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 Comments pursuant to the State of Washington Utilities and Transportation Commission's ("Commission") Notice of Opportunity to File Written Comments in the above-referenced rulemaking.[1] BCAW is the trade association representing cable operators doing business in the State of Washington, as well as companies servicing the cable industry.[2] BCAW members are continually working and investing to deliver state of the art services to Washington's citizens. BCAW members invest $365 million annually to bring the state's residents and enterprises leading edge broadband services including, high-speed broadband internet, home security and a full range of advanced video and voice services.

BCAW supports the Commission's efforts to adopt comprehensive pole attachment rules based on those promulgated by the Federal Communications Commission ("FCC") and Oregon Public Utility Commission ("OPUC"). Several of BCAW's members operate not only in Washington, but also in Oregon and states regulated by the FCC. BCAW welcomes the

[1] Notice of Opportunity to File Written Comments and Notice of Workshop, Re: Rulemaking to Consider Adoption of Rules to Implement RCW ch. 80.54, Relating to Attachments to Transmission Facilities, Docket U-140621 (WUTC Apr. 23, 2014).

[2] BCAW's member companies include: Charter Communications, Comcast, Inland Networks, Sefnco Communications, and Wave Broadband.

opportunity to discuss its members' vast experience in Washington, Oregon and FCC-regulated states and explain which rules and practices facilitate access, foster cooperative joint use, and promote broadband deployment overall, consistent with Washington State policy.[3]

I. BACKGROUND

When conducting a pole attachment rulemaking, it is essential to consider the basis for pole attachment regulation. Primarily, regulation is necessary because utilities possess ownership and control over poles and other utility infrastructure. Local franchises, environmental restrictions, and other legal and economic barriers preclude cable operators and other attachers from placing additional poles in areas where poles already exist.[4] Additionally, "in most instances underground installation of the necessary cables is impossible or impractical. Utility company poles provide, under such circumstances, virtually the only practical physical medium for the installation of television cables."[5] For these reasons, poles, conduit, and other utility infrastructure are considered "essential facilities" and thus bottlenecks to facilities-based competition in telecommunications and cable television markets.[6] Effective regulation over access to these essential facilities is critical to the deployment of advanced broadband services and competition.[7]

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[3] *See, e.g.*, RCW 54.04.045 (Intent Section: "It is the policy of the state to encourage the joint use of utility poles, [and] to promote competition for the provision of telecommunications and information services . . . .").

[4] *See, e.g.*, 123 Cong. Rec. H35006 (1977) (statement of Rep. Broyhill, co-sponsor of the Pole Attachment Act) ("The cable television industry has traditionally relied on telephone and power companies to provide space on poles for the attachment of CATV cables. Primarily because of environmental concerns, local governments have prohibited cable operators from constructing their own poles. Accordingly, the cable operators are virtually dependent on the telephone and power companies . . . .").

[5] *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987) (hereinafter "*Florida Power*").

[6] *See NCTA v. Gulf Power Co.*, 534 U.S. 327, 330 (2002) ("[C]able companies have . . . found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. . . . Utilities, in turn, have found it convenient to charge monopoly rents."). *See also Common Carrier Bureau Cautions Owners of Utility Poles*, DA 95-35, 1995 FCC LEXIS 193, at *1 (1995) ("Utility poles, ducts and conduits are regarded as essential facilities, access to which is vital for promoting the deployment of cable television systems.").

[7] *See,e.g., Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fourth Annual Report, 13 FCC Rcd. 1034, 1045 (1998) ("Wireline video and telecommunications competition is

The 1978 Pole Attachment Act[8] was the legislative response to evidence of abuse by pole-owning utilities, including the imposition of "exorbitant rental fees and other unfair terms" on cable operators.[9] Congress recognized that without pole attachment regulation, "utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents from cable TV systems in the form of unreasonably high pole attachment rates."[10] With the Pole Attachment Act, Congress sought "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."[11]

This Commission's authority over pole attachments is derived from 47 U.S.C. § 224(c). Section 224(c) allows states to preempt FCC jurisdiction over the rates, terms and conditions of pole attachments and "certify" to the FCC its authority over such matters. In 1979, the Washington State Legislature authorized the Commission to regulate pole attachments "in the public interest"[12] and the Commission subsequently certified to the FCC.[13] Like the federal Pole Attachment Act, Washington's enabling statute requires the Commission to ensure that "[a]ll

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heavily dependent on the ability of market participants to obtain access to utility poles, conduits, and rights of way at reasonable rates.").

[8] Pub. L. No. 95-234, 92 Stat. 25 (1978), *codified at* 47 U.S.C. § 224.

[9] *Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103, ¶ 21 (2001) (hereinafter "2001 FCC Pole Order") (citing S. Rep. No. 95-580 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109); *see also Alabama Cable Telecomms. Ass'n v. Alabama Power Co.*, 15 FCC Rcd. 17346 ¶ 6 & n.27 (2000) ("By conferring jurisdiction on the Commission to regulate pole attachments, Congress sought to constrain the ability of telephone and electric utilities to extract monopoly profits from cable television systems operators in need of pole space.") (hereinafter "*Alabama Power*").

[10] H.R. Rep. No. 94-1630, pt. 1, at 5 (1976). *See also 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"), *aff'd, Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002).

[11] 1998 FCC Pole Order, 13 FCC Rcd. 6777, ¶ 2.

[12] RCW 80.54.020.

[13] *See* FCC Public Notice, *States That Have Certified That They Regulate Pole Attachments*, WC Docket 10-101, DA 10-993 (2010).

rates, terms, and conditions made, demanded, or received by any utility for any attachment by a licensee or by a utility must be just, fair, reasonable and sufficient."[14]

Since certifying to the FCC, the Commission has had few (if any) opportunities to consider what pole attachment rates, terms and conditions meet the just, fair, reasonable and sufficient standard. Moreover, while the FCC does not consider a state to be certified unless it has "issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments,"[15] this Commission has adopted no such rules. BCAW and its members appreciate the Commission's decision to commence this rulemaking to perfect the Commission's regulation over pole attachments.

II. COMMENTS

For the most part, both the federal and Oregon rules work well to promote access on reasonable rates, terms and conditions, and take a lot of the guesswork out of pole attachment agreement negotiations, field activities and rate making (both the FCC and OPUC use the FCC "cable" formula to calculate pole and conduit rental rates, which BCAW advocates here, as discussed below). That said, in BCAW members' experiences, not all of the OPUC rules succeed or perform as intended; and some, particularly Oregon's safety inspection and correction program, its penalty rules, and compliant *vs*. non-compliant rate formulas, undermine effective joint use and cost-efficient broadband deployment, and have been extremely difficult and costly to implement across industries.

As the Commission requested, these Comments address the FCC and/or OPUC rules that work/do not work and why, and which rules should be adopted. BCAW also suggests several additional provisions that are not contained in either set of rules but are standard practices

[14] RCW 80.54.020.
[15] 47 U.S.C. § 224(c)(3)(A).

sanctioned by the FCC through rulemakings and adjudications, and promote effective joint use and broadband deployment. The Comments are followed by BCAW's suggested rule language, attached as Exhibit A. BCAW's suggested rule language leaves a placeholder under "Complaint Procedures" to enable the Commission to adopt its own complaint procedures consistent with Washington law.

