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January 3, 2014

UT-140024

Filed Via Federal Express

Steven King
 Executive Director/Secretary
 Washington Utilities and Transportation Commission
 1300 S. Evergreen Park Drive S.W.
 Olympia, WA 98504-7250

Re: PCIA-The Wireless Infrastructure Association and The Hetnet Forum Petition to Adopt Rules to Implement RCW Ch. 80.54

Dear Mr. King,

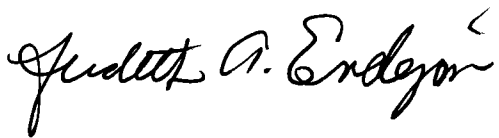
Enclosed please find for filing with the Commission the Petition to Adopt Rules to Implement RCW Ch. 80.54 submitted by The Wireless Infrastructure Association and The Hetnet Forum. If you have any questions, please contact me at (206) 816-1351.

Please date-stamp and add the Docket Number to the enclosed face sheet of the Petition and return to us in the enclosed stamped, self-addressed return envelope.

Thank you.

Sincerely,

GARVEY SCHUBERT BARER

By 
 Judith A. Endejan

Enclosures

cc: Z. Champ w/encl.
 R. Millar w/encl.

SEA_DOCS:1131141.1

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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of:

PCIA – THE WIRELESS INFRASTRUCTURE ASSOCIATION

To Adopt Rules to Implement RCW Ch. 80.54

) Docket No. **UT-1400 24**

) **PCIA – THE WIRELESS
INFRASTRUCTURE ASSOCIATION
AND THE HETNET FORUM PETITION
TO ADOPT RULES TO IMPLEMENT
RCW CH. 80.54**

1 PCIA – The Wireless Infrastructure Association and the HetNet Forum a membership section of PCIA (“PCIA”),¹ hereby petitions the Washington Utilities and Transportation Commission (“Commission”) to adopt rules, regulations and procedures to implement RCW Ch. 80.54, “Attachments to Transmission Facilities.” This Petition is brought pursuant to RCW 34.05.330; RCW 80.54.060; WAC 480-07-240 and WAC 82-05-020.

I. INTRODUCTION

2 Washington State retained the authority to regulate pole attachment rates, terms and conditions in 1979², after Congress authorized the Federal Communications Commission (“FCC”) to regulate them, if states would not.³ However, Washington State has not actually exercised that authority. In 1979, the Washington Legislature charged this Commission to adopt

¹ PCIA is the national trade association representing the wireless infrastructure industry. PCIA’s members develop, own, manage, and operate towers, rooftop wireless sites, and other facilities for the provision of all types of wireless, telecommunications and broadcasting services. PCIA members are authorized to attach to utility poles in Washington under 47 U.S.C. §§224(a)(4), (b)(1) and RCW 80.54.010(1) and 80.54.020. PCIA and its members partner with communities across the nation to effect solutions for wireless infrastructure deployment that are responsive to the unique sensitivities and concerns of each community.

The HetNet Forum, formerly the DAS Forum, is a membership section of PCIA dedicated to the advancement of heterogeneous wireless networks.

² Laws of 1979, Ch. 33.

³ Pole Attachment Act of 1978, Pub. L. No. 95-234, 92 Stat. 33 (1978).

PCIA – THE WIRELESS
INFRASTRUCTURE ASSOCIATION
AND THE HETNET FORUM PETITION
TO ADOPT RULES TO IMPLEMENT
RCW CH. 80.54 -- 1

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rules to implement its new pole attachment authority.⁴ These rules were never adopted. The time has come to adopt these rules. Both state and federal policies require pole attachment rules that will promote the deployment of broadband access and the new technologies that enable it, while providing a fair treatment for pole owners. PCIA urges this Commission to adopt, in whole or in part, the FCC's rules adopted by the 2011 FCC Pole Attachment R&O ("Order"),⁵ which is consistent with Washington policies and initiatives. A copy of these rules is attached as Exhibit A.

3 The deployment of necessary telecommunications infrastructure in Washington has been stymied due to the lack of rules to guide pole attachments. The Commission should act expeditiously to rectify this situation and remove the current roadblocks to advanced broadband deployment.

II. BACKGROUND

A. The Legislative and Regulatory History of Pole Attachment Regulations.

4 The Washington Legislature passed RCW Ch. 80.54 in 1979,⁶ after Congress adopted 47 U.S.C. §224 in 1978.⁷ The federal legislation was intended to provide the FCC with jurisdiction to regulate attachments by cable television providers to utility poles (both telephone and power pole owners). The purpose of the 1978 legislation was to establish "a mechanism whereby unfair pole attachment practices may come under review and sanctions, and to minimize the effect of

⁴ This authority does not extend to poles owned by locally regulated utilities, such as public utility districts, that are governed by RCW 54.04.045.

