Williams, Kastner & Gibbs PLLC

January 14, 1998

24375.105

VIA FEDERAL EXPRESS

Mr. Paul Curl
Acting Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Dr. S.W.
Olympia, WA 98504

Re: Docket No. UT-970723

Dear Mr. Curl::

Enclosed please find an original and fifteen copies of the additional comments of TCI Cablevision of Washington, Inc. in Docket No. UT-970723, relating to the Notice of Preproposal Statement of Inquiry to Adopt Rules, Regulations and Procedures Regarding Attachment to Transmission Facilities, dated December 15, 1997. Also included is a disk which contains the comments and Exhibit A to the Comments.

Yours truly,

WILLIAMS, KASTNER & GIBBS PLLC

Judith A. Endejan

END:psb
Enclosures

DISK AVAILABLE

S1-534969.1

Seattle
Tacoma

cc: Kristoff Bauer (w/encl.)
        Tom Brubaker (w/encl.)
        Peter Butler (w/encl.)
        Bill Clingenpeel (w/encl.)
        Robert Coates (w/encl.)
        Richard Finnigan (w/encl.)
        Joan M. Gage (w/encl.)
        Ron Gayman (w/encl.)
        Paul Glist (w/encl.)
        William E. Guenzler (w/encl.)
        Kristin Hall (w/encl.)
        Elizabeth Hammond (w/encl.)
        Glenn Harris (w/encl.)
        James Heidell (w/encl.)
        Gregory J. Kopta (w/encl.)
        Victoria Lincoln (w/encl.)
        Bill Luce (w/encl.)
        Robert F. Manifold (w/encl.)
        Timothy J. O'Connell (w/encl.)
        James C. Paine (w/encl.)
        Timothy Rahman (w/encl.)
        Mark Reynolds (w/encl.)
        Carrie Rice (w/encl.)
        Richard Rucker (w/encl.)
        Bruce Shaull (w/encl.)
        Mark Simonson (w/encl.)
        Mary E. Steele (w/encl.)
        Terry Vann (w/encl.)

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Proposed Rulemaking to Adopt) A Methodology for Determination of) Just and Reasonable Rates for) Attachment to Transmission Facilities)	Docket No. UT-970723

Pursuant to the December 15, 1997 notice from the Washington Utilities and Transportation Commission ("WUTC"), TCI Cablevision of Washington, Inc. ("TCI") files the following additional comments.

The WUTC invites comments on whether "the rulemaking presently is appropriately structured in its breadth and reach." According to the pre-proposal statement of inquiry filed by the WUTC, this rulemaking is intended to adopt rules which implement RCW Ch. 80.54. That chapter calls for the establishment of just and reasonable rates for all attachments by telecommunications or cable firms to the support structures (e.g., poles) of utilities, including electric or telecommunications utilities. This means that the rules to be adopted will apply to the attachments of both cable and telecommunications providers to the support structures of these utilities. RCW 80.54.010(3). Accordingly, so long as this rulemaking proceeding continues to implement Chapter 80.54 it is appropriately structured in its breadth and reach.

The WUTC also posed several specific questions. TCI's responses to these are as follows:

1.   *What is each party's preference regarding the FCC formula?*

S1-534971.1

TCI recommends that the Commission adopt the current Federal Communications Commission ("FCC") formula to implement RCW Ch. 80.54. TCI stated this formula in Exhibit A to its Petition for Rulemaking. TCI restates this formula in Exhibit A to these comments and has refined its original iteration of the formula in a format which may be clearer and more defined.

2.   *Is there a cost basis for the FCC's formula, other than the policy reason?*

Yes. The FCC formula is cost based. The FCC formula is a straightforward and economic approach for determining costs and determining just and reasonable pole attachment rates. The first step is to calculate the utility's average net cost per bare pole, derived from publicly reported data such as the FERC Form 1. The next step of the FCC's cost-based formula is to calculate the carrying charges — maintenance expense, depreciation expense, administrative expense, taxes, and cost of capital — expressed as percentages of expenses to plant in service. The sum of the carrying charges is multiplied by the net cost per bare pole to produce an annual carrying cost per pole.

