner of the copper cable may elect to pay the costs of having the cable moved to the lowest position as part of the attachment process, or it may elect to move the cable themselves prior to the attaching entity's attachment. If the copper cable must be moved in order for the attacher to be able to safely make its attachment, the attacher shall pay the costs associated with moving the existing copper cable.

R746-345-4. Pole Labeling.

A. Pole Labeling -- A pole owner must label poles to indicate ownership. A pole owner shall label any new pole installed, after the effective date of this rule, immediately upon installation. Poles installed prior to the effective date of this rule, shall be labeled at the time of routine maintenance, normal replacement, change-out, or relocation, and whenever practicable. Labels shall be based on a good faith assertion of ownership.

B. Pole Attachment Labeling -- An attaching entity must label its pole attachments to indicate ownership. Pole attachment labels may not be placed in a manner that could be interpreted to indicate an ownership of the utility pole. An attaching entity shall label any new pole attachment installed, after the effective date of this rule, immediately upon installation. Pole Attachments installed prior to the effective date of this rule shall be labeled at the time of routine maintenance, normal replacement, rearrangement, rebuilding, or reconstruction, and whenever practicable.

C. Exception -- Electrical power pole attachments do not need to be labeled.

R746-345-5. Rental Rate Formula and Method.

A. Rate Formula -- Any rate based on the rate formula in this Subsection shall be considered just and reasonable unless determined otherwise by the Commission. A pole attachment rental rate shall be based on publicly filed data and must conform to the Federal Communications Commission's rules and regulations governing pole attachments, except as modified by this Section. A pole attachment rental rate shall be

calculated and charged as an annual per attachment rental rate for each attachment space used by an attaching entity. The following formula and presumptions shall be used to establish pole attachment rates:

1. Formula:

Rate per attachment space = (Space Used x (1/Usable Space) x Cost of Bare Pole x Carrying Charge Rate)

2. Definitions:

a. "Carrying Charge Rate" means the percentage of a pole owner's depreciation expense, administrative and general expenses, maintenance expenses, taxes, rate of return, pro-rated annualized costs for pole audits or other expenses that are attributable to the pole owner's investment and management of poles.

b. "Cost of Bare Pole" can be defined as either "net cost" or "gross cost." "Gross cost" means the original investment, purchase price, of poles and fixtures, excluding crossarms and appurtenances, divided by the number of poles represented in the investment amount. "Net cost" means the original investment, purchase price, of poles and fixtures, excluding crossarms and appurtenances, less depreciation reserve and deferred federal income taxes associated with the pole investment, divided by the number of poles represented in the investment amount. A pole owner may use gross cost only when its net cost is a negative balance. If using the net or gross cost results in an unfair or unreasonable outcome, a pole owner or attaching entity can seek relief from the Commission under R746-345-5 C.

c. "Unusable Space" means the space on a utility pole below the usable space including the amount required to set the depth of the pole.

d. "Usable Space" means the space on a utility pole above the minimum grade level to the top of the pole, which includes the space occupied by the pole owner.

3. Rebuttable presumptions:

a. Average pole height equals 37.5 feet.

b. Usable space per pole equals 13.5 feet.

c. Unusable space per pole equals 24 feet.

d. Space used by an attaching entity:

(i) An electric pole attachment equals 7.5 feet;

(ii) A telecommunications pole attachment equals 1.0 foot;

(iii) A cable television pole attachment equals 1.0 foot; and

(iv) An electric, cable, or telecommunications secondary pole attachment equals 1.0 foot.

(v) A wireless provider's pole attachment equals not less than 1.0 foot and shall be determined by the amount of space on the pole that is rendered unusable for other uses, as a result of the attachment or the associated equipment. The space used by a wireless provider may be established as an average and included in the pole owner's tariff and standard contract, or SGAT, pursuant to Section R746-345-3 of this Rule.

e. The space used by a wireless provider:

(i) may not include any of the length of a vertically placed cable, wire, conduit, antenna, or other facility unless the vertically placed cable, wire, conduit, antenna, or other facility prevents another attaching entity from placing a pole attachment in the usable space of the pole;

(ii) may not exceed the average pole height established in Subsection R746-345-5(A)(3)(a).

(iii) In situations in which the pole owner and wireless provider are unable to agree, following good faith negotiations, on the space used by the wireless provider as determined in Subsection R746-345-5(A)(3)(d)(v), the pole owner or wireless provider may petition the Commission to determine the footage of space used by the wireless provider as provided in Subsection R746-345-3(C).

f. The Commission shall recalculate the rental rate only when it deems necessary. Pole owners or attaching entities may petition the Commission to reexamine the rental rate.

4. A pole owner may not assess a fee or charge in addition to an annual pole attachment rental rate, including any non-recurring fee or charge described in Subsection R746-345-3(A)(2), for any cost included in the calculation of its annual pole attachment rental rate.

B. Commission Relief -- A pole owner or attaching entity may petition the Commission to review a pole attachment rental rate, rate formula, or rebuttable presumption as provided for in this rule. The petition must include a factual showing that a rental rate, rate formula or rebuttable presumption is unjust, unreasonable or otherwise inconsistent with the public interest.

R746-345-6. Dispute Resolution.

A. Mediation -- Except as otherwise precluded by law, a resolution of any dispute concerning any pole attachment agreement, negotiation, permit, audit, or billing may be pursued through mediation while reserving to the parties all rights to an adjudicative process before the Commission.

1. The parties may file their action with the Commission and request leave to pursue mediation any time before a hearing.

2. The choice of mediator and the apportionment of costs shall be determined by agreement of the parties. However, the parties may jointly request a mediator from the Commission or the Division of Public Utilities.

3. A party need not pay the portion of a bill that is disputed if it has started a dispute proceeding within 60 days of the due date of the disputed amount. The party shall notify the Commission if the dispute process is not before the Commission.

B. Settlement -- If the parties reach a mediated agreement or settlement, they will prepare and sign a written agreement and submit it to the Commission. Unless the agreement or settlement is contrary to law and this rule, R746-345, the Commission will approve the agreement or settlement and dismiss or cancel proceedings concerning the matters settled.

1. If the agreement or settlement does not resolve all of the issues, the parties shall prepare a stipulation that identifies the issues resolved and the issues that remain in dispute.

2. If any issues remain unresolved, the matter will be scheduled for a hearing before the Commission.

KEY

public utilities, rules and procedures, telecommunications, telephone utility regulation

Date of Enactment or Last Substantive Amendment

August 29, 2006

Notice of Continuation

July 31, 2013

Authorizing, Implemented, or Interpreted Law

54-4-13

ADDITIONAL INFORMATION

CONTACT

For questions regarding the content or application of rules under Title R746, please contact the promulgating agency (Public Service Commission, Administration). A list of agencies with links to their homepages is available at http://www.utah.gov/government/agencylist.html or from http://www.rules.utah.gov/contact/agencycontacts.htm.

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STATE OF CONNECTICUT

DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION
PUBLIC UTILITIES REGULATORY AUTHORITY
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

DOCKET NO. 11-11-02 PETITION OF FIBER TECHNOLOGIES NETWORKS, L.L.C. FOR AUTHORITY INVESTIGATION OF RENTAL RATES CHARGED TO TELECOMMUNICATIONS PROVIDERS BY POLE OWNERS

September 12, 2012

By the following Directors:

John W. Betkoski, III
Arthur H. House

DECISION

DECISION

I. INTRODUCTION

A. SUMMARY

By this Decision, the Public Utilities Regulatory Authority finds that its formula for calculating rates charged by utility pole owners to telecommunications service providers should be revised consistent with recent rulings by the Federal Communications Commission so that utility pole rental rates for telecommunications service and cable providers approach parity.

