CHARTER COMMUNICATIONS, INC.
Comments In Response To:

"The Battle for the Utility Pole and the End-Use Customer,"
A PUC Staff Report

CORRECTED VERSION

Submitted February 27, 2004

I. INTRODUCTION

Charter Communications, Inc. ("Charter") respectfully submits these Comments in response to the Oregon Public Utility Commission (hereinafter "Commission") Staff Report, ***The Battle for the Utility Pole and the End-Use Customer***, issued December 15, 2003 (hereinafter "White Paper").

Charter, one of Oregon's largest cable television operators, serving 178,300 subscribers, commends Staff's continuing efforts to improve outside plant, as well as industry and Commission practices in this regard. Charter, too, is committed to public and line worker safety and grid integrity because without a reliable, safe and secure system of poles and related facilities Charter could not serve its customers. Charter has worked diligently and expended considerable resources to carry out its Commission-approved Inspection/Correction and Permit Reconciliation Program, since the Legislature passed House Bill 2271, and has partnered successfully with several Oregon pole owners in this regard. Nevertheless, Charter considers the pole-attachment regulatory framework in Oregon to be structurally flawed and overwhelmingly tilted against it and other communications companies that use and lease space on utility poles (as illustrated by the various proceedings now before the courts and the Commission).

The problem is that the current sanctions scheme allows pole owners themselves to assess and collect extremely high penalties, creating inappropriate and profit-generating incentives.[1] While Charter agrees with Staff that "much progress has been made,"[2] over the past several years, particularly through Staff's significant participation in the Oregon Joint Use Association ("OJUA"), any trans-industry cooperation has occurred in spite of the sanctions, not as a result of them. Indeed, the sanctions have been a major distraction from the overall goal to achieve compliant plant. Further, Charter does not believe that applying the kind of legislative or regulatory patches Staff suggests to these structural problems will provide much, if any, solution.

Charter instead recommends that the sanctions regulations be replaced with a more balanced and reasonable approach to pole attachments that protects the interests of all stakeholders, encourages cooperation and vigorous competition, as well as safe practices and fewer disputes.[3] Both Oregon and federal law already mandate that rates, terms and conditions of pole attachment be "just and reasonable." Charter's comments demonstrate why, in its view, the current pole attachment scheme in Oregon is not "just and reasonable" and suggest how to make it so.

Specifically, Charter recommends that the Commission (a) eliminate the sanctions that pole owners are empowered to levy on attachers today; and (b) adopt reasonable standards with respect to:

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[1] Specifically, OAR § 820-028-0130(Sanctions for Having No Contract) allows pole owners to "impose a sanction" on a pole occupant for having no contract "the higher of: $500 per pole; or 60 times the owner's annual rental fee per pole."); OAR § 820-028-0140 (Sanctions for Having No Permit) allows pole owners to "impose a sanction" on a pole occupant with unauthorized attachments (or "bootlegs") "the higher of: $250 per pole; or 30 times the owner's annual rental fee per pole: OAR § 820-028-0150 (Sanctions for Violation of Other Duties) allows pole owners to "impose a sanction" on a pole occupant for violations of other duties (*i.e.*, safety violations, etc.) "the higher of: $200 per pole; or twenty times the pole owner's annual rental fee per pole.

[2] White Paper at p. 3.

[3] Charter's basic recommendation is that the following sanctions regulations be rescinded: OAR §§ 860-028-0130; 860-028-0140; 860-028-0150; 860-028-0160; 860-028-0170; 860-028-0180. Charter does not advocate the elimination of the Oregon Joint Use Association ("OJUA"). To the contrary, and as noted above, Charter believes the OJUA has been very helpful in addressing joint use problems and promoting industry cooperation.

- Administrative and engineering cost allocation
- Use of approved third-party contractors
- Requiring pole owners to exercise greater control over attacher make-ready and code violation correction coordination
- Requiring reasonable timelines for the processing of permitting and make-ready requests, as well as for completing make-ready and allowing attacher access

With respect to safety and plant-related issues, the Commission already has adequate authority, without new sanctions, to protect the "health or safety of all employees, customers, or the public;"[4] and fine violators directly.[5] The Commission should continue to rely on that authority as needed but should not add redundant and unnecessary requirements.

A. The Sanctions Have Created Inappropriate Incentives That Encourage Utility Abuses Rather Than Plant Safety

House Bill 2271 was intended to provide a mechanism to achieve both rental relief for attachers and safer pole plant. The premise of the H.B. 2271 compromise was a good one: encourage pole users to ensure plant safety and accountability in exchange for reduced rent. Yet now that the regulations have been in effect for several years, imposition of sanctions (or simply the threat of sanctions) have created an acrimonious and untenable joint-use environment in Oregon. This situation continues to undermine the varied interests of the Commission (*e.g.*, providing a just and reasonable pole environment, achieving compliant plant, and promoting competition), as well as the interests of communications attachers and the public, and warrants immediate attention.

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[4] ORS § 757.035. *See also* OAR § 860-024-0010 (requiring compliance with the National Electrical Safety Code) and ORS §§ 756.160(4) and 757.990 (providing for forfeitures for violations of Commission regulation and orders). Charter believes the Commission's plant-related safety goals are not advanced by giving one party the power to "fine" another as the sanctions currently contemplate, but through arms-length negotiation and Commission oversight. To the extent that forfeitures may be appropriate they should *not* be payable (certainly not on the scale that exists today) directly to the pole owner, but to the State.

[5] *See* ORS § 757.990. Charter believes the Commission's plant-related safety goals are not advanced by giving one party the power to "fine" another as the sanctions currently contemplate, but through arms-length negotiation and Commission oversight. To the extent that forfeitures may be appropriate they should *not* be payable (certainly not on the scale that exists today) directly to the pole owner, but to the State.

