**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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| 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") February 10, 2015 Notice of Opportunity to Respond to Written Comments regarding the Commission's Second Draft Rules Governing Access to Utility Poles, Ducts, Conduits, and Rights-of-Way (hereinafter "Second Draft Rules").

## I. INTRODUCTION

As a general matter, BCAW is concerned by the most recent comments submitted by the state's three investor-owned electric utilities, Avista Corporation ("Avista"),[1] Pacific Power & Light Company ("PPL")[2] and, in particular, Puget Sound Energy ("PSE")[3] (collectively, "the IOUs"). Prior to the Second Draft Rules, the stakeholders in this proceeding, including the IOUs, had submitted two rounds of comments and attended two workshops. Yet, many of the IOU comments are duplicative of (and add nothing new to) their earlier comments and workshop statements, and essentially ignore that the Second Draft Rules are a product of a 10 month-long

[1] Comments of Avista Utilities, Docket No. U-140621 (filed Feb. 6, 2015) (hereinafter "Avista Feb. 6 Comments").
[2] Comments of Pacific Power, Docket No. U-140621-Rulemaking to Consider Adoption of Rules to Implement RCW Ch. 80-54 Relating to Transmission Facilities (filed Feb. 6, 2015) (hereinafter "PPL Feb. 6 Comments").
[3] Comments of Puget Sound Energy, Inc. on Proposed Rulemaking Relating to Attachments to Transmission Facilities Docket No. U-140621 (filed Feb. 6, 2015) (hereinafter "PSE Feb. 6 Comments").

rulemaking process.[4] Similarly, to the extent the IOUs failed to raise objections to rule language existing prior to the Second Draft Rules, any new comments should be disregarded as untimely. Efforts to add unnecessary complexity and detail to the rules in the most recent comments, as well as new proposals that are outside the scope of this rulemaking (and are typically a matter of contract negotiation), such as liability, should also be rejected.

More specifically, the IOUs' persistent plaint that adopting the federal access regime will strain internal resources and result in unsafe plant continues to be unfounded. The IOUs have offered no evidence that the federal rules—which the vast majority of utilities in the nation follow—are unworkable and result in extraordinary safety failures. If anything, the Second Draft Rules minimize the onus on pole owners in Washington (including telephone pole owners, who are direct competitors of some BCAW members), by making the survey optional, significantly reducing the number of poles (from 300 down to 100) that must be addressed within the requisite time periods, and removing the "large order" provision altogether, to cite a few examples. While the FCC has "recognize[d] that the public welfare depends on safe and reliable provision of utility services,"[5] it has also explained that the mandatory access provisions of the Pole Attachment Act "reflects Congress' intention that utilities must be prepared to accommodate requests for attachments by telecommunications carriers and cable operators."[6]

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[4] Avista's request to include "sanctions" in the rules for the third time is a prime example. Avista Feb 6 Comments, pp. 16-17; *see also* Avista Oct 8 Comments, pp. 19-23; Avista May 20 Comments, p. 3. The absence of any discussion on sanctions at the workshops and the Commission's decision not to follow the Oregon rules on sanctions should have signaled to Avista, which never broached the subject during the workshops itself, that the Commission has considered and rejected sanctions.

[5] *Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, ¶ 1158 (1996) (hereinafter "*Local Competition Order*").

[6] *Id*. *See also Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Case 03-M-0432, Order Adopting Policy Statement on Pole Attachments, at 3 (Aug. 6, 2004) ("Some Owners and the Unions object to this procedure [of allowing attachers to hire contractors], arguing that their collective bargaining agreements may not allow hiring outside contractors. Since time is the critical factor in allowing Attachers to serve new customers, it is reasonable to require the utilities either to have an adequate number of their own workers available to do the requested work, to hire outside contractors themselves to do the work, or to allow Attachers to hire approved outside contractors"), *available at* http://www.utilityregulation.com/content/orders/04NY0432E.pdf.

Indeed, throughout this proceeding, the IOUs have disregarded the purpose of pole attachment regulation and the important public policies that underlie the Commission's proposals, as if these rules were being developed in a vacuum. Poles, conduit, and other utility infrastructure are considered "essential facilities" and thus bottlenecks to facilities-based competition in telecommunications and cable television markets.[7] Congress granted the Federal Communications Commission ("FCC") the authority to regulate pole attachments to "ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers."[8]

In 2009, after Congress directed the FCC "to develop a National Broadband Plan that would ensure that every American has access to broadband services," the FCC determined that "lack of reliable, timely, and affordable access to physical infrastructure—particularly to poles—is often a significant barrier to deploying wireline and wireless services."[9] Thus, in 2011, the FCC adopted revised rules, including a timeline for access, "to eliminate unnecessary costs or burdens associated with pole attachments, while taking into account legitimate concerns of pole owners and other parties that might be affected by additional attachments."[10] That is precisely what this Commission (and many other certified state commissions) has sought to achieve here, consistent with both federal and state directives that promote broadband deployment and

[7] *See NCTA v. Gulf Power Co.*, 534 U.S. 327, 330 (2002) ("[C]able companies have . . . found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. . . . Utilities, in turn, have found it convenient to charge monopoly rents."). *See also Common Carrier Bureau Cautions Owners of Utility Poles*, DA 95-35, 1995 FCC LEXIS 193, at *1 (1995) ("Utility poles, ducts and conduits are regarded as essential facilities, access to which is vital for promoting the deployment of cable television systems.").

