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

COMMENTS OF THE BROADBAND COMMUNICATIONS ASSOCIATION OF WASHINGTON

The Broadband Communications Association of Washington ("BCAW") respectfully submits these responsive Comments pursuant to the State of Washington Utilities and Transportation Commission's ("Commission") March 24, 2015 Notice of Opportunity to Comment on the Third Revised Draft Rules, regarding the Commission's Rulemaking to Consider Adoption of Rules to Implement RCW 80.54, Relating to Attachments to Transmission Facilities (hereinafter "Third Draft Rules" or "Rules"). BCAW appreciates the extensive time and resources the Commission has spent crafting rules that are just and reasonable and accommodate all legitimate concerns.

I. INTRODUCTION

Unlike every other stakeholder in this proceeding, Puget Sound Energy's ("PSE") latest comments essentially ignore that the Third Draft Rules are the product of a year-long, multi-stake holder rulemaking process whose goal is to implement 80.54, which requires the Commission to ensure that the rates, terms and conditions of pole attachments are "just, fair, reasonable and sufficient." RCW 80.54.020. Rather than contribute anything constructive to the on-going dialogue, PSE's comments are a collection of unsupported, hyperbolic assertions and

unreasonable proposals, many of which the Commission has already considered and rejected.[1] PSE's comments also raise substantive issues for the first time regarding rule language that existed prior to the Third Draft Rules (and in some cases, earlier versions).[2] These untimely proposals should be disregarded outright.

PSE also fails to acknowledge (as it did following the Second Draft Rules), that this Commission has already made a number of revisions in response to PSE and the other investor-owned electric utility's (together, the "IOUs") more reasonable requests, including: clarifying to whom the rules apply; limiting the definition of "usable space" to include "vertical space" only; making the survey optional; removing the "large order" provision altogether; limiting the number of poles in an overlash request; requiring third party overlashers to have an agreement with the owner; requesting that pole owners be reimbursed for conducting surveys and preparing make-ready estimates, and allowing up-front make-ready estimate payments, to cite just some examples.

In addition to treating every set of draft rules as if it was virtually new, PSE has also conducted itself as if it has no obligation to provide reasonable access to its poles, despite its legal obligation to do so. Indeed, PSE's April 17 and earlier Comments, which mostly seek to

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[1] *See generally* Commission Summary of Comments/Responses on Revised Draft Rules, dated March 13, 2015, (hereinafter "Matrix"). While Avista's comments are tempered by comparison, Avista's request to include "sanctions" for the fourth time is inappropriate in light of the Commission's explanation in the Matrix that it would be unlawful for it to do so. *Id.*, p. 18. Avista's position on sanctions is already in the record.

Moreover, as a substantive matter, pole owners are not "defenseless" regarding safety violations, as Avista alleges. Comments of Avista Utilities, Docket No. U-140621, p. 9 (filed Apr. 17, 2015) (hereinafter "Avista April 17 Comments"). Every pole attachment agreement contains multiple provisions requiring attachers to comply with applicable safety codes and rules, and repair violations in a timely manner. There are also numerous remedies available to pole owners, such as default, bond, indemnity, insurance and other provisions, when an attacher fails to comply. Pole attachment agreements fully protect pole owners from any wrongdoing and damages that an attacher may cause. At the same time, attachers are actually "defenseless" in many cases from the wrongdoing of utilities (including when electric utilities cause noncompliance and dangerous conditions on their own poles or the poles of others) because pole attachment agreements rarely afford attachers any remedies.

[2] *See* generally Comments of Puget Sound Energy, Inc. on Proposed Rulemaking Relating to Attachments to Transmission Facilities Docket No. U-140621 (filed Apr.17, 2015) (hereinafter "PSE April 17 Comments").

delay, penalize (in some cases, criminalize), and add unreasonable cost to routine joint use, illustrate the precise reason why access to essential utility infrastructure is regulated: "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."[3]

II. COMMENTS

BCAW's comments will mainly address new issues raised by the IOUs in response to *revised* language in the Third Draft Rules, as well as certain IOU responses to the Commissions eight queries. While BCAW reiterates its general objections to PSE's failure to (1) raise issues regarding rule language pre-existing the Third Draft Rules and (2) contribute anything new to previously raised and rejected issues, BCAW's comments are also directed at certain of those items as well. BCAW also hereby incorporates its prior Comments to the extent BCAW has responded to the issues already raised and rejected by the Commission in this proceeding.[4] To the extent BCAW does not respond to every single instance of proposed language contained in PSE's April 17 (or the other IOU's) Comments, BCAW hereby reserves its right to do so in the event the Commission's next draft includes any such language.