There have been five sanctions-related proceedings initiated in the last several months (two to enforce the sanctions, two to prevent the enforcement of sanctions, and this proceeding) demonstrating a compelling need for overhauling the regulations. Charter believes that the Commission is best advised to make these necessary changes now and on its own initiative, rather than on possible order from a court.[6]

Monopoly owned utility poles provide virtually the only practical physical medium for the installation of cable operators' and other communications attachers' facilities and are therefore recognized as essential facilities.[7] Pole attachment law was developed in response to evidence that utility companies were exploiting their monopoly power over these bottleneck facilities.[8] It is therefore important to emphasize that because the ability to impose sanctions gives electric utilities increased and unjustified leverage over attachers—contrary to the precise purpose of pole attachment regulation—the continued and threatened imposition of sanctions violates the Commission's mandate to ensure that "[a]ll rates, terms and conditions made,

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[6] Qwest has sought judicial review of the rules "that added and amended OAR 860-022-0065 and 860-028-0110 through 860-028-0240." *See In the Matter of the Adoption of Rules to Implement House Bill 2271 Sanction and Rental Reduction Provisions Related to Utility and Pole Attachments, Qwest Corporation v. Public Utility Commission of Oregon*, filed January 12, 2004 (Or. Ct. App.). Charter generally supports Qwest's challenge and believes that the appeal, along with this comment proceeding, provide an ideal opportunity to address the issues the Commission is currently confronting as a result of the sanctions.

[7] *See* 123 Cong. Rec. H35006 (1977) (remarks of Rep. Wirth, sponsor of the Pole Attachments Act, Pub. L. No. 95-234, 92 Stat. 25 (1987), codified at 47 U.S.C. § 224) ("The cable television industry has traditionally relied on telephone and power companies to provide space on poles for the attachment of CATV cables. Primarily, because of environmental concerns, local governments have prohibited cable operators from constructing their own poles. Accordingly, cable operators are virtually dependent on the telephone and power companies. . . ."); S. REP NO. 580, 95th Cong., 1st Sess. 13 (1977) ("Owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles.").

[8] *See, e.g., FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987) (finding that Congress enacted the Pole Attachment Act "as a solution to a perceived danger of anticompetitive practices by utilities in connection with cable television service."). *See also National Cable and Telecom. Ass'n v. Gulf Power*, 122 S. Ct. 782, 784 (2002) (finding that cable companies have "found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. . . . Utilities, in turn, have found it convenient to charge monopoly rents."); *Alabama Cable Telecomm Ass'n v. Alabama Power*, 15 FCC Rcd 17346 at ¶ 6 (2000) ("By conferring jurisdiction on the Commission to regulate pole attachments, Congress sought to constrain the ability of telephone and electric utilities to extract monopoly profits from cable television systems operators in need of pole space."); Common Carrier Bureau Cautions Owners of Utility Poles, 1995 FCC LEXIS 193, *1 (Jan. 11, 1995) ("Utility poles, ducts and conduits are regarded as essential facilities, access to which is vital for promoting the deployment of cable television systems.").

demanded or received by any . . . utility for any attachment . . . shall be just, fair and reasonable."[9]

Although Charter understands that pole occupants participated in the regulatory effort that led to the sanctions, none of the participants could have anticipated that the joint-use situation would have deteriorated so dramatically as a result. Ever since the sanctions regulations were implemented, communications attachers, including the Incumbent Local Exchange Carriers ("ILECs," which own far fewer poles than the electric utilities), have been unfairly and severely penalized (or threatened with penalties) and forced to accept unreasonable rates (including a proliferation of application processing and permitting fees), terms and conditions (in agreements and in the field), or risk severe penalties.[10] This is why Verizon and Qwest have challenged utility practices pursuant to the sanctions regime, as well as the sanctions themselves. Some pole owners have even extended these unreasonable practices to neighboring states.[11]

Charter's own experience in this regard, as detailed in Section II., vividly shows how at least one responsible attacher that has tried to work within the new system, nevertheless continues to encounter unreasonable pole owner demands, as well as the prospect of millions of dollars in sanctions. Although Charter has diligently pursued its Inspection/Correction and Permit Reconciliation Program, paying for and documenting the safety violations for all attachers, including pole owners, on 130,000 poles (so far), as well as notifying pole owners of self-identified bootlegs, several pole owners continue to sanction Charter. Moreover despite its

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[9] ORS § 757.273. Similarly, in connection with its "certification" to the FCC, the Commission is also required to consider "the interests of the subscribers of [cable and competitive local exchange] services . . . as well as the interest of the consumers of the utility service." 47 U.S.C. § 224(c).

[10] *See, e.g., Central Lincoln People's Utility District v. Verizon Northwest*, UM 1087, Petition for Removal of Attachments, (Pub. Util. Comm'n Or.) (seeking an order for Verizon to pay $1,248 per pole in sanctions for "no contract" and the removal of Verizon's attachments) (hereinafter "*CLPUD v. Verizon*").

