BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

FRONTIER COMMUNICATIONS NORTHWEST INC., Complainant, v. PUGET SOUND ENERGY, INC., Respondent.	DOCKET UE 151344 DECLARATION OF KAREN B. BLOOM IN SUPPORT OF PUGET SOUND ENERGY'S RESPONSE TO FRONTIER COMMUNICATIONS NORTHWEST INC.'S MOTION FOR SUMMARY DETERMINATION AND CROSS MOTION FOR SUMMARY DETERMINATION

Pursuant to 28 U.S.C. § 1746(2), KAREN B. BLOOM declares as follows:

1. I am one of the attorneys for Respondent Puget Sound Energy, Inc. ("PSE"), have personal knowledge of the facts set forth herein, and am competent to testify thereto.

2. Attached hereto as Exhibit A is a true and correct copy of Order Denying Frontier Communications Northwest Inc.'s ("Frontier") Motion to Dismiss or, Alternatively, Stay dated September 11, 2015, in *Puget Sound Energy, Inc. v. Frontier Communications Northwest, Inc.*, Superior Court of the State of Washington for King County, Cause No. 15-2-03142-2 SEA ("King County Superior Court Case").

3. Attached hereto as Exhibit B is a true and correct copy of Frontier's Motion to Dismiss or, Alternatively Stay in the King County Superior Court Case.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

4. Attached hereto as Exhibit C is a true and correct copy of Order Granting Puget Sound Energy, Inc.'s Motion to Compel Discovery dated September 1, 2015, in the King County Superior Court Case.

5. At the time that Frontier and PSE negotiated the Agreement in 2002, Frontier owned approximately 130,000 distribution poles in its relevant territory. Attached hereto as Exhibit D is a true and correct copy of Frontier's 2002 "Computation of Annual Rate for Poles Owned by Verizon Northwest Inc. in the State of Washington for the Contract Year 2002," reflecting Frontier's calculation of its ownership of 130,838 distribution poles (*see* A(9)).

6. Frontier submitted its rate calculation to PSE in August 2002 reflecting distribution poles counted by Frontier as whole poles. *See* Exhibit D.

7. Frontier continued to send PSE an annual bill for ten more years (2003 to 2012), each time counting these same fractionally-owned distribution poles as whole poles for purposes of coming up with its own rate. PSE promptly paid Frontier's bill each year and provided its own bill to Frontier, which Frontier promptly paid until 2013.

8. Attached hereto as Exhibit E is a true and correct copy of Frontier's September 23, 2004, letter informing PSE it had decided to change its pole count method and start counting its jointly-owned poles to account for Frontier's fractional ownership, or as "equivalent poles."

9. Attached hereto as Exhibit F is a true and correct copy of a July 19, 2005, letter from Frontier agreeing not to change its distribution pole count method and to continue to use "whole poles."

10. In April 2013, Frontier notified PSE that it had determined that Frontier had "underbilled" PSE for ten years by applying the whole pole method to the rate formula. PSE

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

disagreed and issued its 2013 annual bill to Frontier in October 2013, with full payment due in November 2013.

11. Attached hereto as Exhibit G is a true and correct copy of PSE's Complaint for Breach of Contract and Declaration in the King County Superior Court Case dated February 6, 2015.

12. Frontier never attempted to invoke the regulatory authority of the WUTC when PSE proposed mediation and instead fully participated in the parties' joint mediation efforts.

13. Attached hereto as Exhibit H is a true and correct copy of Frontier's Answer, Affirmative Defenses and Counterclaim in the King County Superior Court Case dated March 6, 2015.

14. Frontier has actively engaged in the King County Superior Court Case, including responding to and serving discovery requests, producing a large volume of documents, and engaging in numerous discovery meet and confer conferences to resolve discovery disputes.

15. Attached hereto as Exhibit I is a true and correct copy of Frontier's Reply in Support of Motion to Dismiss or, Alternatively Stay in the King County Superior Court Case.

16. Attached hereto as Exhibit J is a true and correct copy of the WUTC's CR-102 Proposed Rules, Chapter 480-54 WAC "Attachment to Transmission Facilities" (July 24, 2015).

I CERTIFY UNDER PENALTY OF PERJURY under the laws of the United States of America that the foregoing is true and correct.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

DATED at Seattle, Washington, this 18th day of September, 2015 by KAREN B. BLOOM.

Karen B. Bloom, WSBA #41109

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Docket UE-151344

CERTIFICATE OF SERVICE

CAROL KNESS states as follows:

1. I am a litigation secretary at Perkins Coie LLP, one of the attorneys of record for Puget Sound Energy, Inc., have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. On the 18th day of September, 2015, I made arrangements for the original of the foregoing Declaration of Karen Brunton Bloom in Support of Puget Sound Energy, Inc.'s Response to Frontier Communications Northwest, Inc.'s Motion for Summary Determination to be electronically filed with the WUTC by email delivering a true and correct copy to records@utc.wa.gov.

3. On the same day, I made arrangements for the original of the foregoing to be forwarded via overnight mail to:

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

4. On the same day, I made arrangements for a true and correct copy of the same document to be delivered via email and U.S. Mails as follows:

For Frontier Communications Northwest, Inc.

George Thomson
Associate General Counsel
Frontier Communications Northwest Inc.
1800 – 41st Street
Everett, WA 98203
George.thomson@ftr.com

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Román D. Hernández, WSBA #39939
Stephanie E. L. McCleery, WSBA #45089
Philip S. Van Der Weele, OSB #863650
K & L GATES LLP
One SW Columbia St., Suite 1900
Portland, OR 97258
(503) 228-3200
roman.hernandez@klgates.com
Stephanie.mccleery@klgates.com
phil.vanderweele@klgates.com

For Commission Staff

Jennifer Cameron-Rulkowski, Asst. Attorney General
Krista Gross
Betsy DeMarco
Office of the Attorney General
Utilities and Transportation Division
1400 S. Evergreen Park Drive S.W.
P.O. Box 40128
Olympia, WA 98504-0128
(360) 664-1186
jcamero@utc.wa.gov
kgross@utc.wa.gov
bdemarco@utc.wa.gov

For Puget Sound Energy, Inc.

Kenneth Johnson, Director
State Regulatory Affairs
P.O. Box 97034
Bellevue, WA 98009-9734
Ken.s.johnson@pse.com

I CERTIFY UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 18th day of September, 2015, by CAROL KNESS.

Carol Kness

Carol Kness

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Exhibit A

THE HONORABLE CAROL SCHAPIRA

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

PUGET SOUND ENERGY, INC., a Washington corporation,

Plaintiff,

v.

FRONTIER COMMUNICATIONS NORTHWEST, INC., a Washington corporation,

Defendant.

No. 15-2-03142-2 SEA

~~[PROPOSED]~~ ORDER DENYING FRONTIER COMMUNICATIONS NORTHWEST INC.'S MOTION TO DISMISS OR, ALTERNATIVELY, STAY

THIS MATTER came before the Court on Frontier Communications Northwest Inc.'s Motion to Dismiss or, Alternatively, Stay. The Court having considered Frontier's motion and all papers filed in support of and in opposition to the motion, and being fully advised in the premises, NOW, THEREFORE,

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

IT IS HEREBY ORDERED Plaintiff Frontier Communications Northwest Inc.'s Motion to Dismiss or, Alternatively, Stay is DENIED.

DATED: 9/11, 2015.

Honorable Carol Schapira
Superior Court Judge

Presented by:

By: *s/ James F. Williams*, WSBA #23613
James F. Williams
Karen Brunton Bloom, WSBA #41109
JWilliams@perkinscoie.com
KBloom@perkinscoie.com
ATTORNEYS FOR PLAINTIFF

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Exhibit B

Honorable Carol A. Schapira
Hearing Date/Time:
September 11, 2015 at 9:00 a.m.
Oral Argument Requested

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

PUGET SOUND ENERGY, INC., Plaintiff, v. FRONTIER COMMUNICATIONS NORTHWEST, INC., Defendant.	No. 15-2-03142-2 SEA DEFENDANT FRONTIER COMMUNICATIONS NORTHWEST INC.'S MOTION TO DISMISS OR, ALTERNATIVELY, STAY **ORAL ARGUMENT REQUESTED**

I. Introduction and Relief Requested

This dispute regarding utility pole attachment rates belongs before the Washington Utilities and Transportation Commission ("WUTC"). Plaintiff Puget Sound Energy, Inc. ("PSE"), a utility company, alleges that Frontier Communications Northwest Inc. ("Frontier"), a telephone operating company, owes fees pursuant to a Pole Attachment Agreement between the parties. That Agreement allows both parties to attach equipment to each others' utility poles, for a fee. The parties dispute how that fee should be calculated. This dispute falls squarely within the authority of the WUTC, which is charged with "regulat[ing] in the public interest the rates, terms, and conditions for [utility pole] attachments." RCW 80.54.020. Indeed, the parties explicitly recognized the WUTC's jurisdiction over their Agreement. Respectfully, the WUTC has primary jurisdiction over this

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

dispute, and the Court should thus dismiss or stay this lawsuit.

The primary jurisdiction doctrine recognizes that administrative agencies with specialized expertise and responsibility over complex regulatory schemes may be better suited than courts to resolve certain disputes. Thus, courts defer decision-making to agencies when (i) the administrative agency has authority to resolve the issues before the court, (ii) the agency has special competence over all or some of the controversy, and (iii) danger exists that judicial action would conflict with the agency's regulatory scheme. *D.J. Hopkins, Inc. v. GTE Nw., Inc.*, 89 Wash. App. 1, 8, 947 P.2d 1220 (1997). Those three factors are easily satisfied here.

First, the WUTC has statutory authority to resolve the parties' dispute over pole attachment fees. Under its general powers and duties, the WUTC "shall . . . [r]egulate . . . the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation." RCW 80.01.040(3) (emphasis supplied). The WUTC expressly regulates both PSE, a utility company, and Frontier, a telephone operating company. Furthermore, the WUTC is legislatively mandated to regulate "the rates, terms, and conditions for [pole] attachments by licensees or utilities." RCW 80.54.020. This dispute is thus directly within the WUTC's mandate because it involves a disagreement over the rates, terms, and conditions of the parties' Pole Attachment Agreement.

Second, the WUTC has special competence to resolve disputes related to the fairness of pole attachment fees. The Washington legislature has recognized the WUTC's expertise by tasking the agency with determining the reasonableness of pole attachment "rates, terms, and conditions." RCW 80.54.030. The WUTC Commissioners themselves bring years of prior industry experience to bear in resolving rate disputes. The WUTC's experience is crucial to properly balance, as required by statute, both the parties' interests and "the interest of customers" when setting reasonable attachment rates. *Id.* Indeed, determining "[w]hat is

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

fair to the company, and at the same time fair to the people and businesses it serves, is what the commission must decide many times over."[1] In addition, the WUTC is currently in a rule-making cycle regarding the specific issues in this case. *See* WUTC Pole Attachment Rulemaking, Docket U-140621.[2] Given the WUTC's experience and familiarity with its own regulatory scheme, "the agency's expertise should be applied to determine whether the fees are 'reasonable' and 'just.'" *See Barahona v. T-Mobile US, Inc.*, 628 F. Supp. 2d 1268, 1271 (W.D. Wash. 2009) (deferring to the FCC's expertise).

Third, declining jurisdiction over this matter will avoid the possibility of the Court's judgment in this lawsuit conflicting with the WUTC's enforcement of its regulatory scheme. Litigating this dispute as an ordinary breach of contract claim, as PSE intends, would ignore the legislative criteria that the WUTC must follow in determining a "just and reasonable rate" for pole attachments. RCW 80.54.040. Furthermore, as noted *supra*, the WUTC is in the process of adopting additional pole attachment rules directly addressing the core issue in this dispute: the fairness of a party being treated as owning an entire utility pole for purposes of rate calculations when, in fact, it only owns a portion of the utility pole, thereby artificially lowering the net cost per pole in rate calculations. *See* Third Draft Rules Governing Access to Utility Poles, Ducts, and Conduits, Docket U-140621 (March 24, 2015).[3] After accepting rounds of comments from a variety of interested parties (including comments from both PSE and Frontier), and drafting multiple revisions, the current draft of proposed rules clarifies that "poles" in attachment agreements should be calculated based on proportional ownership. *See id.* at § 480-54-020(11). Regardless of how the WUTC ultimately settles this issue, however, there is a real risk that the Court's judgment here could conflict with the WUTC's final rules

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[1] Declaration of Stephanie E. L. McCleery in Support of Defendant's Motion to Dismiss or, Alternatively, Stay the Lawsuit ("McCleery Decl."), ¶ 4, Ex. B (*About the Commission*).

[2] McCleery Decl. ¶ 5, Ex. C.

[3] McCleery Decl. ¶ 8, Ex. F.

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

or with the WUTC's decision in the Formal Complaint currently pending between the parties on the same issues. McCleery Decl. ¶ 3, Ex. A.

Finally, the parties explicitly recognized the jurisdiction of the WUTC over their Pole Attachment Agreement. Compl. Ex. A, § 6.1.2.

For these reasons, and the reasons explained below, Frontier respectfully requests that the Court dismiss or stay this action to allow the WUTC to resolve this dispute within its regulatory framework.

II. Statement of Facts

A. The Parties and the Pole Attachment Agreement

PSE is a Washington electric utility company that provides retail electric service. Compl. ¶ 2. It owns utility poles throughout its service territory that it uses to distribute electricity to customers. *Id.*

Frontier is a Washington telecommunications company that provides telephone and other communications services to customers throughout Washington. *Id.* ¶ 3. It also owns utility poles throughout its service territory. *Id.* Frontier wholly owns some of its poles, but jointly owns roughly 70,000 poles with a local utility company (in this instance, the Snohomish County Public Utility District No. 1). Defendant Frontier's Answer, Affirmative Defenses, and Counterclaims to Plaintiff's Complaint ("Counterclaims") ¶ 10.

In August of 2002, PSE and Verizon Northwest, Inc. ("Verizon")[4] entered into a Pole Attachment Agreement that allowed each party to attach equipment to the other party's utility poles. Compl. ¶ 5. In exchange, the parties charge each other a rental rate. *Id.* ¶ 6. The rental rate is calculated, in part, based on the number of "distribution poles" a party owns. *Id.* ¶ 8.

[4] On July 1, 2010, Frontier Communications Corporation purchased all outstanding shares of Verizon Northwest, Inc. and then changed the name to Frontier Communications Northwest Inc.

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

B. The Parties' Rate Dispute

In April 2013, Frontier discovered that the parties had been miscalculating the number of distribution poles that Frontier owns, leading to over a half-million dollar windfall for PSE. *Id.* ¶¶ 9, 17. Frontier fractionally owns over 70,000 poles jointly with Snohomish County Public Utility District No. 1. Counterclaims ¶ 10. For those 70,000 poles, Frontier owns only 45 percent of each pole. *Id.* Yet Verizon, Frontier, and PSE had mistakenly treated those poles under the Pole Attachment Agreement as being fully owned by Frontier. *Id.* This error resulted in PSE paying a significantly lower pole attachment rental rate than it should have – to the tune of $624,472. *Id.* ¶¶ 10–11. Frontier notified PSE of this under-billing. *Id.* ¶ 12. After several discussions with PSE about this billing issue, Frontier offset approximately half of the total amount PSE had been under-charged from subsequent payments to PSE. *Id.*

C. This Lawsuit

PSE filed this lawsuit on February 8, 2015, asserting two claims for breach of contract, one claim for anticipatory breach, and one claim for declaratory judgment. It disagrees with Frontier's interpretation of the term "distribution poles." Compl. ¶ 12. It contends that the 70,000 utility poles that Frontier fractionally owns should be treated as if they are wholly owned by Frontier. *See id.*

While the parties engaged in mediation and discussed possible resolution of this matter, Frontier reserved its rights by filing its Answer, Affirmative Defenses, and Counterclaims on March 6, 2015. After denying liability, Frontier asserted its own claims for declaratory judgment and attorneys' fees. At its core, the Counterclaims seek a court decree that the term "distribution poles" in the Pole Attachment Agreement should be interpreted to account for a party's fractional ownership of utility poles. Counterclaims ¶ 3.

On June 29, 2015, Frontier filed a formal Complaint against PSE regarding the dispute between the parties at issue in this suit. McCleery Decl. ¶ 3, Ex. A, "Frontier's Formal Complaint Against Puget Sound Energy," June 29, 2015.

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

The parties' settlement efforts have been unsuccessful, and Frontier now seeks to dismiss or stay this action so that the parties' rate dispute can properly proceed before the WUTC.

III. Issue Presented

Under the doctrine of primary jurisdiction, the Court should dismiss or stay the action if an administrative agency has the authority and expertise to resolve the dispute, and if there is a risk of inconsistent decisions. Here, the WUTC has express authority and expertise in "regulat[ing] . . . the rates, terms, and conditions for [utility pole] attachments," RCW 80.54.020, and the Court's decision on the merits could conflict with current WUTC rulemaking and future WUTC decisions. Should this Court defer to the WUTC and dismiss or, alternatively, stay this action on the basis of primary jurisdiction?

IV. Evidence Relied Upon

Frontier relies upon the Complaint, the Counterclaims, the Declaration of Stephanie E. L. McCleery in support of this Motion, and the exhibits thereto.

V. Argument

The doctrine of "primary jurisdiction" is "predicated on an attitude of judicial self-restraint and is applied when the court feels that the dispute should be handled by an administrative agency created by the legislature to deal with such problems." *Kerr v. Dep't of Game*, 14 Wash. App. 427, 429, 542 P.2d 467 (1975) (citation and internal quotations omitted). Courts "usually defer to agency jurisdiction if enforcement of a private claim involves a factual question requiring expertise that the courts do not have or involves an area where a uniform determination is desirable." *D.J. Hopkins, Inc. v. GTE Nw., Inc.*, 89 Wash. App. 1, 7, 947 P.2d 1220 (1997) (citation and internal quotations omitted).

Three factors govern the application of the primary-jurisdiction doctrine: (i) "[t]he administrative agency has the authority to resolve the issues that would be referred to it by the court," (ii) "[t]he agency must have special competence over all or some part of the

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

controversy which renders the agency better able than the court to resolve the issues," and (iii) "[t]he claim before the court must involve issues that fall within the scope of a pervasive regulatory scheme so that a danger exists that judicial action would conflict with the regulatory scheme." *Id.* at 8. Each of those factors is present here, favoring dismissal or a stay.

A. The WUTC has authority to resolve the parties' pole attachment rate dispute

The WUTC is unquestionably authorized to resolve utility rate disputes involving pole attachments. The WUTC's regulatory framework is codified in Title 80 of the Revised Code. Within that framework, the Washington legislature gave the WUTC general authority to regulate "the rates, services, facilities, and practices of all persons engaging within [Washington] in the business of supplying any utility service or commodity to the public for compensation." RCW 80.01.040(3). PSE is an "electric utility" that "transmit[s] and distribut[es] electricity to customers," and Frontier "provides telephone and other services to customers in Washington." Compl. ¶¶ 2–3. Both entities thus supply utility services or commodities to the public for compensation, and the WUTC expressly regulates both. McCleery Decl. ¶¶ 6, 7, Exs. D, E (listing PSE and Frontier as WUTC-regulated entities). Accordingly, the WUTC has authority to regulate "the rates, services, facilities, and practices" of both entities. RCW 80.01.040(3).

Aside from the general regulatory scheme through which the WUTC regulates utility rates, the legislature dedicated an entire chapter of the Revised Code to giving the WUTC specific authority over pole attachment issues. RCW 80.54 ("Attachments to Transmission Facilities"). Under this Chapter, the WUTC has "the authority to regulate . . . the rates, terms, and conditions for attachments by licensees or utilities." RCW 80.54.020. The WUTC is empowered to hold hearings to determine whether "the rates, terms, or conditions demanded, exacted, charged, or collected by any utility in connection with attachments are unjust, unreasonable, or that the rates or charges are insufficient to yield a reasonable compensation

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

for the attachment." RCW 80.54.030. If it makes such a finding, the WUTC then issues an order determining "the just, reasonable, or sufficient rates, terms, and conditions." *Id.*

In an analogous case, a federal judge granted the defendant's motion to stay a similar contract dispute arising from pole attachments, in deference to Oregon's equivalent of the WUTC. *Verizon Nw., Inc. v. Portland Gen. Elec. Co.*, No. CIV. 03-1286-MO, 2004 WL 97615, at *7 (D. Or. Jan. 13, 2004).[5] There, like here, a state statute gave the public utilities commission authority to regulate "the rates, terms, and conditions for pole attachments." *Id.* Based on this statutory mandate, the court concluded that "determining the appropriateness of the alleged amounts due under the agreement's rental formula presents an issue within the decision-making authority conferred on the [public utilities commission]." *Id.*

As in the *Verizon* case, the WUTC's authority over pole attachment rates and conditions covers the parties' dispute here. As framed by both parties, this dispute concerns the reasonableness and fairness of a rate calculation formula that does not account for fractionally owned utility poles. *See* Compl. ¶¶ 9–10; Counterclaims ¶ 9. PSE's proffered calculation would cost Frontier several hundred thousands of dollars. Determining which calculation method is just and reasonable falls plainly within the WUTC's authority. RCW 80.54.030.

B. The WUTC has special competence to resolve the parties' pole attachment rate dispute

The WUTC has unique substantive competence to resolve this dispute. In its own words, determining fair rates in light of the WUTC's complex regulatory scheme "is what the commission must decide many times over." McCleery Decl. ¶ 4, Ex. B. Where, like here, "an agency is charged with responsibility for regulating a complex industry, it is much better equipped than the courts, 'by specialization, by insight gained through experience, and by more flexible procedure,' to gather the relevant facts that underlie a particular claim involving

[5] A copy of this decision is attached hereto as Exhibit 1.

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

that industry." *Indus. Commc'ns Sys., Inc. v. Pac. Tel. & Tel. Co.*, 505 F.2d 152, 157 (9th Cir. 1974) (quoting *Far E. Conference v. United States*, 342 U.S. 570, 575 (1952)).

As explained above, the WUTC has been statutorily charged with determining fair and reasonable rates for pole attachments. RCW 80.54.020; 80.54.030; 80.54.040. Thus, regulation of pole attachment rates and terms are matters that the Washington legislature has placed within the unique competence of the WUTC. *See Barahona v. T-Mobile US, Inc.*, 628 F. Supp. 2d 1268, 1271 (W.D. Wash. 2009) (deferring to the specialized experience of the FCC, which regulates pole attachment rates in the absence of state preemption by, in Washington, the WUTC).

The WUTC's expertise and special insight into the matters at issue in this case is illustrated by a review of the legislature's "criteria for just and reasonable [pole attachment] rate[s]." RCW 80.54.040. Among the myriad factors that must be considered in order to ensure a fair rate are: "not less than all the additional costs of procuring and maintaining pole attachments," not "more than the actual capital and operating expenses, including just compensation, of the 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 which remain available to the owner or owners of the subject facilities." *Id.* The regulatory scheme at issue in this case is a classic example of a "complex industry" for which the WUTC is better equipped "to gather the relevant facts that underlie a particular claim involving that industry." *Indus. Commc'ns Sys., Inc.* 505 F.2d at 157.

The WUTC's recent rulemaking efforts concerning pole attachment rates further underscore its expertise. Since early 2014, the WUTC has engaged in comprehensive rulemaking covering all aspects of utility pole access. McCleery Decl. ¶ 5, Ex. C. As relevant here, the WUTC's third (and current) draft of the proposed rules has a section specifically dedicated to pole attachment rates. *See* McCleery Decl. ¶ 8, Ex. F (Third Draft

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

Rules Governing Access to Utility Poles, Ducts, and Conduits, Docket U-140621 (March 24, 2015)). Relying on its unique expertise, the WUTC has drafted rules that explain what constitutes "[a] fair, reasonable, and sufficient rate for attachments," and actually set a specific formula for determining such a rate taking into account the effect of partial ownership of poles. *See id.* at 480-54-060. The WUTC's depth of experience with these types of issues counsels strongly in favor of dismissal or a stay.

The individual commissioners themselves also possess a breadth of relevant industry experience:

- Commissioner David Danner has been with the WUTC since 2005, serving as its executive director since 2005, secretary since 2008, and a Commissioner since 2013. Prior to that, he served as executive policy advisor to Washington Governor Gary Locke on, among other issues, energy and telecommunications. He was a telecommunications attorney in private practice, and counsel to the Washington State Energy and Utilities Committee.[6]

- Commissioner Ann Rendahl has served as Commissioner since December 2014. She previously served as Director of Policy and Legislation for the WUTC. Prior to that, she served as the Director of Administrative Law Division, as an administrative law judge for the WUTC, and as an assistant attorney general representing the Utilities and Transportation Division.[7]

- Commissioner Philip Jones was appointed to the WUTC in March 2005. He served as president of the National Association of Regulatory Commissioners (NARUC), and is a member of NARUC's Critical Infrastructure, Telecommunications and Washington Action Committees. He also serves on the Advisory Council of the Electric Power Research Institute.[8]

In *Dioxin/Organochlorine Ctr. v. Dep't of Ecology*, the Washington Supreme Court affirmed dismissal on primary jurisdiction grounds where the Pollution Control Hearings Board

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[6] McCleery Decl. ¶ 9, Ex. G (WUTC biography of Commissioner David W. Danner).

