BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Rulemaking to Consider Adoption of Rules to Implement RCW ch. 80.54, Relating to Attachments to Transmission Facilities, Docket U-140621	)))))))	DOCKET U-140621

COMMENTS OF THE BROADBAND COMMUNICATIONS ASSOCIATION OF WASHINGTON

The Broadband Communications Association of Washington ("BCAW") respectfully submits these Comments pursuant to the State of Washington Utilities and Transportation Commission's ("Commission") September 8, 2014 Notice of Opportunity to File Written Comments on the Commission's Draft Rules Concerning Access to Utility Poles, Ducts, Conduits, and Rights-of-Way (hereinafter "Draft Rules").[1] BCAW fully supports the Commission's Draft Rules but believes they can benefit from several clarifying edits. BCAW also reiterates its request that the Commission follows the federal rules on overlashing, as discussed herein. *See also* BCAW's "Initial Draft Rules Redline," attached hereto as Exhibit A, which incorporates BCAW's requested revisions.

I. COMMENTS

First and foremost, BCAW welcomes the Commission's efforts to promulgate rules that harmonize with federal law. Many certified states follow the federal rules, including the Federal Communications Commission's ("FCC") "cable formula," in order to promote broadband competition and deployment, and to "eliminate unnecessary variation in regulatory

[1] Notice of Opportunity to File Written Comments and Notice of Workshop, Re: Rulemaking to Consider Adoption of Rules to Implement RCW ch. 80.54, Relating to Attachments to Transmission Facilities, Docket U-140621 (WUTC September 8, 2014).

requirements" nationwide.[2] Adopting the federal access standards and timelines, as well as the widely-used "cable formula" and cost modification rules will also give necessary guidance to parties negotiating pole attachment agreements and in the field.

While BCAW agrees with the Commission's Draft Rules overall, certain of the Draft Rules could benefit from clarifying edits in order to prevent unnecessary disputes over their interpretation. In addition, as BCAW discussed in its opening Comments and at the July 28 Workshop, allowing cable operators to overlash on their previously permitted attachments without going through an additional permitting process is a safe, pro-competitive and cost-effective way to deploy broadband and advanced services to Washingtonians. BCAW reiterates its request that the Commission include a provision that would allow unpermitted overlashing, provided the licensee complies with applicable safety requirements, as discussed further below.

A. Definitions: 480-54-020

1. "*Attachment*"

BCAW recognizes that the proposed definition of "Attachment" is statutory. But, the last clause of the definition, *i.e.*, "where the installation has been made with the consent of the [sic] one or more utilities," arguably conflicts with an attacher's ability to meaningfully use the self-help remedies contained in the timelines. For example, if a pole owner misses the survey and/or make-ready timeframes and an attacher resorts to a contractor, the attacher may never get the utility's formal "consent" for use of that pole(s). Attachments made without the formal "consent" of the pole owner, but otherwise in compliance with the rules, should be considered attachments "made with the consent . . . of the utilit[y]."

[2] *In the Matter of Certain Pole Attachment Issues Which Arose in Case 94-C-0095*, Case No. 95-C-0341, Opinion and Order, p.6 (1997 NYPSC); *see also id*. at 5 ("[W]e have decided to simplify the regulation of pole attachments rates and operations in New York, intending thereby to encourage telecommunications competition and to stimulate economic development. These objectives can be best achieved by adopting many, if not all, elements of the federal approach to pole attachments rates and operations. . . .")

The simplest way to address the issue is to add the words "consistent with these rules," at the end of the last sentence. In the alternative, a provision could be added in the timeline section, clarifying that in the event an attacher must resort to the self-help remedies in these rules and the pole owner never formally "consents" to the attachment, "consent is deemed granted."[3]

2. "*Occupied Space*"

BCAW does not believe it is proper to state that an attachment is presumed to occupy one foot of duct or conduit, as the definition of "occupied space" appears to indicate. Under the FCC's conduit formula, "in order to identify a rebuttable presumption of the percentage of capacity occupied by an attachment in a conduit, [the FCC] adopted a rebuttable presumption that a[n attacher] occupies one half of a duct."[4] Therefore, the definition of "occupied space" should be amended to include the following language at the end of the sentence: "on a pole and one-half of a duct in a duct or conduit."

