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October 8, 2014

Via Electronic Mail

Steven V. King
Executive Director and Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive S. W.
P.O. Box 47250
Olympia, Washington 98504-7250

Re: Docket No. U-140621 - Comments of Avista Utilities

Dear Mr. King,

Avista Corporation, dba Avista Utilities (Avista or Company), submits the following comments in accordance with the Washington Utilities and Transportation Commission's (Commission) Notice of Opportunity to File Written Comments (Notice) issued in Docket U-140621.

I. BACKGROUND

On April 22, 2014, the Commission filed with the Code Reviser a Preproposal Statement of Inquiry (CR-101) to consider adoption of rules to implement RCW ch. 80.54, relating to attachments to transmission facilities. The Commission filed the CR-101 under Docket U-140621.

Federal law requires the Federal Communications Commission (FCC) to regulate attachments to utility poles unless a state certifies that it regulates such attachments.[1] The Washington legislature elected to assert jurisdiction over attachments to "transmission" facilities by enacting RCW ch. 80.54. The statute authorizes the Commission "to regulate in the public

[1] 47 U.S.C. § 224(c).

interest the rates, terms, and conditions for attachments by licensees or utilities,"[2] and requires the Commission to adopt implementing rules, regulations, and procedures.[3]

On February 25, 2014, the Commission entered Order 01 in Docket UT-140024, denying the petition of PCIA – The Wireless Infrastructure Association to initiate a rulemaking to adopt rules to implement RCW ch. 80.54. The Commission concluded that it should initiate its own, more comprehensive rulemaking proceeding. This is that proceeding.

PCIA in its rulemaking petition proposed that the Commission adopt the most recent set of FCC rules regulating pole attachments (47 C.F.R. § 1.1401 through 1.1424). In addition, the Public Utility Commission of Oregon (OPUC) has adopted rules governing pole and conduit attachments (OAR 860-028-0000 through 03100). The Commission proposed to use the FCC and OPUC rules as the starting point for developing its own rules to govern attachments to transmission facilities in Washington.

On May 30, 2014, Avista and others filed initial comments in this proceeding and Commission staff held a workshop with interested stakeholders on July 28, 2014. Avista's initial comments explained that its primary concern was with safety and the proper application of safety codes and other operating standards. Avista also explained that FCC regulations raise significant safety and operational issues for utilities, including those associated with make-ready deadlines, wireless attachments above energized electric facilities, liability issues, unauthorized attachment and safety violation concerns, and temporary attachments. Avista also explained that the FCC's annual pole attachment rental rates subsidized communications companies at the expense of electric utility ratepayers. To allow Avista to police noncompliant attachers, Avista proposed allowing utilities to sanction attachers for unauthorized attachments, safety violations, and other failures to comply with existing agreements, similar to sanctions in effect in Oregon but without the additional regulatory burdens established in Oregon.

[2] RCW 80.54.020.
[3] RCW 80.54.060.

Avista appreciates the opportunity to provide the following comments on the Draft Rules:

II. COMMENTS

A. The Pole Attachment Regulations Should Apply To Distribution Facilities, Not Transmission Facilities

Although RCW 80.54 references attachments to "Transmission" facilities, pole attachment regulations at the FCC and elsewhere are limited to lower-voltage electric distribution facilities, not high-voltage transmission facilities. Transmission towers are different than distribution poles, and should not be subject to any Commission pole attachment rules.

It certainly appears that the intent of the Draft Rules is to limit the applicability to distribution facilities. The Draft Rules are entitled, "Draft Rules Governing Access to Utility Poles, Ducts, Conduits, and Rights-of-Way," all of which are parts of electric distribution systems. Similarly, "Facilities" is defined as "poles, ducts, conduits, rights-of-way, manholes or handholes, or similar facilities,"[4] which again are electric distribution system facilities.

This issue whether pole attachment regulations cover transmission facilities or only distribution facilities was addressed by the U.S. Court of Appeals for the 11th Circuit in 2002, when the court ruled that Federal Communications Commission ("FCC") jurisdiction over attachments to any utility "pole, duct, conduit or right-of-way" gave the FCC jurisdiction over attachments only to distribution facilities, not transmission facilities.[5] In reaching that conclusion, the court reasoned that "poles, ducts and conduits" were regular components of distribution facilities, and that the definition did not mention "towers," which are the primary facility used for electric transmission.[6] The court therefore concluded that FCC authority to regulate attachments to utility "poles, ducts, conduits and rights-of-way" meant authority over attachments to distribution facilities, not transmission facilities.[7]

The reference in Draft Rule 480-54-010 to "Transmission Facilities" may confuse some into believing that attachments to transmission facilities are covered by the Draft Rules, when that does not appear to be the Commission's intent. The Draft Rules should therefore be

[4] Draft Rule 480-54-020 (6).
[5] *Southern Co. v. FCC*, 293 F.3d 1338, at 1343-46 (11th Cir. 2002), interpreting the federal Pole Attachment Act at 47 U.S.C. §224(a)(1).
[6] *Id*. at 1344.
[7] *Id*. at 1344-46.

clarified to state that they apply to attachments to distribution facilities, not transmission facilities.

B. The Commission Should Consider FCC Rulings, But Consider Other Relevant Information

As currently written, Draft Rule 480-54-010(2) would have the Commission treat any relevant FCC ruling or federal court interpretation of those rulings as "persuasive authority." In any complaint proceeding, the Commission certainly should take note of relevant FCC rulings, just as it should take note of relevant rulings from other state public service commissions. But the Commission should not constrain itself by focusing solely on the FCC rulings, many of which the UTC may find unsuitable in Washington State for Washington stakeholders. Instead, Avista requests that Draft Rule 480-54-010(2) be modified to state that the Commission "may" consider relevant FCC rulings and rulings from other states, as appropriate. This would give the Commission far more discretion.

