**IN THE COURT OF APPEALS OF THE STATE OF OREGON**

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| QWEST CORPORATION,<br><br>Petitioner,<br><br>v.<br><br>PUBLIC UTILITY COMMISSION OF OREGON<br><br>Respondent.<br><br>And<br><br>PACIFICORP,<br><br>Intervenor-Respondent. | Public Utility Commission of Oregon<br>Docket Nos. AR 386 and 401<br><br>CA A123511 |

# *AMICUS CURIAE* BRIEF OF CHARTER COMMUNICATIONS, INC.

Judicial Determination of Validity of Rules
Promulgated by Public Utility Commission of Oregon

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**



**Legislative**

**Administrative**

**A. Federal**

**B. State**



**Treatises**



**Other Authority**

## STATEMENT OF THE CASE

*Amicus Curiae* Charter Communications, Inc. ("Charter") adopts the Statement of the Case presented in the brief of Petitioner Qwest Corporation ("Qwest"). Qwest presented two issues on appeal:

(1) Do the PUC's rules authorizing pole owners to impose sanctions on pole occupants exceed the statutory authority of the PUC?

(2) If the PUC's rules authorizing pole owners to impose sanctions on pole occupants do not exceed the statutory authority of the PUC, are the PUC's rules and the statute on which they are based unconstitutional as:

a. unlawfully delegating governmental authority to private parties;

b. depriving parties of property without due process of law;

c. establishing excessive fines and disproportionate penalties; and

d. denying private parties equal protection of the laws?

The argument in this *Amicus* brief is limited to the first issue (1), and it may be summarized as follows:

### A. Summary of Argument

Monopoly-owned utility poles are considered "essential" or "bottleneck" facilities, access to which is vital for the deployment of communications services throughout Oregon and the country. Because of governmental, environmental and other restrictions, construction of redundant pole plant is neither legal nor feasible. Cable operators, like Charter, and other communications companies (collectively "attachers") must therefore attach their facilities to these existing utility poles in order to provide their services.

Pole attachment law was developed to prevent abuse of the pole resource and ensure that communications attachers are able to install their facilities at just and reasonable rates, terms and conditions, despite the inherently superior bargaining position that monopoly pole

owners have over attachers. Rather than mitigate the monopoly power of pole owners, however, the rules challenged here by Petitioner Qwest (hereinafter "penalty rules") give pole owners additional leverage by improperly allowing them – indeed encouraging them – to demand and impose severe penalties on attachers and thus serve to strengthen a pole owner's ability to impose *un*just rates, terms and conditions on attachers contrary to Oregon's pole attachment enabling statute. ORS 757.273.

Additionally, although the PUC is tasked with protecting "the health [and] safety of all [utility] employees, customers, [and] the public," ORS 757.035, the PUC is also obligated to ensure that utilities do not recover more than their allowable share of costs for pole attachments. *See* ORS 757.282. Consequently, while the PUC may have implemented the penalty rules to encourage safe pole installation and maintenance practices, *see, e.g.,* PUC Judicial Review Record at Item 4 (describing rules), it was not authorized to provide a windfall to electric utilities in the process. The imposition of the challenged penalties on an attacher would provide the pole owner recovery of more than its allowable share of costs in direct violation of Oregon's pole attachment cost recovery statute.

Finally, the constant threat of substantial sanctions creates a hostile market environment for all communications attachers in Oregon. The more resources communications attachers are forced to spend on non-compensatory penalties, the less they have to invest in communications infrastructure and the development of advanced communications services for Oregon residents. The penalty rules, which far exceed the PUC's statutory mandate, thus undermine facilities-based competition, contrary to the express public policies of both the Oregon legislature and the United States Congress. Accordingly, the penalty rules are invalid and Qwest's Petition should be granted.

## ARGUMENT

### A. The PUC's Penalty Rules Exceed The Statutory Authority Of The Agency Because The Rules Contradict The Terms and Purpose Of The Enabling Statute Authorizing The PUC To Regulate Pole Attachments.

#### 1. Monopoly-Owned Utility Poles Are Essential Facilities And Are Therefore Subject To Regulation.

Utilities possess monopoly ownership of poles on which cable operators must rely to provide their services.[1] Local franchises, environmental restrictions and other legal and economic barriers preclude cable operators and others from placing additional poles in areas where poles already exist. Redundant aerial plant structures (*i.e.*, additional sets of utility poles) are therefore neither permissible nor feasible. Moreover, "in most instances underground installation of necessary cables is impossible or impractical. Utility company poles provide, under such circumstances, virtually the only practical physical medium for the installation of television cables."[2] Indeed, the United States Congress,[3] the Supreme Court,[4] federal courts,[5] the Department of Justice[6] and the Federal Communications Commission

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[1] "About 80 percent of the nation's poles are controlled by [electric] utility companies and the remaining 20 percent by phone companies * * * ." Ted Hearn, *Supreme Court Takes Cable Pole Case*, MULTICHANNEL NEWS, Jan. 29, 2001, at 34. Accordingly, although incumbent local exchange carriers like Qwest and Verizon own poles in Oregon, the state's electric utilities would appear to own more poles. Charter is attached to approximately 180,000 poles in the State of Oregon and, as a cable operator, owns virtually no poles.

[2] *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 247 (1987) (hereinafter "*Florida Power*").

[3] *See, e.g.*, 123 CONG. REC. H35006 (1977) (statement of Rep. Broyhill, co-sponsor of the Pole Attachments Act) ("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, the cable operators are virtually dependent on the telephone and power companies * * * .").

[4] *See Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 330 (2002) (hereinafter "*Gulf Power*") (stating 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.").

[5] *See, e.g., United States v. Western Elec. Co., Inc.* 673 F. Supp. 525, 564 (D.D.C. 1987) (stating that cable television companies "depend on permission from the Regional Companies for attachment of their cables to the telephone companies' poles and the sharing

("FCC"),[7] have all recognized the status of poles and conduit as "essential facilities" and thus bottlenecks to facilities-based competition in telecommunications and cable television markets. Effective regulation of these facilities is thus crucial to ensure access at just and reasonable rates, terms and conditions[8] and to promote facilities-based competition.[9]

**2. The Terms and Purpose Of Federal And Oregon Pole Attachment Regulation Is To Curb Utility Exploitation Of Its Monopoly Pole Ownership Position.**

The federal 1978 Pole Attachment Act ("PAA")[10] was the legislative response to substantial evidence of abuse by monopoly pole-owning utilities, including the imposition of "exorbitant fees and other unfair terms * * * on cable operators.[11] Congress recognized that without pole attachment regulation, "utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents from

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of their conduit space * * * . In short, there does not exist any meaningful, large-scale alternative to the facilities of the local exchange networks * * * .").

