PACIFIC POWER
A DIVISION OF PACIFICORP

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February 27, 2015

VIA ELECTRONIC FILING
AND OVERNIGHT DELIVERY

Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive S.W.
P.O. Box 47250
Olympia, WA 98504-7250

Attention: Steven V. King
Executive Director and Secretary

RE: Docket No. U-140621 – Rulemaking to Consider Adoption of Rules to Implement RCW Ch. 80-54 Relating to Transmission Facilities--Comments of Pacific Power & Light

Dear Mr. King:

In accordance with the Notice of Opportunity to Respond to Written Comments (Notice) issued February 10, 2015, Pacific Power & Light Company, a division of PacifiCorp, provides the attached comments responsive to the Notice. The Company appreciates the opportunity to provide comments on the draft rules and looks forward to further participation in this rulemaking.

Informal questions concerning this filing may be directed to Natasha Siores, Director, Regulatory Affairs & Revenue Requirement, at (503) 813-6583.

Sincerely,

R Bryce Dalley / NCS

R. Bryce Dalley
Vice President, Regulation

Attachment

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** **COMMENTS OF PACIFIC POWER & LIGHT COMPANY**

I. INTRODUCTION

1 In accordance with the Notice of Opportunity to Respond to Written Comments dated February 10, 2015 (Notice), Pacific Power & Light Company, a division of PacifiCorp (Pacific Power or Company), submits the following for the Washington Utilities and Transportation Commission's (Commission) consideration. The Notice invites responses to the comments submitted in this proceeding on February 6, 2015, with a focus on whether proposed revisions to the Second Draft Rules are consistent with the Federal Communications Commission or other state utility commission rules, orders and interpretations. The Notice also suggests that comments focus on the practical effect of the proposed rules. Pacific Power's comments focus on these issues and respond to certain legal issues raised by various parties.

II. GENERAL MATTERS

2 Pacific Power generally agrees with the comments filed by Puget Sound Energy, Inc. (PSE) and Avista Corporation, d/b/a Avista Utilities (Avista). Of particular interest is PSE's suggestion that occupants be required to modify attachments to conform to the National Electric Safety Code (NESC) and be subject to penalties for failure to identify and/or correct non-conforming conditions.[1] Pacific Power has experience with this type

[1] Comments of Puget Sound Energy, Inc. on Proposed Rules Rulemaking Relating to Attachments to Transmission Facilities Docket No. U-140621, February 6, 2015. p. 2.

of compliance mechanism in Oregon. The Public Utility Commission of Oregon (OPUC) requires all utilities and attachers to conform to the NESC, and allows owners to issue monetary sanctions to attachers for failure to make timely corrections.[2] This tool may be effective for managing the relationships of the attachers and owners.

III. OVERLASHING

3 The Commission inserted language regarding overlashing into the draft rules issued with the Notice of Opportunity to File Written Comments January 6, 2015.[3] Pacific Power commented on the proposed language and offered suggested revisions to establish parameters for overlashing.[4] Pacific Power does not offer additional comments on overlashing at this time, but is generally supportive of the comments submitted by PSE[5] and Avista.[6] Pacific Power urges the Commission to carefully consider the potential detrimental effects of unrestricted overlashing if it is determined a rule regarding overlashing is required.

IV. ACCESS TO RIGHTS OF WAY

4 The Second Draft Rules appropriately include the deletion of the phrase "rights-of-way" throughout the proposed rules. Several parties disagree. The Broadband Communications Association of Washington (BCAW),[7] PCIA – the Wireless Infrastructure Association and the HetNet Forum (PCIA)[8] and T-Mobile West LLC (T-

[2] OAR 860-028-0140.
[3] Second Draft Rules, WAC 480-54-030(11).
[4] Docket No. U-140621- Comments of Pacific Power & Light, February 6, 2015, p. 3.
[5] Comments of Puget Sound Energy, Inc. on Proposed Rules Rulemaking Relating to Attachments to Transmission Facilities Docket No. U-140621, February 6, 2015, pp 2-5.
[6] U-140621-Comments of Avista Utilities, February 6, 2015. pp. 10-15.
[7] Comments of the Broadband Communications Association of Washington, February 6, 2015.pp 3-4.
[8] PCIA – the Wireless Infrastructure Association and the HetNet Forum Comments on Second Draft Rules to Implement RCW Ch. 80.54, February 6, 2015. p. 2.