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[3] *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") (internal citations omitted), *aff'd, Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002).

[4] For instance, BCAW has previously responded to the IOU's consistent, but unsupported allegations that adopting the Federal Communications Commission's ("FCC") access program will result in an unsafe environment. *See, e.g.*, Comments of the Broadband Communications Association of Washington, Docket No. U-140621, p. 2 (filed Feb. 27, 2015) ("[t]he 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") (hereinafter "BCAW Feb. 27 Comments."). *See also Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, ¶ 1158 (1996) ("recogniz[ing] that the public welfare depends on safe and reliable provision of utility services," but reminding utilities 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.")

A. Definitions: 480-54-020

1. *Make-Ready*

The IOUs and CenturyLink (which owns pole and competes directly for customers with BCAW members) continue to urge the Commission to exempt pole replacements from the Rules, including the timeline. Retaining the requirement to replace poles to accommodate attachers (who pay the full price for new poles) in a timely manner is critical to the deployment of communications networks. Moreover, it is important to reiterate, that the FCC *has never ruled* that pole replacements are optional. As the FCC explained in its most recent pole attachment 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.[5]

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 WAC 480-54-030) here, merely because (as alleged by the IOUs and CenturyLink) *in some instances* pole replacements cannot be performed in a timely manner. Whether or not a pole owner can always meet the requisite make-ready timeframe is not adequate justification to dispense with the pole replacement requirement altogether. First, under the rules, a pole owner may extend the make-ready deadline "if the owner discovers unanticipated circumstances that reasonably require additional time to complete the work." WAC 480-54-030(8). As long as an attacher knows that a pole owner is working in good faith and with all deliberate speed to

[5] *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, ¶226 (2011) (hereinafter "2011 FCC Pole Order").

accommodate an access request, the attacher is unlikely to interrupt the work and file a complaint. Second, according to the record, utilities are capable of replacing poles within the requisite timeframes.[6] Moreover, only a small percentage of poles need replacement in any typical attachment request. Third, contractors are also an option if a pole owner does not have adequate personnel.[7] Last, as the FCC observed in the 2011 FCC Pole Order, performing pole change-outs to accommodate attachers provides ample benefits to pole owners and their customers:

> In cases where an attacher pays make-ready fees to upgrade or to add capacity to an existing pole, or for a new, taller pole to accommodate that attacher's demand, the utility, not the attacher, owns the pole. The utility therefore benefits from this situation in a number of ways, including its recovery upfront of all the costs the third-party attacher causes it to incur. In particular, because poles typically come in standard sizes, the utility is likely to obtain, at no cost to itself, capacity above and beyond the additional foot of pole space needed to accommodate the typical third-party attachment. The utility benefits from the extra capacity because it can use that capacity to supply its own services, rent the capacity to other third-party attachers and realize additional revenues, and/or safe or defer some of the cost of periodic pole replacement needed to provide its own service.[8]

In sum, there are no downsides, only benefits, to including pole change-outs in these Rules. On the other hand, the absence of a requirement to perform replacements would make

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[6] *See* PSE April 17 Comments, Exhibit A, Response to Commission Query No. 2 ("Replacement of a standard distribution pole . . . usually takes one day. However, permitting in some jurisdictions can delay the work significantly"); Avista April 17 Comments, p. 8 (Avista's average time for replacing poles . . . is 46.3 days," not accounting for certain permits that may be requiring or other extraordinary circumstances); Comments of Pacific Power, Docket No. U-140621, p. 2 (filed Apr. 17, 2015) (hereinafter "PPL April 17 Comments") ("[P]ole replacements average approximately 60 days).

[7] Comments of Frontier Communications Northwest, Docket No. U-140621, p. 3 (filed Apr. 17, 2015) (hereinafter "Frontier April 17 Comments").

[8] FCC 2011 Pole Order, ¶187. PSE's claim that there are tax consequences for contributions in aid of construction when a pole is replaced, (*see* PSE April 17 Comments, Response to Commission Query No. 7), is wrong. *See, e.g., Cavalier Tele., LLC v. Virginia Electric and Power Co.*, 15 FCC Rcd 9563, ¶¶24-28 (rel. June 7, 2000) (finding that make-ready reimbursements are not construction expenditures and thus not CIAC and ordering VEPCo to reimburse any such payments already made by Cavalier) (hereinafter "*Cavalier v. VEPCo*").

these Rules incomplete and undermine important public policies that promote broadband deployment and competition.