[6] *See, e.g., United States v. AT&T*, No. 74-1698, Plaintiff's First Statement of Contentions and Proof, Appendix, Tab 8 (D.D.C. filed Nov. 1, 1978) (cataloguing by the Justice Department of Bell Operating Company dominance of pole and conduit facilities).

[7] *See 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.").

[8] *See 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.").

[9] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034, *1045 (Jan. 13, 1998) ("Wireline video and telecommunications competition is heavily dependent on the ability of market participants to obtain access to utility poles, conduits and rights of way at reasonable rates.").

[10] Pub. L. No. 95-234, 92 Stat. 33 (1978) (codified at 47 U.S.C. § 224).

[11] *Amendment of Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of The Telecommunications Act of 1996*, Consolidated Partial Order On Reconsideration, 16 FCC Rcd 12103, ¶ 21 (2001) (hereinafter "*2001 FCC Order*") (citing S. REP. NO. 95-580, 95th Cong., 1st Sess. (1977), reprinted in 1978 U.S.C.C.A.N. 109); *see also Florida Power*, 480 U.S. at 247 (recognizing 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.").

cable TV systems in the form of unreasonably high pole attachment rates."[12] The statute instructs the FCC to adopt procedures necessary to hear and resolve complaints and to ensure just and reasonable rates, terms and conditions for the use of these essential facilities.[13]

> "[T]he predominant legislative goal for Congress in enacting the Pole Attachment Act was 'to establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust and unreasonable pole attachment practices on the wider development of cable television service to the public.'"[14]

Principles of nondiscrimination have also been implemented to protect telecommunications providers. The Telecommunications Act of 1996 (hereinafter "the 1996 Act") amended the PAA to expand the FCC's jurisdiction over poles and conduit to cover "telecommunications carriers" along with "cable television systems."[15] As amended, the PAA imposes upon all utilities, the duty to "provide * * * nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[16] This directive ensures that "no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields."[17] The PAA also sets forth a cost-based, pole attachment rent formula that "accomplishes key objectives of assuring, to both

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12 H.R. REP. NO. 94-1630 at 5 (1976).

13 47 U.S.C. § 224(b)(1).

14 *2001 FCC Order* at ¶ 21 (citing S. REP. NO. 95-580, 95th Cong., 1st Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 109).

15 For purposes of the PAA, the term "telecommunications carrier" does not include incumbent local exchange carriers, like Qwest and Verizon. *See* 47 U.S.C. § 224(a)(5). Therefore, neither Qwest nor Verizon are protected under the federal PAA.

16 47 U.S.C. § 224(f)(1).

17 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 1123 (1996).

the utility and the attaching parties, just and reasonable rates; establishes accountability for prior cost recoveries; and accords with generally accepted accounting principles."[18]

Indeed, application of the FCC's rate formula and the numerous other pole attachment rules and case law,[19] developed in response to Congressional mandate, ensures that facilities-based competition proceeds on fair rates, terms and conditions, notwithstanding monopoly ownership and control of distribution facilities and utilities' "superior bargaining position in pole attachment matters."[20]

The FCC is not the only permitted regulator in the field, however. States are allowed to adopt their own regulatory pole attachment regime by "certifying" to the FCC that they regulate "the rates, terms and conditions for poles attachments"[21] and have "issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments," that specifically "consider the interests of the subscribers of cable television services as well as the interests of the consumers of the utility services."[22] The State of

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18 *2001 FCC Order* at ¶ 15. Attachers to poles typically pay an annual rental rate for every pole on which they have an attachment. For cable attachers in FCC states, their annual rent is calculated under the cable rate formula set forth at 47 U.S.C. § 224(d). There is a separate telecommunications rate formula for attachments made by competitive local exchange carriers, which is set forth at 47 U.S.C. § 224(e). Specifically, both pole rate formulas rely on historical ("actual" or "embedded") publicly available and reported data reflected in a utility's regulatory accounts: ARMIS 43-01 Reports (for ILECs) and FERC Form 1 Reports (for electric utilities). Oregon has one pole attachment rate that applies to both cable and telecommunications attachers alike.

19 Unlike the PUC, which has heard relatively few, if any, pole attachment complaints, the FCC has adjudicated approximately 300 complaints. *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777 at ¶ 8, n. 37 (1998) (hereinafter "*1998 FCC Order*"). All utilities are therefore on notice that if an attacher files a complaint, the rates, terms and conditions of pole attachments will be reviewed and scrutinized administratively to ensure they are just and reasonable, as required by the PAA.

20 *TCA Mgmt. v. Southwestern Public Serv. Co.*, 10 FCC Rcd 11832, ¶ 15 (1995) (citing S. REP. NO. 95-580, 95th Cong. 1st Sess. at 13).

21 47 U.S.C. § 224(c).

22 47 C.F.R. § 1.1414(a)(1)-(3). In this regard, Oregon's certification to the FCC is arguably at risk. The penalty rules undermine "effective" pole attachment regulation in the state and

Oregon has made the requisite certification to the FCC that it regulates the rates, terms and conditions of pole attachments.[23] Like the federal PAA, Oregon's enabling statute authorizing the PUC to regulate pole attachments also aims to protect attachers by requiring that "[a]ll rates, terms and conditions made demanded or received by any public utility * * * for any attachment * * * shall be just, fair and reasonable."[24] To that end, the state adopted a statutory pole rental rate formula based on and similar to the FCC's.[25] Moreover, the "FCC requirements related to nondiscriminatory access for telecommunications providers and cable television [operators also] apply in Oregon."[26] Accordingly, the Court should look to federal pole attachment precedent for guidance when considering Qwest's Petition and reviewing its challenge to the PUC's penalty rules.

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essentially disregard "the interests of the subscribers of cable television services" as well as the interests of the citizenry of the State of Oregon in having safe pole plant, by allowing the diversion of scarce dollars towards the payment of excessive, non-compensatory penalties rather than upgraded and improved facilities and the deployment of new and advanced communications services, and undoubtedly making existing and future services more expensive. *See, infra* Section C (discussing how the sanctions rules are contrary to the goals of The 1996 Act and Oregon's own competitive goals).