A. Definitions

Together, the definitions in the FCC and OPUC rules are fairly numerous (especially in the OPUC rules). BCAW will therefore comment only on those rules that either (a) should be included as is, (b) should be included, but revised, and (c) are redundant (of each other or Washington law). The absence of any comment on any particular definition means that BCAW (a) has addressed the definition elsewhere or (b) does not believe the defined term is necessary. The suggested rule language found at Exhibit A contains a comprehensive set of combined rules (including definitions) that BCAW believes should be adopted, as per the Comments below.

1. FCC Rules (set forth at 47 C.F.R. § 1.1402, not in alphabetical order)

a. *Utility*: RCW 80.54.010(3) defines "Utility." That is the definition that should be used in WUTC's rules.

b. *Pole attachment*: RCW 80.54.010(1) defines "Attachment." This definition of "Attachment" should be sufficiently broadened to ensure that all communications, including wireless, and electric equipment will be covered under the new rules. In addition, the language "where the installation has been made with consent of one or more utilities," should be clarified so that the need for consent is consistent with the rules. (*See* Comments relating to "access," "overlashing" and "service drops.")

c. *Usable space*: The rules should include the FCC definition of "usable space."[16] That definition covers poles and conduit. The definition also ensures that all the space on the pole above the necessary ground clearance (18 feet, under FCC rules), "which can be used" is considered "usable." This is important for rate purposes because a reasonable rate should accurately reflect an attachers' actual use of the pole, based on all the available usable space. Otherwise, the rate would allow a pole owner to over-recover. The Commission should not adopt the OPUC definition of "usable space," which unreasonably exempts the 40 inches of "safety clearance space" between the lowest electric conductor and highest communications attachment from its definition of "usable space."[17] Indeed, utilities make ample *use* of the safety space. *See* Section II.E., note 67.

d. *Duct*: The rules should include the FCC definition of "duct." This definition is consistent with OPUC rules and standard industry terminology.

e. *Unusable space*: The rules should include the FCC definition of "unusable space," which ensures that such space refers only to the actual unusable space on the pole—the setting depth (or part of the pole buried for stability) and the space below the "usable space," *i.e*., from the lowest attachment down to the ground level. The Commission should reject the OPUC's definition of "unusable space," because it considers the "safety space" as unusable, as discussed above (*see also* Section II.E., note 67)).

f. *Inner-duct*: The rules should include the FCC definition of "inner-duct." This definition is consistent with standard industry terminology and is important for rate calculation purposes.

[16] 47 C.F.R. § 1.1402(c).
[17] OAR 860-028-0020(34).

2. OPUC Rules (set forth at OAR 860-028-0020)

a. *Carrying charge*: The new rules should include this OPUC definition as is. This definition (including OAR 860-028-0020(3)(a) – (e)(B)), is consistent with FCC rules governing rate calculations under its complaint procedures (*see* 47 C.F.R. § 1.1404(g)(1)(ix)-(x)), (g)(2), (h)(1)(vii)-(2)) and will help clarify how annual rental rates and other charges should be calculated. The OPUC term "net investment" should also be included in these rules because it will likewise assist in the calculation of rental rates and is consistent with FCC rental rate rules. *Id*.

b. *Conduit*: The rules should include this comprehensive OPUC definition of "conduit," except for the term "or consumer-owned utilities."

c. *Licensee*: RCW 80.54.010(2) defines "licensee" under Washington law. This definition is broad enough to cover various communications attachers and should be used in the rules.

d. *Make-ready work*: This OPUC definition captures what virtually all stakeholders would agree is the proper definition of "make-ready work." It is important to note, however, that, while make-ready costs are "non-recurring costs" and are reimbursable, the entity responsible for paying make-ready costs in any particular situation varies depending on the cost-causer, as discussed below. *See* Section II.D. (Modification Costs). BCAW has included the FCC modification cost allocation rules in its suggested rule language.

e. *Periodic inspection*: This OPUC definition is important to include, as it not only defines what a "periodic inspection" is, but clarifies who is responsible for the costs to perform such inspections, and therefore provides necessary guidance to the parties. The rule is also

consistent with FCC case law.[18] The OPUC definition should be revised to exclude the reference to "division 024," which is the OPUC's safety rules.

f. *Permit*: BCAW believes this OPUC definition should be revised to clarify that there are instances under the rules where a permit or consent is not required or cannot be obtained because of utility delays, as discussed below, by adding the language "consistent with these rules," to the end of the definition. In addition, the term "on support equipment" should be deleted because an attacher typically does not get a separate permit to attach to an "anchor," for example. Instead, the authority to attach to "support equipment," like anchors, is typically part of the overall pole attachment permit for an individual pole.

g. *Pole*: This OPUC definition should be revised to include an additional sentence stating that: "To the extent the Commission has jurisdiction over transmission towers and poles that do not carry distribution lines, attachments to transmission poles are governed under these rules." While the FCC and OPUC do not have complete jurisdiction over transmission facilities, they both have authority over poles that carry both distribution and transmission lines.[19] Many attachers (including wireless entities) need access to (and are already on) transmission poles and there is no reason to exempt transmission facilities from the rules except to the extent of the Commission's jurisdiction. It is also important to point out that rates for attachments on transmission poles can and should be calculated separately (from distribution pole rents) using FERC Accounts related to transmission facilities (if the costs associated with those facilities are

[18] *See Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachment Use and Safety and Rulemaking to Amend Rules in OAR 860, Division 028 Relating to Sanctions for Attachments to Utility Poles and Facilities*, Docket AR 506/510, Order, at 14 (Or. PUC Apr. 10, 2007) (citing FCC case law and stating that "only post-construction inspections and special inspections requested by pole occupants may be charged separately; all other inspection charges . . . should be calculated in the rental rate. . . . For this reason, we . . . adopt a definition of 'Periodic Inspection' to accommodate safety and other inspections.") (hereinafter "2007 OPUC Pole Order"), *available at* http://apps.puc.state.or.us/orders/2007ords/07-137.pdf.

[19] *Id*. at 7 (following "federal law").

actually booked separately from distribution facilities). But transmission rental rates can and should be calculated consistent with the FCC Cable formula.[20]

h. *Preconstruction activity*: This OPUC definition should be included but clarified, consistent with standard industry practices. To that end, the word "activity" should be replaced with the word "survey," and the words "an attachment application" should be replaced with the phrase "make-ready work."

i. *Service drop*: This OPUC definition of "service drop" is consistent with standard industry practices and should be included in order to differentiate "service drops" from mainline attachments for permitting purposes. *See* Section II.B.4. (Service Drops).

j. *Unauthorized attachment*: This OPUC definition should be revised to account for instances under the rules where a permit or an agreement is not required or cannot be obtained, as discussed below. Otherwise, pole owners might assess unauthorized attachment penalties under improper circumstances. *See e.g.*, Section II.B.2. (Access Timeline). To that end, BCAW proposes that the language "subject to OAR 860-028-0120" be replaced with "except as otherwise provided under these rules or as mutually agreed to by a licensee and utility." In addition, unauthorized attachment penalties should be assessed consistent with FCC rules, which essentially follow OPUC rules.[21]

[20] *Id.* at 7-8.
[21] *See Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240, ¶ 115 (2011) (hereinafter "2011 FCC Pole Order").