⁵ *In the Matter of Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5230 (April 7, 2011) *aff'd sub nom. Electric Power Service Corporation v. Federal Communications Commission*, 708 F. 3d 183 (D.C. Cir.2013) *cert. den.* 134 S. Ct. 118 (2013).

⁶ Laws of 1979, Ch. 33.

⁷ Pole Attachment Act of 1978, Pub. L. No. 95-234, 92 Stat. 33 (1978).

unjust or unreasonable pole attachment practices on the wider development of cable television service to the public.”⁸

5 The 1978 legislation recognized that cable providers needed to attach to existing poles. Due to the local monopoly in utility ownership or control of the poles cable providers were at a disadvantage in negotiating pole attachment agreements. Therefore, Congress concluded that regulation was appropriate to ensure that these agreements would contain rates, terms and conditions that would be just and reasonable. Congress created a two-tiered regulatory scheme. States could elect to regulate pole attachments. If the states chose not to regulate, the FCC would resolve pole attachment disputes.

6 Washington elected to regulate pole attachments. RCW Ch. 80.54 was passed to give the Commission the authority to regulate pole attachments. Washington certified to the FCC that it regulates pole attachments.⁹ By making this certification, Washington certified that:

- (2) In so regulating such rates, terms and conditions, the state has the authority to consider and does consider the interests of the subscribers of cable television services as well as the interests of the consumers of the utility services; and,
- (3) It has issued and made effective rules and regulations implementing the state’s regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available in the state), it will be rebuttably presumed that the state is not regulating pole attachments.

47 C.F.R. §1.1414(a).

7 In 1979, the Washington Legislature directed the Commission to adopt rules and regulations governing pole attachments:

RCW 80.54.060 Adoption of Rules.

⁸ S. Rep. No. 580, S. Rep. 95-580 (1977) at *122.

⁹ 25 F.C.C.R. 5541 (2010) contains the most current list of states that have certified they would regulate pole attachments.

The commission shall adopt rules, regulations and procedures relative to the implementation of this chapter. (emphasis supplied)

8 To date, the Commission has not adopted rules to implement state regulation of pole attachments.

9 In the thirty-four years since the passage of Laws of 1979, Ch. 33, much has transpired. Congress passed the Telecommunications Act of 1996 (“1996 Act”) that directed the FCC to “encourage the deployment . . . of advanced telecommunications by removing barriers to infrastructure investment.”¹⁰

10 Congress expanded the reach of section 224 in the 1996 Act to promote infrastructure investment and competition in the 1996 Act. Among other things, Congress added “provider[s] of telecommunications services[s]” to the category of attachers entitled to pole attachments at just and reasonable rates, terms and conditions under section 224,¹¹ Due to the 1996 Act, section 224 created two methodologies to determine the maximum rates for pole attachments – one to apply to pole attachments used by telecommunications carriers (“the telecom rate formula”) and the other to pole attachments used “solely to provide cable service” (“the cable or CATV rate formula”).¹² As the FCC implemented these statutory formulas, the telecom rate formula generally resulted in higher pole rental rates than the cable rate formula.¹³

¹⁰ 47 U.S.C. §1320(b) (section 706). Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, §706, 110 Stat. 56, 153 (1996) (1996 Act), as amended in relevant part by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (BDIA), is now codified in title 47, Chapter 12 of the United States Code. See 47 U.S.C. §§1301, *et seq.*

¹¹ 47 U.S.C. §§224(a)(4), (b)(1).

¹² 47 U.S.C. §§224(e)(1)-(4).

¹³ 47 U.S.C. §§224(d)(c).

11 More than a decade later, Congress directed the FCC to develop a National Broadband Plan that would ensure that every American has access to broadband services.¹⁴ The FCC's National Broadband Plan found that the cost of deploying a broadband network depends on the costs that service providers incur to access poles and other infrastructure.¹⁵

12 In the docket that led to the Order the FCC undertook a comprehensive examination into pole attachment practices and rates. It received forty-six sets of opening comments, and thirty-five sets of reply comments from interested parties, with about half coming from pole owners and half from attaching parties. The FCC created a thorough administrative record before issuing its Order in 2011 establishing new rules regarding pole attachments. The Order:

- Established a four-stage timeline for attachment to poles, with a maximum time frame of up to 148 days;
- Established criteria for rejection of an attachment due to capacity, safety, reliability or engineering concerns, which allows access for pole-top attachments;
- Established a new rate formula that produces essentially the same rate for telecom and cable providers;
- Clarified that wireless providers are entitled to the same rate as other telecom carriers;
- Allowed incumbent local exchange carriers (“ILECs”) to file pole attachment complaints; and
- Adopted measures to encourage negotiated resolution of pole attachment disputes.