[23] *See Public Notice, States That Have Certified That They Regulate Pole Attachments*, 7 FCC Rcd 1498 (1992).

[24] ORS 757.273.

[25] ORS 757.282(1); OAR 860-028-0110(2)-(3). The state and federal statutory formulas differ slightly. Under the FCC pole rental formula, the entire 40 inches of "clearance space" (*i.e.*, the distance required by law between the lowest electric line and the highest communications line on the pole) is considered "usable space." Under both the state and federal rental rate formulas, the more "usable space" on the pole, the lower the annual pole rent. In Oregon, however, the "clearance space" is considered "unusable." ORS 757.282(1). The more "unusable space," the higher the pole rent. In cases where an attacher is considered "compliant" and therefore entitled to a rental reduction under the PUC's rules, only 20 inches of that 40-inch clearance space gets added to the total usable space. Consequently, even when an attacher receives a "rental reduction" under the PUC's rules, they are still paying more to the pole owner than they would under the FCC formula, which has been held to satisfy the constitutional requirement that utilities receive "just compensation" for allowing third parties to attach to their poles. *Alabama Power v. F.C.C.*, 311 F.3d 1357, 1358 (11th Cir. 2002); *cert. denied*, 124 S.Ct. 50 (2003).

[26] Staff of the Oregon Public Utility Commission, Responses to Oregon Joint Use Association Clarification Questions Regarding Staff's Report on the Utility Pole, at 5 (Feb. 9, 2004) available at: http://www.puc.state.or.us/safety/workgrp/ojua-ltr.pdf.

### 3. The PUC's Penalty Rules Give Monopoly Electric Utilities The Kind Of Leverage Over Attachers That The PUC's Pole Attachment Regulations Must Protect Against.

Despite the express statutory mandate in the Oregon code commanding the PUC to ensure fair, just and reasonable pole rates, terms and conditions, and precedent under the PAA interpreting virtually identical statutory language, the PUC's penalty rules challenged here serve to *strengthen* the monopoly power over attachers that pole regulation was intended to protect against.[27] The PUC penalty rules therefore "depart[] from the legal standard expressed or implied in the enabling statute,"[28] exceed the statutory authority of the agency, and are therefore void and unenforceable.

Essentially, the penalty rules, which are set forth in more detail in Petitioner Qwest's "Summary of Rules" and verbatim in Qwest's Excerpt of Record, give pole owners the right to impose the following penalties on pole occupants for failing to perform certain "duties:"[29]

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[27] As noted above, Charter does not believe that the PUC has ever issued a decision interpreting ORS 757.273, the enabling statute mandating just, fair and reasonable rates, terms and conditions. The FCC, on the other hand, has adjudicated 300 cases interpreting the same just and reasonable standard under the PAA, and thus this Court should look to federal precedent for guidance when evaluating the rules challenged here. Indeed, PUC Staff has indicated that it would rely on federal pole attachment law as a basis for Oregon's pole attachment principles. *See The Battle for the Utility Pole and the End-Use Customer*, A PUC Staff Report, Attachment E—Pole Joint Use Principles, E-2 - E-3 (Dec. 15, 2003) (stating that federal pole attachment laws set the basic principles for nondiscriminatory access and referring to the applicability of federal pole attachment law, including "FCC regulations and orders"), available at: http://www.puc.state.or.us/safety/workgrp/staffrpt.pdf.

Other "certified states" also rely on federal pole attachment authority for guidance in various pole attachment matters. For example, the State of Alaska's Public Utility Commission recently adopted the FCC pole attachment rental rate formula because "the formula provides the right balance given the significant power and control of the pole owner over its facilities."). *Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint-Use Regulations Adopted under 3 AAC 52.900 – 3 AAC 52.940*, 2002 Alas. PUC LEXIS 489, * 6 (2002). At least 8 of the 19 states that are certified to regulate pole attachments also follow the FCC approach, including the neighboring States of California, Idaho and Washington.

[28] *Gilliam County v. Dep't of Envtl. Quality of State of Oregon*, 849 P.2d 500, 505 (Or. 1993), *rev'd and remanded sub nom Oregon Waste Systems, Inc. v. Dep't of Envtl. Quality of Oregon*, 511 U.S. 93 (1994), *on remand*, 876 P.2d 749 (1994).

[29] "Duties of Pole Occupants" are set forth at OAR 860-028-0120.

(1) the higher of $500 per pole or 60 times the owner's rental fee per pole, if the occupant does not have a written contract with the pole owner;

(2) the higher of $250 per pole or 30 times the owner's rental fee per pole, if the occupant does not have a permit issued by the pole owner for each pole; and

(3) the higher of $200 per pole or 20 times the pole owner's annual pole rental fee, if the occupant fails to apply for a permit for a service drop pole within seven days of installation[30] and fails to install and maintain all its attachments in compliance with (a) the pole owner's contract (b) the pole owner's permits and (c) the PUC's safety rules.[31]

While Charter considers each of these penalty rules to be excessive and non-compensatory, and addresses those aspects of the rules below, the "no contract" penalty is a particularly striking example of how the penalty rules undermine the purpose of pole regulation. Indeed, the very existence of the "no contract" penalty, coupled with the essential nature of monopoly-owned poles, gives pole owners an overwhelming advantage when negotiating the required "written contract"—one of the very abuses pole regulation was intended to prevent.[32]

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30 "A service drop is an adjunct line to the electric supply or communications main line. Where it is necessary to maintain ground clearance a pole may be used to provide support for the service drop. A subscriber service drop is a cable connecting a subscriber to the cable distribution network via a tap located on or near a distribution pole. In cases where it is necessary for the drop to cross a roadway, a drop pole is placed on the side of the roadway opposite the cable tap and the drop is hung over the roadway suspended on the distribution pole and the drop pole. The cable then enters the subscriber's premises from the drop pole." *Mile Hi Cable Partners v. Pub. Serv. Co. of Colo.*, 15 FCC Rcd 11450, ¶ 17 (2000). Because state and federal requirements oblige cable operators to install service to customers within a certain time period, the FCC has ruled that service drops may be installed prior to seeking a permit. *Id.* at ¶ 19. Likewise, the PUC allows "pole occupants to install a service drop without [] a permit" but requires the occupant to "[a]pply for a permit within seven days of installation." OAR 860-028-0120(3)(a).