The FCC formula then allocates pole costs in proportion to the amount of space occupied by the attachment. The FCC's proportional cost allocation in this regard is consistent with the language of RCW 80.54.040. The rates derived from the application of the FCC formula are based upon fully allocated costs, which establish the maximum end of the range of reasonableness for rates. Further, the typical pole attachment contract permits the rates to be recalculated annually to reflect the most recently filed cost information.

The purpose of pole rent regulation is to allow owning utilities to recover their fair share of costs without permitting the utility to exact a monopoly profit for the value inherent in an

S1-534971.1

essential facility, such as a pole. The FCC formula satisfies this purpose. It develops all of the

capital and non-capital costs of a pole, based on historical costs, less depreciation (or embedded

cost), and then properly allocates those costs among users according to relative use. The FCC's

use of an embedded cost methodology as a policy choice, is consistent with longstanding utility

ratemaking practice and has been widely accepted by Congress[1] and those states which have

certified that they will regulate pole attachment rates.[2] Finally, the Supreme Court has upheld

the FCC formula against utility claims that it produces rates which are too low. *F.C.C. v.*

---

[1] *See, e.g.*, Communications Amendment Act of 1982, Pub. L. No. 97-259 (1983); Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984); Cable Television Consumer Protection and Competition Act of 1992 Pub. L. No. 102-385, 106 Stat. 1460 (1992); and Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[2] Indeed, the leading certified state PUCs have adopted the FCC's cost-based formula intact. California is certified, but adopts the FCC's formula and usable space ratio—7.41%. Cal. Pub. Util. Code § 767.5 (1996). Ohio adopted the FCC formula intact after months of hearing. *Ohio Edison Co. et al.*, No. 81-1171-EL-AIR (Nov. 3, 1982). In 1995, the Michigan legislature adopted the FCC formula for all attachments on all poles owned by telecommunications competitors. Michigan Telecommunications Act of 1995, MCL 460.6; MSA 22.13(6g). In 1997, the Michigan PSC adopted the FCC formula for all electric utilities, whether or not they were currently diversified. *See Consumers Power Co., et al.*, Mich. Pub. Serv. Case Nos. U-10741, U-10816, U-10831, 1997 Mich. PSC LEXIS 26, (Feb. 11, 1997), *reh'g denied* (April 24, 1997), *appeal pending, Detroit Edison Co et al. v. Michigan Public Service Comm'n et al.*, Nos. 203480 & 203421 (Mich. Ct. App. filed May 22, 1997). New York adopted the FCC formula in 1997. *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, N.Y. Pub. Serv. Comm'n. Case No. 95-C-0341 1997 N.Y. PUC LEXIS 364, (Issued and effective June 17, 1997), recon. denied, 1997 N.Y. PUC LEXIS 639 (October 7, 1997). The formula has also been approved in State Section 251/271 proceedings. See, *Review of Cost Studies, Methodologies, and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications Services*, Georgia Pub. Serv. Comm'n Docket 7061-U, October 21, 1997 ("The Commission concludes that it is most appropriate to adopt the current pole rental rate according to the FCC formula, which produces a rate of $4.20 ... . The current FCC formula has proven to be a reasonable, cost-based approach to setting pole rates.")

-3-

Florida Power Corp., 480 U.S. 245, 247 (1987). The court held that the FCC formula is not subject to serious claim of being confiscatory.

3.   *Should Washington adopt revisions to the proposed methodology on an ongoing basis to mirror the FCC?*

TCI recommends that the Commission adopt the current FCC formula as set forth in TCI's proposed rule. Future changes to the FCC's formula can be dealt with as they arise and should not be incorporated automatically in the rule that this Commission adopts. Several benefits flow from this approach. First, it provides certainty. While TCI fully endorses the current time-tested, widely-accepted FCC formula, TCI believes that this Commission should consider changes if and when they occur.

Second, TCI's approach is more consistent with rulemaking procedures under Washington administrative law. The Washington Administrative Procedure Act sets forth specific rulemaking procedures for the adoption of, and amendment of, administrative rules, which provides for notice and an opportunity to comment. *See* RCW 34.05.310, *et seq.*, and WAC 480-09-210. While an agency may incorporate an existing rule or regulation of an agency of the United States by reference, RCW 34.05.365, nothing in Washington
Administrative law appears to support incorporation by reference of future changes not in effect at the time of incorporation by reference.