¹⁴ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, §6001(k)(2) (2009) (ARRA).

¹⁵ OMNIBUS BROADBAND INITIATIVE, FEDERAL COMMUNICATIONS COMMISSION, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 1009 (2010), *available at* <http://download.broadband.gov/plan/national-broadband-plan.pdf> (NATIONAL BROADBAND PLAN or PLAN).

13 State regulatory policies over the past thirty (30) years have mirrored those at the federal level, favoring the promotion of competition and diversity in the supply of telecommunications markets.¹⁶ This Commission has also taken steps to promote broadband deployment. For instance, when it approved the merger of Qwest Communications, Inc. and CenturyTel, Inc. the Commission imposed a key condition that the merged company spend \$80 million for deployment of broadband infrastructure over five years. The Commission noted:

It is increasingly clear that access to broadband services is vital to a community's economic and social fabric. Indeed, in a previous merger proceeding, we specifically recognized and took into account the fact that broadband service is rapidly becoming an essential service for Washington households and businesses.¹⁷

14 Thus, given the parallel state and federal policies and goals behind pole attachment regulation, it makes sense for this Commission to follow the federal lead and adopt parallel rules that would support the deployment of broadband services in Washington. Connecticut has recently revised its pole rental formula to be consistent with the Order¹⁸ and Oregon has essentially adopted the FCC cable rate formula (with certain modifications required by Oregon statute). See OAR 860-02-0000-0310. PCIA is aware that Ohio is also considering the adoption of rules in line with the FCC's Order and/or to help promote the deployment of broadband services.¹⁹

¹⁶ RCW 80.360.300.

¹⁷ Re *Qwest Communications International, Inc.*, 2011 WL 92.7005 (Wash. U.T.C.) at *60.

¹⁸ See *Petition of Fiber Technologies Networks, L.L.C. for Authority Investigation of Rental Rates Charged to Telecommunications Pole Owners*, Docket No. 11-11-02, 2012 WL 4320126 (Conn.D.P.U.C.).

¹⁹ See Case No. 13-0579-AU-ORD, *Adoption of Chapter 4901:1-3, Ohio Administrative Code, Concerning Access*.

B. The FCC's Pole Attachment Rules, if Adopted, will Promote Deployment of Advanced Wireless Broadband Services in Washington.

15 Increasingly, access to the Internet is through wireless means. Analysts anticipate that global mobile data traffic will increase 850 percent between 2012 and 2017,²⁰ and that mobile Internet users will outnumber wireline users by 2015, when a majority of Americans will utilize a wireless device as their primary Internet access tool.²¹ The amount of mobile data used on cellular networks in the United States increased by 56 percent from 2011 to 2012²². Additionally, data use by the biggest users grew by 7.5 percent from 2011 to 2012.²³

16 In the State of Washington, the percentage of persons living in wireless-only households has doubled from 2007 to 2011.²⁴ In fact, more than 70 percent of all emergency calls each day are placed with a wireless device.²⁵ The increasing demand for wireless voice and broadband services requires the expansion and augmentation of infrastructure to deliver those services. The most efficient way to do this is to use existing facilities in the right-of-way, such as poles.

²⁰ Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2012-2017, CISCO SYSTEMS, INC., (Feb. 16, 2013), http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-520862.html.

²¹ Hayley Tsukayama, IDC: Mobile Internet Users to Outnumber Wireless Users by 2015, WASHINGTON POST, http://www.washingtonpost.com/blogs/post-tech/post/idc-mobile-internet-users-to-outnumber-wireless-users-by-2015/2011/09/12/gIQAkZP7MK_blog.html?wprss=post-tech (last accessed December 5, 2011).

²² iGR, GLOBAL MOBILE DATA TRAFFIC FORECAST, 2011-2016: UP, UP AND UP SOME MORE (2012).