C. The Proposed Rate Provisions Are Inconsistent With Washington State Law And Should Be Revised In Several Respects

1. The FCC Cable-Only Rate Formula Proposed In Draft Rule 480-54-060(2) Is Inconsistent With The Definition Of A "Fair, Just, Reasonable, and Sufficient Rate" In Draft Rule 480-54-060(1)

Draft Rule 480-54-060(1) defines what the Commission considers to be a "fair, just, reasonable, and sufficient" rate. As explained below, that definition language has been interpreted by Washington State courts to be the FCC's Telecom rate in effect prior to the FCC's April 2011 Pole Attachment Order.[8] In the next subsection, however, Draft Rule 480-54-060(2) proposes a formula for calculating a "fair, just, reasonable, and sufficient" pole attachment rate that is identical to the FCC's Cable-Only attachment rate.[9]

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[8] *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) ("April 2011 Pole Attachment Order" or "April 2011 FCC Pole Attachment Order").

[9] The FCC's cable-only rate formula is identified at 47 C.F.R. §1.1409(e)(1) as follows: "The following formula shall apply to attachments to poles by cable operators providing cable services….:

$$\text{Maximum Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate}$$

The language in Draft Rule 480-54-060(1) defining a "fair, just, reasonable, and sufficient" rate is the same language reviewed by a Washington state court judge in Pacific County in March 2011. In *Public Utility District No. 2 of Pacific County v. Comcast of Washington IV, Inc*., the judge was asked to determine, among other things, which formula was being described by the statutory language in RCW 54.04.045(3)(a), which described pole attachment rates that Public Utility Districts can charge. The language the judge reviewed in RCW 54.04.045(3)(a) is practically identical to the language the Commission proposes in Draft Rule 480-54-060(1).[10] The judge decided that this language described the FCC Telecom formula.[11]

Since the March 2011 *Pacific County* ruling predated the FCC's April 7, 2011 Pole Attachment Order that revised the FCC Telecom rate, the judge in that case was referencing the pre-2011 Order Telecom rate, which the FCC continues to use as a "reference point" for determining rates for incumbent local exchange carrier ("ILEC")[12] attachments to electric utility poles.[13]

$$\text{Where Space Factor} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}}$$

[10] Draft Rule 480-54-060(1) states:

> A fair, just, reasonable, and sufficient rate for attachments to or in poles, ducts, conduits, or rights-of-way shall assure the utility the recovery of not less than all the additional costs of procuring and maintaining the attachments, nor more than the actual capital and operating expenses, including just compensation, of the utility attributable to that portion of the pole, duct, conduit, or right of way used for the attachments, including a share of the required support and clearance space, in proportion to the space used for the attachment, as compared to all other uses made of the facilities, and uses which remain available to the owner or owners of the facilities.
> (emphasis added)

RCW 54.04.045(3)(a) states:

> One component of the rate shall consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the locally regulated utility attributable to that portion of the pole, duct, or conduit used for the pole attachment, including a share of the required support and clearance space, in proportion to the space used for the pole attachment, as compared to all other uses made of the subject facilities and uses that remain available to the owner or owners of the subject facilities.
> (emphasis added).

[11] *Public Utility District No. 2 of Pacific County v. Comcast of Washington IV, Inc.*, Memorandum Decision at 2 (Wash. Sup. Ct., Pacific County) (Docket No. 07-2-00484-1) (Mar. 15, 2011) (Finding No. 4: "Section 3(a) of the RCW 54.04.045 (2008) reflects the FCC Telecom Method."), attached hereto as Exhibit A.

[12] An ILEC is the original local exchange carrier that provided telephone exchange service on the date of enactment of the Telecommunications Act of 1996. ILECs own poles in their service areas and have entered into "joint use"

As explained below, Avista believes that this inconsistency should be resolved in favor of the statutory language in Draft Rule 480-54-060(1), which has been adjudged to require the FCC's pre-2011 Order Telecom rate.

2. The FCC's Pre-2011 Order Telecom Rate Is Much More Reasonable Than The FCC Cable Rate, Particularly For ILEC/Electric Joint Use Attachments

Not only is the FCC's pre-2011 Order Telecom Rate consistent with the *Pacific County* case, it provides more equitable allocations of pole costs among attaching entities, and is particularly an improvement with respect to attachments by ILEC and electric utilities to each other's poles pursuant to joint use arrangements.

The FCC's rate rules presume an average 37.5-foot pole with 13.5 feet of "usable" space, and cable and CLEC attachments occupying one foot of space. Using these presumptions and the FCC Cable-Only rate proposed in Draft Rule 480-54-060(2) would allow the pole owner to recover only 7.4% of annual pole costs, whereas using the pre-2011 Telecom rate described in 480-54-060(1) would allow recovery of 11.2% or 16.9%, using FCC presumptions for the number of attaching entities in "urbanized" (5 entities) and "non-urbanized" (3 entities) areas.[14]

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agreements with electric utility pole owners to enable ILECs and electric utilities to share each other's poles. Competitive local exchange carriers ("CLECs"), which became commonplace after the 1996 Telecom Act, typically do not own poles and are treated as third party licensees on poles owned by the ILECs and electric utilities.