[8] *See also Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd. 6777 ¶ 2 (1998) (hereinafter "1998 FCC Pole Order"), *aff'd, Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002).

[9] *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, ¶¶ 2-3 (2011) (hereinafter "2011 FCC Pole Order").

[10] *Id*. at 6.

competition in the communications industries.[11] Indeed, "[i]t is the policy of the state to encourage the joint use of utility poles [and] to promote competition for the provision of telecommunications and information services. . . ."[12] These policies are a critical component of any pole attachment rules and cannot be discounted by the IOU's in this proceeding.

## II. COMMENTS

BCAW's specific comments will mainly address new issues raised by the IOU's in response to *revised* language in the Second Draft Rules. While BCAW reiterates its general objections to the IOU's failure to (1) raise issues regarding rule language preexisting the Second Draft Rules until the most recent round of comments and (2) contribute anything new to previously raised and discussed issues, BCAW's comments are also directed at certain of those items as well.

### A. Definitions: 480-54-020

1. *Attachment*

Avista is concerned with the definition of "Attachment" because it is defined "to mean only those attachments that have been made with the consent of an owner" and that "[n]ot all attachments are authorized."[13] BCAW agrees. That is why in its October Comments BCAW proposed the addition of the language "consistent with these rules," at the end of the last sentence. That language has now been added. BCAW pointed out that if the words "consistent with these rules," were absent, owners could claim that attachments that are *permitted* to be made without the consent of the owners under the rules (*e.g.*, if owners fail to meet certain

[11] *See, e.g.*, RCW § 43.330.400 (2013) (notes: "(1) The legislature finds that the deployment and adopting of high-speed internet services and technology advancements enhance economic development and public safety for the state's communities. . . . (3) In recognition of the importance of broadband deployment and adoption to the economy, health, safety, and welfare of the people of Washington, it is the purpose of this act to make high-speed internet service more readily available throughout the state, especially in areas and for populations with a low utilization rate.").

[12] RCW 54.04.045 (Intent Section).

[13] Avista Feb 6 Comments, p. 1.

deadlines), could be considered unauthorized.[14] BCAW believes that Avista's concern, *i.e.*, that some attachments are truly unauthorized (and thus subject to complaint or some other remedy), is resolved by the same "consistent with these rules" language, because if an attachment is not authorized "consistent with the rules" that attachment *would* be unauthorized.

BCAW also has no objection to Avista's proposal to end the definition after the words "by one or more owners," but notes that, that language is statutory.

2. "*Carrying Charge*"

PSE's comments are peppered with new language related to cost-reimbursement, even though the Second Draft Rules (including the Commission's definitions of "Carrying Charge," with a clarifying tweak, and Make-Ready Work), along with long-standing FCC rules, already ensure that pole owners are fully compensated for any costs attachers may cause by virtue of their attachments.[15] Specifically, with regard to this provision, PSE proposes to add the words "other costs as incurred pursuant to this Chapter," to the definition of "Carrying Charges."[16] That modification is inappropriate.

The elements that comprise the carrying charge component of the FCC Cable Formula — namely the administrative, maintenance, depreciation, taxes and rate of return elements— are made up of FERC Accounts (in the case of electric utilities) and ARMIS Accounts (in the case of the telephone utilities) that are intended to reflect "a sufficient nexus to the operating expenses

[14] BCAW Oct. 8 Comments, p. 2.

[15] *See, e.g., Alabama Power v. FCC*, 293 F.3d 1338, 1368-71 (11th Cir. 2002); see also FCC v. Florida Power Corp., 480 U.S. 245, 254 (1987) (holding that the cable rate is not confiscatory because it provides for "the recovery of fully allocated cost, including the cost of capital").