²³ *Id.*

²⁴ Compare Stephen J. Blumberg, Ph.D., et al., *Wireless Substitution: State-level Estimates From the National Health Interview Survey, January 2007 – June 2010*, NATIONAL HEALTH STATISTICS REPORTS, Number 39, at Table 1 (April 20, 2011), <http://www.cdc.gov/nchs/data/nhsr/nhsr039.pdf> (citing 15.3 percent of adults aged 18 and over living in wireless-only households in Washington) with Stephen J. Blumberg, Ph.D., et al., *Wireless Substitution: State-level Estimates From the National Health Interview Survey, 2010-2011*, NATIONAL HEALTH STATISTICS REPORTS, Number 61, Table 2 (Oct. 12, 2012), <http://www.cdc.gov/nchs/data/nhsr/nhsr061.pdf> (reporting 30.2 percent of adults aged 18 and over living in wireless-only households in Washington).

²⁵ See *911 Wireless Services Guide*, FCC, <http://www.fcc.gov/guides/wireless-911-services> (last visited on July 9, 2013).

17 Distributed Antenna Systems (“DAS”) and small cell networks provide an essential way to meet the growing need and demand for broadband services. These networks are primarily comprised of a fiber backbone that delivers traffic to and from small nodes that are installed in the public rights-of-way. The nodes are comprised of antennas and associated electronic equipment that converts RF to optical signals (allowing traffic to be transported over the fiber network to a designated point where it is handed off and/or interconnected with the public switched network). DAS and small cell networks can deliver targeted services to specific locations where coverage is otherwise difficult to achieve or where there is a concentrated demand for wireless services.²⁶

18 DAS and small cell nodes and fiber must be placed on utility poles in order to interconnect with the providers’ networks. Antennas associated with DAS and small cell networks are installed in both the communications space on the utility pole and the pole top, depending on the propagation needs and/or availability of space on the utility poles. Thus, pole attachments for the node equipment (e.g. antennas and electronics) and fiber backhaul are key to delivering the quality of service that consumers expect and to ensuring public safety through the deployment of effective broadband services.

19 Despite the fact that DAS and small cell networks are essential links in a holistic strategy to achieve universal broadband deployment goals, deployment is often stifled by utility pole owners who deny access and impose unjust rates for network attachments. Today, nationwide, the largest obstacle to DAS and small cell deployment is the lack of access to utility poles, including pole tops, at equitable rates. PCIA member companies’ access to pole tops is restricted

²⁶ In addition to the 2011 Order, the FCC has taken further steps to remove impediments to deployment of facilities, such as DAS and small cells, in its September 2013 *Notice of Proposed Rulemaking* in WC Dockets. Nos. 13-328, 11-59 and 13-32. The FCC will examine, for instance, expediting environmental reviews, exempting pre-construction environmental notification requirements and other issues unresolved by prior decisions, with the goal of reducing, where appropriate, the cost and delay associated with the deployment of newer wireless infrastructure.

in Washington and, where attachment rights are granted, the utilities' rates are unreasonable. Individually, any of these problems could stall or kill one wireless project, but cumulatively they frustrate efforts to meet the demands of broadband users in the State of Washington. They also provide incentives to carriers to deploy broadband infrastructure in other states, that must follow the FCC's rules, rather than in Washington.

20 The Commission can solve these problems by adopting the FCC's pole attachment rules, and must do so in order to unleash investment for critical broadband services in Washington.

III. PETITION²⁷

A. Name of the Agency Responsible for Administering the Pole.

Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
Olympia, WA 98504-7250
Phone: (360) 664-1160

B. Authority for the Rule.

21 The Legislature granted express authority to the Commission to adopt rules, regulations and procedures to implement its regulatory authority over the pole attachments in RCW 80.54.060.

C. Why the Rule is Needed.

22 Currently no Commission rules regulate the pole attachment practices and rates of the Washington utilities regulated by the Commission. As a consequence, telecommunications providers have faced arbitrary, exorbitant rates, and denials of access to necessary infrastructure.²⁸ This has discouraged investment by the very providers that are needed to address

²⁷ This section addresses the criteria required by WAC 82-05-020 and RCW 34.05.330(4).

²⁸ For example, one attaching party in Washington has been charged an annual rate of \$1,200 per attachment by one electric Investor Owned Utility ("IOU") for an antenna 24 inches in length. In contrast, the same party pays an annual rate of \$30.28 for the same antenna installation in a state subject to FCC-determined rates. In addition, another Washington State electric IOU has a blanket prohibition on pole top attachments.

Washington's current and future telecommunications needs, but who choose to deploy infrastructure in states that follow the FCC's rules.

23 New Washington rules should mirror the FCC's rules. The FCC has created and analyzed a substantive record, based upon comments from multiple parties with divergent interests (pole owners and attachers) over many months. The FCC's rules were adopted to promote infrastructure investment by telecom providers by removing key barriers these providers have faced, while providing fair cost-based rates for pole owners.