[13] April 2011 FCC Pole Attachment Order at ¶218. The FCC states that this pre-existing Telecom rate will be used as a "reference point" only when existing joint use agreements are not presumed to be reasonable and when the ILEC is not "comparably situated" to cable company or competitive local exchange carrier ("CLEC") attachers:

> By contrast, if a new pole attachment agreement between an incumbent LEC and a pole owner includes provisions that materially advantage the incumbent LEC vis a vis a telecommunications carrier or cable operator, we believe that a different rate should apply. Just as considerations of competitive neutrality counsel in favor of similar treatment of similarly situated providers, so too should differently situated providers be treated differently. In particular, we find it reasonable to look to the pre-existing, high-end telecom rate as a reference point in complaint proceedings involving a pole owner and an incumbent LEC attacher that is not similarly situated, or has failed to show that it is similarly situated to a cable or telecommunications attacher.

[14] The space factor for the Telecom rate was not modified by the April 2011 FCC Pole Attachment Order. That space factor is expressed in 47 C.F.R. §1.1409(e)(2)(i) and (ii) as:

$$\text{Where Space Factor} = \left[\frac{\left(\frac{\text{Space}}{\text{Occupied}} \right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right]$$

Considering the benefits to attachers of having guaranteed access to fully-constructed pole distribution corridors, and that all attachers benefit equally from the 24 feet of "unusable" space necessary to have their facilities elevated at least 18 feet above ground on a pole buried six feet underground, the pre-2001 Order Telecom rate described in 480-54-060(1) generates rates that are still lower than what is desired, but are at least better than rates generated by the FCC's Cable-Only rate.[15]

3. Whichever Formula Is Used, The Occupied Space Presumed For Communications Attachers Should Be Greater Than One Foot

FCC pole attachment regulations presume that cable company and CLEC attachers occupy only one foot of space on a pole.[16] The FCC never calculated a presumption for how much space an ILEC occupies.[17]

It would be reasonable for the Commission to presume that these attachers occupy not only the space on the pole on which their attachments are located, but also a share of the 40" safety space between their facilities and energized electric facilities, which would not exist on

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Applying this formula using FCC presumptions of 1 foot for Space Occupied, 24 feet for Unusable Space, 37.5 feet for Pole Height and 5 entities and 3 entities for No. of Attaching Entities in urbanized and non-urbanized areas, respectively, results in Space Factors of 11.2% for urbanized areas and 16.9% for urbanized areas.

[15] The FCC's pre-2011 Telecom formula generates rates that are also lower than other states allow, including rates that were blessed by a Washington State Court judge for the City of Seattle. The following table lists the percentage of annual pole-related costs that utility pole owners can recover from each attacher under each formula, assuming three attachers per pole and a 37.5 foot average pole height.

	FCC Cable-Only	**FCC Pre-2011 Telecom**	**Delaware**	**Maine**	**Indiana**	**Seattle**
% of Annual Pole Costs Allocated to Each Attacher	7.4%	16.9%	30.2%	32.4% (telco) 23.0% (cable)	31.25%*	27.1%

* assumes 40-foot pole

The Seattle rates were approved by the judge in *TCI Cablevision of Washington, Inc. v. City of Seattle*, No. 97-2-02395-5SEA, Findings of Fact, Conclusions of Law and Judgment (May 20, 1998, J. Learned, Washington Sup. Ct., King County) (attached hereto at Exhibit B).

[16] 47 C.F.R. §1.1418.

[17] Nor has the FCC ever calculated a presumption for how much space an electric utility occupies.

the pole but for the presence of communications attachments. The National Electrical Safety Code, in fact, refers to this 40-inch safety space as the "Communications Worker Safety Zone."[18] In Avista's view, this entire 40-inch safety space should be allocated to the communications attachers as part of the space that they occupy. Consistent with this concept, the Louisiana Public Service Commission recently revised its pole attachment regulations in August of this year and confirmed that cable companies and CLECs occupy two feet of space on the pole, consisting of one foot for their attachments and an additional one foot share of the Communications Worker Safety Zone.[19]

In addition, it is well known that ILECs typically attach multiple separate cable attachments and more equipment on distribution poles than do cable companies or CLECs. ILECs therefore typically occupy more space on poles than do cable companies and CLECs and for that reason alone should pay a higher rate.

The Commission should therefore establish a presumption that cable companies and CLECs occupy two feet of space each, and that ILECs occupy two and one-half feet.

4. The FCC Cable-Only Rate Is Inappropriate For ILEC/Electric Joint Use Relationships

The FCC Cable-Only Rate the Commission proposes in Draft Rule 480-54-060(2) would require the attaching entity to pay for a portion of the pole owner's annual pole costs based upon the amount of "usable" space occupied by the attacher. If ILECs were allowed to use the FCC's presumptive one foot of space, then an electric utility could charge the ILEC only 1/13.5, or

[18] National Electrical Safety Code, 2012 Edition, § 238.E, attached hereto at Exhibit C).

[19] *See* Louisiana Public Service Commission, Docket No. R-26968 (General Order approved August 6, 2014), slip op. at 4:

> Staff further finds that the use of two feet of space in the Commission's pole attachment rental rate formula is reasonable. Attachers have argued in favor of modifying the current Commission pole rental rate formula to reflect one foot of occupied space as opposed to two feet, stating that this change would mirror the current FCC formula rate. However, the Staff finds that the basis for the Commission's original pole rental rate still remains sound. Under most circumstances, the separation space mandated by the National Electric Safety Code for the protection of communications workers is forty inches; this space is not necessary, but for the Attachments. The Commission's formula does not require Attachers to pay for the entire safety space, but only twelve inches of the mandated forty inches. Therefore, the use of two feet of space in the Commission's formula is reasonable and ensures that Attachers pay a fair portion of the costs caused by their Attachments.

7.4%, of the electric utility's annual pole costs. No presumption exists for the amount of space occupied by electric utilities, but if an electric utility were determined to occupy four or more feet of space, then the electric utility would be paying for a share of the ILEC's annual pole costs that is four or more times higher than the share of electric utility pole costs paid by the ILEC.

