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Via Electronic Mail

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Re: Docket No. U-140621 – Reply Comments of Avista Utilities

Avista Corporation, dba Avista Utilities ("Avista" or "Company"), submits the following Reply Comments in accordance with the Washington Utilities and Transportation Commission's ("Commission's") Notice of Opportunity to Comment on Third Revised Draft Rules ("Notice") issued March 24, 2015 in Docket U-140621.

Avista appreciates the opportunity to reply to the proposals submitted by all parties in this docket on April 17, 2015.

I. 480-54-020 DEFINITIONS

The Commission Rejected Proposed Changes to the Definitions of "Requester," "Usable Space" and "Attachment" for Good Reason

Integra's April 17, 2015 Comments claim that the definition of "Requester" under 480-54-020(17) "goes too far in limiting Requesters' ability to request attachments" by requiring an attachment agreement to be in place prior to a request for access.[1]

The Commission's decision to require an agreement makes sense for the same reason it made sense to reject Google's proposal to allow entities without franchises, licenses or other authorizations to use public rights-of-way.[2] Allowing entities without agreements to request access would require utility pole owners to redirect resources to accommodate attachment requests by any entity that has not agreed to comply with any agreement terms. Genuine work for other attaching entities with attachment agreements might be postponed to accommodate these new entities that have not yet put adequate effort into negotiating an agreement. Integra's proposal would unnecessarily burden electric utility and ILEC pole owners and be unfair to the other attachers whose legitimate requests would likely be delayed. In addition, Avista is concerned that parties without agreements may find themselves surveying and measuring utility poles without any agreement covering potential liabilities.

Integra also proposes to revise the definition of "Usable Space" under 480-54-020(19). To include "extension technology" that covers boxing, cross arms, and extension arms to the extent the owner currently employs those "technologies."[3] But this change was already added into the Second Draft and then deleted from the Third Draft for good reason. The effect of this change would only serve to modify the rate formula to require attaching entities to pay far less than even the FCC cable rate would allow, which appears to be the lowest pole attachment rate in the country. This is true because the formula's "space factor" is calculated by dividing the space an attacher occupies on the pole by the total usable space on the pole and cross-arms can add space to which attachers can install facilities. If the usable space is increased as Integra proposes, the Commission's proposed formula would not mirror the FCC cable rate because the FCC formula does not include cross-arms and extension arms in its definition of usable space.

The Broadband Communications Association of Washington ("BCAW") continues to be concerned about the exclusion of "rights-of-way" from these rules, and wants to include "rights-of-way" in the definition of "Attachment" under 480-54-020(1). BCAW claims that if the

[1] Comments of Integra, at 2 (April 17, 2015).
[2] *See* Google's February 6, 2015 Comments at 5.
[3] Comments of Integra at 3.

Commission does not mandate access to rights-of-way then it would violate state law and require right-of-way disputes to be adjudicated at the FCC.[4] The Commission, for its part, already has responded by explaining that permitting third party access to easements is beyond the scope of the FCC rules and implicates state law.[5]

BCAW is arguing in effect that the pole attachment regulation adopted in the federal Pole Attachment Act for the FCC guarantees BCAW members whatever rights that Congress allowed the FCC to grant in FCC regulations. That is not how the Pole Attachment Act works, however. Instead, the Act provides explicitly that any State may preempt FCC jurisdiction by certifying to the FCC that it has decided to regulate pole attachments. Washington State already has provided that certification. As a result, Section 224(c)(1) of the Act plainly states:

> Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State.[6]

BCAW members therefore have no recourse at the FCC for any pole attachment disputes in Washington State.

It could be that BCAW's proposal is designed to allow attaching entities to "piggy-back" on electric utility easements granted by private property owners, but such an added burden on private property owners may violate express terms of the easement. Even if express terms of the easement are not violated, the tenuous relationship between landowners and Avista might be changed with the introduction of third party communications attachments, particularly wireless attachments, on landowner property. BCAW members are perfectly capable of obtaining their own easements with private property owners.