Mobile)[9] encourage the Commission to reinstate the phrase "right-of-way" into the rules. Pacific Power requested the deletion of the phrase in its October 8, 2014 comments, as noted by BCAW.[10] BCAW cites a Federal Communications Commission (FCC) decision as requiring electric utilities to grant access to rights-of-way owned or controlled by electric utilities as a matter of state law.[11] The FCC found the scope of a utility's ownership or control of an easement or right-of-way to be a matter of state law and that access obligations apply when a utility owns or controls the right-of-way.[12]

5 In Washington, easement holders have the right to use easements for purposes consistent with the grant of easement and may only alter the use in the course of natural development of the dominant estate so long as it does not overburden the easement.[13] Easements are construed to meet the original intent of the parties, taking into consideration the nature and situation of the property involved and the manner in which the easement has been used and occupied.[14] Pacific Power's easements do not contemplate Pacific Power granting access to a third party for the purpose of attaching to its poles. Granting use of an easement (or right-of-way) by a third party is not permissible and if imposed by the new rules could lead to disputes between utilities and owners of property underlying Pacific Power's easements. Requiring owners to allow attachers access to rights-of-way is inconsistent with legal principles. Owners can grant attachers access to facilities after the attachers have received the appropriate permission from the underlying property owner.

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[9] T-Mobile West LLC's Comments on Revised Draft Rules, February 6, 2015. p. 2.
[10] BCAW February 6, 2015, Comments. p. 3.
[11] Id. citing 11 FCC rcd. 15499, ¶ 1179 (1996). (Local Competition Order).
[12] Local Competition Order, ¶ 1179.
[13] *McGraw v. Blackwell,* p. 3, 2012 WL 1655935 (Wash.App. Div. 2) (2012).
[14] *City of Cle Elum v. Owens & Sons, Inc.*, p. 11, 2008 WL 934080 (Wash.App. Div. 3) (2011).

V. DUTY TO PROVIDE ACCESS, MAKE READY WORK, TIMELINES

6 Google Inc. (Google) makes a number of comments related to "procedural" points in the Second Draft Rules.[15] Google suggests modifying the definition of "requester" by changing who may request to attach to an owner's facilities from "licensee or utility" to "entity."[16] Google perceives the Second Draft Rules to preclude those without established property rights or franchises, or without an agreement with the owner of the facilities, or without a firm business plan for placing attachments on an owner's facilities as being harmed by not being able to apply to attach. Having permission from the underlying landowner and established franchise rights, executing an attachment agreement with the owner and having a finalized plan for attaching are critical components of the attachment process. These solidify certain legal requirements and demonstrate a commitment to enter into a business relationship. In other states such as Oregon and Utah, under FCC rules and in the Second Draft Rules, the application process starts a clock that sets dates certain for established milestones. If a requestor lacks legal authority to attach or use the underlying property, or changes its attachment plans mid-stream, this jeopardizes the owner's ability to meet established deadlines. Modifying the definition of "requestor" as suggested by Google will force owners to process applications for attachment without any of the requisite protections in place, will lead to an inefficient process and will increase costs of the attachment program, potentially unfairly shifting costs to utility customers.

7 Google also requests that the rules include a requirement for owners to negotiate

[15] Comments of Google Inc. on Second Draft Rules, February 6, 2015.
[16] Id. p. 5.

for access with those without a franchise, license or other authorization.[17] The timing of entering into negotiations is a business decision of the owner. Forcing utilities to begin negotiations with a company that is not prepared to do business is inefficient and burdensome to utilities devoting resources to providing reliable service to their customers. From a practical perspective, Pacific Power has engaged in negotiations with companies wishing to attach to Pacific Power facilities before those companies held franchises. However, it is not a common or expected occurrence.