This result would be disproportionate and unfair on its face, but it is also inconsistent with existing joint use agreements. Joint use agreements result from arm's length negotiations between two large utilities which are completely dependent upon the other for access to the other's poles. This mutual dependency ensures that neither party can dictate terms to the other and ensures that rates for attachment, along with all the other terms and conditions of joint use agreements, are reasonable.

As a result, the Commission should revise the Draft Rules to establish a presumption that the rates, terms and conditions of existing joint use agreements are reasonable. Such a presumption would be consistent with the FCC's conclusions about joint use agreements. In its April 2011 Pole Attachment Order, the FCC explained that existing joint use agreements are likely to be reasonable: "the Commission is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable."[20] The FCC explained that joint use agreements were entered into years ago with no expectation they would be second-guessed decades later: "Nothing in the record suggests that existing agreements between incumbent LECs and electric utilities were entered into with the expectation that their provisions would be subject to Commission review."[21]

The FCC allows an ILEC to receive the FCC's Cable-Only rate only if there is reason to believe the existing joint use agreement did not contain reasonable rates already, and only if the ILEC thereafter could show that it is "comparably situated" to a cable company. But even if some showing could be made that the existing agreement was not negotiated fairly and reasonably, ILECs which operate pursuant to joint use agreements have too many advantages over third party cable company licensees for them to be "comparably situated" to cable companies. Unlike cable companies and CLECs, ILECs have historically incurred very little make-ready expense when their attachments were installed because their attachments were made on large enough poles designed to accommodate ILEC attachments. Cable companies and

[20] April 2011 FCC Pole Attachment Order, at ¶216.
[21] April 2011 FCC Pole Attachment Order at ¶ 96, n.654.

CLECs arriving decades after the original pole installation must pay to make room for their attachments, often by paying to replace existing poles with taller poles. Unlike cable companies and CLEC's, ILECs often occupy the more desirable lowest attachment space on the pole. Unlike cable companies and CLECs, ILECs often are guaranteed more than one foot if space on the pole for their attachments. Unlike cable companies and CLECs, ILECs may not be delayed by having to wait for pole owner permission to attach under some circumstances, or burdened by the expense and further delay of post-construction inspections.

In short, the joint use relationship between ILEC and electric utility pole owners is completely different from third party licensee arrangements between ILEC/Electric pole owners and cable companies or CLECs. ILECs are not "comparably situated" to cable companies or CLECs, and thus would not qualify for the FCC Cable-Only rate even if their existing joint use agreements were not negotiated fairly.

Like the FCC, the Commission should presume that existing joint use agreements were negotiated fairly and not disturb existing rates, terms and conditions of those agreements. And in no event should ILECs be entitled to the FCC Cable-Only rate unless somehow the ILEC can determine it is "comparably situated" to a cable attacher. Whatever the case, should an ILEC seek lower rates, it should be required to file a complaint with the Commission, to allow the Commission to determine which rate may be appropriate for both parties to the joint use agreement (both ILEC and Electric), when analyzed in relation to all the other terms and conditions of that joint use arrangement.[22]

[22] This requirement to file a complaint is consistent with FCC rules and also with the approach recently taken by the Public Utilities Commission of Ohio ("PUCO"), which issued new pole attachment regulations on July 30, 2014. The new PUCO rules establish the FCC's Cable-Only rate as the default attachment rate for all entities except for ILECs and Electric joint users, who must file a complaint if they disagree about which rate should apply or about any other term or condition of joint use. *See* Public Utilities Commission of Ohio, Case No. 13-579-AU-ORD, Finding and Order (entered July 30, 2014), slip op. at 42:

> Finally, regarding the application of the default cost allocation mechanism provided for in proposed Ohio Adm.Code 4901:1¬3-04(D)(2) and (D)(3), the Commission finds that the default rate formulas may be negotiated among the parties to a joint use agreement but may not be unilaterally insisted upon due to the unique nature of joint use agreements. Instead, in the event of a dispute, the applicable rate shall be determined by the Commission in the context of a complaint case. The proposed rule has been amended accordingly.

See also Ohio Adm. Code Chapter 4901:1-3-04(D)(5).

5. The Draft Rules Should Clarify That ILECs Must Use ILEC Costs To Calculate Rates ILECs May Charge To Attach To ILEC Poles

Despite the common sense of requiring ILECs to use their own pole costs to determine the rates ILECs may charge to attach to ILEC poles, Frontier Communications has argued to the FCC that the electric utility's costs, not the ILEC's costs, should be used to determine what electric utilities pay to attach to ILEC poles.[23]

The Draft Rules likewise contain no guidance as to how to calculate such rates ILECs can charge electric utilities for attachments to ILEC poles. As the Company explains above, the rates in existing joint use agreements should be presumed reasonable and any change in those rates should be determined in a complaint proceeding in which all rates, terms and conditions of joint use can be fairly evaluated. In addition to these revisions of the Draft Rules, the Commission should clarify that any rate ILECs charge electric utilities to attach to ILEC poles should be based on ILEC costs, not electric utility costs.

6. Existing Rates Should Be Presumed Reasonable, And Rate Refunds Should Be Limited

Draft Rule 480-54-070(7) would allow the Commission to order refunds of overcharges "to the extent authorized by applicable law." The Draft Rules do not specify what "applicable law" means, and from a legal standpoint an issue exists whether such refunds violate the contract clause in Article I, Section 10 of the U.S. Constitution providing that States cannot pass laws impairing obligation of contract.