[16] For the same reasons, PSE's new WAC 480-54-060(4) should also be rejected. If the costs have a "sufficient nexus to the operating expenses and actual capital costs of the utility attributable to the pole or conduit attachment," they will be recovered in appropriate carrying charge. Other reasonable and actual costs attributable to the attacher may be recovered as a direct charge.

and actual capital costs of the utility attributable to the pole or conduit attachment."[17] They are not intended to account for "*all*" of the costs "the owner incurs to own and maintain poles" as PSE's proposed edits to this definition appear to imply. The FCC's "policy has been that not every detail of pole attachment cost must be accounted for, nor every detail of non-pole attachment cost eliminated from every account used."[18] Rather, "[t]he FCC's inclusion of unrelated expenses in certain accounts and [its] exclusion of possible minor expenses in other accounts provides a balanced overall allocation of costs while avoiding a prolonged and contentious ratemaking process."[19]

The specific FERC and ARMIS Accounts that the FCC includes in the carrying charge component[20] have been used to set rates (with some minor adjustments) for almost 30 years, surviving a United States Supreme Court challenge in 1987 and numerous attacks by pole owners.[21] Moreover, the carrying charges that factor into the rental rate are not intended to recover the so-called "non-recurring incremental costs" or "out of pocket expenses attributable to pole attachments" such as "pre-construction, survey, engineering, make-ready, and change-out costs."[22] Those costs are "directly reimbursable" to the utility.[23] Therefore, PSE's proposal to

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[17] *Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103, ¶ 119 (2001) (hereinafter "2001 FCC Pole Order").

[18] *Amendment of Commission's Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453, Report and Order, ¶ 12 (2000).

[19] 2001 FCC Pole Order, ¶ 128.

[20] S*ee, e.g.*, 2001 FCC Pole Order, Appendix D-2 (describing the FERC Accounts that factor into the electric utility pole attachment rate).

[21] *Id*. at ¶¶ 110-128 (rejecting repetitive efforts of pole owners to include additional expense and capital accounts to be included in the calculation of the FCC formula and stating that "[p]etitioners failed to provide any new information and their reiteration of the same arguments fail to persuade us to include any additional accounts in our calculation… .").

[22] *Texas Cable & Telecomm. Ass'n v. Entergy Services, Inc.*, 14 FCC Rcd 9138, ¶ 5 (1999).

[23] *Id*.

add the words "other costs as incurred pursuant to this Chapter," are inappropriate in the context of the definition of "Carrying Charges."[24]

3. *"Make-Ready Work"*

The IOUs claim that pole change-outs should be optional and that the FCC does not require them. This is inaccurate. For instance, Avista cited the FCC's May 2010 Order for the premise that the FCC, in that Order, "drew a clear distinction between using existing techniques to increase pole capacity and changing out a pole altogether."[25] But, as the FCC itself explained in its April 2011 Order, when denying a request for clarification on this issue:

> While the 2010 Order may have alluded to pole replacement in discussing our findings on attachment techniques, the Commission made no findings in that Order relative to pole replacement. Thus, the 2010 Order provides no basis upon which to reconsider (or clarify) a utility's obligation to perform pole change-outs, and there is no record foundation for making the clarification sought by the Cable Providers.[26]

Even if this issue had been decided at the federal level, there is no basis to exclude pole replacements from the definition of "Make-Ready Work" or a pole owner's duty to provide access (in 480-54-030) here, as the IOU's request. Section 480-54-030(1) of the Second Draft Rules includes language ensuring that the attacher pays "the owner for the costs to replace the existing pole with a taller pole," which then becomes the property of the pole owner. Similarly, a pole owner may extend the make-ready deadline to 75 days "for good cause shown." Two and one-half months is ample time to perform the limited number of pole change-outs that may be required pursuant to any particular access request. Indeed, BCAW finds it difficult to believe that a pole owner itself would wait between 4 and 8 months to perform a pole change-out for

[24] For the same reasons, PSE's new WAC 480-54-060(4) should also be rejected. If the costs have a "sufficient nexus to the operating expenses and actual capital costs of the utility attributable to the pole or conduit attachment," they will be recovered in appropriate carrying charge. Other reasonable and actual costs attributable to the attacher may be recovered as a direct charge.

[25] Avista Feb. 6 Comments, at 5 (citing 2011 FCC Pole Order at 9).

[26] 2011 FCC Pole Order at ¶ 226.

itself, as PSE claims.[27] Contractors are also an option if the IOUs do not have adequate personnel.[28] Moreover, as long as an attacher knows that a pole owner is working in good faith and with all deliberate speed to accommodate an access request, the attacher is unlikely to complain. But, without the requirement to perform a pole change-out, these rules would be incomplete and undermine important public policies to promote broadband deployment and competition.

PSE proposes to include certain costs in the definition of "Make-ready work," "including, but not limited to, cost of working capital . . . liability insurance, engineering, overheads, permits, traffic control, materials, legal costs, taxes and supervision." This revision must be rejected. While BCAW has no objection to reimbursing pole owners for the actual reasonable costs associated with make-ready, such as for labor and materials, most of these other items are either inappropriate (*e.g.*, working capital, because the attacher pays for the pole change-out directly), already recovered in the pole attachment rent (*e.g.*, legal costs, liability insurance and taxes)[29] or provided for in the pole attachment agreement (*e.g.*, liability insurance is also required as part of every agreement). To the extent PSE can show that it has incurred a direct charge in the context of "Make-ready work" that is not already booked to a FERC Account, it may charge the attacher directly for that direct cost. Indeed, the recovery of those direct, "non-recurring" costs is already accounted for in the Second Draft Rule's definition of Make-Ready Work.