8 Google advocates for the ability to replace a pole or otherwise increase capacity if an owner denies access based on insufficient capacity and the requestor is otherwise willing to pay for the costs to replace the pole or increase capacity.[18] Google suggests a requester should be able to notify the owner that it will replace the pole or increase capacity, to which the owner must respond with a plan for replacement or capacity increase. This is problematic because it gives control over utility maintenance to a third party that has no experience operating a utility. Utility maintenance and pole replacement programs are planned and managed over several years, maximizing the life span of poles to control costs and minimize impacts to electric rates and pole attachment rates. Implementing a program with the steps advocated by Google would redirect utility resources away from utility service and the planning and maintenance that goes along with it. For example, when a company builds a new network, it submits applications for attachments to thousands of poles per week, with some percentage of those poles to which it proposes to attach having insufficient capacity for additional joint use. Under Google's advocacy, pole owners would be forced unnecessarily into accelerating

[17] Google comments, p. 5.
[18] Google comments, p. 6.

maintenance projects, replacing thousands of poles in a single year that would otherwise have been planned for and replaced over a ten to twenty year period consistent with good utility practice.

9 Google also advocates for payment by owner for a pole replacement or repairs to enable attachment for improper maintenance or other damage that prevents additional access.[19] This again imposes requirements on an owner to give preference to a third party rather than its customers. As explained above, utility maintenance and pole replacement programs are planned and managed over several years.

VI. THRESHOLDS AND TIME PERIODS FOR ACCESS

10 Integra Telecom of Washington, Inc. (Integra),[20] Google[21] and PCIA[22] argue to reinstate the threshold number of poles subject to the timeframes for responses for requests to attach to facilities to the proposal in the First Draft Rules. The Commission set a threshold of the greater of 300 poles or 0.5% of the owner's poles in the First Draft Rules, but reduced the threshold to 100 poles or 0.5% of the owner's poles. These parties cite FCC rules and discussion or suggest that a lower threshold diminishes predictability, making it difficult for communications companies to deploy communications infrastructure, particularly new technologies.

11 PCIA offers an example of why the lower threshold is problematic. PCIA states a typical digital antenna system (DAS) or small cell installment includes three to ten miles of fiber, averaging 45 to 50 poles per mile and somehow suggests negotiating timeframes

[19] Google comments, p. 7.
[20] Written comments of Integra.
[21] Google comments, p. 6.
[22] PCIA Comments, pp. 2-3.

for attachment for this type of installation is a hardship for PCIA.[23] PCIA's example does not paint the complete picture. Small cell or DAS installations include fiber and they also include antennae and other support equipment often requiring electric service from the utility. Utilities must analyze whether the proposed installation of all of these components is possible and must send field engineers, to visually inspect and evaluate poles and facilities, arrange for electric service and needed make-ready work or pole replacements, all of which can take weeks if not months for the type of installation PCIA describes.

VII. COMPLAINT PROCESS

A. SIGN AND SUE

12 The Second Draft Rules contain a provision allowing parties to file a complaint with the Commission after negotiating a contract for attaching to an owner's facilities.[24] Pacific Power opposed this provision in its first comments and continues to oppose it. Such a provision belies the basic tenets of contract law, which implies a duty of good faith and fair dealing that obligates the parties to cooperate with each other so each may obtain the full benefit of performance.[25] Allowing parties to enter into a negotiated contract and then file a complaint that the contract is unfair is inconsistent with contracting principles.

