at&t

Cynthia Manheim
General Attorney

16331 NE 72nd Way
Redmond, WA 98052

T: 425-580-8112
F: 425-580-8333
cindy.manheim@att.com

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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 the Responses to the Notice of Opportunity to Respond to Written 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 Dac with permission

Cynthia Manheim
General Attorney

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

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

AT&T RESPONSES TO SECOND WRITTEN COMMENTS

AT&T Corp., New Cingular Wireless PCS, LLC, and Teleport Communications America, Inc. (collectively "AT&T") respectfully submit comments in response to the Washington Utilities and Transportation Commission ("WUTC") Notice of Opportunity to Respond to Written Comments issued on February 10, 2015 ("Responses to Second Comments").

I. INTRODUCTION

AT&T was surprised by the numerous changes suggested by some parties in the comments submitted on February 6, 2015, especially on rules that had not changed substantially since the Initial Draft Rules were issued for comment on September 8, 2014. There have already been substantial opportunities for entities to comment on the rules proposed in this docket, including three previous rounds of written comments and two workshops. At this stage in the docket, AT&T had anticipated that the comments submitted on February 6, 2015 would be on a limited number of issues and related to the revisions made in the Second Draft proposed rules issued on January 6, 2015. Unfortunately, it appears some parties waited until February 6, 2015 to submit substantive comments on many

of the proposed rules. AT&T appreciates the opportunity to respond to many of the issues that were raised for the first time in the February 6, 2015 comments.

AT&T believes there are a few general areas to consider when evaluating comments of various entities. First, the main focus of this docket is on pole attachment rates which are recurring charges for occupying a vertical portion of the usable space of the pole. In contrast, make-ready costs are one-time charges to recover the actual costs to make a specific pole ready for the requester and should be excluded from the calculation of pole attachment rates. Charges for make-ready work should be direct, reasonable, actual, verifiable and non-discriminatory. Other than clarifying that make-ready costs should be direct, reasonable, actual, verifiable and non-discriminatory and that such rates should be available upon request, the rules do not need to detail out each specific component of make-ready costs.

Second, many of the changes suggested in the recent comments are items that have already been considered and rejected by the Federal Communications Commission ("FCC"), which has decades of experience in implementing pole attachment rules. AT&T respectfully suggests that the Commission consider the FCC's rationale in rejecting a number of the items that have been suggested in this latest round of comments and to make the rules as consistent as possible with the FCC's pole attachment rules. This clearly seems to be the intent of the current rules which direct the Commission to consider the FCC's orders promulgating and interpreting its pole attachment rules.[1]

II. DISCUSSION

A. Definitions: -020

1. Attachment

[1] See proposed rule WAC §480-54-010(2).

PSE proposes adding the following sentence to the end of the definition of attachment:

> Where the attachment is an antenna, due to radiation exposure limits or concerns, the owner may deny attachment or make requirements for the attachment or its operation that are not consistent with these rules.

AT&T strongly opposes this addition. PSE's suggested change would, in essence, allow a pole owner to issue a blanket denial of wireless antenna attachments to poles or to certain areas of the pole based on "concerns" about radiation exposure or would allow a pole owner to make "requirements for the attachment." The FCC, which has promulgated radio frequency ("RF") safety rules which all carriers must comply,[2] did not provide a similar exclusion in its pole attachment rules. Indeed, in December 2004, when the FCC reminded utilities of the "obligation to provide wireless telecommunications providers with access to utility poles at reasonable rates pursuant to section 224 of the Commissions Act, 47 U.S.C. §224"[3] and confirmed that wireless attachments are permitted above the communications space and on pole tops,[4] it did not include any such blanket exclusion for pole owners.

