BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

1 The Wireless Infrastructure Association and the HetNet Forum, a membership section of PCIA (together "PCIA"),[1] hereby submits to the Washington Utilities and Transportation Commission ("Commission") the following reply to certain comments submitted by several energy companies in this rulemaking on April 17, 2015.[2]

2 PSE's comments to the Third Draft Rules Governing Access to Utility Poles, Ducts, Conduits, and Rights-of-Way ("Third Draft" or "Rules") continue its attempt to derail, or at least delay, the rulemaking process. PSE asks the Commission to re-draft the Rules again and subject all interested parties to additional rounds of comments. (PSE's Comments p.2)[3]. Further, PSE claims that it will need twenty-four months to be able to comply with any new rules once they

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

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

[3] All parenthetical references refer to that party's April 17, 2015 Comments.

are adopted and proposes a new rule for this purpose (p.21).[4] No other commenter has proposed such delays. PSE's tactics should not dissuade the Commission from moving forward expeditiously. This rulemaking is in its thirteenth month and is still in the CR 101 phase. It is time for the Commission to move forward to issue final rules. There is no question that it has received sufficient input from all parties interested in pole attachments and little will be gained by further process. As the FCC recognized "Time is of the essence for requesting entities, their investors and their potential customers."[5]

I. INTRODUCTION

3 The latest Rules continue to be based on the FCC's pole attachment rules. These were adopted, and modified, by FCC rulings, such as the 2011 Order, which were all based upon voluminous records.[6] While the Rules contain some Washington-specific modifications that exceed the FCC rules, these changes have sound policy reasons. PSE's latest comments continue to propose the same themes from its February 6, 2015 Comments that were rejected by Commission in the Third Draft.

4 In essence, PSE continues to claim that the Commission's Rules prioritize expediency for attachers over the safety and reliability of the electric system, create burdensome requirements for pole owners and require its customers to cross-subsidize attachers. These claims have no merit and ignore the overarching purpose behind the Rules. The purpose behind the FCC's pole attachment rules, and the Commission's state-tailored rules, is the same: to accelerate broadband

[4] Notably, neither Avista nor PP request additional time to comply with new Rules. Moreover, PSE claims it complies with many of the proposed requirements today. (pp.15,21).

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

[6] 2011 Order ¶ 96.

deployment and to promote competition and availability of robust affordable telecommunications and advanced services to consumers throughout the nation.

II. PSE'S PROPOSAL SHOULD NOT BE ADOPTED

A. Make-Ready Work Should Include Pole Replacement.

5 PSE and Avista continue to criticize the proposed rules for including pole replacements within the definition of "make-ready work" in Proposed WAC 480-54-020 whereas PP made no such criticism. PSE and Avista complain primarily about the inability to meet proposed attachment timelines if the request involves pole replacements.

6 PSE claims that pole replacements take between 114 and 202 days (p.14). Avista claims that its average time for replacement is 46.3 days (p.8). PP's average pole replacement time is 60 days (p.2). PCIA questions PSE's numbers, which are twice as high as its energy brethren. Proposed WAC 480-54-030(6)(a)(ii), which allows a pole owner up to 75 days within which to complete make-ready work, would seem to meet the timelines of Avista and PP. Nonetheless, if pole replacements do require more time, as PSE claims, then the solution is to modify the make-ready timeline to reasonably account for this fact rather than exclude pole replacements from the definition of make-ready work. There is no reason to change the current definition of make-ready.

7 Including pole replacements within make-ready work will remove a contentious issue in negotiating pole attachment agreements that has disadvantaged wireless providers in the past. This, in turn will promote accelerated deployment while benefitting pole owners like PSE when new attachers cover the costs of the pole replacements.

8 The fact that no other jurisdiction has included pole replacements in make-ready provides no reason for this Commission to follow suit. This Commission is free to make a different

choice under Washington law, as explained in PCIA's Reply to the PSE's Comments of February 7, 2015.

9 To the extent the Commission considers altering timelines for pole replacements, PCIA respectfully requests that it alter the pole request limit in Proposed WAC 480-54-030(7), from 100 poles to 300 poles in alignment with the FCC rules on the same subject. If the rationale for the 100 pole limit is tied to the inclusion of pole replacements in make-ready work then this limit could be adjusted if the pole replacement provisions are adjusted. PCIA explained the negative impact of the 100-pole limit on broadband deployment in its Comments to the Third Revised Draft Rules released on March 24, 201.

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

10 Pole owners have three options to recover costs – application fees, make-ready fees and attachment rates. The proposed rate formula will provide a compensatory rate because it is identical to the judicially affirmed FCC rate.[7]

11 Under the FCC's rules pole owners can be reimbursed for identified non-recurring costs through an application fee. 47 C.F.R § 1.1404(g)(1)(xii) and (h)(1)(ix). However, these costs cannot be recovered as part of the carrying charges used to calculate attachment rates. Furthermore, pole owners can include all identified actual costs incurred in make-ready work. PSE, Avista and PP all charge sizable application fees and there is no reason to believe, based upon any evidence, that these fees do not cover all costs associated with processing a pole attachment application. Nor is there any reason to believe that make-ready charges will not cover all non-recurring costs and that cross-subsidization will occur. In fact, pole owners benefit

[7] 2011 Order ¶¶ 189-95.

from the upfront recovery of make-ready costs in instances of pole replacement, the FCC has noted.[8] The attacher pays all capital costs of the new pole and the utility gets to own it and derive other benefits from the new facility.