[11] *See* Section II, regarding PacifiCorp's use of Oregon's sanctions in Washington and Utah.

efforts, including the expenditure of $8.5 million, Charter has failed to receive rental reductions from certain pole owners, even though it has paid for those owners' pole inspections.[12]

B. The Sanctions Are Potentially Harmful To Competition And Innovation

The constant threat of excessive utility sanctions shadowing communications companies creates a hostile market overhang to Charter's efforts to deploy and innovate. Today's cable operators provide many services beyond the predominantly "entertainment" services offered in the early days of cable television. Many Oregon residents rely on Charter and other operators to receive valuable services like news and information programming, high-speed data and important new Internet-Protocol services, including, eventually, voice services.[13] But because communications attachers, like Charter, have been (and will continue to be) forced to divert significant resources to pay unfair penalties and other unreasonable costs, facilities-based communications competition and innovation may suffer, along with the competitive goals of the Commission, plant safety and the interests of Oregon's consumers.[14]

As consumers increasingly rely upon cable and competitive providers for communications services and demand more advanced services, like Voice over Internet Protocol ("VoIP"), a much more balanced and certain pole attachment environment is essential in Oregon if new services are expected to flourish. This is particularly true as electric companies are poised

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[12] When attachers receive a rental reduction in Oregon, they are merely receiving half the required 40 inches of clearance space (that space between the lowest electric line and the highest communications line) added to the calculation of their annual rent. The more usable space the lower the rent. Although Charter does not now advocate a change in Oregon's pole formula, because it believes that it is, by and large, fair to all parties, there is one significant difference between Oregon's formula and the Federal Communications Commission ("FCC") formula that prevails in approximately 40 states. Unlike the Oregon formula, under the FCC approach the entire 40 inches of clearance space is **always** considered usable space. Therefore, pole owners in Oregon are already receiving a larger share of pole costs than their counterparts elsewhere. And, as Verizon has also alleged in its complaint against PGE, PGE (and other pole owners, including PacifiCorp) have attempted to include inappropriate charges in the calculation of their rates. For instance, both PGE and PacifiCorp include investment in transmission poles, although the rental calculation should be limited to distribution pole costs. Also, both utilities add an improper administrative surcharge, as well as an unauthorized yearly extrapolator. *See, e.g., Verizon Northwest v. Portland General Electric Company*, CV 1286, filed September 17, 2003, stayed, Jan. 13, 2004 (D. Or.) (hereinafter "Verizon v. PGE").

to become cable's next competitor, with the advent of broadband over power lines (or "BPL").[15] To be sure, one of Charter's concerns is that electric utilities in Oregon will ultimately exploit their monopoly control over poles, in combination with the sanctions regime, to achieve an unfair competitive advantage over Charter as well as to cross-subsidize new competitive ventures.

C. A More Balanced Approach To Pole Attachments Will Serve The Interests Of All Stakeholders

For these and other reasons, set forth in more detail below, Charter urges the Commission to replace the regulations adopted as a result of H.B. 2271 with a more balanced approach—one that promotes competition, clearly establishes the rights and responsibilities of pole owners and attachers alike, while acknowledging the inherently dominant power of pole owners, like the federal approach. Indeed, Staff approves and notes its reliance on federal pole attachment law throughout its White Paper and has stated that "FCC requirements related to nondiscriminatory access for telecommunications providers and cable television apply in Oregon."[16]

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[13] Contrary to Staff's characterization of the cable industry as simply "a premium entertainment service," White Paper at 7, federal rules require cable television operators to carry Emergency Alert System audio and video signals. Cable systems are the primary delivery system for local noncommercial television broadcast stations (generally, public broadcast stations) and local commercial television stations (generally, local network affiliates and independent stations). Certificates of Public Good require cable operators to carry local public, educational and governmental access channels, over which citizens express views, schools transmit distance learning and citizens watch their City Council in action, as well as the United States House of Representatives and Senate over the cable-industry-funding C-SPAN networks. The shared responsibility between cable and broadcasters for the nation's emergency alert system is further evidence that the nation has come to rely upon cable for far more than entertainment.

[14] "In 1985, the Legislative Assembly adopted a goal for the State of Oregon 'to secure and maintain high-quality universal service at just and reasonable rates for all classes of customers and to encourage innovation within the industry by a balanced program of regulation and competition.'" THE STATUS OF COMPETITION AND REGULATION IN THE TELECOMMUNICATIONS INDUSTRY, PUBLIC UTILITY COMMISSION OF OREGON, January 2004, at 1-4 (citing ORS 759.015).

[15] *See, e.g.,* JOINT WIRE AND POLE USAGE, BEST PRACTICES TO MAXIMIZE REVENUE OPPORTUNITIES AND MINIMIZE ATTACHMENT COSTS CONFERENCE held Dec. 8-9-, Scottsdale, AZ, Presentation by Paul Brown , Managing Director of Distribution Support for PacifiCorp (discussing BPL as a future project for PacifiCorp) (hereinafter "Paul Brown Presentation").

[16] OJUA Work Group: Response to PUC White Paper at 5; *see also,* White Paper at Attachment E (stating that federal laws set the basic principles for attachment nondiscriminatory access).

II. Charter's Joint-Use Experiences In Oregon Since The Implementation Of The Sanctions Regulations

Charter believes that unsafe construction practices and the performance of substandard work are on the wane today and should not prompt the development of new rules or continued sanctions.[17] Charter agrees that safety is paramount and is working diligently to achieve compliance, without which it would be unable to deliver reliable services. Moreover, because Charter's upgrades in the state are largely complete, Charter's main outside-plant concentration in Oregon is plant compliance.

A. Charter's Correction/Inspection and Records Reconciliation Program

Charter is attached to approximately 180,000 poles in Oregon. Since the Commission approved Charter's Correction/Inspection and Records Reconciliation Program (hereinafter "Program") in June, 2001, Charter has corrected violations on approximately 130,000 poles (*i.e.*, about 4,000 miles of plant) of 30 different owners. The remaining 50,000 poles are located in areas where Charter has recently rebuilt its plant. Charter expects that any problems existing on those poles will be corrected this year. Over the long run, Charter will comply fully with all applicable safety requirements and codes, including the Commission's Line Inspection Policies.

