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 PCIA – THE WIRELESS INFRASTRUCTURE ASSOCIATION AND THE HETNET FORUM REGARDING THE COMMISSION'S PROPOSED RULES TO IMPLEMENT RCW 80.54

PCIA –The Wireless Infrastructure Association and the HetNet Forum, a membership section of PCIA (hereinafter collectively "PCIA"), on behalf of its member companies,[1] respectfully submit these Comments regarding the Commission's Proposed Rules, consistent with the Commission's July 24, 2015 Notice of Opportunity to Submit Written Comments.

I. INTRODUCTION

PCIA is the principal organization representing the companies that build, design, own, and manage telecommunications facilities throughout the world. Its over 220 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"). 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 USC §§ 224(a)(4), (b)(1), and RCW 80.54.010 and 80.54.020.

[1] Information regarding PCIA and HetNet membership can be found at the following links: http://www.pcia.com/our-current-members and http://www.hetnetforum.com/about-us/who-we-are/.

PCIA commends the Commission and its Staff on the Proposed Rules, which are the result of a painstaking and comprehensive rulemaking process that included input from stakeholders through workshops and multiple rounds of comments on three separate drafts of the rules. While the Proposed Rules do not reflect every position advocated by PCIA[2], they nevertheless represent a vast improvement over the existing uncertainty in an environment with no Commission rules implementing RCW 80.54.

Accordingly, PCIA files these comments to address one item only, namely, the definition of "owner" in Proposed Rule WAC 480-54-020. The Commission has modified the definition from the version set forth in the Third Draft Rules, released on March 24, 2015, by eliminating the phrase "other than a commercial mobile radio service company" and thereby creating the impression that the Proposed Rules could be applied to regulate access, rates, terms and conditions of attachments to "facilities" owned or controlled by wireless providers.

On May 27, 2015, the Commission issued a Notice of Opportunity to Respond to Small Business Economic Impact Statement (SBEIS) Questionnaire (hereinafter "SBEIS Notice"). In conjunction with that Notice, the Commission issued a "final" draft of the rules along with a matrix entitled "Summary of Comments/Responses on Third Revised Draft Rules" (hereinafter "Matrix"). With respect to the definition of "owner" in WAC 480-54-020, the Matrix sets forth the Staff recommendation, stating:

> Revise rule to delete express exclusion of CMRS providers as more consistent with RCW 80.54 to the extent such providers are included within the statutory definition of "utility."

See Matrix, p. 3. This statement suggests that a wireless carrier that falls within the definition of "utility" as that term is used in RCW 80.54 might be deemed an "owner" of "facilities" under the

[2] For example, *see* Comments on behalf of PCIA – The Wireless Infrastructure Association and HetNet Forum, filed April 17, 2015.

rules and be subject to the requirements of the rules relating to an "owner" of "facilities." This is simply incorrect and PCIA urges the Commission to make clear that the Proposed Rules, once adopted, will not apply in this manner.

The Commission lacks jurisdiction to regulate wireless carriers. Thus, the rules cannot be applied to attachments made to the "facilities" of wireless carriers. Accordingly, the caveat "other than a commercial mobile radio service company" is consistent with Washington law and should be reinserted into the definition of "owner" to provide clarity regarding the proper scope of the rules.

II. STATE LAW PROHIBITS THE COMMISSION FROM APPLYING ATTACHMENT RULES TO WIRELESS CARRIER FACILITIES

In 1985, the Washington Legislature passed EHB 281, which prohibits Commission regulation of wireless carrier rates, services, facilities and practices, except in very narrowly tailored circumstances, namely, when the wireless carrier is the only provider of basic telecommunications service in a given geographic area. This sweeping state law deregulation of wireless carriers is codified at RCW 80.66.010, which provides, in pertinent part, as follows:

> The commission shall not regulate radio communications service companies[3], except that:
>
> (1) The commission may regulate the rates, services, facilities, and practices of radio communications service companies, within a geographic service area or a portion of a geographic service area in which it is authorized to operate by the federal communications commission ***if it is the only provider of basic telecommunications service*** within such geographic service area or such portion of a geographic service area. For purposes of this section, "basic

[3] EHB 281 also amended RCW 80.04.010, adding the following definition: "Radio communications service company includes every corporation, company, association, joint stock association, partnership, and person, their lessees, trustees, or receivers appointed by any court, and every city or town making available facilities to provide radio communications service, radio paging, or cellular communications service for hire, sale, or resale." RCW 80.04.010(24).