B. BACKGROUND OF THE PROCEEDING

By its November 7, 2011 petition (Petition), Fiber Technologies Networks, L.L.C. (Fibertech or Petitioner) requested that the Public Utilities Regulatory Authority (Authority or PURA) open a new docket to investigate the appropriateness of the utility pole rental formula being used by The Connecticut Light and Power Company (CL&P), The United Illuminating Company (UI), AT&T Connecticut (AT&T) and Verizon, New York, Inc. (Verizon) for Fibertech and other certified telecommunications service providers (Telcom Providers). The Petition was filed pursuant to the General Statutes of Connecticut (Conn. Gen. Stat.) §§16-247h, 16-247b(b), 16-247f(a), 16-247-k, 16-247f(f) and the Regulations of Connecticut State Agencies (Conn. Agencies Regs) §16-1-45 et seq., §16-1-102 et seq and 16-1-116. The Petitioner requested that the Authority revise its current utility pole rental formula in accordance with recent rulings by the Federal Communications Commission (FCC) to achieve competitive neutrality and to promote broadband deployment. Petition, p. 1.

C. CONDUCT OF THE PROCEEDING

By Notice of Request for Written Comments and Reply Comments (Notice) dated December 28, 2011, the PURA requested written comments about the Petition from pole owners and attachers, including telecommunications and cable providers, the Office of Consumer Counsel (OCC) and other interested persons (collectively, Participants). The PURA sought comment on whether it was in the public interest to consider the Petition and modify the utility pole rental formula used to calculate rates charged to telecommunications and/or cable providers by utility pole owners in Connecticut consistent with the FCC Report and Order on Reconsideration, In the Matter of Implementation of Section 224 of the Act (WC Docket No. 07-245), and A National Broadband Plan for Our Future (GN Docket No. 09-51), adopted and released April 7, 2011 (Pole Attachment Order). The Notice also requested comment on any other matter Participants believed would assist the Authority in considering the Petition.

Comments were received from the OCC, the Wireless Infrastructure Association (PCIA), CL&P, Verizon, UI, jointly from AT&T and AT&T Mobility, Fibertech, the New England Cable and Telecommunications Association (NECTA) and the Wireless

Association (CTIA).[1] Reply Comments were filed by the PCIA, AT&T, CL&P, UI, Fibertech and NECTA.

The Authority determined that a hearing was not required; no Participant requested one and none was held. Participants were given the opportunity to submit Written Exception to a draft Decision that was issued on August 14, 2012.

D. PARTICIPANTS

The following were designated as Participants to the proceeding: the OCC, AT&T, Verizon, CL&P, UI, Fibertech, CoxCom, Inc., Charter Communications Entertainment I, L.L.C., Thames Valley Communications, Inc., Comcast of Connecticut and Cablevision of Connecticut. NECTA, the PCIA and the CTIA were granted Participant status after filing comments and/or reply comments.

II. FIBERTECH PETITION AND PARTICIPANTS' POSITIONS

A. FIBERTECH PETITION

Fibertech, which is authorized to do business in the State of Connecticut, requested that the Authority exercise its authority to investigate the appropriateness of the formula used by the owners of utility poles to calculate recurring rental fees charged to certified telecommunications providers. The Petitioner believes that revising the utility pole rental rates charged to telecommunications providers is necessary to achieve competitive neutrality and promote broadband deployment in Connecticut. Petition, p. 1. Fibertech stated that the formulas used to calculate utility pole rental rates for Telcom Providers and cable television (CATV) attachers differ in their allocation of expenses associated with the unusable portions of each utility pole, with the effect being that telecommunications attachers pay 11.2% to 16.9% of annual pole costs, while CATV attachers pay approximately 7.4% of annual pole costs. Id., p. 5.

The Petitioner asserted that the Authority has permitted pole owners to use the FCC formula developed under the Pole Attachment Act of 1978 (the 1978 Act), but utilized a weighted cost approach to calculate the pole cost factor based on a 90/10 ration of embedded cost to marginal cost. Id., p. 5.[2] Fibertech pointed to the Pole Attachment Order to support its request that the formula to determine utility pole rental rates be revised by determining that the lower boundary for the telecommunications rate be calculated by a formula that recovered the pole owners' operating expenses, but not their capital expenses, such as depreciation, taxes and rate of return components of carrying charges. Id., p. 6.

The Petitioner stated that the Pole Attachment Order results in a rate that reflects a reasonable level of contribution to pole owners' capital costs, while being low enough

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[1] CTIA and NECTA did not offer specific recommendations to the Authority about the Petition in their comments, but each reserved the right to file reply comments.

[2] Fibertech (and other Participants) noted that the PURA has asserted its authority over the regulation of pole rates, terms and conditions in accordance with the reverse preemption provisions of the 1978 Act. Petition, p. 3.

not to hinder the promotion of competition. Id., p. 6. Fibertech indicated that the FCC sought to minimize the difference between CATV pole rates and Telcom Provider pole rates to help remove market distortions which may affect attachers' decisions to deploy new technologies. Id., p. 8. Fibertech also stated that the PURA has indicated that the pole rental rate differences between CATV and telecommunications company attachers is not due to increased costs incurred by pole owners or electric company ratepayers for telecommunications attachments. Id., p. 8. Fibertech indicated that the Petition did not represent a challenge to the existing pole rates charged to CATV companies under the Authority's previous rate decisions. Id., p. 9.

Fibertech stated that the disparity in utility pole rental rates has created barriers to infrastructure development, inhibited the deployment of new technology and negatively affected competition in Connecticut. Fibertech Comments, p. 2. The Petitioner also indicated that granting the Petition would support the legislature's directive to regulate telecommunications services in accordance with the goal of ensuring that they are affordable, promoting competition and facilitating the deployment of an advanced telecommunications infrastructure. Id., p. 4.

B. PARTICIPANTS' POSITIONS

The OCC stated that the Authority should order utility pole owners to implement pole rental rates in accordance with the Broadband Order.[3] The OCC contends that equalizing utility pole rental rates will facilitate access opportunities and streamline investment in the public rights of way. OCC Comments, p. 3. The OCC indicated that the discrepancy in rental rates between telecommunications and CATV services attachers is based upon a public policy goal that is outdated. In addition, the OCC stated that, although the PURA is under no obligation to follow the FCC's orders regarding utility pole attachment issues, including rental rates, it makes sense for the state to adopt the FCC rules contained in the Pole Attachment Order. Id., pp. 4 and 5.

The OCC maintained that the Broadband Order reforms the pole attachment rules, taking into account marketplace changes and incorporating policies implemented in various states. The OCC further stated that a federal appeal of the Broadband Order should not prevent the Authority from finding that equal utility pole rental rates will promote greater infrastructure investment. Id., pp. 7 and 8. According to the OCC, reforming utility pole rates should hasten broadband deployment and lower the cost of serving households, resulting in savings to consumers. Id., p. 13.

CL&P stated that the Authority should deny the Petitioner's request that utility pole rental rates for Telcom Providers be reduced because it would inappropriately require CL&P's electric customers to subsidize telecommunications service attachers. CL&P Comments, p. 2. CL&P noted that the Pole Attachment Working Group already has the authority to modify any issue related to pole attachments. Id., p. 3.

CL&P also stated that the PURA should decline to act on the Petition until pending legal challenges to the Pole Attachment Order are resolved and that approving

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[3] In its comments, the OCC refers to the Pole Attachment Order as the Broadband Order.

Fibertech's request would violate §224(e) of the Pole Attachment Act. Id., pp. 5-8.[4] CL&P claimed that by taking the position it did regarding the Petition, the OCC is favoring one set of consumers over another, which is inconsistent with the OCC's responsibilities as detailed in Conn. Gen. Stat. §16-2a(a). CL&P Reply Comments, p. 2.

UI concurred with CL&P's comment that approving Fibertech's Petition would require electric customers to inappropriately subsidize telecommunications service providers. UI also agrees with CL&P that the Authority should not rule on the Petition until legal challenges to the Pole Attachment Order are resolved. UI Comments, p. 1. UI disagreed with the OCC's statement that adopting the pole attachment rate formula would encourage increased infrastructure investment and broadband deployment, stating that no support for those claims was included in the OCC's Comments. UI Reply Comments, pp. 1 and 2. UI agrees with AT&T and Verizon when each, as described below, recommend that the Authority should consider a variety of issues addressed in the Pole Attachment Order, not just the issues that benefit Fibertech. Id., pp. 3 and 4.

