BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In Re Rulemaking:	)	Docket No. U-140621
	)	
	)	**PCIA – THE WIRELESS**
To Adopt Rules to Implement RCW Ch. 80.54	)	**INFRASTRUCTURE ASSOCIATION**
	)	**AND THE HETNET FORUM'S REPLY**
	)	**TO FEBRUARY 6, 2015 COMMENTS ON**
	)	**SECOND DRAFT RULES TO**
	)	**IMPLEMENT RCW CH. 80.54**

PCIA – The Wireless Infrastructure Association and the HetNet Forum, a membership section of PCIA (together "PCIA"),[1] hereby submits to the Washington Utilities and Transportation Commission ("Commission") the following reply to certain comments submitted by several energy companies in this rulemaking on February 6, 2015.[2]

PSE waited until its February 6 comments to the Second Draft Rules Governing Access to Utility Poles, Ducts, Conduits, and Rights-of-Way ("Second Draft" or "Rules"), to present sweeping objections and proposed revisions in a patent attempt to derail the rulemaking process. PSE wants the Commission to completely re-draft the Rules and subject all interested parties to new rounds of comments. The obvious motive for PSE's actions here (and its proposed revisions) is to achieve further delay in the final adoption of rules that PSE does not want to be subject to. PSE's tactics should not dissuade the Commission from moving forward

[1] PCIA – The Wireless Infrastructure Association is the principal organization representing the companies that build, design, own and manage telecommunications facilities throughout the world. Its over 200 members include carriers, infrastructure providers, and professional services firms.
The HetNet Forum, formerly The DAS Forum, is dedicated to the advancement of heterogeneous networks. HetNets provide increased network coverage, capacity and quality through the use of a variety of infrastructure and technology, enabling seamless voice and data communications. The HetNet Forum is a membership section of PCIA – The Wireless Infrastructure Association. PCIA members are authorized to attach to utility poles in Washington under 47 U.S.C. §§ 224A (4), (b) (1) and RCW 80.54.010(1) and 80.54.020.

[2] These companies are Puget Sound Energy ("PSE"), Avista Corp. ("Avista") and Pacific Power ("PP"). Except where indicated this Reply will be responding to PSE's comments.

expeditiously as the FCC recognized "Time is of the essence for requesting entities, their investors and their potential customers."[3]

I. INTRODUCTION

PSE has had ample opportunity in this rulemaking to express the abundant "concerns" now overflowing in its February 6 comments and to provide evidence to support its new positions, but has failed to do so. PSE's due process rights have been fully honored in this rulemaking to date by the two workshops and several rounds of comments within which PSE has been allowed to present its views. There is no need for the Commission to "explain" itself to PSE, as PSE requests, thereby delaying final issuance of the Rules. Further delay will only reward PSE for its deliberate, unfair eleventh-hour delay tactics, particularly when there is no legal or policy basis for doing so.

PSE criticizes the Rules for lacking an adequate record but this ignores the basis upon which the Rules are modeled, the FCC's pole attachment rules. These were adopted, and modified, by FCC rulings, such as the 2011 Order, which were all based upon voluminous records.[4] The Rules do contain some Washington-specific modifications, and to a small extent go beyond FCC rules, for sound policy reasons. The Commission would act well within its authority granted by RCW 80.54.060 if it were to adopt the Rules with some of the limited reasonable revisions proposed by other parties. PSE's proposal is *not reasonable* and its proposed revisions advance positions that should be rejected by this Commission. Attached

[3] *See In the Matter of Implementation of Section 224 of the Act*, 26 FCCR 5240, 26 FCC RCD 5240 (April 7, 2011), ¶ 69. Hereinafter referred to as 2011 Order.
[4] *See* 2011 Order ¶ 96.

hereto as Exhibit A is a matrix that lays out PSE's proposed revisions and the reasons to reject them.[5]

PSE's criticisms and revisions fall into several broad categories, each of which is discussed below. Generally PSE claims that the Commission's Rules prioritize expediency for attachers over the safety and reliability of the electric system, create burdensome requirements for pole owners and create a new special class for pole attachment work. These claims have no merit and ignore the overarching purpose behind the Rules. The purpose behind the FCC's pole attachment rules and the Commission's state-tailored rules is the same: to accelerate broadband deployment and to promote competition and availability of robust affordable telecommunications and advanced services to consumers throughout the nation.

