BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Rulemaking to Consider Adoption of Rules to Implement RCW ch. 80.54, Relating to Attachments to Transmission Facilities, Docket U-140621	)))))))	DOCKET U-140621

COMMENTS OF THE BROADBAND COMMUNICATIONS ASSOCIATION OF WASHINGTON

The Broadband Communications Association of Washington ("BCAW") respectfully submits these Comments pursuant to the State of Washington Utilities and Transportation Commission's ("Commission") January 6, 2015 Notice of Opportunity to File Written Comments on the Commission's Second Draft Rules Governing Access to Utility Poles, Ducts, Conduits, and Rights-of-Way (hereinafter "Second Draft Rules" or "Rules").

I. COMMENTS

First and foremost, BCAW appreciates the Commission's commitment to this process. The Commission's full engagement throughout the comment period and in the workshops will help ensure that the final rules meet the needs of all stakeholders, consistent with state and federal law and policies. BCAW especially welcomes the Commission's proposal to consider federal law "as persuasive authority" when interpreting its final rules. The Federal Communications Commission ("FCC") has built an extensive body of law over more than 30 years through hundreds of litigated cases and rulemakings that can provide helpful guidance to the Commission when resolving disputes. Reliance on existing law also makes negotiations between parties more efficient and fruitful. Many other certified states follow the federal rules, including the FCC "cable formula," to promote broadband competition and deployment,

"eliminate unnecessary variation in regulatory requirements" nationwide,[1] and take advantage of the FCC's extensive precedent.[2]

While BCAW supports the Commission's Second Draft Rules and approach overall, BCAW believes that certain of the Rules could benefit from clarifying edits in order to prevent unnecessary disputes over their interpretation. BCAW also suggests a few substantive revisions so that the final Rules more fully correspond to state and federal law, and further reduce the incidence of disputes. *See also* BCAW's "Second Draft Rules Redline," attached hereto as Exhibit A, which incorporates BCAW's requested revisions.

A. Purpose and Interpretation: 480-54-010(2)

One of the most contentious issues in pole attachments is rental rates, particularly the methodology that must be used to calculate the rental rates. That said, as BCAW previously commented:

> [I]n states (including certified states) that use the FCC formula, neither the utilities nor cable operators find it necessary to seek FCC or state commission intervention to check those calculations. Instead, the industries have established transparent, party-to-party review mechanisms that apply the FCC formula to current utility financial data, thereby allowing almost all disputes to be resolved without federal or state agency intervention. What makes the process work is the simplicity of the formula, its reliance on data that ties to publicly available ARMIS and FERC Form 1 reports, and the confidence of the parties that errors would be swiftly adjudicated at the FCC or state commission.[3]

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[1] *In the Matter of Certain Pole Attachment Issues Which Arose in Case 94-C-0095*, Case No. 95-C-0341, Opinion and Order, p.6 (1997 NYPSC); *see also id*. at 5 ("[W]e have decided to simplify the regulation of pole attachments rates and operations in New York, intending thereby to encourage telecommunications competition and to stimulate economic development. These objectives can be best achieved by adopting many, if not all, elements of the federal approach to pole attachments rates and operations. . . .")

[2] *Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachment Use and Safety (AR 506)*, Order, p.10 (OR PUC 2007) ("[U]se of the [federal] cable rate will allow parties to rely on the case law interpreting that rate, providing guidance in forming their contracts. Based on the legislative history, as well as considerations of the many arguments made by the participants, we conclude that we will follow the cable formula and the subsequent FCC and court decisions interpreting it.")

[3] Comments of The Broadband Communications Association of Washington, Rulemaking to Consider Adoption of Rules to Implement RCW ch. 80.54, Relating to Attachments to Transmission Facilities, Docket U-140621 (filed May 30, 2014 WUTC).

To that end, BCAW suggests that the following language be added to the end of 480-54-010(2) (which ties the Commission's pole attachment provisions to federal rules and precedent): "*including the rate formula herein.*" The addition of this language would signal to pole owners and attachers alike that the Commission will use the FCC Cable Formula when adjudicating rate disputes under 480-54-060 (and RCW 80.54.040), but allow the Commission the discretion it needs to deviate from the formula (either higher or lower) in unique cases if warranted.

B. Definitions: 480-54-020

1. "*Attachment*"

BCAW is concerned with the removal of the term "right-of-way" from the Second Draft Rules. The electric utilities' argument that including the term "right-of-way" in these rules would require a pole owner to grant access to use "rights-of-way or other easements" that the pole owner does "not have permission from the underlying landowner to grant" is misguided.[4] Including the term "right-of-way" in these rules, would not require a utility to grant access to property beyond the extent allowed by law. Rather, as the FCC clarified when confronted with these same arguments, "the access obligations of section 224(f) apply when, as a matter of state law, the utility *owns or controls* the right-of-way to the extent necessary to permit such access."[5] Moreover, virtually every single pole attachment agreement in use today requires an attacher to obtain any rights necessary to access land that the utility itself has no right to grant, and indemnify the utility for the attacher's failure to do so.

[4] Comments of Power & Light Re: Docket U-140621 – Rulemaking to Consider Adoption of Rules to Implement RCW Ch. 80-54 Relating to Transmission Facilities, p. 3 (filed Oct. 8, 2014 WUTC).

[5] Implementation of Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd. 15499, ¶ 1179 (1996) (emphasis added) (hereinafter "*Local Competition Order*"). *See also* id. at ¶ 1123 ("Pursuant to section 224(f)(1), a utility must grant . . . access to all poles, ducts, conduits, and rights-of-way owned or controlled by the utility. This directive seeks to ensure 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. . . ."). *See also* RCW 80.54.010(1) (defining "Attachment" to include rights-of-way "owned or controlled" by a utility).