The FCC has developed a detailed regulatory framework regarding RF safety and all carriers are required to comply with these rules.[5] The FCC rules are designed to accommodate the critical public interest in health and safety and include two exposure limits – one for the general population/uncontrolled environment and one for "occupational/controlled" environment.[6] The occupational/controlled exposure limit applies where exposure occurs as a consequence of employment and where the exposed persons "are

[2] 47 CFR 1.1310 et seq.
[3] FCC Public Notice, *Wireless Telecommunications Bureau reminds Utility Pole Owners Of Their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates*, DA 04-4046, (rel. Dec. 23, 2004).
[4] *Id.*
[5] 47 CFR 1.1310 et seq
[6] Id.

fully aware of the potential for exposure and can exercise control over their exposure" or when an individual is transiting the affected area and has been made aware of the potential for exposure.[7] With regard to RF safety concerns, the FCC had the opportunity to block wireless antenna installations on utility poles; however, it did not make a blanket exclusion in its pole attachment rules.

Further, the FCC has required that a specific explanation of the reasons for denial to access a pole must be provided on a pole-by-pole basis.

> It is not sufficient for a utility to dismiss a request with a written description of its blanket concerns about a type of attachment or technology, or a generalized citation to section 224. Instead, we find a utility must explain in writing its precise concerns – and how they relate to lack of capacity, safety, reliability, or engineering purposes – in a way that is specific both with regard to both the particular attachment(s) and the particular poles(s) at issue. Furthermore, such concerns must be reasonable in nature in order to be considered nondiscriminatory. Concerns that appear to be mere pretexts rather than legitimate reasons for denying statutory rights to access will be given serious scrutiny by the Commission, including in any complaint proceeding arising out of a denial of access.[8]

If a pole owner has a concern, this should be addressed on a pole-by-pole basis. AT&T has been able to address the concerns of pole owners in other states through work protocols or procedures that can take into account the specific circumstances surrounding the proposed antenna attachments. Pole owners should not be able to circumvent these rules and deny the attachment of wireless antennas in either the communication space or pole top based on blanket "safety concerns."

2. Carrying Charge:

[7] 47 CFR 1.1310(e)(1)
[8] FCC 2011 Pole Attachment Order, para. 76.

A number of parties suggested changes to the definition of carrying charge.[9] After reviewing the comments of Frontier and BCAW, AT&T agrees that "including" should be deleted. AT&T's proposed changes to the Second Draft Rules for carrying charge are as follows:[10]

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

3. Make-Ready Work

PSE seeks to include a number of items in the make-ready charges for pole replacement. AT&T believes that all charges associated with make-ready must be direct, reasonable, actual, verifiable and non-discriminatory (supported by detailed invoices).

4. Occupied Space

PSE has suggested a number of changes to this section that should be rejected. First, PSE has deleted the phrase "that is rendered unusable for any other attachment." As AT&T explained in its previous comments, an attacher should not have to pay for space transited by wires or cables running vertically on the pole. For example, many entities have cables or wires that, for various reasons, must run vertically on a pole and do not render any vertical portion of the pole's usable space unavailable for others.[11] In fact, power companies could have wires that travel from the base of the pole all the way to the top without encumbering

[9] PSE, Frontier (p.1-2), Broadband Communications Association of Washington ("BCAW")(p.4).
[10] Underlined text is AT&T's suggested additions to the Second Draft Proposed Rules; suggested deletions to the Second Draft Proposed Rules are indicated by strike-through.
[11] AT&T Comments (Oct. 8, 2014), p. 6-7.

the ability of others to avail themselves of the usable space in the communications zone. The definition of occupied space should remain as follows:

> "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.

5. Pole

Avista has requested changing the definition of "pole" to "structures used to attach distribution lines and having a voltage rating of or below 34.5 kV."[12] Limiting the rules in this manner would be inconsistent with the Washington statute, the FCC's rules, and pole attachment rules in other states. Therefore, AT&T opposes Avista's suggested change.

The Commission has authority to promulgate pole attachment rules for poles that are subject to the Commission's jurisdiction. The Washington statutory chapter directing the Commission to promulgate pole attachment rules is entitled "Attachments to Transmission Facilities."[13] The Commission has the authority to "regulate in the public interest the rates, terms and conditions for attachments…"[14] and "attachments" are "installed upon any pole."[15] The Commission, therefore, has jurisdiction to regulate the attachments to poles to the extent not otherwise preempted by federal law.