While AT&T supports the Authority adopting the costing methodology for telephone company utility pole rental rates in the Pole Attachment Order, it stated that other aspects of the Pole Attachment Order should also be considered by the PURA as they apply to Connecticut. AT&T Comments, p. 2. AT&T further indicated that all pole attachments used by a cable system or telecommunications provider should be subject to a uniform rate, including wireless providers. Id., p. 4. Verizon also stated that the PURA should review and investigate issues addressed in the Pole Attachment Order other than the utility pole rental rates issue. For example, Verizon recommended that the reasonableness of the Authority's "make ready" time intervals adopted in its April 30, 2008 Decision in Docket No. 07-02-13, DPUC Review of the State's Public Service Company Utility Pole Make-Ready Procedures, should also be investigated. Verizon Comments, pp. 3 and 4.

The PCIA urged the Authority to revise the calculation of utility pole rates in accordance with the Pole Attachment Order. In support of its position, the PCIA indicated that pole owners and attachers have failed to come to an agreement regarding pole attachment rates and that the Authority must intervene and solve the dispute by adopting the modified pole rental calculation in the Pole Attachment Order. The PCIA expressed support for the revised formula, indicating that it is based on a cost recovery methodology which establishes a low, uniform rate. PCIA Comments, pp. 2, 5 and 8. The PCIA, citing the Pole Attachment Order, stated that disparate utility pole rental rates distort investment decisions that adversely affect the availability of advanced services and broadband. Id., p. 14. Similar to AT&T and Verizon, the PCIA recommended that the Authority investigate not only utility pole rental rates, but terms and conditions of pole attachments. Id., pp. 7 and 8. The PCIA noted that the Authority has adopted policies in recent Decisions that either mimicked or were consistent with the FCC policies. Id., p. 15.

The PCIA disagreed with CL&P's recommendation that the Authority wait until the pending appeals of the Pole Attachment Order have been resolved, stating that the

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[4] Fibertech noted that the Pole Attachment Order has not been stayed by either the FCC or the United States Court of Appeals for the Federal Circuit. Fibertech Reply Comments, p. 5.

PURA has the ability to adopt the formula immediately. PCIA Reply Comments, p. 3. In addition, the PCIA claimed that CL&P's argument that adopting the revised utility pole rental rate would require electric customers to subsidize the telecommunications industry is based upon a faulty economic analysis. Id., p. 9. The PCIA expressed substantial agreement with the OCC's comments. Id., pp. 11-14.

The NECTA advised the Authority to reject any suggestion to expand the scope of the proceeding beyond the Petition. The NECTA also noted that in 2005, the Authority denied UI's proposal to assess higher attachment rates to cable operators who offered telecommunications and Internet services, in addition to cable service. NECTA Reply Comments, pp. 1 and 2. Finally, the NECTA urged the PURA to apply the Pole Attachment Order cable attachment rate to all attachments. Id., p. 3.

III. AUTHORITY ANALYSIS

As one of the 20 states (plus the District of Columbia) that regulates the rates, terms and conditions for pole attachments, Connecticut is not subject to or bound by FCC rulings or policy pronouncements related to pole attachment matters. Pole Attachment Order, Appendix C. However, neither is the state precluded from adopting, in whole or in part, FCC rulings or policy directives that the Authority finds to be in the public interest and consistent with state initiatives and goals after allowing stakeholders to comment on the issue or issues under consideration. Although the Pole Attachment Order addressed a number of matters of interest to utility pole owners, attachers and other interested persons, such as timelines, payment for make-ready work and dispute resolution procedures, in this docket, the Authority only addressed the telecommunications pole rental rate, as requested by Fibertech. The Authority is under no obligation to investigate all the issues addressed in the Pole Attachment Order and declines to expand the scope of this docket, as some commenters have recommended.

CL&P and UI stated that the PURA should decline to act on the Petition due to legal challenges to the Pole Attachment Order. While the Authority retains an obvious interest in the outcome of the legal challenges to the Pole Attachment Order and will assess those results and determine what, if any, substantive effect the resolution of the legal challenges may have on its pole attachment-related actions, the legal challenges do not preclude the Authority from accepting the Petition and investigating the topics included therein. An appeal of a FCC ruling or policy directive does not require that the PURA halt its own investigation of an issue addressed in a ruling that is being challenged in federal court. The Authority finds that it is appropriate to proceed with this case and address the Petition regardless of outstanding legal challenges to the underlying order that precipitated Fibertech's request for an investigation.

The Pole Attachment Order discussed the policy and practical reasons for revising the telecommunications pole rental rates. Properly evaluating the Petition must begin with a review and understanding of the telecommunications rental rate component of the Pole Attachment Order. A summary of the discussion of the telecommunications pole rental rate issues from the Pole Attachment Order follows.

The Pole Attachment Order revised the rental rate for pole attachments used by telecommunications carriers to provide their services. The goal of the revision was to

seek to balance the goals of promoting broadband with the historical role that utility pole rental rates have played in supporting pole infrastructure. Pole Attachment Order, para. 135. According to the FCC, the new rate methodology will serve the public interest by making broadband and advanced services widely available. Id., para. 136.

The revised telecommunications rate establishes an upper-bound and lower-bound rate, identifying reasonable interpretations of the term "cost." In identifying a lower bound for the telecommunications pole rental rate, the FCC excluded capital costs from the definition of "cost of providing space. If capital costs arise from the make-ready process, attachers bear those costs through make-ready fees. Certain operating costs continue to be included in the lower bound telecommunications rate formula, including maintenance and administrative costs. Id., paras. 144, 145 and 148. Lowering the telecommunications rental rate will better enable providers to compete, eliminate distortions in end-user choices between technologies and lead to behavior being driven by economic costs and not arbitrary price differentials. Id., para. 147. The FCC adopted the following definition of "cost" (a) in urban areas, 66% of the fully allocated costs used for purposes of the pre-existing telecommunications rate and; (b) in non-urban areas, 44% of the fully allocated costs used for purposes of the pre-existing telecommunications rate. Id., para. 149.

The FCC concluded that the majority of third-party pole attachments subject to its regulation have been priced at the cable rate, leading it to conclude that pole owners will have sufficient incentives to invest in poles and continue to provide attachments under the new approach to the telecommunications rate introduced in the Pole Attachment Order. The FCC also confirmed that wireless carriers should receive the benefits and protection of section 224 of the Telecommunications Act of 1996 (Act), including the right to that rate. Id., paras. 151 and 153.

The FCC found that while the initial fully-allocated cost approach implemented when the Act was enacted was reasonable, the approach has resulted in higher rates than necessary, in addition to rate disparities and disputes over which formula, cable or telecommunications, applies to certain attachers. Id., para. 157. The FCC also maintained and numerous commenters agreed that it has the discretion to reinterpret the term "cost" and the phrase "cost of providing space." Accordingly, the FCC adopted a pricing approach different from the fully allocated approach that complies with the statute's requirements and produces efficient pricing signals for infrastructure investment and the deployment of advanced services. Id., para. 158. The FCC rejected arguments that "cost of providing space" must be defined as fully allocated costs. Id., para. 160. Additionally, neither the text of sections 224(d) and (e) of the Act, nor the legislative history convinced the FCC that the telecommunications rate should be higher than the cable rate. Id., para. 167.

The FCC concluded that the action taken in the Pole Attachment Order regarding the revision to the telecommunications rental rate plays a significant role in deployment and availability of voice, video and data networks and advances the pro-competitive policies in the Act, while providing pole owners with a compensatory rate. Id., paras. 172, 173 and 176. The FCC also noted that some states that self-regulate pole attachment matters apply a uniform rate for all attachments to provide cable and telecommunications services. Id., para. 177. The FCC concluded that the benefits to

be realized from adopting a revised telecommunications pole rental rate "substantially outweigh any costs associated with the rule." Id., para. 181. The FCC also found that the new telecommunications pole rental rate is compensatory and that pole owners will continue to recover through make-ready fees the capital costs incurred to accommodate attachers. Accordingly, the revised telecommunications pole rental rate is just, reasonable and fully compensatory. Id., para. 183.