Therefore, to maintain the flexibility to make changes only if and when the Commission deems them appropriate, and to preserve the validity of the rule to be adopted in this proceeding from future procedural challenges, TCI recommends that future revisions to today's FCC methodology be considered in future, separate proceedings.

-4-

4. *Should any established methodology be second to private contract negotiations?*

TCI supports private contract negotiations as the preferable means to establish pole attachment rates. However, such negotiations will be wholly ineffective <u>unless</u> an established methodology is in place, which can establish the boundaries for such negotiations.

Adoption of a Commission methodology will help to equalize the bargaining power between the monopoly pole owners on the one hand and the attaching parties on the other. Further, such a methodology is absolutely necessary to avoid coerced agreements and the potential for anti-competitive abuses that have arisen historically as a result of pole owners' control of the essential corridors that cable operators and competitive telecommunications companies need to provide service. Therefore, it is critical for the establishment of just and reasonable rates, as well as the continued proliferation of facilities-based competition and innovative and cost-effective service offerings that a rate methodology such as the FCC formula be in place as a default mechanism to promote and encourage consistent settlements without Commission involvement.

By serving as a "check" on the negotiation process and by providing a clear mechanism for dispute resolution if negotiations fail, this Commission's rule will serve a crucial function in providing for truly meaningful contract negotiations.

5. *Should the transition rate for CLECs and cable companies mirror the FCC's contemplated five year period (ending in 2006), or should there be a "flash cut" to the ILEC rates?*

For administrative simplicity, conservation of regulatory resources, and to promote an even more pro-competitive environment, this Commission may well decide upon one pole attachment rate formula - the current cable rate formula. This approach takes the well-

-5-

established existing cable rate and applies it to all attaching parties, including telecommunications companies. At least one state - Michigan - has already adopted this approach for all poles owned by telecommunications companies or diversified electric utilities.

TCI strongly opposes a "flash-cut" now to the telecommunications rate of 2006 for any purpose. Such a flash-cut would contradict the intent of Congress in the Telecommunications Act of 1996, which was to promote the development of local competition. Indeed, Congress deliberately left in place the formula for the lower cable attachment rates to be applied to both cable _and_ telecommunications firms for the initial years of local competition, to provide nondiscriminatory deployment of both cable and CLEC lines and to create an incentive to diversification. Moreover, as more facilities-based competitors attach to poles during the phase-in, the ultimate effect of sharing nonuseable space pro rata among entities will be mitigated substantially. Thus, the current FCC formula works well not only to properly price cable attachments but to phase in different methods of pole pricing as competition grows. Any decision to adopt _now_ a rate intended for future telecommunications attachments would undermine the pro-competitive policies of Congress and this state.

On the other hand, choosing the cable rate formula now for all attachments with no phase-in requirement for telecommunications attachments would be consistent with the Telecommunications Act of 1996, and would promote competition.

6.   *Does GTENW propose the same cost methodology in Washington that it proposes in other states?*

TCI is not familiar with the cost methodology GTE has proposed in other individual states. GTE, in its comments to the FCC in Docket No. 97-98 ("FCC Proceeding"), did not

S1-534971.1

propose a Total Element Long Run Incremental Cost (TELRIC), or reproduction cost-based methodology as it has in this proceeding. Rather, it recommended in those comments a gross-cost based methodology as a solution to the negative net pole investment issue raised in that proceeding. GTE, in its FCC comments, suggested as an alternative to a gross cost methodology, a modified net cost approach to address the anomalous negative net pole investment issue if the Commission chose not to adopt a gross book method. GTE has not identified this net pole investment issue as present in Washington.

PROPOSED RULE
ATTACHMENT TO TRANSMISSION FACILITIES

1. This Rule is intended to implement RCW Chapter 80.54 relating to attachments to transmission facilities.

2. The generally applicable formula for calculating the maximum attachment rate consists of a) a Use Ratio, b) the Net Cost of Bare Pole, and c) Carrying Charges, and is expressed as follows

   Maximum Rate = Use Ratio X Net Cost of a Bare Pole X Carrying Charges

   a. The term "Use Ratio" is calculated by dividing the Space Occupied by the Attachment by the Total Usable Space. The term "Usable Space" means the total distance between the top of a utility pole and the lowest possible attachment point that provides the minimum allowable grade clearance, including the space which separates communications and power lines. The total usable space on a pole occupied by a pole attachment shall be presumed to be 13.5 feet; provided that a utility or communications company may rebut the presumption with statistically reliable measurements of the total usable space on the public utility's poles which bear pole attachments in the relevant service area.