Removing the term "right-of-way" from the rules, on the other hand, would ostensibly permit a utility to deny access rights on an arbitrary basis to those rights-of-way (including those that a utility owns outright) that a utility may otherwise grant. Moreover, if the Commission fails to make rules governing access to rights-of-way "owned and controlled" by a utility, that would not only violate state law (*see* RCW 80.54.060 stating that "[t]he commission shall adopt rules, regulations and procedures relative to the implementation of this chapter"), but potentially force right-of-way access disputes to be adjudicated at the FCC because the Commission's complaint rules would not cover right-of-way issues.[6] For these reasons, the Commission should retain the term "right-of-way" in the final rules.

2. "*Carrying Charge*"

As BCAW mentioned above, one of the most disputed issues relating to pole attachments (for parties that are not required to use the FCC Cable Formula), involves the rental rate calculation methodology. Although the Commission clearly intends to apply the FCC Cable Formula as a rule, the Commission's proposed definition of "carrying charges" could be interpreted to allow costs in addition to those that are used in the FCC Cable Formula, namely: administrative, maintenance, depreciation, taxes and authorized rate of return. In order to ensure that there is no confusion over which costs may be used in the carrying charge component of the Commission's formula, BCAW suggests that the word "including" be deleted from the first sentence and replaced with the words "*and are comprised of. . . .*"

[6] *See Local Competition Order* at ¶ 1240 (stating that if a party does not believe a state has asserted jurisdiction over access issues the party may file with the FCC and the "defending party or the state itself should come forward to apprise us whether the state is regulating such matters."). Indeed, the failure to include the term "right-of-way" in the final rules could result in bifurcated adjudication if a claim involved unreasonable denials of access to both poles and rights-of-way, for example. Such an outcome would not only be administratively inefficient, but could lead to inconsistent results.

3. "*Pole*"

As BCAW suggested in its Comments filed October 8, 2014, "[i]n order to avoid pole-by-pole calculations of pole height when determining pole attachment rates . . . the definition of 'pole' [should] include a (rebuttable) presumptive average pole height, such as the FCC's average 37.5 foot pole."[7] Although the Commission included the FCC's presumptive amount of usable (13.5) and unusable (24) space on an average pole in its Second Draft Rules, without a presumptive pole height, the usable and unusable space presumptions have no basis, *i.e.*, without a presumptive pole height, the usable and unusable space presumptions are essentially meaningless (37.5 – 24 (of unusable space) = 13.5 (of usable space).

Therefore, in order to provide consistency throughout the rules and avoid unnecessary confusion, BCAW reiterates its proposal that the rules include a presumptive pole height and suggests the following language be included as the second sentence of the definition of "pole:" "*In the absence of measurements to the contrary, a pole is presumed to have a height of 37.5 feet.*"

C. Duty to Provide Access; Make-Ready Work; Timelines: 480-54-030

1. *Overlashing*

BCAW appreciates the inclusion of an expedited overlash process that provides cable companies the flexibility needed to serve customers in a timely and competitive manner, while ensuring compliant pole plant, consistent with longstanding FCC precedent. While the FCC does not require notice to pole owners prior to overlashing,[8] BCAW members believe that the

[7] Comments of The Broadband Communications Association of Washington, Rulemaking to Consider Adoption of Rules to Implement RCW ch. 80.54, Relating to Attachments to Transmission Facilities, Docket U-140621 (filed October 8, 2014 WUTC) (hereinafter "October Comments").
Cite October Comments (internal citations omitted).

[8] *In the Matter of Amendment of Rules and Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of The Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103, ¶ 75 (2001) ("We affirm our policy that neither the host attaching entity nor the third party overlasher

10 day written notice provision in the Second Draft Rules is a reasonable compromise, provided pole owners do not abuse their right to deny access under the provision.

BCAW has two primary concerns, in this regard. First, BCAW wants to ensure that pole owners cannot thwart or otherwise delay the process by requiring information in the requisite "notice" that is not available to attachers. To that end, the only data a pole owner should be able to request in the notice is the pole location and a description of "the *additional* communications wires or cables" the attacher seeks to overlash, as the current language provides. WAC 480-54-030(11)(emphasis added). Otherwise, the overlash process could become more burdensome and time-consuming than the regular permit process, contrary to the intent of this provision. A pole owner should already be in possession of any other information necessary (*i.e.*, information on its own attachments and existing attacher information through the permit process) to perform its evaluation. *See* Exhibit A (edits to WAC 480-54-030(11).

Second, the new overlash rule should not be used to codify the practice of holding an attacher responsible for correcting pre-existing safety violations it did not cause. As BCAW has previously explained, in its experience, one of the reasons pole owners in Washington currently require permits for overlashing is to identify *pre*-existing safety conditions (caused by others) so that they can be repaired on the cable company's dime, "as a condition of overlashing."[9] Pole owners also often require pre-existing conditions to be repaired prior to overlashing, even if the overlashing would not exacerbate or change the existing condition in any way.[10] As currently written, nothing in draft Rule 480-54-030(11) prevents the continuation of these unreasonable

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must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment.")

[9] October Comments at p. 9.

[10] *Id.*

practices.[11] Therefore, BCAW proposes language that would require the responsible party (including the pole owner) to pay for any make-ready work (including pole change-outs) necessary to correct pre-existing non-compliant plant to accommodate the overlashing and prevent unnecessary delays. *See* Exhibit A (edits to WAC 480-54-030(11)).