From a policy perspective, it is important to note that the rates in existing attachment agreements were negotiated as part of a package of rates, terms and conditions. Avista therefore proposes the Draft Rules be modified to provide that the rates, terms and conditions in existing agreements should be presumed reasonable. In addition, consistent with Draft Rule 480-54-070(4) regarding newly negotiated agreements, Avista proposes that Draft Rules 480-54-070(2) and (3) be modified similar to the requirement in Draft Rule 480-54-070(4), so that any

[23] *See* "Pole Attachment Complaint Reply" filed July 31, 2014 with the FCC by Commonwealth Telephone Company LLC d/b/a Frontier Communications Commonwealth Telephone Company, *et al.*, FCC File No. EB-14-MD-008, at 35-36.

complaint for a revised term or condition in an existing agreement must be brought within six months of the effective date of the rules.

In order to encourage parties to file timely complaints, and to add certainty to existing contractual relationships, Avista proposes that any refunds ordered by the Commission should date back only to the date the complaint is filed.[24]

In any event, Avista seeks clarification that no refund period will pre-date the effective date of the rules that Commission eventually adopts.

D. The Proposed Make-Ready Deadlines Should Be Modified To Protect The Safety And Integrity Of Electric Distribution Systems And To Conform With Electric Utility Operating Realities

1. Attachers Cannot Control Make-Ready Work Performed In The Electric Space

As currently written, the Draft Rules could be interpreted to allow communications attachers to supervise contractors performing make-ready design and construction work on potentially hazardous electric distribution facilities, thus ceding control over those electric facilities to communications companies.

Draft Rules 480-54-030(6)(a)(v) and (9) would allow an entity requesting attachment in the communications space to hire an authorized contractor to complete any required make-ready if the pole owner misses the deadline. The term "make-ready work," however, is defined broadly in Draft Rule 480-54-020(10) and is not limited to work in the communications space on the pole. These rules taken together could be interpreted to allow a contractor hired and supervised by a communications attacher to move electric facilities and even to install new poles to expand capacity and transfer energized electric facilities to the new pole, which poses serious safety concerns.

Other provisions of the Draft Rules indicate that this is not the intent of the Draft Rules, and it certainly should not be. Like the FCC's make-ready deadline rules, Draft Rule 480-54-040(1) would require "facility utilities" like Avista to make available a list of contractors authorized to perform surveys and make-ready work "in the communications space on its utility

[24] This limitation is consistent with FCC rules until the FCC modified them in its April 2011 Pole Attachment Order. *See* April 2011 FCC Pole Attachment Order at ¶¶110-112. The FCC's new rule allows refunds back to the "applicable statute of limitations," whatever that may be. 47 C.F.R. §1.1410(a)(3).

poles."[25] Draft Rule 480-54-040(2), like the FCC's make-ready deadline rules, would require an attacher to hire a contractor from that list of contractors authorized to perform work in the communications space.[26] The FCC's April 2011 Pole Attachment Order clarified that the FCC's contractor rule allows attachers to "hire contractors to complete the work in the communications space."[27] They do not allow communications companies to hire contractors to work in the electric space.

Draft Rule 480-54-040(1) and (2), therefore, contain the same limitation as exists in the FCC's rules to allow contractors hired by attachers to perform work only in the communications space. Unfortunately, Draft Rules 480-54-030(6)(a)(v) and (9), read in combination with the definition of "make-ready work" in Draft Rule 480-54-020(10), does not appear to contain this restriction.

The Commission therefore should clarify Draft Rules to state that contractors hired by attachers may only perform survey and make-ready work in the communications space.

This requirement is very important. Communications companies have no training or expertise in electric distribution system design and cannot responsibly manage the activities of outside contractors performing work affecting electric facilities in the electric space. Energized electric facilities must be controlled by electric utility pole owners. Performing make ready work in the electric space on poles is far more hazardous and complex than installing communications cables outside of the electric space.

Contractors in the electric space under the direction of communications companies could injure themselves, create hazards to subsequent pole workers or the public at large, cause electrical outages or reliability concerns, or damage electric service facilities on the poles. It is for these and other reasons that some electric utilities insist on performing all electrical make-ready work in-house and do not hire outside contractors under any circumstances.

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[25] Compare 47 C.F.R. §1.1422(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.").

[26] Compare 47 C.F.R. §1.1422(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.").

[27] April 2011 FCC Pole Attachment Order at ¶49 ("We adopt the proposal in the *Further* Notice and hole that, if a utility does not meet the deadline to complete a survey or make-ready established in the timeline, an attacher may hire contractors to complete the work in the communications space.")

It is therefore inappropriate and potentially dangerous to allow a communications attacher, even through qualified contactors, to perform field surveys to make determinations about the capacity and integrity of an electric utility facility to support its communications attachments, or to rearrange, relocate or transfer potentially hazardous electric distribution facilities.

The Commission therefore should revise its Draft Rules to clarify that contractors hired by attachers may only perform survey and make-ready work in the communications space. In addition, since the Draft Rules also define electric utilities as attachers on ILEC poles, the Draft Rules should be further clarified to allow electric utilities to perform, or hire contractors to perform, surveys and make-ready work in the electric space on ILEC poles.

2. The Draft Rule Requiring Notifications To Existing Attachers Should Be Revised To Allow New Attachers To Waive That Requirement

Draft Rule 480-54-030(6) would require facility utilities like Avista to notify existing attachers of upcoming make-ready work and the deadlines for completing that work. Avista, however, has created successful procedures allowing for a new attacher to work directly with other entities on the pole with existing attachments. These procedures allow new attachers to provide the existing attaching entities an Avista-approved "Signoff" form, which has worked well to notify existing attachers of work to be performed and to receive their approval of the work. In many cases, charges are waived by existing attachers in exchange for allowing the new attacher to do the make-ready work for the existing entities. This process has encouraged fewer trips to the pole and resulted in faster performance of make-ready work than what the Commission's proposed timelines would require, at least with respect to the usual size attachment requests that Avista has received.