B. Access

1. Access Standard

The Commission should follow the Congressionally-mandated nondiscriminatory access standard set forth in the Pole Attachment Act and FCC rules.[22] The federal access standard requires that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[23] A utility may deny access "on a nondiscriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[24] If a utility does deny access, the FCC requires such denial "shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards."[25]

The OPUC adopted the federal access standard in its 2007 rulemaking,[26] although it is not incorporated in their rules; however, like the FCC rules, the OPUC rules require utilities to state the reasons for denial in detail.[27] Indeed, the federal access standard is followed in many other certified states and was adopted by the Washington State legislature in relation to public utility districts.[28]

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[22] *See* 47 U.S.C. § 224(f)(1); 47 C.F.R. § 1.1403. BCAW has included the entire access rule, 47 C.F.R. § 1.1403, except for subsection (e), which relates to the FCC's "telecommunications rate."
[23] *Id*.
[24] 47 U.S.C. § 224(f)(2); 47 C.F.R. § 1.1403(a).
[25] 47 C.F.R. § 1.1403(b).
[26] 2007 OPUC Pole Order, at 19.
[27] OAR 860-028-0100(4)(d).
[28] *See, e.g., Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service; Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service*, 1998 Cal. PUC LEXIS 879, at 20 (Cal. PUC Oct. 22, 1998); Vt. Pub. Serv. Bd. R. 3.707(A); *see also* RCW 54.04.045(6).

Incorporation of this widely-followed federal access standard is critical to promoting a cooperative joint-use environment and efficient broadband deployment. It also ensures attachers that access decisions are nondiscriminatory and based on objective criteria, such as the National Electrical Safety Code ("NESC"). Application of the federal access standard (including requiring evidence supporting the denial) also will aid the Commission in determining whether any particular access denial is justified.

2. Access Timeline

Both the FCC and OPUC have definitive timelines for processing an application from submission through make-ready. A specific access timeline is essential in the pole attachment process because it "give[s] necessary guidance to both pole owners and attachers."[29] The evidence in the FCC's most recent rulemaking "reflect[ed] that, in the absence of a timeline, pole attachments may be subject to excessive delays. Moreover, having specific timelines offers certainty to attachers and allows them to make concrete business plans."[30] In addition, "[a]dopting a specific timeline will also generate jobs and help to move large broadband projects forward. . . ."[31] BCAW suggests that the Commission adopt a specific access timeline consistent with and comprised of a mix of FCC and OPUC rules, as discussed below.

The FCC and OPUC rules are somewhat similar. Both contain the widely used 45 day rule, which requires a pole owner to review an application and perform a preconstruction survey in 45 days.[32] The FCC and OPUC also provide for a self-help remedy when pole owners miss the 45-day deadline (*i.e.*, there is no requirement to wait for pole owner approval once the

[29] 2011 FCC Pole Order, at ¶ 21.
[30] *Id.*
[31] *Id.*
[32] 47 C.F.R. § 1.1403(b); 47 C.F.R. § 1.1420(c); OAR 860-028-0100(4)(e).

deadline is missed), including the use of utility-approved contractors.[33] Self-help remedies in the pole attachment context are standard and ensure that attachers are able to meet customer demand in a competitive environment and deliver critical services.[34] While both sets of rules also permit the use of contractors when a pole owner fails to meet make-ready deadlines, the FCC's make-ready timeframe rules are much more detailed and provide greater guidance to the parties.[35] That said, the OPUC rules explicitly set forth what can be requested in an application, which adds specificity to the application process, and should be included in the Commission's rules.[36]

Finally, the scope of the FCC and OPUC timelines differ slightly. While both the FCC and OPUC timelines apply to wireless attachments, the FCC rules are more explicit in this regard and should be adopted.[37] The FCC timeline does not, however, cover access to conduit (except for the 45-day rule).[38] The OPUC timeline (which is similar to the FCC timeline) does apply to conduit, however, and thus there is no reason that the timelines adopted in these rules should not similarly apply to conduit.[39]

3. Application Fees and Preconstruction Survey Charges

While the subject of so-called "application fees" might seem innocuous, it is somewhat controversial and a source of disputes, especially in Oregon. Some pole owners charge per-application or per-pole fees purportedly to cover the costs of application "processing." The problem with charging for application "processing" is that the costs associated with this

[33] 47 C.F.R. § 1.1422(a); OAR 860-028-0100(6).
[34] 2011 FCC Pole Order, 26 FCC Rcd. 5240, ¶ 52 ("We are not persuaded by contentions that use of contractors is impractical or unduly burdensome. We agree that the statutory obligation to provide access to poles places some burden on pole owners. It is, however, a burden that Congress found appropriate to place on utilities in order to facilitate the critical delivery of video, telecommunications, and other communications services, including broadband, and one that the courts have upheld.").
[35] *See* 47 C.F.R. § 1.1420(d)-(i), *compare with* OAR 860-028-0100(5).
[36] OAR 860-028-0100(2).
[37] *See, e.g.*, 47 C.F.R. § 1.1420.
[38] 2011 FCC Pole Order, 26 FCC Rcd. 5240, ¶ 40.
[39] BCAW has left a placeholder for conduit timeframes.

administrative activity are already recovered in the pole attachment rent. For example, the salary of the employee who handles applications (for all attachers throughout the day and performs other utility activities) is (or at least is required to be) allocated to an administrative expense account that factors into the annual rental rate carrying charges (in both FCC-regulated states and Oregon).[40] Therefore, pole owners that charge application processing fees (unless they cover preconstruction survey costs) are double-recovering those costs—once as a direct charge and again in the rent.

Although the OPUC in its 2007 Pole Attachment Order explicitly prohibited pole owners from charging application processing fees to cover administrative expenses based on FCC case law, some Oregon pole owners continue to do so.[41] While flat per-pole preconstruction survey fees are also not permitted by the FCC or OPUC (because all charges must be based on the actual costs incurred by the utility), certain attachers do not mind flat fees in this context because it provides some certainty, as long as the pole owner can demonstrate that the flat fee is closely related to the actual cost of a typical survey. Whether the preconstruction survey is in the form of a flat fee or is based on actual costs, pole owners should be prohibited from requiring attachers to submit preconstruction survey fees with the application. Requesting upfront payments can delay the application process due to check-request processes and, in any event, the actual cost of a preconstruction survey is not known until after it is performed. In addition, if the pole owner

[40] *See Central Lincoln People's Util. Dist. v. Verizon Northwest, Inc*., Docket UM 1087, Order, at 15 (OPUC Jan. 19, 2005) ("The salaries of the people involved with 'joint use issues' or pole maintenance and operation must be calculated and allocated as part of the carrying charge. Similarly, to the extent application fees do not relate to 'special inspections or preconstruction, make ready, change out, and rearrangement work,' application fees may not be recovered, and administrative charges related to processing new attachments should be allocated with the carrying charge."), *available at* http://apps.puc.state.or.us/orders/2005ords/05-042.pdf; *see also* 2007 OPUC Pole Order, at 13 (citing FCC case law for the proposition that "[a] utility would doubly recover if it were allowed to receive a proportionate share of these expenses based on the fully-allocated costs formula and additional amounts for administrative expenses") (internal citation omitted).