II. PSE'S PROPOSED REVISIONS SHOULD NOT BE ADOPTED

A. Make-ready Work Can Include Pole Replacement.

PSE, Avista and PP all criticize the proposed rules for including pole replacements within the definition of "make-ready work" in WAC 480-54-020. They claim that this Commission lacks authority to require pole replacements when necessary as part of make-ready work, relying upon the FCC's lack of jurisdiction to mandate expansion of capacity. However, the FCC's jurisdiction is limited by the express language of its enabling statute, 47 U.S.C. § 224(f) (1), that provides that pole access may be denied where there is "insufficient capacity." The 11th Circuit in *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002) interpreted this language to mean that the FCC's attempt to *mandate* capacity expansion is outside of its authority. The court reasoned that if utilities were required to expand the capacity of their plant then Section 224(f) (2)'s "insufficient capacity" language could have no meaning.

[5] PCIA lists those proposed revisions of most concern to its members but does not address all of PSE's proposals such as those regarding overlashing because those can best be responded to by overlashing parties, represented by the Broadband Communications Association of Washington.

This Commission is not bound by the federal law and has independent authority to issue its own rules and regulations under 47 U.S.C. § 224(c). RCW Ch. 80.54 authorizes the Commission to adopt rules to regulate the rates, terms and conditions for pole attachments with no "insufficient capacity" language to constrain those rules. Thus, based upon the foregoing statutes, the Commission has the authority to adopt regulations that are both similar and differ from the federal rules to achieve a legitimate policy objective, such as encouraging the acceleration of broadband deployment in order to promote competition and increase the availability of advanced services to Washington citizens.

Members of the PCIA frequently request pole replacements, pay for any such replacements and consider pole replacements as part of make-ready work. PSE's revisions would give PSE the discretion to deny a necessary facility (i.e., pole replacement) and harm wireless infrastructure development. The energy utilities are not harmed by including pole replacements in make-ready work because attachers will cover all costs. Thus there is no reason to change the current definition of make-ready.

B. The Commission Should Reject PSE's Attempts to Expand the Level of Costs it Seeks to Recover.

Throughout its proposed revisions PSE adds to the costs of what it claims should be recovered either through make-ready charges or pole attachment rates.

For instance, PSE's proposed revisions to WAC 480-54-020(9) state that "the owner may include all costs of make-ready work, including but not limited to, costs of working capital (providing the owner has agreed to replace an existing pole), liability insurance, engineering, overheads, permits, traffic control, materials, legal costs, taxes, and supervision in the charges to the requester for make-ready work."

The FCC has clearly limited the costs to be recovered through make-ready charges which are the "entire capital costs."[6] "[M]ake-ready costs … are those costs incurred by a utility in the preparation of a pole for attachment."[7] Before including additional costs in a rule that defines make-ready costs PSE should have to prove that each of these costs is, in fact, incurred to prepare a pole for attachment and is appropriate to include in make-ready charges. For instance, "legal costs" are do not appear necessary or appropriate costs incurred to prepare a pole for attachment."[8] Only "but for" pole attachment costs are recoverable (pre-instruction survey, engineering, make-ready, preparatory change-out costs).[9]

The FCC rejected the laundry list of additional costs proposed by PSE to be included in make-ready costs, as well as pole attachment rate costs. Pole attachment rates in the FCC formulae adopted by the 2011 Order recover those costs actually caused by attachers, which are limited to those specified in the formulae and encompass maintenance and administrative expenses[10]

C. The Policies Underlying Pole Attachment Rates Do Afford Attachers a Priority.

PSE proposes numerous revisions to treat pole attachment requests the same way that PSE treats all of its service requests. This is another way of promoting delay in deploying necessary telecommunications infrastructure. Federal and state policy in fact made such deployment a priority, which is why the FCC and the Commission have carefully developed

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[6] 2011 Order ¶ 143.
[7] *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 45 Rad. Reg. 2d (P & F) 1005, May 23, 1979, ¶ 8.
[8] Capital costs are fixed, one-time expenses incurred on the purchase of land, buildings, construction, and equipment used in the production of goods or in the rendering of services. Put simply, it is the total cost needed to bring a project to a commercially operable status. Whether a particular cost is capital or not depends on many factors such as accounting, tax laws, and materiality. http://en.wikipedia.org/wiki/capital_cost.
[9] 2011 Order ¶ 128.
[10] Id. ¶145.