24 This Commission has frequently turned to the FCC for guidance on issues like pole attachments, where the FCC's considerable expertise and resources obviate the need for the state to duplicate its efforts in resolving a similar issue.²⁹ Indeed there is nothing unique to pole attachments in Washington that would require divergence from the FCC's approach, because they promote the same policy goals. Both this Commission and the FCC recognize the urgency and critical need for increased broadband availability. Therefore, given the absence of Washington rules, and the urgent need to adopt ones that would remove a key infrastructure impediment to increased broadband deployment, the Commission should adopt the FCC rules. These reflect a careful balancing of the need to promote expanded broadband availability with the need to provide a fair return to pole owners to assure continued infrastructure investment.

25 The new FCC rate-setting rule is probably the most important one to be adopted if this Commission wants to best advance broadband availability, because it impacts a carrier's costs so much, which, in turn, impacts deployment decisions.

26

²⁹ See e.g. *Re Covad Communications Company*, 2004 WL 3051999 *5 (Wash. U.T.C.); *Washington Utilities and Transportation Commission v. Northwest Bell Company et. al.*, 80 P.U.R. 4th 80, 1986 WL 215085 *91 (Wash. U.T.C.); *In re U.S. West Communications, Inc.*, 220 P.U.R. 4th 201, 2002 WL 1997945 *216.

The standards for pole attachment rates under 47 U.S.C. §224(b)(1) and RCW 80.54.040 are the same: the rates must be “just and reasonable.” Both state and federal statutes determine that this standard is met if a rate falls above a lower bound (roughly, incremental costs) and below an upper bound (roughly, fully allocated costs). The new FCC rules define “cost” so that the telecom rate would recover the same portion of pole costs as the cable rate. The definition of cost is central to a pole attachment rate determination. Yet no Washington rule defines “cost” to flesh out the formula for a pole attachment rate. There is no rational reason for this Commission to define it any differently than the FCC. The FCC’s authorizing language is the same as Washington’s and the FCC reached fully informed conclusions on the same issue that this Commission must resolve, namely the formula for “just and reasonable” pole attachment rates.

27 Adopting FCC rules for pole attachment rates would also be consistent with what the Legislature established for locally regulated utilities in 2008.³⁰ The Legislature amended RCW Ch. 54.04 to establish formulas for determining pole attachment rates for poles owned by locally regulated utilities. RCW 54.04.045(3) gives these utilities a choice. The rate may be based upon incremental costs or upon the FCC’s cable rate formula (the lowest rate). RCW 54.04.045(4). This reflects the Legislature’s determination that the FCC’s formula for pole attachment rates must produce a “just and reasonable” rate or it would not have included it in the statute.³¹

28 Further, other states that have certified state pole attachment regulations to the FCC have implemented pole attachment rules that adhere to the FCC’s rules. In 2007, the Oregon Public Utility Commission (“OPUC”) adopted a comprehensive set of pole attachment rules to promote non-discriminatory access for communications companies, including wireless carriers to utility-

³⁰ Laws of 2008, Ch. 197.

³¹ In addition, RCW 54.04.050(5) adopts timelines for processing a pole attachment application that is consistent with the FCC’s new rules.

owned and controlled facilities.³² The OPUC basically adopted the FCC cable rate formula (with certain modifications required by Oregon statute); which in essence is the end rate produced by the FCC's Order. The OPUC rules also contain timelines and other provisions similar to the FCC's rules.

29 In 2012, the State of Connecticut revised the telecommunications pole rental rate to be consistent with the FCC's Order.³³

30 In summary, without a compelling state-specific reason – which does not exist – this Commission can quickly and efficiently fill the regulatory void for pole attachments by adopting the FCC's rules.

D. Do the Proposed Rules Conflict with, or Duplicate, other Federal, State or Local Laws?

31 As discussed in Section III.C., the proposed rules would be consistent with federal pole attachment rules.

E. Alternatives to the Rule that will Serve the Same Purpose at Less Cost.

32 There are no alternatives to rules that have never been adopted. Other alternatives could be considered during the rulemaking proceedings, so this factor should not be an impediment to rulemaking.

F. The Rule Applies Differently to Public and Private Entities.

33 The rule would only apply to those entities subject to the Commission's jurisdiction and to those entitled to attach to the poles of those entities. The majority of poles in Washington are owned by electric utilities, but many are jointly owned by telecommunications companies subject

³² Oregon also certified self-regulation to the FCC in 1979. The OPUC adopted these rules in Docket Nos. AR 506/510. They appear in OAR 860-028-0000 through 0310.