As for public rights-of-way granted by municipal, county, and state governments, those rights-of-way are granted as part of a process allowing these government entities to monitor and approve equipment installed in rights-of-way and to require appropriate compensation for the use of public property. Communications attachers should be subject to the same oversight and approval process and should therefore be required to obtain their own rights-of-way.

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[4] Comments of BCAW at 2 (April 17, 2015) (citing its February 6, 2015 Comments).
[5] Summary of Comments/Responses on Revised Draft Rules at 1 (Mar. 13, 2015) [hereinafter "Commission Matrix"].
[6] 47 U.S.C. §224(c)(1).

II. 480-54-030 DUTY TO PROVIDE ACCESS; MAKE-READY WORK; TIMELINES

Application Processing Fees

BCAW takes issue with the language in Draft Rule 480-54-030(3) that allows utilities to recover "the reasonable costs the owner actually and reasonably incurs to process applications," contending that neither Oregon nor the FCC allows such charges.[7] BCAW claims that the costs associated with processing applications are already "rolled up into the administrative FERC Accounts that factor into the rental rate", and that "double-recovery" would occur if direct recovery of these costs were allowed.[8] Other parties made similar claims of "double recovery."[9]

These claims of double recovery are entirely without merit. BCAW believes that double recovery would occur because these costs already are included in the 13 FERC Accounts that comprise the administrative carrying charge, citing specifically FERC Accounts 920, 921, 923, 926, and 928.[10] But this belief is mistaken because the entire budget of Avista's joint use department is included in Account 588 ("Miscellaneous distribution expenses"), not in any of the 13 FERC Accounts that make up the administrative carrying charge.[11] In fact, Account 588 is not included anywhere in the pole attachment rate calculation. Avista therefore recovers none of its costs of processing applications through the pole attachment rate formula.

Moreover, dollar for dollar, the reimbursement Avista receives for processing applications are applied to offset the expense incurred, so that double recovery would not occur

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[7] Comments of BCAW at 4.

[8] *Id*.

[9] *See, e.g.*, Comments of AT&T, at 3 (Apr.17, 2015) ("If an application fee or other charge is assessed and a corresponding reduction is not taken from the inputs to the carrying charge, there would be a double recovery."); CenturyLink's April 17, 2015 Comments on Draft Rules, at 2 ("WAC 480-54-030(3) contains new language in response to PSE's comments making it explicit that the pole owner may recover the costs necessary to process the application. . . . No party should double recover those costs.") [Hereinafter "CenturyLink's Comments"]; Comments of Integra at 6 ("[T]he *Third Revised Draft Rules* allowing a facility owner to recover the costs it incurs to process applications is unnecessary."); PCIA – The Wireless Infrastructure Association and the HetNet Forum's Comments on Third Revised Draft Rules to Implement RCW Ch. 80.54, at 4 (Apr. 17, 2015) ("PCIA requests the Commission to verify that owners will not duplicate recovery of administrative costs associated with processing pole attachment applications.") [Hereinafter "PCIA Comments"].

[10] Comments of BCAW at 4-5.

[11] The Uniform System of Accounts describes costs to be included in Account 598 as follows: "This account shall include the cost of labor, materials used and expenses incurred in distribution system operations not provided for elsewhere."

even if the costs to process applications were included in one of the 13 FERC Accounts in the administrative carrying charge. Those accounts would simply be reduced by the amount recovered from the attaching entity.

Leaving aside the facts, even if Avista's costs to process applications were included as one of the 13 FERC Accounts in the administrative carrying charge, and even if those costs were not offset by amounts received from attaching entities, there still would be no "double recovery" of the vast majority (well over 99%) of those costs. Attached as Exhibit A to these comments are rate calculations performed using the formula proposed by the Draft Rules for "XYZ Utility", whose administrative costs are about twice as high as Avista's. Assume that Avista's annual costs to administer all pole attachments are about $200,000. Applying twice that amount ($400,000) to the total administrative and general ("A&G") expense in XYZ Utility's rate calculation shows that XYZ's annual pole attachment rate would increase by 1/5 of one penny ($8.6444 vs. $8.6424) as a result of this increase in total A&G expense. Even if the increase in the annual rate were a full penny, multiplying one cent times the approximately 150,000 pole attachments for which Avista can charge each year would allow Avista to recover only $1500 (150,000 X $0.01 = $1500) of Avista's $200,000 annual expense, which is less than one percent of that expense. Since the increase in the attachment rate is actually only 1/5 of one cent, Avista would recover through its attachment rates $300 out of the total $200,000 expense. This tiny reimbursement cannot seriously be considered "double recovery."