The Authority finds that the discussion and conclusions regarding revising the telecommunications pole rental rate in the Pole Attachment Order, on which the Petition is based, are comprehensive and persuasive. More than 50 entities provided comments or reply comments to the FCC regarding pole attachment issues. Pole Attachment Order, Appendix D. The record evaluated by the FCC to make its ruling regarding revising the telecommunications pole rental rate is substantial. The primary reasons that Authority finds that revising the telecommunications pole rental rate in accordance with the Pole Attachment Order are as follows.

First, the PURA has the authority to adopt a FCC order or policy directive related to pole attachment matters if it concludes that doing so is in the public interest. Second, revising the telecommunications pole rental rate downward should facilitate more rapid deployment of advanced services in Connecticut, including broadband, which is both a federal and state policy goal. Third, the revised telecommunications pole rental rate is compensatory and reasonable and pole owners should not be economically harmed. Fourth, the current rate differential between cable and telecommunications pole rental fees is not due to the fact that pole owners incur more recurring costs to accommodate telecommunications attachers as compared to cable attachers.

Another key reason for finding that the telecommunications pole rental rate should be revised is that cable companies have been paying a lower pole rental fee even though they have been using pole attachments to provide, not only their video product, but voice, broadband and other communications services. Fibertech Comments, pp. 2 and 3. In today's marketplace, it is increasingly difficult to distinguish a cable company from a telecommunications company, when entities that once provided only video service now offer telecommunications, data and Internet products, and companies that used to provide dial tone and "plain old telephone service" now offer a wide variety of telecommunications services, in addition to offering video and broadband products.[5] The Authority notes that companies aggressively market all of the products they offer, making it more difficult to characterize one company as a "cable" company and another as a "telecommunications" company. Notwithstanding legal definitions that distinguish or attempt to distinguish a telecommunications service or provider from a cable service or provider, the practical difference between a cable provider and a telecommunications provider is increasingly a distinction without a difference and charging all providers the same or substantially the same pole rental rates to offer an array of different services makes sense for economic reasons and for

[5] The Authority notes that the New England Cable and Telecommunications Association (NECTA) was formally known as the New England Cable Association. Additionally, on its website, NECTA states that it " . . . has represented the cable **telecommunications** industry before state and federal agencies. . . ," further blurring the once clear-cut distinction between types of business enterprises. www.necta.info/about.aspx (emphasis added).

reasons of equity among attachers. Importantly, the PURA finds that implementing this revision to the telecommunications pole rental rate will not economically harm pole owners.

Accordingly, the Authority concurs with Fibertech and finds that revising the telecommunications pole rental rate in accordance with the Pole Attachment Order is in the best interests of attachers, utility pole owners and is consistent with federal and state policy goals to hasten the deployment of advanced services and to promote infrastructure development.

IV. FINDINGS OF FACT

1. The Pole Attachment Order adopted a revised formula to calculate telecommunications utility pole rental rates.

2. The Authority self-regulates rates, terms and conditions for utility pole attachments.

3. Current pole rental rates for cable providers and telecommunications providers in Connecticut are calculated using different formulas.

V. CONCLUSION AND ORDERS

A. CONCLUSION

The PURA finds that it is in the public interest to adopt the revised telecommunications utility pole rental rate in accordance with the Pole Attachment Order.

C. ORDERS

For the following Orders, submit an original and one copy of the required documentation to the Executive Secretary, Ten Franklin Square, New Britain, Connecticut 06051, and file an electronic version through the Authority's website at www.ct.gov/pura. Submissions filed in compliance with Department Orders must be identified by all three of the following: Docket Number, Title and Order Number.

1. In its next rate application, CL&P shall file with the Authority a utility pole rental rate in accordance the Pole Attachment Order.

2. In its next rate application, UI shall file with the Authority a utility pole rental rate in accordance with the Pole Attachment Order.

3. No later than October 1, 2012, AT&T shall file with the Authority a revised utility pole rental rate in accordance with the Pole Attachment Order, with an effective date of January 1, 2013.

4. No later than October 1, 2012, Verizon shall file with the Authority a revised utility pole rental rate in accordance with the Pole Attachment Order, with an effective date of January 1, 2013.

The Connecticut Department of Energy and Environmental Protection is an Affirmative Action/Equal Opportunity Employer that is committed to requirements of the Americans with Disabilities Act. Any person with a disability who may need information in an alternative format may contact the agency's ADA Coordinator at 860-424-3194 or at deep.hrmed@ct.gov. Any person with limited proficiency in English, who may need information in another language, may contact the agency's Title VI Coordinator at 860-424-3035 or at deep.aaoffice@ct.gov. Any person with a hearing impairment may call the State of Connecticut relay number – 711. Discrimination complaints may be filed with DEEP's Title VI Coordinator. Requests for accommodations must be made at least two weeks prior to any agency hearing, program or event.

DOCKET NO. 11-11-02 PETITION OF FIBER TECHNOLOGIES NETWORKS, L.L.C. FOR AUTHORITY INVESTIGATION OF RENTAL RATES CHARGED TO TELECOMMUNICATIONS PROVIDERS BY POLE OWNERS

This Decision is adopted by the following Directors:

John W. Betkoski, III

Arthur H. House

CERTIFICATE OF SERVICE

The foregoing is a true and correct copy of the Decision issued by the Public Utilities Regulatory Authority, State of Connecticut, and was forwarded by Certified Mail to all parties of record in this proceeding on the date indicated.

K. Santopietro

Kimberley J. Santopietro
Executive Secretary
Department of Energy and Environmental Protection
Public Utilities Regulatory Authority

September 12, 2012

Date

OHIO

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Chapter 4901:1-3, Ohio Administrative Code, Concerning Access to Poles, Ducts, Conduits, and Rights-of-Way by Public Utilities.	)))))	Case No. 13-579-AU-ORD

ENTRY

The Commission finds:

(1) Utility pole attachments and conduit occupancy are subject to the provisions of Sections 4905.51 and 4905.71, Revised Code. The Commission's current rule on pole attachments and conduit occupancy is found in Rule 4901:1-7-23, Ohio Administrative Code (O.A.C.).

(2) The Commission is considering adopting a new chapter of rules, in Chapter 4901:1-3, O.A.C., specifically dedicated to access to poles, ducts, conduits, and rights-of-way provided by public utilities.

(3) In accordance with Section 121.82, Revised Code, in the course of developing draft rules, the Commission must evaluate the rules that adversely affect businesses. If there will be an adverse impact on businesses, as defined in Section 107.52, Revised Code, the agency is to incorporate features into the draft rules to eliminate or adequately reduce any adverse impact. Furthermore, the Commission is required, pursuant to Section 121.82, Revised Code, to provide the Common Sense Initiative (CSI) office the draft rules and the business impact analysis. The Commission is to consider any recommendations made by CSI with regard to the draft rules and provide CSI with a memorandum explaining either how CSI's recommendations were incorporated into the rules or why the recommendations were not incorporated into the rules. The Commission has considered the current rule review procedures and revised them to incorporate the new CSI process.

(4) By entry issued April 3, 2013, the Commission scheduled a workshop at the offices of the Commission on April 17, 2013, to elicit feedback on the new chapter of rules specifically dedicated to access to poles, ducts, conduits, and rights-of-way provided by public utilities.

(5) The workshop was held as scheduled. Comments were offered on behalf of TW Telecom, Fibertech Networks (Fibertech), AEP Ohio, and the Ohio Cable Telecommunications Association (OCTA). Rather than develop standards from scratch, Fibertech encouraged the Commission to look to other regulatory bodies as rules are developed in Ohio. For example, Fibertech advocated that the Commission adopt some of the Connecticut time frames to ensure that access and make-ready work is accomplished in a timely fashion. Moreover, Fibertech and OCTA noted that New York allows the use of utility-approved contractors to complete make-ready work in an expeditious and economic fashion. Additionally, like Connecticut, New York permits the use of temporary attachments. Finally, Fibertech encouraged the Commission to consider adopting time frames for conduit access which, to date, has not been dealt with by the Federal Communications Commission (FCC). OCTA was appreciative of the Staff's proposal to formally provide for mediation of disputes among utilities and attachees. OCTA also encouraged the Commission to adopt standards regarding the attachment of wireless antennas to utility street light poles for broadband access.