Avista therefore proposes that the Draft Rules be revised to allow the new attacher to waive any requirement that the pole owner provide the necessary notices to existing attachers. The notice requirement exists for the benefit of the new attacher, so if a better system exists for the new attacher, as it does with Avista's facilities, then the new attacher should be able to use it. If needed, a procedure could be added allowing the new attacher to notify the facility utility if existing attachers are not complying. The timelines could start for the facility utility when such notice is provided.

3. Allowing Attachers To Hire Authorized Contractors To Complete Surveys is Problematic

If the deadline for completing a survey is missed, Draft Rules 480-54-030(9) and 480-54-040 would allow an attacher to complete the survey with a contractor authorized by the facility utility. This requirement is problematic in that Avista is not aware of any local qualified design engineer contractors who could perform this duty from an electric utility perspective. Because Avista's service territory is located in a somewhat isolated market for electric design engineers, qualified design engineering personnel may need to travel to eastern Washington at considerable extra expense.

As explained below, the proposed make-ready deadlines applicable to requests totaling no more than 300 poles per month are manageable from a design engineering perspective. If the deadlines for surveys for larger orders were negotiated, Avista would elect to manage the design engineering in-house, and the absence of established qualified design engineering contractors in eastern Washington State would not be an issue.

4. The Deadlines For Applications Totaling 300-3000 Poles Should Be Negotiated

The make-ready deadlines in Draft Rule 480-54-030(7) are confusing because the cross-references in that subsection appear to be in error. Assuming they will be corrected, it appears the Draft Rules provide more time to complete surveys and make-ready work for larger orders in any 30-day period totaling between 300-3,000 poles. For these larger orders, it appears that 60 days would be provided for surveys and 105 days for make-ready work.

These proposed timelines are too short. A project of 3,000 poles is ten times larger than a project of 300 poles, yet a 3,000-pole project would be subject to the same deadline as a 300-pole project. In a given month, Avista typically reviews requests to attach to about 300 poles, and the make-ready deadlines for that number are manageable. Requiring the same deadlines for larger requests is problematic.

Draft Rule 480-54-030(7)(c) (the second of the two subsection (c)'s in the Draft Rules) would allow a utility to negotiate in good faith the timing for surveys and make-ready work when requests to attach to more than 3000 poles have been received. Avista proposes that the

Draft Rules be modified to lower this threshold for requiring negotiation for make-ready deadlines from 3,000 poles to 300 poles.

Other states have much more lenient make-ready deadlines than what the Draft Rules propose. In Oregon, for example, if make-ready work requires more than 45 days to complete or if there are more than 50 poles in an application, the parties must negotiate a mutually acceptable longer period to complete the work.[28]

In Utah, pole owners must provide make-ready estimates for applications of 20 poles or less within 45 days, and must complete make-ready work within 120 days after the initial payment of the make-ready estimate. For applications greater than 20 poles but less than 300 (or .5% of the owner's poles in Utah, whichever is lower), the make-ready estimate is due within 60 days and construction must be completed 120 days after payment. For applications greater than 300 (or .5%) but less than 3,000 (or 5%, whichever is lower), the make-ready estimate is due in 90 days and the time for construction is extended to 180 days after payment. For applications greater than that, the timeframes are negotiated. All applications within a single month are counted as a single application, and the pole owner has the flexibility of justifying longer timelines based on anticipated delays.[29]

Vermont provides for a sliding scale that begins with at least 180 days to complete the make-ready estimate and perform make-ready work, "unless otherwise agreed by the various parties, and except for extraordinary circumstances and reasons beyond the Pole-Owner's control."[30]

The New Hampshire PUC adopted pole attachment regulations that require most make-ready work to be completed by pole owners within 150 days following pre-payment of make-ready estimates, while the estimates themselves (for 200 poles or less) must be provided within 45 days after application.[31]

These states have taken more reasonable approaches to make-ready deadlines than did the FCC. They avoided "one size fits all" requirements by implementing varying deadlines based upon the different needs of the pole owners and attachers. The Draft Rules should therefore be

[28] Oregon Administrative Rules §§ 860-028-0020(32), 860-028-0100(5), (7).
[29] Utah Administrative Code, § R746-345-3.C.
[30] Vermont Public Service Board, Rules 3.708 (B)(2), (C) and (E).
[31] New Hampshire Code of Administrative Rules, Parts Puc 1303.12 and 1303.04.

revised to lower the threshold for requiring negotiation for make-ready deadlines from 3,000 poles to 300 poles.

5. The Make-Ready Deadlines Should Not Apply To Facility Utilities With No History Of Failing To Meet The Deadlines

Avista already has an excellent record in responding to requests for attachment. For Avista and perhaps other facility utilities, the proposed make-ready deadlines in the Draft Rules are addressing a problem that does not exist.

To address situations where the existing process is working fine, Avista proposes that the Rules be modified so that attachers must demonstrate that a particular utility has not been able to meet the deadlines before the deadlines can apply to new attachment requests.

E. The Draft Rules Should Be Modified In Other Ways

1. The Proposed Regulation of Energized Ducts and Conduits Should Be Eliminated

Draft Rule 480-54-060(3) would establish a regulated rate to cover attachments to underground utility ducts and conduits. The Draft Rules would also apply make-ready deadlines to conduit attachment requests. Avista believes imposition of these new rules to electric utility-owned conduit is inappropriate and unwarranted, and that the new rate and make-ready requirements for electric utility conduits and ducts would upend decades of successful, mutually-beneficial sharing of Avista's energized conduit space under the City of Spokane. Avista's downtown core Spokane Network was built around 80 years ago with no expectation that Avista would be required to allow other entities to install their facilities at regulated rates. Because of the age and complex nature of the downtown network's duct banks, Avista does not have a viable way to determine the total system duct length, and thus the proposed regulated rate formula would simply not work. If a regulated rate were required, some other methodology would need to be developed to determine that rate.