D. Modification Costs; Notice; Temporary Stay: 480-54-050

1. *Modification Costs*

BCAW recognizes that the Commission edited WAC 480-54-050(2) to conform to the revised definitions of "occupant," "owner" and "requester." In so doing, the language in that section appears to have been altered contrary to the Commission's original intent (based on the federal law this language mirrors).[12]

First, the newly added words "the owner incurs to" must be deleted. When an existing occupant must rearrange or replace its attachment to accommodate another entity (including the owner), the owner does not incur those costs. Those rearrangement and replacement costs are incurred by the existing attacher itself. Therefore, unless the language "the owner incurs" is deleted, existing attachers with compliant attachments would be required to incur the costs of

[11] *See Knology Inc. v. Georgia Power Co.*, 18 FCC Rcd 24615, ¶ 37 (2003) ("[I]t is an unjust and unreasonable term and condition of attachment, in violation of section 224 of the Act, for a utility pole owner to hold an attacher responsible for the costs arising from the correction of another attachers' safety violations"); *see also Cavalier Tele., LLC v. Virginia Elec. & Power Co.*, 15 FCC Rcd 9563, ¶ 16 (2000) ("[Attacher] maintains that [pole owner] has imposed the costs of all make-ready work associated with its poles on [attacher] even though the work may have been required only to correct another attaching entity's pre-existing safety violations. . . . [Pole owner] argues that it is not required to ensure that other attachers pay their share of correcting safety violations. We find this to be unacceptable. . . . [Pole owner] is prohibited from holding [attacher] responsible for costs arising from the correction of safety violations of attachers other than [attacher."]); *Kansas City Cable Partners v. Kansas City Power & Light*, 14 FCC Rcd11599, ¶ 19 (1999) ("Correction of pre-existing code violation is reasonably the responsibility of [the pole owner,] KCPL and only additional expenses incurred to accommodate Time Warner's attachment to keep the pole within NESC standards should be borne by Time Warner.")

[12] *See* 47 C.F.R. § 1.1416(b) and 47 U.S.C. § 224(h)-(i).

rearranging or replacing their facilities to accommodate other attachers and owners, which is contrary to the FCC's intent.[13]

Second, the Commission's proposal to remove the words "or the modification of an existing attachment sought by the facility utility or attacher," also changes the intent of the FCC's modification rules. Existing attachers are often required to rearrange or replace their attachments (for the benefit of others) for "modifications" that do not involve "creating capacity for an additional attachment." For instance, the correction of a safety violation would not necessarily involve "an additional attachment or creating capacity." Nevertheless the correction of a safety violation could force existing parties to rearrange or replace their attachment so the other party could correct its attachment through "modification," *i.e.*, moving the attachment up or down (without the need for the creation of additional capacity). Thus, if the language "or the modification of an existing attachment sought by the facility utility or attacher" is deleted, existing attachers with conforming attachments would be required to pay to accommodate the safety violations repairs of others (including the pole owner) or otherwise pay rearrangement or replacement costs that provide no benefit to that existing attacher, unless the work involved "creating capacity for an additional attachment."

In order to resolve these discrepancies consistent with federal intent, BCAW suggests the following edits (additions in italics, deletions in brackets):

> A utility or licensee with a preexisting conforming attachment to a pole, duct, [or] conduit, *or right-of-way* shall not be required to bear any of the costs [the owner incurs] to rearrange or replace *its* [the occupant's] attachment if such rearrangement or replacement is necessitated solely as a result of creating capacity for an additional attachment *or the modification of an existing attachment sought by the owner or other utility or licensee*.

[13] *See* Local Competition Order at ¶¶ 1211-1216 (discussing interpretation and policy of FCC modification/cost allocation rules and stating that "[a]s a general approach, requiring modification costs be paid only by entities [including pole owners] for whose benefit the modification is made simplifies the modification process.").

E. Complaint: 480-54-070

1. *Discovery Rights*

As discussed above in relation to the "Purpose and Interpretation" section, pole owners and attachers that use the FCC formula "have established transparent, party-to-party mechanisms that apply the FCC formula to current utility financial data" and are usually able to resolve rate disputes on their own because the outcome of any rate dispute (in most cases) is already known. Requiring the use of publicly available data (*i.e.*, FERC and ARMIS data) for the calculation of rates is part of the equation. But, it is equally important that attachers have the right to obtain the utility's rental rate calculations in order to verify that the proper data was used and input correctly. Additionally, an electric utility's pole count (which is needed to determine the net bare pole cost component of the formula) is not filed with the FERC. The only way to obtain an electric utility's pole count is from the utility itself. It is also often difficult to determine an electric or telephone utility's "authorized rate of return," which is one of the five carrying charges and is not filed with the FERC or ARMIS.[14] Without an express right to essential pole rate data, attachers will be forced to either accept unverifiable rates or expend significant resources filing complaints, merely to obtain data that otherwise should be forthcoming.[15]

For these reasons, BCAW previously recommended that in order to ensure that the FCC's rate regime operates as intended and alleviates the need for constant Commission involvement (and use of Commission and stakeholder resources),[16] the rules should include pre-compliant

[14] *See* 47 C.F.R. § 1.1404(g)(1)(x).

[15] Moreover, without an express right to such data, owners may claim such data is "confidential." *See Alabama Power*, ¶ 8 (Admonishing Alabama Power for its "confidential" designation of pole rate data and stating that "we emphasize that it is never appropriate to withhold FERC Form1 data and other essential data from an attacher, nor is it ever appropriate to require an attaching entity to agree to any curtailment of its statutory right to access this information. . . .")