Charter is proud of its Program and to date, has spent more than $8.5 million to inspect and correct plant. Specifically, on the 130,000 poles Charter has inspected, it has measured every attachment from the lowest power conductor downward, identifying the code violations of all attachers on the pole, including the pole owner. Charter has not simply used this information for its own benefit. Instead, at its own expense, Charter has provided tenants and owners with the documentation it has collected in the field, detailing the code violations of all parties and specifying any engineering work that must be done in order to achieve compliance on a

[17] Indeed, according to the Commission's own annual Utility Electric Contact Incident Report, issued last March, "Incidents usually occur because of an unsafe act, not an unsafe condition."

particular pole. Charter has incurred all the costs associated with its Program and has not sought financial recovery from any other attacher, even though it is reasonably entitled to reimbursement. Moreover, Charter has even coordinated the cleanup efforts between tenants and pole owners, although Charter believes this is (and should be) the responsibility of the pole owner.[18] Indeed, because Charter has no leverage either over pole owners or other tenants (other than on the basis of its in-field and inter-personal relationships), trying to convince other occupants to modify their attachments upon Charter's request has proven to be one of the most problematic, costly and time-consuming aspects of Charter's Program.

In addition to the field inspection component of the Program, Charter is in the process of reconciling all permit issues on these same 130,000 poles. To achieve this self-audit, Charter is comparing its permit databases to the databases of pole owners. Upon discovering an unpermitted pole, Charter informs the pole owner and submits a permit.

B. As A Responsible Pole Occupant, Charter Nevertheless Continues To Receive Bootleg And Safety Sanctions From Some Pole Owners, But No Rental Reduction

Despite all these efforts, certain pole owners, like PacifiCorp (on whose poles Charter has the most attachments by far: approximately 80,000) have continued to sanction Charter for bootlegs and safety violations. For example, in the spring of 2003, as it did for other pole owners, Charter began to identify its own bootlegs on PacifiCorp's poles and submit permits for those attachments. In the same self-audit, Charter had also identified many PacifiCorp poles for which it was being billed, but which Charter did not actually occupy. Instead of acknowledging that both parties' records needed updating, PacifiCorp has to this point refused to forgo any sanction that it could conceivably collect under the Oregon regulations. At about the same time, Charter had just completed paying for and insulating all its guys for PacifiCorp, even though

[18] *See* Section III. B. (discussing standards that require pole owners, given their pole ownership status, to coordinate safety violation corrections and other makeready efforts).

Charter's guys were already grounded and the NESC requires either that guys be grounded ***or*** insulated.

Apparently encouraged by the prospect of collecting such great sums in Oregon, PacifiCorp has attempted to extend Oregon's sanction regime to other certified states, like Washington and Utah, which do not seem to have specific penalty provisions.[19] Specifically, Charter has received invoices from PacifiCorp totaling approximately $250,000 assessing unauthorized attachment penalties in the amount of $250 per (allegedly) unpermitted pole for one area (Yakima) in the State of Washington. It is Charter's belief that the Yakima audit results are flawed. For example, although Charter has not had a full opportunity to assess the audit, Charter nevertheless has been able to determine that (1) many of the audited poles are not owned by PacifiCorp; (2) many more of the audited poles are not occupied by Charter; and (3) Charter has a permit for many of the poles for which it has been sanctioned. Moreover, the documentation provided by PacifiCorp also includes inaccurate pole numbers and other mistakes that will make it difficult to verify many of the alleged violations. Charter also understands that

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[19] *See* Section III (discussing the reasonableness of unauthorized attachment penalties). PacifiCorp's goals are clear: maximize revenues from pole attachments. *See* Paul Brown Presentation (advising that to recover the full value of poles, owners should "[c]ollect[] all penalties allowed."). PacifiCorp acknowledges that this is "an aggressive approach, but only from the point of view of companies that have grown accustomed to the free ride." Contrary to PacifiCorp's claims that "attachers have had a free ride at the expense of utility rate payers and shareholders," the courts, including the United States Supreme Court, have concluded that the FCC formula (upon which Oregon's is based) provides just compensation. *See, e.g., Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002), *cert. denied*, 124 S. Ct. 50 (2003) (holding that, in the context of pole attachments, where FCC regulations provide for pole owners to be paid at least their marginal costs through makeready payments and an annual pole rent, the requirement of just compensation is satisfied). Indeed, the FCC "has concluded that its pole attachment formulas, together with the payment of make-ready expenses, provide compensation that *exceeds* just compensation." *Florida Cable Telecommunications Ass'n, Inc., et al. v. Gulf Power Co.*, 18 FCC Rcd. 9599 at ¶ 15 (rel. May 13, 2003) (internal citations omitted)(emphasis added). In addition to the costs of providing access (make-ready), the Oregon formula provides for a pole rental based on all the costs associated with operating and maintaining the pole, costs of the pole itself and a reasonable profit. Given that Charter has provided PacifiCorp with valuable pole data that documents the violations of all attachers, including PacifiCorp, on its poles and information necessary to help reconcile billing records, it is difficult to understand how Charter could be getting a "free ride."

another cable operator in Utah is in litigation with PacifiCorp at the Public Service Commission over identical PacifiCorp charges and practices.

Charter understands that PacifiCorp has initiated a new round of inspections in Oregon, Charter is therefore concerned what this will mean for the approximately 80,000 PacifiCorp poles to which Charter attaches in Oregon. Charter expects the imposition of charges like those assessed in Washington (including the erroneous charges) but on a far broader scale, even though Charter has largely completed its safety Program. Without an overhaul, there will be a new wave of excessive utility demands and charges, as well as possible litigation and proceedings at the Commission, similar to the pending cases.[20]

Finally, another significant indication that the sanctions regulations have not worked as intended, even though Charter is a responsible operator and has spent more than $8.5 million on its Program to date, is that many pole owners have refused to give Charter a rental reduction.