31 OAR 860-028-0120, 860-028-0130, 860-028-0140, 860-028-0150.

32 "For example, the relevant Senate report [associated with the PAA] refers to testimony received in committee concerning: 'the local monopoly in ownership or control over of poles' by the utilities; the 'superior bargaining position' enjoyed by utilities over cable operators in negotiating rates terms and conditions for pole attachments; and allegations of

Even with extensive federal regulation of utility pole attachments, "utilities still maintain a superior bargaining position over CATV systems in negotiating the rates, terms and conditions for pole agreements" because of their control over essential facilities.[33] Nevertheless, in states where the FCC has jurisdiction over pole attachments, attachers may rely on a substantial number of pole attachment rules and decisions through which the FCC and reviewing courts have established the boundaries of just and reasonable terms and conditions.

In addition, attachers have other tools that serve to level the playing field during written contract (or "pole attachment agreement") negotiations. For example, pole owners in FCC states are required to negotiate pole attachment agreements in "good faith."[34] Additionally, when attachers are presented with an unjust and unreasonable pole attachment agreement that a utility refuses to negotiate commensurate with federal pole attachment law, attachers can also rely on the "sign and sue" rule. The "sign and sue" rule was established to ameliorate the superior bargaining position held by utilities and ensure that attachers receive

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'exorbitant rental fees and other unfair terms' demanded by the utilities in return for the right to lease pole space. As the Senate report and the case law bear out, Congress clearly acted to protect cable operators from anticompetitive conduct by utilities." *Heritage Cablevision Assoc. of Dallas v. Texas Util. Elec. Co.*, 6 FCC Rcd 7099, ¶ 14 (1991) (internal citations omitted).

33 *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles,* Report and Order, 2 FCC Rcd 4387, ¶ 77 (1987) (hereinafter "*1987 FCC Order*"). *See also, Federal Communications Commission Issues Biennial Regulatory Review Report For The Year 2000,* 2001 FCC LEXIS 378, Part 1, Subpart J-Pole Attachment Complaint Procedures (2001) ("At the time of adoption of section 224, utilities enjoyed a superior bargaining position over attachers in negotiating the rates, terms and conditions for pole attachments due to the utilities' monopoly position in ownership or control of these facilities. That monopoly position has not changed, hence there remains the possibility of anticompetitive practices by utilities against cable or competitive telecommunications providers in the absence of section 224.").

34 *See 1987 FCC Order* ("Our willingness to review contract provisions and the possibility of either revising an unlawful term or condition or ordering an adjustment to the maximum rate because of an onerous term or condition should serve as an impetus to utilities to negotiate in good faith with regard to terms and conditions of the agreement before they are presented to the [FCC].").

the full protections of the PAA. The rule, which has been upheld by the United States Court of Appeals for the District of Columbia Circuit, allows attachers to "sign" unreasonable agreements and "sue" on them at the FCC later.

> "For example, one scenario in which 'sign and sue' is likely to arise is when the attacher acquiesces in a utility's 'take it or leave it' demand that it pay more than the statutory maximum or relinquish some other valuable right—without any *quid pro quo* other than the ability to attach its wires on unreasonable or discriminatory terms. Of course the Pole Attachments Act was designed to prevent such an exercise of monopoly power that would nullify the statutory rights of cable systems or telecommunications carriers to obtain both immediate access and timely regulatory relief to the extent access is unreasonable or discriminatory. The utility is statutorily required to grant prompt, nondiscriminatory access and may not erect unreasonable barriers or engage in unreasonable delaying tactics. So in this scenario, where the utility gives nothing of value in exchange for the attacher's coerced 'agreement' to accept unreasonable or discriminatory access, the utility has no right to complain if the attacher 'signs and sues' to challenge this abuse of the utility's monopoly control over the essential transport facilities."[35]

In comparison, the penalty for "no written contract" of $500 per pole or *sixty* times the rental fee per pole gives pole owners in Oregon a mechanism that actually *reinforces* their superior bargaining position over attachers, contrary to the precise intended effect of leveling the playing field. In fact, "negotiated" pole attachment agreements in Oregon are presumed "just, fair and reasonable," *regardless* of any negotiating problems or other deviations from the "just, fair and reasonable" standard unless found otherwise.[36]

As a result, (and especially given that pole owners in Oregon are under no express obligation to negotiate in good faith as they are in states regulated by the FCC), when

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[35] *Southern Co. Serv., Inc. v. F.C.C.*, 313 F.3d 574, 583 (D.C. Cir. 2002) (quoting, with approval, the agency's brief and upholding, *inter alia*, the "sign and sue" rule).

[36] ORS 757.285; *contra Selkirk Comm., Inc. v. Florida Power and Light Co.*, 8 FCC Rcd 387, ¶ 17 (1993) ("Due to the inherently superior bargaining position of the utility over the cable operator in negotiating the rates, terms and conditions for pole attachments, pole attachment rates cannot be held reasonable simply because they have been agreed to by a cable company."). As discussed below, however, unlike the FCC's complaint regime, the PUC's complaint procedures are untested, and no formal rules exist in Oregon to guide the parties in negotiating a just and reasonable agreement.

presented with a "written contract" that contains unjust and unreasonable terms, attachers in Oregon are forced to accept one of two unattractive alternatives: (1) either sign the unreasonable agreement and try to operate under its terms and conditions and perhaps bring a complaint at the PUC where it is highly uncertain that the outcome could benefit the attachers; or (2) refuse to sign the agreement and face severe penalties or a potential collections action upon refusal to pay, as well as forced removal of an existing network.[37]

Given these options, an attacher may have no choice but to accept the first alternative to ensure the continued delivery of its services.[38] Forced acceptance of one bad option over a worse option, is, however, a factor that led to pole regulation in the first instance.[39]

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[37] This scenario essentially describes a pending action at the PUC between Verizon, initiated by one of the state's public utility districts. *See 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 penalties for "no contract" and the removal of Verizon's attachments). (Charter references this proceeding in support of its argument that the penalty rules undermine pole regulation, and does not concede that the penalty rules are valid or that the PUC otherwise had the authority to adopt the rules or allow pole owners to impose them. In addition, given the dearth of precedent from the PUC and the Oregon courts, a favorable resolution of the complaint or possible relief from the penalties simply cannot be reasonably evaluated). Like Qwest, Verizon also owns poles and therefore has much more leverage than a cable operator like Charter. Charter itself was threatened with "no contract" sanctions of approximately $6.7 million dollars and removal of its facilities by a pole owner eager to complete "negotiations" by a certain date and felt compelled to sign the contract. *See* Charter Communications, Inc., Comments in Response To: "*The Battle for the Utility Pole and the End-Use Customer*," A PUC Staff Report, Corrected Version, p. 11 (Feb. 27, 2004), available at: http://www.puc.state.or.us/safety/workgrp/respltrs/17chartr.pdf.