[41] The OPUC rule allowing utilities to recover the "actual costs" associated with applications processing (OAR 860-028-0110(3)) is not helpful. There are no "actual costs" related to applications processing that are not already covered in the rent.

fails to perform a preconstruction survey within the requisite timeframe and the attacher is forced to hire a contractor, the attacher would be forced to get a refund from the pole owner, which can be difficult. Upfront payments for preconstruction survey fees are not permitted by the FCC and do not factor into its access timeline.[42]

In sum, the Commission's rules should clarify that application processing fees are not allowed, unless they are charged to cover the cost of preconstruction surveys. In addition, whether or not a pole owner charges a flat fee for preconstruction surveys, those fees must be demonstrably based on actual costs and may only be reimbursed.

4. Service Drops

Cable companies would not be able to meet their customer service obligations if they were required to seek approval from a pole owner prior to installing a service drop. For example, federally-mandated cable customer service rules require that "[s]tandard installations will be performed seven (7) business days after an order has been placed."[43] "Standard installations" are defined as "those that are located up to 125 feet from the existing distribution system."[44]

As a practical matter, cable companies would be unable to compete for customers against competitive pole owners (*i.e.*, telephone companies) who do not need to get approval from themselves or with satellite providers (which advertise service in 48 hours from a customer call and merely install a satellite dish) if prior approval of a drop was required. Moreover, service drops do not normally require conventional framing hardware or the drilling of the pole, as

[42] *See, e.g.*, *Texas Cable & Telecomms. Ass'n v. Entergy Servs., Inc.*, Order, 14 FCC Rcd 9138, ¶ 10 (1999) (stating that cable companies "may be held only to the agreed to obligation to reimburse Entergy for the actual cost of necessary engineering survey expenses."). In the federal timeline, pole owners may seek prepayment of estimated make-ready charges only. *See also* 47 C.F.R. § 1.1420(d).
[43] 47 C.F.R. § 76.309(c)(2)(i).
[44] *Id.*

mainline attachments do, and do not pose the same potential safety issues. For these reasons, while the FCC has no "rule" governing service drops, the FCC has adjudicated the issue and determined that cable companies must be able to install service drops without the need "for approval prior to attaching."[45]

The OPUC does have a specific service drop rule. That rule requires attachers to "[a]pply for a permit within seven days of installation [of a service drop]."[46] Although the OPUC does not require pole owner consent prior to installing a drop, the seven-day requirement is onerous and can be a bureaucratic strain on attacher and pole owner alike. BCAW proposes that the OPUC's seven-day rule be replaced with language requiring an attacher to notify the pole owner every 30 days of all service drops made during that period. That way, the pole owner is able to charge rent for the drops (if appropriate) and the recordkeeping for both parties is kept to a minimum. The parties should also be free to mutually agree on a longer time period between notifications.

5. Overlashing[47]

"Cable companies have, through overlashing, been able for decades to replace deteriorated cables or expand the capacity of existing communications facilities, by tying communication conductors to existing, supportive strands of cable on poles. . . . Overlashing existing cables reduces construction disruption and associated expense."[48] Overlashed fibers occupy the same foot of space already licensed to the attacher party, are extremely lightweight,

[45] *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd 11450, ¶ 19 (2000), *aff'd*, *Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).
[46] OAR 860-028-0120(3)(a).
[47] Overlashing is the practice of lashing additional wires, typically fiber optic cables, to existing, permitted attachments.
[48] 2001 FCC Pole Order, 16 FCC Rcd. 12103, ¶ 73.

and add no burden to the pole.[49] Unlike affixing a new attachment to a pole, which sometimes requires the rearrangement of other' facilities, and always requires the drilling of a pole, placement of a through-bolt, clamp, and steel strand, fiber overlashing is non-invasive. For these and other policy reasons, the FCC prohibits pole owners from requiring "additional approval or consent" from the pole owner for overlashing.[50] The FCC's policy on unrestricted overlashing was upheld on appeal and has never again been challenged.[51] Therefore, in the vast majority of states, cable operators may overlash without approval from the pole owner and do so without incident.

The OPUC has no explicit rules on overlashing. A pole owner may allow unpermitted overlashing at its option and some do. But the vast majority of pole owners in Oregon require overlashing to go through the same full-blown permit process as mainline attachments, even though the overlashed fiber adds no burden and is lashed to a previously permitted attachment. There is no real safety benefit to requiring the same process for overlashing as with the mainline attachment. Today, the majority of overlashing involves fewer than 10 poles and is necessary to serve new customers. Requiring permits for this type of minimal overlashing merely adds unnecessary expense and delay to the process and impedes a cable operator's ability to compete

[49] For example, the typical fiber overlashed by cable companies today is a 48 count fiber, which is ½ inch in diameter and weighs 1/8 of a pound, per foot.

[50] 2001 FCC Pole Order, 16 FCC Rcd. 12103, ¶ 75 ("We affirm our policy that neither the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment."). *See also Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, ¶ 62 (1998) ("We believe overlashing is important to implementing the 1996 Act as it facilitates and expedites installing infrastructure essential to providing cable and telecommunications services to American communities. Overlashing promotes competition [and helps] provide diversity of services over existing facilities, fostering the availability of telecommunications services to communities, and increasing opportunities for competition in the marketplace.").

[51] *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002) (affirming FCC rule that attachers are not required to obtain permission from utilities for overlashing).

effectively for customers. When overlashing is subject to the application process, which can take months, the cable operator will often lose the customer (sometimes to a competitive pole owner).

Allowing attachers to overlash without a permit is both pro-competitive and consistent with federal law. Other certified state commissions that have examined the issue have followed the FCC's lead and incorporated rules that promote expeditious overlashing. For example, pursuant to a comprehensive rulemaking in New York, where Staff and stakeholders held several sessions on overlashing and extensively briefed the issue, the New York Public Service Commission ("NYPSC") adopted a standard that allows parties to overlash upon notice, up to pre-determined limits.[52]

In announcing the standard, the NYPSC recognized that, "[t]ypically, a fiber cable overlashed to an existing coaxial cable facility with a common trunk and feeder cable configuration adds very little to the existing facility's overall weight and bundle diameter."[53] Thus, the Commission had "little concern about ice and wind loading," even though New York is situated within a "heavy" load zone.[54] Even when a New York attacher determines that the overlash will exceed the limit, the attacher is merely required "to provide the pole [o]wner with a 'worst case' pole analysis from the area to be overlashed, to be sure the additional facilities will not excessively burden the pole structures . . . and for future attachment applications and engineering."[55] In no case is a permit required.

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[52] Specifically, "[a]n Attacher [] whose facility has a pre-existing NESC calculated span tension of no more than 1,750 lbs., shall be allowed to overlash a pre-determined maximum load of not more than 20% to the existing communications facility. Existing facilities with an NESC calculated span tension of less than 1,000 lbs. shall be allowed a pre-determined overlash of up to 40% of such pre-existing facilities." *See Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Case 03-M-0432, Policy Statement on Pole Attachments, Appendix A at 9 (Aug. 6, 2004), *available at* http://www.utilityregulation.com/content/orders/04NY0432E.pdf. According to BCAW members, virtually all of their overlashing is well within the New York standard.