13 Further, "sign and sue" may rise to the level of bad faith. Black's law dictionary defines "bad faith" as dishonestly of belief or purpose.[26] Black's law dictionary goes on to explain that cataloguing a complete list of types of bad faith would be impossible, but offers examples, including evasions of the spirit of the bargain. Signing and suing,

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[23] PCIA Comments, p. 3.
[24] WAC 480-54-070(4).
[25] *Badgett v. Security State Bank*, 116 Wash.2d 563, 569 (1991).
[26] Black's Law Dictionary (9th ed. 2009).

particularly if there is not notice of disputed provisions as advocated by several parties, would evade the spirit of the bargain.

14 If the Commission intends to retain the "sign and sue" provision, appropriate safeguards must be included. The FCC implemented a similar sign and sue provision, but noted its rules also contained certain checks so that parties will attempt to resolve issues before bringing them to the FCC for resolution. The Second Draft Rules require that notice be given of any objectionable terms and conditions before executing an agreement and then seeking relief from the Commission. AT&T Mobility[27] and T-Mobile[28] encourage the Commission to delete this requirement, citing concerns that attachers may feel compelled to provide a blanket objection, increasing time and expense for negotiating an agreement and potentially initiating disputes even during the negotiation process.[29] As AT&T Mobility notes, the FCC included a sign and sue provision in its rules over objections raised by utilities in a 2011 decision.[30] However, the Commission may craft rules different from those promulgated by the FCC to meet the needs of Washington. Washington contract law requires good faith negotiations.

15 Further, the Second Draft Rules contain a requirement that executive level negotiations be attempted before initiating a complaint. Frontier Communications Northwest Inc. (Frontier) proposes eliminating the requirement to engage in executive-level negotiations.[31] This is inconsistent with the findings of the FCC, which determined that the sign and sue provision is appropriate because the rules contain other safeguards

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[27] AT&T Mobility Comments, pp. 3-4.
[28] T-Mobile Comments, p. 4.
[29] AT&T Mobility Comments, p. 4; T-Mobile Comments, p.4.
[30] 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 (April 7, 2011).
[31] Comments of Frontier Communications Northwest Inc. to Second Draft Rules Governing Access to Utility Poles, Ducts, Conduits and Rights-of-Way, February 6, 2015. p.3.

to encourage parties to resolve disputes before filing a complaint. One of those safeguards is holding executive-level negotiations.

B. EXPEDITED CONSIDERATION OF COMPLAINTS

16 The Commission has proposed a detailed complaint process to resolve disputes between licensees and utilities. AT&T Mobility suggests adding language to WAC 480-54-070(1) to require the Commission to expedite decisions for complaints alleging denial of access.[32] This addition is unnecessary. As drafted, the rules require the Commission to consider the interests of the customers of the parties involved in the complaint. This will allow the Commission to issue a decision in a timeframe it deems appropriate, moving expediently if customers could be harmed by improper denial of access.

C. RETROACTIVE COMPLAINTS

17 Frontier suggests that the Commission apply the new rules retroactively by allowing complaints to be filed challenging the lawfulness or reasonableness of existing attachment agreements rather than apply strictly prospectively to agreements made after the effective date of the rules.[33] Allowing the complaint provision to apply retroactively to existing agreements is problematic for a number of reasons. Existing agreements were negotiated between parties and other remedies are available to address disputes. Further, administrative rules must be prospectively applied. Retroactive application of the complaint provision would also be inconsistent with the basic tenets of contract law, which require good faith and fair dealing, as addressed in Section VII.A above.

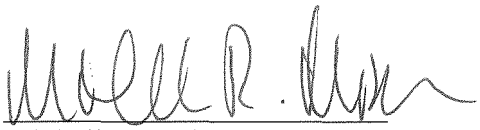
VIII. CONCLUSION

18 Pacific Power appreciates the opportunity to provide additional comments. The

[32] AT&T Mobility Comments, p. 3.
[33] Frontier Comments, p. 2.

Second Draft Rules provide a generally reasonable basis for attachment rules in Washington, with a few minor tweaks as proposed by Pacific Power in its February 5, 2015 comments.

Respectfully submitted this 27th day of February, 2015,

By: 

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