[38] Even the PUC Staff recognizes that the "no contract" penalty rule gives pole owners increased leverage over attachers. *See The Battle for the Utility Pole and the End-Use Customer*," A PUC Staff Report, ( Dec. 15, 2003) (proposing to incorporate a "principle" in its rules that pole owners "shall not apply pole attachment sanctions to existing attachments * * * to force a revised contract on an existing occupant.").

[39] In the days before regulation, cable operators seeking to attach coaxial facilities to poles faced delays in installation, overcharges, restrictive tariffs forbidding competitive telecommunications, and efforts to force cable operators into "lease-back" arrangements in which the telephone company would have exclusive control over the installation, maintenance, and operation of the cable attachments on the pole. *See, e.g., Communications Act Amendments of 1977: Hearings on S. 1547 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong. (1977) ("*S.1547 Hearings*"); S. REP. NO. 95-580, at 13 (1977); *Better T.V., Inc. of Duchess County, N.Y. v.*

Resort to the PUC's complaint procedures, would offer little solace to an attacher. For example, in the event an attacher chooses to sign a "written contract" that would be considered *per se* unreasonable at the FCC, and sues upon execution, that agreement is already "presumed reasonable" in Oregon, as mentioned above. In addition, aside from the rental rate and penalty rules, the PUC has not established *any* rules to balance the interests of the parties or any boundaries of "fair, just and reasonable" terms and conditions. Nor has the PUC resolved a complaint challenging the rates, terms and conditions of a pole attachment agreement (to Charter's knowledge) under the "fair, just and reasonable" standard. Under these circumstances, the outcome of such a complaint is, at best, uncertain.

An attacher would fare even worse in the event it refused to sign an unreasonable "written contract." At that point, under the penalty rules, a pole owner is within its rights to impose the sanctions *even if* the agreement demanded by the utility is one-sided and unreasonable. The PUC's complaint procedure rules provide no relief to an attacher in such a case. Indeed, only the pole owner is armed with an enforceable rule.[40] The attacher might

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*New York Tel. Co.*, 31 F.C.C.2d 939, 967 (1971), *recon. denied,* 34 F.C.C.2d 142 (1972) (stating that independent operators "quickly took the hint about the lack of manpower to perform makeready work and accepted channel service rather than run the risk of having the competing channel service customer get such a head start as to make a grant of its request for a pole attachment agreement an empty and worthless gesture.") *Applications of Telephone Companies For Section 214 Certificates For Channel Facilities Furnished To Affiliated Community Antenna Tele. Systems*, 21 F.C.C.2d 307, 323-29 (1970) (stating that cable systems "have to rely on the telephone companies for either construction and lease of channel facilities or for the use of poles for the construction of their own facilities."); *General Tel. Co. of California (formerly California Water & Tel. Co.) The Associated Bell System Companies, Applicability of Section 214 of the Communications Act with Regard To Tariffs for Channel Service for Use by Community Antenna Tele. Systems*, 13 F.C.C.2d 448, 463 (1968) (by control over poles, the telephone company is in a position to preclude an unaffiliated CATV system from commencing service).

[40] Although the "no contract" penalty provides the best example of how the challenged penalty rules strengthen electric utilities' monopoly status, the other penalty rules also fortify that power. For example, as required by and at the approval of the PUC, Charter has undertaken a significant "Inspection/ Correction and Permit Reconciliation Program." To date, Charter has paid to inspect and document the safety violations for all parties, including pole owners, on approximately 130,000 poles. Although it is not Charter's responsibility,

also face a potential state court collections action upon its refusal to pay; and the pole owner may sue to have the attacher's facilities removed.[41]

For these reasons, the "no contract" penalty rule undermines the purpose of pole regulation established by the Oregon legislature—*i.e.*, to mitigate the superior bargaining position held by utilities—and therefore its promulgation exceeds the PUC's statutory authority. It is invalid *per se*.

**B. The PUC's Rules Exceed The Statutory Authority Of The Agency Because The Non-Compensatory Nature Of The Penalty Rules Allows Utilities To Recover More Than They Are Entitled To Under Oregon Pole Attachment Law.**

The PUC's primary responsibility is "to protect * * * customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate services at fair and reasonable rates."[42] Consistent with that charge, the PUC is required to ensure that the rates, terms and conditions demanded by utilities for pole

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financially or otherwise, to provide such a service to pole owners, Charter has incurred approximately $7-8 million on its program, rather than funnel millions of dollars to pole owners in non-compensatory penalties, in exchange for pole owner promises that penalties for violating safety rules would not be imposed. Charter has even paid to correct many violations that Charter arguably is not responsible for. Even so, some pole owners have nevertheless imposed penalties on Charter. Moreover, even though the same legislation that resulted in the dubious penalty rules also provides for a rental "reduction" for compliant attachers, only 25% of the pole owners with whom Charter has relationships have given Charter the reduction. Likewise, the prospect of such great sums from the penalties seems to have created an improper profit motive for pole owners. For example, the penalties have allegedly encouraged some pole owners to charge "no permit" sanctions for every single item placed on a pole by an attacher, even though the pole owner did not require a permit for the initial installation. *See, e.g., Verizon v. Portland General Elec. Co.*, Civ. No. 03-1286-MO, filed Sept. 17, 2003 (D. Or.) (alleging, *inter alia*, that PGE has begun to charge unauthorized attachment penalties for miscellaneous equipment for which no permit was ever required). The District Court suit was stayed pending resolution of a pending action filed by PGE at the PUC seeking "no contract" and other penalties under the penalty rules. *Verizon v. Portland General Electric Co.*, 2004 WL 97615 (D.Or. 2004). Again, Charter notes this case for the limited purposes discussed herein, not to otherwise agree that the PUC had authority to promulgate the penalty rules or permit pole owners to impose them.