C. Contract Negotiations

Following implementation of the sanctions regulations, nearly every pole owner in Oregon cancelled their existing pole attachment agreements and presented Charter with new ones. All contain the full complement of sanctions. While some pole owners have negotiated in good faith, as mandated by the federal nondiscriminatory access rules, several have abused the sanctions in order to gain leverage over Charter. One pole owner threatened that if Charter did not sign its pole agreement by a date certain, it would impose the "no contract" sanctions, which would have resulted in an instant liability to Charter of about $6.7 million. Other owners have abused the sanctions to gain further advantages during negotiations (although pole owners already have superior bargaining power, and as indicated, these abuses are intended to be

[20] Indeed, Charter just recently received an invoice for over $100,000 dollars for unauthorized attachments and safety sanctions from another Oregon pole owner, although Charter is only attached to approximately 6,000 of this owner's poles.

checked not bolstered through pole regulation). Indeed, Charter has felt compelled to accept various unjust and unreasonable rates, terms and conditions, or risk possible imposition of sanctions for "no contract." Although Charter appreciates that Staff has admonished pole owners against abusing the sanctions in this manner, Charter believes that as long as the sanctions exist they will be improperly used as leverage during contract and negotiations, as well as in the field and invoice disputes.

D. Pole Processing And Other Fees Contained In Post-Sanction Pole Attachment Agreements

Aside from the sanctions themselves, one of the most onerous terms in some of the new contracts is a requirement to pay per-pole processing fees. These fees are charged purportedly to recover administrative costs associated with processing a permit. But Charter believes that pole owners already recover these costs in the fully allocated annual rental rate. By definition, fully allocated rent, such as that paid to pole owners in Oregon, encompass all pole related costs.[21] Consequently, "[a] separate fee for recurring costs such as applications processing or periodic inspections is not justified, if the costs are included in a rate based on fully allocated costs."[22] Some pole owners have sought to charge Charter an application processing fee for its self-identified bootlegs.

Similarly, some contracts require that Charter pay the costs associated with the performance of periodic inspections and audits, although those costs are also recovered in the fully allocated pole rent.[23]

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21 *Texas Cable & Telecom. Ass'n v. Entergy Services, Inc.*, 14 FCC Rcd 9138, ¶ 10 (1999).

22 *Texas Cable & Telecom. Ass'n v. GTE Southwest Inc.*, 14 FCC Rcd 2975, ¶ 32 (1999). For example, FERC Accounts 920-931 and 935, which are used to calculate the pole rent, together include such administrative costs as office supplies and expenses, travel, supervision fees, premiums payable to insurance companies, payment of certain employee pensions, to name a few items. Additionally, as noted above, some pole owners include an administrative surcharge in its pole rent. *See* n. 11, *supra.*

23 *See Texas Cable & Telecom. Ass'n v. GTE Southwest Inc.*, 14 FCC Rcd 2975, ¶ 32 (1999).

Charter likewise is wary of certain flat per-pole pre- and post-construction inspection and transfer fees contained in some of the new agreements. Indeed, Charter's own contractors can often perform the same job for a fraction of the fees listed in the agreements. Charges for pre-construction surveys and other makeready-related tasks should reflect the hourly labor rate for makeready, divided by the average number of poles inspected per hour. Charter believes that hidden inappropriate costs (*i.e.*, those costs recovered in the pole rent) may be contained in the loaders that pole owners tack on to their basic engineering rates.

Furthermore, many pole owners are charging attachment rental fees for every attachment on the pole, not just per foot of space, which Charter believes also results in over recovery. This is particularly troublesome given the extreme sanction for unauthorized attachments.

Unless the Commission addresses these cost issues as well (which could be done in either a rulemaking or a complaint proceeding), their continued application will spark further disputes. Unlike the current rules in Oregon, which only generally refer to cost recovery, pole-attachment precedent in jurisdictions that follow FCC standards, provides specific guidance to the parties in the areas of cost allocation, and virtually all other operational issues, as well.

III. Elimination Of The Sanctions In Favor Of More "Just And Reasonable" Standards Will Go A Long Way Towards Resolving Most Of The Joint-Use Problems In Oregon

Of all the certified states with which Charter is familiar, Oregon's regulations, especially the sanctions, are by far the most punitive. The sanctions encourage pole owner abuses and undermine the very purpose of pole attachment regulation (*i.e.*, the limitation of monopoly pole owner abuse). Rescinding the sanctions implemented after the passage of H.B. 2271, and incorporating more reasonable and flexible standards, like those followed in FCC states, will promote a safer and more equitable joint-use environment, reduce the incidence of disputes

(including the types of disputes now before the Commission), and satisfy the Commission's mandate to provide "just, fair and reasonable" rates, terms and conditions.

The benefits of the "just and reasonable" approach Charter advocates are varied. First, there is a wealth of precedent to borrow from that clearly delineates the rights and responsibilities of attachers and pole owners, facilitating joint-use and eliminating disputes. Additionally, because the vast majority of states rely on these same standards, companies, like Charter would be able to make better and more informed investment decisions, thereby promoting competition and other consumer benefits. Finally, the perceived need for many of Staff's recommended actions would also be obviated if the Commission chose to rely on and incorporate the available precedent, which includes numerous rulemakings and approximately 300 adjudicated cases.