AEP Ohio opined that the current regulatory scheme is working fine. AEP Ohio noted that within the past two years, the company negotiated new pole attachment tariffs with OCTA and that the company was currently working with Fibertech on a broadband build-out situation. However, should the Commission deem it necessary to adopt rules covering pole attachments and conduit occupancy, AEP Ohio encouraged the Commission to forgo adopting wholesale the FCC's methodologies on access or rates. AEP Ohio submitted that, while the FCC is focused on the expeditious build-out of broadband, the Commission must remain mindful of pole reliability and safety. AEP Ohio also expressed the view that joint use agreements

between two public utilities (e.g., the electric utilities and the incumbent telephone companies) should be excluded from any O.A.C. rules and the complaint procedure should remain as the appropriate mechanism for a public utility to seek redress if there is a denial of access or improper rates between those two parties. AEP Ohio also suggested that the Commission make clear that current and future tariffs supplant any O.A.C. rules to the extent that there are differences between the rules and approved tariffs. Finally, AEP Ohio noted that the Commission should carefully consider pricing as the FCC formulas establish rates closer to marginal costs which may lead to electric customers having to make up the difference.

(6) Staff has evaluated the draft rules contained in proposed Chapter 4901:1-3, O.A.C., and has taken into consideration the stakeholder comments referred to in Finding (5). Among other issues, the Staff has added to the definitions section; further enhanced the mediation provisions; inserted time frames for surveys, the payment of estimates, and make-ready work; proposed safe harbor rate formulas for cable attachments and for telecommunication attachments; and added language encouraging negotiations and clarifying the status of existing tariffs and joint use agreements.

(7) The Commission now invites interested persons to comment on the attached proposed rules and to assist in the review required by Executive Order 2011-01K. Comments on the draft rules and/or on the business impact analysis contained in the attachments should be filed, either via electronic filing or in hard copy, by June 14, 2013. Reply comments should be filed by July 1, 2013.

(8) In order to avoid needless production of paper copies, the Commission will serve a paper copy of this entry only and will make Staff's proposed rules in Chapter 4901:1-3, O.A.C., as well as the business impact analysis for this package of rules, available on line at: www.puco.ohio.gov/puco/rules. All interested persons may download the proposed rules and the business impact analysis from the above website, or contact the Commission's Docketing Division to be sent a paper copy.

It is, therefore,

ORDERED, That all interested persons file comments and reply comments on the proposed rules and business impact analysis contained in the attachments by June 14, 2013, and by July 1, 2013, respectively. It is, further,

ORDERED, That a notice or copy of this entry without the attached rules or business impact analysis be served upon all investor-owned electric utilities in the state of Ohio, all certified local exchange carriers in the state of Ohio, the Electric-Energy and Telephone industry list-serve, and any other interested person of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

JRJ/dah

Entered in the Journal

MAY 15 2013

Barcy F. McNeal

Barcy F. McNeal
Secretary

DRAFT - NOT FOR FILING

4901:1-3-01 Definitions.

As used within this chapter, these terms denote the following:

(A) "Attaching entity" means cable operators, telecommunications carriers, incumbent and other local exchange carriers, public utilities, governmental entities and other entities with either a physical attachment or a request for attachment, to the pole, duct, conduit, or right-of-way. It does not include governmental entities with only seasonal attachments to the pole.

(B) "Cable operator" for purposes of this chapter, shall have the same meaning as defined in 47 U.S.C. 522(5), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(C) "Cable service" for purposes of this chapter, shall have the same meaning as defined in 47 U.S.C. 522(6), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(D) "Cable system" for purposes of this chapter, shall have the same meaning as defined in 47 U.S.C. 522(7), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(E) "Commission" means the public utilities commission of Ohio.

(F) "Conduit" means a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed.

(G) "Conduit system" means a collection of one or more conduits together with their supporting infrastructure.

(H) "Duct" means a single enclosed raceway for conductors, cable, and/or wire.

(I) "Inner-duct" means a duct-like raceway smaller than a duct that is inserted into a duct so that the duct may carry multiple wires or cables.

(J) "Local exchange carrier" (LEC) for purposes of this chapter, shall have the same meaning as defined in division (A)(7) of section 4927.01 of the Revised Code.

(K) "Pole attachment" means any attachment by a cable system, a provider of telecommunications service, or an entity other than a public utility to a pole, duct, conduit, or right-of-way owned or controlled by a public utility.

DRAFT - NOT FOR FILING

(L) "Public utility" for purposes of this chapter, shall have the same meaning as defined in section 4905.02 of the Revised Code.

(M) "Telecommunications" for purposes of this chapter, shall have the same meaning as defined in division (A)(10) of section 4927.01 of the Revised Code.

(N) "Telecommunications carrier" for purposes of this chapter, shall have the same meaning as defined in division (A)(11) of section 4927.01 of the Revised Code.

(O) "Telecommunications services" for purposes of this chapter, shall have the same meaning as defined in division (A)(12) of section 4927.01 of the Revised Code.

(P) "Telephone company" for purposes of this chapter, shall have the same meaning as defined in division (A)(13) of section 4927.01 of the Revised Code and includes the definition of "telecommunications carrier" incorporated in 47 U.S.C. 153(44), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(Q) "Unusable space" with respect to poles, means the space on a public utility pole below the usable space, including the amount required to set the depth of the pole.

(R) "Usable space" with respect to poles, means the space on a public utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the public utility. With respect to conduit, the term usable space means capacity within a conduit system which is available, or which could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable, and associated equipment for telecommunications or cable services, and which includes capacity occupied by the public utility.

4901:1-3-02 General applicability.

(A) Each citation contained within this chapter that is made to either a section of the United States code or a regulation in the code of federal regulations is intended, and shall serve, to incorporate by reference the particular version of the cited matter as effective on June 1, 2013.

(B) The obligations found in this chapter, shall apply to: (i) all public utilities pursuant to 47 U.S.C. 224(c) through (i), 47 U.S.C. 253(c), as effective in

paragraph (A) of this rule, and section 4905.51 of the Revised Code; and (ii) a telephone company and electrical light company that is a public utility pursuant to section 4905.71 of the Revised Code.

(C) The commission may for good cause shown and consistent with state and federal law, waive any requirement, standard, or rule set forth in this chapter, other than a requirement mandated by statute unless such waiver is permitted by the terms of the statute.

(D) Any public utility seeking a waiver(s) of rules contained in this chapter shall specify the period of time for which it seeks such a waiver(s), and a detailed justification in the form of a motion filed in accordance with rule 4901-1-12 of the Administrative Code.

(E) All waiver requests must be approved by the commission. Such a request may, at the commission's discretion, toll any time frames.

4901:1-3-03 Access to poles, ducts, conduits, and rights-of-way.

(A) Duty to provide access and required notifications

(1) A public utility shall provide an attaching entity with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. Notwithstanding this obligation, a public utility providing electric service may deny an attaching entity access to its poles, ducts, conduits, or rights-of-way, on a nondiscriminatory basis where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes.

(2) Requests for access to a public utility's poles, ducts, conduits, or rights-of-way must be in writing. If access is not granted within forty-five days of the request for access, the public utility must confirm the denial in writing by the forty-fifth day. The public utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability, or engineering standards.

(3) A public utility shall provide an attaching entity no less than sixty days written notice prior to:

(a) Removal of facilities or termination of any service to those facilities, such

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removal or termination arising out of a rate, term, or condition of the attaching entity's pole attachment agreement;

(b) Any increase in pole attachment rates; or

(c) Any modification of facilities other than routine maintenance or modification in response to emergencies.