> telecommunications service" means voice grade, local exchange telecommunications service.[4]

RCW 80.66.010(1) (emphasis added).

It is important to recognize that RCW 80.54, which the Proposed Rules are designed to implement, was passed in 1979. Had the 1985 Legislature intended to allow the Commission to regulate attachments to facilities owned by wireless carriers under RCW 80.54, it would have done so as part of EHB 281. But the 1985 Legislature did not make any such exception to the blanket deregulation of wireless carriers reflected in EHB 281; and RCW 80.66.010 has never been amended to do so.

The legislative history of EHB 281 also makes clear that the Legislature intended to very strictly circumscribe the Commission's regulatory authority over wireless carriers. For example, the "Summary" of the Final Bill Report for HB 281 states:

> Radio communications service companies are deregulated except when they provide the only voice-grade local telephone service in a service area or portion of a service area.[5]

The Bill was designed to subject wireless carriers to regulation by the Commission *only* where a wireless carrier is the exclusive provider of local telephone service. The Legislature did not contemplate bestowing on the Commission authority to regulate attachments to facilities owned or controlled by wireless companies.[6] A Memorandum dated February 4, 1985, addressed to the members of the Washington Legislature on behalf of NewVector Communications, Inc. states:

> Present Law
>
> The Washington Utilities and Transportation Commission (WUTC) has asserted jurisdiction to regulate rates and charges and other business matters of cellular communications companies.

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[4] PCIA is unaware of any geographic area in the State where a wireless carrier is the only provider of basic telecommunications service. In addition, subsequent to 1985, Congress enacted the Omnibus Budget Reconciliation Act which preempts the ability of a state to regulate the rates or entry of CMRS providers. *See* 47 U.S.C. §332(3).

[5] Final Bill Report, HB 281, C 167 L 85. A copy of the Final Bill Report is attached as Exhibit A to these comments.

[6] The legislative history of EHB 218 does not refer to attachment regulation.

Proposed Change

SB 3370 and HB 281 provide that a cellular communications company or other radio communications service company shall not be regulated by the WUTC unless it becomes the only provider of basic telecommunications service (voice grade, local exchange service) within a geographic area.[7]

This legislative history makes clear that the Bill was in part a response to an attempt by the Commission to assert general regulatory jurisdiction over wireless carriers. The Legislature made clear that the Commission's regulatory authority would instead be limited to only those circumstances where a wireless carrier is the only provider of basic local service.

Had the 1985 Legislature intended to subject wireless carriers to pole attachment regulation, it would have carved out an additional exception to the blanket deregulation provided in EHB 281. It did not do so. Thus, even if the current (post-1985) version of RCW 80.54 is interpreted to include wireless carriers within the definition of "utility," RCW 80.66.010 prohibits the Commission from regulating wireless carrier rates, services, facilities and practices.

III. CONCLUSION

For the foregoing reasons, PCIA urges the Commission to reinsert the phrase "other than a commercial mobile radio service company" into the definition of "owner" set forth in WAC 480-54-020 of the Proposed Rules. Whether wireless carriers are included within the definition of "utility" as that term is used in RCW 80.54, the Commission is expressly prohibited by RCW 80.66.010 from regulating the rates, services, *facilities*, and practices of wireless carriers (emphasis added). Accordingly, it is appropriate to make clear within the Proposed Rules themselves that a wireless carrier cannot be subject to the Proposed Rules as an "owner" of

[7] February 4, 1985, Memorandum from William T. Robinson and Clifford A. Webster on Behalf of NewVector Communications, Inc. to Members of the Washington Legislature. A copy of an excerpt of the memorandum is attached as Exhibit B to these comments.

"facilities" to which attachments are made. This will provide clarity to the Proposed Rules and avoid undue confusion regarding the proper scope of the rules.