12 Despite the FCC's clear rejection of pole owners' claims that they cross-subsidize pole attachers, PSE continues to claim that it might not recover all costs caused by pole attachers. Avista speculates that it cannot recover $1.7 million in costs associated with pole attachments. PP, on the other hand, appears to have devised a suitable cost recovery system and has identified no unrecoverable costs.

13 Given the fact that the energy utilities are not foreclosed from full recovery under the Rules there is no reason to change the cost recovery provisions in the Third Draft.[9]

C. <u>The Policies Underlying Pole Attachment Rates Do Afford Attachers a Priority.</u>

14 PSE continues to propose that pole attachment requests be treated the same way that PSE treats all of its service requests. This is another way of promoting delay in deploying necessary telecommunications infrastructure. Federal and state policy made such deployment a priority, which is why the FCC and the Commission have carefully developed timelines to prevent delay and encourage expeditious deployment of telecommunications facilities to promote broadband deployment.[10] Thus, separate, expedited timelines adopted for pole attachments are acceptable even if these may differ from others used to fulfill other customers' orders. The purported "discrimination" PSE alleges has a rational basis because the FCC and the Commission have

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[8] *Id.* at ¶ 187.

[9] PSE objects to the adjective "reasonable" in Proposed WAC 480-54-030(3) as a modifier of "costs" (p.12). Yet, it endorses retention of the word "reasonably" in Proposed WAC 480-54-030(8) which relates to PSE's ability to modify timelines for unanticipated circumstances. PCIA views the term "reasonable" as key to providing balance for all parties in the Rules and supports its retention throughout.

[10] 2011 Order ¶ 149.

concluded that pole attachers need different treatment to further the legitimate public policy of promoting the deployment of advanced telecommunications infrastructure.

15 Further, PSE continues to propose a double standard. On the one hand it wants to be able to schedule pole attachment requests in the same way it handles all other service requests. *See, e.g.* proposed revisions to Proposed WAC 480-54-030(b). On the other hand PSE wants to be relieved of the service responsibilities PSE owes to all of its customers. *See e.g.* proposed revisions to Proposed WAC 480-54-030(6)(b)(ii) ("PSE shall not be held responsible for violation of any rules."). They cannot have it both ways.

D. <u>The Definition of "Owner" Should not be Changed.</u>

16 PSE proposes that "other than a commercial radio service company" be stricken from the definition of "owner" in Proposed WAC 480-54-020(15). PCIA opposes that revision because the stricken language clarifies that the Rules do not apply to wireless facilities such as towers. Pole attachment rules are intended to apply to owners of incumbent utility facilities with disproportionate bargain power who can extract monopoly rents.[11] CMRS providers do not own such facilities and should not be covered by these rules. The language that PSE wants deleted removes any ambiguity about whose facilities are to be covered by the Rules owners.

17 In addition, it is important to recognize that federal law in 47 U.S.C. §332 has pre-empted the state's ability to regulate the location, construction and modification of wireless facilities. In passing that law Congress took an important initial step toward tearing down barriers to infrastructure deployment. Congress sought to "promote competition and higher quality in American telecommunications services" and "'encourage the rapid deployment of new telecommunications technologies'" by reducing "impediments imposed by local governments

[11] 2011 Order ¶ 4.

upon the installation of facilities for wireless communications, such as antenna towers." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (citation omitted). To achieve these goals, Congress took a balanced approach that "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification" of wireless facilities, *Abrams*, 544 U.S. at 115, without preempting that authority altogether. *See* 47 U.S.C. § 332(c)(7); H.R. REP. NO. 104-458, at 207-08 (Conf. Rep).

E. PSE's Proposals Regarding Complaints Should Not Be Accepted.

18 PCIA continues to urge the Commission to remove the notice of dispute provision in Proposed WAC 480-54-070. Such a provision will promote gamesmanship, rather than decrease it, because the pole attachment agreement process will have the parties reserving all rights to complain for virtually everything to avoid being foreclosed down the road.

19 PSE proposes a bizarre modification to the complaint process that would make an agreement invalid upon the filing of a complaint (p. 11). This would have the same effect as a lack of a "sign and sue" rule and places the attacher in the untenable position of having no right to attach to a pole pending resolution of the complaint. PSE's suggestion and its proposed addition to Proposed WAC 480-54-030(2) should be rejected.

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III. CONCLUSION

20 PCIA appreciates the amount of effort expended by this Commission regarding the Rules. There is no reason to make the substantial modifications to the Rules proposed by PSE and Avista. PCIA members look forward to operating under the Rules in the near future.

Respectfully submitted this 1st day of May, 2015.

GARVEY SCHUBERT BARER

By *s/Judith A. Endejan*
Judith A. Endejan, WSBA #11016
Attorneys for Petitioner
PCIA – The Wireless Infrastructure Association

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