41 *See* discussion *supra* note 37.

42 ORS 756.040.

attachments "shall be just, fair and reasonable."[43] To that end, and in accordance with the basic "revenue-requirement-standard" of utility rate regulation, which allows a utility "to set rates that will both cover operating costs and provide an opportunity to earn a reasonable rate of return on the property devoted to the business,"[44] a just and reasonable pole attachment rent in Oregon:

> "[E]nsure[s] the public utility, telecommunications utility or consumer-owned utility the recovery of not less than all the additional costs of providing and maintaining pole attachment space for the licensee nor more than the actual capital and operating expenses, including just compensation of the * * * utility attributable to that portion of the pole, duct or conduit used for the pole attachment, including a share of the required support and clearance space in proportion to the space used for pole attachment above minimum grade level, as compared to all other uses made of the subject facilities, and uses that remain available to the owner or owners of the subject facilities."[45]

Likewise, under the federal pole attachment rent statute, upon which the Oregon rent statute is based, a rate is just and reasonable:

> "[I]f 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 * * * 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 * * * ."[46]

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43 ORS 757.273.

44 CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES 176, (4th ed. 1993).

45 ORS 757.282(2). With regard to the "just compensation" reference in the Oregon rate statute, it is important to note that the FCC formula, which the Oregon rate statute is modeled after, satisfies just compensation requirements. *See Alabama Power*, 311 F.3d at 1358. In *Alabama Power*, the Court found that the formula provides just compensation except possibly where poles are unusually crowded and even then, the formula exceeds marginal cost sufficiently that crowded poles should not be subject to higher rentals outside of the range established by the formula. *See also, Florida Power*, 480 U.S. at 253-54 (upholding the FCC formula and finding that it could not be "seriously argued, that a rate providing for the recovery of fully allocated costs, including the cost of capital, is confiscatory.").

46 47 U.S.C. § 224(d).

In other words, *both* the Oregon and federal statutes create a similar range of allowable compensation relating to pole attachments. The low end of the range is the "incremental costs [,or] those that the utility would not have incurred 'but for' the pole attachments in question."[47] The high end of the range is the fully-allocated "operating expenses and capital costs [including a return on investment] that a utility incurs in owning and maintaining poles that are associated with the space occupied by the pole attachments."[48]

Most utilities recover the "incremental" or out-of-pocket costs in advance of any pole attachment or conduit occupancy through the imposition of "makeready" expenses and in this way receive at least the minimum required under both rate statutes (even before any pole rental is paid).[49] Anything above incremental costs is therefore a contribution to the utility's overall revenue requirements. More significantly, *any* costs that a utility imposes on an attacher beyond the fully allocated

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47 *1998 FCC Order*, ¶ 96 n. 303.

48 *Id.* Although the Oregon pole attachment rent statute sets a range of recoverable costs, as does the federal statute, the PUC's rules only refer to the upper range of compensation in the event of a dispute. *See* OAR 860-028-0110(2)-(3) ("A disputed pole attachment rental rate will be computed by taking the pole cost times the carrying charge times the portion of the usable space occupied by the licensee's attachment."). OAR 860-028-0110(2)(a) defines "carrying charge" as "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."). This is similar to the federal rule that applies in disputed cases: *i.e.*, when application of the formula reduces a contractual rental rate the FCC will only reduce the rate to the statutory maximum. *See, e.g., Florida Power,* 480 U.S. at 254 (1987). Indeed, in Charter's experience most if not all utilities in FCC states charge the fully allocated (maximum upper range) pole rent.

49 *See, e.g., Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453, ¶ 7 (2000) (hereinafter "*2000 FCC Order*"). "'Makeready' generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities." *Id.* at n. 40. The PUC's pole rules specify that the "rental rate[] * * * do[es] not cover the costs of special inspections, or preconstruction, make ready, change out and rearrangement work. Charges for those activities shall be based on actual (including administrative) costs." OAR 860-028-0110(6). The PUC pole rules that existed prior to the implementation of the rules challenged here, included the same language. *See* OAR 860-022-0055(6), which was replaced by OAR 860-028-0110(6).

rental rate that are either (1) also recovered in the rent or (2) do not reflect actual costs incurred, would necessarily exceed the maximum cost recovery allowed under both the federal and state statutes.

The penalties at issue here are imposed in addition to the fully allocated rental rate and do not reflect or even attempt to approximate the actual costs that are or may be incurred by pole owners when "pole occupants" fail to perform their requisite "duties."[50] Indeed, under separate rules, pole owners in Oregon are reimbursed for "any fines, fees, damages, or other costs the [attacher's] attachments cause the pole owner."[51] Thus, as Charter explains more fully below, looking to federal authority for guidance as necessary, any imposition of the penalties allowed under Oregon's penalty rules amounts to over-recovery under Oregon's own pole attachment cost recovery statute, and the adoption of the rules is invalid. Notwithstanding any intent by the PUC to use the penalty rules to encourage safe pole installation and maintenance practices by imposing certain "duties" on "pole occupants," the PUC was not authorized to provide a windfall to electric utilities and thus violate its mandate to ensure just and reasonable rates, terms and conditions in the process.

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[50] Consistent with the PUC pole attachment rental rate regulations, which only reference the upper range of the allowable compensation, *see* OAR 860-028-0110(2)-(3), it is Charter's experience that most, if not all, Oregon utilities impose, at least, the fully allocated rent.

[51] OAR 860-028-0110(8). *See also id.* at 110(6) ("The rental rates * * * do not cover the costs of special inspections or preconstruction, make ready, change out, and rearrangement work. Charges for those activities shall be based on actual (including administrative) costs."). It is also important to note that virtually every pole attachment agreement requires an attacher to indemnify the pole owner for any and all damages caused by the attacher and also contains insurance requirements. Many agreements also require performance bonds.

### 1. The Penalties Allowed Under The PUC's Penalty Rules Are Neither Compensatory Nor Intended To Approximate Actual Damages And Their Imposition Would Therefore Result In Over-Recovery To The Pole Owner.

FCC and other precedent help illustrate how imposition of the penalty rules here would result in unjust and unreasonable over-compensation for utilities in violation of federal as well as Oregon law. Resort to federal law in this case is particularly relevant, as Oregon's pole rate statute is based on the federal statute and both the federal and state statutes place the same limitations on utility cost recovery.