BCAW incorrectly claims that Oregon's rules disallow recovery of application processing expenses.[12] In the 2007 rulemaking order cited by BCAW, the Oregon PUC reviewed the FCC decisions cited by BCAW and concluded, consistent with Draft Rule 480-54-030(3), that "[s]eparate charges may be made for new attachment activity costs, including preconstruction activity, post-construction inspection, make-ready costs, and related administrative charges."[13] The regulations promulgated by this 2007 rulemaking order are even more explicit in allowing recovery of the costs of application processing. Oregon Administrative Rule 860-028-0110 explains first how annual pole attachment rental rates are calculated and then states:

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[12] Comments of BCAW at 4, n. 12.

[13] *Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachment Use and Safety (AR 506)*, Order, Permanent Rules Adopted, at 13-14 (Oregon PUC 2007) (emphasis added), available at: http://apps.puc.state.or.us/orders/2007ords/07-137.pdf

> (3) the rental rates referenced in section (2) of this rule do not include the costs of permit application processing, preconstruction activity, post construction inspection, make ready work, and the costs related to unauthorized attachments. Charges for activities not included in the rental rates will be based on actual costs, including administrative costs, and will be charged in addition to the rental rate.[14]

The FCC rulings cited by BCAW are rulings of Bureaus acting on delegated authority, and it appears they conducted no analysis to determine the extent of any double-recovery. Moreover, these rulings are based on the incorrect conclusion that application processing is a "recurring" cost for which a separate fee is not justified, while "pre-construction, survey, engineering, make-ready and change-out costs" are all "non-recurring" costs for which separate fees are justified.[15] This distinction, however, makes no sense because application processing costs, like the costs for pre-construction, survey, engineering, make-ready and change-out costs, are all costs that pole owners incur only after new attachment applications are submitted. If pre-construction, survey, engineering, make-ready and change-out costs are all "non-recurring," then so are application processing costs.

The annual pole attachment rate is intended to allow the pole owner recover the attacher's share of the annual costs of owning an maintaining a bare pole, which include administrative, maintenance and other expenses. Since the attacher makes use of that pole, the attacher is supposed to pay for its share of these total annual costs of owning a bare pole. The annual rental rate is not designed to recover the other exceptional costs that the owner incurs in order to monitor, evaluate and manage the joint use program. Those costs are not costs associated with owning a bare pole. Instead, they are out-of-pocket costs incurred by the pole owner to process applications, get communications attachments on the poles, and then monitor and manage those attachments. That is why separate charges are needed for pre-construction, survey, engineering, make-ready and pole change-out costs, and that is why separate charges are needed for application processing. Otherwise, pole owners would not be able to recover those costs.

For all of these reasons, Avista respectfully proposes that the Commission follow the Oregon PUC approach and retain the language in Draft Rule 480-54-030(3) allowing utilities to recover "the reasonable costs the owner actually and reasonably incurs to process applications."

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[14] OAR 860-028-0110(3) (emphasis added).

[1515] *See Texas Cable & Telecommunications Ass'n v. Entergy Services, Inc.*, 14 FCC Rcd 9138, at ¶5.

To do otherwise would be to misrepresent the realities of cost recovery and require electric ratepayers to subsidize communications company attachments.[16]

Correcting Pre-Existing Violations

BCAW objects to the requirement that all pre-existing violations be corrected before overlashing, and instead requests new language in Draft Rule 480-54-030(11) providing that only pre-existing violations *caused* by the attacher seeking to overlash need to be corrected prior to overlashing.[17] This change, however, would place occupant contractors in harm's way and leave all other safety violations in place for other workers to encounter in the future. In fact, the only effect of this proposed change would be to allow Occupants to argue every time that they did not cause the violation so that their overlashing or new attachment project should proceed without delay.