(4) An attaching entity may file with the commission a petition for temporary stay of the action contained in a notice received pursuant to paragraph (3) of this section within fifteen days of receipt of such notice. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of service and a copy of the notice. The public utility may file an answer within seven days of the date the petition for temporary stay was filed. No further filings under this section will be considered unless requested or authorized by the commission. If the commission does not rule on a petition filed pursuant to this paragraph within thirty days after the filing of the answer, the petition shall be deemed denied.

(5) Cable operators must notify pole owners upon offering telecommunications services or any comparable services regardless of the technology used.

(B) Timeline for access to public utility poles

(1) Survey

A public utility shall respond as described in paragraph (A)(2) of this section to an attaching entity within forty-five days of receipt of a complete application to attach facilities to its poles (or within sixty days, in the case of larger orders as described in paragraph (B)(5) of this section). This response may be a notification that the public utility has completed a survey of poles for which access has been requested. A complete application is an application that provides the public utility with the information necessary under its procedures to begin to survey the poles.

(2) Estimate

Where a request for access is not denied, a public utility shall present to the attaching entity an estimate of charges to perform all necessary make-ready work within fourteen days of providing the response required by paragraph

(B)(1) of this section, or in the case where a prospective attaching entity's contractor has performed a survey as described in paragraph (C) of this section, within fourteen days of receipt by the public utility of such survey.

(a) A public utility may withdraw an outstanding estimate of charges to perform make-ready work beginning fourteen days after the estimate is presented.

(b) An attaching entity may accept a valid estimate and make payment within fourteen days from receipt of the estimate but before the estimate is withdrawn.

(3) Make-ready

Upon receipt of payment specified in paragraph (B)(2)(b) of this section, the public utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready.

(a) For attachments in the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than sixty days after notification is sent (or one-hundred and five days in the case of larger orders, as described in paragraph (B)(5) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the public utility may assert its right to fifteen additional days to complete make-ready.

(v) State that if make-ready is not completed by the completion date set by the public utility (or, if the public utility has asserted its fifteen-day right of control, fifteen days later), the attaching entity requesting access may complete the specified make-ready.

(vi) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

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(b) For wireless attachments above the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than ninety days after notification is sent (or one-hundred and thirty-five days in the case of larger orders, as described in paragraph (B)(5) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the public utility may assert its right to fifteen additional days to complete make- ready.

(v) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(4) For wireless attachments above the communications space, a public utility shall ensure that make-ready is completed by the date set by the public utility in paragraph (3)(b)(ii) of this section (or, if the public utility has asserted its fifteen-day right of control, fifteen days later).

(5) For the purposes of compliance with the time periods in this section:

(a) A public utility shall apply the timeline described in paragraphs (B)(1) through (B)(3) of this section to all requests for pole attachments up to the lesser of three-hundred poles or one-half percent of the public utility's poles in the state.

(b) A public utility may add fifteen days to the survey period described in paragraph (B)(1) of this section to larger orders up to the lesser of three-thousand poles or five percent of the public utility's poles in the state.

(c) A public utility may add forty-five days to the make-ready periods described in paragraph (B)(3) of this section to larger orders up to the lesser of three-thousand poles or five percent of the public utility's poles in the state.

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(d) A public utility shall negotiate in good faith the timing of all requests for pole attachments larger than the lesser of three thousand poles or five percent of the public utility's poles in the state.

(e) A public utility may treat multiple requests from a single attaching entity as one request when the requests are filed within thirty days of one another.

(6) A public utility may deviate from the time limits specified in this section:

(a) Before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.

(b) During performance of make-ready for good and sufficient cause that renders it infeasible for the public utility to complete the make-ready work within the prescribed time frame. A public utility that so deviates shall immediately notify, in writing, the attaching entity requesting attachment and other affected entities with existing attachments, and shall include the reason for, and date and duration of the deviation. The public utility shall deviate from the time limits specified in this section for a period no longer than necessary and shall resume make-ready performance without discrimination when it returns to routine operations.

(7) If a public utility fails to respond as specified in paragraph (B)(1) of this section, an attaching entity requesting attachment in the communications space may, as specified in section (C) of this rule, hire a contractor to complete a survey. If make-ready is not completed by the date specified in paragraph (B)(3)(a)(ii) of this section, the attaching entity requesting attachment in the communications space may hire a contractor to complete the make-ready:

(a) Immediately, if the public utility has failed to assert its right to perform remaining make-ready work by notifying the requesting attaching entity that it will do so; or

(b) After fifteen days if the public utility has asserted its right to perform make-ready by the date specified in paragraph (B)(3)(a)(ii) of this section and has failed to complete make-ready.

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(C) Contractors for survey and make-ready

(1) A public utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space on its poles in cases where the public utility has failed to meet deadlines specified in section (B) of this rule.

(2) If an attaching entity hires a contractor for purposes specified in section (B) of this rule, it shall choose from among the public utility's list of authorized contractors.

(3) An attaching entity that hires a contractor for survey or make-ready work shall provide the public utility with a reasonable opportunity for a public utility representative to accompany and consult with the authorized contractor and the attaching entity.

(4) The consulting representative of an electric utility may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

(D) Notwithstanding all time frames identified above, parties are free to negotiate different time frames on a case-by-case basis.

(E) Rights-of-way

(1) Public utilities are subject to all constitutional, statutory, and administrative rights and responsibilities for use of public rights-of-way.

(2) Private rights-of-way for all public utilities are subject to negotiated agreements with the private property owner, exclusive of eminent domain considerations.

(3) Public utilities are prohibited from entering into exclusive use agreements of private building riser space, conduit, and/or closet space.

(4) Public utilities shall coordinate their right-of-way construction activity with the affected municipalities and landowners. Nothing in this section is intended to abridge the legal rights and obligations of municipalities and landowners.

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(F) The commission reserves the right to require any or all arrangements between public utilities and between public utilities and private landowners to be submitted to the commission for its review and approval, pursuant to sections 4905.16 and 4905.31 of the Revised Code.

(G) The public utility is required to allow attaching entities to use the same attaching techniques used by the public utility itself or another similarly situated attaching entity on the pole.

(H) The time frame for access to a public utility's conduits shall be identical to the time frame established in this rule for access to a public utility's poles.

4901:1-3-04 Rates, terms, and conditions for poles, ducts and conduits.

(A) Rates, terms, and conditions for nondiscriminatory access to poles, ducts, conduits, and right-of-way of a telephone company or electric light company by an entity that is not a public utility are established through tariffs pursuant to section 4905.71 of the Revised Code. Initial implementation of such tariff or any subsequent change in the tariffed rates, terms, and conditions for access to poles, ducts, conduits, or rights-of-way shall be filed in the appropriate proceeding consistent with parameters established in rule 4901:1-3-03 of the Administrative Code. Nothing in this chapter prohibits an attaching entity that is not a public utility from negotiating rates, terms, and conditions for access to poles, ducts, conduits, and rights-of-way of a telephone company or electric light company through voluntarily negotiated agreements.

(B) Rates, terms, and conditions for nondiscriminatory access to public utility poles, ducts, conduits, and rights-of-way by another public utility shall be established through negotiated agreements.

(C) Access to poles, ducts, conduits, and rights-of-way as outlined in paragraphs (A) and (B) of this section shall be established pursuant to 47 U.S.C. 224, as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

(D) Pole attachment and conduit occupancy rate formulas

(1) The commission shall determine whether the rate, term, or condition is just and reasonable in complaint proceedings. For the purposes of this paragraph, 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 public utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) When parties fail to resolve a dispute regarding charges for pole attachments and the commission's complaint procedure under sections 4905.26 or 4927.21 of the Revised Code are invoked, the commission will apply the formulas set forth in the appendix to this rule for determining a maximum just and reasonable rate.

(E) Allocation of Unusable Space Costs

(1) With respect to the formula referenced in the appendix of this rule, a public utility shall apportion the cost of providing unusable space on a pole so that such apportionment equals two-thirds of the costs of providing unusable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(2) All attaching entities attached to the pole shall be counted for purposes of apportioning the cost of unusable space.