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[27] PSE Feb. 6 Comments, at 12-13.

[28] *See* note 6, *supra*.

[29] For example, FERC administrative expense accounts 924 and 925 (which factor into the administrative element of the carrying charge component), respectively, "include the cost of insurance or reserve accruals to protect the utility against losses and damages to owned or leased property used in its utility operations," *inter alia*, and "the cost of insurance or reserve accruals to protect the utility against injuries and damages claims of employees or others, losses of such character not covered by insurance, and expense incurred in settlement of injuries and damages claims, *inter alia*. *See* 18 C.F.R. Part 101 (descriptions of FERC Accounts 924 and 925). And these are just a few of the myriad capital costs and expenses included in the carrying charges.

4. *Net Cost of a Bare Pole*

PSE proposes that this definition be clarified to include that the "original investment in poles" include "appurtenances." BCAW has no issue with that addition because appurtenances are included in FERC Account 364 (the account that includes the costs installed of "poles, towers, and fixtures"). But, PSE's proposal to add the words "to cross arms," after the word "appurtenances," (with regard to which costs are excluded from pole investment costs) must be rejected. The FCC reduces its original investment in pole costs, *i.e.*, FERC Account 364 and ARMIS Account 2411, to account for non-pole-related appurtenances. There is a rebuttable presumption in the FCC Cable Formula that non-pole related appurtenances account for 15% of the investment in electric poles and 5% in telephone poles.[30] While cross-arms "constitute a significant portion of the appurtenances to be removed from the pole line," cross-arms are not the only item.[31]

Therefore, perhaps the most appropriate way to address this issue is to include the FCC's rebuttable presumptions of 15% and 5%, in the definition of "net cost of a bare pole," to avoid any confusion.

5. *Occupied Space*

PSE's effort to override the rebuttable presumption that attachers occupy one-half duct in a conduit (by including an additional full duct presumption) must be rejected. The FCC uses the half-duct presumption in its conduit formula because "[t]he presumption that a communications cable in a conduit system occupies one half is based on clear evidence that all types of cable—including electric supply cables when controlled by the same party as the communications

[30] *See* Rules and Policies Governing Attachment of Cable Television Hardware to Utility Poles, 2 FCC Rcd 4387, ¶ 19 (1987).
[31] *Id.*

cable—may share a duct."[32] The FCC has rejected utility arguments that "utilities are not justly compensated for use of their conduit by the one half duct presumption."[33] Like the vast majority of other utilities in the nation, PSE is entitled to rebut the presumption on a case-by-case basis.[34]

Second and similarly, PSE and PPL's proposal to include language that "[t]he minimum attachment is deemed to occupy one-foot" on a pole conflicts with the rebuttable presumption already contained in the definition of "occupied space." An attacher should have the right to show that its attachment occupies less than one foot of space, just as the pole owner has the right to show that an attacher occupies more space.[35]

Third, PSE and PPL's proposal that "the owner may authorize additional occupied space in six inch increments," is an attempt to allow the pole owner to charge rent for more (*i.e.*, for each piece of equipment) than the horizontal cable strand attachment on the pole, which the FCC does not permit. Rather, any equipment associated with an attacher's wireline attachment is part and parcel of that attachment and may not be charged for separately. *See, e.g., Capital Cities Cable, Inc. v. Mountain States Telephone and Telegraph*, Mimeo No. 5059, ¶ 23 (1984) ("[T]he space deemed occupied by CATV includes not only the cable itself, but also any other equipment normally required by the presence of CATV. Thus, the company has not met the burden of showing that CATV occupies an additional .67 feet of space because of dips and power supplies. Under the circumstances, then, it is appropriate to use the Commission's previously adopted figure of one foot occupied by CATV").[36]

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[32] 2001 FCC Pole Order at ¶ 97. In this regard, PSE and PPL's proposed language in this definition and PPL's proposal in the definition of "usable space," that "shared occupancy is not allowed within the same duct or conduit of both communications and electric facilities" is also erroneous. Again, if PSE and PPL have evidence to rebut the presumption, they may do so.

[33] *Id*.

[34] *See, e.g., id*. at ¶ 95. For the same reasons, PSE's edits to WAC 480-54-060(3) must also be denied.

[35] For the same reasons, PSE's proposed new WAC 480-54-060(6) must be rejected.