Respectfully submitted this 24th day of August, 2015.

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FINAL BILL REPORT

HB 281

C 167 L 85

BY Representatives Jacobsen, Long, Unsoeld, Nealey, Todd, Gallagher, McMullen, Sutherland, Barnes, Miller, Ballard, D. Nelson, Madsen, Bond and Hine

Authorizing limited regulation by the state of radio communications service companies.

House Committee on Energy & Utilities

Senate Committee on Energy & Utilities

SYNOPSIS AS ENACTED

BACKGROUND:

Cellular mobile telephone service is a new form of radio communications service which greatly improves the scope and quality of mobile telephone service. The FCC will license two cellular providers in each metropolitan area. Cellular service has begun in the Seattle area and will soon begin in Tacoma.

Cellular service supplants earlier forms of mobile telephone service. There are other forms of radio communications service, such as radio paging, which are independent of cellular service and generally are provided by different companies.

SUMMARY:

Radio communications service companies are deregulated except when they provide the only voice-grade local telephone service in a service area or portion of a service area. Deregulated radio communications services are subject to the Consumer Protection Act.

"Radio communications service company" is defined to include every person or entity providing facilities for hire for radio communications service, radio paging, or cellular communications service.

VOTES ON FINAL PASSAGE:

House	97	0
Senate	48	0

EFFECTIVE: July 28, 1985

4/12/85

MEMORANDUM

TO: Members of the Washington Legislature

FROM: William T. Robinson and Clifford A. Webster

RE: Cellular Communications Legislation

SB 3370 (By Senators Williams, Kreidler, Kiskaddon, Bailey, Benitz, Goltz, Owen and Sellar)

HB 281 (By Representatives Jacobsen, Long, Unsoeld, Nealey, Todd, Gallagher, McMullen, Sutherland, Barnes, Miller, Ballard, D. Nelson, Madsen, Bond and Hine)

DATE: February 4, 1985

Prepared on Behalf of NewVector Communications, Inc.

SB 3370 and HB 281 are companion measures which provide for deregulation of the cellular communications industry. They are identical to the cellular communications provisions in the comprehensive regulatory flexibility bill recommended unanimously by the Joint Select Committee on Telecommunications. The Committee's final report states:

> The Committee finds that cellular mobile telephone service should be largely deregulated. Cellular mobile telephone service is a new technology which represents a significant improvement over traditional mobile telephones. The FCC has developed a licensing plan for cellular providers which ensures a duopoly in most cellular markets. Further, cellular mobile telephone service is a premium service aimed primarily at the business market. As such, it is not an essential service like electricity, water or gas for telephone subscribers. Since the FCC's scheme contemplates competition in the cellular market and the service is not a necessity, the historical rationale for regulating firms providing this service does

not obtain. Some have argued that cellular service should be regulated as a check against any threat it may pose to the wire line carriers who provide local exchange service. The Committee believes that this is an inappropriate rationale for regulation. If and when cellular begins to provide meaningful competition for local exchange service, the Committee believes that regulation of the traditional monopoly provider should be reexamined rather than regulating competitive providers now on the basis of fears of future unknowns.

Cellular Communications in Washington

Cellular communication service became a reality for the public in 1981, when the Federal Communications Commission (FCC) announced its decision in the regulatory proceeding relative to cellular communication systems. The FCC announced that it would grant two cellular licenses in each geographic service area, and thereafter began accepting applications. To date, the FCC has granted licenses to operate cellular systems in the largest 60 markets in the United States, including Seattle/Everett and Tacoma. Applications for the Spokane area licenses were filed with the FCC on July 16, 1984; and applications for licenses in the smaller Washington markets will be filed according to a schedule established by the FCC.

Present Law

The Washington Utilities and Transportation Commission (WUTC) has asserted jurisdiction to regulate rates and charges and other business matters of cellular communications companies.

Proposed Change

SB 3370 and HB 281 provide that a cellular communications company or other radio communications service company shall not be regulated by the WUTC unless it becomes the only provider of basic telecommunication service (voice grade, local exchange service) within a geographic area. The unregulated activities of such companies, however, are subject to the provisions of the Consumer Protection Act.