[16] *See Alabama Cable Telecomm Ass'n v. Alabama Power Co.*, 15 FCC Rcd 17346, ¶ 6 (2000) (denying Alabama Power's request to deviate from the FCC cable formula and stating that "[t]he continued use of a clear rate formula

discovery rights.[17] For example, the FCC's Complaint procedures require "[a] utility [to] supply a cable television operator or telecommunications carrier the information required [to calculate rates], along with its supporting pages from its ARMIS, FERC Form 1, or other report to a regulatory body, within 30 days of the request by the cable television operator or telecommunications carrier."[18] Oregon's rules are similar. *See* OAR 860-028-0070(6)(e)(B) ("The owner must supply the licensee the information required in this rule, as applicable, within 30 calendar days of the receipt of the request.")

For these reasons, BCAW therefore reiterates its request that language be added to 480-54-070(5)(c), as follows: "*A utility shall supply a licensee the information required to calculate rates under 480-54-060, along with supporting pages from its ARMIS, FERC Form 1, or other report or order to or from a regulatory body, within 30 days of the request by a licensee*."

2. *Burden of Proof*

Second Draft Rule 480-54-070(6) states that "[e]xcept as otherwise provided in WAC 480-54-030(2), a licensee or utility has the burden to prove its right to attach to or in the owner' s poles, ducts, or conduits and that any rate, term, or condition the licensee or utility challenges is not fair, just, and reasonable or otherwise violations any provision of RCW Ch. 80.54, this Chapter, or any other applicable law." BCAW appreciates the Commission's effort to clarify that WAC 480-54-030(2) already requires that "any party advocating rates, terms and conditions that vary from the rules . . . bears the burden to prove those rates, terms, or conditions are fair, just, reasonable, and sufficient." But, 480-54-070(6) would be clearer if it reiterated that the

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by the Commission is essential to encourage parties to negotiate for pole attachment rates, terms and conditions and to avoid a prolonged and expensive complaint process") (hereinafter "*Alabama Power*").

[17] *See* October Comments at pp. 6-7.

[18] 47 C.F.R. § 1.1404(j).

party advocating rates, terms and conditions varying from these rules bears the burden of proof, "consistent with WAC 480-54-030(2)."

In addition, BCAW does not believe a licensee's or utility's "right to attach" or "access" issues are addressed in 480-54-030(2). Therefore, those issues should be disconnected from any reference to 480-54-030(2). The second sentence of 480-54-070(6) also does not account for a situation where a pole owner may seek to prove that the "terms and conditions" versus just the rates, it seeks to impose are otherwise just and reasonable, even if they deviate from the rules. That circumstance also needs to be addressed.

In order to clarify these burden of proof issues and provide consistency throughout the rules, BCAW recommends the following edits to Draft Rule 480-54-070(6) (new language in italics, deleted language in brackets):

> [Except as provided in WAC 480-54-030(2)] *A* licensee or utility has the burden to prove its right to attach to or in the owner's poles, ducts, [or] conduits *or rights-of-way* and that any rate, term, or condition the licensee or utility challenges is not fair, just, [and], reasonable *and sufficient, (unless the rate, term or condition varies from these rules, in which case the owner bears the burden to prove the rate, term or condition is fair, just, reasonable, and sufficient, consistent with WAC 480-54-030(2)),*or otherwise violates any provision of RCW 80.54, this Chapter, or other applicable law. [Except as provided in WAC 480-54-030(2),]*A*n owner bears the burden to prove that attachment rates *calculated under these rules* are insufficient or that the owner's denial of access to its facilities is lawful and reasonable.

II. CONCLUSION

BCAW hopes that these Comments and suggested clarifications will help the Commission develop fair and just pole attachment rules in Washington that facilitate access, reduce the potential for disputes and promote broadband deployment and competition.

Dated this 6th day of February, 2015.

DAVIS WRIGHT TREMAINE LLP

By: /s/ Jill M. Valenstein
JILL M. VALENSTEIN
1633 Broadway, 27th Floor
New York, New York 10019
Phone: (212) 603-6426

Attorneys for Broadband Communications Association of Washington

EXHIBIT A

Docket U-140621
January 6, 2015

SECOND DRAFT RULES GOVERNING ACCESS TO UTILITY POLES, DUCTS, CONDUITS, AND RIGHTS-OF-WAY

BCAW Second Draft Rules Redline (February 6, 2015)

480-54-010 Purpose and Interpretation

(1) This chapter implements RCW Ch. 80.54 "Attachment to Transmission Facilities."

(2) ~~To the extent that these rules contain provisions that are the same as Federal Communications Commission rules governing pole attachments, t~~The commission will consider Federal Communications Commission orders promulgating and interpreting its pole attachment rules and federal court decisions reviewing those rules and interpretations ~~of those rules~~ as persuasive authority in construing the ~~comparable~~ provisions in this chapter, including the rate formula herein.

480-54-020 Definitions

(1) ~~"Attacher" means any utility or licensee with an attachment to an owner facility utility's pole, duct, or conduit, or right-of-way or that is granted the right to make such an attachment.~~

(2) ~~(2)~~ "Attachment" means any wire, ~~or~~ cable, ,or antenna for the transmission of intelligence by telecommunications or television, including cable television, light waves, or other phenomena, or for the transmission of electricity for light, heat, or power, and any related device, apparatus, or auxiliary equipment, installed upon any pole or in any telecommunications, electrical, cable television, or communications right-of-way, ~~telecommunications, electrical, cable television, or communications right-of-way,~~ duct, conduit, manhole or handhole, or other similar facilities owned or controlled, in whole or in part, by one or more owners~~utilities~~, where the installation has been made with the consent of the one or more owners~~utilities~~ consistent with these rules.

(2) "Carrying charge" means the costs the owner incurs to own and maintain poles, ducts, or conduits without regard to attachments, ~~including~~ and are comprised of the owner's administrative, maintenance, and depreciation expenses, commission-authorized rate of return on investment, and applicable taxes. When used to calculate an attachment rate, the carrying charge may be expressed as a percentage of the net pole, duct, or conduit investment.

