

**ITEM NO. 1**

**PUBLIC UTILITY COMMISSION OF OREGON  
STAFF REPORT  
PUBLIC MEETING DATE: February 24, 2009**

**REGULAR**   X   **CONSENT**        **EFFECTIVE DATE**       Upon Approval      

**DATE:** February 17, 2009

**TO:** Public Utility Commission

**FROM:** Jerry Murray

**THROUGH:** Lee Sparling and JR Gonzalez

**SUBJECT:** TILLAMOOK PEOPLE'S UTILITY DISTRICT: (Docket No. DR 42) Petition for a Declaratory Ruling pursuant to ORS 756.450 regarding pole attachments.

**STAFF RECOMMENDATION:**

Staff recommends that the Commission deny the Petition for Declaratory Ruling submitted by Tillamook People's Utility District (TPUD) on the grounds that the Petition is too complex and involves too many potential factual issues for a declaratory ruling process. Staff instead recommends that TPUD use the Commission's complaint process set forth in Chapter 756 and applicable Commission procedural rules in seeking resolution of its pole attachment and safety issues with Charter Communications, Inc. (Charter).

**DISCUSSION:**

The Commission has discretion to issue declaratory rulings under ORS 757.450. Under this statute, the Commission makes decisions based on the applicability of any rule or statute enforced by the Commission to a set of assumed facts presented by the petitioner. A declaratory ruling is binding between the Commission and the petitioner on the facts assumed.

TPUD is a consumer-owned electric utility subject to regulation by the Commission's pole attachment and safety regulations pursuant to ORS Chapters 756 and 757. On December 23, 2008, TPUD filed a "Petition for Declaratory Ruling" (Petition) pursuant to ORS 756.450 in order to determine whether it may charge Charter costs allegedly incurred by TPUD to enable Charter to correct its safety violations, including costs incurred by TPUD to replace existing poles or rearrange facilities.

The rules of the Oregon Public Utility Commission (OPUC) require that TPUD and Charter maintain their respective facilities in compliance with the National Electrical Safety Code and other safety standards within OAR Chapter 860 Division 024.<sup>1</sup> The Commission's Safety Rules require TPUD and Charter to inspect their respective facilities to determine the extent of safety violations that may exist on TPUD's poles. TPUD states that, to date, its inspections have reported large numbers of safety violations by Charter on TPUD's poles. According to TPUD, a significant number of Charter violations require that TPUD perform pole replacements or other rearrangement work to assist Charter in correcting its violations. TPUD apparently will use a favorable declaratory ruling to assist in obtaining reimbursement from Charter for the rearrangement work per ORS 757.271(2), OAR 860-028-0120, standard industry practice, and other references cited in the petition. TPUD further claims that "Charter ... is alone in taking the position that it need not reimburse TPUD for the rearrangement costs required to correct Charter's violations, and that it must reimburse TPUD for only a small fraction (or none) of the pole replacement costs necessary to correct its violations." According to the petition, Charter claims that Article IX of the Charter/TPUD Pole Joint Use Agreement supports Charter's position. TPUD and Charter are at an impasse on the issues, and the correction of safety violations caused by Charter on TPUD has been unduly delayed.

TPUD's Petition requests the Commission declare that:

Item 1. ORS 757.271 permits TPUD to require Charter to reimburse TPUD for the pole replacement and rearrangement costs necessary to correct Charter's violations of the Commission's Safety Rules.<sup>2</sup>

Item 2. TPUD's position that Charter must reimburse TPUD for the pole replacement and rearrangement costs necessary to correct Charter's violations of the Commission's Safety Rules is a just, fair and reasonable rate, term or condition of pole attachments, in accordance with ORS 757.276.

Item 3. OAR 860-028-0120(5) requires Charter to reimburse TPUD for the pole replacement and rearrangement costs necessary to correct Charter's violations of the Commission's Safety Rules.

Item 4. OAR 860-028-0110(5) entitles TPUD to require Charter to pay TPUD in advance for the pole replacement and rearrangement costs necessary to correct Charter's violations of the Commission's Safety Rules.

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<sup>1</sup> OAR 860-024-0010 and OAR 860-024-0001(1).

<sup>2</sup> OAR 860-024-0001(1)

Item 5. Should the Commission reject TPUD's position and require TPUD to replace poles and rearrange facilities to correct Charter's violations of the Commission's Safety Rules without being reimbursed by Charter, TPUD may recover those replacement and rearrangement expenses in its annual rental as an additional cost of providing and maintaining pole attachment space for Charter.

In a letter to Commission, Charter has stated that it strongly opposes TPUD's Petition. Charter states that "TPUD's Petition is nothing more than an obvious attempt to evade the retroactive application of an unfavorable term in its decade-old pole attachment agreement with Charter." Charter goes on to state that it is not appropriate for the Commission to use the declaratory ruling process to amend an existing pole attachment agreement.

Moreover, Charter claims that TPUD also failed to cite a single statute or rule that would clearly and unambiguously trump the language in the parties' pole attachment agreement. This disagrees with TPUD's Petition Item 3, which cites OAR 860-028-0120 as a mandatory regulation per OAR 860-024-0050(3).

Staff believes that Items 1, 2, 4 and 5 involve factual issues that should not be addressed in declaratory ruling process, under ORS 756.450. Staff's listing of Items 1, 2, 4 and 5 appear to involve the application of various PUC regulations<sup>3</sup>, orders, and the parties' agreement. For Item 4, TPUD cites OAR 860-028-0110 as justification for prepayment of make-ready work. However, this OAR 860-028-0110 is not a mandatory rule per OAR 860-028-0050(3) and parties can agree otherwise. Staff believes that Items 1, 2, 4 and 5 would be better addressed in the PUC formal complaint and investigation proceeding, which is covered by ORS 756.500 through 756.515.

All of the Petition Items involve timeline issues associated with the applicability of various Commission statutes, rules, orders and the parties' agreement. These documents have different effective dates. It would be difficult to address these timing issues without investigating the evidence provided by both TPUD and Charter along with their pole attachment agreement.

Staff has reviewed the Petition and follow-up comments provided by TPUD and Charter. Michael Weirich, Staff's Department of Justice counsel, has reviewed their comments and Staff's comments and recommendations herein. Staff recommends that the Commission deny TPUD's Petition for a Declaratory Ruling as it involves disputed factual issues that are not appropriate for a declaratory ruling proceeding. These

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<sup>3</sup> ORS 757.035, ORS 757.276, ORS 757.282, and ORS 757.285

matters would be better addressed by the Commission's complaint processes covered in ORS 756.500 through 756.515.

TPUD has presented facts in its Petition that TPUD and Charter are at an impasse in correcting safety violations on TPUD's poles. These uncorrected safety violations are long-standing violations that are more than 180-days old and without an agreed-upon plan of correction by the parties. TPUD and Charter need to take expedited actions to correct the violations to prevent personal injuries and property damage. Because of the tardiness of resolving these safety violations, Staff recommends that any complaint filing brought to the Commission on these matters should be processed in an expedited manner.

**PROPOSED COMMISSION MOTION:**

1. The Commission deny the Petition for Declaratory Ruling filed by Tillamook People's Utility District (TPUD).
2. The Commission encourages TPUD or Charter to file a complaint as soon as possible to commence a Commission proceeding to expeditiously resolve these safety violations.