[7] *Id.* ¶ 10, Ex. H (WUTC biography of Commissioner Ann Rendahl).

[8] *Id.* ¶ 11, Ex. I (WUTC biography of Commissioner Philip B. Jones).

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

("PCHB") consisted of members "qualified by experience or training in pertinent matters pertaining to the environment." 119 Wash. 2d 761, 775–76, 837 P.2d 1007 (1992). It also observed that PCHB members "acquire additional expertise in performing their statutory duties." Here, the Commissioners are knowledgeable and experienced leaders in the utilities field, and are uniquely qualified to resolve the parties' dispute in harmony with the WUTC's complex regulatory framework. *See id.*; *Barahona*, 628 F. Supp. 2d at 1271 (deferring action to the FCC because "the agency's expertise should be applied to determine whether the fees are 'reasonable' and 'just.'").

C. Absent dismissal or a stay, a real danger exists that this Court's decision would conflict with the WUTC's pervasive regulatory scheme

A critical purpose of the primary jurisdiction doctrine is "to avoid the possibility of conflicting rulings by courts and agencies concerning issues within the agency's special competence." *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1090 (9th Cir. 2006). "When a court does not refer issues to an agency that fall within this pervasive regulatory scheme, a danger exists that the court's action might conflict with that scheme." *Jaramillo v. Morris*, 50 Wash. App. 822, 832, 750 P.2d 1301 (1988) (finding it an abuse of discretion for the trial court not to refer the central issue in the case to the relevant agency).

That danger is particularly great here, for at least two reasons. ***First***, pole attachment agreements are commonplace, and ensuring uniformity and fairness in attachment rates is paramount. Congress itself has recognized the importance of uniformity and fairness. In 1978, it enacted the Pole Attachment Act to prevent utility companies from "exploiting their monopoly position by engaging in widespread overcharging" for pole attachments. *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 247 (1987). The Pole Attachment Act gave the FCC, in the absence of state regulation, authority "to regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1). The Washington legislature, like Congress, passed its own statute giving

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ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

the WUTC the same authority to ensure "just, reasonable, [and] sufficient rates, terms, and conditions" for pole attachments. RCW 80.54.030. Respectfully, the Court should defer this rate dispute to the WUTC where, like here, the express purpose of RCW 80.54.030 is to ensure uniformity and fairness of rates. *See Barahona*, 628 F. Supp. 2d at 1271 ("Referral of this matter to the FCC will also promote uniformity and consistency in its regulation of the telecommunications industry."); *Walla Walla Country Club v. PacifiCorp*, No. CV-13-5101-LRS, 2014 WL 2862885, at *7 (E.D. Wash. June 24, 2014) ("[T]he interest of uniformity weighs heavily in favor of deferring to the expertise of the WUTC under the primary jurisdiction doctrine.").[9]

Second, the Court's decision may conflict with the WUTC's additional rules specifically addressing pole attachments, once they are adopted. PSE's interpretation of "distribution poles" under the Pole Attachment Agreement fails to account for Frontier's fractional ownership of 70,000 utility poles. Rather, its interpretation assumes that Frontier fully owns those poles. In its current draft rules, the WUTC clarifies – quite explicitly – that poles should be counted by taking into account a party's proportional ownership. *See* McCleery Decl. ¶ 8, Ex. F (Third Draft Rules Governing Access to Utility Poles, Ducts, and Conduits, Docket U-140621, 480-54-020(11)) ("When an owner owns poles jointly with another utility, the number of poles for purposes of calculating the net cost of a bare pole is the number of solely-owned poles plus the product of the number of the jointly-owned poles multiplied by the owner's ownership percentage in those poles."). Thus, for example, a company that owns 10 full poles and half of one pole should be treated as owning 10.5 poles, not 11. Regardless of what the WUTC's rules ultimately say about this issue, it is clear that the WUTC is considering the question, recognizes there is a potential issue, and intends to provide guidance. The Court's ruling – whether issued before or after the WUTC publishes final rules – could contradict the WUTC's decision on this issue. *See Walla Walla Country*

[9] A copy of this decision is attached hereto as Exhibit 2.

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

Club, 2014 WL 2862885, at *7 ("Uniformity is very much at issue here" where "this issue is before the WUTC currently."). The potential for conflicting decisions is even more likely considering that Frontier initiated a WUTC proceeding against PSE regarding the issues in this case by filing a formal complaint with the WUTC on June 29, 2015. McCleery Decl. ¶ 3, Ex. A.

These factors favor deference to the WUTC: "If this Court were to consider the reasonableness of Defendants' challenged billing practice, issues related to the regulation of these services would necessarily be involved." *Barahona*, 628 F. Supp. 2d at 1271 (granting stay because "[a]llowing the FCC to first consider [the parties' rate dispute] is thus consistent with the purposes of the primary jurisdiction doctrine.").

D. The parties recognized the WUTC's jurisdiction over the Pole Attachment Agreement

Even in the absence of application of the primary jurisdiction doctrine, the parties themselves specifically acknowledged the WUTC's jurisdiction within their Pole Attachment Agreement. The Agreement states:

> "Notwithstanding the foregoing paragraph 6.1.1, the formulas to determine Annual Rate shown in Schedules 1 and 2 of Appendix IV may be revised during the Term by mutual agreement between the parties or by the imposition of a revision by the WUTC or other governmental authority with jurisdiction [in] such matters."

Compl. Ex. A, § 6.1.2 (emphasis supplied). Therefore, the parties originally contemplated resolution of rate calculation issues – precisely the issue in this case – by the WUTC.

VI. Conclusion

This pole attachment rate dispute should proceed before the WUTC – the administrative agency statutorily charged with ensuring that attachment rates and terms are fair and consistent.

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K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

Frontier therefore respectfully requests that this Court dismiss this action based on the primary jurisdiction doctrine. *See Dioxin/Organochlorine Ctr.*, 119 Wash. 2d at 763, 776 (affirming trial court's dismissal with prejudice based on the primary jurisdiction doctrine). Alternatively, Frontier seeks a stay of this lawsuit while the WUTC decides a just, reasonable, and sufficient attachment rate for the parties in the currently pending proceeding. *See Verizon Nw., Inc. v. Portland Gen. Elec. Co.*, No. CIV. 03-1286-MO, 2004 WL 97615, at *9 (D. Or. Jan. 13, 2004) (granting motion to stay parties' rate dispute in favor of Oregon's utilities commission).

DATED this 30th day of June, 2015

K&L GATES LLP

By: /s/Román Hernández
Román D. Hernández, WSBA #39939
Email: roman.hernandez@klgates.com
Stephanie E. L. McCleery, WSBA #45089
Email: stephanie.mccleery@klgates.com
Adam Holbrook, *pro hac vice*
Email: adam.holbrook@klgates.com
One SW Columbia Street, Suite 1900
Portland, OR 97258
(503) 228-3200
Attorneys for Defendant Frontier Communications Northwest Inc.

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2015, a true copy of the foregoing **DEFENDANT FRONTIER COMMUNICATIONS NORTHWEST INC.'S MOTION TO DISMISS OR, ALTERNATIVELY, STAY** was submitted via Electronic Service, and served on the following named person(s) via Email and US MAIL at their last known address as indicated below:

James F. Williams, WSBA # 23613
JWilliams@perkinscoie.com
Karen Brunton Bloom, WSBA # 41109
KBloom@perkinscoie.com
Perkins Coie LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101
Phone: 206.359.8000
Fax: 206.359.9000
Attorneys for Plaintiff Puget Sound Energy

DATED: June 30, 2015.

K&L GATES LLP

By: /s/Román Hernández
Román D. Hernández, WSBA #39939
Email: roman.hernandez@klgates.com
Stephanie E. L. McCleery, WSBA #45089
Email: stephanie.mccleery@klgates.com
Adam Holbrook, *pro hac vice*
Email: adam.holbrook@klgates.com One SW Columbia Street, Suite 1900
Portland, OR 97258
(503) 228-3200
Attorneys for Defendant Frontier Communications Northwest Inc.

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

Exhibit 1

2004 WL 97615
Only the Westlaw citation is currently available.
United States District Court,
D. Oregon.

VERIZON NORTHWEST, INC., Plaintiff,
v.
PORTLAND GENERAL ELECTRIC CO., Defendant.

Civil No. 03-1286-MO. | Jan. 13, 2004.

Attorneys and Law Firms

Christopher S. Huther, Preston Gates Ellis & Rouvelas Meeds LLP, Washington, DC, Harvard P. Spigal, John E. Kennedy, Preston Gates & Ellis, LLP, Portland, OR, for Plaintiff.

Lisa A. Kaner, Markowitz Herbold Glade & Mehlhaf, PC, Portland, OR, for Defendant.

ORDER STAYING ACTION

MOSMAN, Judge.

*1 Before the court is a motion to stay filed by defendant Portland General Electric Co. ("PGE"). For the reasons discussed below, PGE's motion is GRANTED. (Doc. # 10).

I

This case arises out of a dispute involving a "joint pole agreement." A utility and a telecommunications company commonly enter into such an agreement to govern each company's equipment attachments to the other's poles. While joint-pole agreements are private agreements, Congress enacted the Pole Attachment Act to regulate pole attachments. 47 U.S.C. § 224. Pursuant to the Act, the Federal Communications Commission ("FCC") has enacted regulations governing pole attachments. The Act, however, allows states essentially to opt out of FCC control and themselves regulate the "rates, terms, and conditions for pole attachments." *Id.* at § 224(b)-(c). Through the Public Utility Commission ("PUC"), Oregon has chosen to regulate pole attachments. ORS 757.273 (granting PUC "authority to regulate in the public interest the rates, terms, and conditions for attachments by licensees to poles or other facilities of public utilities and telecommunications utilities").

In 1985, Verizon's predecessor in interest entered into a joint-pole agreement with PGE under which each party attached its equipment to the other's poles in Oregon. As amended by the parties in 1996, the agreement set forth the terms by which the parties were to construct and pay for equipment attachments to the other's poles. The agreement, for example, established a rental formula for calculating the rent due for the attachments. The agreement required each party to tabulate annually the number of poles it owned on which the other had attached equipment. The parties' pleadings indicate many thousands of poles potentially are at issue; PGE, for example, alleges Verizon attached its equipment to over 38,000 PGE poles. After making the annual tabulation, the agreement requires the pole owner to then bill the other party according to the agreement's rental formula.

The parties dispute whether their agreement remains in effect today. PGE argues the agreement was terminated in July 1998; Verizon contends, while the parties discussed terminating the agreement, the parties' conduct shows the agreement remains in effect. Based on its belief no contract exists, PGE contends Verizon is liable for sanctions for each instance in which Verizon had its equipment on a PGE pole. PGE began sending bills to Verizon for the allegedly due amounts. In doing so, PGE invoked state regulations permitting a company to recover sanctions when equipment has been attached to its poles without a written contract. See OAR 860-028-0120(a)(1); OAR 860-028-0130(1); see also ORS 757.271(1). PGE also began billing Verizon for sanctions allegedly due for equipment attached in violation of the National Electric Safety Code ("NESC"). See OAR 860-028-0110(8), 860-028-0120(1)(d). In addition, PGE billed Verizon for its alleged failure to obtain required permits before attaching its equipment to certain of PGE's poles. See OAR 860-028-0120(1)(b).

*2 Seeking the sanctions it believes are due for the above reasons and which Verizon has not paid, PGE filed a complaint with the PUC on July 15, 2003. Discovery for the PUC proceedings has been moving along and opening arguments are set to begin in February 2004.

But, based on its belief the agreement remains in effect, Verizon claims PGE is not entitled to sanctions for a failure to have a written contract. Nor does Verizon agree it owes PGE sanctions for failure to obtain permits or for NESC violations. Verizon contends PGE's seeking these sanctions therefore violates the agreement's rental formula, and further

contends any money PGE has been able to collect from Verizon for the purported violations runs afoul of the formula. Making these arguments, Verizon filed this lawsuit against PGE on September 17, 2003. Verizon asserts claims for breach of contract, breach of the duty of good faith and fair dealing, fraud, unjust enrichment, money had and received, and declaratory relief.

PGE asks this court to stay Verizon's lawsuit in deference to the proceedings before the PUC. PGE asserts a stay is appropriate for three separate reasons: (1) Verizon failed to exhaust its administrative remedies before filing its lawsuit in this court, (2) the primary jurisdiction doctrine requires deference, and (3) the *Colorado River* doctrine requires deference. As discussed below, the court concludes a stay is appropriate under primary jurisdiction principles.

II

As a general matter, a federal district court " 'possesses the inherent power to control its own docket and calendar.' " *Cohen v. Carreon,* 94 F.Supp.2d 1112, 1115 (D.Or.2000) (quoting *Mediterranean Enterps., Inc. v. Ssangyong Constr. Corp.,* 708 F.2d 1458, 1465 (9th Cir.1983)). A district court therefore generally may in furtherance of efficiency "enter a stay of an action before it, pending resolution" of separate judicial, arbitral, or administrative proceedings which bear upon the case. *Cohen,* 94 F.Supp.2d at 1115.

The Supreme Court, however, has stated federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976). Thus, when the separate proceedings are not pending in another federal court, a federal district court has less discretion to grant a motion to stay. See, e.g., *McCarthy v. Madigan,* 503 U.S. 140, 146 (1992) (observing, because federal courts "are vested with a 'virtually unflagging obligation' to exercise the jurisdiction given them," before deferring to federal administrative proceedings, courts must carefully balance the particular circumstances presented); *Colorado River,* 424 U.S. at 817 ("Generally, as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction ....' " (quoting *McClellan v. Carland,* 217 U.S. 268, 282 (1917)). [1]

*3 Stating a district court has a "virtually unflagging obligation" to exercise its jurisdiction "somewhat overstates the law because in certain circumstances, a federal court may stay its proceedings in deference to pending state proceedings." *Nakash v. Marciano,* 882 F.2d 1411, 1415 (9th Cir.1989). In fact, while recognizing federal courts generally must exercise their jurisdiction, the *Colorado River* Court also recognized that a district court, in deciding whether to defer to a state-court litigation, may be guided by "considerations of [w]ise judicial administration [and] giv[e] regard to conservation of judicial resources." *Colorado River,* 424 U.S. at 817; see, e.g., *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 731 (1996) (suggesting a district court appropriately may enter a stay to await state court litigation when the state court likely will decide an issue involved in the federal court litigation, thus "avoiding inconsistent adjudications on that [issue]").

When the related state proceedings are administrative proceedings, district courts should determine the propriety of deciding a case's merits in light of the institutional policies served by deferring to an administrative agency. The primary jurisdiction and exhaustion-of-administrative-remedies doctrines guide district courts in making this determination. As a general matter, both doctrines have similar purposes; for instance, both are designed to promote judicial efficiency and to effectuate legislative intent vesting an agency with primary responsibility to decide certain matters. See, e.g., *McCarthy,* 503 U.S. at 145 (discussing exhaustion); *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, 305-06 (1973) (discussing primary jurisdiction); see also *United States v. Western Pac. R.R. Co.,* 352 U.S. 59, 63 (1956) ("The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.").

However, the circumstances in which each doctrine applies differ. Primary jurisdiction is a discretionary doctrine "specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency." *Reiter v. Cooper,* 507 U.S. 258, 268 (1993); see also *Western Pac. R.R.,* 352 U.S. at 63-64; *Syntek Semiconductor Co. v. Microchip Tech., Inc.,* 307 F.3d 775, 781 (9th Cir.2002). In contrast: " '[w]here relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is

premature and must be dismissed.' " *Syntek,* 307 F.3d at 781 (quoting *Reiter,* 507 U.S. at 269). Thus primary jurisdiction is within a district court's sound discretion and is triggered when administrative proceedings involve *an issue* also involved in the district court litigation. Exhaustion is not concerned with merely issues but with whether the ultimate *relief* sought in the district court would be available in administrative proceedings. See *Reiter,* 507 U.S. at 269.

***4** In the case before the court, PGE invokes both doctrines. This case, however, is more properly analyzed under primary jurisdiction principles. Verizon asserts in this court a number of common law causes of action, seeking tort and contract damages. PGE does not suggest the applicable regulatory framework contemplates resolving traditional common law claims or Verizon could obtain the relief it seeks in the PUC proceedings. Nor does PGE contend this court lacks jurisdiction over Verizon's common law claims. As a result, PGE's request for a stay is not easily analyzed under the Supreme Court's descriptions of the exhaustion-of-administrative-remedies doctrine. See, e.g., *Reiter,* 507 U.S. at 269 ("Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts."); *Western Pac. R.R.,* 352 U.S. at 63 (" 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone...."). Accepting the position Verizon could not obtain the relief it seeks before the PUC, however, does not bar the application of primary jurisdiction principles.

As mentioned, primary jurisdiction is concerned with overlapping issues, rather than with exact parallelism in the nature of the pending claims or the available relief. See *Reiter,* 507 U.S. at 269; *Ricci,* 409 U.S. at 305-06. And, under primary jurisdiction principles, a district court may defer to an agency's adjudication even if certain ultimate issues relevant to the federal court claims will remain unresolved despite the agency's decision. See, e.g., *Ricci,* 409 U.S. at 306 ("Affording the opportunity for administrative action will 'prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court ....' " (citation omitted)). Moreover, unlike the exhaustion doctrine, the primary jurisdiction doctrine does not implicate a court's subject matter jurisdiction. *Syntek Semiconductor Co.,* 307 F.3d at 780. "Rather, it is a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts." *Id.;* see also RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 14.1, at 917 (4th ed.2002) (describing primary jurisdiction as a "doctrine used by the courts to allocate initial decisionmaking responsibility between agencies and courts where ... [jurisdictional] overlaps and potential for conflicts exist").

To aid in determining whether deference is appropriate in a particular case the Ninth Circuit has looked at various factors such as whether the case involves an issue (1) within a comprehensive regulatory scheme, (2) within an administrative body's regulatory authority, and (3) whose proper and efficient resolution requires expertise or uniformity. See *Syntek Semiconductor Co.,* 307 F.3d at 781; see also *Industrial Communications Sys., Inc. v. Pacific Tel. & Tel. Co.,* 505 F.2d 152, 157 (9th Cir.1974) ("Where, as here, a regulatory agency possesses such extensive authority and control over a particular subject matter, and where consideration of the same subject matter is sought before that agency and the courts, the possibility of a judicial-administrative conflict should be avoided.").

***5** In evaluating whether to exercise its discretion to defer to administrative proceedings, a district court should bear in mind an overarching question: whether "a prior agency adjudication ... will be a material aid" in ultimately deciding the claims before the court. *Ricci,* 409 U.S. at 305. For instance, when the agency likely will decide "questions about the scope, meaning, and significance of [agency] rules," which also are involved in the federal court claims, deferring to the agency likely will be of "material aid" to the federal court. *Id.* In addition, as explained by the Ninth Circuit:
Another reason for deferring to [an agency] is the need to obtain the benefit of that agency's expertise in ascertaining, interpreting and distilling the facts and circumstances underlying the legal issues. Where an agency is charged with responsibility for regulating a complex industry, it is much better equipped than the courts, "by specialization, by insight gained through experience, and by more flexible procedure," to gather the relevant facts that underlie a particular claim involving that industry.

Industrial Communications Sys., 505 F.2d at 157 (quoting *Far East Conference v. United States,* 342 U.S. 570, 575 (1952)). In sum, under federal precedent, primary jurisdiction principles require a district court to determine whether litigation before it involves issues whose resolution would benefit from agency experience and expertise or involves issues more appropriately decided by federal courts.

Oregon courts have adopted primary jurisdiction principles similar to those found in federal cases. [2] As under federal law, primary jurisdiction under Oregon law does not present an issue of subject matter jurisdiction. *Adamson v. WorldCom Communications, Inc.*, 190 Or.App. 215, 223 (2003). Rather, as under federal precedent, judicial efficiency is the guiding policy in determining whether to defer to an agency:

Judicial invocation of the doctrine of primary jurisdiction generally is appropriate when a court decides that an administrative agency, rather than a court of law, initially should determine the outcome of a dispute or one or more issues within that dispute that fall within that agency's statutory authority. The purpose behind the doctrine is the "recognition of the need for orderly and sensible coordination of the work of agencies and of courts." KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT § 19.01, [at] 374 (3d ed.1972). The reason for the doctrine is "not a belief that an agency's expertise makes it superior to a court; [but] that a court confronted with problems within an agency's areas of specialization should have the advantage of whatever contributions the agency can make to the solutions." *Id.* § 19.06, at 381. That is, the doctrine is one ordinarily invoked by a court in the traditional judicial system with the belief that a previous agency disposition of one or more issues before the court will assist the court in resolving the case before it.

***6** *Boise Cascade Corp. v. Board of Forestry*, 325 Or. 185, 192 (1997); see also *Adamson*, 190 Or.App. at 223-24 (observing primary jurisdiction "addresses whether it is preferable, in light of concerns for the efficient administration of justice, for the court" to defer to an agency). As the Oregon Supreme Court has refused to adopt a "fixed formula," the propriety of deferring to an agency depends on such factors as the degree to which an agency's expertise will aid an issue's resolution and the potential a judicial resolution of the issue will adversely affect the agency's regulatory responsibilities. See *Boise Cascade*, 325 Or. at 192. The Oregon Supreme Court has further reasoned a trial court should "balance the considerations that favor allocation of initial decisionmaking responsibility to an agency against the likelihood that application of primary jurisdiction will unduly delay resolution of the dispute before the court." *Id.* (citation omitted).

As discussed below, primary jurisdiction principles favor a stay in this case.

III

Verizon suggests a stay is inappropriate because this case involves merely a contract dispute. Specifically, Verizon emphasizes, this case raises the threshold issue whether a valid contract exists between the parties. Verizon argues this common law issue does not fall within the PUC's decision-making authority, and further argues, because its claims do not require an interpretation of any PUC regulations, the court should not defer to the PUC.

The court rejects Verizon's unduly narrow description of this case as merely a "common law" contract dispute. As discussed below, Verizon's complaint reveals its claims are inextricably intertwined with the PUC's regulatory framework.

As an initial point Verizon's complaint does not assert just a contract claim; it also seeks recovery for fraud (two counts), breach of the duty of good faith and fair dealing, money had and received, unjust enrichment, and declaratory relief. Verizon's breach-of-contract and declaratory-relief claims are the only two claims for which the existence of a pole-attachment contract is a necessary predicate. Moreover, even focusing for a moment on the common law issue of whether a contract exists, the legislature expressly granted the PUC authority to regulate equipment attached to a utility's poles without a contract. See ORS 757.271. As a result, the applicable regulatory framework contemplates the PUC may decide whether a pole-attachment agreement exists. See *id.*; OAR 860-028-0120(1)(a) (providing a pole occupant shall have "a written contract with the pole owner that specifies general conditions for attachments on the poles of the pole owner"); OAR 860-028-0130 (providing "a pole owner may impose a sanction on a pole occupant that is in violation of OAR 860-028-0120(1)(a)"); see also OAR 860-028-0220(1)-(2) (granting PUC authority to resolve fact disputes which must be resolved so "the pole owner can impose appropriate sanctions"). In fact, the PUC recently rejected Verizon's argument the PUC should stay its hand in deference to this court because the dispute involves whether a contract between the parties exists. The PUC reasoned:

> ***7** Because the Commission regulates pole attachments by public utilities, the Commission has jurisdiction over a contract governing those attachments, and also has authority to impose sanctions *if no contract exists.* Verizon's

> implication that the contract issue between it and PGE is for the courts overlooks the Commission's role as regulator of pole attachments between public utilities.

In re Portland General Elec. Co., UM 1096, at 7 (Nov. 7, 2003)(emphasis added). Thus Verizon's contention the PUC is unfit to resolve any contract issues is not persuasive.

In any event, even assuming the court were to conclude a pole-attachment contract exists, Verizon's complaint raises other issues which are regulatory in nature. As mentioned, Verizon focuses on one issue-whether a pole-attachment contract currently exists between the parties-as if resolving that one issue resolves Verizon's claims. Other potentially complicated and technical issues would not be resolved, however.