³³ See *Petition of Fiber Technologies Networks, L.L.C. for Authority Investigation of Rental Rates Charged to Telecommunications Pole Owners*, Docket No. 11-11-02, 2012 WL 4320126 (Conn.D.P.U.C.).

to the Commission's jurisdiction, such as CenturyLink and Frontier Communications. The three electric utilities subject to Commission jurisdiction are Puget Sound Energy, PacificCorp and Avista Corporation.

G. The Rule Serves the Purposes for Which is was Adopted.

34 As discussed above, adopting the FCC's rules would serve the public policy purposes of this Commission and the State of Washington. They are non-discriminatory, pro-competitive rules intended to remove roadblocks to the deployment of infrastructure necessary for increased, expanded broadband deployment. At the same time, they would provide fair, cost-recovering rates to pole owners.

H. The Rule Imposes Unreasonable Costs.

35 The absence of necessary pole attachment rules imposes unreasonable costs on carriers who need to attach their facilities to the poles of the utilities regulated by the Commission.

I. The Rules are Clearly and Simply Stated.

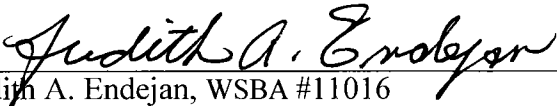
36 The FCC thoroughly vetted the language in its new rules through its lengthy rulemaking process. They provide a complicated rate determination formula, but the rules are as clear and succinct as they can be given the topic they address.

IV. CONCLUSION

37 PCIA respectfully requests that this Commission immediately open a rulemaking for the purpose of adopting pole attachment rules and that the Commission adopt the FCC pole attachment rules, Exhibit A hereto.

DATED this 3rd day of January, 2014.

GARVEY SCHUBERT BARER

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

PCIA – THE WIRELESS
INFRASTRUCTURE ASSOCIATION
AND THE HETNET FORUM PETITION
TO ADOPT RULES TO IMPLEMENT
RCW CH. 80.54 -- 14

EXHIBIT A

FN688. Florida IOUs Petition at 2.

FN689. *See 2010 Order*, 25 FCC Rcd at 11869, para. 9.

FN690. *See* Coalition Petition at 3-4; Florida IOUs Petition at 7-8.

FN691. *See* Coalition Petition at 3-4; Florida IOUs Petition at 7-8.

FN692. *See* Coalition Petition at 2; Florida IOUs Petition at 9.

FN693. *See infra* para. 231.

FN694. *See* Florida IOUs Petition at 13.

FN695. *2010 Order*, 25 FCC Rcd at 11871-73, paras. 14-16.

FN696. *See id.*

FN697. *See* 47 U.S.C. § 224; *see also* Florida IOUs Petition Comments at 5-6.

FN698. Florida IOUs Petition at 18.

FN699. *Southern*, 293 F.3d at 1346.

FN700. *Id.* at 1347.

FN701. *2010 Order*, 25 FCC Rcd at 11871-73, paras. 14-16.

FN702. Florida IOUs Petition at 18.

FN703. *See, e.g., 2010 Order*, 25 FCC Rcd at 11871-73, paras. 14-16; *Southern*, 293 F.3d at 1346-47.

FN704. Florida IOUs Petition at 20.

FN705. *2010 Order*, 25 FCC Rcd at 11872, n.56.

FN706. *Id.*

FN707. Although some of the Commission's past statements might suggest that a pole's capacity "increases" or

"expands" when facilities are rearranged, others suggest the opposite. *Compare, e.g., Local Competition Order*, 11 FCC Rcd at 16075, para. 1161 (suggesting that rearranging existing facilities "maximize [es] usable capacity") with *Local Competition Order*, 11 FCC Rcd at 16076, para. 1163 (suggesting that rearranging existing facilities "increases capacity").

FN708. *Id.* Generally, an agency may depart from a prior decision if it acknowledges that it is doing so and provides a reasonable explanation for the change. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). While the *2010 Order* referred to statements in the *Local Competition Order* when referring to disavowal, we now clarify that this extends also to statements in the *Local Competition Order on Reconsideration*.

FN709. *See* Florida IOUs Petition at 3, 9-10.

FN710. *See 2010 Order*, 25 FCC Rcd at 11870, para. 11.

FN711. Florida IOUs Petition at 10, n. 25.

FN712. *See* 5 U.S.C. § 603.

FN713. *See Further Notice*, 25 FCC Rcd at 11939-57 (App. D).

FN714. *See* 5 U.S.C. § 801(a)(1)(A).