   b. The "Net Cost of a Bare Pole" is determined as follows:

   $$\text{Net Cost of a Bare Pole} = \frac{\text{"Net Pole Investment" X "Factor"}}{\text{Number of Poles}}$$

      i. The term "Net Pole Investment" means Gross Pole Investment minus the Depreciation Reserve Related to Poles minus Accumulated Deferred Income Taxes Related to Poles.

      ii. The term "Factor" represents costs associated with crossarms and other property and equipment not necessary for pole attachments. Electric utilities shall use a presumptive "Factor" of 0.85. Telephone utilities shall use a presumptive "Factor" of 0.95.

   c. The "Carrying Charges" are expressed as percentages of expenses to plant in service, the total of which are expressed as follows:

   Total Carrying Charges = Administrative + Maintenance + Depreciation + Taxes + Rate of Return

      i. The Carrying Charges for Telephone Utilities shall be calculated as follows:

   $$\text{Administrative Expense} = \frac{\substack{\text{Total Administrative and General} \\ \text{A/Cs 6710+6720+6411(ae) Rental Expense Poles}}}{\substack{\text{Gross Plant Investment - Accum. Depreciation - Deferred Taxes} \\ \text{(A/C 2001)} \qquad \text{(A/C 3100)} \qquad \text{(Plant-A/Cs 4100, 4340)}}}$$

   $$\text{Maintenance Expense} = \frac{\text{A/C 6411- 6411(ae) Rental Expense Poles}}{\text{Net Pole Investment**}}$$

   $$\substack{\text{Depreciation Expense} \\ \text{for Gross Pole}} = \text{Depreciation Rate X} \frac{\text{Gross Pole Investment (A/C 2411)}}{\text{Net Pole Investment**}}$$

$$\text{Tax Carrying Charge Expenses} = \frac{\text{Operating Taxes (A/C 7200)}}{\text{Gross Plant Investment - Accum. Depreciation - Accum. Deferred Taxes}}$$

                     (A/C 2001)   (A/C 3100)   (Plant)

Rate of Return   = Rate last authorized by the Washington Utilities and Transportation Commission

ii. The Carrying Charges for Electric Utilities shall be calculated as follows:

$$\text{Administrative Expense} = \frac{\text{Total Administrative and General Expenses (A/Cs 920-931, 935)}}{\text{Gross Plant Investment - Depreciation Reserve in - Accum. Deferred Income}}$$

            (Electric Plant)***   (Electric Plant)   Taxes (Electric Plant)*

$$\text{Maintenance Expense} = \frac{\text{A/C 593}}{\text{Investment in - Depreciation in - Accum. Deferred Income Taxes}}$$

        A/Cs 364+365+369   A/Cs 364+365   Related to A/Cs 364
                                 +369   +365+369*

$$\text{Depreciation Expense} = \text{Depreciation Rate for Gross Pole} \times \frac{\text{Gross Pole Investment}}{\text{Net Pole Investment**}}$$

$$\text{Normalized Taxes (Expressed as A Percentage of Net Plant Investment)} = \frac{\text{A/C (408.1 + 409.1 + 410.1 + 411.4) - 411.1}}{\text{Gross Plant - Depreciation Reserve - Deferred Income Taxes*}}$$

Rate of Return   = Rate last authorized by the Washington Utilities and Transportation Commission

* In the calculations using FERC Form No. 1 data, treat deferred taxes as a rate base deduction. Deferred Taxes is ordinarily reported at page 275, FERC Form No. 1.

** For purposes of these calculations Net Pole Investment equals Gross Pole Investment minus the Depreciation Reserve Related to Poles minus Accumulated Deferred Income Taxes Related to Poles

*** For companies which have multiple operations, such as gas, electric and/or nuclear power, the Commission, in calculating the administrative expenses component, utilizes only the investment relating to electric operations. However, in the computation of the taxes component, the total gross plant investment of all of the company's operations is utilized. The taxes paid by the utility generally relate to its entire operations.