For example, determining the appropriateness of the alleged amounts due under the agreement's rental formula presents an issue within the decision-making authority conferred on the PUC. See 47 U.S.C. § 224(b)(1) (allowing states to regulate "the rates, terms, and conditions for pole attachments"); ORS 757.285 (granting PUC authority to determine whether rates established by agreements are "adverse to the public interest and fail to comply with [regulatory] provisions"). As the administrative-law judge recognized, even assuming a contract exists, "[t]he issue of the contract's reasonableness still remains for the Commission [to decide]." *In re Portland General Elec. Co.*, UM 1096, at 7. Thus the agency decision may provide "material aid" to the court as to whether a contract exists and what reasonably is due under any existing contract. See *Ricci*, 409 U.S. at 305.

Moreover, throughout its complaint, Verizon contends PGE is liable for seeking from Verizon charges unauthorized by the agreement. See, e.g., Verizon's complaint ¶¶ 13, 15, 18, 21, 27, 28, 30, 33, 38, 42. For instance, Verizon bases its claims in part on an allegation PGE wrongly billed Verizon for purported NESC violations. See *id.* ¶¶ 18-19. Even if the parties currently are contractually bound, the court potentially would have to contend with complicated safety-code issues more appropriately considered by the designated agency. See ORS 757.035 (conferring authority on PUC to apply the NESC). In addition, Verizon also bases its claims on PGE's wrongful collection of fees for Verizon's alleged attaching its equipment without proper permits, see *id.* ¶¶ 15, 20, an issue which would remain even if a contract exists. While Verizon contends it held a valid permit for the over 1,600 poles at issue, PGE's complaint filed with the PUC seeks sanctions for Verizon's failure to obtain valid permits. See PGE's complaint and petition for relief ¶¶ 29-33. As a result, even if a contract remains in effect, the court would have to resolve this regulatory issue. See OAR 860-028-0120(1)(b) (requiring pole occupants to have "a permit issued by the pole owner for each pole on which the pole occupant has attachments").

***8** In seeking recovery for PGE's alleged collection of (and attempts to collect) "false and erroneous" charges, Verizon's complaint further alleges PGE is liable for unauthorized equipment, construction, inspection, "bootleg," and program-fee charges. See Verizon's complaint ¶¶ 26, 28, 30, 33. To efficiently and properly evaluate whether, as Verizon alleges, these various charges were "unauthorized" the court likely would have to become intimately familiar with the PUC's regulations. For example, Verizon's correspondence with PGE reveals one of the potential regulatory issues implicated in determining whether these charges were unauthorized: "It is Verizon's position, that PGE's assessment of both a penalty for an unauthorized attachment and a sanction for a code violation runs counter to both the spirit and the intent of the Oregon Pole Attachment Rule." In sum, whether or not a contract exists, Verizon's lawsuit ultimately involves a consideration of PUC regulations.

Even aside from the fact this case likely turns on interpreting PUC regulations, Verizon's complaint raises a number of potentially complicated fact issues which the PUC likely will consider. The PUC should be given an opportunity to resolve these issues. As an example, Verizon contends: "PGE [is liable for] ... assessing unauthorized bootleg charges and retroactive annual rental for drop cans and other miscellaneous equipment located in the common space on poles." Verizon's complaint ¶¶¶ 38, 42, 62. Underlying this allegation are highly technical fact issues, including whether potentially thousands of attachments are within "common space." As a further example, Verizon seeks recovery for allegedly unauthorized construction charges, such as charges for "topping poles." *Id.* ¶ 28. Verizon also alleges it did not cause the alleged NESC violations, if any. See *id.* ¶¶ 18-19. Such a causation issue-even to the extent Verizon argues it simply did not own some of the attachments at issue-presents potentially tedious and technical facts, especially given PGE's position over 260 of Verizon's attachments violated the NESC, see PGE's complaint and petition for

relief ¶ 19. Verizon's complaint raises a number of other potentially difficult fact issues, including whether PGE in fact charged Verizon for unnecessary pole inspections and improper "program fees."

At least some of these issues likely will be resolved by the PUC. Given the literally thousands of poles involved in this dispute, the court is persuaded it should take "advantage of whatever contributions the agency can make" to this case's resolution. *Boise Cascade,* 325 Or. at 192 (citation omitted); see also *Ricci,* 409 U.S. at 305-06 ("We would recognize 'that the courts, while retaining the final authority to expound the statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern.' " (quoting *Federal Maritime Bd. v. Isbrandtsen,* 356 U.S. 481, 498 (1958)). And although this court and the PUC ultimately will examine this potentially complex dispute "from two distinct points of view, the facts material to each examination may in large part be the same." *Chronicle Pub'g Co. v. National Broad. Co.,* 294, F.2d 744, 747 (9th Cir.1961). As a result, "[t]he situation is one which cries out for the elimination of wasteful duplication of effort." *Id.*

***9** Finally, when weighed against the potential benefits of awaiting the PUC's decision, staying this case in deference to the PUC will not "unduly delay resolution of the dispute before the court." *Boise Cascade,* 325 Or. at 192. As mentioned, the parties have engaged in discovery for the PUC proceedings and opening arguments before the PUC are set for February 2004. And the PUC has decided to move forward with the proceedings, denying Verizon's request to stay the proceedings. In contrast, the case before the court has not proceeded beyond Verizon's complaint and PGE's motion to stay. Cf. *Colorado River,* 424 U.S. at 820 (finding "significant," in upholding a dismissal in deference to state-court litigation, "the apparent absence of any proceedings in the District Court, other than the filing of the complaint, prior to the motion to dismiss"). Under the circumstances of this case, a stay would not present an excessive threat to Verizon's right to have its claims expeditiously resolved. In fact, Verizon actually may be helped by a stay because Verizon could use any favorable PUC rulings to assist it in proving its claims in this court. And, as for any unfavorable rulings, Verizon will have saved time and money by not racing to obtain rulings in this comparably recent litigation, since Verizon likely would be precluded by at least some of the PUC's rulings.

IV

In conclusion, while mindful of the court's usual obligation to exercise its jurisdiction, under this case's circumstances, deferring to the authority conferred upon the Oregon PUC amounts to "[w]ise judicial administration." *Colorado River,* 424 U.S. at 817. More specifically, the court is guided by primary jurisdiction principles in concluding deferring to the PUC is the proper course. Given the PUC likely will consider at least some of the regulatory-interpretation and technical fact issues raised by Verizon's complaint, staying this case will be of material aid to the resolution of this litigation. Accordingly, PGE's motion to stay is GRANTED. (Doc. # 10).

IT IS SO ORDERED.

Footnotes

1 PGE argues *Colorado River's* abstention doctrine provides separate and independent grounds for staying this case, aside from the primary jurisdiction and exhaustion-of-administrative-remedies doctrines. The *Colorado River* abstention doctrine however was specifically formulated in the context of parallel *state court* proceedings. See *Colorado River,* 424 U.S. at 817-19; see, e.g., *O'Neill v. United States,* 50 F.3d 677, 688 (9th Cir.1995) (defining *Colorado River* abstention as when "a federal court declines to decide a case in favor of similar litigation pending before a *state court* " (emphasis added)). In this case there is no litigation pending before a state court. Because the court concludes a stay is appropriate under primary jurisdiction principles, PGE's argument *Colorado River* abstention should be extended to parallel state administrative proceedings need not be decided. Nevertheless the court believes it must be mindful of *Colorado River's* broadly stated principle a district court generally must exercise its jurisdiction.

2 The parties do not discuss whether the court should apply Oregon or federal primary jurisdiction principles. Some federal cases, without discussion, have looked to state primary jurisdiction principles when the parallel proceedings are pending in a state administrative agency and the district court has diversity jurisdiction over the case. See, e.g., *REO Indus., Inc. v. Natural Gas Pipeline Co. of Am.,* 932 F.2d 447,457 (5th Cir.1991) (applying Texas law); *Penny v. Southwestern Bell*

Tel. Co., 906 F .2d 183, 187-88 (5th Cir.1990) (applying Texas law). That the case before the court involves only state law claims and the parallel proceedings are pending before the Oregon PUC would seem to weigh in favor of applying Oregon law.

On the other hand, Congress, through the Pole Attachment Act, specifically gave Oregon the authority to regulate pole attachments in lieu of the FCC, see 47 U.S.C. § 224(b)-(c), suggesting the court should treat the state administrative proceedings as it would federal administrative proceedings. Cf. *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1310 n. 9 (2d Cir.1990) (noting "[i]f a state agency operates pursuant to a federal legislative scheme, for the purposes of the primary jurisdiction doctrine, the state agency may be entitled to the same treatment to which a federal agency is entitled").

The Ninth Circuit has applied federal primary-jurisdiction precedent in a case involving related proceedings pending before the California Public Utility Commission. *Industrial Communications Sys.*, 505 F.2d at 157-58. In that case, however, the Ninth Circuit did not discuss its decision to apply federal law, which might have rested on the fact the plaintiff asserted federal claims or the fact Congress had expressly reserved to state agencies the authority to decide the disputed issues. See *id.* at 156-57.

In any event, the court does not need to determinatively decide whether Oregon or federal primary jurisdiction principles govern this case. The issue need not be decided because, in addition to the parties' lack of briefing on the issue, the court concludes the general primary jurisdiction principles announced by Oregon courts do not materially differ from those found in federal cases, at least for purposes of resolving the stay issue presented here.

End of Document

Exhibit 2

2014 WL 2862885
Only the Westlaw citation is currently available.
United States District Court,
E.D. Washington.

The WALLA WALLA COUNTRY CLUB,
a Washington corporation, Plaintiff,
v.
PACIFICORP, dba Pacific Power & Light
Company, an Oregon corporation, Defendant.

No. CV–13–5101–LRS. | Signed June 24, 2014.

ORDER RE DEFENDANT'S MOTION TO DISMISS

LONNY R. SUKO, Senior District Judge.

***1 BEFORE THE COURT** is Defendant's Motion to Dismiss For Lack of Subject Matter (ECF No. 11), filed on December 12, 2013 and noted for oral argument on March 13, 2014. Due to court calendar conflicts, a hearing was held on June 5, 2014 in Yakima, Washington. Matthew W. Daley, David S. Grossman, and Stanley M. Schwartz appeared on behalf of Plaintiff Walla Walla Country Club. Troy D. Greenfield appeared on behalf of Defendant PacifiCorp, dba Pacific Power & Light Company (hereinafter "PacifiCorp"). At the close of oral argument, the court took the matter under advisement.

I. INTRODUCTION

Defendant PacifiCorp moves to dismiss for lack of subject matter jurisdiction under Fed. R.Civ.P. 12(b)(1), arguing that the dispute in this case must be resolved by the Washington Utilities and Transportation Commission (hereinafter "WUTC"). Defendant argues the WUTC has exclusive jurisdiction to determine whether the cost quoted by PacifiCorp, for removal of utility facilities supplying power to Plaintiff Walla Walla Country Club (hereinafter "Country Club") exceeds what is permitted by PacifiCorp's tariff. Defendant maintains the Country Club's complaints fall within the exclusive jurisdiction of the WUTC; therefore, state and federal courts lack subject matter jurisdiction. PacifiCorp moves for an order dismissing this action for lack of subject matter jurisdiction under Fed.R.Civ.P. Rule 12(b)(1).

In the alternative, PacifiCorp argues the court should dismiss and refer the action to the WUTC under the doctrine of primary jurisdiction. PacifiCorp asserts that the dispute is within the WUTC's area of special expertise, authority, and pervasive regulation. Additionally, PacifiCorp notes the instant issues are before the WUTC at this time and a judicial decision risks conflicting with the WUTC's determination.

II. BACKGROUND

In October 2012, the Country Club asked PacifiCorp to disconnect the County Club's facilities from PacifiCorp's electrical grid, so that the Country Club could transfer its utility service to Columbia Rural Electric Association, Inc. (hereinafter "CREA"), one of Pacific Power's competitors. [1] PacifiCorp informed the Country Club that its tariff, which has been approved by the WUTC, requires the Country Club to pay the cost to remove certain utility equipment that PacifiCorp had installed specifically to provide service to the Country Club.

The PacifiCorp's Rule 6, General Rules and Regulations (hereinafter "tariff"), Section I provides, in pertinent part:

> **I. *PERMANENT DISCONNECTION AND REMOVAL OF COMPANY FACILITIES:***
>
> When Customer requests Permanent Disconnection of Company's facilities, Customer shall pay to Company the actual cost for removal less salvage of those facilities that need to be removed for safety or operational reasons ...
>
> ...
>
> Company shall provide an estimate of such charges to Customer prior to removal of facilities. The Customer shall pay the amount estimated prior to disconnection and removal of facilities. The facilities shall be removed at a date and time convenient to both the Customer and the Company. No later than 60 days after removal, Company shall determine the actual cost for removal less salvage, and adjust the estimated bill to that amount ...

***2** ECF No. 13, Exh. A.

Schedule 300 of PacifiCorp's tariff also provides that the rate charged for removal of facilities for "nonresidential service removals" is the "actual cost less salvage." *Id.*

In July 2012, PacifiCorp verbally gave the Country Club an initial estimate of the cost to remove a portion of the

PacifiCorp facilities required for disconnection. ECF No. 14 at ¶ 4. PacifiCorp's removal quotes last for ninety days. *Id.* Once the parties agree, PacifiCorp and the customer execute a contract for the removal. *Id.* Upon receiving the estimate, the Country Club elected against discontinuing any portion of services with PacifiCorp. *Id.* at ¶ 5. No removal contract was signed. CREA again pursued the Country Club's business and offered to pay the cost of facilities removal. *Id.* In October 2012, after the initial estimate had expired and the Country Club had some further discussions with CREA, the Country Club notified PacifiCorp that it intended to permanently discontinue its service[2] with PacifiCorp and move all of its business to CREA. *Id.* at ¶ 5.

In response to this information, PacifiCorp began to update the initial estimate provided in July, to include removal of all facilities, which, by way of example, would include among other things, digging up the golf course fairways, greens and parking lot. The estimated removal costs ended up being significantly higher than originally estimated. On December 28, 2012, after PacifiCorp informed the Country Club of the total estimated cost of removal, the Country Club filed an informal complaint with the WUTC. The Country Club contended that removal of the conduit was unnecessary and could damage its property. *Id.*

On January 11, 2013, PacifiCorp submitted a request for a general rate revision to the WUTC. This filing included potential revisions to Rule 6 and Schedule 300, which address removal of facilities when a customer requests permanent disconnection. ECF No. 13 at ¶ 3. On January 15, 2013, CREA intervened to challenge PacifiCorp's potential changes to the tariff. *Id.* The WUTC found that "while CREA does not have a direct and substantial interest in charges to PSE's [sic] customers, the Commission has a strong interest in seeing that the record is fully developed ..." and thus allowed CREA to intervene. *Id.;* Exh. B. CREA proposed a number of additional changes to the portion of the tariff pertaining to facilities removal, likely in anticipation of other PacifiCorp customers desiring disconnection or transfer of existing services to another provider.

On January 25, 2013, PacifiCorp informed the Country Club and the WUTC that the cost to remove the facilities would be $104,176.[3] *Id.* at ¶ 8. The WUTC closed the informal complaint as "Company Upheld with Arrangements." *Id.* PacifiCorp indicated that it would transfer services after the Country Club had paid a disconnection fee of approximately $100,000. The Country Club refused to pay the demanded disconnection fee for the removal or to otherwise purchase the facilities. The Country Club did not file a formal complaint with the WUTC or seek further assistance from the agency. PacifiCorp has refused to disconnect the Country Club from the electrical grid.

*3 On July 11, 2013, PacifiCorp elected to withdraw the portion of its proposed tariff revision pertaining to Rule 6 and Schedule 300, so it could "gather additional data and analysis regarding the actual costs" of removal services. ECF No. 13 at ¶ 4; Exh. C. CREA objected to this withdrawal, arguing that the WUTC should consider CREA's objections to the portion of the proposed tariff revision addressing the cost of facilities removal, despite PacifiCorp's withdrawal of its proposed changes. *Id.* The WUTC granted PacifiCorp's motion to withdraw its proposed tariff revisions and dismissed CREA as a party. *Id.* The WUTC did, however, "require [PacifiCorp] to initiate another proceeding within the next four months in which the Commission can carefully review PacifiCorp's costs, terms, and conditions of service and the Company's administration of Schedule 300 and Rule 6." *Id.*

On August 6, 2013, the Country Club initiated this action in Walla Walla Superior Court (i) to require PacifiCorp to disconnect its service under a breach of contract (Tariff Containing Rate Schedules and General Rules); and (ii) to recover damages for the consequential losses that the County Club suffered as a result of PacifiCorp's refusal to disconnect its service. On September 6, 2013, PacifiCorp removed this case to federal court based on diversity. ECF No. 1.

III. DISCUSSION

A. 12 (b)(1) Standard

Whether the court possesses jurisdiction to decide the merits of a case is a threshold matter. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94–95, 118 S.Ct. 1003 (1998). Subject matter jurisdiction is mandatory and unwaivable. It must be established before a plaintiff's claims can be considered on the merits. *Wilbur v. Locke,* 423 F.3d 1101, 1105 (9th Cir.2005). "[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety." *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 514, 126 S.Ct. 1235 (2006).

B. WUTC—Exclusive Jurisdiction

PacifiCorp argues that the Country Club's complaint-whether a fee charged by a public service company exceeds the tariff

rate or is unreasonable—falls squarely within the exclusive jurisdiction of the WUTC. Therefore, state and federal courts lack subject matter jurisdiction. PacifiCorp further argues that RCW 80.04.220–.240 applies in this case, not RCW 80.04.440 as the Country Club asserts.

The Country Club disagrees urging that RCW 80.04.440 specifically affords a private right of action, in court, to recover damages caused by a public utility's violation of duty. That statute states that "[a]n action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any person or corporation." The Country Club's predominant complaint is that it allegedly can not obtain its requested relief before the WUTC because the WUTC is not authorized to resolve the damage claims. By inference however, the only "damages" alleged or discussed at oral argument (loss of electrical rate cost savings while awaiting an adjudication by WUTC and/or facility restoration/equipment removal expense) would appear to fall within the agency's authority.

***4** The Country Club insists this case is a straight-forward breach of contract case, and contends that the only issue is whether some safety or operational reasons require PacifiCorp to remove the facilities.

The court is not convinced that this is a simple breach of contract claim. The Country Club, in its original state court complaint, alleges that this dispute is over the charge to disconnect facilities needed to switch its electrical utility provider. The Country Club complains that the charge for more than $100,000 to remove the required facilities is what this dispute is all about. The complaint alleges, "PacifiCorp breached its contractual obligations, under the Rules, by refusing to disconnect the Club's property from PacifiCorp's facilities unless and until the Club paid to remove or purchased the conduit and vaults." ECF No. 1 at ¶ 4.5. The complaint also alleges that PacifiCorp's charges for facilities removal are excessive or not allowed by the tariff. *Id.* at ¶ 3.19. The complaint alleges PacifiCorp breached its contractual obligations under the tariff. *Id.* at ¶ 4.6.

In reality, the Country Club is complaining that PacifiCorp is charging an excessive or exorbitant amount ($104,176) for such disconnection services, which is impeding their ability to switch utility companies because they refuse to pay this excessive amount. It appears that the RCW 80.04.220 is the statute on point for this complaint, which reads:

80.04.220. Reparations

When complaint has been made to the commission concerning the reasonableness of any rate, toll, rental or charge for any service performed by any public service company, and the same has been investigated by the commission, and the commission has determined that the public service company has charged an excessive or exorbitant amount for such service, and the commission has determined that any party complainant is entitled to an award of damages, the commission shall order that the public service company pay to the complainant the excess amount found to have been charged, whether such excess amount was charged and collected before or after the filing of said complaint, with interest from the date of the collection of said excess amount.

RCW 80.04.220

This judicial officer concludes that in light of the foregoing language, the Country Club's complaint is covered by RCW 80.04.220, which provides a process for a formal complaint concerning the reasonableness of *any* charge for *any* service performed. Further, once a complaint is made to the commission that PacifiCorp has overcharged for a service, i.e., disconnection of facilities, RCW 80.04.230 provides for a refund for said overcharges when warranted following an investigation and decision. This statute reads:

80.04.230. Overcharges—Refund

When complaint has been made to the commission that any public service company has charged an amount for any service rendered in excess of the lawful rate in force at the time such charge was made, and the same has been investigated and the commission has determined that the overcharge allegation is true, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, whether such overcharge was made before or after the filing of said complaint, with interest from the date of collection of such overcharge.

***5** RCW 80.04.230

The County Club concedes that Rule 6 is the specific tariff provision that applies in this. The parties do not dispute that Rule 6 would guide the commission in determining if the public service company has charged in excess of the lawful amount. Finally, if an overcharge is determined and the public service company fails to repay such overcharge ordered by

WUTC, RCW 80.04.240 creates a new right or independent cause of action to collect and claim by plenary action in a tribunal of competent jurisdiction. This statute provides:

> **80.04.240. Action in court on reparations and overcharges**
>
> If the public service company does not comply with the order of the commission for the payment of the overcharge within the time limited in such order, suit may be instituted in any superior court where service may be had upon the said company to recover the amount of the overcharge with interest. It shall be the duty of the commission to certify its record in the case, including all exhibits, to the court. Such record shall be filed with the clerk of said court within thirty days after such suit shall have been started and said suit shall be heard on the evidence and exhibits introduced before the commission and certified to by it. If the complainant shall prevail in such action, the superior court shall enter judgment for the amount of the overcharge with interest and shall allow complainant a reasonable attorney's fee, and the cost of preparing and certifying said record for the benefit of and to be paid to the commission by complainant, and deposited by the commission in the public service revolving fund, said sums to be fixed and collected as a part of the costs of the suit. If the order of the commission shall be found to be contrary to law or erroneous by reason of the rejection of testimony properly offered, the court shall remand the cause to the commission with instructions to receive the testimony so proffered and rejected and enter a new order based upon the evidence theretofore taken and such as it is directed to receive. The court may in its discretion remand any cause which is reversed by it to the commission for further action. Appeals to the supreme court shall lie as in other civil cases. All complaints concerning overcharges resulting from collecting unreasonable rates and charges or from collecting amounts in excess of lawful rates shall be filed with the commission within six months in cases involving the collection of unreasonable rates and two years in cases involving the collection of more than lawful rates from the time the cause of action accrues, and the suit to recover the overcharge shall be filed in the superior court within one year from the date of the order of the commission.
>
> The procedure provided in this section is exclusive, and neither the supreme court nor any superior court shall have jurisdiction save in the manner hereinbefore provided.

RCW 80.04.240

This court concludes that although the Country Club's argument is couched in terms of a "straight-forward" breach of an "individual" contract claim with compensable damages, the Country Club's claim is really one for overcharges, for which they have not sought to file a formal complaint pursuant to the statutes in place for doing so.[4] Considering the actions of CREA in front of the WUTC, i.e., intervening to challenge PacifiCorp's potential changes to the tariff at issue here, the Country Club appears to be seeking a ruling that would be common to all PacifiCorp customers who wish to disconnect and switch service to CREA. The court further concludes that the commission appears to have ample statutory authority to afford meaningful relief as described in the statutes recited above.

C. Doctrine of Primary Jurisdiction–Referral to WUTC

***6** As an alternative, PacifiCorp argues that the court should exercise its discretion and apply the doctrine of primary jurisdiction so as to refer the Country Club's claims to WUTC for breach of contract and damages due to excessive charges to disconnect.

PacifiCorp represents that the very same issues before this court currently stand as an administrative proceeding in front of the WUTC. The doctrine of primary jurisdiction "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *Barahona v. T–Mobile US, Inc.*, 628 F.Supp.2d 1268, 1270 (W.D.Wash., 2009) *citing Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976). The doctrine is properly invoked when enforcement of a claim in court would require resolution of issues that have already been placed within the special competence of an administrative body. The *T–Mobile US* court quoted a passage wherein Justice Frankfurter described the following circumstances the doctrine should be applied to:

> [I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over .... Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited

> functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

T–Mobile US, Inc., 628 F.Supp.2d at 1270 (citation omitted).

The doctrine is applied on a case-by-case basis, considering several factors. First, the court should examine "whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Id.* At 1270–71 (citation omitted). Second, the court must determine if uniformity is desirable and could be obtained through administrative, rather than judicial, review. *Id.* (citation omitted). Finally, the court considers the "expert and specialized knowledge of the agencies involved ...." *Id.* (citation omitted).

The Court finds, in applying these factors, that the doctrine of primary jurisdiction is applicable in this case as another ground to refer this matter to WUTC. As the court has concluded above, the dispute is within the WUTC's area of special expertise, authority, and pervasive regulation. For example, determining under the tariff those facilities that need to be removed for safety or operational reasons and whether certain facilities were necessary to provide service to a customer would appear to be squarely within the expertise of the WUTC. Indeed, removal of facilities when a customer requests permanent disconnection, particularly the amounts charged, has been placed within the special competence of the WUTC by RCW 80.04.220–.240.