The FCC's pole attachment rules apply to poles that may have some transmission facilities in addition to distribution. In *Southern Company v. FCC,*[16] the U.S. Court of Appeals for the 11th Circuit found that "[t]he fact that a given 'pole, duct, conduit, or right[ ]-of-way' may have some transmission plant attached to it does not exclude if from the

[12] Avista, p.3.
[13] RCW Ch. 80.54.
[14] RCW 80.54.020.
[15] RCW 80.54.010(1)
[16] Southern Co. v, FCC, 293 F.3d 1338 (11th Cir. 2002)

coverage of the Act. These local distribution facilities, festooned as they may be with transmission wires, are plainly within the FCC's jurisdiction under the terms of the Act."[17]

In Oregon's pole attachment proceeding, the Commission found that the rules regarding access to poles included poles that "carry both distribution and transmission lines."[18] The Oregon Commission further found that if poles that have distribution lines are accounted for in the transmission accounts, the transmission accounts should be used to calculate the rental rates on those transmission poles.

For these reasons, the definition of pole should remain as proposed in the Second Draft Rules and apply to structures that include distribution and transmission lines.

> "Pole" means an above-ground structure on which an owner maintains attachments. When the owner is an electric company as defined in RCW 80.04.010, "pole" is limited to structures used to attach distribution lines.

6. Usable Space

PSE has suggested a number of changes to the definition of usable space.[19] AT&T supports PSE's suggestion to add "vertical" and remove "including cross-arms and extensions" to the beginning of the definition as this will provide additional clarity. Although carriers should be allowed to make attachments to cross arms, cross arms should not be used in the definition of usable space as this is part of the rate formula which is calculated based on vertical space on the pole.

AT&T opposes PSE's suggested addition to the end of the definition. Details regarding surveys are part of make-ready and should not be included in the definition of usable space. The definition of usable space should be as follows:

[17] Id, at 1345.
[18] Oregon Order No. 07-137, p. 7 (April 10, 2007)
[19] PSE Comments, p.9.

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

B. Duty to Provide Access -030

PSE has suggested extensive changes to this section, many of which could have and should have been raised when the Initial Draft Rules were released. AT&T has not attempted to address all of PSE's proposed changes, but will comment on a number of them below.

As a general comment, AT&T believes that any expenses associated with make-ready charged by the pole owner should be direct, reasonable, actual and verifiable.

(1) AT&T opposes PSE's suggestion to insert the following sentence into paragraph 480-54-030(1): "*Nondiscriminatory in the preceding and following sentences means only that the owner cannot discriminate between coincident requesters."* There are a number of problems with this sentence. First, there are usually not "coincident" requesters as it would be rare for a pole owner to receive requests from different entities at the same time to attach to the same poles.[20] Second, if this sentence was adopted it would effectively allow PSE to indefinitely reserve space on poles and declare that there is "insufficient" capacity for another attacher. The FCC considered this issue and required the pole owner to have a "bona fide development plan" as a prerequisite to a utility's reservation of space for its

[20] According to the Merriam-Webster online dictionary defines "coincident" as 1: of similar nature, 2: occupying the same space or time. http://www.merriam-webster.com/dictionary/coincident

future needs.[21] The FCC's conclusion was reviewed in *Southern v. FCC* and the court found that requiring a showing of a bona fide future need is an "eminently reasonable mechanism to ensure that when utilities reserve space on a pole and deny attachers access on the basis of insufficient capacity, capacity is actually insufficient."[22]

AT&T also opposes PSE's suggested changes to the end of this rule to exclude pole replacement from make-ready work, thus giving the pole owner basically unfettered discretion to determine when to schedule a pole replacement. As AT&T explained in its previous comments in this docket due to the manner in which customers are now using their wireless phones, wireless infrastructure is required in residential areas to provide high quality, reliable wireless voice and data service that penetrate inside homes.[23] Coupled with codes in a number of jurisdictions in Washington which encourage wireless providers to place facilities on existing structures, such as utility poles, means that there is real public benefit to ensuring that pole replacements can occur in a timely manner.[24]