timelines to prevent delay and encourage expeditious deployment of telecommunications facilities to promote broadband deployment.[11] Accordingly, PSE's proposals should be rejected and separate, expedited timelines adopted for pole attachments are acceptable even if these may differ from others used to fulfill other customers' orders. The purported "discrimination" PSE alleges has a rational basis because the FCC and the Commission have concluded that pole attachers need different treatment to further the legitimate public policy of promoting the deployment of advanced telecommunications infrastructure.

Further, PSE seems to propose a double standard. On the one hand it wants to be able to schedule pole attachment requests in the same way it handles all other service requests. *See, e.g.* proposed revisions to WAC 480-54-030(b). On the other hand PSE wants to be relieved of the service responsibilities PSE owes to all of its customers. Se e.g. proposed revisions to WAC 480-54-030(a)(6)("PSE shall not be held responsible for violation of any rule."). This is simply wrong.

All of PSE's proposed revisions, reviewed *in toto*, are amazingly self-serving, designed to eliminate any possible risk or burden to it from having to provide access to poles. They should not be adopted.

D. PSE Should Not Be Allowed to Set Arbitrary Deadlines to Address Emergencies and Other Unanticipated Occurrences.

The FCC recognized that emergencies and certain events beyond an owner's control may interrupt pole attachment projects. Therefore, it adopted a "good and sufficient" standard to toll pole attachment rule timelines *only for so long as necessary*. An owner must be required to justify stopping the work and must be required to resume pole attachment projects when normal operations resume.[12] PSE's proposed revisions place no such obligations upon it. Rather, they

[11] 2011 Order ¶ 149.
[12] 2011 Order ¶¶ 68, 69.

give PSE free reign to unilaterally determine when to stop the clock and for how long. Again, PSE's self-serving proposal on this point must be rejected.

E. PSE's Changes to Proposed Timelines Are Not Justified.

The Rules follow the FCC's rules regarding proposed timelines which have built-in flexibility.[13] PSE fails to justify with any record its proposed changes which increase the number of days in its favor in the pole attachment timeline. For instance, PSE proposes to expand the timeline for treating multiple attachment requests as one request from thirty to ninety days, making the 90th day as the start of the clock. Based upon a full record and thoughtful analysis, the FCC adopted a flexible timeline in the rules adopted in the 2011 Order. The FCC favored putting in place procedures for requiring utilities to justify conditions placed on access, such as unreasonable timelines, to safeguard attachers' rights. So, too this Commission should not adopt PSE's preferred timeline without further, demonstrated good reason to do so.

III. CONCLUSION

PSE has tried to throw a monkey-wrench in this proceeding by propounding major, last-minute revisions to the Rules, advancing arguments rejected by the FCC or otherwise supported by no authority or public policy except PSE's own self-interest. They present no basis for this Commission to delay issuance of final Rules, which are long overdue.

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DATED this 27th day of February, 2015.

[13] *See* 2011 Order ¶ 73.

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EXHIBIT A

PSE CLAIMS	BASIS FOR REJECTION
Rules create cross-subsidies, burdening PSE customers p. 1	2011 Order ¶¶ 182-187
Rules are not based upon record p. 1	2011 Order ¶ 6, 8, 19, 21, 32, 42, 96
Make-ready work should not be given scheduled preference p. 6	2011 Order ¶ 149
If pole numbers increase attachers should pay the cost of working capital p. 6	2011 Order ¶ 144 (attachers pay all capital costs for pole replacements in make ready charges but pole attachment rates should not recover capital costs)
Make-ready charges should include costs of working capital, liability insurance, engineering, overheads, permits, traffic control, materials, legal costs, taxes and supervisors p. 6, WAC 480-50-020(9) revisions	*See* discussion at Sec. II.B. *Infra.*
Where antenna is attachment, due to radiation exposure limits owner may deny attachments or impose other requirements p. 7, 480 480-50-020(1) revision	2011 Order ¶ 77 (only limits on antenna placement is statute) 47 U.S.C. § 332(c)(7) preempts local decision making regarding RF decisions
Carrying charges include "overheads" and "other costs as incurred pursuant to this Chapter" 480-54-020(2) revisions	FCC Rules, per 2011 Order, establish permissible costs to be recovered. They do not include what PSE proposes. *See* discussion at Sec. II.B. *Infra.*
"Coordinate means to provide notice through a joint notification system" p. 6, 480-54-020 revision	PSE adds this new definition which is not required by the FCC or even discussed in the 2011 Order. This would increase pole attacher administrative expense because they would have to adopt a new software system that may differ from state to state where they deploy.

