



February 6, 2015

**Via Records Center Web Portal**

Steven King  
Executive Director and Secretary  
Utilities & Transportation Commission  
P. O. Box 47250  
Olympia, WA 98504-7250

**Re: Rulemaking to Consider Adoption of Rules to Implement RCW 80.54,  
Relating to Attachments to Transmission Facilities, Docket U-140621**

Dear Mr. King:

The following are comments of Google Inc. provided in response to the Second Draft Rules issued in connection with the rulemaking proceeding referenced above.

Respectfully submitted,

A handwritten signature in blue ink that reads "Megan Anne Stull".

Megan Anne Stull  
Counsel  
Google Inc.

## BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Rulemaking to Consider Adoption of Rules to Implement Was. Rev. Code § 80.54, Relating to Attachments to Transmission Facilities

Docket U-140621

### COMMENTS OF GOOGLE INC. ON SECOND DRAFT RULES

Google Inc. (“Google”) applauds the Commission’s progress toward adopting rules implementing Section 80.54 of the Revised Code of Washington. Changes included in the Second Draft Rules<sup>1</sup> would expedite broadband infrastructure deployment throughout the State. But, opportunities remain to facilitate access by competitive entrants and to clarify attachment and make-ready processes. Adopting these refinements to the Second Draft Rules would pave the way for increased broadband deployment and help get more Washingtonians online, thus boosting education, jobs, and community benefits.

#### **I. INFRASTRUCTURE ACCESS IS ESSENTIAL TO BROADBAND DEPLOYMENT.**

Having more and better broadband available leads to advancements in healthcare and consumer services, heightened economic development, better public safety, expanded opportunities in education and civic participation, and an improved quality of life.<sup>2</sup> Recognizing these benefits, the Legislature and this Commission have

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<sup>1</sup> *Second Draft Rules Governing Access to Utility Poles, Ducts, Conduits, and Rights-of-Way*, Docket No. U-140621 (Jan. 6, 2015) (“*Second Draft Rules*”), available at [http://www.utc.wa.gov/\\_layouts/CasesPublicWebsite/GetDocument.ashx?docID=105&year=2014&docketNumber=140621](http://www.utc.wa.gov/_layouts/CasesPublicWebsite/GetDocument.ashx?docID=105&year=2014&docketNumber=140621).

<sup>2</sup> Wash. Rev. Code § 43.330.400 (2013) notes, available at <http://apps.leg.wa.gov/rcw/default.aspx?cite=43.330.400>.

acted to encourage broadband network deployment and stoke competition among providers.<sup>3</sup>

These objectives provide the backdrop for the Commission's efforts to adopt rules implementing Section 80.54 of the Revised Code of Washington. Ready access to infrastructure at reasonable rates and terms is essential for construction of broadband networks. Conversely, inability to gain "reliable, timely, and affordable access to physical infrastructure," including utility poles, creates a major roadblock to deployment.<sup>4</sup> Because market forces alone cannot guarantee access to existing poles, ducts, and conduits,<sup>5</sup> delineation of clear processes by the Commission to enable predictable and rapid infrastructure access is vital.

## **II. THE SECOND DRAFT RULES CONTAIN PROVISIONS HELPFUL TO ACCELERATING BROADBAND DEPLOYMENT.**

Many proposed changes in the Second Draft Rules would enable faster and lower-cost deployment of broadband networks. Of particular importance are changes to the definition of "Attachment" in Section 480-54-020(1) and the elimination of references to discrete categories of service providers from the definition of "Licensee" in Section

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<sup>3</sup> See *id.*; *In the Matter of the Joint Application of Verizon Commc'ns Inc. and Frontier Commc'ns Corp. For an Order Declining to Assert Jurisdiction Over, or, in the Alternative, Approving the Indirect Transfer of Control of Verizon Northwest Inc.*, Final Order Approving and Adopting, Subject to Conditions, Multiparty Settlement Agreements and Authorizing Transaction, 2010 Wash. UTC LEXIS 337, at \*150 (2010).