[36] *See also Texas Cablevision Company v. Southwestern Electric Power Company*, PA-84-0007, ¶ 6 (1985) ("SWEPCO has apparently defined 'multiple attachments' to include not only attachments of multiple cables, but

Last, PSE and PPL's proposed language that would allow a pole owner to grant access in additional six inch increments is also precluded by the mandatory access requirements included in the Second Draft Rules (and federal law). A pole owner may only deny access for two reasons: "where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes."[37] PSE and PPL's attempt to codify another reason for denying access must therefore be rejected. If an attacher seeks to add another wireline attachment to a pole (and use another foot of space) that request must be addressed in the same manner as the first wireline attachment.

6. *Overlashing*

PPL proposes to add the words "an occupant's" before the words "additional communications wires," in the definition of overlashing. Essentially, PPL seeks to preclude third parties from overlashing on the host attacher's strand. The FCC considers "third party overlashing" a pro-competitive way to deploy broadband while "reduc[ing] construction disruption and associated expenses which would otherwise be incurred by third parties installing new poles and separate attachments."[38] The FCC has found that similar to first party overlashing, "third party overlashing d[oes] not disadvantage the utility's ability to ensure the integrity of its poles" and ruled that "neither the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment."[39]

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also attachment of facilities other than cable such as power supply cables and underground risers. SWEPCO is misguided. First, in adopting a standard of one foot for space deemed occupied by CATV, the Commission not only included that space occupied by the cable itself, but also the space associated with any equipment normally required by the presence of the cable television attachment. Moreover, to the extent this ancillary equipment may occupy the 18-28 feet designated as 'ground clearance,' which by definition is excluded from usable space, it is to be omitted from any measurements") (internal citations omitted).

[37] WAC 480-54-030(1); 47 U.S.C. § 224(f)(2).

[38] 2001 FCC Pole Order, ¶ 73.

[39] *Id*. at ¶¶ 74-75.

PPL's concern that without a pole attachment agreement, "no rates, terms or conditions" would govern third party overlashing is also misplaced. Under FCC rules, the third party overlasher is liable for any costs (or liability) to the host attacher, who is ultimately liable to the pole owner.[40]

7. *Pole*

Avista, once again, insists that "[p]ole attachment regulation at the FCC and elsewhere are limited to lower-voltage electric distribution facilities, not high-voltage transmission facilities" and seeks to restrict the definition of "pole" to "structures used to attach distribution lines and having a voltage rating of or below 34.5 kV."[41] As BCAW explained in its opening comments, while the FCC (and other jurisdictions, such as Oregon) "do not have complete jurisdiction over transmission facilities, they both have authority over poles that carry both distribution and transmission lines."[42] Therefore, the Commission's current definition of "pole" is consistent with federal and other certified state law.[43]

PSE's proposed revision to the definition of "pole" is also problematic. Specifically, PSE seeks to redefine "pole" to mean a structure that "may accommodate" attachments, rather than one that "maintains" attachments. PSE made the edit "to eliminate the implication that the owner is responsible to maintain the attachments on the pole."[44] Nothing in the current definition of "pole" indicates that the owner is required to maintain another party's attachments.

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[40] *Id*. at ¶ 76.
[41] Avista Feb. 6 Comments, pp. 2-3.
[42] BCAW May 30 Comments, p. 8 (citing *See Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachment Use and Safety and Rulemaking to Amend Rules in OAR 860, Division 028 Relating to Sanctions for Attachments to Utility Poles and Facilities*, Docket AR 506/510, Order, at 6 (Or. PUC Apr. 10, 2007) (citing federal law and stating that in the 11th Circuit Southern Company case "[t]owers that serve only transmission lines were found to be outside the purview of the federal pole attachment statute, but 'local distribution facilities, festooned as they may be with transmission wires,' fell within the statute and subsequent regulations.").
[43] It is also important to point out that rates for attachments on transmission poles can and should be calculated separately (from distribution pole rents) using FERC Accounts related to transmission facilities (if the costs associated with those facilities are actually booked separately from distribution facilities). But transmission rental rates can and should be calculated consistent with the FCC Cable formula. *See* BCAW May 30 Comments, pp. 8-9.
[44] PSE Feb. 6 Comments, p. 9.

Rather, the definition is intended to ensure that the rules cover poles that "maintain" (*i.e.*, have) attachments. Moreover, PSE's proposal could be interpreted to mean that unless a pole can readily "accommodate" an attachment, access may be denied. For these reasons, PSE's revision should be rejected.