PSE CLAIMS	BASIS FOR REJECTION
Rules would apply to all communications companies, including wireless companies and tower companies p. 9	No evidence that electric utilities need to or have ever attached to facilities wholly-owned by telecom companies. 2011 Order *in toto* addressed electric utility poles. *See, e.g.*, ¶ 8, 19
Removes "insufficient capacity" as basis for denial if requester agrees to pay for pole replacement. p. 10, 480-54-030(1) revisions	PSE should not be allowed to "not agree" to pole replacement, which would unreasonably create "insufficient capacity" and cause delay.
A pole replacement obligation would impair ability to provide service to new electrical customers or restore service to existing customers p. 10	2011 Order *in toto* found FCC rules did not impair electric utilities' ability to serve customers
Parties must submit dispute prior to executing pole attachment agreement. 480-54-050(2) revision	2011 Order ¶¶ 119-125 sustained "sign and sue" practice
Pole attachment application must be treated in same way as all other applications for service. 480-54-030(3) revision	*See* discussion *Sec II.C. Infra.*
Costs of processing application and denial letter, along with "overheads and applicable taxes" to be paid by attacher in separate fee. p. 16, 480-54-030(3) revisions	Owners may only charge make-ready and pole attachment rates. Overhead and taxes not recoverable. 2011 Order ¶ 143, 196
Pole owner can assess $500 penalty per attachment that is not pre-approved and recover "loss of revenue, attachment removed costs and any legal costs." 480-54-030(3) revision	2011 Order ¶ 115 referred to Oregon rules regarding penalties for unauthorized attachments (which are not those proposed by PSE) as setting the outer bounds of reasonableness.
Attacher must request a report, and pay for it, that will provide all relevant information supporting the denial. 480-54-030(4) revision	2011 Order requires this report from owner and does not impose any cost upon attacher to learn why its application is denied.

PSE CLAIMS	BASIS FOR REJECTION
Owner to provide cost estimate for make-ready within 30 days. 480-54-030(5) revision	2011 Order ¶ 26 requires 14 days
Owner to recover all costs to prepare estimate through application fee paid with application. 480-54-030(5) revision	Such cost recovery is not tied to actual cost of individual estimate preparation and should not be allowed. Application process is an administrative cost in pole attachment rates so no separate fee. 2011 Order ¶ 183
Estimate is valid only for 30 days. 480-54-030(5)(b) revision	2011 Order ¶ 26 Estimate must be actively withdrawn by owner and do not automatically expire
Costs for providing notice of time period for make-ready completion work to be included in pole attachment rates 480-54-030(b) revisions	Only if notice is an administrative cost. 2011 Order ¶ 183. Notice imposes small burden (i.e., cost) ¶ 34.
Pole replacements are to be scheduled along with "all other work scheduled by owner. 480-54-030(6)(a) and (b) revisions	*See* discussion *Sec.* II.C. *Infra.*
PSE not responsible for violation of any rules in completing make-ready work or any delays. 480-54-030(6)(a) and (b) revision	No basis to relieve PSE of rule violations or overarching public service obligations
Attachment can be removed by PSE if attacher does not modify upon request of PSE when PSE does not have qualified employees to do it and PSE not liable for any damage and attacher must pay for costs of removal. 480-54-030(6)(a)(iii), (b)(iii) revisions	This is inherently arbitrary and wrought with the potential for dispute. This is not addressed in the 2011 Order probably because of the foregoing reasons.
PSE can delay make-ready work "in order to allow make-ready work to be completed on non-discriminatory basis" or due to emergencies. 480-54-030(6)(a)(iv) and (b)(iv) and 480-54-030(7)(c) revisions	*See* discussion *Sec. II.B. Infra.* and 2011 Order ¶ 68