A. A Wealth Of Precedent

Staff has expressed a concern that because "Oregon has chosen its own pathway with respect to the shared usage of poles, [the Commission] do[es] not have a lot of applicable precedence [sic] from other states to build on."[24] The absence of applicable precedent in Oregon is one of the best reasons the Commission should consider Charter's proposal. Indeed, many of the unreasonable joint-use conditions Charter has encountered (both in contract negotiations and in the field) over the last several years, could have been avoided if there had been clear rules, based on the principles of reasonable rate requirements and nondiscriminatory access, and not simply the threat of sanctions. Although the following list is not exhaustive, these guidelines provide a way for parties to avoid some of the most contentious joint-use issues and will also facilitate nondiscriminatory access and pole attachment agreement negotiations, reduce disputes and promote competition.

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[24] White Paper at 3.

1. Reasonable Charges

From Charter's perspective, one of the biggest and most contentious issues in Oregon is the imposition of non-rental charges, including charges related to sanctions and other penalties; inspections and audits; and applications processing fees, pre- and post-construction survey fees, and transfer fees. Charter agrees that it is responsible for the reasonable and actual costs associated with its attachments that are not otherwise recovered in the pole rent. But Charter disagrees that sanctions should be imposed for safety violations or that pole owners should recover far and above any costs they incur for unauthorized attachments. That the sanctions are paid directly to pole owners provides a perverse incentive to exploit the safety inspection and audit processes for profit, creating suspicion, mistrust and deteriorating field relationships, which will ultimately thwart the Commission's goals to achieve compliant plant.

a. There Should Be No Sanction For Having "No Contract"

The "no contract," $500 per pole or 60 times the annual rental fee per pole sanction has given pole owners unrestricted leverage over attachers, as demonstrated by the various proceedings now before the Commission. Permitting pole owners to make attachers feel compelled to sign non-negotiated contracts or otherwise accept unjust, unfair and unreasonable rates, terms and conditions, is contrary to the Commission's mandate under ORS § 757.273. The pole attachment agreement required by the Commission's rules should serve to protect the rights of **both** parties, not simply limit the rights of one party. Because pole owners already have superior bargaining power (because they own the poles) they should be required to conduct attachment agreement negotiations in good faith.[25] If either party fails to do so, there should be

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[25] *See Implementation of Section 703(e) of the Telecommunications Act; Amendment of Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, ¶¶ 11-21 (recognizing the superior bargaining position of pole owners and stating that "all parties must negotiate in good faith for non-discriminatory access at just and reasonable pole attachment rates.").

recourse at the Commission, where unjust and unreasonable terms would be reformed and just and reasonable terms, as well as access, enforced.[26]

b. There Should Be A Reasonable Unauthorized Attachment Penalty

Charter also believes that an unauthorized attachment penalty is reasonable only when it bears some relationship to both the back rent owed and the average frequency of audits. For example, after hearing expert testimony regarding standard practices, the FCC rejected the imposition of a $250 per pole unauthorized attachment penalty and found that a reasonable penalty would "not [] exceed an amount approximately equal to the annual pole attachment fee for the number of years since the most recent inventory or five years, whichever is less."[27] The FCC recognized that such a penalty would "provide an incentive for [attachers] to comply with reasonable application process[es] while encouraging utilities not to delay audits of unauthorized attachments."[28] Likewise, in order to strike the proper balance, the Commission here should rescind its $250 unauthorized attachment sanction (which some pole owners have imposed in neighboring states) in favor of a penalty that creates the proper incentives for both parties.

c. There Should Be No Sanction For Safety Violations

In accordance with the nondiscriminatory standards, the beneficiary of any action (facility modification, inspection, audit, etc.) is responsible for the cost.[29] For example, when a safety violation is detected, the responsible party corrects the violation and pays any associated

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[26] Again, reliance on the voluminous precedent available can easily resolve many pole attachment agreement differences.

[27] *Mile Hi Cable Partners v. Pub. Serv. Co. of Colo.*, 15 FCC Rcd 11450, ¶ 14 (2000), *aff'd Pub. Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003)("In its analysis, the FCC . . . showed that most utilities currently charge a one-time fee of $15.00 to $25.00 per pole, or charges based on back rent for no more than three years. Finding no reason to doubt [the Complainant's] uncontested expert testimony regarding industry practices, the [FCC] correctly figure that an attachment rate based on the years of unpaid annual rent, on average $3.77 per pole plus interest, would put the charge right in the middle of the industry range. . . . In addition . . . under the FCC's unauthorized attachment rate, a violating cable company would face the same penalty, five times the rental rate plus interest, even for an unauthorized attachment that had only been in place for two weeks.").

[28] *Id.*

[29] *See, e.g.*, 224(h)-(i) (requiring the beneficiary of any pole modifications, etc.. including pole owners, to bear the costs).

costs,[30] but no sanction. The only motivation is to maintain safe and operational plant. Moreover, responsible attachers may not be unjustly penalized. The federal nondiscriminatory standards also recognize that utilities benefit from periodic inspections and audits and that the costs incurred by utilities to perform them are a cost of doing business, and, thus are already recovered in the annual pole rent.[31]

d. Administrative Costs Are Recovered In The Pole Rent

Another fundamental tenet of pole attachment cost recovery theory is that to the extent pole owners recover costs in their fully allocated pole rent, they are not permitted to double recover those same costs in makeready or other fees.[32] In Oregon, pole occupants pay fully allocated rental rates. Thus, any fees charged for items like applications processing are unreasonable. Pole occupants in Oregon should not pay more than their reasonable share of costs, and the Commission should "look closely at charges in excess of fully allocated costs to ensure that there is no double recovery for expenses for which the utility has been reimbursed through the annual fee."[33]

2. Approved Third Party Contractors

Another way to promote nondiscriminatory access, ensure just and reasonable rates and limit disputes is by requiring utilities to allow attachers to use their own properly trained workers or outside contractors to perform work "in the proximity of utility facilities."[34] Although "[a]

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30 *See Cable Television Association of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333, ¶ 15 (rel. Aug. 8, 2003), *recon. denied,* DA 03-3411 (Oct. 29, 2003) (hereinafter "*Georgia Power*").