2. "*Pole*"

PSE once again claims that the word "maintain," in the definition of "pole," could be interpreted to mean that the pole owner is required to "maintain" third party attachments.[9] PSE's newest proposal to revise the definition of "pole" is inappropriate, however, because it would define "pole" in a manner that could be interpreted to pre-judge access decisions. Specifically, by adding the words "can allow" . . . "through an attachment agreement," in place of "maintain," pole owners would be able to deny access to their poles if they decided they did not want to "allow" a pole attachment because of something in their pole attachment agreement, rather than due to "insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes." WAC 480-54-030(1). Moreover, the term "attachments" in these rules is not limited to third party attachments. PSE's proposal must therefore be rejected. While it is unlikely that anyone would infer that PSE is required to maintain all third party attachments on its poles, perhaps the word "maintain" can be replaced with the word "has."

Avista urges the Commission again to carve out poles carrying both transmission and distribution plant from these rules, even though attachers routinely maintain plant on such poles and federal law obligates electric pole owners to provide access to such poles. As the Court of Appeals for the 11th Circuit explained when it upheld the FCC's decision to require access to poles carrying both transmission and distribution facilities:

> The fact that a given 'pole, duct, conduit, or right-of-way' may have some transmission plant attached to its poles does not exclude it from the coverage of the [Pole Attachment] Act. These local distribution facilities,

[9] PSE April 17 Comments, p. 10.

> festooned as they may be with transmission wires, are plainly within the FCC's jurisdiction under the terms of the Act.").[10]

Moreover, as Staff pointed out in the Matrix, "[t]o the extent that attachment to such [pole] poses a legitimate safety issue, that issue should be addressed under section 030(1)," i.*e.*, the access standards.[11] Avista's proposal is thus without merit and must 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. PSE made many of the exact same edits in their prior comments, which the Commission already rejected for reasons explained in the Matrix. Also, the provisions in these sections (based on the federal access rules) have largely remained intact since the first (or at least second) draft rules. Most of the Commission's revisions in the Third Draft Rules consist mainly of clarifying edits or language requested by and benefitting pole owners. For example, revised WAC 480-54-030(5) ensures that "make-ready" costs are recovered directly and that a pole owner may require an attacher to pay the estimate up front. Revised WAC 480-54-030(6) requires existing occupants to repair noncompliant attachments before the date set for make-ready work. Revised WAC 480-54-030(9)-(10) and 040(2) relieve pole owners from the requirement to maintain a list of authorized contractors. Revised WAC 480-54-030(11) reduced the number of poles in an overlash request to 30 and requires attachers to provide data allowing the pole owner to perform an expeditious review. The overlash proposal also requires the overlasher to repair any of its noncompliant plant prior to overlashing. The Commission included many other IOU suggestions in the Second Draft Rules.[12]

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[10] *Southern Company v. FCC*, 293 F.3d 1338, 1345-46 (11th Cir. 2002).
[11] Matrix, p. 5.
[12] *See, e.g.*, BCAW Feb. 27 Comments, p. 2.

PSE's proposed revisions are also inappropriate and undermine the purpose of these rules and pole attachment regulation in general, *i.e.*, to ensure that access to essential bottleneck facilities proceeds on a nondiscriminatory basis pursuant to just and reasonable rates, terms and conditions. For example, PSE's April 17 Comments (**a**) seek an end-run around the timelines by predetermining the reasons for justified make-ready delays (WAC 480-54-030(1); (6)(a)(iii),(iv),(6)(b)(iii), (iv); (7)(c); (8)(c), (e);[13] (9)); (**b**) undermine good faith negotiations by requiring every pole attachment agreement where a party has conceded something to be litigated at the Commission (WAC 480-54-030(2));[14] (**c**) allow pole owners to charge attachers any cost whether or not "reasonable," alleviating the attacher of its right to challenge costs except in a formal complaint (WAC 480-54-030(3));[15] (**d**) predetermine fault and damages without proof or remedy, and despite what terms and conditions may be contained in a pole attachment agreement (WAC 480-54-030(3), 8(f), (11)(f)); and (**e**) incorporate costs that are either improper or already

