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*Via Web Portal*

Steven King  
Executive Director and Secretary  
Washington Utilities and Transportation Commission  
1300 S. Evergreen Park Drive SW  
P.O. Box 47250  
Olympia, WA 98504-7250

**Re: Docket U-140621**

Enclosed for filing are comments by AT&T Corp., New Cingular Wireless PCS, LLC, and Teleport Communications America, Inc. (collectively "AT&T") in the above mentioned docket.

Sincerely,

*Cynthia Manheim by Doc with permission*

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**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

Rulemaking to Consider Adoption of            )  
Rules to Implement RCW ch. 80.54,            ) **Docket U-140621**  
Relating to Attachments to Transmission    )  
Facilities, Docket U-140621                    )  
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**COMMENTS OF AT&T**

AT&T Corp., New Cingular Wireless PCS, LLC, and Teleport Communications America, Inc. (collectively “AT&T”) appreciate the opportunity to submit comments on the Draft Rules Governing Access to Utility Poles, Ducts, Conduits, and Rights-of-Way issued on January 6, 2015 (“Draft Rules”).

**I. DISCUSSION:**

AT&T appreciates the Commission’s effort to craft workable pole attachment rules. These comments suggest further clarification to a few of the Draft Rules to avoid uncertainty, confusion and additional disputes in the future.

**A. WAC 480-54-020 – Definitions**

**1. Subsection (12) - Occupied Space**

To be consistent with the use of this definition in the rate formula contained in Draft Rule WAC 480-54-060(3), AT&T respectfully requests the following change to the definition of occupied space:

“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, if no inner duct or only a single duct is installed.

## 2. Subsection (14) - Owner:

In the current Draft Rules the *owner* is a utility that owns or controls the facilities to or in which an occupant maintains or seeks to make attachments which includes attachments to *poles*, ducts or conduits. AT&T does not object to the use of the term *owner* throughout the Draft Rules, but when this definition is read in conjunction with the definition of “*pole*” and “*utility*” it may create some ambiguity regarding the applicability of these rules.

The Draft Rules define “utility” to include any “telecommunications company as defined in RCW 80.04.010.”<sup>1</sup> The definition of “telecommunications company” in this statutory section is very broad and appears to include wireless providers. Furthermore, the definition of pole includes any “above-ground structure on which an owner maintains attachments” which arguably could be read to include cell sites or other structures owned by wireless companies. AT&T, therefore, respectfully requests that the definition of owner be modified to clarify that a commercial mobile radio service (“CMRS”) provider cannot be considered an *owner*.

AT&T’s requested change is consistent with the FCC rules which address attachments to a pole, duct, conduit, or right-of-way owned or controlled by a utility; however, under the federal rules a utility is defined as a “local exchange carrier or electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used in whole or in part, for any wire communications.”<sup>2</sup> Furthermore, AT&T is not aware of any participant in this proceeding that was seeking to expand these pole attachment rules beyond attachments to local exchange carrier and electric company poles.

AT&T suggests the following addition to the definition of owner:

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<sup>1</sup> Draft Rules WAC 480-54-020(19).

<sup>2</sup> 47 C.F.R. §1.1402(a).

“Owner” means the utility, excluding commercial mobile radio service provider, that owns or controls the facilities to or in which an occupant maintains or seeks to make attachments.

## **B. WAC 480-54-070: Complaint**

### **1. Subsection (1)**

A provision has been added to this subsection that would require the commission to determine the fair, just, reasonable, and sufficient rates, terms and conditions within 360 days after the filing of the complaint. AT&T does not object to this timeline for adjudications regarding rates, terms and conditions, but suggests that a sentence be added to the end of this subsection clarifying that the 360 day timeline does not apply to denials of access. Denials of access should be addressed on an expedited timeline as the inability to access a pole, duct or conduit may result in customers not being served in an area or the loss of a customer for the attacher. AT&T respectfully requests that the rule be modified as follows:

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 in connection with attachments to its facilities are not fair, just, and reasonable, or by an owner that the rates or charges are insufficient to yield a reasonable compensation for the attachment, the commission will determine the fair, just, reasonable, and sufficient rates, terms, and conditions thereafter to be observed and in force and 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 commission will consider the interest of the customers of the licensee or utility, as well as the interest of the customers of the owner. The commission will expedite consideration and decision of complaints alleging the owner has denied access to its poles, ducts, conduits, or rights-of-way.