*5345 APPENDIX A

Final Rules

Part 1, Subpart J of Title 47 of the Code of Federal Regulations is amended as follows:

1. The table of contents of Part 1 is revised to read as follows:

* * *

Subpart J--Pole Attachment Complaint Procedures 1.1401 Purpose.

1.1402 Definitions.

1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for tempo-

rary stay; and cable operator notice.

1.1404 Complaint.

1.1405 File numbers.

1.1406 Dismissal of complaints.

1.1407 Response and reply.

1.1408 Numbers of copies and form of pleadings.

1.1409 Commission consideration of the complaint.

1.1410 Remedies.

1.1411 Meetings and hearings.

1.1412 Enforcement.

1.1413 Forfeiture.

1.1414 State certification.

1.1415 Other orders.

1.1416 Imputation of rates; modification costs.

1.1417 Allocation of Unusable Space Costs.

1.1418 Use of presumptions in calculating the space factor.

1.1420 Timeline for access to utility poles.

1.1422 Contractors for survey and make-ready.

1.1424 Complaints by incumbent local exchange carriers.

* * *

2. Section 1.1401 is revised to read as follows:

§ 1.1401 Purpose.

The rules and regulations contained in subpart J of this part

provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable. They also provide complaint and enforcement procedures for incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)) to ensure that the rates, terms, and conditions of their access to pole attachments are just and reasonable.

3. Section 1.1402 is revised to read as follows:

§ 1.1402 Definitions.

* * *

(d) The term *complaint* means a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not just and reasonable. It also means a filing by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable.

(e) The term *complainant* means a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, an association of telecommunications carriers, an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers who files a complaint.

4. Section 1.1404 is revised to read as follows:

§ 1.1404 Complaint.

(k) The complaint shall include a certification that the complainant has, in good faith, engaged or attempted to engage in executive-level discussions with the respondent to resolve the pole attachment dispute. Executive-level discussions are discussions among representatives of the parties who have sufficient authority to make binding decisions on behalf of the company they represent regarding the subject matter of the discussions.

Such certification shall include a statement that, prior to the filing of the complaint, the complainant mailed a certified letter to the respondent outlining the allegations that form the basis of the complaint it anticipated filing with the Commission, inviting a response within a reasonable period of time, and offering to hold executive-level discussions regarding the dispute. A refusal by a respondent to engage in the discussions contemplated by this rule shall constitute an unreasonable practice under section 224 of the Act.

* * *

(m) In a case where a cable television system operator or telecommunications carrier as defined in 47 C.F.R. 224(a)(5) claims that it has been denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section 47 U.S.C. 224(f), the complaint shall include the data and information necessary to support the claim, including:

- (1) The reasons given for the denial of access to the utility's poles, ducts, conduits, or rights-of-way;
- (2) The basis for the complainant's claim that the denial of access is unlawful;
- (3) The remedy sought by the complainant;
- (4) A copy of the written request to the utility for access to its poles, ducts, conduits, or rights-of-way; and
- *5347 (5) A copy of the utility's response to the written request including all information given by the utility to support its denial of access. A complaint alleging unlawful denial of access will not be dismissed if the complainant is unable to obtain a utility's written response, or if the utility denies the complainant any other information needed to establish a prima facie case.

* * *

(ix) The annual carrying charges at-

tributable to the cost of owning a pole. The utility shall submit these charges separately for each of the following categories: depreciation, rate of return, taxes, maintenance, and administrative. These charges may be expressed as a percentage of the net pole investment. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court that determines the treatment of accumulated deferred taxes if it is at issue in the proceeding and shall note the section that specifically determines the treatment and amount of accumulated deferred taxes.

* * *

5. Section 1.1409(e) is revised to read as follows:

§ 1.1409 Commission consideration of the complaint.

* * * *

(e) * * *

(2) With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by section 1.1409(e)(2)(i) or 1.1409(e)(2)(ii) of this Part.

(i) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in section 1.1409(e)(2)(ii):

$$\text{Rate} = \text{Space Factor} \times \text{Cost}$$

Where Cost

- in Urbanized Service Areas = 0.66 x (Net Cost of a Bare Pole x Carrying Charge Rate)
- in Non-Urbanized Service Areas = 0.44 x (Net Cost of a Bare Pole x Carrying Charge Rate)

[Note: The following table/form is too wide to be printed on a single page. For meaningful review of its contents the table must be assembled with part numbers in ascending order from left to right. Row numbers, which are not part of the original data, have been added in the margins and can be used to align rows across the parts.]