(3) "Communications space" means the usable space on a ~~utility~~ pole below the communications workers safety zone and above the vertical space for meeting ground clearance requirements under the National Electrical Safety Code ~~below the space used to attach electrical wires~~.

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

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

(6) "Facility" or "Facilities" means one or more poles, ducts, conduits, right-of-way, ~~rights-of-way,~~ manholes or handholes, or similar structures on or in which attachments can be made~~facilities~~.

(7) ~~"Facility utility" means the utility that owns or controls the facilities to or in which an attacher maintains or seeks to make attachments.~~

~~(8)~~ "Inner duct" means a duct-like raceway smaller than a duct that is inserted into a duct so that the duct may carry multiple wires or cables.

(8~~9~~) "Licensee" means any person, firm, corporation, partnership, company, association, joint stock association, or cooperatively organized association, other than a utility, that is authorized to construct attachments upon, along, under, or across the public ways~~, including a provider of telecommunications service, radio communications service company, as defined in RCW 80.04.010, any cable television service company or personal wireless services company~~.

(9~~10~~) "Make-ready work" means engineering or construction activities necessary to make~~work required to modify~~ a pole, duct, conduit, right-of-way or other support equipment available for a new attachment, attachment modifications, or~~right-of-way to enable the facility to accommodate one or more~~ additional attachments. Such work may include rearrangement of existing attachments, installation of additional support for the utility pole, or creation of additional capacity, up to and including replacement of an existing pole with a taller pole. Make-ready work costs are non-recurring costs and are not included in carrying charges.

(10) "Net cost of a bare pole" means (a) the original investment in poles, including purchase price of poles and fixtures and excluding cross-arms and appurtenances, less depreciation reserve and deferred federal income taxes associated with the pole investment, divided by (b) the number of poles represented in the investment amount.

(11) "Occupant" means any utility or licensee with an attachment to an owner's pole, duct, ~~or~~ conduit or right-of-way or that is granted the right to make such an attachment.

(12) "Occupied space" means that portion of the pole, duct, or conduit used for attachment that is rendered unusable for any other attachment, which is presumed to be one foot on a pole and one half of a duct in a duct or conduit.

(13) "Overlashing" means the tying of additional communications wires or cables to existing communications wires or cables attached to poles.

(14) "Owner" means the utility that owns or controls the facilities to or in which an occupant maintains or seeks to make attachments.

(152) "Pole" ~~or "utility pole"~~ means an above-ground structure on which an owner ~~facility utility~~ maintains attachments. When the owner is an electrical company as defined in RCW 80.04.010, "pole" is limited to structures used to attach electric distribution lines. In the absence of measurements to the contrary, a pole is presumed to have a height of 37.5 feet.

(16) "Requester" means a licensee or utility that applies to an owner to make attachments to or in the owner's facilities.

(173) "Unusable space" with respect to ~~utility~~ poles means the space on the pole below the usable space, including the amount required to set the depth of the pole. In the absence of measurements to the contrary, a pole is presumed to have 24 feet of unusable space.

(184) "Usable space," with respect to poles, means the space on a ~~utility~~ pole, including cross-arms and extensions, above the minimum grade level that ~~which~~ can be used for the attachment of wires, cables, and associated equipment, and that ~~which~~ includes space occupied by the owner ~~facility utility~~. In the absence of measurements to the contrary, a pole is presumed to have 13.5 feet of useable space. With respect to conduit, "usable space" means capacity within a conduit that is available or that could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable, and associated equipment for telecommunications or cable services, and that ~~which~~ includes capacity occupied by the owner ~~facility utility~~.

(195) "Utility" means any electrical company or telecommunications company as defined in RCW 80.04.010, and does not include any entity cooperatively organized, or owned by federal, state, or local government, or a subdivision of state or local government.

480-54-030 Duty to provide access; make-ready work; timelines

(1) An owner ~~facility utility~~ shall provide other utilities or licensees with nondiscriminatory access for attachments to or in any pole, duct, ~~or~~ conduit, or right-of-way ~~, or right-of-way~~ the owner ~~facility utility~~ owns or controls, except that if the owner is an electrical company as defined in RCW 80.04.010, the owner is not obligated to provide access for attachment to its facilities by another electrical company. An owner ~~facility utility~~ may deny such access to specific facilities on a nondiscriminatory basis where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering principles; provided that in the case of poles, the owner may not deny access to a pole based on insufficient capacity if the requester is willing to compensate the owner for the costs to replace the existing pole with a taller pole or otherwise undertake make-ready work to increase the capacity of the pole to accommodate an additional attachment.

(2) All rates, terms, and conditions made, demanded, or received by any owner ~~utility~~ for any attachment by a licensee or by a utility must be fair, just, reasonable, and sufficient. Parties may mutually agree on terms for attachment to or in poles, ducts, ~~or~~ conduits, or rights-of-way ~~, or rights-of-way~~ that differ from those in this chapter. In the event of

disputes submitted for commission resolution, any party advocating rates, terms, or conditions that vary from the rules in this chapter bears the burden to prove those rates, terms, or conditions are fair, just, reasonable, and sufficient.

(3) Except for overlashing requests as described in subsection (11) below, a~~A~~ utility or licensee must submit a written application to an owner ~~facility utility~~ to request access to its facilities. The owner~~facility utility must~~ may survey the facilities identified in the application and recover the costs of that survey from the requester. The owner must complete any such survey and respond in writing to requests for access to th~~os~~e facilities identified in the application within 45 days from the date the owner~~facility utility~~ receives a complete application, except as otherwise provided in this section. A complete application is an application that provides the information necessary to enable the owner~~facility utility~~ to identify and evaluate~~survey~~ the facilities to or in which the requester seeks to attach.