8. *Usable Space*

PSE proposes that only the utility may take measurements to rebut the presumption that there is an average of 13.5 feet of usable space on a pole. PSE offers no support for its revision. In any case, long-standing FCC rules appropriately allow either party to rebut every presumption, including the usable space presumption, attendant to its rate formula.[45] Moreover, physical measurements are not necessary to rebut the presumptions. Both the owner or attacher may use the owner's continuing property records to rebut the presumption.[46] Any costs the utility incurs to rebut the presumption (which is optional) would be passed through in the pole attachment rent (by virtue of the FCC Cable Formula). On the other hand, if a utility decides to hire an outside company to perform field measurements in order to rebut the presumption (at its option), the owner must incur those direct costs. For these reasons, all of PSE's suggested edits to this definition should be rejected.

### B. Duty to Provide Access; Make-Ready Work; Timelines: 480-54-030; Contractors for Survey and Make-Ready: 480-54-040

PSE's extensive edits to these provisions should be denied wholesale. These provisions (based on the federal access rules) have remained largely intact since the first draft rules, except for the new overlash section. The vast majority of the Commission's other edits to these provisions in the Second Draft Rules consist mainly of clarifying edits (*e.g.*, changing "facility

[45] *Cable Television Pole Attachments*, 46 RR2d 1637, FCC 80-90, Opinion, ¶ 12 (1980) (stating that either the utility or the cable company may "rebut[] the 13.5 foot figure.").
[46] *See, e.g., Continental Cablevision of New Hampshire, Inc. v. Concord Elec. Co.*, 1985 FCC LEXIS 3023, *6 (1985) (allowing the use of continuing property records to rebut the usable space presumption).

utility" to "owner") or language requested by and benefitting pole owners. In fact, two of the three edits to WAC 480-54-030 suggested by PSE in its brief, four page long October Comments to the first draft rules (*i.e.*, requesting that a pole owner be allowed to recover the costs for performing surveys and make-ready estimates) were included in the Second Draft Rules.[47]

Other revisions in the Second Draft Rules to WAC 480-54-030 that benefit pole owners include, but are not limited to: (1) making the survey optional; (2) removing the requirement to provide "evidence" to support an access denial; (3) giving a pole owner 30, rather than 14, days to withdraw a make-ready estimate; (4) removing "large orders" from the timeframes; (5) requiring an attacher to give notice prior to hiring a contractor; and (6) reducing the number of poles (from 300 down to 100) that must be addressed within the requisite time periods. Indeed, it should be noted that PPL and Avista requested only minor edits to these provisions in their most recent comments.

If the Commission intends to consider any of the edits made by PSE to 480-54-030 in its most recent edits, another workshop may be warranted.[48]

### C. Overlashing: 480-54-030(11)

The IOUs act surprised that the Second Draft Rules include a provision allowing for unpermitted overlashing, even though the subject matter was discussed at both workshops and in previous comments. Indeed, rather than acknowledge that the Commission strongly indicated during the last workshop that it would allow unpermitted overlashing (with a notice

[47] *See* PSE Oct. 8 Comments at pp. 2 and 3, respectively, requesting that pole owners be reimbursed for (1) conducting surveys (which is now included in WAC 480-54-030(3)) and (2) preparing make-ready estimates (which is now included in WAC 480-54-030(5)).

[48] For example, PSE's proposals include numerous types of cost reimbursements that are already accounted for in the pole attachment rate, such as application processing costs, legal fees, insurance, liability, taxes, and the like. PSE should be required to explain why it believes it is entitled to double-recover for these costs and why it is necessary to include provisions in the rules that are already covered by every pole attachment agreement (*e.g.*, such as insurance).

requirement), Avista and PSE only now seek to inflame the issue by including a series of cherry-picked photographs purporting to demonstrate that even permitted overlashing is a problem.

What these pictures actually show is that even large overlashed bundles can be compliant, while very small bundles can eventually sag to cause a violation. That said, while BCAW acknowledges that some of these pictures show violations, it is not clear that overlashing has anything to do with the some of these violation or who caused them (particularly with respect to the pictures where the attachments are too close to power). Indeed, as far as BCAW knows, all of the pictures show permitted attachments that were made with the authorization of Avista and PSE, and no BCAW member has been notified of these violations.

Nevertheless, BCAW recognizes that unpermitted overlashing is difficult for the IOUs (even though the vast majority of utilities is already subject to such a requirement). And although BCAW has already agreed to deviate from the FCC rule that allows for overlashing without any consent of the pole owner, BCAW can make the following additional compromises. First, BCAW can agree to limit the number of poles on a particular overlash notice to 30 or fewer, as requested by PSE.[49] Second, BCAW can agree to include the weight per foot and number of conductors in the notice, as PSE also requested.[50] Third, BCAW can agree to provide maps of the proposed overlash route and pole numbers (if available), as requested by PPL.[51] Fourth, BCAW can agree to correct preexisting violations caused by *that attacher* at the time of overlashing, as PPL also requested.[52]

[49] *See* PSE Feb. 6 Comments, p. 3.
[50] *Id*.
[51] *See* PPL Feb. 6. Comments, Attachment (overlash proposal to WAC 480-54-030(11)).
[52] *Id*.