[53] *Id*. at 8-9.

[54] *Id*. at 9. Unlike New York, Washington is situated within a "medium" ice/wind load district.

[55] *Id*.

Likewise, following a comprehensive rulemaking in Utah, where overlashing was a significant issue, the Utah Public Service Commission ("UPSC") determined that "[a]dditional permitting applications for overlashing are not required for a Licensee in its existing pole space."[56] The UPSC merely requires "a 14 day prior notice to the Pole Owner," including the poles to be overlashed so that "the Pole Owner [can] monitor and maintain its" poles.[57] The Vermont Public Service Board also considered overlashing during its pole attachment rulemaking and adopted a rule that allows the vast majority of overlashing without application upon "ten days' notice. . . ."[58] The Commission should also follow this pro-competitive and cost-effective broadband deployment rule and allow overlashing without a permit, provided that the attacher complies with applicable safety requirements when overlashing.

C. Oregon's Safety Program Rules

Perhaps the most controversial and detrimental aspect (to all parties) of the OPUC's pole attachment rules is its inspection, correction and sanction program. This program essentially requires pole owners and attachers alike to constantly inspect and correct even minimally noncompliant plant in unreasonably short timeframes. The program is particularly onerous on attachers who are not only required to inspect their own attachments, but must also respond to all pole owner inspection notices throughout the state (or face significant monetary penalties, known as "sanctions"). As a result, there is a constant stream of conflicting data sent between attachers and pole owners causing duplicative and unnecessary inspections of the same plant and copious disputes, including over which entity caused a particular violation, whether an attacher's "plan of

[56] Utah pole attachment agreement approved by the Commission in Docket No. 04-999-03, Section 3.01. BCAW will provide a copy of the agreement upon request.
[57] *Id*.
[58] Vt. Pub. Serv. Bd. R. 3.708(I).

correction" is adequate and timely, whether an attacher is subject to sanctions, and whether an attacher should receive the "compliant" or noncompliant rate," inter alia.[59]

Moreover, while pole owners are allowed to assess the $200 per violation "sanction" on attachers that do not correct noncompliant plant (which may or may not be the fault of the attacher) within the requisite timeframe, attachers have no similar enforcement rights when pole owners cause issues or fail to make corrections.[60] The ability to assess sanctions gives pole owners perverse incentives to blame attachers for the majority of violations. Indeed, assessment of the safety sanctions has led to bitter fights in Oregon and the kind of untoward pole owner leverage that regulation is intended to prevent.

While BCAW members consider safety to be paramount and would be unable to serve their customers without compliant plant, the OPUC safety program is unreasonably time-consuming and costly. Many companies struggle both with manpower and budgetary issues to keep up with the myriad requirements and penalties. Some companies have been forced to hire additional employees dedicated solely to dealing with the program. BCAW members alone have spent roughly $40,000,000 to date to comply with program. In addition, without the constant oversight of the Oregon Joint Use Association ("OJUA"), which is a uniquely structured organization of stakeholders authorized by the Oregon state legislature to address issues and disputes arising from the program, the OPUC would be inundated with complaints.[61] Even with

[59] Under the OPUC's rules, "a licensee must receive a rental reduction" (which consists of adding 20 inches of the safety space back to the usable space), unless the Commission or pole owner can show that the licensee has engaged in various noncompliant behavior. *See* OAR 860-028-0230. In BCAW members' experiences, whether or not a licensee receives the rental rate reduction is up to the pole owner's discretion and is often completely arbitrary. In some cases, the compliant/noncompliant rate is based on the quality of the relationship between the parties. The Commission should reject this arbitrary and unworkable aspect of the rules, which, in any case, is dictated by statute and reliant upon the safety space being considered "unusable," which it is not. *See infra* note 67.
[60] *See* OAR 860-028-0150.
[61] *See* ORS 757.290.

OJUA participation, OPUC staff must actively monitor the program by performing field inspections, monitoring plans of correction and admonishing pole owners and attachers.

For these reasons, BCAW strongly urges the Commission to reject the OPUC's overly complicated, burdensome and unbalanced safety and sanction rules, including rules 860-028-0115 (Duties of Structure Owners); 860-028-0120 (Duties of Pole Occupants); 860-028-0150 (Sanctions for Violation of Other Duties); 860-028-0160 (Choice of Sanctions); 860-028-0170 (Plans of Correction); 860-028-0180 (Removal of Occupant Pole Attachments); 860-028-0190 (Notice of Violation); 860-028-0200 (Joint-Use Association); 860-028-0210 (Resolution of Disputes over Plans of Correction); 860-028-0220 (Resolution of Factual Disputes); and 860-028-0230 (Pole Attachment Rental Reductions).

Instead, the Commission should adopt the common-sense approach followed in the vast majority of states, which simply requires that the party who caused a violation must correct the violation in a reasonable period of time. If a pole owner corrects a violation caused by the attacher, the attacher would reimburse the pole owner and vice versa.

D. Modification Costs

Section 1.1416(b) of the FCC's pole attachment rules incorporates Section 224(h)-(i) of the Pole Attachment Act. Essentially, this rule (and the statutory provisions upon which it is based) provides that the cost of modifying poles/conduits (including for make-ready purposes) and other plant will be borne by the party(ies) benefitting from the modification, including the pole owner.[62] For example, if an attacher or pole owner needs access to a pole that requires make-ready to accommodate that attacher or pole owner, that attacher or pole owner will be the benefitting party and is responsible for all the modification costs, including pole change-out costs

[62] 47 C.F.R. § 1.1416(b); 47 U.S.C. § 224(h)-(i); *see also Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, ¶ 1211 (1996) (adopting modification cost allocation rules).

and the costs incurred by other parties to rearrange and/or transfer their equipment. If another party uses that opportunity to correct a safety violation, they too will be deemed to have benefitted and must pay their proportionate share of the modification costs.[63] Any party that "incidentally benefits" is not required to share in the modification costs.[64]

This "simplified" approach to modification cost allocation provides guidance to the parties and ensures that no party that has made an otherwise compliant attachment (and probably paid make-ready costs to access a pole) is forced to incur costs for subsequent rearrangements requested by another party, including the pole owner.[65] It is also important to point out that the utility receives the full financial benefit of any improvements made to its plant by an attacher (including the outright replacement of an existing pole with a new taller pole, on which the attacher must still pay rent). These benefits include: increased asset value, additional realizable rental revenues, and the deferral of the utility's own capital expenditures. Moreover, pole owners recover the costs of certain rearrangements and other like activities (that solely benefit the pole owner) from attachers in the annual rent rate, through the maintenance carrying charge.[66]

Oregon has no cost modification rules. The absence of such rules has resulted in confusion and unfair assessments of make-ready and other costs on entities that would not be responsible under FCC rules. Therefore, BCAW suggests that the Commission use the FCC's reasonable and balanced cost allocation modification rules.