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(ii) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in section 1.1409(e)(2)(i):

$$\text{Rate of a Bare Pole} = \frac{\text{Space Factor} \times \text{Net Cost of a Bare Pole} + \frac{\text{Maintenance and Administrative Carrying Charge Rate}}{\text{Pole Height}}}{\text{Pole Height}}$$

[Note: The following table/form is too wide to be printed on a single page. For meaningful review of its contents the table must be assembled with part numbers in ascending order from left to right. Row numbers, which are not part of the original data, have been added in the margins and can be used to align rows across the parts.]

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2	[()	+	(-	x	-----	Space										
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*5348 6. Section 1.1410 is revised to read as follows:

§ 1.1410 Remedies.

(a) 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:

- (1) Terminate the unjust and/or unreasonable rate, term, or condition;
- (2) Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission;
- (3) 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

(b) 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.

7. Section 1.1420 is added as follows:

§ 1.1420 Timeline for access to utility poles.

(a) The term "attachment" means any attachment by a cable television system or provider of telecommunications service to a pole owned or controlled by a utility.

(b) All time limits in this subsection are to be calculated according to section 1.4 of this title.

(c) *Survey.* A utility shall respond as described in section 1.1043(b) to a cable operator or telecommunications carrier within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days, in the case of larger orders as described in subsection (g)). This response may be a notification that the utility has

completed a survey of poles for which access has been requested. A complete application is an application that provides the utility with the information necessary under its procedures to begin to survey the poles.

(d) *Estimate*. Where a request for access is not denied, a utility shall present to a cable operator or telecommunications carrier an estimate of charges to perform all necessary make-ready work within 14 days of providing the response required by section 1.1420(c), or in the case where a prospective attachers's contractor has performed a survey, within 14 days of receipt by the utility of such survey.

***5349** (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 cable operator or telecommunications carrier may accept a valid estimate and make payment anytime after receipt of an estimate but before the estimate is withdrawn.

(e) *Make-ready*. Upon receipt of payment specified in subsection (d)(2), 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 subsection (g)).

(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 cable operator or telecommunications carrier requesting access may complete the specified make-ready.

(vi) State the name, telephone number, and email 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 subsection (g)).

(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 email address of a person to contact for more information about the make-ready procedure.

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

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

(1) A utility shall apply the timeline described in subsections (c) through (e) 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.

(2) A utility may add 15 days to the survey period described in subsection (c) to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(3) A utility may add 45 days to the make-ready periods described in subsection (e) to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(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.

(5) A utility may treat multiple requests from a single cable operator or telecommunications carrier as one request when the requests are filed within 30 days of one another.

***5350** (h) 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 cable operator or telecommunications carrier 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.

(i) If a utility fails to respond as specified in subsection (c), a cable operator or telecommunications carrier requesting attachment in the communications space may, as specified in section 1.1422, hire a contractor to complete a survey. If make-ready is not complete by the date specified in subsection (e)(1)(ii), a cable operator or telecommunications carrier 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 attachor 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 subsection (e)(1)(ii) and has failed to complete make-ready.

8. Section 1.1422 is added as follows:

§ 1.1422 Contractors for 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 in cases where the utility has failed to meet deadlines specified in section 1.1420.

(b) If a cable operator or telecommunications carrier hires a contractor for purposes specified in section 1.1420, it shall choose from among a utility's list of authorized contractors.

(c) A cable operator or telecommunications carrier that hires a contractor for 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 cable operator or telecommunications carrier.

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

9. Section 1.1424 is added as follows:

§ 1.1424 Complaints by incumbent local exchange carriers.

Complaints by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable shall follow the same complaint procedures specified for other pole attachment complaints in this Part, as relevant. In complaint proceedings where an incumbent local exchange carrier (or an association of incumbent local exchange carriers) claims that it is similarly situated to an attachor that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system for purposes of obtaining comparable rates, terms or conditions, the incumbent local exchange carrier shall bear the burden of demonstrating that it is similarly situated by reference to any relevant evidence, including pole attachment agreements. If a respondent declines or refuses to provide a complainant with access to *5351 agreements or other information upon reasonable request, the complainant may seek to obtain such access through discovery. Confidential information contained in any documents produced may be subject to the terms of an appropriate protective order.

***5352 APPENDIX B**

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),^[FN1] an Initial Regulatory Flexibility Analysis (IRFA) was included in the *2010 Order and Further Notice* in WC Docket No. 07-245 and GN Docket No. 09-51.^[FN2] The Commission sought written public comment on the proposals in these dockets, including comment on the IRFA. This Final Regulatory Flexibility