Poles cannot be left with safety issues because of arguments over who caused the violation. If one communication attachment has violated the safety zone, for example, then each party below it does not have adequate separation from energized facilities because the required safety zone has been breached. There then needs to be a cooperative effort to make the pole safe by modifying the attachments. The location of existing attachments at the pole, including those of BCAW members, may already violate National Electrical Safety Code (NESC) spacing requirements by being located too close other attachments, and of particular concern, too close to the energized conductors of Avista. Existing cable bundles may not be compliant with existing codes and standards. Even without the additional sag created by the new overlashed cable, they may violate the NESC's mid-span sag limitations.

As with any attachment request, requests to overlash provide an opportunity for those attached to the pole to assess the attachment conditions on the pole and to make any changes

[16] Similarly, as Avista noted at page 12 of its April 17, 2015 Comments, pole owners must be able recover costs associated with responding to overlash requests. Staff's Recommendation associated with Draft Rule 480-54-030(11) states: "Costs of reviewing and responding to notice [of overlashing] should be included in pole maintenance expenses included in the carrying charge." But the cost of reviewing and responding to overlashing requests is no different than the cost of reviewing and responding to new attachment requests. In both cases, trips to the poles are necessary, engineering analysis and design is required, and a make-ready estimate must be prepared. If this were a new attachment request, those costs would be billed to the requester and recovered separate from the annual rental charge. Like the administrative costs for applications processing, Avista explained that these costs cannot be recovered through the annual rental charge as part of Account 593 maintenance expense.

[17] Comments of BCAW at 7.

necessary to ensure the pole is safe and reliable for the benefit of all attachers and the general public. Every pole on which pole owners cannot correct existing safety and reliability problems is a pole that will continue to have safety and reliability problems, which unsupervised overlashing will exacerbate.

It may be taxing in some cases for all parties on the pole to comply with safety standards, but compliance with safety standards remains the highest responsibility of all attaching entities. The fully-constructed distribution pole system to which communications facilities are attached contain potentially hazardous energized facilities and were constructed by Avista to provide safe and reliable electricity. There is no room for attaching entities to be cavalier about overlashing or any attachment requirements, and pole owner hands should not be tied simply to save communications companies a little money and inconvenience. Communications companies plan their overlashing projects well in advance and should set aside sufficient time and resources to ensure a safe pole plant for all attaching entities. Avista's current program has been effective in building a cooperative process to resolve safety violations found in the course of overlash projects.

Make-Ready Time Extensions

PCIA argues that some pole replacements can be completed within 60 days and that "pole replacements should not serve as the reason for drastically reducing the pole order limit from 300 poles to 100 poles."[18] PCIA argues further that if a pole replacement order is significant, longer time periods can be negotiated.[19]

PCIA's argument is flawed, because it simply ignores the realities of pole replacements. Pole replacements are a forced expansion of capacity that is inconsistent with FCC rules and is a burden on electric utility personnel and resources. Utilities have historically been willing to allow pole replacements as long as electric utility operations and other considerations are not adversely affected, but replacing poles with taller poles simply to accommodate communications attachers is a time-consuming process. Once pole replacements are at issue, timelines are often impossible to meet consistently.

[18] PCIA Comments at 3.
[19] *Id.*

As explained in Avista's April 17, 2015 response to the second of eight questions posed by the Commission, Avista's average time required to replace poles (including necessary field work) is 46.3 days, but this 46.3 day time period does not include: (i) the additional time that may be required to obtain necessary easements or special permitting, such as those required by the Washington Department of Transportation or railroad companies, those required because environmental issues exist, or those required because poles are located near shorelines, historical sites or archeological sites; (ii) the considerable amount of time required for the ordering and delivery of specially engineered steel or laminated poles; (iii) requests for pole replacements that never occurred because the time required for the replacement was longer than the attaching entity wanted to wait and the attaching entity chose an alternate route or chose to install its facilities underground; and (iv) the time to replace transmission poles, since outages associated with transmission pole replacements need to be coordinated with other scheduled outages on the system, and Avista schedules no planned outages to the 115kV and 230kV transmission systems for six months out of the year due to loads and system conditions.