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[63] *Id.* ¶ 1212.
[64] *Id.* ¶ 1213.
[65] *Id.* ¶¶ 1212-1213; *see also* 47 U.S.C. § 224(i).
[66] *See, e.g.*, FERC Maintenance Account 593, which includes the cost of "labor, materials and expenses in the maintenance of overhead distribution line facilities," such as "moving line or guy pole in relocation of pole or section of line;" "realigning or strengthening poles . . . [and] pole fixtures;" "supporting conductors, transformers, and other fixtures and transferring them to new pole during pole replacements;" "resagging, retying or rearranging position or spacing of conductors," to name a few items. 18 C.F.R. ch. 1, Part 101 (FERC Account 593).

E. Pole Attachment and Conduit Occupancy Rental Rates

Most utilities in the State of Washington already follow the FCC cable formula for pole and conduit rates, even though the Commission has never formally adopted that approach. Oregon also follows the FCC's cable formula, except that, for statutory reasons, Oregon's "presumptions" regarding usable and unusable space vary slightly from the cable formula for poles.[67] In its 2007 rulemaking, the OPUC acknowledged that "the cable formula has been found to fairly compensate pole owners for use of space on the pole."[68] The OPUC also recognized that its own rate statute "mirrored the federal law," and concluded that "[b]ased on the legislative history, as well as consideration of the many arguments made by the participants . . . we will follow the cable rate formula and the subsequent FCC and court decisions interpreting it."[69] The Washington rate statute also mirrors the FCC cable formula and there is every reason to formally adopt it in Washington.

The FCC cable formula is a straight-forward, self-executing and economic approach for determining just and reasonable pole attachment and conduit occupancy rates using existing accounting measures to determine costs, based on an historical (or actual) cost methodology and publicly available data. "Congress did not believe that special accounting measures or studies would be necessary [in determining pole and conduit rates] because most cost and expense items

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[67] For example, ground clearance in Oregon is 20 feet, not 18 feet; and Oregon poles are presumptively 40, not 37.5 feet tall. In addition, as discussed above, Oregon considers the 40 inches of safety space "unusable," despite the widely-known fact that pole owners make ample use, including for revenue-generating purposes, of this space. The FCC has always considered the safety space usable for purposes of its formula. In 1979, one year after the Pole Attachment Act was passed, the FCC concluded that safety space is *usable* space 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." *Adoption of Rules for the Regulation of Cable Television Pole Attachment*, Memorandum Opinion and Second Report and Order, 72 FCC 2d 59, ¶ 24 (1979), *aff'd, Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981). Some utilities also place nonconductive communications fiber in that space. The FCC has repeatedly reviewed the evidence concerning this issue and reaffirmed its conclusion in four separate rulemakings between 1984 and 2001, and in litigated cases. There is no rational basis upon which to find that the safety space is unusable.

[68] 2007 OPUC Pole Order, at 10.

[69] *Id*.

attributable to utility pole, duct and conduit plant were already established and reported to various regulatory bodies . . . ."[70] Even when there is an actual rate dispute, application of the FCC formula helps avoid "a prolonged and expensive complaint process."[71] Reliance on publicly available data—ARMIS reports in the case of ILECs and FERC Form 1 in the case of electric utilities—has allowed utility pole owners and attaching parties to resolve hundreds of rate issues without FCC or state commission involvement.

For example, the typical pole attachment agreement permits pole rates to be recalculated annually to reflect a utility's most recently filed cost information. Despite these annual increases, in states (including certified states) that use the FCC formula, neither the utilities nor cable operators find it necessary to seek FCC or state commission intervention to check those calculations. Instead, the industries have established transparent, party-to-party review mechanisms that apply the FCC formula to current utility financial data, thereby allowing almost all disputes to be resolved without federal or state agency intervention. What makes the process work in these states is the simplicity of the formula, its reliance on data that ties to publicly available ARMIS or FERC Form 1 reports, and the confidence of the parties that errors would be swiftly adjudicated at the FCC or state commission. As the FCC has recognized:

> An important attribute of the [FCC's] pole attachment program has been that the parties can compute the rate themselves without the necessity of filing a complaint before the [FCC]. This has facilitated negotiations and settlements among the parties either after complaints have been filed or before the dispute reached the level of a formal complaint since both parties knew what the [FCC's] determination would be.[72]

[70] *Alabama Power*, 15 FCC Rcd 17346, ¶ 5.
[71] *Id.* ¶ 6.
[72] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 104 FCC 2d 412, ¶ 12 (1986).

All an attacher (or any public utility commission when there is a rate case) needs to do to verify whether a rate is just and reasonable under the FCC Formula, is download the data from the FCC's ARMIS or the FERC websites and plug it into the formula.[73] When attachers are able to calculate rates under a specific formula that uses financial data filed with a public agency and certified by an officer of the company, they can be confident that the rates are just and reasonable. On the other hand, if the rental rate is dependent on access to unverifiable, internal information controlled by the utility, attachers have no independent means of assessing rates, short of filing a complaint and commencing a lengthy and complicated rate-making case.

In sum, the Commission should adopt the FCC cable formula wholesale (including the usable/unusable space presumptions) not only because the Washington rate statute operates like the federal formula and Washington pole owners use it now, but also because application of the FCC cable formula ensures reasonable rates for attachers, provides more than just compensation for pole owners, and takes the guesswork out of rental rates.[74]

F. Pole Attachment Agreement Negotiations

Adopting pole attachment regulations is only the first step towards ensuring that the rates, terms, and conditions "demanded" by a utility are "just, fair, reasonable, and sufficient." The Commission's charge to make "effective regulations" dictates that the Commission have authority to review and revise, if necessary, contracts that are unjust and unreasonable or otherwise conflict with these rules. That way, pole owners are on notice that if they impose an

[73] The one data point that *electric* utilities do not file with the FERC that is needed to compute the rate is the pole count. The Commission should require electric pole owners to provide its annual pole count to attachers, when providing notice of a new rate.

[74] Please note: BCAW suggests that the rules include reference to the FCC cable formula, rather than a narrative, so there is no doubt which formula is intended. Some Oregon pole owners insist that the OPUC did not adopt the cable formula, even though the 2007 OPUC Pole Order specifies that the OPUC "will follow the cable rate formula," as discussed above. This is consistent with what other certified states, including Utah, have done. *See* Utah Admin. Code r. 746-345-5 ("A pole attachment rental rate shall be based on publicly filed data and must conform to the [FCC]'s rules and regulations governing pole attachments, except as modified by this Section."). The Utah PSC adopted certain presumptions for wireless attachers and electric pole owners that are not included in FCC rules.

unreasonable rate, term, or condition on an attacher that is not bargained for, that provision would be considered unenforceable by the Commission.