[13] PSE's proposal for WAC 480-030-8(e) stating that "[t]ime periods shall not start until the owner has received payments for all amounts due and the requester has complied with all requests to relocate or remove an attachment" is particularly pernicious. With this proposal, PSE would be able to gain undue leverage in a billing dispute, for example, or delay the timeline further for reasons that are not even associated with a request. If an attacher is not complying with its agreement or paying bills on time, that is a matter of default under the agreement. Indeed, the FCC has previously ruled that "[o]nly two permissible reasons for denial of access are acceptable – insufficient capacity or reasons of safety, reliability and generally applicable engineering purposes;" and "[d]ebt collection is not permissible grounds for denial of access." *Kansas City Cable Partners v. Kansas City Power & Light*, 14 FCC Rcd 11599, ¶¶ 11, 18 (1999).

[14] BCAW does not understand PSE's edit to this Rule. PSE asserts that "[i]n order to preserve the pole owner's rights" every time a complaint is filed over an agreement, the agreement must be voided because "the pole owner may have made some concessions that it would not make knowing that the requester was going to file a complaint." PSE April 17 Comments, p. 11. This makes no sense. If a pole owner made concessions during negotiations, it would have an opportunity to address those in a complaint case. That is the very nature of "sign and sue." *See Southern Co. Servs. Inc. v. FCC,* 313 F.3d 574, 583 (D.C. Cir. 2001) ("It is conceivable that in some circumstances, the utility may give a valuable concession in exchange for the provision the attacher subsequently challenges as unreasonable. . . . In that situation, the Commission could evaluate the reasonableness of the [agreement] provisions as a package, and these provisions would rise or fall together without undermining the statutory policy in favor of voluntary dispute resolution") (quoting the Commission's brief with approval). In addition, under the rules, the parties are required to engage in pre-complaint dispute resolution. WAC 480-54-070(5)(a). Thus, it is unlikely that a pole owner would ever be unaware of an imminent complaint.

[15] PSE claims that the "reasonable" determination can be handled in a pole attachment complaint. *See* PSE April 17 Comments, Response to Query No. 7. This approach is untenable. Attachers would be unable to file a complaint each time it believed it was being charged an unreasonable amount. Moreover, without a requirement to limit costs to their "reasonable" amount in the first instance, there would be no basis for a complaint.

recovered in the rent or pole attachment agreement (WAC 480-54-030(3), (9), 10(c), (11)(f); 480-54-040(1), (2), (3)).[16]

If the Commission intends to consider any of the edits proposed by PSE to 480-54-030 or 040, most of which the Commission has already rejected for the reasons set forth in the Matrix, another workshop may be warranted.

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

PSE claims that its "first major concern with the rules" is that they "remove the requirement that an occupant submit an application to overlash additional wires or cables."[17] In fact, the rules never required attachers to submit an application for overlashing; and there has been an overlash exception in the rules since early January. Indeed, rather than acknowledge that the Commission strongly indicated during the October workshop (seven months ago), that it supported unpermitted overlashing (with a notice requirement), PSE continues its efforts to obstruct the small overlash projects (less than one mile per request) contemplated in the rules, even as it complains that it is unable to handle the "miles" of overlash applications it now receives.[18] PSE should welcome the Commission's overlash proposal as way to alleviate the "strain" on PSE's resources that PSE believes will occur due to the new application process.[19]

Avista similarly claims that "[t]here is nothing about overlashing that requires such short notice or requires utilities to act so swiftly."[20] According to Avista "[c]ommunications companies understand well in advance the areas in which they need to expand capacity through overlashing, just like they know well in advance which areas they want to serve for the first time

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[16] *See also*, *infra* Section II.D.
[17] PSE April 17 Comments, p. 2.
[18] *Id.*
[19] *Id.*, p. 1.
[20] Avista April 17 Comments, p. 10.

through the use of new attachment[s]. . . ."[21] Avista is wrong. As BCAW explained in its prior comments and at the workshops, the vast majority of overlashing today is on a limited number of poles and "serves 'individual customers'" that BCAW can easily lose (often to pole-owning competitors who may overlash freely on their own poles or through joint-use agreements) due to delays in the application process.[22] That is why BCAW agreed to the 30 pole limit in each overlash request. Moreover, nothing in the Rules precludes pole owners from inspecting overlashing after the fact, at its convenience, to determine compliance with applicable safety codes. For the same reasons, Avista is mistaken that "[i]t appears . . . that the only reason [attachers] are in a rush to overlash is to prevent utility pole owners from conducting adequate safety and engineering analysis of the overlashing, thus lowering the risk of having to pay make-ready expenses."[23] Avista is correct about one thing: BCAW members continue to believe it is unreasonable for attachers "to pay make-ready expenses" to fix all the existing violations on a pole, as a condition of overlashing, whether or not the attacher caused the violation.