Avista could live with a modified proposal to apply the timelines to projects of 300 poles, but only if such projects do not involve pole replacements.

III. 480-54-050 MODIFICATION COSTS; NOTICE; TEMPORARY STAY

Modification Costs

BCAW proposes changes to Draft Rule 480-54-050(2) that would introduce the element of causation into the requirement that existing safety violations be fixed.[20] As explained above with respect to overlashing, this change would allow Occupants to argue every time that they did not cause the violation, raising disputes about causation and jeopardizing the prompt correction of necessary violations. Occupants will often quarrel that another party is to blame, alleging something must have changed on the pole or the property surrounding it since their attachments were affixed. Most arguments like this have no basis and a pole owner should not have to bear any costs for code violations caused by and that exist because of the joint use facilities in place. The purpose of the NESC and construction standards is the practical safeguarding of persons,

[20] Comments of BCAW at 8.

utility facilities and affected property. When facilities on a pole are intended to be modified (including overlashing) or found not to be in compliance, the lines and equipment must be promptly corrected. Code compliance enforcement should not be unnecessarily delayed and neither should the project that initiated it. At the very least, attaching entities whose facilities are out of compliance should be required to bear the costs of bringing their facilities into compliance to allow the correction to be made. Thereafter, the burden should be on the attacher(s) that bore the expense to prove that it did not cause the violation. Again, Avista has built a collaborative program that satisfies the need for timely access to poles while at the same time addresses safety issues along the way.

IV. 480-54-060 RATES

Rates

CenturyLink argues again that it should be entitled to calculate rates based on the gross cost of a bare pole if the net cost is negative due to depreciation.[21] This argument has already been rejected by the Commission, but CenturyLink insists that because the FCC allows it so should the WUTC.

The problem with CenturyLink's proposal is that it allows entities like CenturyLink which opted for the significant tax advantages of super-depreciating their pole plant until it has a negative value, to continue to receive income for the use of that pole plant that now has no book value. Super-depreciating pole plant has allowed the carrying charges to remain high for rate calculations. Then when the book value is depleted, they are prescribing an alternate formula to re-inflate the rates. In other words, it allows CenturyLink and other telephone company pole owners "to have their cake and eat it too."

V. 480-54-070 COMPLAINT

Complaint

[21] CenturyLink's Comments at 4.

In Draft Rule 480-54-07094), AT&T proposes again to delete the phrase "*The parties were aware of the dispute at the time they executed the agreement*."[22] The Commission considered and rejected this proposal already, and at this point Avista adds only that this language very helpfully encourages parties to negotiate thoughtfully and to identify issues that may arise before they agree to sign a pole attachment agreement. Under these circumstances, once the agreement is signed, both parties deserve assurances that the agreement will be enforceable.

Burden of Proof

BCAW proposes to modify Draft Rule 480-54-070(6) so that the licensee's or utility's burden to prove a right to attach to owner's poles extends only to the licensee's or utility's "jurisdictional" right to attach.[23] This proposed change, however, would eliminate the requirement that a licensee or utility prove it has the easements or rights-of-way necessary to attach. This information about a licensee's right to attach is of obvious significance to the parties and the Commission in any complaint case, even if the licensee or utility is a "jurisdictional" licensee or utility under the rules. Avista therefore proposes that the Commission reject BCAW's proposed limitation.

VI. CONCLUSION

Protecting the public and all line workers (power and communications alike) continues to be one of Avista's primary goals and responsibilities. Proposals made by Avista are the ingredients that have made our joint use program successful by balancing the safety and reliability concerns to meet the demands of a growing communication industry. We strongly believe that utilities need to maintain control over the safety, engineering and reliability of their facilities, and the Commission's pole attachment regulations should promote that objective.

Avista again appreciates the opportunity to provide these comments, and we look forward to participating in any future workshops or discussions. If you have any questions regarding these comments, please contact me at 509-495-4975 or at linda.gervais@avistacorp.com.

[22] Comments of AT&T at 6.
[23] Comments of BCAW at 10.

Sincerely,

/s/Linda Gervais/

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