<sup>4</sup> See *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240 ¶ 3 (2011).

<sup>5</sup> See, e.g., *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd. 11864, ¶ 68 (2010) (explaining that "incumbent LECs are usually in direct competition with at least one of the new attacher's services, and the incumbent LEC may have strong incentives to frustrate and delay attachment"); *In the Matter of Amendment of Commission's 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, ¶ 13 (2001) ("Consolidated Partial Order") (disagreeing with utilities' arguments that the "market for pole attachments is fully competitive" and that "utilities now lack any incentive to discriminate against attaching entities").

480-54-020(8), which together make clear that *all* broadband providers can obtain access to poles, ducts, and conduits at reasonable rates and terms.<sup>6</sup> Any further changes to the Second Draft Rules should establish equality of infrastructure access among broadband providers that utilize poles, ducts, and conduits in the same way, though they provide Internet access with different technologies. Doing so also would be consistent with upcoming anticipated Federal Communications Commission (“FCC”) action to extend federal pole attachment rights to broadband providers that currently lack such access because they are neither traditional telecommunications carriers nor cable systems.<sup>7</sup>

Google also commends other modifications incorporated within the Second Draft Rules that will ease broadband deployment.

- Clarifications to the definition of “Make-ready work” in Section 480-54-020(9) add specificity that should allow all parties to be clear as to when facilities are ready for use.<sup>8</sup>
- Clarifications in Section 480-54-030(6)(a)(v) that a Requester can hire a contractor from a list authorized by the Owner if the Owner fails to timely finish make-ready will enable quicker completion of make-ready processes (although Requesters also should be able to use contractors to complete make-ready at the outset).<sup>9</sup>

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<sup>6</sup> Second Draft Rules § 480-54-020(1), (8).

<sup>7</sup> See 47 U.S.C. § 224(f)(1) (requiring a utility to “provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.”); FCC, *Fact Sheet: Chairman Wheeler Proposes New Rules for Protecting the Open Internet*, at 3 (rel. Feb. 4, 2015), available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2015/db0204/DOC-331869A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0204/DOC-331869A1.pdf) (stating that anticipated upcoming FCC action will ensure “fair access to poles and conduits under Section 224, which would boost the deployment of new broadband networks”); *In the Matter of Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd. 5561 ¶¶ 148-150 (2014) (seeking comment on whether the FCC should “revisit [its] classification of broadband Internet access service as an information service[,]” and instead classify broadband Internet access service “as a telecommunications service.”).

<sup>8</sup> Second Draft Rules § 480-54-020(9).

<sup>9</sup> See *id.* § 480-54-030(6)(a)(v); Comments of Google Inc. in Docket U-140621 at 6 (filed Oct. 8, 2014), available at

- Additions to Section 480-54-030(1) prohibiting denial of access to poles “based on insufficient capacity” if Requesters are willing to pay for increasing capacity will assist deployment and ease burdens on Owners.<sup>10</sup>
- Clarification in Section 480-54-030(11) that Occupants do not need the Owner’s permission to overlash the Occupant’s own attachments—which involves no additional use of space on the pole—is a positive step to make broadband deployment faster and more affordable (although prior notification also should not be necessary, as described below).<sup>11</sup>

The Commission should preserve these changes as it considers potential modifications to the Second Draft Rules.

### **III. THE RULES SHOULD FACILITATE NEW ENTRANTS’ ACCESS TO INFRASTRUCTURE.**

In most cases, a potential provider of broadband service must offer multichannel video service as well as Internet access to win customers from the cable and telephone companies’ triple-play offers. Local franchising authorities, however, sometimes require franchisees to offer service by a date certain after issuance of the franchise. This presents a chicken and egg problem: pole owners may refuse to negotiate attachment agreements with new entrants absent authorization from the franchising authority; new entrants do not want to gain authorizations too early and be unable to meet service requirements. Similarly, a potential broadband entrant that is assessing the business case for building a network needs to know its infrastructure options before it can make a go/no go decision and start the regulatory approval process, but infrastructure owners may refuse even to begin negotiations before regulatory approval.