(4) If the owner~~facility utility~~ denies the request in an application for access, in whole or in part, the owner~~facility utility~~'s written response to the application must include an explanation of the reasons for the denial for each pole, duct, or conduit to which the owner is denying access. Such a response must include all relevant ~~evidence and~~ information supporting the denial.

(5) To the extent that it grants the access requested in an application~~access~~, the owner~~facility utility~~'s written response must inform the requester~~attacher~~ of the results of the review of the application~~, including but not necessarily limited to a notification that the facility utility has completed a survey of the facilities identified in the application~~. Within 14 days of providing its written response, the owner~~facility utility~~ must provide an estimate of charges to perform all necessary make-ready work, including the costs of completing the estimate.

(a) The requester must~~An attacher may~~ accept or reject an estimate of charges to perform make-ready work ~~and submit payment to the facility utility any time after~~ within 30 days of receipt of the estimate ~~but before the facility utility withdraws the estimate~~.

(b) An owner ~~facility utility~~ may withdraw an outstanding estimate of charges to perform make-ready work any time after~~beginning~~ 30~~14~~ days from the date~~after~~ the owner~~facility utility~~ provides the estimate to the requester~~attacher~~ if the requester has not accepted that estimate.

(6) ~~Upon receipt of payment of the estimated charges for make-ready work,~~ For requests to attach to poles, the owner must~~facility utility shall~~ determine the time period for completing the make-ready work and provide that information in a written notice to the requester and all known occupants~~entities~~ with existing attachments on the poles~~facilities~~ that may be affected by the make-ready work. The owner and the requester must coordinate the make-ready work with any such occupants as necessary.

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

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

(ii) Set a date for completion of make-ready work that is no later than 60 days after the notice is sent ~~(or 105 days in the case of larger orders, as described in subsection (f) of this section)~~. For good cause shown, the owner~~facility utility~~ may extend completion of the make-ready work by an additional 15 days.

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

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

(v) State that if make-ready work is not completed by the completion date set by the owner~~facility utility~~ (or 15 days later if the owner~~facility utility~~ has asserted its right to 15 additional days), the requester, after giving reasonable notice to the owner,~~attacher requesting access~~ may hire a~~n authorized~~ contractor from the list of contractors the owner has authorized to work on its poles to complete the specified make-ready work within the communications space.

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

(b) For wireless antennas or other attachments on poles in the space above the communications space, the notice shall:

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

(ii) Set a date for completion of make-ready work that is no later than 90 days after notice is sent ~~(or 135 days in the case of larger orders, as described in subsection (f) of this section)~~. For good cause shown, the owner~~utility~~ may extend completion of the make-ready work by an additional 15 days.

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

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

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

(7) For the purpose of compliance with the time periods in this section:

(a) ~~A facility utility shall apply t~~The time periods~~line described in subsections (b) through (e) of this section~~ apply to all requests for access to up to ~~3~~100 poles or 0.5 percent of the owner~~facility utility~~'s poles~~, ducts, or conduits, or rights-of-way~~ in Washington, whichever is less ~~as applicable~~.

~~(b) A facility utility may add 15 days to the survey period described in subsection (b) of this section to all requests for access to between 300 and 3000 poles or between 0.5 and five percent of the facility utility's poles, ducts, conduits, or rights-of-way in Washington, whichever is less as applicable.~~

~~(c) A facility utility may add 45 days to the make-ready work periods described in subsection (c) of this section to all requests for access to between 300 and 3000 poles or between 0.5 and five percent of the utility's poles, ducts, conduits, or rights-of-way in Washington, whichever is less as applicable.~~

(b~~c~~) An owner ~~facility utility~~ shall negotiate in good faith the time periods~~ing~~ for~~of~~ all requests for access to more than ~~3~~1000~~0~~ poles or 0.5 percent of the owner~~utility~~'s poles~~, ducts, conduits, or rights-of-way~~ in Washington, whichever is less ~~as applicable~~.

(c~~e~~) An owner ~~facility utility~~ may treat multiple requests from a single requester~~n attacher~~ as one request when the requests are filed within the same 30 day period. The applicable time period for completing the optional~~required~~ survey or required make-ready work begins on the date of the last request the owner~~facility utility~~ receives from the requester~~attacher~~ within the 30 day period.

(8) An owner ~~facility utility~~ may extend the time periods~~limits~~ specified in this section under the following circumstances:

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

(b) During performance of make-ready work if the owner~~facility utility~~ discovers unanticipated circumstances that reasonably require additional time to complete the work. Upon discovery of such circumstances, the owner~~facility utility~~ must promptly~~immediately~~ notify, in writing, the requester~~ing attacher~~ and other affected occupants~~entities~~ with existing attachments. The notice must~~, and shall~~ include the reason for the extension~~additional time~~ and date by which the owner~~facility utility~~ will complete the work. The owner~~facility utility~~ may not extend completion of make-ready work for a period any longer than reasonably necessary and shall undertake such work on a nondiscriminatory basis.

(9) If the owner~~facility utility~~ determines that a survey is necessary for responding to a request for attachment to poles and fails to complete a survey of the facilities specified in the application within the time period~~frame~~s established in this section, a~~n attacher~~ requester seeking attachment in the communications space may hire a~~n authorized~~ contractor from the list of contractors the owner has authorized to work on its poles to complete the survey.