The Spokane Network is a unique and valuable system that Avista has already shared successfully with many companies in order to expand and enhance their fiber networks at critical hub points. Avista has a contractual flat rate for duct use within this downtown area and has not increased that rate in over 15 years. Avista proposes that the Draft Rules be revised to eliminate

any regulation of conduit rates. In the alternative, if rate regulation were required, Avista proposes that rates in existing agreements be preserved as long as they do not increase by more than the Consumer Price Index every year.

As for applying make-ready deadlines to conduits, even the FCC decided not to establish such requirements, for the very good reasons that conduit access raises different issues and the record did not support any large scale inability to access conduits in a timely manner .[32]

Underground electric facilities are energized; underground ILEC facilities are not. Any determination on access to electric system's underground networks (i.e., conduit, manholes, handholes) must be reviewed separate and distinct from the ILEC's underground network.

The inherent dangers of energized underground electric facilities render make-ready deadlines impossible. The potential hazards present in the confined space of the electric manhole are much different than in a telephone manhole. Access to electric manholes is permitted only by OSHA-qualified electric workers. Few, if any, telephone (communications) workers are OSHA-qualified to access an electric manhole. This is because far greater precautions need to be taken when accessing confined spaces like manholes and conduit that are used to conduct electricity. More extensive training is required of anyone entering a manhole containing energized electric facilities, and electric utilities must ensure that whoever enters the manhole is properly trained. Someone lacking proper training to perform manhole surveys could be injured severely or killed.

Because of the liability and safety concerns, utilities must have qualified electrical underground employees present whenever anyone enters enclosed energized facilities like manholes. Without utility supervision, contractors would have no knowledge of other utility operations, planning activity or the status of electrical circuits, which can change at any time. Inspectors also are needed to make determinations on the spot if conditions prohibit the work from being performed as designed (for example, if a duct is obstructed in a particular section and a different one must be assigned). The presence of third parties in manholes also compromises

[32] *See* April 2011 FCC Pole Attachment Order at ¶45:

> *Ducts, Conduits, and Rights-of-Way*. We decline to adopt a timeline for access to section 224 ducts, conduits, and rights-of-way at this time. Access to ducts and conduits raises different issues than access to poles, and the record does not demonstrate that attachers are, on a large scale, currently unable to timely or reasonably access ducts, conduits, and rights-of-way controlled by utilities. (footnotes omitted)

the integrity of the system because it provides more opportunity for damage to occur. For these reasons, supervision by electric utilities of manhole access not only makes common sense, it is required by OSHA regulations.

The NESC does not allow communications and electric facilities to share the same duct, but they are allowed to share the same duct bank. Electric utility duct banks usually have enough ducts to carry electric facilities and additional spare ducts must be set aside. In the event of damage to existing electric cable or other service interruption, a spare duct allows the utility to restore service quickly by installing new electric cable in the spare duct while it repairs the damaged facilities. Spare duct also may be needed to address future electric service needs of other customers, particularly in the downtown core.

If a communications company were occupying the spare duct, restoring service following damage to an existing electric cable would be more time consuming and expensive. The utility would need to pull out its own damaged electric cables and then install new electric cables while dealing with the existing communications cables. This would increase the expense of correcting the electricity outage and significantly lengthen the duration of the outage. Having communications cables sharing the same conduit also increases the liability of electric utilities if the electric utility were to burn out its own electric facilities, as occasionally happens, which could damage the communications facilities as well.

In summary, it is better to leave the management of existing energized conduit and duct capacity owned by electric utilities like Avista to continue to be managed by electric utilities, without the constraints and potential liabilities associated with make-ready deadlines, regulated rates and other ill-fitting regulatory requirements. Avista's management of conduit access has worked safely, effectively and economically for a long time. The regulation of utility ducts and conduits (at least the energized ducts and conduits owned by electric utilities), therefore, should be removed from the Draft Rules.

2. The Commission Should Add Penalty Provisions To The Draft Rules

Avista believes that allowing facility utilities to apply sanctions against communication attachers for having no contract or permit, for violating existing contracts, or for not resolving code violations in a timely manner, has the potential to reduce dramatically the number of unauthorized attachments, safety violations, and other contract violations by attachers.

Today, competitive dynamics in the communications world challenge the safe and reliable distribution of electricity over poles. Cable companies, CLECs and ILECs all compete for telephone, Internet and video customers. All are providing broadband services.

In today's competitive environment, speed to market and cost cutting are the forces driving the rollout of new communication services. Electric system safety, reliability and efficiency, on the other hand, may be in conflict with this environment.

Construction crews hired by cable companies and telephone companies often are paid to string cables over utility poles in a manner that rewards speed but not necessarily safety. Distance covered is the prime objective.

Communications attachers often appear to be inadequately trained with respect to National Electrical Safety Code compliance. Unlike electric companies, many cable companies, CLECs and emerging telecommunication service providers may not have established safety programs or qualified engineering and safety departments. It is more common than not for communication companies to hire turn-key contractors and not have any quality controls in place related to inspection of pole attachments.

Sanctions are necessary to allow facility utilities to enforce safety codes, design and engineering standards, and other provisions in pole attachment agreements. Without effective enforcement mechanisms, attachers find it too easy to avoid some of the more inconvenient, time-consuming and costly steps necessary to maintain a safe and reliable pole distribution system. Unauthorized attachments, safety violations, failure to timely transfer facilities, and other problems can be avoided and the entire process made more efficient if attaching entities understand the importance of compliance.