PSE CLAIMS	BASIS FOR REJECTION
Remove 15-day extension for pole owner to complete make-ready. 480-54-030(6)(a)(v) revision	2011 Order ¶ 39 Imposes additional 15 days in timeline when owner does make-ready
Changes owner's duty to treat multiple requests as one request within a 30-day period to a 90-day period. 480-54-030(7)(c) revision	2011 Order ¶ 67
Time period for make-ready survey and completion runs from last request received in 90-day period. 480-54-030(7)(c) revision	2011 Order ¶ 67
Deletes obligation of owner to notify attacher of unanticipated circumstances requiring extension of completion date. 480-54-030(8)(b) revision	2011 Order ¶¶ 34, 35 Owner must first notify existing attachers of needed make-ready. Notice is a "relatively small burden"
Make-ready work to be performed along with "all other work performed by the owner" and time periods shall be extended to respond to natural disaster. 480-54-030(8)(b) and (c) revision	*See* discussion at Sec. II.B. and C. *Infra.*
Pole replacements to be done per time periods required "for all other work performed by the owner." 480-54-030(8)(d) revision	*See* discussion at Sec. II.B. and C. *Infra.*
Time periods do not start until owner has received "payment for all amounts due." 480-54-030(8)(e) revision	2011 Order imposes no such requirement. 2011 Order only requires prepayment of make-ready charges.
Notice requirements of WAC 480-100-108(4) to apply to notices of changes, the cost of such notices to be included in pole attachment rates.	Only if notice produces administrative costs. Notice impose a small burden (i.e. cost) 2011 Order ¶ 34 and 183

PSE CLAIMS	BASIS FOR REJECTION
Owner can place a hold on processing of new applications if attacher is in breach of pole attachment agreement, apparently determined unilaterally by owner. 480-54-030(8)(f) revision	Owner may delay only if make-ready not paid. Per logic of "sign and sue" rule disputes do not delay the attaching process.
Attachers are to provide list of contractors authorized to work on poles and shall be responsible for all costs and "the owner's legal costs related to the contractors work or accident or injury to the contractor's employees or any member of the public and must insure such contractor does not work above communications space and informs PSE of NESC violations. p. 15, 480-54-030(10) revisions	Contradicts 480-54-040(1) 2011 Order (owner required to develop list of contractors)
All costs associated with PSE's contractors lists to be included in pole attachment costs. p. 16, 480-54-040(1) revision	Not discussed in 2011 Order ¶ 54. Recovery only if this is a proper "administrative cost"
Attacher must pay federal income taxes on pole improvements and all PSE legal costs incurred for contractor's work. p. 16, 480-54-040(2)	See above and discussion in Sec. II. B. infra. Taxes are not recoverable under 2011 Order ¶ 196
PSE bills all costs associated with its representative accompanying authorized contractor. p. 16, 480-54-040(3)	See above.
Cost of pole attachments to include accounting, tracking, billing, switching, de-energizing lines and owner costs associated with rearrangement or replacement. p. 18, 480-54-050(2) revisions	See above.
Nonpayment of pole attachment fees for more than 90 days is "sufficient evidence" to remove attachments. p. 18, 480-54-050(5) revision	This self-help remedy is not supported by any authority. State law provides remedies for non-payment
Pole attachment rate costs to include costs of	See discussion in Sec. II. B. infra.

PSE CLAIMS	BASIS FOR REJECTION
removing abandoned attachments and insurance costs due to attachments are not transferred. p. 18, 480-54-050(5)	
Attachments to be classified as abandoned if attacher refuses to pay all costs of removal. p. 18, 480-54-050(6)	2011 Order does not address.
PSE includes potpourri of "Chapter 480-54 costs" including "carrying costs and taxes" in calculating pole attachment rates. pp. 18-19, 480-54-060(4) revisions	See above and discussion in Sec. II. B. infra. Taxes are not recoverable under 2011 Order ¶ 196
PSE limits refund due for unfair, unjust, unreasonable or insufficient rate from the date of the filing of the formal complaint. p. 19, 480-54-070(7) revision	2011 Order ¶ 112
Complaint procedure creates "a special class of customers out of the requesters and occupants." p. 19	2011 Order ¶ 149. Pole attachments receive priority.