31 *See id.* at ¶ 16.

32 *See, e.g., Texas Cable and Telecom. Ass'n v. GTE*, 14 FCC Rcd 2975, ¶ (1999) ("A separate fee for recurring costs such as applications processing or periodic inspections is not justified, if the costs are included in a rate based upon fully allocated costs. We will look closely at make-ready and other charges to ensure that there is no double recovery for expenses which the utility has been reimbursed through the annual fee.").

33 *Id.*

34 *Implementation of the Local Competition Provisions in the Telecommunications At of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶ 1182 (rel. Aug. 8, 1996), *aff'd Southern Co. v. FCC*, 293 F.3d 1338, 1350-51 (11th Cir. 2003))("This

utility may require that individuals who work in the proximity of electric lines have the same qualifications, in terms of training, as the utility's own workers . . . the party seeking access [should be] able to use any individual workers who meet these criteria."[35] Allowing "a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers and cable operators and would inevitably lead to disputes over rates to be paid to the workers."[36]

As mentioned above, fully qualified contractors used by Charter and other attachers often perform the same makeready task for far less cost than the utility's own employees or contractors. Incorporating this rule would therefore conserve costs for attachers (freeing up those resources for plant compliance and innovation) and limit disputes over costs.

3. Pole Owner Coordination Function

Because of the "inherent disparity in the relationship" between the attacher and the owner "to other parties that have attached to the pole," Charter believes it is the pole owner's responsibility to manage attachments and notify attachers "when safety violations must be corrected or when makeready or other work which may affect attachments is going to be performed."[37] Moreover, "[a]ny costs incurred by [the pole owner] in managing and maintaining

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guideline is a reasonable effort to regulate one of the fundamental 'conditions' of pole attachment—namely, the process by which an attachment is made and maintained. The guideline represents an attempt to balance the interests involved in a measured and reasonable way. . . .").

35 *Id.*

36 *Id.*

37 *Cavalier Tele. , LLC v. Virginia Elec. and Power Co.*, 15 FCC Rcd 9563, ¶ 17 (rel. June 7, 2000) ("[The pole owner] is required by the Pole Attachment Act to notify other attachers of any pending work, which will affect their attachments. [The pole owner] cannot abrogate its duties as pole owner or force [the Attacher] to accept [pole owner's] duties towards other attachers. . . . Due to the inherent disparity in the relationship of the [Attacher] and the [pole owner] to the other parties that have attached to a pole, we find that [pole owner] is responsible for coordinating and notifying the attaching parties."), *vacated by settlement* 2002 FCC LEXIS 6385 (Dec. 3, 2002)(in issuing the *vacatur*, the FCC specifically stated that its decision did not "reflect any disagreement with or reconsideration of any of the findings or conclusion contained in" the underlying decision (hereinafter "*Cavalier*").

poles is passed through to [the attacher] and other attachers in the form of makeready costs or the pole rental fee."[38]

In Charter's experience most pole owners in Oregon adhere to this rule. But others abrogate their duties as pole owners and force the attacher to perform this coordination function, although attachers have no privity with other pole tenants. This type of behavior on the part of pole owners is not only potentially dangerous when safety violations are involved, but also make it difficult to perform other necessary work. Indeed, the largest impediment to Charter's Correction and Inspection Program is that it was forced to assume the coordinating role, but had no power to enforce its correction requests.

4. Cost Allocation, Scope of Access, Timelines For Applications Processing, Notice And Reservation Of Space Guidelines

There are various other guidelines governing nondiscriminatory access, which new entrants (whose systems are not yet built) especially depend on. These include the scope of access rules, which permit an electric utility to deny access only "on a nondiscriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes."[39] Moreover, if a utility does not grant access within 45 days of the request for access, "the utility must confirm the denial in writing by the 45th day."[40] This standard further requires utilities to justify their denials in detail.[41]

Further a utility should be required to provide no less than 60 days written notice prior to (1) removal of facilities or termination of any service to those facilities; (2) any increase in pole

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38 *Id.*

39 47 U.S.C. § 224(f)(2). *But see* ORS § 757.272, which does not specify the circumstances under which an electric utility can deny access, and permits (contrary to federal law) a telecommunications utility to deny access.

40 47 C.F.R. § 1.1403(b).

41 *Id.* ("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.").

attachment rates; (3) or any modification of facilities other than routine maintenance or modification in response to emergencies.[42]

These nondiscriminatory standards also prohibit a utility from forcing an attacher who has obtained attachment to a pole to pay for any rearrangement, modification costs, or the like, for the benefit of another party, including the pole owner.[43] They also do not allow a utility to reserve space to provide competitive telecommunications or video services, and then force an attacher to bear the cost of modifying the facility to increase capacity.[44] An electric utility may reserve space for its core utility service. But, such reservation must be consistent with a *bona fide* development plan that reasonably and specifically projects a need for that space for the provision of core electric service."[45] A utility must also permit cable operators and telecommunications carriers to use the reserved space until the utility has an actual need for the space. At that time, the utility shall give the displaced cable operator or telecommunications carrier the opportunity to pay for the cost of any modification needed to expand capacity and maintain the attachment.[46]

While there are many other rules that would be useful for the Commission to consider, those listed here exemplify how it is possible to balance the interests of all parties, facilitate plant

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42 47 C.F.R. § 1.1403(c).