### **2. Subsection (4)**

The Draft Rules add the following bolded provision to subsection (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 was brought within six months...

AT&T strongly urges the Commission to delete the newly added phrase. In its 2011 Pole Attachment Order,<sup>3</sup> the FCC declined to add a rule requiring an attacher to provide during contract negotiations written notice of its objections to provisions of a proposed pole attachment agreement as a prerequisite for later bringing a complaint challenging those provisions.<sup>4</sup> The FCC found that such a notice requirement poses a significant risk of unduly delaying the negotiation process and adding unnecessary complexity to the adjudication of pole attachment disputes.<sup>5</sup> Commenters to the FCC noted a number of concerns with such a requirement such as attachers making “blanket” objections to terms to ensure it did not waive any rights to later object,<sup>6</sup> increasing the time and expense involved in negotiating a pole attachment agreement,<sup>7</sup> and prematurely igniting a host of unnecessary disputes during the negotiation process over contract provisions that are never enforced.<sup>8</sup> These same concerns are present with the language that has been added in the Draft Rules. Presumably as currently drafted the party bringing the complaint would have to demonstrate that both parties were aware of the dispute at the time the contract was executed.

AT&T also agrees with previous commenters that six months is too short of a time to require an attacher to bring a complaint, especially since it may not be discovered until later that a party is applying a provision of an attachment agreement unreasonably.<sup>9</sup>

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<sup>3</sup> Implementation of Section 224 of the Act, A National Broadband Plan for Our Future, WC Dkt No. 07-245, GN Dkt No. 09-51, FCC 11-50, Report and Order and Order on Reconsideration (rel. April 7, 2011)(“2011 Pole Attachment Order”).

<sup>4</sup> *Pole Attachment Order*, para. 120.

<sup>5</sup> *Id.*

<sup>6</sup> *Pole Attachment Order*, para. 121.

<sup>7</sup> *Id.*

<sup>8</sup> *Pole Attachment Order*, para. 122.

<sup>9</sup> PCIA-The Wireless Infrastructure Association and the HetNet Forum Comments on Draft rules to Implement RCW Ch. 80.54 (October 8, 2014), p. 3 (“PCIA recommends that the proposed six-month term be replaced with

AT&T respectfully suggests the following revisions to this section:

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 was brought within ~~six~~ eighteen months from the agreement execution date. Nothing in this section precludes an owner or occupant from bringing any other complaint that is otherwise authorized under applicable law.

### **3. Subsection (6)**

AT&T appreciates the addition of “Except as provided in WAC 480-54-030(2)” to this subsection, but remains concerned that there may continue to be ambiguity about the burden on the licensee or utility bringing the complaint. AT&T suggests the following language replace the version of WAC 480-54-070(6) contained in the Draft Rules:

In the event a complaint is brought 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. Any owner denying access for attachments to or in any pole, duct, conduit or right-of-way bears the burden of demonstrating the denial was on a nondiscriminatory basis and there was insufficient capacity or for reasons of safety, reliability, or generally applicable engineering practices; 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 cost to replace the existing pole or otherwise undertake make-ready work to increase the capacity of the pole to accommodate an additional attachment.

### **4. New Subsection**

A new subsection should be added to the end of this section which provides that subsections (7) and (8) do not preclude other remedies available by law. AT&T respectfully suggests the following language:

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language that states that a complaint may be brought no more than 18 months from the date of the execution of a pole attachment agreement.”); Reply Comments of Century Link (Oct. 8, 2014), p. 4 (“CenturyLink believes that a six-month “sign and sue” provision as a stated in this rules is sufficient, so long as that timeline does not preclude a later challenge to the unreasonable application of a provision once the affected party learns of it.”)

Nothing in subsections (7) or (8) shall preclude other remedies available under applicable law.

## II. CONCLUSION

AT&T appreciates the Commission's considerable effort and careful consideration of proposals to establish fair and reasonable pole attachment rules to encourage continued deployment of wireless infrastructure in the state to keep up within increasing demand.

Submitted this 6th day of February, 2015

*Cynthia Manheim by Doe with permission*

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