(3) Public utilities may use the following rebuttable presumptive averages when calculating the number of attaching entities with respect to the formulas referenced in the appendix of this rule. For non-urbanized service areas (under fifty-thousand population), a presumptive average number of attaching entities of three. For urbanized service areas (fifty-thousand or higher population), a presumptive average number of attaching entities of five. If any part of the public utility's service area within the state has a designation of urbanized (fifty-thousand or higher population) by the Bureau of Census, United States Department of Commerce, then all of that service area shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities.

(4) A public utility may establish its own presumptive average number of attaching entities for its urbanized and non-urbanized service area as follows:

(a) Each public utility shall, upon request, provide all attaching entities and

all entities seeking access the methodology and information upon which the utilities presumptive average number of attaching entities is based.

(b) Each public utility is required to exercise good faith in establishing and updating its presumptive average number of attaching entities.

(c) The presumptive average number of attaching entities may be challenged by an attaching entity by submitting information demonstrating why the public utility's presumptive average is incorrect. The attaching entity should also submit what it believes should be the presumptive average and the methodology used. Where a complete inspection is impractical, a statistically sound survey may be submitted.

(d) Upon successful challenge of the existing presumptive average number of attaching entities, the resulting data determined shall be used by the public utility as the presumptive number of attaching entities within the rate formula.

(F) With respect to the formulas referenced in the appendix of this rule, the space occupied by an attachment is presumed to be one foot. The amount of usable space is presumed to be thirteen and one-half feet. The amount of unusable space is presumed to be twenty-four feet. The pole height is presumed to be thirty-seven and one-half feet. These presumptions may be rebutted by either party.

(G) The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. Each party described in the preceding sentence shall share proportionately in the cost of the modification. A party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification as provided in rule 4901:1-3-03(B)(3) of the Administrative Code, it adds to or modifies its attachment. Notwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party. If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such

modification rendered possible the added attachment.

(H) A public utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section, pursuant to 47 U.S.C. 224(g), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code.

4901:1-3-05 Complaints.

Any attaching entity or a public utility may file a complaint against a public utility pursuant to sections 4905.26 or 4927.21 of the Revised Code, as applicable, to address claims that it has been denied access to a public utility pole, duct, conduit, or right-of-way in violation of section 4905.51 of the Revised Code or 47 U.S.C. 224, as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code; and/or that a rate, term, or condition for a pole attachment are not just and reasonable. The provisions and procedures set forth in sections 4905.26 and 4927.21 of the Revised Code, and chapters 4901-1 and 4901-9 of the Administrative Code, shall apply. The commission shall issue a decision resolving issue(s) presented in a complaint filed pursuant to this section within a reasonable time not to exceed three-hundred and sixty days after the filing of the complaint.

4901:1-3-06 Mediation and arbitration of agreements.

(A) All local exchange carriers (LECs) have the duty to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way to competing providers of telecommunications services on rates, terms, and conditions that are consistent with 47 U.S.C. 224 pursuant to 47 U.S.C. 251(B)(4), as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code. If parties are unable to reach an agreement on rates, terms, or conditions regarding access to poles, ducts, conduits, and rights-of-way, either party may petition the commission to mediate or arbitrate such agreement pursuant to 47 U.S.C. 252, as effective in paragraph (A) of rule 4901:1-3-02 of the Administrative Code according to procedures established in rules 4901:1-7-8 through 4901:1-7-10 of the Administrative Code.

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(B) All public utilities have the duty to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way. If an attaching entity is unable to reach an agreement on rates, terms, or conditions regarding access to poles, ducts, conduits, or rights-of-way, in a situation other than those identified in paragraph (A), either party may petition the commission to mediate such an agreement pursuant to the process outlined in paragraphs (C)(1) through (C)(8) of this section.

(C) Mediation process

(1) Mediation is a voluntary alternative dispute resolution process in which a neutral third party assists the parties in reaching their own settlement. At any point during the negotiation, any party or both parties to the negotiation may ask the commission to mediate any differences arising during the course of the negotiation.

(2) To request mediation, a party to the negotiation shall notify in writing the chief of the telecommunications section of the commission's legal department and the chief of the telecommunications division of the utilities department of the commission. A copy of the mediation request should be simultaneously served on the other party in the dispute. The request shall include the following information:

(a) The name, address, telephone number, e-mail, and fax number of the party to the negotiation making the request.

(b) The name, address, telephone number, e-mail, and fax number of the other party to the negotiation.

(c) The name, address, telephone number, e-mail, and fax number of the parties' representatives participating in the negotiations and to whom inquiries should be made.

(d) The negotiation history, including meeting times and locations.

(e) A statement concerning the differences existing between the parties, including relevant documentation and arguments concerning matters to be mediated.

(f) The other party to the negotiation shall provide a written response within seven calendar days of the request for mediation to the chief of

the telecommunications section of the commission's legal department and to the chief of the telecommunications section of the utilities department. The response to a request for mediation shall be simultaneously served upon the party requesting the mediation.

(3) The commission will appoint a mediator to conduct the mediation. The mediator will promptly contact the parties to the negotiation and establish a time to commence mediation. The mediator will work with the parties to establish an appropriate schedule and procedure for the mediation.

(4) The mediator's function is to be impartial and to encourage voluntary settlement by the parties. The mediator may not compel a settlement. The mediator may schedule meetings of the parties, direct the parties to prepare for those meetings, hold private caucuses with each party, request that the parties share information, attempt to achieve a mediated resolution, and, if successful, assist the parties in preparing a written agreement.

(5) Participants in the mediation must have the authority to enter into a settlement of the matters at issue.

(6) Confidentiality

(a) Discussions during the mediation process shall be private and confidential between the parties. By electing mediation under this rule, the parties agree that no communication made in the course of and relating to the subject matter of the mediation shall be disclosed, except as permitted in this chapter.

(b) No party shall use any information obtained through the mediation process for any purpose other than the mediation process itself. This restriction includes, but is not limited to, using any information obtained through the mediation process to gain a competitive advantage.

(c) As provided in the Ohio Rules of Evidence 408, offers to compromise disputed claims and responses to them are inadmissible to prove the validity of that claim in a subsequent proceeding. Evidence of conduct or statements made in compromise negotiations are also not admissible in a future proceeding. This rule does not require the exclusion of evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

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(7) Parties to the mediation shall reduce to writing the mediated resolution of all or any portion of the mediated issues and submit the resolution to the mediator.

(8) A member of the commission staff or an attorney examiner who serves as a mediator shall, by virtue of having served in such capacity, be precluded from serving in a decision-making role or as a witness on matters subject to mediation in a formal commission case involving the same parties and the same issues.

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Public Utilities Commission of Ohio (PUCO)
Attention: Jeff Jones, Chief, Telecommunications Section
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Regulation/Package Title: Chapter 4901:1-3, Access to Poles, Ducts, Conduits, and Rights- of-Way – Case No. 13-579-AU-ORD

Rule Number(s):

4901:1-3-01	Definitions
4901:1-3-02	General Applicability
4901:1-3-03	Access to Poles, Ducts, Conduits, and Rights-of-way
4901:1-3-04	Rates, Terms, and Conditions for Poles, Ducts, and Conduits
4901:1-3-05	Complaints
4901:1-3-06	Mediation and Arbitration of Agreements

Date: May 15, 2013

Rule Type:

☒ New ☐ 5-Year Review
☐ Amended ☐ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. **Please briefly describe the draft regulation in plain language.**

   Chapter 4901:1-3, Ohio Administrative Code (O.A.C.), establishes the rates, terms, and conditions by which public utilities and non-public utilities (attachees) attach facilities to a pole or in the conduit of an electric company or telephone company.

2. **Please list the Ohio statute authorizing the Agency to adopt this regulation.**

   Sections 4927.03 and 4927.15, Revised Code.