***7** In view of the disparity between the cases cited by the parties, the Court finds that the interest of uniformity weighs heavily in favor of deferring to the expertise of the WUTC under the primary jurisdiction doctrine. The WUTC's determination as to whether PacifiCorp's disconnection charge is a "charge" and if it is, whether the charge is reasonable, will necessarily guide similar complaints or suits against PacifiCorp when its customers seek to disconnect and establish service with a public service competitor albeit one that is not regulated by WUTC. Uniformity is very much at issue here, as the parties have pointed out that other customers may be following suit and this issue is before the WUTC currently. Thus, use of the primary jurisdiction doctrine and referral to the WUTC will avoid disparate or conflicting outcomes for customers and utility providers, and promote uniformity and consistency in WUTC's regulation of the utility industry as the competition unfolds. Accordingly, it is hereby **ORDERED** that Defendant's Motion to Dismiss, **ECF No. 11,** is **GRANTED.** This case is dismissed for lack of subject matter jurisdiction.

The District Court Executive is directed to enter this Order and **CLOSE THE FILE.**

Footnotes

1 CREA is not regulated by the WUTC.

2 PacifiCorp had provided service to the Country Club for the past 90 years.

3 The $104,176.00 figure included two components: (i) $66,718 for the removal of two separate runs of conduit, along with the attendant electrical vaults; and (ii) $37,458 for the removal of wires, transformers and metering equipment. See Complaint, ECF. No. 1, ¶ 3.14.

4 See *D.J. Hopkins, Inc. v. GTE Northwest, Inc.*, 89 Wash.App. 1 ((1997).

End of Document

Exhibit C

THE HONORABLE CAROL SCHAPIRA

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

PUGET SOUND ENERGY, INC., a Washington corporation, Plaintiff, v. FRONTIER COMMUNICATIONS NORTHWEST, INC., a Washington corporation, Defendant.	No. 15-2-03142-2 SEA [~~PROPOSED~~] ORDER GRANTING PUGET SOUND ENERGY, INC.'S MOTION TO COMPEL DISCOVERY

THIS MATTER came before the Court on Puget Sound Energy, Inc.'s Motion to Compel Discovery. The Court, having considered PSE's motion and all papers filed in support of and in opposition to the motion (Response and Reply), and being fully advised in the premises, NOW, THEREFORE,

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Many documents in a personnel file are not in any way confidential and may have been sent to or by third parties.

IT IS HEREBY ORDERED that within 10 days of this Order, Defendant shall produce the personnel file of Michael Foster to Plaintiff;* and it is further

ORDERED that Defendant shall pay Plaintiff reasonable expenses, including attorneys' fees and costs that Plaintiff incurred in bringing this motion. Plaintiff shall have 14 ____ days from the date of this Order in which to submit a declaration establishing the amount of such expenses.

DATED: September 1, 2015.

Honorable Carol Schapira
Superior Court Judge

Presented by:

By: *s/ James F. Williams*, WSBA #23613
James F. Williams
Karen Brunton Bloom, WSBA #41109
JWilliams@perkinscoie.com
KBloom@perkinscoie.com
ATTORNEYS FOR PLAINTIFF

All documents shall be treated as confidential pending further court order.
Court will review in camera, if needed, documents withheld.

* Frontier may designate a log of any documents it withholds on a basis of privacy, such as HIPAA, or confidential information such as social security or credit card numbers. Personal information about his family is excluded. The log shall include dates, subject and basis for withholding.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

CERTIFICATE OF SERVICE

CAROL KNESS states as follows:

1. I am a litigation secretary at the law firm of PERKINS COIE LLP, attorneys of record for plaintiff, Puget Sound Energy, have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. On the 18th day of August, 2015, I made arrangements for the original of the foregoing [PROPOSED] ORDER GRANTING PUGET SOUND ENERGY, INC.'S MOTION TO COMPEL DISCOVERY to be filed with the Clerk of Court using the CM/ECF system.

3. On the same day, I made arrangements for a true and correct copy of the same document to be delivered to defendant's counsel via email and U.S. Mail as follows:

Román D. Hernández, WSBA #39939
Stephanie E.L. McCleery, WSBA #45089
K&L Gates LLP
One SW Columbia St., Suite 1900
Portland, OR 97258
T: (503) 228-3200
F: (503) 248-9085
Email: roman.hernandez@klgates.com
Stephanie.mccleery@klgates.com

I CERTIFY UNDER PENALTY OF PERJURY under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of August, 2015.

s/ Carol Kness
Carol Kness, Litigation Secretary

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Exhibit D

Appendix A
Schedule 2

COMPUTATION OF ANNUAL RATE FOR POLES OWNED BY VERIZON NORTHWEST INC. IN THE STATE OF WASHINGTON FOR THE CONTACT YEAR 2002

A. NET INVESTMENT PER BARE POLE (PV)			
(1) Investment in poles, towers and fixtures (FCC Account 241)	$43,134,000		
(2) Less depreciation reserve associated with Item (1)	$32,284,368		
(3) Less deferred Federal income taxes associated with Item (1	$4,830,723		
(4) Net investment in poles, towers and fixtures	$6,018,909		
(5) Ratio of bare pole to total pole	95%		
(6) Value of all bare poles	$5,717,964		
(7) Easements	0		
(8) Combined value of all bare poles and easements	$5,717,964		
(9) Total number of distribution poles	130,838		
Net investment per bare pole		$43.70	(PV)
B. ANNUAL CARRYING CHARGE (CC)			
(1) Net pole depreciation	44.7900%		
(2) Administration and general expenses	7.1500%		
(3) Maintenance	16.9600%		
(4) Taxes	8.8700%		
(5) Cost of capital (overall rate of return authorized by WUTC in latest Verizon-NW rate case)	9.7600%		
Total annual carrying charge		87.5300%	(CC)
C. USE RATIO PER POLE (PR)			
(1) Usable space on pole, in feet	13.5		
(2) Effective space occupied by Puget, in feet			
(a) Primary poles	7.5		
(b) Secondary poles	2		
(3) Use ratio			
(a) Primary poles		55.556%	(PR)
(b) Secondary poles		14.815%	(PR)
D. ANNUAL POLE ATTACHMENT RATE			
(PV) X (CC) X (PR)			
(a) Primary poles		$21.25	
(b) Secondary poles		$5.67	
E. ANNUAL FEE			
(a) Primary poles (4,609 X $21.25)		$97,941.25	
(b) Secondary poles (2,238 X $5.67)		$12,689.46	
Total annual fee		$110,630.71	

VERIZON NORTHWEST INC.

By: _____
Tim Bardon
Title: Manager - Infrastructure Provisioning Support

Date Signed: 8-7-2002

PUGET SOUND ENERGY, INC.

By: _____
Marty O'Connor
Title: Manager - Communication Siting & Services

Date Signed: 8/9/02

Exhibit E

verizon

Verizon Communications
Northwest Region
P.O. Box 1003 (WA0103NP)
Everett, WA 98203

Puget Sound Energy
Attention: Joint Facilities Administrator
PO Box 90868 GEN-02W
Bellevue, WA 98009-0868

September 23, 2004

Dear PSE,

Attached please find a copy of our calculated pole rates as followed in schedule 2 of our agreement. As you will see the rate is significantly higher than what we have been billing you in the past, including the current rate for 2004 attachments. In the past Verizon calculated its "Net Investment Per Bare Pole" using whole poles rather than equivalent poles. Using the past method had the effect of significantly understating the true and fair rate Verizon charges for the attachments to our poles. The FCC formula calls for the rate to be calculated based on equivalent poles.

So our billing to you in 3rd quarter 2005, for your 2005 attachments will be approximately the rates you see on the attached (remember that we will have new accounting information so the rates may change somewhat from the attached rates).

Also, although the rates are making a significant increase from prior years, the rates still remain significantly lower than the per foot rates PSE is billing to Verizon.

Please contact me should you have any questions concerning this letter.

Sincerely,

Michael Foster
Specialist
Network Engineering & Planning
Pacific – CO/OSP Support

Schedule 2
Computation of Annual Rate for Poles owned by Verizon

A. Net Investment Per Bare Pole (PV)

(1) Investment in poles, towers and fixtures (ARMIS Account 2411)		$ 45,944,000	
(2) Less depreciation reserve associated with Item (1)		$ (36,217,000)	
(3) Less deferred Federal income taxes associated with Item (1)		$ (4,884,000)	
(4) Net book value of poles and fixtures		$ 4,843,000	
(5) Ratio of bare pole to total pole		95%	
(6) Net Investment in bare poles		$ 4,600,850	
(7) Total number of poles	88,294		
			$52.11

B. Annual Carrying Charge

(1) Net Pole Depreciation	x 2 for 2005	44 88.23%	44.79
(2) Administration and General Expenses		16.57%	
(3) Maintenance		17.32%	
(4) Taxes		5.40%	
(5) Authorized Cost of Capital		9.67%	
			137.19%

C. Use Ratio Per Pole

(1) Usable space on pole, in feet	13.5	
(2) Effective space occupied by PacifiCorp attachments, in feet		
(a) Primary poles	7.5	
(b) Secondary poles	2.0	
(3) Use Ratio		
(a) Primary poles		55.556%
(b) Secondary poles		14.815%

D. Annual Pole Attachment Rate
(PV) x (CC) x (PR)

(a) Primary poles	39.72
(b) Secondary poles	10.59

Exhibit F

Verizon Communications
Northwest Region
P.O. Box 1003 (WA0103NP)
Everett, WA 98203

Puget Sound Energy
Attention: Joint Facilities Administrator
PO Box 90868 GEN-02W
Bellevue, WA 98009-0868

July 19, 2005

Dear PSE,

Thank you for taking the time to meet with us last week concerning Verizon's rate notice. After careful consideration, Verizon is in agreement with PSE that we will continue using the calculation components that were agreed to in the original agreement dated 8/1/2002. Therefore, we will continue to use whole poles in our calculation methodology for PSE.

Attached please find our new rates for our September 2005 billing, using the agreed upon method.

Please contact me should you have any questions concerning this letter or its attachment.

Sincerely,

Michael Foster
Specialist
Network Engineering & Planning
Pacific – CO/OSP Support

Exhibit G

THE HONORABLE _____

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

PUGET SOUND ENERGY, INC., a Washington corporation,, Plaintiff, v. FRONTIER COMMUNICATIONS NORTHWEST, INC., a Washington corporation,, Defendant.	No. COMPLAINT FOR BREACH OF CONTRACT AND DECLARATORY RELIEF

Plaintiff Puget Sound Energy, Inc. ("PSE" or "Plaintiff"), alleges against Defendant Frontier Communications Northwest, Inc. ("Frontier" or "Defendant") as follows:

I. INTRODUCTION

1. This case is about the Defendant's unilateral decision to change and breach the terms of a contract that had been honored by both parties for over ten years and, in the process, wrongfully withhold payment in excess of $2,600,000. This lawsuit is filed to

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

enforce PSE's contractual rights, and to compel Frontier to honor the parties' 11-year course of contract performance and course of dealing.

II. THE PARTIES

2. Plaintiff PSE is a Washington corporation with its principal place of business in King County, Washington. It is an investor-owned electric utility that provides retail electric service in the State of Washington. PSE owns utility poles throughout its service territory for the purposes of transmitting and distributing electricity to customers.

3. Defendant Frontier is a Washington corporation with its principal place of business in Snohomish County, Washington. Frontier provides telephone and other services to customers in Washington. Frontier also owns utility poles throughout its service territory for the purposes of transmitting and distributing its services to customers. Frontier is the successor to Verizon Northwest Inc. ("Verizon").

III. JURISDICTION AND VENUE

4. This Court has jurisdiction under RCW 2.08.010, and venue properly rests with this Court pursuant to RCW 4.12.025(1) and (3) because the Defendant transacts business in King County, and the actions giving rise to the claims arose in King County.

IV. STATEMENT OF FACTS

5. On or about August 1, 2002, PSE and Frontier's predecessor, Verizon, negotiated and entered into the Pole Attachment Agreement between PSE and Verizon (the "Agreement"). The Agreement is attached hereto as Exhibit A. The Agreement provides each party with the right to charge the other a particular rental rate for attaching equipment to some portion of their respective utility poles.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

6. Section 6.1 of the Agreement governs the annual rental rates PSE and Frontier may charge each other for the pole attachments. The specific rental rates are determined based on agreed-upon formulas set forth in Appendix IV to the Agreement.

7. Schedule 1 to Appendix IV describes the formula to be applied by PSE when it charges Frontier for the use of PSE-owned poles. Schedule 2 to Appendix IV describes the formula to be applied by Frontier when it charges PSE for the use of Frontier-owned Poles.

8. The term "distribution poles" is a critical part of the formulas and, since the inception of the Agreement in 2002, the parties have consistently calculated the total number of distribution poles by counting the "raw" number of poles (referred to as "whole poles") owned, in whole or in part, by either party.

9. In April of 2013, Frontier began to dispute the rental rate formulas. Frontier claimed that the parties have been operating under an "error" for the past 10 years in calculating "distribution poles" as the total number of "whole poles," without regard to whether Frontier owns the pole entirely or has joint ownership with another entity.

10. Frontier now asserts that the "total number of distribution poles" should account for fractional interests in poles (referred to as "equivalent poles") that it partially owns.

11. Under Frontier's new rental rate calculation method, the total number of Frontier-owned poles goes down, and the amount Frontier can charge as a rental rate goes up. The net result of Frontier's new approach is that PSE is asked to pay more for the use of each Frontier pole.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

12. Frontier's new method for calculating the rental rates is inconsistent with the parties' original understanding in 2002, is inconsistent with the parties' course of performance, and is inconsistent with their course of dealing for the past 11 years.

13. Section 6.1.2 provides that the formulas in the Agreement may only be revised during the term of the Agreement "by mutual agreement between the Parties" or by "the imposition of a revision by the WUTC or other governmental authority with jurisdiction is [sic] such matters."

14. Frontier lacks authority to unilaterally revise the method for calculating "distribution poles" under the Agreement without the mutual agreement of PSE, and the WUTC has not imposed any revision that would modify the rental rate formulas.

15. Section 6.3 of the Agreement provides that "[a]ll amounts payable by one Party to the other pursuant to this Agreement shall be paid within thirty (30) days after the owing Party's receipt of a correct invoice from the billing Party."

16. PSE issued its 2013 Annual Pole Attachment Rental Invoice ("2013 Invoice") to Frontier on October 28, 2013, for a total of $1,105,969.72. Under the Agreement, full payment was due to PSE on November 30, 2013.

17. In May 2014, Frontier used its new rental rate calculation method to, for the first time, assert that PSE owed Frontier $624,472.39 for alleged past "underbilling" by Frontier in using the whole pole method for the ten invoices it sent to PSE between 2003 and 2013. Frontier claimed that $624,472.39 constituted the total difference between its previous invoices to PSE and the purported "corrected" amounts using the equivalent pole calculation method. Frontier also asserted that it would take a "setoff" of $624,472.39 against PSE's 2013 invoice to Frontier to satisfy the amounts allegedly owed by PSE.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

18. On September 30, 2014, PSE sent Frontier its 2014 Annual Pole Attachment Rental invoice ("2014 Invoice") in the amount of $1,122,193.44, which was due by no later than October 21, 2014.

19. Frontier has made every indication that it will not pay PSE under the agreed-upon rental rate formulas.

20. Paragraph 6.3 of the Agreement states that "[a]ny amounts not paid when due under this Agreement shall bear interest, compounded daily, at the rate of one-and-one-half percent (1.5%) per month."

21. The daily compounded interest for the 2013 invoice began on November 30, 2013, and continues to present.

22. The daily compounded interest for the 2014 invoice began on October 21, 2014, and continues to present.

23. PSE provided Frontier with a Notice of Default/Breach on January 29, 2015, demanding immediate payment of all outstanding amounts and reserving the right to exercise all rights and remedies under the Agreement.

24. Paragraph 16.16 of the Agreement required mediation of any disputes prior to initiating litigation. After an unsuccessful attempt at mediating this dispute on February 5, 2015, PSE is exercising its right to initiate legal action.

V. CAUSES OF ACTION

FIRST CAUSE OF ACTION
BREACH OF CONTRACT – 2013 INVOICE

25. PSE incorporates and reasserts the allegations in each of the above paragraphs.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

26. The Agreement is a valid and enforceable contract that was the product of extensive negotiation between PSE and Frontier's predecessor, Verizon.

27. The Agreement requires Frontier to pay the full amount owed for the 2013 Invoice within 30 days of receipt.

28. By failing to timely and completely pay PSE for the 2013 Invoice, Frontier has breached the Agreement and caused damages to PSE in an amount to be proven at trial.

SECOND CAUSE OF ACTION
BREACH OF CONTRACT – 2014 INVOICE

29. PSE incorporates and reasserts the allegations in each of the above paragraphs.

30. The Agreement is a valid and enforceable contract that was the product of arms' length negotiation between PSE and Frontier's predecessor, Verizon.

31. The Agreement requires Frontier to pay the full amount owed for the 2014 Invoice within 30 days of receipt.

32. By failing to timely and completely pay PSE for the 2014 Invoice, Frontier has breached the Agreement and caused damages to PSE in an amount to be proven at trial.

THIRD CAUSE OF ACTION
ANTICIPATORY BREACH OF CONTRACT – FORTHCOMING 2015 INVOICE

33. PSE incorporates and reasserts the allegations in each of the above paragraphs.

34. The Agreement is a valid and enforceable contract that was the product of arms' length negotiation PSE and Frontier's predecessor, Verizon.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

35. Frontier's indications that it will not timely and completely pay PSE, including the amount due for the forthcoming 2015 Invoice, constitute anticipatory breach of the Agreement.

36. PSE has been and will continued to be damaged by Frontier in an amount to be proven at trial.

FOURTH CAUSE OF ACTION
DECLARATORY JUDGMENT

37. PSE incorporates and reasserts the allegations in each of the above paragraphs.

38. By its actions described above, Frontier created a justiciable issue regarding interpretation of the Agreement, including the method to calculate the total number of "distribution poles" under the Agreement.

39. Pursuant to RCW 7.24, PSE requests that the Court declare, adjudge and decree that "distribution poles" are to be calculated based on "whole poles" pursuant to the Agreement, the course of performance, and the course of dealing between the parties for the past 11 years.

VI. PRAYER FOR RELIEF

A. Plaintiff requests that the Court enter a judgment in favor of Plaintiff in an amount to be proven at time of trial, including interest as allowed under the Agreement;

B. That the Court declare "distribution poles" are to be calculated as "whole poles" pursuant to the Agreement.

C. For its attorneys' fees and costs; and

D. For such other and further relief as the Court deems just and equitable.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

DATED this 6th day of February, 2015.

s/ James F. Williams, WSBA No. 23613
JWilliams@perkinscoie.com
Karen Brunton Bloom, WSBA No. 41109
KBloom@perkinscoie.com
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000
Attorneys for Plaintiff
PUGET SOUND ENERGY, INC.

Exhibit A

POLE ATTACHMENT AGREEMENT

between

PUGET SOUND ENERGY, INC.

and

VERIZON NORTHWEST INC.

Dated August 1, 2002

TABLE OF CONTENTS

POLE ATTACHMENT AGREEMENT

FOR

VERIZON NORTHWEST INC.

This Agreement, dated as of August 1, 2002, is made by and between Puget Sound Energy, Inc., a Washington corporation ("Puget"), and Verizon Northwest Inc., a Washington corporation, ("Verizon"). In this Agreement, Puget and Verizon are sometimes referred to individually as a "Party" and collectively as the "Parties"; references to "User" or "Owner" refer to either Party interchangeably as the context may require.

RECITALS

A. Puget operates an electric system, including a distribution system, within the State of Washington. Verizon operates a communications distribution system within the State of Washington.

B. The Parties often use utility poles to support wires, cables, equipment and other items constituting part of their respective distribution systems.

C. The Parties desire to cooperate in the joint use of their respective utility poles.

AGREEMENT

Puget and Verizon agree as follows:

Section 1 Scope and Definitions

1.1 Scope

This Agreement governs all attachments of a Party's Equipment to any Pole owned in whole or in part by the other Party which are now existing or hereafter made with the consent of such other Party.

1.2 Definitions

When used in this Agreement with the initial letter capitalized, the following terms shall have the following specified meanings:

"AAA" means the American Arbitration Association.

"Abandoned Pole, Abandonee, Abandoner, Abandonment Notice, Abandonment Date and Abandoner Indemnitees" shall have their respective meanings specified in Section 7.

"Annual Rate" shall have its meaning specified in paragraph 6.1.1.

"Another" and "Another's Equipment" shall have their respective meanings specified in paragraph 10.1.

"Application" means either a written or electronic communication substantially in the form of a NJUNS Ticket or the Application for Attachment attached hereto, as Appendix II, including the information required by paragraph 2.2.

"Consent" means, with respect to a Party, either a written or electronic notification or communication sent by such Party which expressly gives the Party's affirmative consent to and approval of the matter for which the Party's consent is required.

"Defaulting Party" shall have its meaning specified in Section 14.

"Dispute" shall have its meaning specified in paragraph 16.16.

"Equipment" means the crossarms, wires, cables, cable clamps, guys, brackets, equipment, equipment enclosures, transformers, terminals, streetlights, meters, and all other items related to a Party's distribution system within the State of Washington.

"JAMS" means the Judicial Arbitration and Mediation Services, Inc.

"Joint Audit" shall have its meaning specified in Section 5.

"Joint Owner" means, with respect to a Pole, one of the Parties that has a partial ownership interest in a Pole.

"Joint Pole" means a Pole owned in whole or in part by a Party to which Equipment of the other Party is attached.

"Indemnitees" means, with respect to a Party, that Party and its successors and assigns, and the respective directors, officers, employees, agents, and representatives of such Party and its successors and assigns.

"NJUNS" means the National Joint Utilities Notification System or a substantially comparable electronic communication system that both Parties agree, in writing, to use.

"NJUNS Ticket" means the electronic communication provided by NJUNS, or its equivalent, used by both Parties to communicate activities and dates related to a Pole.

"Normal Joint Pole" means a forty (40) foot, fully treated, wood Pole, classified by the American National Standards Institute as a class three (3) Pole.

"Owner" means, with respect to a Pole, the Party that owns in whole or in part the Pole.

"Pole" means a utility pole located within the State of Washington owned in whole or in part by a Party.

"Puget's Annual Rate and Puget's Annual Rental Rate" shall have their respective meanings specified in paragraph 6.1.1.

"Replacing Party" means the Party replacing, relocating, or removing a Pole.

"Sole Owner" means, with respect to a Pole, the Party that owns in whole the Pole.

"Verizon's Annual Rate and Verizon's Annual Rental Rate" shall have their respective meanings specified in paragraph 6.1.2.

"Term" means the term of this Agreement specified in paragraph 14.

"Terminating Party" shall have meaning specified in Section 14.

"User" means, with respect to a Pole, the Party that has, or desires to have, its Equipment attached to the Pole that is owned in whole or in part by the other Party.

"Value-In-Place" means the then current cost that would be incurred to replace a Pole, reduced to reflect ordinary wear and tear, all determined in accordance with methods established and consistently applied by the Parties. For purposes of determining Value-In-Place, the cost to replace a Pole shall include, but not necessarily be limited to, the following:

> The cost to remove the replaced Pole; the cost of a replacement Pole; the cost to furnish all labor,equipment, tools, materials, handling, engineering, supervision, services, transportation and other items to install the Pole; the cost to replace anchors and grounding material for the Pole; the cost of acquiring and maintaining all permits, licenses, franchises, and other rights associated with the Pole; and a reasonable allowance for overhead, general administrative and other indirect costs.

"Work" means any attaching, moving, maintaining, repairing, replacing or removing of any Equipment related to a Joint Pole; any installing, relocating, maintaining, repairing, replacing or removing of a Joint Pole; and any other work by a Party or any of its contractors or suppliers of any tier in connection with a Joint Pole or any Equipment related to a Joint Pole.

Section 2 Attachments

2.1 Restriction

The User shall not attach any Equipment to any Pole without the Owner's prior Consent. Such Consent shall not be unreasonably withheld in the case of a Pole owned by both Parties. In the case of a Pole in which the User has no ownership interest, the Owner may withhold its Consent for any or no reason whatever, subject to the applicable Federal or State law, rule, or regulation. This Agreement shall not in itself constitute any such Consent. The User shall, upon the Owner's request, promptly remove any Equipment attached to any Pole without the Owner's Consent.