BCAW can agree, however, with PPL's reasonable proposal to "limit the number of affected poles . . . that may be submitted" in a 10-day period. While BCAW understands that PPL suggests up to 100 poles in a 10-day period, BCAW can agree to limit the number of poles submitted for overlashing (under the expedited notice procedure) to *100 poles in a 30-day period* (BCAW disagrees there should be a limit on the number of notices submitted in that period).[24] BCAW also agrees that it is reasonable to *reimburse* a pole owner for any actual and reasonable cost it incurs pursuant to an overlash request for any necessary field inspections and make-ready

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[21] *Id.*
[22] Comments of the Broadband Association of Washington, Docket U-140621, p. 9 (filed WUTC Oct. 8, 2014).
[23] Avista April 17 Comments, p. 11.
[24] To be clear, if BCAW members choose to submit overlashing requests through the application process, during an upgrade, for example, it should be able to submit the maximum amount allowed under the final rules related to applications.

engineering. Up-front payments, as PSE suggests, are inappropriate because the pole owner may chose not to do the work under certain circumstances. In addition, if, during an overlash inspection, the pole owner finds violations it or another party caused, those costs should be recovered in the carrying charges, as is appropriate under those circumstances.

D. Application Processing Fees and Cost Recovery

The issues of so-called "application processing fees" and cost recovery are wholly related, as BCAW explained in its April 17 Comments. In short: the fully allocated rental rate, in addition to reimbursements of non-recurring costs for pre-construction surveys, make-ready engineering, make-ready (including pole change-outs) and post-construction inspections, "encompasses all pole related costs and additional charges are not appropriate."[25] This includes fees that allegedly cover the administrative "costs" to "process" applications. The FCC prohibits such fees because any administrative expenses related to pole attachments (and then some) are fully recovered in the administrative carrying charge, as BCAW demonstrated in its April 17 Comments.[26]

The ILEC pole owners agree and confirm that "that the FCC pole attachment rules do not provide for an application fee . . . but allow for reimbursements for non-recurring fees."[27] Indeed, the only charges related to application processing that should be permitted are the actual,

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[25] BCAW April 17 Comments, p. 4 (internal citations omitted).

[26] *Id.* pp. 4-6. While PSE did not include its schedule of charges, PPL and Avista charge application fees on top of actual nonrecurring charges. *See* PPL April 17 Comments, Ex. B.; Avista April 17 Comments, p. 20.

[27] Comments of AT&T, Docket U-140621, p. 3 (filed April 17, 2015). *See also* Frontier April 17 Comments, p 3 ("Frontier does not charge a separate application fee to process pole attachment or conduit occupancy requests. Instead, Frontier recovers the expenses associated with processing such requests through the administrative cost component of the carrying charge utilized when calculating Frontier's pole attachment rate.") It is important to note, contrary to AT&T's statement (*see id.*), that the FCC also forbids taking a "corresponding reduction" from the carrying charges if an application fee is charged, as BCAW previously explained. *See* BCAW April 17, 2015 Comments, p. 5 & n. 16. CenturyLink is also mistaken that "the FCC formulae used to calculate the pole rates do not allow cost recovery for processing applications in the carrying charge components of the formulae." Comments of CenturyLink, Docket No. U-14062, p. 2 (filed April 17, 2015). The FCC does not allow *the direct* recovery of application processing fees because such expenses are already recovered in the carrying charges.

reasonable costs of pre-construction surveys, make-ready engineering and performance, and post-construction inspections. While BCAW members agree that make-ready estimates are reasonable to charge up-front, every other charge should be invoiced after the work is performed.