Long-standing FCC precedent dictates that "in arriving at an appropriate rate, it is important to ensure that the attaching entity is not charged twice for the same costs, once for make-ready costs and again for the same costs if the business expense is reported in the corresponding pole or conduit capital account," for calculation of the fully allocated rent.[52] Similarly, attaching parties "may be held only to the agreed to obligation to reimburse [a utility] for the actual costs of necessary * * * expenses," incurred beyond the fully allocated costs.[53] Even the "unauthorized attachment"

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[52] *2000 FCC Order* at ¶ 7 (citing *1987 FCC Order*); *see also Texas Cable and Telecomm. Ass'n v. GTE Southwest, Inc.*, 17 FCC Rcd 6261, ¶ 11 (2002) ("The general principle that a utility may not recover the same expenses twice, once as a make ready charge and again as an allocated portion of an expense account included in the calculation of the annual pole attachment rental fee, is not a new concept * * * .").

[53] *Texas Cable & Telecomm. Ass'n, et al. v. Entergy Serv., Inc.* 14 FCC Rcd 9138, ¶ 10 (1999). *See also Cavalier Tele., LLC v. Virginia Electric and Power Co.*, 15 FCC Rcd 9563, ¶ 22 (2000) ("We look closely at make-ready and other charges to ensure that there is no double recovery for expenses for which the utility has been reimbursed through the annual fee. The record contains no explanation of the fees contested by the [attacher] other than that the fees are not otherwise recovered by the [pole owner]. The application fee appears to be an administrative fee for costs associated with the application process and does not appear to reflect actual costs. It may be a recurring cost recoverable through the annual fee and included in the carrying charges when calculating the maximum rate. If so, the application fee effectively increases the annual fee beyond the maximum permissible rate and, therefore, results in an annual fee that is unjust and unreasonable. Because [pole owner] provided no explanation that the administrative costs associated with permit application processing are not otherwise included in the carrying charges, we find that the fees are an unjust and unreasonable rate, term or condition."); *vacated by settlement, Cavalier Telephone Settlement*

penalty or "fee" the FCC allows utilities to recover for unpermitted pole attachments (the only type of "penalty" allowed in FCC states, applied when an attacher fails to obtain a permit for attaching to a pole) is required to be reasonable and to approximate actual damages for back rent owed so as not to overcompensate the utility.[54] None of the penalties under the PUC's penalty rules is compensatory or even attempts to approximate actual damages that may be incurred by pole owners for the failure of "pole occupants" to perform their requisite "duties."

**a. The Penalty For No Contract Is Neither Compensatory Nor Intended To Approximate Actual Damages And Its Imposition Would Result In Over-Recovery.**

The "no contract" penalty is not designed to compensate a pole owner for an attacher's failure to enter into a "written contract." Rather, the penalty is set at an arbitrary amount (*i.e.*, the higher of $500 per pole or 60 times the annual rate per pole) and merely punishes the attacher for its failure to carry out its "duty" to have a written contract.[55] It is

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*Order*, 17 FCC Rcd 24414 (2002). The vacatur notwithstanding, the FCC affirmed that its decision to vacate did "not reflect any disagreement with or reconsideration of any of the findings or conclusions contained" in the original order issued in 2000. *Id.* at ¶ 19.

By the same token, "[a]n underlying principle of [FCC] regulation of pole attachments, based on Congressional mandate and judicial interpretation, is that costs incurred in regard to poles and their attachments which result in a benefit should be borne by the beneficiary." *Newport News Cablevision, Ltd. v. Virginia Elec. and Power Co.*, 7 FCC Rcd 9, ¶ 8 (1992).

[54] *See, e.g., The Cable Television Ass'n of Georgia v. Georgia Power Co.*, 8 FCC Rcd 16333, ¶ 22 (2003) (rejecting an unauthorized attachment fee back to the date of the last pole audit because "[w]hile providing for calculation based on the date of the last [audit] might be a reasonable proxy where no other information is available, [that standard] precludes the use of more precise information regarding attachment, which would permit an accurate calculation of back rent."). Some utilities perform "pole audits" to determine the number of poles an attacher occupies, for pole rental assessment purposes. There is no FCC or other legal requirement to perform such audits, however, so although some utilities perform audits regularly, some utilities perform them less frequently or not at all.

[55] For an operator like Charter, which occupies approximately 180,000 poles in the State of Oregon, there is a great deal of exposure under this penalty rule. The average pole rate in Oregon ranges between ten and twelve dollars. Portland General Electric, for example, currently charges Charter a pole rent of $11.65 per pole. Multiplying $11.65 by 60 results in a per pole penalty of approximately $700 per pole! Indeed, for attachers, the prospect of paying such extreme non-compensatory penalties is precisely what gives pole owners such

difficult to conceive, however, what possible damage a pole owner would suffer in the event an attacher failed to have a written contract, beyond the actual "damages" a pole owner is entitled to under other regulatory provisions.[56] Indeed, Charter understands that some pole owners and attachers have operated normally for years in Oregon without a formal written contract.

**b. The Penalty For No Permit Is Neither Compensatory Nor Intended To Approximate Actual Damages And Its Imposition Would Result In Over-Recovery.**

Under the PUC's rules, a pole occupant's failure to have a permit may result in a penalty that is the *higher* of "$250 per pole" or "30 times the owner's annual rental fee per pole."[57] This penalty is also arbitrary rather than compensatory or reflective of the actual costs that may be incurred when an attacher does not have a permit. For example, the FCC attempts to approximate back rent owed as the "penalty" or "fee" and prohibits the inclusion of any other costs unless actually incurred, in the event of an unpermitted attachment because unpaid pole rent is the damage a pole owner suffers when an attacher fails to obtain a permit. Consequently, the FCC has ruled that:

> "[a]though an unauthorized attachment penalty may exceed the annual pole attachment rent, the amount of the penalty and the circumstances under which it is imposed must be just and reasonable * * * . [The Pole Owner] suggests that the cost avoided by [the Attacher] for unauthorized attachments is the present value of fourteen years of annual fees plus some speculative amount related to supposed increased safety risks and administrative costs. First, it is unreasonable to infer that the alleged unauthorized attachments at issue have existed for fourteen years. Second, because [the Attacher] must always comply with safety concerns, there is no cost avoided by [the Attacher] related to safety issues. Third, because [the Attacher] is obligated to pay the maximum allowable rent, which is based upon

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leverage over attachers during contract negotiations and, at the same time, seems to have created an improper profit motive for pole owners.