The User may install service drops to unpermitted Poles without the Owner's prior Consent provided that the Application for the newly installed service drop is received by the Owner within ten (10) days following the date the service drop was installed. An Application for a newly installed service drop is not required on Poles for which the Owner has previously granted Consent for attachment of User's Equipment.

2.2 Application

A Party desiring to attach any of its Equipment, other than service drops, to any Pole owned in whole or in part by the other Party shall submit to the other Party an Application therefor. Each Application shall describe in detail:

(a) the User's Equipment to be attached;

(b) the Owner's Poles that will be affected by the attachment;

(c) the amount of space desired by the User on each of the Owner's Poles that will be affected by the attachment;

(d) the proposed location of the User's Equipment on the Owner's Poles that will be affected by the attachment;

(e) the approximate dates on which the User will make the attachment; and

(f) the action that the User proposes in order to satisfy the obligations under paragraph 2.4 below to accommodate the additional strain that will be imposed upon the Owner's Poles that will be affected by the attachment.

Each Application shall also include working sketches and such other information (for example, with regard to the proposed nature, appearance, circuit arrangement, line sags and location of the User's Equipment) as the Owner may reasonably request. The Owner shall endeavor to process and respond to each Application submitted by the User within thirty (30) calendar days after the Owner's receipt of such Application.

2.3 Making an Attachment

If the Owner gives its Consent to attachment of the User's Equipment, the User shall make the attachment only in strict accordance with:

(a) the Application therefor;

(b) any conditions or qualifications set forth in the Owner's Consent thereto; and

(c) the provisions of this Agreement.

2.4 Guys and Anchors

If existing anchors are adequate in size and strength to support the Equipment of both Parties, the User may attach its guys to such existing anchors at no cost. If existing anchors are not adequate, the User shall at its sole expense install all anchors necessary to support the additional strain imposed on any Pole by attachment of the User's Equipment. Guys shall be installed at the sole expense of the Party requiring such guys. If the Owner installs or replaces any guys or anchors to support the additional strain imposed on any Pole by attachment of the User's Equipment, the User shall reimburse the Owner on demand for the entire costs of such installation or replacement (including, but not limited to, the cost of installing or transferring guys to such anchors).

2.5 Removal of User's Equipment

The User may at any time remove any or all of its Equipment from any Joint Pole. The User shall give the Owner written or electronic notice of any removal of the User's

Equipment from any Joint Pole. The date on which the NJUNS Ticket is closed shall be the effective date that the User's Equipment has been removed from said Pole.

2.6 Specifications for Attachments

Each Party shall endeavor to use all attachments of its Equipment to any Joint Pole in accordance with all applicable:

(a) laws, ordinances, rules, regulations, orders, licenses, permits, and other requirements of governmental authorities; and

(b) the Owner's standard practices, specifications, rules and regulations, a copy of which will be provided by the Owner to the User upon request.

Section 3 Installing, Replacing, Relocating and Removing Joint Poles; Transfers

Whenever a Party plans to install, replace, relocate, or remove a Joint Pole, such Party shall notify the other Party of its intentions by issuing a NJUNS Ticket. Each Party shall update the NJUNS Ticket in a timely manner when such Party's scheduled task on said NJUNS ticket has been completed. Information in the NJUNS Ticket may be augmented by paper records, such as maps and work sketches, and by oral communications.

If Verizon installs, replaces, relocates, or removes a Joint Pole, Verizon shall ensure that all activities required to be performed by qualified electrical workers, in accordance with the Washington Administrative Code, are, in fact, performed by such workers.

3.1 Installing, Replacing, Relocating and Removing Joint Poles

3.1.1 Notice

If the Sole Owner of a Joint Pole desires to install, replace, relocate, or remove such Pole, such Sole Owner shall provide the User advance written or electronic notice of such Work. Further, the Sole Owner shall provide the User, to the extent necessary to accommodate the requirements of the User's existing Equipment, a reasonable opportunity to participate in the design, engineering and other planning of any additional, replacement or relocated Joint Pole as well as the Work related to the installing, replacing, relocating or removing of any Joint Pole. The User shall fully cooperate with the Sole Owner ~~regarding~~ and be solely responsible for any attaching, moving, relocating or removing of (or other Work related to) the User's Equipment required to effectuate the expeditious, efficient and orderly installing, replacing, relocating or removing of a Joint Pole by the Sole Owner. If the Sole Owner gives the User at least thirty (30) days' advance written or electronic notice of Work to be performed by the User following the date all third parties have vacated the Joint Pole, the User will reimburse the Sole Owner according to Appendix III for all costs incurred by the Sole Owner as a result of any failure of the User to timely perform such Work.

3.1.2 Pole Placed in Same Hole

If the Joint Pole to be replaced has User's Equipment, such as risers, attached, then the Sole Owner will position the replacement Pole in the same hole as the replaced Pole previously occupied if feasible.

3.1.3 Pole Size

The Sole Owner shall provide a Pole of height, strength, class, and at a location suitable for attachment of the User's Equipment; provided, however, that in the case of installation or replacement requiring additional or extraordinary measures to provide a location suitable for the User's Equipment, such User shall reimburse the replacing Party for expenses associated with such measures.

3.1.4 Jointly Owned Poles

If the Replacing Party desires to replace, remove, or relocate a Joint Pole of which such Replacing Party is not the Sole Owner, the Replacing Party shall provide the other Party advance written or electronic notice of such Work. Further, the Replacing Party shall provide the other Party, to the extent necessary to accommodate the requirements of the other Party's existing Equipment, a reasonable opportunity to participate in the design, engineering, and other planning of any replacement or relocated Joint Pole. The other Party shall fully cooperate with the Replacing Party regarding, and be solely responsible for, any attaching, moving, relocating, or removing of (or other Work related to) the other Party's Equipment required to effectuate the expeditious, efficient and orderly replacing, relocating, or removing of a Joint Pole by the Replacing Party. If the Sole Owner gives the User at least thirty (30) days' advance written or electronic notice of Work to be performed by the User following the date all third parties have vacated the Joint Pole, the User will reimburse the Owner for all costs incurred by the Owner as a result of any failure of the User to timely perform such Work.

3.2 Transfer of Equipment to the New Pole

3.2.1 Puget Transfers Verizon's Equipment

If Puget replaces an existing Joint Pole, Puget will transfer its Equipment to the replacement Pole. Puget may also transfer Verizon's Equipment with Verizon's prior approval. The physical transfer shall be made at the sole risk and expense of Verizon. If Puget transfers Verizon's Equipment to the replacement Pole in conjunction with the time Puget is transferring its own Equipment to the replacement Pole, Verizon shall reimburse Puget for any and all costs and expenses incurred in connection with such transfer in accordance with Appendix III, "First Trip Costs," which may be amended from time to time.

3.2.2 Puget Does Not Transfer Verizon's Equipment

If Puget replaces a Joint Pole and Puget does not have Verizon's approval or is otherwise unable to transfer Verizon's Equipment to the replacement Pole, then Puget may remove the upper portion of the replaced Pole at a point approximately one (1) foot above the highest communications attachment and Verizon shall reimburse Puget in accordance with Appendix III. When Verizon has transferred its Equipment to the replacement Pole, Verizon shall remove the topped, replaced Pole (back-fill and restore the surface of the ground) and deliver the replaced Pole to the nearest Puget yard for disposal. Along with each such delivered Pole, Verizon shall supply to Puget a written record showing Puget's Pole number.

Puget shall reimburse Verizon in accordance with Appendix III for such Work. Verizon shall promptly update the NJUNS Ticket.

If Verizon fails, after thirty (30) days notice on the NJUNS Ticket from Puget following the removal of all third party attachments to the Pole, to transfer its Equipment from the replaced Pole to the replacement Pole and perform such other Work as described in this section 3.2.2, Puget may have such Work performed by a licensed contractor competent to perform such Work and charge Verizon costs for such Work in accordance with Appendix III, "Return Trip Costs."

3.3 Pole Removal

If the Sole Owner of a Joint Pole desires to remove such Pole, such Sole Owner shall provide the User advance written or electronic notice of such Work. Further, the Sole Owner shall provide the User, to the extent necessary to accommodate the requirements of the User's existing Equipment, a reasonable opportunity to participate in the design, engineering and other planning of any Work related to the removing of any Joint Pole.

Section 4 Expense of Installing, Replacing, Relocating and Removing Poles

4.1 General

The Sole Owner of a Joint Pole shall maintain such Joint Pole in a safe and serviceable condition and in accordance with the requirements of the NESC and shall replace, reinforce, or repair such Pole should it become defective.

Except as otherwise expressly provided in this Agreement, the installation, replacement, relocation, and removal of any solely owned Pole shall be at the sole expense of the Sole Owner.

4.2 User's Sole Requirements (Installing Additional Joint Poles)

In the case of installing an additional Joint Pole (such as an interset or midspan Pole) solely to accommodate the requirements of the User:

(a) the Sole Owner of the new Pole shall bear the cost of the Pole, the crossarms, guys, anchors, and associated hardware items; and

(b) the User shall bear the cost for all labor, tools, materials handling, engineering, and other ancillary items to install the Pole; and

(c) the User shall bear the cost of attaching the Sole Owner's Equipment to such Pole.

4.3 User's Sole Requirements (Owner Replaces Existing Joint Poles)

In the case of the Sole Owner replacing an existing Joint Pole solely to accommodate the requirements of the User:

(a) the Sole Owner shall bear the cost of the Pole, the crossarms, guys, anchors, and associated hardware items; and

(b) the User shall bear the cost for all labor, tools, materials handling, engineering, and other ancillary items to install the Pole; and

(c) the User shall bear the cost of transferring the Sole Owner's Equipment from the replaced Pole to the Replacement Pole.

4.4 User's Sole Requirements (User Replaces Existing Joint Poles)

If the User of an existing Joint Pole, having received the prior approval of the Sole Owner, replaces such Joint Pole with a new Joint Pole, the Parties shall jointly determine the costs to be recovered by the User. If the User of an existing Joint Pole replaces such Pole without the prior approval of the Sole Owner, the User shall bear the full cost of replacement.

4.5 Taller or Stronger Poles

In the case of installing a Joint Pole (whether an additional Joint Pole or to replace an existing Joint Pole) that is taller or stronger than a Normal Joint Pole, the following shall apply:

(a) If the height or strength in excess of the height or strength of a Normal Joint Pole is solely to accommodate the requirements of the User, then the User shall pay to the Owner an amount equal to the difference between the Value-in-Place of such Joint Pole and the Value-in-Place of a Normal Joint Pole, determined at the time of such installation; and

(b) If the height or strength in excess of the height or strength of a Normal Joint Pole is to satisfy the requirements of both Parties, then:

(i) if Puget is the Sole Owner, Verizon shall pay to Puget an amount equal to forty percent (40%) of the difference between the Value-in-Place of such Joint Pole and the Value-in-Place of a Normal Joint Pole, determined as of the time of such installation; or

(ii) If Verizon is the Sole owner, Puget shall pay to Verizon an amount equal to sixty percent (60%) of the difference between the Value-in-Place of such Joint Pole and the Value-in-Place of a Normal Joint Pole, determined as of the time of such installation.

4.6 Maintenance of Joint Poles

In connection with a Party's inspection or treatment program for wood decay of any of its own Poles, such Party may, at its option and with the prior consent of the other Party, so inspect and treat any Joint Poles owned by the other Party which are located in the same geographic area as the inspecting Party's Poles. Such other Party agrees to accept the results of inspections performed in accordance with agreed-upon Joint Pole testing and maintenance procedures; such results include but are not limited to the determination to replace Poles, where such replacement is shown by the inspection to be necessary. The other Party releases each of the inspecting Party's Indemnitees from any responsibility or liability arising out of any inspection or treatment under this paragraph; this release shall apply regardless of any act, omission, fault, negligence, or strict liability of any of the inspecting Party's Indemnitees.

4.7 Cross Arms

In the case of installing, maintaining, and owning a cross arm for communication conductors on a solely owned Pole, the Sole Owner of the Pole shall bear the cost to provide, install, and maintain the cross arm. In the case a Pole owned in part by both Parties, Puget shall provide, install, and maintain the cross arm for communication conductors and administer attachments on the cross arm.

4.8 Replacement of Joint Poles Owned by Both Parties

4.8.1 Replacing a Serviceable Pole

The Replacing Party replacing a serviceable Joint Pole owned by both Parties shall:

(a) bear the cost to provide and install the replacement Pole; and

(b) remove and dispose of the replaced Pole, backfill and restore the surface of the ground; and

(c) reimburse the other Party for the cost of transferring such other Party's Equipment from the replaced Pole to the replacement Pole, except that, in the case of a relocation required by a governmental authority, each Party shall bear the cost of transferring its Equipment from the replaced Pole to the replacement Pole.

4.8.2 Replacing a Defective or Damaged Pole

The Replacing Party replacing a defective or damaged Joint Pole owned, in part, by both Parties shall provide to the other Party an itemized invoice for the cost of the replacement Pole, its installation, and the cost to remove the replaced Pole and to back-fill and restore the surface of the ground. The Parties shall share in such costs with Puget paying sixty percent (60%) and Verizon paying forty percent (40%) of such costs. Each Party shall bear the cost of transferring its Equipment from the replaced Pole to the replacement Pole.

4.8.3 Costs for Replacing a Pole

In the cases described in 4.8.1 and 4.8.2 above, the Replacing Party shall provide the other Party a NJUNS Ticket . If the other Party fails, after thirty (30) days notice on the NJUNS Ticket from the Replacing Party, to transfer its Equipment from the replaced Pole to the replacement Pole, the Replacing Party may at the other Party's expense, have such Work performed by a licensed contractor competent to perform such Work.

4.9 Relocating Existing Poles

In the case of relocating an existing Pole solely to accommodate the requirements of the User, the User shall reimburse the Owner for all costs of such relocating.

4.10 Ownership

Each Party hereby reserves all rights with respect to each Joint Pole to which it is an Owner. Other than pursuant to Section 7 hereto, a Party shall not acquire or increase any ownership interest in a Joint Pole to which the other Party is an Owner by virtue of

replacement, relocation or maintenance performed on such Joint Pole, or any payments made by a Party to the other Party with respect thereto.

4.11 Hazardous Waste Disposal Expenses

The Parties acknowledge that during the period covered by this Agreement, an agency of the federal, state or local government may classify chemicals used as a preservative or other treatment of the Poles as hazardous waste or toxic waste requiring special disposal procedures. The Party that is the Sole Owner of a given pole at the time of disposal shall bear the full cost of any special disposal procedures. The cost of any special disposal procedures shall be split between the Parties with Puget paying sixty percent (60%) and Verizon paying forty percent (40%) for any poles that are jointly owned by both Parties.

Section 5 Audits

The process of comparing a Party's Joint Pole records and the Equipment attached thereto with what is actually found in the field and correcting such records to reflect what was found in field is known as an audit. An audit conducted by both Parties simultaneously, in concert, and for an area agreed to by both Parties, is known as a "Joint Audit."

5.1 Joint Audits Preferred

The purpose of a Joint Audit is to correct any deficiencies in each Party's records regarding the Equipment attached to the Joint Poles and the ownership of such Joint Poles. The Parties agree that Joint Audits should be performed at least every eight (8) years..

5.2 Joint Audits

While participating in a Joint Audit, each Party shall cooperate with the other Party to identify and resolve any difference in their respective records. A Joint Audit may be conducted on all or any portion of the Joint Poles and the Equipment attached thereto. If any such Joint Audit discloses differences, discrepancies, or omissions in the records of the Parties, the Parties shall endeavor to quickly resolve and correct such differences; discrepancies, or omissions to the satisfaction of both Parties.

Any differences, discrepancies, or omissions in the Parties' records resulting from the Joint Audit that, if corrected, would result in the payment of fees by one Party to the other Party shall be limited to five (5) years back rent without interest. Such fees, if any, shall be paid immediately.

For any Joint Audit currently underway at the beginning of the Term of this Agreement, neither Party shall be liable for back rent payable to the other Party if any such liability should be found as a result of the Joint Audit.

5.3 Unilateral Audits

If more than eight (8) years has elapsed since the commencement of the field work of the last previous Joint Audit, then either Party may, at its option and cost, conduct an audit of all or any portion of the Joint Poles and the Equipment attached thereto. If any such audit discloses that the other Party has failed to pay any fees or other amounts properly payable hereunder, such other Party shall immediately pay to the auditing Party the full amount of

such deficiency, plus interest thereon in accordance with paragraph 6.3. If the deficiency disclosed by such audit exceeds ten percent (10%) of the total fees properly payable by the audited Party for the period of time covered by the audit, such Party shall immediately pay or reimburse all costs incurred by the auditing Party to conduct the audit.

Section 6 Payments

6.1 Annual Rate

6.1.1 Rate Schedules

The term "Annual Rate" shall mean the annual charge in effect from time to time for one Party's use of the other Party's solely owned Poles as calculated in accordance with the formulas set forth in Appendix IV. The formula in Schedule 1 of Appendix IV applies to those Joint Poles owned solely by Puget. The formula in Schedule 2 of Appendix IV applies to those Joint Poles owned solely by Verizon. The Annual Rate formula for each Party in effect on the date of this Agreement is set forth in Appendix IV.

The formulas in Schedules 1 and 2 of Appendix IV provide the means to adjust the Annual Rate by inserting the then current values into the elements of the formulas. The formulas, their elements, and their calculations shall not be revised during the Term of this Agreement except as provided in paragraph 6.1.2

6.1.2 Revision of the Annual Rate Formula

Notwithstanding the foregoing paragraph 6.1.1, the formulas to determine the Annual Rate shown in Schedules 1 and 2 of Appendix IV may be revised during the Term by mutual agreement between the Parties or by the imposition of a revision by the WUTC or other governmental authority with jurisdiction is such matters.

6.1.3 Effective Date of Revisions to the Annual Rate

Except for the provision in this paragraph 6.1.3, any revisions to the Annual Rate formulas in Appendix IV shall be effective on a date agreed to by both Parties or on the date imposed by the governmental authority with jurisdiction is such matters.

6.2 Annual Fees

6.2.1 Fees Paid to Puget

As soon as practicable after each April 30 occurring after the date of this agreement, Puget shall determine, as of such April 30:

(a) the number of Joint Poles owned by Puget; and

(b) the Annual Rate for each Joint Pole owned by solely Puget calculated in accordance with Schedule 1 of Appendix IV.

Verizon shall pay to Puget for the calendar year (i.e. January 1 through December 31) which includes such April 30, above, an amount equal to the Annual Rate

(determined in accordance with paragraph 6.2.1 (b)) multiplied by the number of Joint Poles solely owned by Puget.

6.2.2 Fees Paid to Verizon

As soon as practicable after each April 30 occurring after the date of this agreement, Verizon shall determine, as of such April 30:

(a) the number of Joint Poles owned by Verizon to which Puget has primary attachments;

(b) the number of Joint Poles owned by Verizon to which Puget has secondary attachments; and

(c) the Annual Rate for each Joint Pole owned solely by Verizon calculated in accordance with Schedule 2 of Appendix IV.

Puget shall pay to Verizon for the calendar year (i.e. January 1 through December 31) which includes such April 30, above, an amount equal to the Annual Rate (determined in accordance with paragraph 6.2.2 (b)) multiplied by the number of Joint Poles solely owned by Verizon.

6.3 Payment Terms

All amounts payable by one Party to the other pursuant to this Agreement shall be paid within thirty (30) days after the owing Party's receipt of a correct invoice from the billing Party, supported by such documents and information as the owing Party may reasonably request to verify the invoice. A Party performing any Work, the expense of which is to be borne by the other Party, shall submit its invoice therefor promptly after completion of such Work; any such invoice shall be supported by a detailed itemization of such expense and such other information as the owing Party may reasonably request to verify the amount owing.

Any amounts not paid when due under this Agreement shall bear interest, compounded daily, at the rate of one-and-one-half percent (1.5%) per month or the maximum rate permitted by applicable law, whichever is less, from the date due until the date paid. Payment of such interest shall not excuse or cure any breach of or default under this Agreement.

6.4 Addresses for Invoices

Unless otherwise directed by Verizon, Puget shall submit all of its invoices for payments by Verizon by mailing to the following address:

Verizon Northwest Inc.
Attn. Joint Use Mailstop WA0103NP
PO Box 1003
Everett, WA 98206-1003

Unless otherwise directed by Puget, Verizon shall submit all of its invoices for payment to Puget by mailing to the following address:

Puget Sound Energy, Inc.
Attn. Joint Facilities Administrator
PO Box 90868 GEN-02W
Bellevue, WA 98009-0868

Section 7 Abandonment of Joint Poles

7.1 Notice

If the Owner of a Joint Pole, whether a Sole Owner or Joint Owner (the "Abandoner"), desires at any time to abandon the use of and ownership interest in that Joint Pole (the "Abandoned Pole") to the User or other Joint Owner (the "Abandonee") of the Abandoned Pole, the Abandoner shall give the Abandonee written or electronic notice, such as a NJUNS Ticket ("Abandonment Notice"). The Abandonee may reject the transfer of title by so designating in its response to the Abandonment Notice within thirty (30) days from the date of the Abandonment Notice.

The Abandonment Notice must state:

(a) the Abandoner's intention to abandon the use and ownership of the Abandoned Pole to the Abandonee;

(b) the date (the "Abandonment Date"), not less than thirty (30) days after the date on which the Abandonment Notice is sent by the Abandonee, by which the Abandoner intends to remove all of its Equipment from the Abandoned Pole; and

(c) a description of any attachment of Another's Equipment to the Abandoned Pole ("Another" and "Another's Equipment" are defined below in paragraph 10.1).

7.2 Transfer of Title

Title to the Abandoned Pole shall automatically transfer from the Abandoner to the Abandonee at the close of business on the Abandonment Date provided that:

(a) the Abandoner has removed all of its Equipment from the Abandoned Pole on or before the Abandonment Date, and

(b) the Abandonee has not removed all of its Equipment from the Abandoned Pole prior to the Abandonment Date.

The NJUNS Ticket shall serve as evidence of transfer of title. Any attachments by Another shall be governed by the license agreement between the new Sole Owner and the Another as of the close of business on the Abandonment Date.

7.3 Indemnity

If title of an Abandoned Pole is transferred to the Abandonee, the Abandonee shall release, defend, indemnify and hold harmless the Abandoner, its successors and assigns and the respective directors, officers, employees, agents and representatives of the Abandoner and its successors and assigns (collectively, the "Abandoner Indemnitees") from all claims, losses, harm, costs, liabilities, damages and expenses (including, but not limited to,

reasonable attorneys' fees) arising after the date of such transfer on account of the placement or otherwise in connection with the Abandoned Pole. To the fullest extent permitted by applicable law, this release, defense, indemnity and hold harmless shall apply regardless of any act, omission, fault, negligence, or strict liability of any of the Abandoner Indemnitees.

Section 8 Performance of Work

8.1 General

Each Party shall furnish all personnel, supervision, labor, transportation, tools, equipment, materials and other items for performance of its Work under this Agreement. Each Party shall perform its Work in accordance with its own methods in an expeditious, efficient, safe, orderly and workmanlike manner. Each Party shall ensure that all personnel who perform its Work shall be fully experienced and properly qualified to perform the same.

8.2 Protection of Property and Persons

Each Party shall take appropriate precautions to prevent bodily injury (including death) to persons and damage to any property or environment arising in connection with such Party's performance of Work or any attachment of such Party's Equipment to a Joint Pole. Such precautions may include, but are not necessarily limited to, the erection and maintenance of barricades, signs, flags, flashers and other safeguards. Any Party performing Work shall, prior to such performance, inspect the site of such Work and all materials, tools, equipment (including, but not limited to, the Equipment), Poles and other items related to such Work to discover any conditions involving a risk of bodily injury to persons or a risk of damage to any property or environment and shall be solely responsible for the discovery of and protection against any such conditions.

8.3 Restoration

All property (including, but not limited to, Poles and Equipment) damaged in connection with a Party's performance of Work shall be promptly repaired, replaced or otherwise restored by or at the expense of such Party to at least as good quality and condition as existed prior to such damaging.

8.4 Electric Circuits

Prior to performing any Work, Verizon shall satisfy itself as to the nature of the electric circuits attached to the Poles to which such Work relates. Verizon shall ensure that such circuits continue in normal operation at all times during performance of Work by Verizon. Verizon shall take all precautions which are necessary to prevent bodily injury (including death) and property damage resulting from such circuits in the course of performing its Work.

8.5 Communication Circuits

Prior to performing any Work, Puget shall satisfy itself as to the nature of the communication circuits attached to the Poles to which such Work relates. Puget shall ensure that such circuits continue in normal operation at all times during performance of Work by

Puget. Puget shall take all precautions which are necessary to prevent bodily injury (including death) and property damage resulting from such circuits in the course of performing its Work.