"Due to the inherently superior bargaining position of the utility over the cable operator in negotiating the rates, terms and conditions for pole attachments, pole attachment rates [, terms and conditions] cannot be held reasonable simply because they have been agreed to by a cable company."[75] To that end, both the FCC and OPUC incorporate remedies that allow the agencies to substitute a just and reasonable provision in place of one found to be unjust and unreasonable.[76] The FCC believes that its "[w]illingness to review contract provisions and the possibility of either revising an unlawful term or condition or ordering an adjustment to the maximum rate because of an onerous term or condition [has] serve[d] as an impetus to utilities to negotiate in good faith with regard to terms and conditions of the agreement before they are presented to the Commission."[77]

The OPUC rules go a step further: "[i]f a dispute is submitted to the Commission for resolution, the burden of proof is on any party advocating a deviation from the rules . . . to show the deviation is just, fair and reasonable."[78] The Oregon rules also expressly require that "[p]arties must negotiate pole attachment contracts in good faith."[79] The FCC also requires good faith negotiations, but that requirement is not incorporated in the rules.[80] In this same regard, the OPUC rules also provide that "the last effective contract between the parties will continue in effect until a new contract between the parties goes into effect." This rule is critical to ensure

[75] *Selkirk Commc'ns, Inc. v. Florida Power & Light*, 8 FCC Rcd. 387, ¶ 17 (1993).
[76] 47 C.F.R. § 1.1410(b); OAR 860-028-0070(8).
[77] *Amendment of the Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC Rcd, 4387, ¶ 77 (1987).
[78] OAR 860-028-0050(3).
[79] OAR 860-028-0060(3).
[80] 1998 FCC Pole Order, 13 FCC Rcd. 6777, ¶ 20 (stating that "parties must negotiate in good faith for non-discriminatory access at just and reasonable pole attachment rates").

that attachers have continued access during pole attachment agreement negotiations and are not threatened with expulsion if the parties are unable to agree on a new contract without Commission intervention.

III. CONCLUSION

BCAW hopes these Comments will help the Commission develop fair and balanced pole attachment rules in Washington that facilitate access, foster cooperative joint use relationships, and promote broadband deployment overall, consistent with state and federal law.

Dated this 30th day of May, 2014.

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EXHIBIT A

Broadband Communications Association of Washington Proposed Rules

Applicability

The rules contained in this chapter apply to every utility and licensee, as defined herein.

Purpose

The rules and regulations contained in this chapter provide complaint and enforcement procedures to ensure that licensees have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just, fair, reasonable and sufficient.

[SECTION #-1]

Definitions for Pole and Conduit Attachment Rules

For purposes of this Division:

(a) "Attachment" means any wire, cable or other equipment, including wireless equipment, for the transmission of intelligence by telecommunications, television, or other communications services, including cable television, broadband, light waves, or other phenomena, or for the transmission of electricity for light, heat, or power, and any related device, apparatus, or auxiliary equipment, installed upon any pole or in any telecommunications, electrical, cable television, or communications right-of-way, duct, conduit, manhole or handhole, or other similar facilities owned or controlled, in whole or in part, by one or more utilities.

(b) "Carrying charge" means the costs incurred by the utility in owning and maintaining poles or conduits. The carrying charge is expressed as a percentage. The carrying charge is the sum of the percentages calculated for the following expense elements, using the utility's data from the most recent calendar year and that are publicly available to the greatest extent possible:

(i) The administrative and general percentage is total general and administrative expense as a percent of net investment in total plant.

(ii) The maintenance percentage is maintenance of overhead lines expense or conduit maintenance expense as a percent of net investment in overhead plant facilities or conduit plant facilities.

(iii) The depreciation percentage is the depreciation rate for gross pole or conduit investment multiplied by the ratio of gross pole or conduit investment to net investment in poles or conduit.

(iv) Taxes are total operating taxes, including, but not limited to, current, deferred, and "in lieu of" taxes, as a percent of net investment in total plant.

(v) The cost of money is calculated as follows:

(A) For an incumbent exchange carrier, the cost of money is equal to the rate of return on investment authorized by the Commission in the pole or conduit owner's most recent rate or cost proceeding;

(B) For an electric utility, the cost of money is equal to the rate of return on investment authorized by the Commission in the pole or conduit owner's most recent rate or cost proceeding.

(c) "Commission pole attachment rules" mean the rules provided in [####].

(d) "Conduit" means any structure, or section thereof, containing one or more ducts, manholes, or handholes, used for any telephone, cable television, electrical, or communications conductors or cables, owned or controlled, in whole or in part, by one or more utilities.

(e) "Duct" means a single enclosed raceway for conductors, cable and/or wire.

(f) “Innerduct” means means a duct-like raceway smaller than a duct that is inserted into a duct so that the duct may carry multiple wires or cables.

(g) "Licensee" has the meaning given in RCW 80.54.010(2).

(h) "Make-ready" means engineering or construction activities necessary to make a pole, conduit, or other support equipment available for a new attachment, attachment modifications, or additional facilities. Make ready costs are non-recurring costs and are not contained in carrying charges.

(i) "Net investment" means the gross investment, from which is first subtracted the accumulated depreciation, from which is next subtracted related accumulated deferred income taxes, if any.

(j) "Periodic Inspection" means any inspection done at the option of the utility, the cost of which is recovered in the carrying charge.

(k) "Permit" means the written or electronic record by which a utility authorizes a licensee to attach one or more attachments on a pole or poles, or in a conduit, except as otherwise provided in these rules.

(l) "Pole" means any pole that carries distribution lines and that is owned or controlled by a utility. To the extent the Commission has jurisdiction over transmission facilities that do not carry distribution lines, transmission facilities are governed by these rules.

(m) "Preconstruction survey" means engineering, survey and estimating work required to prepare cost estimates for make-ready work.

(n) "Service drop" means a connection from distribution facilities to the building or structure being served.

(o) "Unauthorized attachment" means an attachment that does not have a valid permit or a governing agreement, except as otherwise provided under these rules or as mutually agreed to by the parties. Unauthorized attachment penalties may be charged but only in accordance with Federal Communications Commission ("FCC") rules.

(p) "Unusable space" means the space on a utility pole below the usable space, including the amount required to set the depth of the pole.

(q) "Usable space" means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the utility. With respect to conduit, the term *usable space* means capacity within a conduit system which is available, or which could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable and associated equipment for telecommunications or cable services, and which includes capacity occupied by the utility.

(r) "Utility" has the meaning given in RCW 80.54.010(3).

[SECTION #-2]

Access; Removal of Facilities; Notices of Increases, Modifications; Petition for Temporary Stay

(a) A utility shall provide a licensee with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. Notwithstanding this obligation, a utility may deny a licensee access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.

(b) Requests for access to a utility's poles, ducts, conduits or rights-of-way by a licensee must be in writing. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

(c) A utility shall provide a licensee no less than 60 days written notice prior to:

(1) Removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the licensee's pole attachment agreement;

(2) Any increase in pole attachment rates; or

(3) Any modification of facilities other than routine maintenance or modification in response to emergencies.

(d) A licensee may file a "Petition for Temporary Stay" of the action contained in a notice received pursuant to paragraph (c) of this section within 15 days of receipt of such notice. Such submission shall not be considered unless

it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of licensee's service, a copy of the notice, and certification of service as required by [##]. The named respondent may file an answer within 7 days of the date the Petition for Temporary Stay was filed. No further filings under this section will be considered unless requested or authorized by the Commission and no extensions of time will be granted unless justified pursuant to [##].

[SECTION #-3]

Timeline for access to utility poles and conduit

(a) *Preconstruction survey.* A utility shall respond as described in [# 2.b.] to a licensee within 45 days of receipt of a complete application to attach facilities to its utility poles or conduit (or within 60 days, in the case of larger orders as described in paragraph (g) of this section). This response may be a notification that the utility has completed a preconstruction survey of poles or conduit for which access has been requested. Application fees to cover processing are prohibited, unless to cover the actual cost of preconstruction surveys. Such costs shall be reimbursed following the preconstruction survey.