56 *See* OAR 860-028-0110(6) and (8) (permitting pole owners to recover all actual and other costs incurred, including "damages," for pole attachments beyond the fully allocated rental rate).

57 OAR 860-028-0140(1)(a)-(b).

> fully allocated costs, any indirect administrative costs are recovered in the annual fee."[58]

It is unlikely, however, that any attachments in Oregon have existed for 30 years without having been detected previously by the pole owner in a pole audit or some other type of pole inspection. Moreover, even if the last audit was 30 years ago, "a hard-and-fast rule requiring back rent to the date of the last inspection could grossly overcompensate [the pole owner] if an unauthorized attachment were installed long after the last inspection."[59] Further, if the pole owner does incur other costs in the event of an unpermitted attachment, pole owners in Oregon are fully compensated for all of their actual costs.[60] Thus, this penalty is clearly not intended to compensate for or approximate back rent owed to the pole owner or any other costs that may be incurred on account of an unpermitted attachment.

The FCC also recognizes that an unauthorized attachment fee that does not approximate the back rent actually owed, is "unenforceable on grounds of public policy as a

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58 *Mile Hi Cable Partners v. Pub. Serv. Co. of Colo.*, 15 FCC Rcd 11450, ¶¶ 10-13 (2000), *aff'd*, 17 FCC Rcd 6268 (2002) ("We find that the Bureau's determination—*i.e.*, that a just and reasonable unauthorized attachment fee is five times the annual rent that [the attacher] would have paid if the attachment had been authorized—is appropriate in these circumstances."), *aff'd*, *Pub. Serv. Co. of Colo. v. F.C.C.*, 328 F.3d 675, 680 (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 figured 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.").

59 *Georgia Power* at ¶ 22.

60 *See supra* notes 51 and 57.

penalty."[61] This is similar to Oregon law that prohibits private parties from imposing penalties that are disproportionate to any damage they could suffer.[62]

### c. The Penalty For Safety Violations Is Neither Compensatory Nor Intended To Approximate Actual Damages And Its Imposition Would Result In Over-Recovery.

Finally, none of the three penalty rules under which pole owners can penalize an attacher $200 per pole or 20 times the annual rent, whichever is higher, for safety violations (*i.e.*, failure to maintain and install attachment in compliance with the pole owner's contract, permit, or the PUC's safety rules) compensate the pole owner for any actual losses.[63] Pole owners are compensated under a separate regulatory provision for "any fines, fees, damages, or other costs the licensee's attachments cause the pole owner to incur" as the result of a deficient attachment, including the cost of correction.[64] While compensating a pole owner for the actual costs incurred to correct a safety violation or for associated damages is reasonable under the federal rules, the FCC does not allow pole owners to impose "penalties" or any other non-compensatory expense for safety violations, because it would result in over-recovery.[65]

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61 *Mile Hi Cable Partners, LP, et al v. Pub. Serv. Co. of Colorado*, 17 FCC Rcd 6268 (2002) (citing the *Restatement (Second) of Contracts* § 356). For these same reasons, the penalty for failure to apply for a drop pole permit, OAR 860-028-0150(1), if imposed, would similarly exceed the maximum allowable recovery.

62 *See* Qwest Brief at Section B.2 (*citing Secord v. Portland Shopping News*, 126 Or. 218, 223, 269 P.2d 228 (1928).

63 OAR 860-028-0150 ("Violations of Other Duties").

64 OAR 860-028-0110(8). This provision was also in existence prior to the implementation of the new rules. *See* prior rule 860-022-0055(8).

65 *See, e.g., Mile Hi*, 17 FCC Rcd 6268, ¶ 12 (2002) ("[T]here is no basis in the record to support * * * exemplary or punitive damages beyond compensatory damages, and indeed, [pole owner] has attempted to justify its fee in terms of its actual losses. [Pole owner] was unable to support its claim for the present value of fourteen years of annual fees plus some speculative amount related to alleged increased safety risks and administrative costs. Just and reasonable administrative costs associated with a pole attachment survey are fully recoverable in addition to any unauthorized attachment fee and therefore may not be included in the unauthorized attachment fee. [The attacher] must also pay all just and reasonable costs

For these reasons, the imposition of any one of these penalties by a pole owner would result in over-compensation to the pole owner and thus exceed the maximum recovery allowed under the Oregon cost recovery statute. The penalties, and any contract provisions incorporating them, are therefore void.

### C. The PUC's Penalty Rules Exceed The Statutory Authority Of The Agency Because The Rules Undermine The Promotion Of Communications Competition In Violation Of The Express Public Policies of Both The State And Federal Governments.

"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."[66] The PUC is charged with administering "the statutes with respect to telecommunications rates and services in accordance with this policy."[67]

Similarly, in passing the 1996 Act, Congress hoped to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening telecommunications markets to competition * * * ."[68] The "Telecommunications Act of 1996 * * * charges the [FCC] with 'encourag[ing] the

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associated with safety compliance issues in addition to any unauthorized attachment fee. [Pole owner] was unable to provide support for actual losses in excess of the unauthorized attachment fee approved by the [Cable] Bureau."), *aff'd Pub. Serv. Co. of Colo. v. FCC*, 328 F.3d 675, 679-80 (2003).

66 THE STATUS OF COMPETITION AND REGULATION IN THE TELECOMMUNICATIONS INDUSTRY, PUBLIC UTILITY COMMISSION OF OREGON, Jan. 2004, at 1-4 (citing ORS 759.015).

67 ORS 759.015. *See also* Public Utilities Commission Website, *History Duties and Functions at* http://www.puc.state.or.us/consumer/history.htm ("The Oregon Public Utility Commission regulates utility industries to ensure that customers receive safe, reliable services at reasonable rates, while promoting competitive markets.").

68 H.R. CONF. REP. No. 104-458 (1996). The Communications Act of 1934, as amended by the Telecommunications Act of 1996, applies "to all interstate and foreign communications by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio * * * . The provisions of this Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in title VI [Cable Communications]." 47 U.S.C. § 152(a).

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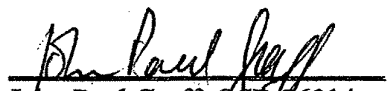

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