8.6 Emergencies

In the event of an emergency, a Party may, after making a reasonable attempt to contact the other Party , replace a damaged Pole, relocate the other Party's Equipment, and take such other action affecting the Equipment and Joint Poles owned by the other Party as the Party taking such action deems appropriate under the circumstances, all at the risk of the other Party if the other Party is not present to make such transfers. The Party replacing the Pole and transferring the other Party's Equipment will submit an itemized invoice for the cost of the materials and work performed. Ownership of the Pole will remain with the original Owner or Owners..

The Party performing the work shall inform the other Party if the work is temporary in nature.

8.7 Ground Wires

In the case of a Joint Pole, a Party may connect the ground wires of its Equipment to the other Party's pole grounds where such connections are required by the National Electric Safety Code.

8.8 Cooperation and Coordination

Each Party acknowledges and anticipates that its Work may be interfered with and delayed on account of the concurrent performance of Work by the other Party. Each Party shall fully cooperate with the other Party and coordinate its own Work with the other Party's Work so as to minimize any delay or hindrance of any Work.

8.9 Defects in Other Work

A Party whose Work depends upon the results of Work by the other Party shall, prior to commencing its Work, notify the other Party in writing or electronically of any actual or apparent deficiencies or defects in such other Party's Work that render such other Party's Work unsuitable.

8.10 Liens

Each Party shall timely pay all (and shall promptly secure the discharge of any liens asserted by any) persons and entities furnishing labor, equipment, materials or other items in connection with its Work.

8.11 Inspection

All Work and Equipment attached to any Joint Pole shall at all times be subject to inspection and testing by either Party.

8.12 Work Areas

Each Party shall at all times keep its work areas cleared of rubbish, refuse and other debris and in a neat, clean, sanitary and safe condition. Upon completion of any of its Work,

such Party shall promptly remove all rubbish, refuse and other debris and all of its equipment and surplus materials.

Section 9 Equal Opportunity

9.1 Compliance

Each Party shall comply with Executive Order No. 11246, Executive Order No. 11701, the Vietnam Era Veterans' Readjustment Act of 1972 and the Rehabilitation Act of 1973, and all orders, rules and regulations promulgated thereunder (including, but not limited to, 41 CFR Part 60-1, 41 CFR Part 60-250 and 41 CFR Part 60-741), all as the same may have been or may be amended.

9.2 Incorporation

The "equal opportunity clause" of 41 CFR Section 60-1.4(a), the "Affirmative Action Obligations for Disabled Veterans and Veterans of the Vietnam Era" clause of 41 CFR Section 60-250.4 and the "Affirmative Action for Handicapped Workers" clause of 41 CFR Section 60-741.4 are by this reference incorporated in this Agreement.

9.3 Certification

Each Party certifies that segregated facilities (within the meaning of 41 CFR Section 60-1.8) are not and will not be maintained or provided for such Party's employees and that such Party will not permit its employees to perform their services at any location under such Party's control where segregated facilities are maintained. Each Party shall obtain a similar certification from any of its subcontractors, vendors or suppliers performing Work as required by 41 CFR Section 60-1.8.

Section 10 Attachments by Another

10.1 General

A Party may permit (by lease, license or otherwise) any cable television company, any telecommunications carrier, any municipal corporation or other governmental authority, or any other person or entity ("Another") to attach any crossarms, wires, cables, cable clamps, guys, brackets, equipment, equipment enclosures, transformers, street lights, circuits (e.g., fire alarm, police alarm and traffic signal circuits) or other items (collectively, "Another's Equipment") to any Joint Pole owned solely by such Party. Such Party shall not have any authority by virtue of this Agreement to permit attachment of Another's Equipment to any Joint Pole with respect to which such Party is not the Sole Owner except as provided for in paragraph 10.5 below.

10.2 Making an Attachment

The Party who permits attachment of Another's Equipment to a Joint Pole as provided for in paragraph 10.1 shall be responsible for the administration of the agreement granting such permission and shall be entitled to any and all revenues under such agreement. Further, such Party shall ensure that the attachment is made in strict accordance with the provisions of this Agreement (other than Section 11). Further, the provisions of this

Agreement (other than Section 11) shall apply to any such attachment as if the Another was the Party permitting the attachment and the Another's Equipment was such Party's Equipment.

10.3 Rearrangements of Equipment

The Party permitting attachment of Another's Equipment shall bear any costs associated with any resulting rearrangement of the other Party's Equipment.

10.4 Indemnity

The Party permitting the attachment of Another's Equipment shall release, defend, indemnify and hold harmless the Indemnitees of the other Party from all claims, losses, harm, costs, liabilities, damages, and expenses (including, but not limited to, reasonable attorneys' fees) arising in connection with such attachments of Another's Equipment to any Joint Pole. To the fullest extent permitted by applicable law, this release, defense, indemnity and hold harmless shall apply regardless of any act, omission, negligence, or strict liability of any of the Indemnitees of the other Party.

10.5 Jointly Owned Poles

In the case of Joint Poles that are owned in part by both Parties, Puget may permit the attachment of Another's Equipment to any such Joint Pole. Puget shall be responsible for the administration of the Agreement, granting Consent to Another, and collecting any and all rental fees under such agreement. Puget shall pay to Verizon thirty-three percent (33%) of any such rental fees collected. Further, Puget shall ensure that the Another's attachment is made in strict accordance with the provisions of this Agreement (other than Section 11) and that the provisions of this Agreement (other than Section 11) shall apply to any such attachment as if the Another were Puget and the Another's Equipment were Puget's Equipment.

Section 11 Damage to Property or Injury to Persons

11.1 Release and Indemnity

Each Party releases and shall defend, indemnify and hold harmless the other Party and the other Party's Indemnitees from all claims, losses, harm, liabilities, damages, costs, and expenses (including, but not limited to, reasonable attorney's fees for third-party personal injury and property damage) arising out of or in connection with any negligence, misconduct or other fault of the indemnifying Party or the performance or nonperformance of the indemnifying Party's obligations under this Agreement. To the fullest extent permitted by applicable law, the foregoing shall apply regardless of any fault, negligence, strict liability or product liability of any indemnified Party or Indemnitee and to any claim, action, suit or proceeding brought by any employees of either Party. However, neither Party shall be required to so defend, indemnify or hold harmless such indemnified Party or Indemnitee for any claim, loss, harm, liability, damage, cost or expense to the extent the same is caused by or results from the negligence of such indemnified Party or Indemnitee.

11.2 Notice of Claims

Each Party shall promptly notify the other Party of all material claims asserted against it arising in connection with interruption or loss of service by it or damage to any property or bodily injury (including death) to any persons, which service, damage or injury is related to any Joint Pole or any Equipment attached to any Joint Pole. Each Party shall, if requested by the other Party, cooperate with and permit participation by the other Party in any negotiations, settlement, action, suit or proceeding related to any such claims.

11.3 Waiver of Certain Immunities, Defenses and Protections Relating to Employee Injuries

In connection with any action to enforce a Party's obligations under Section 10.4 or 11.1 with respect to any claim arising out of any bodily injury (including death) to an employee of such Party, such Party waives any immunity, defense or protection under any workers' compensation, industrial insurance or similar laws (including but not limited to, the Washington Industrial Insurance Act, Title 51 of the Revised Code of Washington). This Section 11.3 shall not be interpreted or construed as a waiver of a Party's right to assert any such immunity, defense or protection directly against any of its own employees or such employee's estate or other representatives.

Section 12 Insurance

12.1 Workers' Compensation

Each Party shall ensure that, with respect to any persons performing its Work, such Party or its contractors or suppliers maintain in effect coverage or insurance in accordance with the applicable laws relating to workers' compensation and employer's liability insurance (including, but not limited to, the Washington Industrial Insurance Act), regardless of whether such coverage or insurance is mandatory or merely elective under the law.

12.2 Policy Provisions

Each Party shall ensure that any policies of insurance that it carries as insurance covering property damage related to any Joint Pole or any Equipment attached to a Joint Pole shall contain a waiver of the insurer's right of subrogation against the other Party Indemnitees. Further, each Party shall ensure that any policies of insurance that it carries as insurance covering liability for property damage or bodily injury (including death) contains a waiver of subrogation against the other Party Indemnitees, names the other Party Indemnitees as additional insureds or includes broad-form contractual coverage.

12.3 Evidence

Upon request, each Party shall furnish to the other Party Certificates of Insurance as provided for in Appendix I or evidence of self-insurance satisfactory to the other Party.

Section 13 Taxes

Each Party shall pay (or reimburse the other Party on demand for) all taxes, assessments, levies, duties, excises and governmental fees imposed upon, allocable to or

measured by the value of such Party's Equipment. The Owner shall pay all taxes, assessments, levies, duties, excises and governmental fees imposed upon, allocable to or measured by the value of Joint Poles, provided that the User shall reimburse the Owner for all taxes, assessments, levies, duties, excises and governmental fees imposed upon, allocable to or measured by the value of Joint Poles to which none of the Owner's Equipment is attached.

Section 14 Term

14.1 Duration

The term of this Agreement (the "Term") shall commence on the date of this Agreement and shall automatically terminate upon the first of the following to occur:

(a) Upon any one (1) year anniversary of the commencement of the Term, provided that either Party has given the other Party written notice of termination at least nine(9) months but not more than twelve (12) months prior to such anniversary; or

(b) written notice of termination is given by one Party (the "Terminating Party") to the other Party (the "Defaulting Party") in any event that:

(i) the Defaulting Party fails to pay when due the full amount of any fee or other payment payable under this Agreement to the Terminating Party and the Defaulting Party further fails to pay such amount within ten (10) days after the Terminating Party gives the Defaulting Party written notice of such failure;

(ii) the Defaulting Party breaches or defaults under this Agreement and further fails to cure such breach or default within thirty (30) days (or within such longer period as may reasonably be required to cure such breach or default) after the Terminating Party gives the Defaulting Party written notice of such breach or default; or

(iii) the Defaulting Party becomes insolvent, makes an assignment for the benefit of creditors or becomes the subject of any petition or order in bankruptcy whether voluntary or involuntary, or in any other proceeding under any bankruptcy, insolvency or receivership law.

14.2 Removal of Equipment

Upon termination of the Term, the User shall promptly remove all of its Equipment from the Joint Poles. If the User shall fail to remove all of its Equipment from the Joint Poles within one (1) year after the termination of the Term, the Owner may, after ten (10) days' advance written notice to the User of the Owner's intention to do so, remove and dispose of the User's Equipment at the User's sole risk and expense.

Section 15 Corrections of Noncompliances

15.1 General

The Parties agree that all Equipment attached to any Joint Pole and all Work performed shall be in compliance with the then current edition of the National Electric Safety Code.

If a Party directs the other Party to correct defective or noncomplying Work or to otherwise comply with the requirements of this Agreement and such other Party thereafter fails to comply or indicates its inability or unwillingness to comply, then the directing Party, upon ten (10) day's advance written or electronic notice to the other Party of its intention to do so, may correct (or cause to be corrected) the defect or noncompliance or otherwise achieve compliance by the most expeditious means available to it (by contract or otherwise) at the other Party's sole risk and expense.

15.2 Nonexclusive Remedy

The rights of a directing Party to make corrections and otherwise achieve compliance at the other Party's sole risk and expense are in addition to any and all other rights and remedies available to such Party under this Agreement or otherwise by law and shall in no event be construed or interpreted as obligating the directing Party to make any correction of defective or noncomplying Work or to otherwise achieve compliance with this Agreement. Further, the other Party's obligations shall not be interpreted or construed as being reduced in any way because of any corrections or other obligations performed (or caused to be performed) by the directing Party or the directing Party's rights to perform (or cause to be performed) the same.

Section 16 Miscellaneous

16.1 Notices

Any notice, request, authorization, consent, direction, or other communication under this Agreement (except as provided in paragraph 6.2) shall be given in writing and (a) with respect to routine communications for which a provision of this Agreement expressly provides for written or electronic notice, be delivered by e-mail, facsimile or as provided in (b), below, or (b) with respect to all other communications, be delivered in person or by first class U.S. mail, properly addressed and stamped with the required postage, in each case to the intended recipient as follows:

If to Puget:
Puget Sound Energy, Inc.
Attn. Joint Facilities Administrator
PO Box 90868 GEN-02W
Bellevue, WA 98009-0868

If to Verizon:
Verizon Northwest Inc.
Attn. Joint Use Mailstop WA0103NP
PO Box 1003
Everett, WA 98206-1003

Either Party may change its address specified above by giving the other Party notice of such change in accordance with this paragraph 16.1. All notices, requests, authorizations, directions, or other communications by a Party shall be deemed delivered when mailed as provided in this paragraph 16.1 or personally delivered to the other Party.

16.2 Records

Each Party shall provide to the other Party access during normal business hours to all of its records that relate to the Joint Poles, the Equipment attached to any Joint Pole, or this Agreement for examination, reproduction and audit by such other Party and, if required for such other Party's utility purposes or by law, for public record. Notwithstanding the foregoing, records associated with legal proceedings or claims shall be produced only upon mutual consent of the Parties or pursuant to discovery requests under the Rule of Civil Procedure applicable to the Superior Court proceedings.

16.3 Regulatory Approvals

If this Agreement and any ownership transfers of Poles or other property pursuant to this Agreement are subject to, and conditioned upon, approval by the WUTC, then the Party subject to the jurisdiction of the WUTC will promptly submit this Agreement to the WUTC and both Parties will actively support and take such additional action as may reasonably be required to promptly obtain such WUTC approval.

16.4 Assignment

A Party shall not assign or otherwise transfer, voluntarily or by operation of law, any interest in this Agreement, any Joint Pole or any of its Equipment attached to any Joint Pole, except:

(a) to any mortgagee, trustee or secured party, as security for bonds or other indebtedness, now or hereafter existing, of such Party or pursuant to any foreclosure or exercise of any power sale by any such mortgagee, trustee or secured party (or any transfer in lieu of such foreclosure or exercise), provided that upon any such assignment or transfer the person or entity acquiring the interests of such Party pursuant to the assignment or transfer assumes all of the obligations of such Party under this Agreement;

(b) to any person or entity into or with which such Party is merged or consolidated or to which such Party transfers substantially all of its assets, provided that upon any such assignment or transfer the person or entity acquiring the interests of such Party pursuant to the assignment or transfer assumes all of the obligations of such Party under this Agreement;

(c) to any government or municipal corporation or to any subdivision or agency of a government or municipal corporation, provided that upon any such assignment or transfer the person or entity acquiring the interests of such Party pursuant to the assignment or transfer assumes all of the obligations of such Party under this Agreement; or

(d) to any other person or entity with the Consent of the other Party.

16.5 Successors and Assigns

Subject to the restrictions on assignments described in paragraph 16.3, this Agreement shall be fully binding upon, inure to the benefit of and be enforceable by the successors, assigns and legal representatives of the respective Parties.

16.6 Attorneys' Fees

In the event of any action to enforce this Agreement, for interpretation or construction of this Agreement or on account of any breach of or default under this Agreement, the prevailing Party in such action shall be entitled to recover, in addition to all other relief, from the other Party all reasonable attorneys' fees incurred by the prevailing Party in connection with such action (including, but not limited to, any appeal thereof).

16.7 No Partnership

This Agreement shall not be interpreted or construed to create an association, joint venture, or partnership between the Parties or to impose any partnership obligations or liability upon either Party. Further, except as otherwise expressly provided in this Agreement, neither Party shall have any right, power or authority to enter into any agreement or undertaking for or on behalf of, to act as or be an agent or representative of, or to otherwise bind the other Party.

16.8 Nonwaiver

A Party's failure to insist upon or enforce strict performance by the other Party of any of the provisions of this Agreement or to exercise any rights under this Agreement shall not be construed as a waiver or relinquishment to any extent of the right to assert or rely upon any such provisions or rights in that or any other instance; rather, the same shall be and remain in full force and effect.

16.9 Survival

The obligations imposed upon the Parties under Sections 5, 6, 7, 10, 11, 12, 13, 14, 15 and 16, and all provisions of this Agreement which may reasonably be interpreted or construed as surviving the completion, termination or cancellation of this Agreement, shall survive the completion, termination or cancellation of this Agreement.

16.10 Entire Agreement

This Agreements sets forth the entire agreement of the Parties, and supersedes any and all prior agreements, with respect to the attachment of Equipment to the Joint Poles. This Agreement shall be construed as a whole. All provisions of this Agreement are intended to be correlative and complementary.

16.11 Amendment

No change, amendment, or modification of any provision of this Agreement shall be valid unless set forth in a written amendment to this Agreement signed by both Parties.

16.12 Implementation

Each Party shall take such action (including, but not limited to, the execution, acknowledgment and delivery of documents) as may reasonably be requested by the other Party for the implementation or continuing performance of this Agreement.

16.13 Invalid Provision

The invalidity or unenforceability of any provision of this Agreement shall not affect the other provisions hereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provisions were omitted.

16.14 Headings

The headings of sections and paragraphs of this Agreement are for convenience of reference only and are not intended to restrict, affect or be of any weight in the interpretation or construction of the provisions of such sections or paragraphs.

16.15 Applicable Law

This Agreement, and all questions concerning the capacity of the Parties, execution, validity (or invalidity) and performance of this Agreement, shall be interpreted, construed and enforced in all respects in accordance with the laws of the State of Washington.

16.16 Disputes

Any action, dispute, claim or controversy between or among the parties, whether sounding in contract, tort or otherwise, other than a matter within the regulatory authority of the Washington Utilities and Trade Commission or other governmental authority with proper jurisdiction, (a "Dispute"), shall, at the option of either Party, and at such Party's expense, be submitted to mediation, using either the American Arbitration Association ("AAA") or Judicial Arbitration and Mediation Services, Inc. ("JAMS") within thirty (30) days of the date on which the alleged events occurred to form the basis of the Dispute. If mediation is not used, or mediation fails to resolve the Dispute within 30 days from the date AAA or JAMS is engaged, then the parties may, at their option, initiate any and all appropriate legal action to resolve the Dispute. Notwithstanding the foregoing, the Parties shall act in good faith and use commercially reasonable efforts to resolve any Dispute prior to the initiation of mediation under this paragraph 16.16.

Section 17 Signatures

Verizon	Puget:
Verizon Northwest Inc.	Puget Sound Energy, Inc.
By: Karen G. LaBonte Karen G, Labonte	By: Jerry Ferencz Jerry Ferencz
Its: Director – Network Engineering & Planning, Pacific Region	**Its:** Director of Delivery Services
Date Signed: 12/2/02	**Date Signed:** 12/05/02
Address: Attn. Joint Use Mailstop WA0103NP PO Box 1003 Everett, WA 98206-1003	**Address:** Attn. Joint Facilities Administrator PO Box 90868 GEN-02W Bellevue, WA 98009-0868

APPROVED AS TO FORM
11/22/2002

LIST OF APPENDICES

Appendix I	Insurance Certificate referred to in paragraph 12.3
Appendix II	Application for Attachment referred to in paragraph 2.2
Appendix III	Transferring Communication Equipment referred to in paragraph 3.2
Appendix IV	Schedules 1 and 2

Appendix I

Insurance Certificate

Appendix II

Application or Job Number ☐ Date ☐

TO: PUGET SOUND ENERGY

FROM LICENSEE: _____

REPRESENTATIVE _____

NAME _____

ADDRESS _____

EMAIL/PHONE # _____ / _____

Please grant permission to occupy your poles in accordance with the conditions set forth in Pole Attachment Agreement, dated _____.

☐ Application for rental on _____ poles

☐ Termination for rental on _____ poles

DESCRIPTION OF WORK:

CABLE Overlashing ☐ new cable ☐

POLES

☐ PSE Universal maps attached with requested poles highlighted.

☐ Licensee's work sketch showing at least 95% of PSE grid numbers is attached.

☐ List of grid numbers is attached.

POWER SUPPLIES _____ will be installed. Pole list is attached and power supply specifications are included.

Failure to supply requested information may delay acceptance of the application.

☐ Application or notification accepted.
Billing of new contacts to be effective _____

LICENSOR PUGET SOUND ENERGY

BY _____ _____
PSE Engineer Date

Appendix III

Transferring Communication Equipment

FIRST TRIP COSTS - Cost of performing transfer work while Puget is in the process of doing its own work.

Crossarms, all types	$ 45.00
Anchor strand or overhead guy	45.00
Sidewalk anchor guy and pipe	55.00
Drop wire (no splicing)	45.00
Service Conduit	95.00
Messenger and cable bolted to pole or cable arm (no splicing)	50.00
Messenger dead-end	65.00
Cable riser (including pipe and molding – no splicing)	95.00
Cable terminal (no splicing)	55.00

RETURN TRIP COSTS - Cost of performing transfer work when Puget must return to the job site. The following amounts include travel time.

Crossarms, all types	$ 135.00
Anchor strand or overhead guy	135.00
Sidewalk anchor guy and pipe	165.00
Drop wire (no splicing)	150.00
Service Conduit	285.00
Messenger and cable bolted to pole or cable arm (no splicing)	135.00
Messenger dead-end	195.00
Cable riser (including pipe and molding – no splicing)	285.00
Cable terminal (no splicing)	165.00

Topping Charge	if one User attached	105.00
	if two or more Users attached	50.00

Verizon's lower & haul fee 250.00

Appendix IV

Schedule 1

Computation of Annual Rate for Poles Owned by Puget Sound Energy, Inc.

A.	Net Investment Per Bare Pole (PV)		
	(1) Investment in poles, towers, and fixtures (FERC Account 364)	$_____	
	(2) Less depreciation reserve associated with Item (1)	($_____)	
	(3) Less deferred federal income taxes associated with item (1)	($_____)	
	(4) Net investment in poles, towers, and fixtures	$_____	
	(5) Ration of bare pole total pole	0.85	
	(6) Value of all bare poles	$_____	
	(7) Easements (FERC Account 360 not including substations)	$_____	
	(8) Combined value of bare poles and easements	$_____	
	(9) Total number of distribution poles	_____	
			$_____ (PV)

B.	Annual Carrying charge (CC)		
	(1) Net pole depreciation	_____%	
	(2) Administrative and general expenses	_____%	
	(3) Maintenance	_____%	
	(4) Taxes	_____%	
	(5) Cost of capital (overall rate of return authorized by WUTC in latest PSE rate case)	_____%	
			$_____ (CC)

C.	Use Ratio per Pole (PV)		
	(1) Usable space on pole, in feet	13.5	
	(2) Effective space occupied by Verizon, in feet	2.0	
			$_____ (PR)

D.	Annual Pole Attachment Rate		
	(PV) X (CC) X (PR)		$_____

Appendix IV

Schedule 2

Computation of Annual Rate for Poles Owned by Verizon

A.	Net Investment Per Bare Pole (PV)		
	(1) Investment in poles, towers, and fixtures (ARMIS Account 2411)	$ _____	
	(2) Less depreciation reserve associated with Item (1)	($_____)	
	(3) Less deferred federal income taxes associated with item (1)	($_____)	
	(4) Net investment in poles, towers, and fixtures	$_____	
	(5) Ration of bare pole total pole	0.95	
	(6) Value of all bare poles	$_____	
	(7) Easements	$_____	
	(8) Combined value of bare poles and easements	$_____	
	(9) Total number of distribution poles	_____	
			$_____ (PV)

B.	Annual Carrying charge (CC)		
	(1) Net pole depreciation	_____%	
	(2) Administrative and general expenses	_____%	
	(3) Maintenance	_____%	
	(4) Taxes	_____%	
	(5) Cost of capital (overall rate of return authorized by WUTC in latest Verizon rate case)	_____%	
			$_____ (CC)

C.	Use Ratio per Pole (PV)		
	(1) Usable space on pole, in feet	13.5	
	(2) Effective space occupied by Puget attachments, in feet (a) Primary Poles (b) Secondary Poles	 7.5 2.0	
	(3) Use Ratio (a) Primary Poles (b) Secondary Poles		 55.556% (PR) 14.815% (PR)

D.	Annual Pole Attachment Rate		
	(PV) times (CC) times (PR) (a) Primary Poles (b) Secondary Poles		 $_____ $_____

AMENDMENT NO. 1
TO
POLE ATTACHMENT AGREEMENT
BETWEEN
VERIZON AND PUGET SOUND ENERGY AND LIGHT

The parties agree to the amendment to the contract dated August 1, 2002 as follows:

6.2.3 Net Billing. Without changing any obligations of the Parties and with prior Verizon concurrence, Puget may, in rendering invoices to Verizon pursuant to Section 6 of this Agreement, calculate an amount payable from Verizon to Puget which offsets the amounts payable by Puget to Verizon pursuant to paragraph 6.2.2.