43 *See* 47 U.S.C. § 224(h)-(i). Charter was forced to accept a contract provision that requires it to pay to transfer its own attachments for the benefit of subsequently attaching parties, including the pole owner.

44 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶¶ 1165-1170 (rel. Aug. 8, 1996), *aff'd Southern Co. v. FCC*, 293 F.3d 1338, 1348-49 (11th Cir. 2003) ("The FCC recognized that utilities enjoy the power to reserve space on their facilities for future utility-related needs. However, the FCC must have some way of assessing whether these needs are bona fide; otherwise, a utility could arbitrarily reserve space on a pole, claiming it necessary on the basis of unsupportable 'future needs,' and proceed to deny attachers space on the basis of 'insufficient capacity.' This is clearly not what Congress intended when it passed the Act; such a construction would undermine the plain intent of the nondiscrimination provisions found in 224(f)(1).").

45 *Id.*

46 *Id.*

compliance, nondiscriminatory access and pole attachment agreement negotiations, reduce disputes and promote competition.

B. Consistency With Other Jurisdictions Promotes Competition

Although states are permitted to "certify" their jurisdiction over pole attachments, as Oregon has chosen to do, thirty-two (32) states adhere to the federal standards, for many of the reasons stated above. In addition, several "certified states" incorporate within their own regulatory schemes various federal standards. For example, following passage of the Telecommunications Act of 1996, the certified State of New York decided it would use the federal approach for setting rates and regulating pole attachment operations. In reaching this decision, the New York Public Service Commission stated:

> Since the enactment of the Telecommunications Act of 1996, there has emerged a clear need for cooperative federalism in this and other areas of telecommunications so as to provide consumers the full benefits available from the development of competitive markets. . . . By embarking on this course, we hope to make it easier for service providers to do business by eliminating unnecessary variation in regulatory requirements. Also, by exercising our authority in this manner, we make it possible for firms operating nationally to compare favorably New York's practices and those followed elsewhere.[47]

Similarly, if Oregon's pole practices were in greater harmony with the vast majority of states, established cable operators like Charter and new entrants alike would be able to make investment and other business decisions seamlessly across state lines without unnecessary regulatory differences. As a result, consumer demands for new services at competitive prices would be more quickly realized. New competitors might also be encouraged to offer services in

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47 *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, 1997 N.Y.PUC LEXIS 364, **9-10 (NYPSC 1997). The New York Commission is in the process of further refining its rules and a final set of rules is expected later this year. Vermont has also recently adopted a set of new rules, based on FCC nondiscriminatory principles and long-standing precedent and industry practices. *See* Vermont Public Service Board Rules 3.700, *et seq.*

Oregon if they were able to "compare favorably [Oregon's] practices and those followed elsewhere." Presently, many new entrants would consider Oregon's joint-use environment hostile to competition and, given the financial risks and other operational difficulties, might choose to do business elsewhere.

C. Adopting Charter's Approach Would Obviate The Need For Certain Of Staff's Recommendations

Although Charter agrees that certain recommendations set forth in Staff's White Paper could help to ameliorate joint-use issues in Oregon, many of Staff's remedial suggestions would not be necessary if the sanctions regulations did not exist. For example, one of the principles Staff seeks to incorporate in its rules is that pole owners "shall not apply pole attachment sanctions to existing attachments . . . to force a revised contract on an existing occupant."[48] While Charter fully supports this principle in theory, Staff should instead address the root of the problem—namely, the sanctions themselves. Similarly, Staff recommends the development of a standard contract (*i.e.,* pole attachment agreement) because "[p]ole owners and occupants continue to disagree on specific contract obligations, rates terms and conditions in many areas."[49] A better way to ensure just and reasonable contract terms would be to rescind the "no contract" sanction, so attachers would not feel coerced into signing contracts, and instead rely on already developed standards that not only require pole owners to negotiate "in good faith" but also provide negotiating guidelines. Implementing a new rule that allows occupants to sanction pole owners for abusing the sanctions will only lead to a more contentious and uncooperative pole attachment environment in Oregon.[50] Indeed, adding various new layers of joint-use legislation

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48 White Paper at Attachment E, P10 & C4.

49 *Id.* at Attachment A.

50 *See id.* at P15.

and regulation without addressing the underlying problems (the sanctions) is not an adequate solution and will only create additional problems.

Moreover, in addition to acknowledging, generally, that the FCC's nondiscriminatory access requirements "apply in Oregon," in its White Paper, Staff also advocates the adoption of some of the specific federal operational and contract "principles" discussed above. In Attachment D (*Suggested New and Amended Rules*), for instance, Staff recommends that the Commission implement the 61 [sic] day notification rule. Also, in Attachment E, PP. 3&4 (*Pole Joint Use Principles*), Staff promotes the FCC's scope of nondiscriminatory access requirements; the reservation of space rules (PP. 5&6); and the prohibition against charging attachers for preexisting safety violations they did not cause (P. 9). Rather than take this kind of piecemeal approach, applying the federal standards as a whole would help provide an overall solution to the contentious joint use situation that presides in Oregon today.

IV. CONCLUSION

The sanctions implemented as a result of H.B. 2271 have caused enormous difficulties for communications attachers in the State of Oregon and the Commission alike and have distracted attachers and pole owners from achieving compliant plant. Charter submits that unless those sanctions are eliminated from the state's pole regulations, the situation will deteriorate further causing additional litigation and creating a hostile environment for communications technology deployment and innovation. Instead, Charter urges the Commission to incorporate the federal nondiscriminatory access standards into its rules to balance the interests of all parties, facilitate plant compliance, nondiscriminatory access and pole attachment agreement negotiations, reduce disputes and promote competition.