Likewise, in response to the Commission's Query No. 7 asking which "type of costs, if any, that an owner incurs with attachments . . . [that] cannot [be] recover[ed] through an application fee, make-ready work charge, or [FCC] attachment rate," the answer is none.[28] Indeed, every cost listed by the IOUs in response to Query No. 7 is either (a) recovered in the rental rate, (b) reimbursable as a direct charge or (c) inappropriate.[29] For example, PSE is mistaken that "legal costs to collect damages caused by attachment or overlashing," are not recovered through the pole attachment rent. Indeed they are.[30] Not only are legal costs included in the FERC Accounts that factor into the pole attachment rent, but every pole attachment agreement requires an attacher to indemnify and insure the pole owner for any damages the attacher causes. A pole owner's own insurance and liability costs are also included in the FERC Accounts that factor into the pole attachment rate.[31] Avista and CenturyLink are also wrong that a pole owner's costs of "administering an occupant's non-compliance with the terms of the

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[28] *See, e.g., FCC 2011 Pole Order*, ¶128 ("The additional, or incremental, costs that form the basis for the statutory *minimum* are the costs that would not be incurred by the utility 'but for' the pole attachments. These costs include pre-construction survey, engineering, make-ready, and change-out costs incurred in preparing the pole for attachments. Congress expected a pole attachment rate based on incremental costs to be minimal since most of those costs would have been fully recovered in the make-ready charges already paid for by the attacher.") (Emphasis added). *See also* Frontier April 17 Comments, p. 4 ("Frontier does not have any unrecovered costs from third party attachers due to pole attachment applications, make-ready work, or pole rental rates").

[29] BCAW is concerned that PSE is under the impression that it may charge attachers any cost it believes it should be able to recover in an application fee or make-ready charge, such as the cost of hiring new employees. *See* PSE April 17 Comments, Response to Query No. 7 (stating that "WAC 480-54-030(9) and WAC 480-54-030(1) require that the pole owner incur costs of . . . additional staffing to comply with special timeframes for new attachers. The recovery of the cost of the additional staffing, which may not always be needed, is to be included in the application fee or the make-ready work estimate. . . .") PSE seeks clarification on that point. The Commission should provide clarification by advising PSE that it should either have enough employees on hand to address joint use as required by law or allow contractors to do the work.

[30] *See, e.g.*, FERC Accounts 923, 924 and 925 (attached to BCAW April 17 Comments at Ex. B).

[31] *Id.*

pole attachment agreement," as well as "contract negotiations" and "dispute resolution," and "advocacy in various judicial and administrative proceedings," are not fully recovered.[32]

The same is true for any non-field costs incurred to "coordinat[e] make-ready work with other attachers" and "providing written notice," contrary to PSE's claims.[33] Similarly, the cost of coordinating and performing transfers on behalf of attachers are recovered in the rent, contrary to PPL and Avista's assertions.[34] Nevertheless, most pole owners charge directly for transfers they perform on behalf of attachers. The costs of field inspections to determine joint use compliance and responding to emergencies is also included in the pole attachment rent, contrary to what Avista may believe.[35]

PSE's suggestion that it should be compensated for any "costs of increased working capital due to the need to carry a larger inventory of poles in order to respond to the timelines for make-ready work in WAC 480-54-030," is also without merit.[36] First, it is unlikely that PSE will store more poles merely to anticipate joint use issues.[37] Second, any capital cost increases

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[32] *See, e.g., Cable Television Ass'n of Georgia v. Georgia Power Co.*, 18 FCC Rcd 16333, ¶ 18 (2003) ("The allocated portion of administrative expenses covers any routine administrative costs associated with pole attachments, such as billing and legal costs associated with administering the agreement") (hereinafter "*Georgia Power*"); *see also* FERC Account 923 (recovering attorneys' fees) and 928 (covering "regulatory commission expenses"), attached to BCAW April 17 Comments at Ex. B.

[33] *See, e.g., Cavalier v. VEPCo*, ¶17 ("[Pole owner] believes that it is not responsible for managing attachments to the pole or notifying attachers when safety violations must be corrected or when make-ready or other work which may affect the attachments is going to be performed. . . . [Pole owner] cannot abrogate its duties towards other attachers in order to delay the process of attachment. . . . Any costs incurred by [pole owner] in managing and maintaining its poles is passed through to [the attacher] and other attachers in the form of make-ready costs or the pole rental fee.")

[34] *See, e.g.,* FERC Maintenance Account 593 (attached hereto as Exhibit A).

[35] *See id.*; *see also Georgia Power*, ¶16 ("[R]outine inspections of poles, which benefit all attachers, should be included in the maintenance cost account and allocated to each attacher in accordance with the Commission's formula."); *see also* OAR 860-28-0020(19)(defining "periodic inspection" and requiring the cost to be recovered in the carrying charge). FERC Maintenance Account 593 recovers emergency response costs (whether or not the emergency even involves attachers). *See* Ex. A, hereto.

[36] PSE Response to Commission Query No. 7.