(10) If the owner~~facility utility~~ does not complete any required make-ready work within the time period~~frame~~s established in this section, a~~n attacher~~ requester seeking attachment in the communications space may hire a~~n authorized~~ contractor from the list of contractors the owner has authorized to work on its poles to complete the make-ready within the communications space:

(a) Immediately, if the ownerfacility utility has failed to assert its right to perform any necessary make-ready work by notifying the requesteringattacher that the owneritwill undertake that work; or

(b) After 15 days from the end of the applicable time period authorized in this section if the ownerfacility utility has asserted its right to perform make-ready work and has failed to timely complete that work.

(11) An occupant need not submit an application to the owner if the occupant intends only to overlash additional communications wires or cables onto communications wires or cables it previously attached to poles with the owner's consent, but the occupant must provide the owner with 10 days prior written notice. The notice must identify the affected poles and describe the additional communications wires or cables to be overlashed so that insufficient detail to enable the owner maytodetermine any impact of the overlashing on the poles or other occupants' attachments. The occupant may proceed with the overlashing described in the notice unless the owner provides a written response, within seven days of receiving the occupant's notice, prohibiting the overlashing as proposed. Any such denial must be based on the owner's reasonable judgment that the overlashing itself would have a significant adverse impact on the poles or other occupants' attachments. The denial must describe the nature and extent of that impact, include all relevant information supporting the owner's determination, and identify the make-ready work that the owner has determined would be required prior to allowing the proposed overlashing. The owner shall be prohibited from requiring the occupant to incur any make-ready costs that are not solely necessitated by the proposed overlash request. The parties must negotiate in good faith to resolve the issues raised in the owner's denial.

480-54-040 Contractors for survey and make-ready.

(1) An owner facility utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready work in the communications space on its utility poles in cases where the ownerfacility utility has failed to meet deadlines specified in WAC 480-54-030.

(2) If an attacher requester hires a contractor for purposes specified in WAC 480-54-030, the requesterattacher must choose a contractor included on the ownerfacility utility's list of authorized contractors.

(3) An attacher requester that hires a contractor for survey or make-ready work mustshall provide the ownerfacility utility with prior written notice and a reasonable opportunity for an owner facility utility representative to accompany and consult with the authorized contractor and the requesterattacher.

(4) Subject to commission review in a complaint proceeding, the consulting representative of an ownerelectric facility utility may make final determinations, on a nondiscriminatory basis, on the attachment capacity of any pole, duct, conduit, or right-of-way and on issues of safety, reliability, and generally applicable engineering principles.

480-54-050 Modification costs; notice; temporary stay.

(1) The costs of modifying a pole, duct, ~~or~~ conduit, or right-of-way~~, or right-of-way~~ shall be borne by the requester ~~all utilities and licensees that obtain access to the facility as a result of the modification~~ and ~~by~~ all existing~~such~~ occupants~~entities~~ that directly benefit from the modification. Each such occupant~~entity~~ shall share ~~proportionately in~~ the cost of the modification in proportion to the amount of usable space the occupant occupies on or in the facility. A utility or licensee with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification, that occupant~~entity~~ adds to its existing attachment or modifies that~~its~~ attachment to conform to its attachment agreement with the owner.

(2) A utility or licensee with a preexisting conforming attachment to a pole, duct, ~~or~~ conduit, or right-of-way~~, or right-of-way~~ shall not be required to bear any of the costs ~~the owner incurs to~~~~of~~ rearrang~~e~~ing or replac~~e~~ing its ~~its the occupant's~~ attachment if such rearrangement or replacement is necessitated solely as a result of creating capacity for an additional attachment or the modification of an existing attachment sought by the owner or other utility or licensee ~~or the modification of an existing attachment sought by the facility utility or attacher~~.

~~(3) If a utility or licensee makes an attachment to the facility after the completion of a modification, that entity shall share proportionately in the cost of the modification if it enabled the added attachment.~~

(3~~4~~) An owner ~~facility utility~~ shall provide an attaching utility or licensee ~~no less than 60 days~~ with written notice prior to removal of, termination of service to, or modification of (other than routine maintenance or modification in response to emergencies) any facilities on or in which the utility or licensee has attachments affected by such action. The owner must provide such notice as soon as practicable but no less than 60 days prior to taking the action described in the notice; Provided that the owner may provide notice less than 60 days in advance if a governmental entity or landowner other than the owner requires the action described in the notice and did not notify the owner of that requirement more than 60 days in advance.

(4~~5~~) A utility or licensee may file with the commission and serve on the owner~~facility utility~~ a "Petition for Temporary Stay" of utility action contained in a notice received pursuant to subsection (3~~d~~) of this section within 20~~15~~ days of receipt of such notice. The petition must be supported by declarations or affidavits and legal argument sufficient to demonstrate that the petitioner or its customers will suffer irreparable harm in the absence of the relief requested that outweighs any harm to the owner~~facility utility~~ and its customers and that the petitioner will likely be successful on the merits of its dispute. The owner~~facility utility~~ may file and serve an answer to the petition within 7 days after the petition is filed unless the commission establishes a different deadline for an answer.

(5) An owner may file with the commission and serve on the occupant a petition for authority to remove the occupant's abandoned attachments. The petition must identify the attachments and provide sufficient evidence to demonstrate that the occupant has abandoned those attachments. The occupant must file an answer to the petition within 20 days after the petition is filed unless the commission establishes a different deadline for an answer. If the occupant does not file an answer or otherwise respond to the petition, the commission may authorize the owner to remove the attachments without further proceedings.