The FCC's National Broadband Plan calls broadband, "the great infrastructure challenge of the early 21st century."[25] The FCC "has recognized that lack of reliable, timely, and affordable access to physical infrastructure – particularly utility poles – is often a significant barrier to deploying wireline and wireless service."[26] To encourage increased broadband deployment in Washington, the Commission should

[21] First Report and Order, 11 FCC Rcd 15499, para. 1169.
[22] Southern v. FCC, 293 F.3d 1338, 1348-49.
[23] AT&T Comments, Docket No. U-140621 (May 30, 2014), p.3-7.
[24] AT&T Comments, Docket No. U-140621 (October 8, 2014), p.1-3.
[25] Connecting American: The National Broadband Plan ("National Broadband Plan"), p. XI.
[26] Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, WC Docket No. 07-245, GN Docket No. 09-51, FCC 11-50, Report and Order and Order on Reconsideration (rel. April 7, 2011)("*2011Pole Attachment Order*"), para. 3.

encourage timely replacement of existing utility poles the cost of which will all be imposed on the requester.

(2) The last sentence suggested by PSE to WAC §480-54-030(2) should not be accepted. For the reasons AT&T explained in its February 6, 2015 comments, parties should not be required to submit disputes prior to executing an agreement. The FCC considered and rejected this same proposal.[27]

(3) PSE's suggestion in proposed rule 480-54-030(3), (6)(a)(iv), and (6)(b)(iv) to insert a reference to WAC §480-100-108 should not be accepted. WAC §480-100-108 addresses applications by consumers for electric service. These rules are addressing an entity requesting to attach to a pole at a reasonable rate and are not intended to address applications for electric service.

(4) AT&T believes that all of PSE's suggested changes to proposed rule 480-54-030, and throughout the document, regarding make-ready costs should be addressed by clarifying in the rule that make-ready costs should be direct, reasonable, actual, verifiable and non-discriminatory

(5) PSE suggested changes to the timeline to access poles in proposed rule 480-54-030 should be rejected. The FCC has provided in its pole attachment rules for 14 days for each of the estimate stage and acceptance phase and there is no need to deviate from these timelines.[28]

(6) PSE has suggested adding two sentences to the end of Draft Rule 480-54-030(6)(a)(ii) and (6)(b)(ii) which would exclude PSE from certain obligations under WAC 480-100-133, 480-100-148 and other rules not specifically listed. As these rules

[27] AT&T Comments, Docket No. U-140621 (Feb. 6, 2015), p. 3-5.
[28] 47 CFR 1.1420(d).

address electric service to consumers and it is not appropriate to address PSE's request in these pole attachment rules.

C. Rates: -060

PSE suggests adding three paragraphs to the end of this rule which AT&T believes are unnecessary and, in many cases, repetitive.

D. Complaint – 070

Several entities suggested changes to proposed rule 480-54-070(4). Avista, for example, requests that any refunds ordered by the Commission should date back only to the date the complaint is filed.[29] This proposal should be rejected. Even Avista acknowledges that this limitation is inconsistent with the current FCC rules which allow refunds back to the applicable statute of limitations.[30]

Frontier suggests that proposed rule 480-54-070(4) should be clarified so that any complaint about existing attachments should be brought within six months of the date the parties reach an impasse in their attempts to renegotiate any rate, term or condition in an existing pole attachment agreement.[31] AT&T generally supports Frontier's suggested clarification for existing agreements.

III. CONCLUSION

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

[29] Avista Comments, Docket No. U-140621 (Feb. 6, 2015), p.16
[30] Id, ftnt 17.
[31] Frontier Comments, Docket No. U-140621 (Feb. 6, 2015), p. 2-3.

to respond to the voluminous changes suggested by some parties at this late stage of the docket.

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Cynthia Manheim by Dac with permission

By: Cynthia Manheim, WSBA# 26524
Representing AT&T Corp., New Cingular Wireless PCS, LLC, and Teleport Communications America, Inc.
PO Box 97061
16331 NE 72nd Way
Redmond, WA 98073-9761
Telephone: (425) 580-8112
Facsimile: (425) 580-8652
Email: cindy.manheim@att.com