[37] *See, e.g.,* FCC 2011 Pole Order, ¶187 (finding no evidence to support utility claim that they "install taller poles routinely throughout their networks to satisfy their own needs and anticipated third-party attachment demand, and that they do not receive sufficient compensation for this option" because, while utilities were offered ample opportunity to do so, they "did not provide any cost study, let alone one that might demonstrate that pole owners incur capital costs outside the make-ready context solely to accommodate third-party attachers.")

incurred will be reflected in the annual rent, pursuant to FERC Account 364, which is used to calculate the pole cost component of the FCC formula. Avista's claim that it is incurring "higher pole costs [by installing taller and stronger poles] primarily to accommodate communications attachers,"[38] fails for the same reasons. Third, there is a rate of return component of up to 11.25% in the pole attachment rental formula to compensate owners for the cost of capital. Last, the IOUs receive a very sizable benefit due to pole change-outs paid for by attachers, as discussed above.[39]

PSE's assertion that it would not be able to recover the costs of making "measurements of the usable space" to rebut the 13.5 foot presumption is also wrong.[40] If PSE wishes to go out in the field to measure its poles in an attempt to receive higher pole rent, PSE must incur those expenses as a reasonable cost of doing business. But, the FCC would allow those costs to flow through to attachers in the carrying charges of the pole attachment.[41] In any event, PSE should not have to incur field measurement expenses (and pass those expenses on to attachers) because such information should be contained in PSE's continuing property records.

In sum, despite unsupported, conclusory statements such as "[e]lectric pole owners incur a wide array of costs associated with joint use that typically are not recovered by other means,"[42] there are minimal, if any, costs that are not recovered. At the same time, pole owners recover a variety of costs from attachers that have absolutely nothing to do with joint use. As BCAW explained previously:

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[38] Avista April 17 Comments, pp. 24-25.
[39] *See supra*, p. 5.
[40] PSE Response to Commission Query No. 7.
[41] *See, e.g., In the Matter of Amendment of Rules and Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of The Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12130, ¶68 (2001) ("Expenses related to the exercise necessary to develop [a rebuttal to the average number of attaching entities] . . . [shall be] reported to the utility's appropriate regulatory accounts and factored in to the carrying charge rate of the Cable Formula.")
[42] Avista April 17 Comments, 23.

> 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 and actual capital costs of the utility attributable to the pole or conduit attachment." They are not intended to account for "*all*" of the costs "the owner incurs to own and maintain poles . . . . 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." 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."[43]

E. Rates

In answer to Commission Query No. 6, it appears that each pole owner, except Avista, charges annual pole attachment rent calculated in accordance with the FCC Cable Formula. Due to the lack of specific pole attachment rules, Avista has been helping itself to an additional 2.5% adder on each pole annually as a result of including the so called "safety space" in its calculation of unusable space (which results in 10 vs. 13.5 feet of usable space, or the allocation of 10% vs. 7.41% of pole costs). As Avista admitted, "this varies from the FCC's treatment of the 40 inch safety space on the pole required in most cases between the lowest energized conductor and the highest communications attachment.[44] That difference is reflected in Avista's cable rate of $13.05 (compare with PPL at $5.69 and PSE, $10.69).

According to Avista, its unilateral decision to consider the safety space unusable is because "that space exists solely to accommodate communications attachers."[45] To the contrary, the FCC concluded that "[i]t is the presence of potentially hazardous electric lines that makes the safety space necessary and but for the presence of those lines, the space could be used by cable

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[43] BCAW April 17 Comments, pp. 5-6.
[44] Avista April 17 Comments, pp. 22-23.
[45] *Id.*, p. 23.

and telecommunications attachers."[46] The FCC also held long ago that the safety space is *usable* space used by electric utilities and "note[d] the common practice of electric utility companies to make resourceful use of this safety space by mounting street light support brackets, step-down distribution transformers, and grounded, shielded power conductors therein."[47] The FCC's ruling was sustained on appeal in circuit court.[48] The FCC has repeatedly reviewed the evidence concerning this issue and reaffirmed its conclusion in 1984,[49] 1998,[50] 2000[51] and 2001[52] rulemakings, and in litigated cases.[53]

Nothing in the Washington Statute supports Avista's unilateral decision to allocate the safety space as unusable. There is no mention of safety space in 80.54.040. The Commission should admonish Avista not to consider the safety space unusable pending the completion of this rulemaking. Avista should also be forbidden from charging a telecom rate (currently at $21.50), as there is only one formula in Washington, namely 80.54.040, which in no way can be interpreted to follow the FCC's old telecom formula, given the lack of reference to attaching entities and the other unique qualities of the FCC telecom formula.