3. "*Pole*"

In order to avoid pole-by-pole calculations of pole height when determining pole attachment rates, BCAW suggests that the definition of "pole" include a (rebuttable) presumptive average pole height, such as the FCC's average 37.5 foot pole.[5] The FCC uses rebuttable presumptions in its cable formula "[i]n order to facilitate the negotiation of just and reasonable

[3] This is consistent with FCC and Oregon rules. *See, e.g., Cavalier Tel., LLC v. Virginia Elec. Power Co*., 15 FCC Rcd. 9563, ¶ 15 (2000) ("We have interpreted the Commission's rules 47 C.F.R. § 1.1403(b), to mean that a pole owner "must deny a request for access within 45 days of receiving such a request or it will otherwise be deemed granted") (internal citations omitted). *See also* OAR 860-028-0100(4)(e)(allowing attacher to install attachments if owner fails to approve or deny an application in 45 days and forbidding the assessment of an unauthorized attachment penalty to same, even though not technically "approv[ed].")

[4] *In the Matter of Amendment of Rules and Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of The Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103, ¶ 95 (2001) (hereinafter "2001 FCC Order"). *See also* 47 C.F.R. § 1.1409(3)(setting forth conduit formula, included ½ duct presumption), which is consistent with Draft Rule 480-54-060(3).

[5] 2001 FCC Order at n. 169.

rates and the resolution of pole attachment complaints."[6] Indeed, most certified states use rebuttable presumptions to aid in the calculation of just and reasonable rates and avoid unnecessary disputes.[7]

To that end, BCAW proposes that the following language be included as the second sentence in the definition of "pole:" "There is a rebuttable presumption that the average height of a pole or utility pole is 37.5 feet."

4. "*Unusable Space*"

BCAW supports the Commission's proposed definition of "unusable space," which follows the FCC's definition. As with the definition of "pole," in order to avoid unnecessary disputes over the amount of "unusable space" on an average pole, BCAW suggests that the rules include a (rebuttable) presumptive average amount of unusable space on a pole, such as the 24 feet used in the cable formula (*i.e.*, 6 feet of burial depth and 18 feet ground clearance).[8]

BCAW proposes that the following language be included as the second sentence in the definition of "unusable space:" "There is a rebuttable presumption that the average amount of unusable space on a pole is 24 feet."

5. "*Usable Space*"

BCAW similarly supports the Commission's proposed definition of "usable space," which also tracks FCC rules. As with the definitions of "pole" and "unusable space," the definition of "usable space" should include a rebuttable presumption, such as the 13.5 feet of

[6] *Id*. at ¶ 46 and accompanying n. 169.
[7] This includes one of the most recent states to adopt comprehensive pole attachment rules, namely, Ohio. *See In the Matter of the Adoption of Chapter 4901:1-3, Ohio Administrative Code, Concerning Access to Poles, Ducts, Conduits, and Rights-of-Way by Public Utilities*, Finding and Order, Case No. 13-579-AU-ORD, p.41 (Ohio PUC 2014) (adopting FCC average pole height, usable space and unusable space rebuttable presumptions).
[8] *See* 47 C.F.R. § 1.1404(g)(1)(xii).

usable space figure used in the cable formula,[9] in order to facilitate rate negotiations and limit disputes.

BCAW therefore proposes that the following language be included as the second sentence in the definition of "usable space:" "There is a rebuttable presumption that the average amount of usable space on a pole is 13.5 feet."[10]

B. Rates: 480-54-060

Even though sections 480-54-060 (2)-(3) of the Draft Rules clearly represent the mathematical expressions of the FCC cable formula for poles and conduit, respectively (set forth at 47 C.F.R. §1.1409(1) and (3)), the Commission has not prescribed a methodology for determining the "net cost of a bare pole" and "net conduit investment" or the "carrying charge rate" elements. Failure to include, or at least refer to, an explicit method to determine these cost elements may invite pole owners to calculate net bare pole/conduit costs and the carrying charges in a manner that leads to improper cost over-recovery and unnecessary disputes.