A complete application is an application that provides the utility with the following information in writing or electronically to the owner:

(1) Information for contacting the applicant.

(2) Location of identifying pole or conduit for which the attachment is requested;

(3) The amount of space requested;

(4) The number and type of attachment for each pole or conduit;

(5) Physical characteristics of attachments;

(6) Attachment location on pole;

(7) Description of installation;

(8) Proposed route; and

(9) Proposed schedule for construction.

(b) *Estimate*. Where a request for access is not denied, a utility shall present to a licensee an estimate of charges to perform all necessary make-ready work within 14 days of providing the response required by [# 3a], or in the case where a prospective attacher's contractor has performed a survey, within 14 days of receipt by the utility of such survey.

(1) A utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 14 days after the estimate is presented.

(2) A licensee may accept a valid estimate and make payment anytime after receipt of an estimate but before the estimate is withdrawn.

(c) *Make-ready.* Upon receipt of payment specified in paragraph (b)(2) of this section, a utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready.

(1) For attachments in the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 60 days after notification is sent (or 105 days in the case of larger orders, as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State that if make-ready is not completed by the completion date set by the utility (or, if the utility has asserted its 15-day right of control, 15 days later), the licensee requesting access may complete the specified make-ready.

(vi) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(2) For wireless attachments above the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 90 days after notification is sent (or 135 days in the case of larger orders, as described in paragraph (e) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(d) For wireless attachments above the communications space, a utility shall ensure that make-ready is completed by the date set by the utility in paragraph (c)(2)(ii) of this section (or, if the utility has asserted its 15-day right of control, 15 days later).

(e) For the purposes of compliance with the time periods in this section:

(1) A utility shall apply the timeline described in paragraphs (a) through (c) of this section to all requests for pole attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in a state. [TBD conduit]

(2) A utility may add 15 days to the survey period described in paragraph (a) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state. [TBD conduit]

(3) A utility may add 45 days to the make-ready periods described in paragraph (c) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state. [TBD conduit]

(4) A utility shall negotiate in good faith the timing of all requests for pole attachment larger than the lesser of 3000 poles or 5 percent of the utility's poles in a state. [TBD conduit]

(5) A utility may treat multiple requests from a licensee as one request when the requests are filed within 30 days of one another.

(f) A utility may deviate from the time limits specified in this section:

(1) Before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.

(2) During performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete the make-ready work within the prescribed time frame. A utility that so deviates shall immediately notify, in writing, the licensee requesting attachment and other affected entities with existing attachments, and shall include the reason for and date and duration of the deviation. The utility shall deviate from the time limits specified in this section for a period no longer than necessary and shall resume make-ready performance without discrimination when it returns to routine operations.

(g) If a utility fails to respond as specified in paragraph (a) of this section, a licensee requesting attachment in the communications space or in conduit may, as specified in [# 4], hire a contractor to complete a survey. If make-ready is not complete by the date specified in paragraph (c)(1)(ii) of this section, a licensee requesting attachment in the communications space may hire a contractor to complete the make-ready:

(1) Immediately, if the utility has failed to assert its right to perform remaining make-ready work by notifying the requesting attacher that it will do so; or

(2) After 15 days if the utility has asserted its right to perform make-ready by the date specified in paragraph (c)(1)(ii) of this section and has failed to complete make-ready.

[SECTION #-4]

Contractors for preconstruction survey and make-ready

(a) A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space on its utility poles or in conduit in cases where the utility has failed to meet deadlines specified in [# 3].

(b) If a licensee hires a contractor for purposes specified in [# 3], it shall choose from among a utility's list of authorized contractors.

(c) A licensee that hires a contractor for preconstruction survey or make-ready work shall provide a utility with a reasonable opportunity for a utility representative to accompany and consult with the authorized contractor and the licensee.

(d) The consulting representative of an electric utility may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

[SECTION #-5]

Certain Exceptions to the Permitting Requirement

(a) Service Drops. A licensee may install a service drop without requesting a permit, but the licensee must notify the utility of all service drops made within any 30 day period or, if the utility and licensee mutually agree, in a period that exceeds the 30 day period.

(b) Overlashing. A licensee may overlash without requesting a permit if the overlash can be performed in compliance with generally applicable engineering codes, such as the National Electric Safety Code. The licensee shall provide notice of such overlashing within 5 days. The notice shall include the location of the pole(s) overlashed (including pole number, if available) so the utility may inspect the overlashing.

[SECTION #-6]

Imputation of Rate; Modification Allocation Costs

(a) A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(b) The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification, including the utility. Each party described in the preceding sentence shall share proportionately in the cost of the modification. A party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification as provided under these rules, it adds to or modifies its attachment. Notwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party, including the utility. If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.

[SECTION #-7]

Pole Attachment Agreements

(a) To facilitate the joint use of poles, a utility may require a licensee to execute an agreement establishing the rates, terms, and conditions of pole and conduit use in accordance with these rules. A utility shall process application requests submitted under these rules during negotiations, but the utility may prohibit installation of licensee's equipment if the parties have not executed an agreement, subject to #7(c).

(b) Parties must negotiate pole attachment agreements in good faith. Parties may mutually agree on terms that differ from those in these rules. In the event of disputes submitted for Commission resolution, the Commission will deem the terms and conditions specified in these rules presumptively reasonable. If a dispute is submitted to the Commission for resolution, the burden of proof is on any party advocating a deviation from the rules in this division to show the deviation is just, fair and reasonable.

(c) Unless expressly prohibited by an agreement, the last effective agreement between the parties will continue in effect until a new contract between the parties goes into effect.

[SECTION #-8]

Pole and Conduit Rental Rates

(a) *Rates*. Pole attachment and conduit occupancy rates for all licensees shall be based on publicly available data and must conform to FCC's rules and regulations for calculating the cable rate under 47 U.S.C. §224(d) and 47 C.F.R. §1.1409(e)(1);(3). With the notice of a rate increase, utilities will provide licensees with a calculation of the applicable rate, including any information necessary for the licensee to verify that the rate is calculated in compliance with these rules.

(b) *Rebuttable Presumptions*. With respect to the FCC cable rate formula, the space occupied by an attachment is presumed to be one (1) foot. The amount of usable space is presumed to be 13.5 feet. The amount of unusable space is presumed to be 24 feet. The pole height is presumed to be 37.5 feet. The amount of conduit space occupied is ½ duct. These presumptions may be rebutted by either party.

[SECTION #-9]

Complaint Procedures

[PLACEHOLDER]

[SECTION #-10]

Time Frame for Final Action by Commission

The Commission shall issue its final order within 360 days of the date a complaint is filed in accordance with these rules.

[SECTION #-11]

Remedies

If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

(a) Terminate the unjust and/or unreasonable rate, term, or condition;

(b) Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission;

(c) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission, plus interest, consistent with the applicable statute of limitations; and

(d) If the Commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully denied or delayed, it may order that access be permitted within a specified time frame and in accordance with specified rates, terms, and conditions.

(e) The Commission may issue such other orders and so conduct its proceedings as will best conduce to the proper dispatch of business and the ends of justice.