BCAW cannot agree to PSE and PPL's other proposals. For example, many distribution poles are energized at 34.5 kV or carry transmission lines.[53] Therefore, any proposal to limit unpermitted overlashing to poles carrying circuits energized at lower voltages, as requested by both PPL and PSE, is obviously not reasonable. In addition, PSE's proposal that the notice be accompanied by a fee "to recover its cost of reviewing the 'application' and determining if the proposed overlashing can be allowed and costs of preparing a response to the notice," should also be rejected. While BCAW has no issue with reimbursing a pole owner for any direct engineering charges they incur pursuant to an overlash notice, up-front fees are inappropriate because there is no requirement to review the overlash notice. In addition, the costs of reviewing and responding to a notice (in contrast to visiting the pole in the field and preparing a make-ready estimate) is an administrative cost that is recovered in the pole attachment rent.[54]

To accommodate the aforementioned reasonable requests by PSE and PPL, BCAW suggests the following edits to WAC 480-54-030(11) (these include BCAW's proposals in its February 6, 2015 comments, which appear in a different color from BCAW's newly added language):

> 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, which may include 30 or fewer poles. The notice must identify the affected poles by pole number (if available) and describe the additional communications wires or cables, including the weight per foot and number of conductors, to be overlashed so that ~~in sufficient detail to enable~~ the owner may~~to~~ determine any impact of the overlashing on the poles or other occupants' attachments. The notice must also include maps

[53] *See, e.g.*, Avista proposal to limit the definition of "pole" to "structures used to attach distribution lines and having a voltage rating *of* or below 34.5 kV." (Emphasis added).

[54] See BCAW May 30 Comments, pp. 12-14. PSE's attempt to codify a back rent penalty (in WAC 480-54-060(5)) for overlashing it considers "unauthorized" must also be rejected, as a pole owner may not charge rent for overlashing. Any overlashing that is not performed according to the rules or applicable safety codes, should be remedied in the normal course and/or considered a breach of contract.

of the proposed overlash route. 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 occupant must correct any of the occupant's existing, non-compliant facilities at the time of overlashing consistent with the NESC. 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.

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

1. *Modification Costs*

Along with the necessary revisions BCAW suggested to WAC 480-54-050(2), BCAW has no issue with Avista's proposal to revise WAC 480-54-050(1) "to allocate modification costs based on the amount of new space occupied," to the benefitting attacher/owner.[55] But, BCAW strongly objects to PPL and PSE's proposed revisions to subjections (1) and (2).

PPL's proposed edit to the first sentence of WAC 480-54-050(1) does not make sense. Fixing a violation is not the only kind of modification that can be undertaken by an existing attacher or pole owner. A pole owner may choose to install a new transformer or other equipment and need additional pole space that would not be necessary pursuant to the access request. PPL's suggested revision to the second sentence (that the costs be shared based on the

[55] With regard to WAC 480-54-050(1), BCAW erroneously read the Commission's edits to the first sentence of that section to include owners, rather than just "occupants." The FCC rules are clear on modification costs: the cost causer pays. Thus, if, pursuant to an access request, the owner corrects a violation or puts in a transformer and needs more pole space than would be necessary due to the attacher access request alone, the owner must share in those modification costs. *See* BCAW May 30 Comments, pp. 20-21 (explaining federal—statutory and regulatory—law on modification costs). BCAW has corrected for that error in Exhibit A, attached hereto.

number of occupants) conflicts with the Pole Attachment Act and FCC rules on cost causation.[56] As Avista pointed out, the FCC has ruled that any entity (including the pole owner) that benefits from a modification must share the costs "based on the ratio of the amount of new space occupied by that party to the total amount of new space occupied by all of the parties joining in the modification."[57] PPL's deletion of WAC 480-54-050(2) is also inappropriate. This language (as edited by BCAW in its February 6 Comments) ensures that existing attachers with compliant attachments are not forced to pay to accommodate the (a) new equipment or (b) safety corrections of attachers and owners, and that those costs are incurred by the "cost-causer," including the pole owner.

To the extent PSE's edits also conflict with FCC cost allocation rules (*i.e.*, that the cost-causer, including the pole owner, pays), they are also improper and must be rejected. In addition, PSE's proposal in WAC 480-54-050(1) to include the costs for "accounting, tracking, billing, switching, de-energizing lines," etc., "in the cost of pole attachments" is unnecessary and redundant, as any proper costs attributable to pole attachments are already included in the "carrying charge" component of the annual rental rate. Similarly, PSE's new last sentence to WAC 480-54-050(2) is also unnecessary and erroneous. To the extent that any party (including the pole owner) incurs the costs of rearrangement or replacement, those are make-ready costs that would be charged to the attacher directly, not as part of the pole attachment rent.