3. **Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?**

   The rules in this chapter exercise state regulatory authority over rates, terms, and conditions, of pole attachments, ducts, conduits, and rights-of-way as authorized under federal law in 47 USC 224(c). The PUCO has certified to the Federal Communications Commission (FCC), in accordance with 47 USC 224, that Ohio, through the PUCO, regulates such attachments.

4. **If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

   This chapter generally follows the pole attachment and conduit occupancy rules adopted by the FCC in 47 Code of Federal Regulations (CFR) Subpart J, 1.1401 through 1.1424. There are two noteworthy areas where the PUCO has added provisions not found in the federal rules. First, the PUCO has added language encouraging parties to mediate pole attachment agreements in the first instance and clarifies that the rules being adopted in Chapter 4901:1-3, O.A.C., provide a safe harbor in those instances where mediation and negotiations fail. The second noteworthy area is that the PUCO makes clear that these provisions apply equally to attachments to poles and to conduit occupancy.

5. **What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?**

   The PUCO has had statutory authority over utility-to-utility pole attachments through Section 4905.51, Revised Code, since 1953 and over non-utility-to-utility pole attachments through Section 4905.71, Revised Code, since 1981. Additionally, the Commission has had a guideline or O.A.C. rule in place covering pole attachments since 1995. Thus, this is not a new area of regulation by the PUCO. However, in recent years and with the advent of more competition, the PUCO is seeing more disputes between attachees and pole and conduit owners. These rules balance the need for just, reasonable, and timely attachment by attachees against safety, reliability, and insufficient capacity concerns of owners of poles and conduits.

6. **How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?**

   The PUCO will be able to monitor complaints and mediate resolutions of pole and conduit occupancy disputes.

Development of the Regulation

7. **Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**

   On April 3, 2013, in Case No. 13-579-AU-ORD, the PUCO issued an entry by U.S. Mail and e-mail indicating that a workshop would be conducted on April 17, 2013, to listen to any proposed modifications to the proposed rules. The entry was served upon all electric companies, all incumbent local exchange telephone companies, the Ohio Telecom Association, and the Ohio Cable Telecommunications Association (the OCTA) as well as on the PUCO's Electric-Energy, Gas-Pipeline, Telephone, and Water industry list-serves. The workshop was held as scheduled.

8. **What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?**

   Comments at the workshop, which was transcribed, were offered by TW Telecom, Fibertech Networks, AEP Ohio, and the OCTA. A summary of the comments offered at the workshop and how the PUCO addressed those comments in putting the rules out for formal written comment can be found in findings (5) and (6) of the May 15, 2013, Commission entry in Case No. 13-579-AU-ORD.

   The PUCO also grants other opportunities for stakeholders to provide input on proposed rules, including through the PUCO call center and through the formal comment period of the rule review process. All stakeholder comments provided during the formal comment period are reviewed and addressed by the PUCO.

9. **What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?**

   No scientific data was used to develop the rules; however, the rate formulas in the appendix of Rule 4901:1-3-04, O.A.C., mirror the rate formulas adopted by the FCC in 47 CFR 1.1409. The FCC's stated purpose for adoption of these formulas is to assure a public utility the recovery of no 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 public utility attributable to the entire pole, duct, conduit, or right-of-way.

10. **What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?**

    In developing the proposed rules in this chapter, the PUCO Staff considered alternative regulations but ultimately decided to pattern the rules after the rules adopted by the FCC.

11. Did the Agency specifically consider a performance-based regulation? Please explain.

Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.

The proposed rules are performance-based in the sense that the rules encourage pole owners and attachees to negotiate rates, terms, and conditions before seeking PUCO intervention. Once negotiations break-down, however, the proposed rules are intended to provide a mechanism to balance the parties' interests in determining just and reasonable terms of attachment.

12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

The PUCO has reviewed other Ohio regulations and found no duplicate.

13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

The adoption of Chapter 4901:1-3, O.A.C., will provide the PUCO with a framework to ensure consistent and predictable application for affected entities as well as to provide guidance to stakeholders when necessary.

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

a. Identify the scope of the impacted business community;

The scope of the business community impacted by the adoption of Chapter 4901:1-3, O.A.C., includes public utilities owning poles and conduit as well as any business engaged in providing electric service or cable, telecommunications, or broadband

internet services in Ohio. Affected businesses will benefit by having predictable, measurable standards by which to approach negotiations.

b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and

The proposed rules were drafted in an effort to minimize any adverse impact on business, while fulfilling the statutory obligation of encouraging pole and conduit occupancy through rates, terms, and conditions that are just and reasonable as set forth in Sections 4905.51 and 4905.71, Revised Code.

c. Quantify the expected adverse impact from the regulation.
The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a "representative business." Please include the source for your information/estimated impact.

No new impacts are expected from adoption of these regulations.

15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

There is no additional recognized adverse impact to the regulated business community as public utilities have entered into agreements with attachees for years pursuant to the obligations of Sections 4905.51 and 4905.71, Revised Code.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

The rules provide any impacted entity with the opportunity to seek a waiver of a provision of these rules. As part of the consideration of any waiver request, the PUCO could explore alternative means of compliance to satisfy the intent of the statutory obligations.

17. **How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?**

The rules in Chapter 4901:1-3, O.A.C., do not impose fines or penalties for failure to comply.

18. **What resources are available to assist small businesses with compliance of the regulation?**

Commission Staff works with all affected entities, including small businesses, to assist such companies with compliance.

APPENDIX
4901:1-3-04 (Rates, Terms, and Conditions for Poles, Ducts and Conduits)
Pole Attachment and Conduit Occupancy Rate Formulas

(A) The following formula shall apply to attachments to poles by cable operators that solely provide cable services and do not offer any services comparable to telecommunications services regardless of the technology used:

Maximum Rate = space factor x net cost of a bare pole x carrying charge rate

Where:

Space factor = space occupied by attachement ÷ total usable space

(B) With respect to attachments to poles by any telecommunications carrier or cable operator providing either telecommunications services or any comparable services regardless of the technology used, the maximum just and reasonable rate shall be the higher of the rate yielded by paragraphs (B)(1) or (B)(2) of this section.

(1) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph (B)(2) of this section:

Rate = space factor x cost

Where

Cost in Urbanized Service Areas = 0.66 x (Net Cost of a Bare Pole x Carrying Charge Rate)

Cost in Non-Urbanized Service Areas = 0.44 x (Net Cost of a Bare Pole x Carrying Charge Rate).

Where

Space factor =

$$\frac{\left((space\ occupied) + \left(\frac{2}{3} \times (usable\ space \div No.of\ attaching\ entities)\right)\right)}{pole\ height}$$

(2) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph (B)(1) of this section:

Rate = space factor x net cost of a bare pole x (maintenance and administrative carrying charge rate)

Where

Space factor =

$$\frac{\left((space\ occupied) + \left(\frac{2}{3} \times (usable\ space \div No.\ of\ attaching\ entities)\right)\right)}{pole\ height}$$

(C) The following formula shall apply to attachments to conduit by cable operators and telecommunications carriers:

$$\begin{matrix} Maximum \\ Rate\ per \\ Linear\ ft./m. \end{matrix} = \underbrace{\left[\frac{1}{Number\ of\ Ducts} \times \frac{1\ Duct}{No.\ of\ Inner\ Ducts}\right]}_{\text{(Percentage of Conduit Capacity)}} \times \underbrace{\left[\frac{No.\ of\ Ducts}{} \times \frac{Net\ Conduit\ Investment}{System\ Duct\ Length\ (ft./m.)}\right]}_{\text{(Net Linear Cost of a Conduit)}} \times \begin{matrix} Carrying \\ Charge \\ Rate \end{matrix}$$

Simplified as:

$$\begin{matrix} Maximum\ Rate \\ Per\ Linear\ ft./m. \end{matrix} = \frac{1\ Duct}{No.\ of\ Inner\ Ducts} \times \frac{Net\ Conduit\ Investment}{System\ Duct\ Length\ (ft./m.)} \times \begin{matrix} Carrying \\ Charge \\ Rate \end{matrix}$$

If no inner-duct is installed the fraction, "1 Duct divided by the No. of Inner-Ducts" is presumed to be ½.