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[http://www.utc.wa.gov/\\_layouts/CasesPublicWebsite/GetDocument.aspx?docID=59&year=2014&docketNumber=140621](http://www.utc.wa.gov/_layouts/CasesPublicWebsite/GetDocument.aspx?docID=59&year=2014&docketNumber=140621).

<sup>10</sup> Second Draft Rules § 480-54-030(1).

<sup>11</sup> *Id.* § 480-54-030(11).

The Second Draft Rules can be read as allowing Owners to refuse to speak with new entrants about access until the Requester secures a franchise, license, or other authorization to use public rights-of-way. This is no problem for incumbent providers that seek to build out their existing, permitted networks, but it erects a barrier to new entrants that need to construct new facilities in order to compete with the incumbents. To break this logjam, the definition of “Requester” in Section 480-54-020(16) should be modified to acknowledge the needs of new entrants by changing the phrase “licensee or utility” to the word “entity.”<sup>12</sup> Furthermore, Section 480-54-030 should specify that Requesters need not have a franchise, license, or other authorization in hand for Owners to be obliged to negotiate for access to infrastructure.<sup>13</sup> Requesters should qualify for the statutory protections by identifying services, within the scope of rules, that they seek to provide, and attesting that they will apply for any requisite authorizations to provide those services. Any access agreement between the Requester and Owner could require that attachments be made pursuant to all required authorizations.

#### **IV. ADDITIONAL PROCEDURAL CLARIFICATIONS WOULD ENHANCE THE RULES’ EFFICACY.**

Finally, the Second Draft Rules should be further improved by addressing several procedural points that may lead to confusion and conflict between Requesters and Owners. Inclusion of these provisions would lead to more efficient and more expeditious network deployments, allowing Washingtonians to enjoy broadband benefits sooner:

- ***The rules should provide procedures and timeframes for capacity increases or pole replacements subsequent to denials on the basis of***

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<sup>12</sup> *Id.* § 480-54-020(16).

<sup>13</sup> *Id.* § 480-54-030.

**insufficient capacity.** Google supports the new language in Section 480-54-030(1) stating that Owners may not deny access to poles “based on insufficient capacity if the [R]equester is willing to compensate the [O]wner 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.”<sup>14</sup> The Second Draft Rules, however, fail to specify the steps that should be taken if a request for access is denied on the basis of insufficient capacity. The Requester should have 14 days after receipt of the denial to provide the Owner with notice that it intends to replace the pole or increase capacity, and the Owner thereafter should be required to respond to the Requester with a plan for pole replacement or make-ready within 14 days. Clearly setting forth these timeframes will make clear to all parties their shared responsibilities and facilitate broadband deployment.

- **The Commission should restore thresholds and time periods for access to poles contained in the Initial Draft Rules.** Google requests that the Commission restore Sections 480-54-030(7)(a) to (d) of the Initial Draft Rules,<sup>15</sup> consistent with time periods and thresholds in the federal pole attachment rules.<sup>16</sup> Under the new provisions in Sections 480-54-030(7)(a) and (b) of the Second Draft Rules, once an attachment request exceeds the lesser of 100 poles or 0.5 percent of the Owner’s poles, parties need not adhere to the time periods set forth elsewhere in Section 480-54-030, but are directed to negotiate the time periods in “good faith.”<sup>17</sup> This is a roadmap to uncertainty and dispute. As an initial matter, the threshold of 100 poles or 0.5 percent of the Owner’s poles is out of line with what is required to truly support the roll out of new networks, and too low.<sup>18</sup> Many pole negotiations will not benefit from the time periods set forth in Section 480-54-030 but will be thrust into the “good faith” negotiation process. This creates especially acute problems for new entrants, who request access to hundreds or thousands of poles at a time, and will have no way to gauge how long it will take to obtain access. Further, complaints arising from the lack of set time periods could sap the Commission’s enforcement resources. Restoring the formulation in the Initial Draft Rules would give Owners, Requesters, and Occupants greater clarity, and reduce disputes.
- **Payment for improperly maintained (i.e., overloaded or damaged) poles.** Section 480-54-050 currently lacks details about what happens in when a pole

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<sup>14</sup> *Id.* § 480-54-030(1).