2. *Abandoned Plant*

BCAW agrees that giving an owner an opportunity to remove abandoned plant is important, if there is "sufficient evidence" that the plant is actually abandoned. BCAW disagrees that "nonpayment of the fees for attachment for a period of ninety (90) days or longer" is

[56] *Id.*
[57] Avista Feb. 6 Comments, p. 9 (internal citations omitted).

"sufficient evidence" in every case. In some instances, the owner of the plant may be looking for a buyer, or has not paid fees due to a bankruptcy or a dispute. BCAW also disagrees with PSE's additional edits to this subsection. All pole attachment agreements include liability provisions that may differ from PSE's suggested edits. For instance, most pole attachment agreements ensure that the pole owner is liable for its own negligence. PSE's effort to undermine those negotiated provisions should be rejected. PSE's proposed last sentence is also inappropriate because a pole owner's insurance costs are already included in the carrying charge component of the pole attachment rent, as noted above.[58]

3. *Transfers*

PSE's suggested new language (WAC 480-54-050(6)) regarding timeframes for transfers is also inappropriate. Virtually all pole attachment agreements contain transfer provisions that widely vary. Moreover, PSE's proposal conflicts with WAC 480-54-050(3), which requires sixty (60) days' notice prior to modifications/removals. PSE's proposal to consider non-transferred attachments after ninety (90) days as abandoned, is also unreasonable. There are many reasons an attacher may not transfer its attachments in ninety (90) days (*e.g.*, lack of proper notice or opportunity to transfer). Moreover, refusing to provide access due to a failure to transfer is not a permitted reason to deny access under WAC 480-54-030(1) or 47 U.S.C. § 224(f)(2). If an attacher fails to transfer in a timely manner, that is a breach of the parties' pole attachment agreement and should be handled pursuant the agreement's default provisions.

4. *Work on Others' Attachments*

Finally, PSE's proposed new WAC 480-54-050(7) conflicts with an attacher's right (and a pole owner's duty) under WAC 480-54-030 to ensure that make-ready is performed in a timely

[58] *See* note 28, *supra*.

manner and to allow the attacher to hire a contractor to perform make-ready work in the communications space (*i.e.,* on another attachers' equipment).

**E. Complaint: 480-54-070**

1. *Denial of Access*

PSE's proposed edits to WAC 480-54-070(2)(a), providing that a utility or licensee may file a formal complaint if the owner has denied access "without a valid basis following a receipt of a complete application," makes no sense and assumes there was not a valid basis for denial. The purpose of filing an denial of access complaint would be to prove that the owner had a valid basis for denial or did not.

2. *Time Limit On Challenge*

Avista proposes that both WAC 480-54-070(2) and (3) be modified "so that any complaint for a revised term or condition in an existing agreement must be brought within six months of the effective date of the rules."[59] This proposal does not make sense. If a pole owner revises a term or condition in an existing agreement (or imposes a rate, term or condition in an existing agreement in a different manner) and that revision occurs more than six months after the effective date of the rules, those rates, terms and conditions must be subject to review. For example, pole owners increase their rates annually. Those rates must be subject to the new rules whenever they are imposed. Therefore, Avista's proposal is inconsistent with the new rules.

3. *Refunds*

Both PSE and Avista seek to modify WAC 480-54-070(7) so that any refunds ordered by the Commission would date back to the date of the complaint, rather than to when the rate was charged (subject to the applicable statute of limitations). As Avista notes, "[t]his limitation is consistent with FCC rules until the FCC modified them in its April 2011 Pole Attachment

[59] Avista Feb. 6 Comments, 16.

Order."[60] What Avista fails to mention is that the FCC changed its long-standing refund rule in order "to make injured attachers whole," ensure that pole attachment monetary claims are "consistent with the way claims for monetary recovery [is] generally treated under the law," and encourage "pre-complaint negotiations."[61]

Neither Avista nor PSE has offered any sufficient reason to revise the Commission's proposal, which adheres to the FCC rule.

## III. CONCLUSION

In sum, the Commission should reject the vast majority of the IOU's proposals because they are untimely, redundant and have already been considered, and/or are unreasonable and contrary to the purpose of pole attachment regulation and important public policies.

[60] *Id*., n. 17.
[61] 2011 FCC Pole Order, ¶ 111.

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# EXHIBIT A

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 and owners ~~entities~~ that directly benefit from the modification. Each such occupant~~entity~~ and owner shall share ~~proportionately in~~ the cost of the modification in proportion to the amount of new usable space the occupant occupies on or in the facility to the total amount of new space occupied by all of the parties joining in the modification. An occupant or owner ~~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~~ or owner adds to its existing attachment or modifies that~~its~~ attachment to conform to its attachment agreement with the owner.