480-54-060 Rates

(1) A fair, just, reasonable, and sufficient rate for attachments to or in poles, ducts, ~~or~~ conduits, or rights-of-way~~, or rights-of-way~~ shall assure the owner~~utility~~ the recovery of not less than all the additional costs of procuring and maintaining the attachments, nor more than the actual capital and operating expenses, including just compensation, of the owner~~utility~~ attributable to that portion of the pole, duct, ~~or~~ conduit, or right-of-way~~, or right of way~~ used for the attachments, including a share of the required support and clearance space, in proportion to the space used for the attachment, as compared to all other uses made of the facilities, and uses which remain available to the owner ~~or owners of the facilities~~.

(2) The following formula for determining a fair, just, reasonable, and sufficient rate shall apply to attachments to ~~utility~~ poles:

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

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

(3) The following formula for determining a fair, just, reasonable, and sufficient rate shall apply to attachments to ~~utility~~ ducts or conduits:

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

(Percentage of Conduit Capacity) (Net Linear Cost of a Conduit)

simplified as:

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

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

480-54-070 Complaint

(1) Whenever the commission shall find, after hearing had upon complaint by a licensee or by a utility, that the rates, terms, or conditions demanded, exacted, charged, or collected by any owner~~facility utility~~ in connection with attachments to its facilities are not fair, just, and reasonable, or by an owner ~~facility utility~~ that the rates or charges are insufficient to yield a reasonable compensation for the attachment, the commission will~~shall~~ determine the fair, just, reasonable, and sufficient rates, terms, and conditions thereafter to be observed and in force and ~~shall~~ fix the same by order entered within 360 days after the filing of the complaint. In determining and fixing the rates, terms, and conditions, the c~~C~~ommission will~~shall~~ consider the interest of the customers of the licensee or utility~~attacher~~, as well as the interest of the customers of the owner~~facility utility~~.

(2) A utility or licensee may file a formal complaint if:

(a~~1~~) An owner ~~facility utility~~ has denied access to its poles, ducts, or conduits~~, or rights-of-way~~;

(b~~2~~) An owner ~~facility utility~~ fails to negotiate in good faith the rates, terms, and conditions of an attachment agreement; or

(c~~3~~) The utility or licensee disputes the rates, terms, or conditions in an attachment agreement, the ~~facility utility~~owner's performance under the agreement, or the ~~facility utility~~owner's obligations under the agreement or other applicable law.

(3) An owner ~~facility utility~~ may file a formal complaint if:

(a~~1~~) Another utility or licensee is unlawfully making attachments to or in the ~~facility utility~~owner's poles, ducts, or conduits~~, or rights-of-way~~;

(b~~2~~) Another utility or licensee fails to negotiate in good faith the rates, terms, and conditions of an attachment agreement; or

(c~~3~~) The owner~~facility utility~~ disputes the rates, terms, or conditions in an attachment agreement, the occupant~~attacher~~'s performance under the agreement, or the occupant~~attacher~~'s obligations under the agreement or other applicable law.

(4) The execution of an attachment agreement does not preclude any challenge to the lawfulness or reasonableness of the rates, terms, or conditions in that agreement, provided that the parties were aware of the dispute at the time they executed the agreement and such challenge is brought within six months from the agreement execution date ~~the parties executed the agreement~~. Nothing in this section precludes an owner ~~facility utility~~ or occupant~~attacher~~ from bringing any other complaint that is otherwise authorized under applicable law.

(5) A complaint authorized under this section must contain the following:

(a) A statement, including specific facts, demonstrating that the complainant engaged or reasonably attempted to engage in good faith, executive-level negotiations to resolve the disputed issues raised in the complaint and that the parties failed to resolve those issues despite those efforts.

(b) Identification of~~identify~~ all actions, rates, terms, and conditions alleged to be unjust, unfair, unreasonable, insufficient, or otherwise contrary to applicable law;

(c) ~~and shall include s~~Sufficient data or other factual information and legal argument to support the allegations to the extent that the complainant possesses such factual information. A utility shall supply a licensee the information required to calculate rates under 480-54-060, along with the supporting pages from its ARMIS, FERC Form 1, or other report or order to or from a regulatory body, within 30 days of the request by a licensee; and~~. The complaint also must include a~~

(d) A copy of the attachment agreement, if any, between the parties.

(6) ~~Except as provided in WAC 480-54-030(2), a~~A licensee or utility~~An attacher~~ has the burden to prove its right to attach to or in the ~~facility utility~~owner's poles, ducts, ~~or~~ conduits, or rights-of-way~~, or rights-of-way~~ and that any rate, term, or condition the licensee or utility~~attacher~~ challenges is not fair, just, ~~and~~ reasonable and sufficient, (unless the rate, term or condition varies from these rules, in which case the owner bears the burden to prove the rate, term or condition is fair, just, reasonable and sufficient, consistent with WAC 480-54-030(2)), or otherwise violates any provision of RCW Ch. 80.54, this Chapter, or other applicable law. ~~Except as provided in WAC 480-54-030(2), a~~An owner~~A facility utility~~ bears the burden to prove that attachment rates calculated under these rules are insufficient or that the owner~~facility utility~~'s denial of access to its facilities is lawful and reasonable.

(7) If the commission determines that the rate, term, or condition complained of is not fair, just, reasonable, and sufficient, the commission may prescribe a rate, term, or condition that is fair, just, reasonable, and sufficient. The commission may require the inclusion of that rate, term, or condition in an attachment agreement and to the extent authorized by applicable law, may order a refund or payment of the difference between any rate the commission prescribes and the rate that was previously charged during the time the owner was charging the rate after the effective date of this rule.

(8) If the commission determines that access to a pole, duct, ~~or~~ conduit, or right-of-way~~, or right-of-way~~ has been unlawfully or unreasonably denied or delayed, the commission may order the owner~~facility utility~~ to provide access to that facility within a reasonable time frame and in accordance with fair, just, reasonable, and sufficient rates, terms, and conditions.