Puget: Puget Sound Power & Light Company

By _____

Date Signed 11/4/04

Verizon: Verizon Northwest Inc.

By _____
Susan Schmautz
Verizon Network Engineering Manager

Date Signed 11/11/04

Exhibit H

Honorable Carol Schapira
Trial Date: 2/29/2016

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

PUGET SOUND ENERGY, INC., Plaintiff, v. FRONTIER COMMUNICATIONS NORTHWEST INC., Defendant.	No. 15-2-03142-2 SEA DEFENDANT FRONTIER COMMUNICATIONS NORTHWEST INC.'S ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS TO PLAINTIFF'S COMPLAINT

COMES NOW Defendant Frontier Communications Northwest Inc. ("Frontier") and answers Plaintiff Puget Sound Energy, Inc.'s ("PSE") Complaint as follows:

1. Denied.

2. Frontier is without sufficient knowledge or information to form a belief as to the truth of the allegations in paragraph 2 of the Complaint, and therefore denies them.

3. Frontier admits that it is a Washington corporation with its principal place of business in Snohomish County, Washington, that it provides telephone and other services to customers in the State of Washington, and that it owns utility poles throughout its service territory for the purposes of distributing its services to customers. The remaining allegations are denied.

4. Admitted.

K&L GATES LLP
ONE SW COLUMBIA STREET
SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

5. Frontier admits that there is a Pole Attachment Agreement (the "Agreement"), and that it contains what is set forth in the Agreement. The remaining allegations are denied.

6. Frontier admits that there is an Agreement, and that it contains what is set forth in the Agreement. The remaining allegations are denied.

7. Frontier admits that there is an Agreement, and that it contains what is set forth in the Agreement. The remaining allegations are denied.

8. Frontier admits that there is an Agreement, and that it contains what is set forth in the Agreement. The remaining allegations are denied.

9. Denied.

10. Frontier admits that the "total number of distribution poles" should account for its fractional interests in poles that Frontier jointly owns with another utility. The remaining allegations are denied.

11. Denied.

12. Denied.

13. Frontier admits that there is an Agreement, and that it contains what is set forth in the Agreement. The remaining allegations are denied.

14. Frontier admits that there is an Agreement, and that it contains what is set forth in the Agreement. The remaining allegations are denied.

15. Frontier admits that there is an Agreement, and that it contains what is set forth in the Agreement. The remaining allegations are denied.

16. Frontier admits that there is a PSE Statement Summary sent to Frontier, purportedly dated October 28, 2013. The remaining allegations are denied.

17. Frontier admits that PSE had been under-billed by $624,472.39 pursuant to the Agreement. The remaining allegations are denied.

K&L GATES LLP
ONE SW COLUMBIA STREET
SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

18. Frontier admits that there is a PSE Statement Summary sent to Frontier, purportedly dated September 30, 2014. The remaining allegations are denied.

19. Denied.

20. Frontier admits that there is an Agreement, and that it contains what is set forth in the Agreement. The remaining allegations are denied.

21. Denied.

22. Denied.

23. Frontier admits that PSE sent a Notice of Default/Breach to Frontier dated January 29, 2015, and that it contains what is set forth in the Notice. The remaining allegations are denied.

24. Frontier admits that there is an Agreement, and that it contains what is set forth in the Agreement. Frontier denies that there was a meaningful attempt at mediation. The remaining allegations are denied.

FIRST CAUSE OF ACTION

(Breach of Contract - 2013 Invoice)

25. Admit and deny the same as paragraphs 1 through 24.

26. Frontier admits that there is an Agreement, and that it contains what is set forth in the Agreement. The remaining allegations are denied.

27. Frontier admits that there is an Agreement, and that it contains what is set forth in the Agreement. The remaining allegations are denied.

28. Denied.

SECOND CAUSE OF ACTION

(Breach of Contract - 2014 Invoice)

29. Admit and deny the same as paragraphs 1 through 28.

K&L GATES LLP
ONE SW COLUMBIA STREET
SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

30. Frontier admits that there is an Agreement, and that it contains what is set forth in the Agreement. The remaining allegations are denied.

31. Frontier admits that there is an Agreement, and that it contains what is set forth in the Agreement. The remaining allegations are denied.

32. Denied.

THIRD CAUSE OF ACTION

(Anticipatory Breach of Contract - Forthcoming 2015 Invoice)

33. Admit and deny the same as paragraphs 1 through 32.

34. Frontier admits that there is an Agreement, and that it contains what is set forth in the Agreement. The remaining allegations are denied.

35. Denied

36. Denied.

FOURTH CAUSE OF ACTION

(Declaratory Judgment)

37. Admit and deny the same as paragraphs 1 through 36.

38. The allegations contained in Paragraph 38 contain a legal conclusion and therefore require no response. To the extent a response may be required, Frontier denies that Plaintiff is entitled to the relief it seeks.

39. The allegations contained in Paragraph 39 contain a legal conclusion and therefore require no response. To the extent a response may be required, Frontier denies that Plaintiff is entitled to the relief it seeks.

The allegations contained in the section identified as "Prayer for Relief" require no response. To the extent a response may be required, Frontier denies that Plaintiff is entitled to the relief it seeks.

K&L GATES LLP
ONE SW COLUMBIA STREET
SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

AFFIRMATIVE DEFENSES

Having fully answered Plaintiff's Complaint, and without assuming Plaintiff's burden of proof on any issue, Frontier raises the following affirmative defenses to Plaintiff's claims:

FIRST AFFIRMATIVE DEFENSE

(Payment)

1. Plaintiff is barred from obtaining relief, in whole or in part, due to payment.

SECOND AFFIRMATIVE DEFENSE

(Mutual Mistake)

2. Plaintiff is barred from obtaining relief, in whole or in part, due to mutual mistake.

THIRD AFFIRMATIVE DEFENSE

(Set-Off)

3. Any amount due Plaintiff is subject to valid set-offs and/or recoupment.

FOURTH AFFIRMATIVE DEFENSE

(Additional Affirmative Defenses)

4. Frontier reserves the right to plead additional defenses or counterclaims that may be identified during investigation and/or the course of discovery.

COUNTERCLAIMS

1. Frontier Communications Northwest, Inc. ("Frontier") incorporates herein by reference each and every allegation, answer, and denial contained in each of the above paragraphs.

K&L GATES LLP
ONE SW COLUMBIA STREET
SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

Parties

2. Frontier is a Washington corporation with its principal place of business in Snohomish County, Washington. Prior to July 1, 2010, Frontier's corporate name was Verizon Northwest Inc. ("Verizon").

3. On information and belief, Puget Sound Energy, Inc. ("PSE") is a Washington Corporation with its principal place of business in King County, Washington.

Factual Allegations

4. PSE and Verizon entered into a "Pole Attachment Agreement" dated August 1, 2002 (the "Agreement").

5. This dispute involves the proper method for calculating pole rental rates under the Agreement.

6. The Agreement is silent on how the term "distribution poles" should be calculated in the annual rate calculation.

7. The FCC's formula for pole attachment is based on "equivalent poles," which allows a pole owner to aggregate the number of partial poles it owns rather than count each partial ownership as a separately-owned pole.

8. One component in the calculation requires that the parties determine Frontier's "net investment per bare pole," which equals the amount actually invested by Frontier in all Frontier-owned poles (wholly- or partially-owned), divided by Frontier's total number of "distribution poles."

9. To accurately reflect that Frontier's investment includes both **wholly** owned poles, and poles it owns **jointly** with another utility, its total number of "distribution poles" equals the number of its solely owned poles plus the product of the number of its jointly-owned poles times its ownership percentage in those poles.

K&L GATES LLP
ONE SW COLUMBIA STREET
SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

10. From the inception of the Agreement, through the 2012 rental period, PSE and Frontier failed to account for the fact that over 70,000 of Frontier's poles are owned jointly with Snohomish County Public Utility District No. 1 ("Snohomish PUD"). Specifically, each jointly-owned pole was counted as 1 whole pole (100%) rather than 45% of a pole consistent with Frontier's actual 45% ownership percentage. Because Frontier's investment in the jointly-owned poles is only 45% of the cost of the pole -- the equivalent of owning 31,500 poles wholly -- but each of those 70,000 jointly-owned poles were used as the denominator to calculate the "net investment per bare pole", the error resulted in artificially lowering Frontier's "net investment per bare pole." Therefore, PSE paid a significantly lower pole attachment rental rate than it should have under the Agreement.

11. This error resulted in Frontier underbilling PSE by $624,472.39 over the life of the Agreement.

12. In 2013, Frontier notified PSE of this underbilling. After several discussions with PSE about this and other billing issues, Frontier limited the offset that it took from its pole rental payment for the 2013 rental period to the $333,136.78 it underbilled PSE during the preceding 6 years. .

13. PSE has notified Frontier that it disagrees with Frontier's calculation of the annual per pole rental rate that Frontier charges for PSE attachments on Frontier-owned poles under the Agreement.

14. Frontier issued payment for the net amount due to PSE, after deducting the off-set, for the 2013 rental year on or about October 24, 2014.

15. Frontier issued payment for the net amount due to PSE for the 2014 rental year on or about February 17, 2015.

K&L GATES LLP
ONE SW COLUMBIA STREET
SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

16. Section 16.6 of the Agreement entitles the prevailing party in any action to recover reasonable attorneys' fees.

17. Section 16.8 of the Agreement, entitled "Nonwaiver" indicates that a party's failure to strictly enforce any of its rights or provisions of the Agreement does not waive that party's right to assert its rights or provisions of the Agreement.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

(Declaratory Judgment)

1. Frontier repeats and realleges each and every allegation and denial set forth above as if recited here in full.

2. As a result of the undefined term ("distribution poles") in the Agreement, there is a justiciable issue of contract interpretation between the parties.

3. Pursuant to RCW 7.24, Frontier requests that the Court declare, adjudge and decree that the term "distribution poles" in the Agreement be defined as "equivalent poles" to account for poles Frontier owns wholly, and for those owned jointly with Snohomish County PUD, in accordance with the pole attachment formula promulgated by the FCC, in which "equivalent poles" are used to calculate annual rates.

SECOND CAUSE OF ACTION

(Attorneys' Fees)

4. Frontier repeats and realleges each and every allegation and denial set forth above as if recited here in full.

5. Pursuant to section 16.6 of the Agreement, Frontier is entitled to attorneys' fees accrued if it is deemed to be the prevailing party in this action.

K&L GATES LLP
ONE SW COLUMBIA STREET
SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

PRAYER FOR RELIEF

WHEREFORE, given Frontier's answer, affirmative defenses, and counterclaims, Frontier respectfully requests that this Court grant it the following relief:

A. That the Complaint be dismissed with prejudice and judgment granted in Frontier's favor;

B. On its First Claim for Relief, that the Court declare that the term "distribution poles" in the Agreement be defined as "equivalent poles" to account for poles Frontier owns wholly, and for those owned jointly with Snohomish County PUD, in accordance with the pole attachment formula promulgated by the FCC, in which "equivalent poles" are used to calculate annual rates. "distribution poles" in the Agreement are to be calculated using the FCC's "equivalent pole" methodology;

C. On its Second Claim for Relief, that the Court award Frontier its reasonable attorneys' fees, costs and disbursements incurred herein; and

D. Such further and additional relief as the Court deems just and equitable.

DATED this 6th day of March, 2015

K&L GATES LLP

By: s/ Stephanie E. L. McCleery
Román D. Hernández, WSBA #39939
Email: roman.hernandez@klgtes.com
Stephanie E. L. McCleery, WSBA #45089
Email: stephanie.mccleery@klgates.com
One SW Columbia Street
Suite 1900
Portland, OR 97258
(503) 228-3200

Attorneys for Defendant Frontier Communications Northwest, Inc.

K&L GATES LLP
ONE SW COLUMBIA STREET
SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2015, a true copy of the foregoing DEFENDANT FRONTIER COMMUNICATIONS NORTHWEST INC.'S ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS TO PLAINTIFF'S COMPLAINT was served on the following named person(s) via Email and US MAIL at their last known address as indicated below:

James F. Williams
Email: JWilliams@perkinscoie.com
Karen Brunton Bloom
Email: KBloom@perkinscoie.com
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099

Attorneys for Plaintiff Puget Sound Energy

DATED: March 6, 2015.

s/Stephanie E. L. McCleery
Stephanie E. L. McCleery

K&L GATES LLP
ONE SW COLUMBIA STREET
SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

Exhibit I

Honorable Carol A. Schapira
Hearing Date/Time:
September 11, 2015 at 9:00 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

PUGET SOUND ENERGY, INC.,

Plaintiff,

v.

FRONTIER COMMUNICATIONS NORTHWEST, INC.,

Defendant.

No. 15-2-03142-2 SEA

FRONTIER'S REPLY IN SUPPORT OF MOTION TO DISMISS OR, ALTERNATIVELY, TO STAY

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

TABLE OF CONTENTS

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

Contrary to PSE's characterization, nothing is "simple" or "straightforward" about this dispute. Both Frontier and PSE are highly regulated public-service companies, and the subject matter of this dispute – pole attachment agreements – is itself strictly regulated to ensure that attachment rates are "just, fair, reasonable, and sufficient." RCW 80.54.020. PSE's Opposition disregards entirely that the purpose of the WUTC's regulatory activities is to protect the public interest while ensuring that private contracts further that interest. *Id.* (WUTC's authority is to "regulate in the public interest" pole attachment rates). Because the attachment rates that PSE and Frontier charge each other ultimately impact the utility rates they charge their respective customers, the WUTC must regulate pole attachment rates by balancing "the interest of the customers of the attaching utility . . . as well as the interest of the customers of the utility upon which the attachment is made." RCW 80.54.030. The WUTC, not this Court, is legislatively authorized to balance the interests of these two large groups of customers, none of whom is a party to the Pole Attachment Agreement. Accordingly, Frontier respectfully requests that this Court stay or dismiss this action to allow the WUTC to resolve, in the first instance, whatever issues the WUTC deems necessary to resolve.

Recognizing the issues at stake, the WUTC has already asserted jurisdiction over this dispute. McCleery Decl. ¶ 3, Ex. A (explaining in its July 24, 2015 Notice of Prehearing Conference that "[i]t is appropriate that the matters raised in the pleadings be brought for hearing before the Commission" and that "[t]he Commission has jurisdiction over this matter under RCW Title 80"). Frontier has moved for summary determination on its claims in the WUTC, *id.* ¶ 4, Ex. B (summary determination briefing),[1] and the WUTC has already conducted a pre-trial conference, set dates for dispositive motions, and calendared its evidentiary hearing for February of 2016. *Id.* ¶ 5, Ex. C (Prehearing Conference Order).

Given the WUTC's unique expertise and regulatory authority to adjudicate this matter,

[1] PSE's response is due September 18. McCleery Decl. ¶ 5, Ex. C at 2. Frontier expects a ruling shortly thereafter.

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

the reasons PSE offers as to why this Court should not defer to the WUTC are unavailing.

A. This Court's Concurrent Jurisdiction Does Not Negate the WUTC's Primary Jurisdiction.

PSE repeatedly conflates the Court's concurrent jurisdiction over this dispute with whether the Court should defer primary jurisdiction to the WUTC. PSE claims, for example, that Frontier already "already conceded that this Court has jurisdiction," and "admitted in paragraph 4 [of its Answer] that '[t]his Court has jurisdiction[.]'" Opp. at 1, 5.[2]

These "gotcha" allegations are misdirected. This Court *does* have jurisdiction over this dispute, and Frontier has never claimed otherwise. Frontier merely asserts that the Court should *defer* its own decision-making until the WUTC has had an opportunity to consider the issues within its specialized expertise. Mot. at 2. The primary-jurisdiction doctrine does not divest the Court of its jurisdiction, but counsels "judicial self-restraint . . . when the court feels that the dispute should be handled by an administrative agency created by the legislature to deal with such problems." *Kerr v. Dep't of Game*, 14 Wash. App. 427, 429, 542 P.2d 467 (1975). Here, where the dispute "involves a factual question requiring expertise" (determining the fairness and reasonableness of the parties' pole attachment rates) and "involves an area where a uniform determination is desirable" (setting pole attachment rates that protect the public interest), deference to the WUTC is appropriate. *D.J. Hopkins, Inc. v. GTE Nw., Inc.*, 89 Wash. App. 1, 7, 947 P.2d 1220 (1997) (affirming dismissal based on primary jurisdiction).

B. The WUTC Has Authority to Award Retrospective Relief.

PSE's assertion that the WUTC cannot award retrospective relief is wrong.[3] PSE's

---

[2] PSE also criticizes Frontier for filing counterclaims and asking the Court to award it relief. *Id.* at 5. This criticism is baseless. Frontier explicitly requested *either* a dismissal or stay, and was obligated to preserve its rights in the event of a stay by filing its own basic counterclaims for declaratory relief and attorneys' fees.

[3] Notably, the faulty premise that the WUTC cannot award retrospective relief runs throughout most of PSE's arguments against a stay or dismissal. For example, PSE cites several Washington cases declining to apply the primary jurisdiction doctrine where the agency could not grant the requested relief. Opp. at 8. It claims that the WUTC has no "special competence . . . because the WUTC has no ability to rule upon or grant the contract relief requested by the parties." *Id.* And PSE attempts to distinguish the decision in *Verizon Nw., Inc.* because

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

primary authority for this argument is the pole attachment statute, RCW 80.54.030. Although that statute instructs the WUTC to "determine the just, reasonable, or sufficient rates, terms and conditions thereafter to be observed," it does not prohibit the WUTC from *also* awarding retrospective relief. RCW 80.54.030.[4]

In fact, multiple statutes permit the WUTC to award retrospective damages in various circumstances. For example, RCW 80.04.220 permits the WUTC to issue "an award of damages" when the WUTC "determine[s] that [a] public service company has charged an excessive or exorbitant amount" for "any rate, toll, rental or charge." *Id.* RCW 80.04.230 allows the WUTC to refund charges "in excess of the lawful rate in force at the time such charge was made . . . whether such overcharge was made before or after the filing of [a] complaint." Critically, the WUTC itself has already decided that these statutes specifically addressing retrospective relief apply to *this* dispute.[5]

PSE is of course free to challenge the WUTC's authority to award retrospective relief, and, indeed, it has already indicated its intent to lodge such a challenge by September 18. Opp. at 6. As a result of PSE's forthcoming motion, the parties will soon know precisely the extent of any retrospective relief the WUTC can provide, and can update the Court with a status report. If the WUTC provides complete retrospective relief, there may be nothing left for this Court to adjudicate. If the WUTC provides only partial retrospective relief, then the parties can

---

"neither party [in that case] was seeking impermissible retroactive relief." *Id.* at 11. All of these arguments drop to the wayside given that the WUTC's regulatory authority *already* permits the award of retrospective relief.

[4] PSE's citations to decisions prohibiting retroactive ratemaking are misguided. Opp. at 10, n.5. As those decisions actually confirm, the general rule against retroactive ratemaking applies, for a host of policy reasons, only to rates that have already been filed and published, and approved by the Commission. The contractually-specified pole attachment rates at issue here do not meet those conditions.

[5] In its July 23, 2015, Notice of Prehearing Conference, the WUTC set forth expressly the statutes that apply to this matter, and cited specifically to RCW 80.04.220 and 80.04.230. McCleery Decl. ¶ 3, Ex. A at 1.

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

return to this Court to resolve any remaining issues. And even if PSE is correct, and the WUTC determines that it cannot award *any* retrospective relief (despite the statutory authority providing otherwise) the WUTC can still determine, prospectively, a fair and just attachment rate in the public's interest. Moreover, the WUTC can make this prospective determination *regardless* of how this Court may interpret the contract for purposes of retrospective relief.[6] In that scenario, once the WUTC determines the fair and reasonable rate (something the Court cannot do), the parties can resume this litigation to resolve any remaining damages issues. In short, the WUTC will remove any confusion about the scope of relief in the very near term. At a minimum, the Court should defer to the WUTC until that point.

C. A Failure to Stay Creates the Risk of Conflicting Results because the WUTC's Authority Expressly Applies to the Two of PSE's Four Claims that Seek Future Relief.

Because two of PSE's four claims seek *future* relief, which PSE concedes the WUTC can grant, Opp. at 9–10, a ruling by this Court could conflict with the WUTC's determination. PSE's third cause of action alleges an *anticipatory* breach of contract for the as-yet unissued 2015 invoice. It seeks, by its very terms, prospective relief, which is squarely within the WUTC's regulatory authority.[7] PSE's fourth cause of action is for a declaratory judgment regarding the meaning of the term "distribution poles." A declaratory judgment concerning how to count "distribution poles" could directly conflict with either (or both) the WUTC's decision in this matter about what constitutes a fair and reasonable calculation method, or the WUTC's proposed pole-attachment rules, once adopted. McCleery Decl. ¶ 6, Ex. D at 2 (July

---

[6] *E.g.*, RCW 80.54.020 (WUTC has "the authority to regulate in the public interest the rates, terms, and conditions for attachments"); 80.54.030 (WUTC can "determine the just, reasonable, or sufficient rates, terms, and conditions"); 80.54.040 (setting forth criteria to determine a just and reasonable attachment rate).

[7] In addition, PSE's anticipatory breach claim is valid only if PSE's interpretation of the term "distribution pole" results in a fair and reasonable attachment rate. If, however, the WUTC disagrees with PSE, then Frontier is plainly not committing anticipatory breach by stating its intention not to pay an unfair and unreasonable rate.

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

22, 2015 Proposed Rules, explaining that distribution poles should be counted based on fractional pole ownership).[8]

D. Deferring to the WUTC Is Neither "Unfair" nor "Prejudicial."

PSE briefly argues that a stay or dismissal "would be inequitable and prejudicial." Opp. at 13. But neither "fairness" nor "prejudice" are relevant to the primary jurisdiction analysis, and PSE cites not a single case so holding. *See D.J. Hopkins, Inc.*, 89 Wash. App. at 8 (enumerating the only three relevant factors: an agency's authority to resolve the dispute, an agency's special competency, and a risk that judicial action would conflict with the regulatory scheme). PSE's arguments on this point are thus irrelevant.[9]

Furthermore, PSE's characterization that Frontier is attempting to "re-write the terms of a contract" assumes – impermissibly at this stage – that PSE's proffered attachment-rate calculation is correct, fair, and reasonable, all of which Frontier strongly disputes. It also presupposes that this is a simple contract dispute, ignoring entirely the regulatory requirements for pole attachment rates and how those rates in turn influence the utility rates both parties charge their Washington customers. PSE's alleged "prejudice" simply ignores that there is more at stake than just whose interpretation is correct. Respectfully, the WUTC should have the first the opportunity to resolve these important issues.

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[8] PSE mischaracterizes Frontier's purpose of directing the Court to this ongoing rulemaking by asserting, incorrectly, that Frontier "argu[ed] that the WUTC has authority to apply its draft pole attachment rules to this dispute." Opp. at 12. Frontier made no such argument. Rather, Frontier explained that the WUTC's rulemaking process on the *exact* issue pending before the Court is merely evidence of its specialized expertise, one of three factors in the primary jurisdiction analysis. Mot. at 3, 9 ("The WUTC's recent rulemaking efforts concerning pole attachment rates further underscore its expertise."). Because Frontier nowhere asserted that the current draft rules would *govern* this dispute, or that they would have retroactive effect, PSE's argument on this point is misleading and irrelevant. *See* Opp. at 12–13.

[9] PSE's allegation of forum shopping is particularly baseless. There is nothing nefarious about asking the WUTC – an agency legislatively tasked with regulating pole attachment rates in the public interest – to adjudicate a pole-attachment rate dispute involving two WUTC-regulated entities. Additionally, PSE utterly ignores Section 6.1.2 of the Pole Attachment Agreement, in which the parties agreed to allow the WUTC to revise the attachment-rate formulas. Mot. at 13 (citing Compl. Ex. A, § 6.1.2 ("The formulas to determine Annual Rate . . . may be revised . . . by the imposition of a revision by the WUTC.")).

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

DATED this 8th day of September, 2015

K&L GATES LLP

By: */s/ Stephanie E. L. McCleery*

Román D. Hernández, WSBA #39939
Email: roman.hernandez@klgates.com
Stephanie E. L. McCleery, WSBA #45089
Email: stephanie.mccleery@klgates.com
Adam W. Holbrook, *pro hac vice*
Email: Adam.Holbrook@klgates.com
One SW Columbia Street, Suite 1900
Portland, OR 97258
Attorneys for Defendant Frontier Communications Northwest Inc.