Easy access to electric distribution systems should not come at the expense of safety and reliability. The Commission's regulations should promote responsible behavior on the part of those who are granted mandatory access.

Oregon's sanctions provisions have been highly effective in nearly eliminating the large numbers of unauthorized attachments in that State. Portland General Electric, for example, reported an extraordinary drop in the rate of unauthorized attachments from 30% to 1% following its imposition of unauthorized attachment penalties.[33]

[33] *See* Portland General Electric PowerPoint attached hereto as Exhibit D.

Avista therefore proposes that the Draft Rules be modified to allow facility utilities to impose the following sanctions, which are consistent with those in effect in Oregon:[34] (1) for unauthorized attachments, $100 per attachment plus five years back rental; (2) for violations of the National Electrical Safety Code, $200 per violation; (3) for violations of existing contracts, $200 per violation; and (4) for attachments made without a contract, $500 per attachment. Avista proposes not to require the same level of auditing and Commission oversight as is required in Oregon, because existing utility inspection programs should suffice. Instead, Avista proposes that, prior to imposing any sanctions, the facility utility provide the attacher with evidence sufficient to prove non-compliance.

3. Overlashing Of Existing Attachments Should Be Subject To The Usual Attachment Application Process

Overlashing is the practice whereby a service provider physically ties or otherwise attaches new wiring to wiring that already has been affixed to distribution poles. Overlashing creates additional wind and ice load on the poles and must be evaluated by pole owners prior to attachment. In addition to adding further load on the pole, overlashing creates additional sag mid-span, particularly during storms and extreme temperature conditions. The National Electrical Safety Code contains midspan sag clearance requirements that must be evaluated using worst case conditions. Of additional concern, communications companies often do not correct existing code violations prior to overlashing, and dead, no longer used cables are typically left in place when they are overlashed.

FCC rules recognize the potential burdens associated with overlashing and require attachers to pay for any make-ready costs associated with overloaded poles or excessive mid-span sagging.[35] As explained above, overlashing impacts the loading on the pole as much as existing attachments, has a considerable effect on mid-span clearances, raises safety issues, and reduces the limited space on poles. In order to manage safely manage the limited space on poles

[34] Or. Admin. R. §§ 860-028-0130, 0140(2), and 0150(1)-(2) (2008).

[35] *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103 (2001) ("For example, if the addition of overlashed wires to an existing attachment causes an excessive weight to be added to the pole requiring additional support or causes the cable sag to increase to a point below safety standards, then the attacher must pay the make-ready charges to increase the height or strength of the pole.")

for the benefit of all, it is crucial that main line cable overlashing require a Route Application and design prior to construction in the same manner as new construction. The Commission should therefore revise its Draft Rules to require advance approval of overlashing, as the Louisiana PSC recently did.[36]

4. Draft Rule 480-54-050(4) Should Be Revised To Eliminate The 60-Day Notice Requirement If The Pole Removal Is Required By A Landowner Or Government Entity

As currently written, Draft Rule 480-54-050(4) would require pole owners to provide 60 days' notice to attachers prior to removing any pole or other utility facility, or terminating service to any utility facility, no matter what the reason for the removal or termination. Flexibility is needed for this Draft Rule, since in many cases the decision to remove a pole or facilities or to terminate service is not in the pole owner's control, but rather is mandated by the landowner or government entity on whose property the pole is located. Even though the initial inquiries may be made well in advance, Avista itself is given less than 60-days' notice in many cases. Developers and local governments, for example, make decisions at the last minute which require pole modification or removal within a very short time.

FCC rules have a similar 60-day notice requirement, but it does not apply to removals or terminations of service required by a landowner or government entity. The FCC rule provides in relevant part that 60 days' notice is required for "[r]emoval of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the cable television system operator's of telecommunications carrier's pole attachment

[36] *See* Louisiana Public Service Commission, Docket No. R-26968 (General Order approved August 6, 2014), slip op. at 13, pole attachment rule 7 (Overlashing). Consistent with the importance of this practice, the Louisiana rules devote an entire section to overlashing, with provisions covering application, pre-construction inspections, denials of overlashing requests, cost reimbursement, and rental charges. Subsection (a) explains the application process as follows:

> a. Any Attacher wishing to overlash facilities must provide a Pole Owner with reasonable notice of its intent to overlash facilities by filing a written request with the Pole Owner identifying what existing and proposed facilities are to be attached and/or overlashed, all entities served by the overlash, all design information to perform pole loading analysis, where such facilities will be attached and/or overlashed, and when such facilities will be attached and/or overlashed. In the event of an emergency where a line must be replaced or repaired to restore service to customers and advanced notice is not feasible, the Attacher shall provide notice of overlashing as soon as reasonably practical.

agreement."[37] Demands by government entities and private landowners do not "arise out of" the agreement, but instead are third party demands.

Consistent with the FCC rule, Avista therefore proposes that this 60-day notice requirement be modified to eliminate the 60-days' notice requirement if a landowner or government entity make such notice impossible.

III. CONCLUSION

Protecting the public and all line workers (power and communications alike) is Avista's primary goal and responsibility. Utilities need to maintain control over the safety, engineering and reliability of their facilities, and we believe the Commission's pole attachment regulations should promote that objective.

Avista appreciates the opportunity to provide these comments, and we look forward to participating in the stakeholder workshop scheduled for October 28, 2014. If you have any questions regarding these comments, please contact me at 509-495-4975 or at linda.gervais@avistacorp.com.

Sincerely,

/s/Linda Gervais/

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[37] 47 CFR § 1.1403(c)(1) (emphasis added).