In order to ensure pole owners are properly compensated for the cost of owning and maintaining pole attachments, but do not over-recover, the FCC has developed (and refined over 30 years) methodologies for calculating the net bare pole/conduit investment element, as well as the carrying charges, using specified, publicly available FERC (in the case of electric utilities) and ARMIS (in the case of ILECs) Accounts.[11] Reliance on these specific methodologies also allows the parties themselves to determine rates on an annual basis without guesswork or

[9] *See* 47 C.F.R. § 1.1404(g)(1)(xi).
[10] Including rebuttable averages for pole height, usable and unusable space will also help determine the "space factor" in the pole formula, which is one of the formula's three elements, along with net pole investment and the carrying charge rate.
[11] *See, e.g.*, 2001 FCC Order Appendices D1, D2, F1 and F2 (setting forth the calculation of net bare pole/conduit costs and the carrying charges, specifying the proper FERC and ARMIS accounts to use in each element of the formulae).

regulatory intervention, and significantly limits rate disputes. As BCAW stressed in its opening comments:

> [I]n states (including certified states) that use the FCC formula, neither the utilities nor cable operators find it necessary to seek FCC or state commission intervention to check those calculations. Instead, the industries have established transparent, party-to-party review mechanisms that apply the FCC formula to current utility financial data, thereby allowing almost all disputes to be resolved without federal or state agency intervention. What makes the process work is the simplicity of the formula, its reliance on data that ties to publicly available ARMIS and FERC Form 1 reports, and the confidence of the parties that errors would be swiftly adjudicated at the FCC or state commission.[12]

Therefore, for clarification purposes and to limit the incidence of disputes over the proper calculation of pole and conduit rates (including for wireless attachments), BCAW suggests that the following language be added to Draft Rule sections 480-54-060(2) and (3) after the word "poles" in subsection (2) and "conduits" in subsection (3): "and shall conform to the Federal Communications Commission's rules and regulations governing rates."[13]

C. Complaint: 480-54-070

1. *Discovery Rights*

As discussed above in relation to rates, pole owners and attachers that use the FCC formula "have established transparent, party-to-party mechanisms that apply the FCC formula to current utility financial data" and are usually able to resolve rate disputes on their own. Requiring the use of publicly available data (*i.e.*, FERC and ARMIS data) for the calculation of rates is part of the equation. But, it is equally important that attachers have the right to obtain the utility's rental rate calculations themselves in order to verify that the proper data was used and input correctly. Additionally, electric utility pole counts are not filed with the FERC. The only

[12] Comments of The Broadband Communications Association of Washington, Rulemaking to Consider Adoption of Rules to Implement RCW ch. 80.54, Relating to Attachments to Transmission Facilities, Docket U-140621 (filed May 30, 2014) (hereinafter "BCAW Opening Comments").
[13] This language is similar to Utah's pole attachment rate rule, U.A.C. R746-345-5.A.

way to obtain pole counts is from the utility itself. It is also often difficult to determine an electric or telephone utility's "authorized rate of return," which is one of the five carrying charges and is not filed with the FERC or ARMIS.[14]

To ensure that the FCC's rate program operates as intended, the FCC's Complaint procedures require "[a] utility [to] supply a cable television operator or telecommunications carrier the information required [to calculate rates], along with its supporting pages from its ARMIS, FERC Form 1, or other report to a regulatory body, within 30 days of the request by the cable television operator or telecommunications carrier."[15] In addition, if the information is not provided and the attacher files a complaint, "[n]o complaint . . . shall be dismissed where the utility has failed to provide the information . . . after a reasonable request."[16]

BCAW proposes that similar language be added to the end of Draft Rule 480-54-070(5), as follows:

> A facility utility shall supply an attacher the information required to calculate rates under 480-54-060, along with supporting pages from its ARMIS, FERC Form 1, or other report or order to or from a regulatory body, within 30 days of the request by a licensee. No complaint filed under this section shall be dismissed where the utility has failed to provide the information required to calculate rates under 480-54-060 after reasonable request by the attacher.