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2015, a true copy of the foregoing **FRONTIER'S REPLY IN SUPPORT OF MOTION TO DISMISS OR, ALTERNATIVELY, TO STAY** was submitted via Electronic Service, and served on the following named person(s) via Email and US MAIL at their last known address as indicated below:

James F. Williams
Email: JWilliams@perkinscoie.com
Karen Brunton Bloom
Email: KBloom@perkinscoie.com
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
(courtesy email copy to ckness@perkinscoie.com)

Attorneys for Plaintiff Puget Sound Energy

DATED: September 8, 2015.

By: */s/Stephanie E. L. McCleery*
Román D. Hernández, WSBA #39939
Email: roman.hernandez@klgates.com
Stephanie E. L. McCleery, WSBA #45089
Email: stephanie.mccleery@klgates.com
Adam W. Holbrook, *pro hac vice*
Email: Adam.Holbrook@klgates.com
One SW Columbia Street, Suite 1900
Portland, OR 97258
Attorneys for Defendant Frontier Communications Northwest Inc.

K&L GATES LLP
ONE SW COLUMBIA ST., SUITE 1900
PORTLAND, OREGON 97258
TELEPHONE: (503) 228-3200
FACSIMILE: (503) 248-9085

Exhibit J

Chapter 480-54 WAC
ATTACHMENT TO TRANSMISSION FACILITIES

NEW SECTION

WAC 480-54-010 Purpose, interpretation, and application. (1) This chapter implements chapter 80.54 RCW "Attachment to Transmission Facilities."

(2) The commission will consider Federal Communications Commission orders promulgating and interpreting its pole attachment rules and federal court decisions reviewing those rules and interpretations as persuasive authority in construing the provisions in this chapter.

(3) The rules in this chapter apply to all owners, occupants, and requesters as defined in this chapter without regard to whether those entities are otherwise subject to commission jurisdiction.

NEW SECTION

WAC 480-54-020 Definitions. **"Attachment"** means any wire, cable, or antenna for the transmission of intelligence by telecommunications or television, including cable television, light waves, or other phenomena, or for the transmission of electricity for light, heat, or power, and any related device, apparatus, or auxiliary equipment, installed upon any pole or in any telecommunications, electrical, cable television, or communications right of way, duct, conduit, manhole or handhole, or other similar facilities owned or controlled, in whole or in part, by one or more owners, where the installation has been made with the consent of the one or more owners consistent with the rules in this chapter.

"Attachment agreement" means an agreement negotiated in good faith between an owner and a utility or licensee establishing the rates, terms, and conditions for attachments to the owner's facilities.

"Carrying charge" means the costs the owner incurs to own and maintain poles, ducts, or conduits without regard to attachments, including the owner's administrative, maintenance, and depreciation expenses, commission-authorized rate of return on investment, and applicable taxes. When used to calculate an attachment rate, the carrying charge may be expressed as a percentage of the net pole, duct, or conduit investment.

"Communications space" means the usable space on a pole below the communications workers safety zone and above the vertical space for meeting ground clearance requirements under the National Electrical Safety Code.

"Conduit" means a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed.

"Duct" means a single enclosed raceway for conductors, cable, or wire.

"Facility" means a pole, duct, conduit, manhole or handhole, right of way, or similar structure on or in which attachments can be made. "Facilities" refers to more than one facility.

"Inner duct" means a duct-like raceway smaller than a duct that is inserted into a duct so that the duct may carry multiple wires or cables.

"Licensee" means any person, firm, corporation, partnership, company, association, joint stock association, or cooperatively organized association, other than a utility, that is authorized to construct attachments upon, along, under, or across the public ways.

"Make-ready work" means engineering or construction activities necessary to make a pole, duct, conduit, right of way, or other support equipment available for a new attachment, attachment modifications, or additional attachments. Such work may include rearrangement of existing attachments, installation of additional support for the utility pole, or creation of additional capacity, up to and including replacement of an existing pole with a taller pole.

"Net cost of a bare pole" means (a) the original investment in poles, including purchase price of poles and fixtures and excluding cross-arms and appurtenances, less depreciation reserve and deferred federal income taxes associated with the pole investment, divided by (b) the number of poles represented in the investment amount. When an owner owns poles jointly with another utility, the number of poles for purposes of calculating the net cost of a bare pole is the number of solely owned poles plus the product of the number of the jointly owned poles multiplied by the owner's ownership percentage in those poles. In the unusual situation in which net pole investment is zero or negative, the owner may use gross figures with appropriate net adjustments.

"Occupant" means any utility or licensee with an attachment to an owner's facility that the owner has granted the utility or licensee the right to maintain.

"Occupied space" means that portion of the facility used for attachment that is rendered unusable for any other attachment, which is presumed to be one foot on a pole and one half of a duct in a duct or conduit.

"Overlashing" means the tying of additional communications wires or cables to existing communications wires or cables attached to poles.

"Owner" means the utility that owns or controls the facilities to or in which an occupant maintains, or a requester seeks to make, attachments.

"Pole" means an above-ground structure on which an owner maintains attachments, which is presumed to be thirty-seven and one-half feet in height. When the owner is an electrical company as defined in RCW 80.04.010, "pole" is limited to structures used to attach electric distribution lines.

"Requester" means a licensee or utility that applies to an owner to make attachments to or in the owner's facilities and that has an agreement with the owner establishing the rates, terms, and conditions for attachments to the owner's facilities.

"Right of way" is an owner's legal right to construct, install, or maintain facilities or related equipment in or on grounds or property belonging to another person. For purposes of this chapter, "right of way" includes only such legal rights that permit the owner to allow third parties access to those rights.

"Unusable space," with respect to poles, means the space on the pole below the usable space, including the amount required to set the depth of the pole. In the absence of measurements to the contrary, a pole is presumed to have twenty-four feet of unusable space.

"Usable space," with respect to poles, means the vertical space on a pole above the minimum grade level that can be used for the attachment of wires, cables, and associated equipment, and that includes space occupied by the owner. In the absence of measurements to the contrary, a pole is presumed to have thirteen and one-half feet of usable space. With respect to conduit, "usable space" means capacity within a conduit that is available or that could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable, and associated equipment for telecommunications or cable services, and that includes capacity occupied by the owner.

"Utility" means any electrical company or telecommunications company as defined in RCW 80.04.010, and does not include any entity cooperatively organized or owned by federal, state, or local government, or a subdivision of state or local government.

NEW SECTION

WAC 480-54-030 Duty to provide access; make-ready work; timelines. (1) An owner shall provide requesters with nondiscriminatory access for attachments to or in any facility the owner owns or controls, except that if the owner is an electrical company as defined in RCW 80.04.010, the owner is not obligated to provide access for attachment to its facilities by another electrical company. An owner may deny such access to specific facilities on a nondiscriminatory basis where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering principles; provided that the owner may not deny access to a pole based on insufficient capacity if the requester is willing to compensate the owner for the costs to replace the existing pole with a taller pole or otherwise undertake make-ready work to increase the capacity of the pole to accommodate an additional attachment including, but not limited to, using space- and cost-saving attachment techniques, such as boxing (installation of attachments on both sides of the pole at approximately the same height) or bracketing (installation of extension arms), to the extent that the owner uses, or allows occupants to use, such attachment techniques in the communications space of the owner's poles.

(2) All rates, terms, and conditions made, demanded, or received by any owner for any attachment by a licensee or by a utility must be fair, just, reasonable, and sufficient and must be included in an attachment agreement with the licensee or utility. Parties may mutually agree on terms for attachment to or in facilities that differ from those in this chapter. In the event of disputes submitted for commission resolution, any party advocating rates, terms, or conditions that vary from the rules in this chapter bears the burden to prove those rates, terms, or conditions are fair, just, reasonable, and sufficient.

(3) Except for overlashing requests described in subsection (11) of this section, a requester must submit a written application to an owner to request access to its facilities. The owner may recover from the requester the reasonable costs the owner actually and reasonably

incurs to process the application, including the costs of inspecting the facilities identified in the application and preparing a preliminary estimate for any necessary make-ready work, to the extent these costs are not, and would not ordinarily be, included in the accounts used to calculate the attachment rates in WAC 480-54-060. The owner may survey the facilities identified in the application and may recover from the requester the costs the owner actually and reasonably incurs to conduct that survey. The owner must provide the requester with an estimate of those costs prior to conducting a survey. The owner must complete any such survey and respond in writing to requests for access to the facilities identified in the application within forty-five days from the date the owner receives a complete application, except as otherwise provided in this section. A complete application is an application that provides the information necessary to enable the owner to identify and evaluate the facilities to or in which the requester seeks to attach.

(4) If the owner denies the request in an application for access, in whole or in part, the owner's written response to the application must include an explanation of the reasons for the denial for each facility to which the owner is denying access. Such a response must include all relevant information supporting the denial.

(5) To the extent that it grants the access requested in an application, the owner's written response must inform the requester of the results of the review of the application. Within fourteen days of providing its written response, the owner must provide an estimate of charges to perform all necessary make-ready work, including the costs of completing the estimate. Make-ready work costs are nonrecurring costs that are not included in carrying charges and must be costs that the owner actually and reasonably incurs to provide the requester with access to the facility.

(a) The requester must accept or reject an estimate of charges to perform make-ready work within thirty days of receipt of the estimate. The owner may require the requester to pay all estimated charges to perform make-ready work as part of acceptance of the estimate or before the owner undertakes the make-ready work subject to true-up to the reasonable costs the owner actually incurs to undertake the work.

(b) An owner may withdraw an outstanding estimate of charges to perform make-ready work any time after thirty days from the date the owner provides the estimate to the requester if the requester has not accepted or rejected that estimate. An owner also may establish a date no earlier than thirty days from the date the owner provides the estimate to the requester after which the estimate expires without further action by the owner.

(6) For requests to attach to poles, the owner must determine the time period for completing the make-ready work and provide that information in a written notice to the requester and all known occupants with existing attachments on the poles that may be affected by the make-ready work. The owner and the requester must coordinate the make-ready work with any such occupants, as necessary.

(a) For attachments in the communications space, the notice shall:

(i) Specify where and what make-ready work will be performed.

(ii) Set a date for completion of make-ready work that is no later than sixty days after the notice is sent. For good cause shown, the owner may extend completion of the make-ready work by an additional fifteen days.

(iii) State that any occupant with an existing attachment may modify that attachment consistent with the specified make-ready work before the date set for completion of that work. Any occupant with an existing attachment that does not comply with applicable safety requirements must modify that attachment to bring it into compliance before the date set for completion of the make-ready work. The occupant shall be responsible for all costs incurred to bring its attachment into compliance.

(iv) State that the owner may assert its right to fifteen additional days to complete the make-ready work.

(v) State that if make-ready work is not completed by the completion date set by the owner (or fifteen days later if the owner has asserted its right to fifteen additional days), the owner and the requester may negotiate an extension of the completion date or the requester, after giving reasonable notice to the owner, may hire a contractor from the list of contractors the owner has authorized to work on its poles to complete the specified make-ready work within the communications space. If the owner does not maintain a list of authorized contractors, the requester may choose a contractor without the owner's authorization.

(vi) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready work.

(b) For wireless antennas or other attachments on poles in the space above the communications space, the notice shall:

(i) Specify where and what make-ready work will be performed.

(ii) Set a date for completion of make-ready work that is no later than ninety days after notice is sent. For good cause shown, the owner may extend completion of the make-ready work by an additional fifteen days.

(iii) State that any occupant with an existing attachment may modify the attachment consistent with the specified make-ready work before the date set for completion of that work. Any occupant with an existing attachment that does not comply with applicable safety requirements must modify that attachment to bring it into compliance before the date set for completion of the make-ready work. The occupant shall be responsible for all costs incurred to bring its attachment into compliance.

(iv) State that the owner may assert its right to fifteen additional days to complete the make-ready work.

(v) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready work.

(7) For the purpose of compliance with the time periods in this section:

(a) The time periods apply to all requests for access to up to three hundred poles or 0.5 percent of the owner's poles in Washington, whichever is less.

(b) An owner shall negotiate in good faith the time periods for all requests for access to more than three hundred poles or 0.5 percent of the owner's poles in Washington, whichever is less.

(c) An owner may treat multiple requests from a single requester as one request when the requests are filed within the same thirty-day period. The applicable time period for completing the optional survey or required make-ready work begins on the date of the last request the owner receives from the requester within the thirty-day period.

(8) An owner may extend the time periods specified in this section under the following circumstances:

(a) For replacing existing poles to the extent that circumstances beyond the owner's control including, but not necessarily limited to, local government permitting, landowner approval, or adverse weather conditions, require additional time to complete the work; or

(b) During performance of make-ready work if the owner discovers unanticipated circumstances that reasonably require additional time to complete the work. Upon discovery of the circumstances in (a) or (b) of this subsection, the owner must promptly notify, in writing, the requester and other affected occupants with existing attachments. The notice must include the reason for the extension and date by which the owner will complete the work. The owner may not extend completion of make-ready work for a period any longer than reasonably necessary and shall undertake such work on a nondiscriminatory basis with the other work the owner undertakes on its facilities.

(9) If the owner determines that a survey is necessary for responding to a request for attachment to poles and fails to complete a survey of the facilities specified in the application within the time periods established in this section, a requester seeking attachment in the communications space may negotiate an extension of the completion date with the owner or may hire a contractor from the list of contractors the owner has authorized to work on its poles to complete the survey. If the owner does not maintain a list of authorized contractors, the requester may choose a contractor without the owner's authorization.

(10) If the owner does not complete any required make-ready work within the time periods established in this section, a requester seeking attachment in the communications space may negotiate an extension of the completion date with the owner or may hire a contractor from the list of contractors the owner has authorized to work on its poles to complete the make-ready work within the communications space:

(a) Immediately, if the owner declines to exercise its right to perform any necessary make-ready work by notifying the requester that the owner will not undertake that work; or

(b) After the end of the applicable time period authorized in this section if the owner has asserted its right to perform make-ready work and has failed to timely complete that work.

If the owner does not maintain a list of authorized contractors, the requester may choose a contractor without the owner's authorization.

(11) An occupant need not submit an application to the owner if the occupant intends only to overlash additional communications wires or cables onto communications wires or cables it previously attached to poles with the owner's consent under the following circumstances:

(a) The occupant must provide the owner with written notice fifteen business days prior to undertaking the overlashing. The notice must identify no more than one hundred affected poles and describe the additional communications wires or cables to be overlashed so that the owner can determine any impact of the overlashing on the poles or other occupants' attachments. The notice period does not begin until the owner receives a complete written notice that includes the following information:

(i) The size, weight per foot, and number of wires or cables to be overlashed; and

(ii) Maps of the proposed overlash route, including pole numbers if available.

(b) A single occupant may not submit more than five notices or identify more than a total of one hundred poles for overlashing in any

ten business day period. The applicable time period for responding to multiple notices begins on the date of the last notice the owner receives from the occupant within the ten business day period.

(c) The occupant may proceed with the overlashing described in the notice unless the owner provides a written response, within ten business days of receiving the occupant's notice, prohibiting the overlashing as proposed. The owner may recover from the requester the costs the owner actually and reasonably incurs to inspect the facilities identified in the notice and to prepare any written response. The occupant must correct any safety violations caused by its existing attachments before overlashing additional wires or cables on those attachments.

(d) The owner may refuse to permit the overlashing described in the notice only if, in the owner's reasonable judgment, the overlashing would have a significant adverse impact on the poles or other occupants' attachments. The refusal must describe the nature and extent of that impact, include all relevant information supporting the owner's determination, and identify the make-ready work that the owner has determined would be required prior to allowing the proposed overlashing. The parties must negotiate in good faith to resolve the issues raised in the owner's refusal.

(e) A utility's or licensee's wires or cables may not be overlashed on another occupant's attachments without the owner's consent and unless the utility or licensee has an attachment agreement with the owner that includes rates, terms, and conditions for overlashing on the attachments of other occupants.

NEW SECTION

WAC 480-54-040 Contractors for survey and make-ready work. (1) An owner should make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready work in the communications space on its poles in cases where the owner has failed to meet deadlines specified in WAC 480-54-030.

(2) If a requester hires a contractor for purposes specified in WAC 480-54-030, the requester must choose a contractor included on the owner's list of authorized contractors. If the owner does not maintain such a list, the requester may choose a contractor without the owner's approval of that choice.

(3) A requester that hires a contractor for survey or make-ready work must provide the owner with prior written notice identifying and providing the contact information for the contractor and must provide a reasonable opportunity for an owner representative to accompany and consult with the contractor and the requester.

(4) Subject to commission review in a complaint proceeding, the consulting representative of an owner may make final determinations, on a nondiscriminatory basis, on the attachment capacity of any pole and on issues of safety, reliability, and generally applicable engineering principles.

NEW SECTION

WAC 480-54-050 Modification costs; notice; temporary stay. (1) The costs of modifying a facility to create capacity for additional attachment, including but not limited to replacement of a pole, shall be borne by the requester and all existing occupants and owner that directly benefit from the modification. Each such occupant or owner shall share the cost of the modification in proportion to the amount of new or additional usable space the occupant or owner occupies on or in the facility. An occupant or owner with an existing attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification, that occupant or owner adds to its existing attachment or otherwise modifies its attachment. An occupant or owner with an existing attachment shall not be deemed to directly benefit from replacement of a pole if the occupant or owner only transfers its attachment to the new pole.

(2) The costs of modifying a facility to bring an existing attachment into compliance with applicable safety requirements shall be borne by the occupant or owner that created the safety violation. Such costs include, but are not necessarily limited to, the costs incurred by the owner or other occupants to modify the facility or conforming attachments. An occupant with an existing conforming attachment to a facility shall not be required to bear any of the costs to rearrange or replace the occupant's attachment if such rearrangement or replacement is necessitated solely as a result of creating capacity for an additional attachment or to accommodate modifications to the facility or another occupant's existing attachment made to bring that attachment into conformance with applicable safety requirements.

(3) An owner shall provide an occupant with written notice prior to removal of, termination of service to, or modification of (other than routine maintenance or modification in response to emergencies) any facilities on or in which the occupant has attachments affected by such action. The owner must provide such notice as soon as practicable but no less than sixty days prior to taking the action described in the notice; provided that the owner may provide notice less than sixty days in advance if a governmental entity or landowner other than the owner requires the action described in the notice and did not notify the owner of that requirement more than sixty days in advance.

(4) A utility or licensee may file with the commission and serve on the owner a "petition for temporary stay" of utility action contained in a notice received pursuant to subsection (3) of this section within twenty days of receipt of such notice. The petition must be supported by declarations or affidavits and legal argument sufficient to demonstrate that the petitioner or its customers will suffer irreparable harm in the absence of the relief requested that outweighs any harm to the owner and its customers and that the petitioner will likely be successful on the merits of its dispute. The owner may file and serve an answer to the petition within seven days after the petition is filed unless the commission establishes a different deadline for an answer.

(5) An owner may file with the commission and serve on the occupant a petition for authority to remove the occupant's abandoned attachments. The petition must identify the attachments and provide sufficient evidence to demonstrate that the occupant has abandoned those attachments. The occupant must file an answer to the petition within twenty days after the petition is filed unless the commission estab-

lishes a different deadline for an answer. If the occupant does not file an answer or otherwise respond to the petition, the commission may authorize the owner to remove the attachments without further proceedings.

NEW SECTION

WAC 480-54-060 Rates. (1) A fair, just, reasonable, and sufficient rate for attachments to or in facilities shall assure the owner 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 owner attributable to that portion of the facility 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 facility, and uses that remain available to the owner.

(2) The following formula for determining a fair, just, reasonable, and sufficient rate shall apply to attachments to poles:

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

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

(3) The following formula for determining a fair, just, reasonable, and sufficient rate shall apply to attachments to ducts or conduits:

$$\textit{Maximum Rate per Linear ft./m.} = \left[\frac{1}{\text{Number of Ducts}} \times \frac{1 \text{ Duct}}{\text{Number of Inner Ducts}}\right] \times \left[\text{Number of Ducts} \times \text{Net Conduit Investment System Duct Length (ft./m.)}\right] \times \textit{Carrying Charge Rate}$$

(Percentage of Conduit Capacity) (Net Linear Cost of a Conduit)

simplified as:

$$\textit{Maximum Rate per Linear ft./m.} = \left[\frac{1 \text{ Duct}}{\text{Number of Inner Ducts}}\right] \times \left[\text{Net Conduit Investment System Duct Length (ft./m.)}\right] \times \textit{Carrying Charge Rate}$$

If no inner duct or only a single inner duct is installed, the fraction "1 Duct divided by the Number of Inner Ducts" is presumed to be 1/2.

NEW SECTION

WAC 480-54-070 Complaint. (1) Whenever the commission shall find, after hearing had upon complaint by a licensee or by a utility, that the rates, terms, or conditions demanded, exacted, charged, or collected by any owner in connection with attachments to its facilities are not fair, just, and reasonable, or by an owner that the rates

or charges are insufficient to yield a reasonable compensation for the attachment, the commission will determine the fair, just, reasonable, and sufficient rates, terms, and conditions thereafter to be observed and in force and fix the same by final order entered within three hundred sixty days after the filing of the complaint. The commission will enter an initial order resolving a complaint filed in conformance with this rule within six months of the date the complaint is filed. The commission may extend this deadline for good cause. In determining and fixing the rates, terms, and conditions, the commission will consider the interest of the customers of the licensee or utility, as well as the interest of the customers of the owner. Except as provided in this rule, the commission's procedural rules, chapter 480-07 WAC, govern complaints filed pursuant to this rule.

(2) A utility or licensee may file a formal complaint pursuant to this rule if:

(a) An owner has denied access to its facilities;

(b) An owner fails to negotiate in good faith the rates, terms, and conditions of an attachment agreement; or

(c) The utility or licensee disputes the rates, terms, or conditions in an attachment agreement, the owner's performance under the agreement, or the owner's obligations under the agreement or other applicable law.

(3) An owner may file a formal complaint pursuant to this rule if:

(a) Another utility or licensee is unlawfully making or maintaining attachments to or in the owner's facilities;

(b) Another utility or licensee fails to negotiate in good faith the rates, terms, and conditions of an attachment agreement; or

(c) The owner disputes the rates, terms, or conditions in an attachment agreement, the occupant's performance under the agreement, or the occupant's obligations under the agreement or other applicable law.

(4) The execution of an attachment agreement does not preclude any challenge to the lawfulness or reasonableness of the rates, terms, or conditions in that agreement, provided that one of the following circumstances exists:

(a) The parties made good faith efforts to negotiate the disputed rates, terms, or conditions prior to executing the agreement but were unable to resolve the dispute despite those efforts, and such challenge is brought within six months from the agreement execution date; or

(b) The party challenging the rate, term, or condition was reasonably unaware of the other party's interpretation of that rate, term, or condition when the agreement was executed.

(5) A complaint authorized under this section must contain the following:

(a) A statement, including specific facts, demonstrating that the complainant engaged or reasonably attempted to engage in good faith, executive-level negotiations to resolve the disputed issues raised in the complaint and that the parties failed to resolve those issues despite those efforts; such negotiations must include the exchange of reasonably relevant information necessary to resolve the dispute including, but not limited to, the information required to calculate rates in compliance with WAC 480-54-060;

(b) Identification of all actions, rates, terms, and conditions alleged to be unjust, unfair, unreasonable, insufficient, or otherwise contrary to applicable law;

(c) Sufficient data or other factual information and legal argument to support the allegations to the extent that the complainant possesses such factual information; and

(d) A copy of the attachment agreement, if any, between the parties.

(6) The commission will issue a notice of prehearing conference within five business days after the complaint is filed. The party complained against must answer the complaint within ten business days from the date the commission serves the complaint. The answer must respond to each allegation in the complaint with sufficient data or other factual information and legal argument to support that response to the extent the respondent possesses such factual information.

(7) A licensee or utility has the burden to prove its right to attach to or in the owner's facilities and that any attachment requirement, term, or condition an owner imposes or seeks to impose that the licensee or utility challenges violates any provision of chapter 80.54 RCW, this chapter, or other applicable law. An owner bears the burden to prove that the attachment rates it charges or proposes to charge are fair, just, reasonable, and sufficient or that the owner's denial of access to its facilities is lawful and reasonable.

(8) If the commission determines that a rate, term, or condition complained of is not fair, just, reasonable, and sufficient, the commission may prescribe a rate, term, or condition that is fair, just, reasonable, and sufficient. The commission may require the inclusion of that rate, term, or condition in an attachment agreement and to the extent authorized by applicable law, may order a refund or payment of the difference between any rate the commission prescribes and the rate that was previously charged during the time the owner was charging the rate after the effective date of this rule.

(9) If the commission determines that an owner has unlawfully or unreasonably denied or delayed access to a facility, the commission may order the owner to provide access to that facility within a reasonable time frame and in accordance with fair, just, reasonable, and sufficient rates, terms, and conditions.

(10) Nothing in this section precludes an owner or occupant from bringing any other complaint that is otherwise authorized under applicable law.