Finally, PSE should be reminded that in order to rebut the 1 foot usable space presumption, it must do so with demonstrable evidence. It is not at liberty to merely claim that an attacher occupies over 1 foot of space, as it appears to imply in its April 17 Comments: "PSE appreciates the Staff Recommendation (page 4 of the comment matrix) that allows the pole

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[46] *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453, ¶ 22 (200).
[47] *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachment,* Mem. Op. and Second Report and Order, 72 FCC 2d 59 at ¶ 24 (1979) (1979 FCC Order).
[48] *Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981).
[49] *Petition to Adopt Rules Concerning Usable Space On Utility Poles*, 56 R.R.2d 707, 710 (1984).
[50] 1998 FCC Pole Order, 13 FCC Rcd. 677 at ¶ 24 (reaffirming assumptions).
[51] *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453, ¶¶ 20-22 (2000) (hereinafter "2000 FCC Pole Order").
[52] 2001 FCC Pole Order ¶ 48.
[53] *General Television of Delaware, Inc. v. Diamond State Telephone and Telegraph Co.*, PA-84-0015, Mimeo No. 2141 (Jan. 28, 1985); *El Paso Cablevision, Inc. v. Mountain States Telephone & Telegraph Co.*, 49 R.R.2d 847 (1981).

owner to add fractional attachments in addition to a standard one foot attachment." [54] There is no such thing as a "fractional attachment;" and Staff gave no such recommendation. It merely pointed out that the one foot of space is "rebuttable."[55] Moreover, a pole owner may only charge for horizontal strand located in the usable space under the FCC's formula.[56]

F. Conclusion

In sum, BCAW is hopeful that its Comments were helpful and looks forward to the adoption of a set of just and reasonable pole attachment rules.

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[54] PSE April 17 Comments, p. 10.

[55] *See* Matrix, p. 4.

[56] *See, e.g., Capital Cities Cable, Inc. v. Mountain States Tel. and Tel. Co.*, 1984 FCC LEXIS 2443, ¶ 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"); *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 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).

Dated this 1st day of May 2015.

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EXHIBIT A

593 Maintenance of overhead lines (Major only).

This account shall include the cost of labor, materials used and expenses incurred in the maintenance of overhead distribution line facilities, the book cost of which is includible in account 364, Poles, Towers and Fixtures, account 365, Overhead Conductors and Devices, and account 369, Services. (See operating expense instruction 2.)

Items

1. Work of the following character on poles, towers, and fixtures:

a. Installing additional clamps or removing clamps or strain insulators on guys in place.

b. Moving line or guy pole in relocation of pole or section of line.

c. Painting poles, towers, crossarms, or pole extensions.

d. Readjusting and changing position of guys or braces.

e. Realigning and straightening poles, crossarms, braces, pins, racks, brackets, and other pole fixtures.

f. Reconditioning reclaimed pole fixtures.

g. Relocating crossarms, racks, brackets, and other fixtures on poles.

h. Repairing pole supported platform.

i. Repairs by others to jointly owned poles.

j. Shaving, cutting rot, or treating poles or crossarms in use or salvaged for reuse.

k. Stubbing poles already in service.

l. Supporting conductors, transformers, and other fixtures and transferring them to new poles during pole replacements.

m. Maintaining pole signs, stencils, tags, etc.

2. Work of the following character on overhead conductors and devices:

a. Overhauling and repairing line cutouts, line switches, line breakers, and capacitor installations.

b. Cleaning insulators and bushings.

c. Refusing line cutouts.

d. Repairing line oil circuit breakers and associated relays and control wiring.

e. Repairing grounds.

f. Resagging, retying, or rearranging position or spacing of conductors.

g. Standing by phones, going to calls, cutting faulty lines clear, or similar activities at times of emergency.

h. Sampling, testing, changing, purifying, and replenishing insulating oil.

i. Transferring loads, switching, and reconnecting circuits and equipment for maintenance purposes.

j. Repairing line testing equipment.

k. Trimming trees and clearing brush.

l. Chemical treatment of right of way area when occurring subsequent to construction of line.

3. Work of the following character on overhead services:

a. Moving position of service either on pole or on customers' premises.

b. Pulling slack in service wire.

c. Retying service wire.

d. Refastening or tightening service bracket.