<sup>15</sup> *Draft Rules Governing Access to Utility Poles, Ducts, Conduits, and Rights-of-Way*, Docket No. U-140621, § 480-54-030(7)(a) to (d) (Sept. 8, 2014) (“*Initial Draft Rules*”), available at [http://www.utc.wa.gov/\\_layouts/CasesPublicWebsite/GetDocument.aspx?docID=48&year=2014&docketNumber=140621](http://www.utc.wa.gov/_layouts/CasesPublicWebsite/GetDocument.aspx?docID=48&year=2014&docketNumber=140621).

<sup>16</sup> 47 C.F.R. §1.1420(g)(1)-(5).

<sup>17</sup> Second Draft Rules §§ 480-54-030(7)(a) and (b).

<sup>18</sup> See, e.g., 47 C.F.R. § 1.1420(g)(1)-(4) (providing time periods for compliance for pole orders between the lesser of 300 poles (or 0.5 percent of a utility’s poles in a state) and the lesser of 3000 poles (or 5 percent of a utility’s poles in a state)).

has been improperly maintained by the Owner or has been damaged in a way that restricts available space.<sup>19</sup> In such instances, consistent with its safety obligations, the Owner should pay for the pole replacement or repairs that would enable attachment.

- **Prior notification should not be required for overlashing.** Section 480-54-030(11) should not require notification prior to overlashing.<sup>20</sup> Rather, the Occupant should be permitted to notify the Owner promptly after overlashing is completed (for instance, within 30 days). As the FCC found when it addressed this same issue, "it is current practice for [attachers] routinely to overlash their existing attachments without specific prior notification to the pole owners outside the provisions for major modification contained in their pole attachment agreements."<sup>21</sup> Furthermore, while pole owners claimed in the FCC's proceedings that notice is needed to prevent unsafe conditions, the FCC concluded that notice is warranted solely so that the owner can charge the appropriate attachment rate, which overlashing may affect.<sup>22</sup> Prior notice is not required for this billing purpose. If, however, the Commission does require some period of prior notice (which it should not), it should add to Section 480-54-030(11) an exemption for circumstances in which prior notice is not practicable, such as restorations of service after an outage.

In addition to the changes requested above, Google respectfully refers the Commission to Google's Comments on the Initial Draft Rules,<sup>23</sup> which contain further specific proposals targeted to expedite the attachment process. Adoption of these further modifications would accelerate consumer benefits from new broadband service offerings and enhanced competition.

## V. CONCLUSION

The Commission's extension of attachment rights to all broadband providers, and other changes incorporated into the Second Draft Rules, will promote broadband

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<sup>19</sup> Second Draft Rules § 480-54-050.

<sup>20</sup> *Id.* § 480-54-030(11).

<sup>21</sup> *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd. 6777 ¶ 66 (1998) (citation omitted), *aff'd in part, rev'd in part*, *Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *rev'd*, *Nat'l Cable & Telecomms Ass'n v. Gulf Power*, 534 U.S. 327 (2002).

<sup>22</sup> Consolidated Partial Order ¶ 82.

<sup>23</sup> Google Comments at 5-6.



deployment. But opportunities for further improvement remain. Modest additional revisions will avoid unnecessary conflict and expedite facilities deployment. These modifications will promote infrastructure investment, competition, and consumer choice, all to the benefit of Washington's residents, businesses, and communities.

Respectfully submitted,



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