2. *Burden of Proof*

Draft Rule 480-54-070(6) states that "[a]n attacher has the burden to prove . . . that any rate, term, or condition the attacher challenges is not fair, just, and reasonable. . . ." This appears to contradict Draft Rule 480-54-030(2), which provides that "[i]n the event of disputes submitted for commission resolution, any party advocating rates, terms, or conditions that vary from the

[14] *See* 47 C.F.R. § 1.1404(g)(1)(x).
[15] 47 C.F.R. § 1.1404(j); *see also* OAR 860-028-0070(6)(e)(B) (requiring same).
[16] *Id*. *See also* OAR 860-028-0070(6)(C) (requiring a licensee complainant to describe the steps taken to obtain the information if never provided).

rules in this chapter bears the burden to prove those rates, terms, or conditions are fair, just, reasonable, and sufficient." In order to make these two rules consistent with each other and FCC regulations, BCAW suggests the following edits to Draft Rule 480-54-070(6) (new language in italics, deleted language in brackets):

> An attacher has the burden *of establishing a prima facie case* [to prove] *of* its right to attach to the facility utility's poles, ducts, conduits, or rights-of-way and that any rate, term, or condition the attacher challenges is not fair, just, and reasonable or otherwise *varies from these rules or* violates any provision of RCW 80.54, this Chapter, or other applicable law. A facility utility bears the burden to prove that attachment rates *calculated under these rules* are insufficient or that, *once a prima facie case is established by the attacher,* the facility utility's denial of access to its facilities *or the challenged rate, term, or condition* is lawful and reasonable.[17]

D. Overlashing

As BCAW discussed in its Opening Comments[18] and at the July 28 Workshop, "[c]able companies have, through overlashing, been able for decades to replace deteriorated cables or expand capacity of existing communications facilities, by tying communications conductors to existing, supporting strands of cable on poles."[19] Indeed, the FCC believes:

> [O]verlashing is important to implementing the 1996 [Telecommunications] Act as it facilitates and expedites installing infrastructure essential to providing cable and telecommunications services to American communities. Overlashing promotes competition [and helps] provide diversity of services over existing facilities, fostering the availability of telecommunications services to communities, and increasing opportunities for competition in the marketplace.[20]

For these and other policy reasons, the FCC does not require cable companies to "obtain additional approval from or consent of the utility for overlashing other than the approval

[17] *See* 47 C.F.R. § 1.1409(b) (setting forth the respective burdens in an FCC pole attachment complaint case).
[18] *See* BCAW Opening Comments at pp. 9-12.
[19] 2001 Pole Order, ¶ 73.
[20] *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments,* Report and Order, 13 FCC Rcd 6777, 6807 ¶ 62 (1998).

obtained for the host attachment."[21] Other certified states have taken a similar approach, including New York, Vermont and Utah.[22]

By contrast, most (although not all) pole owners in Washington require permits for overlashing cable plant that has already been permitted. This requirement is unnecessary and has a significant negative impact on broadband deployment and competition. For example, as BCAW explained in its Opening Comments "[t]oday, the majority of overlashing involves fewer than 10 poles and is necessary to serve" individual customers.[23] These customers expect relatively efficient and cost-effective service. But, even though these minimal, extremely lightweight overlash projects place no additional burden or load on the pole, some pole owners take months (sometimes nine or more months) to "approve" the overlashing. These excessive delays have caused BCAW members a number of lost customers, usually to competitors who own their own poles and do not have to wait to obtain permits from themselves.

It is also important to point out that when make-ready is required pursuant to an overlash request, BCAW members find that the poles involved in their overlash request were already out of compliance (due to another party) and the overlash would not exacerbate the existing non-compliance. Nevertheless, pole owners often force the cable operator to pay to repair the existing non-compliance it did not cause, as a condition of overlashing. At that point, the cable operator has to pass along the extra cost to the customer, which can also lead to customer cancellation (especially if there is also a long delay) of the project.

BCAW therefore reiterates its request that the Commission establish a rule allowing unpermitted overlashing, provided the attacher complies with applicable safety requirements, consistent with long-standing FCC policies and the rules in other certified states.

[21] 2001 FCC Order, ¶ 75.
[22] *See* BCAW Opening Comments at pp.10-12.
[23] *Id*. at p. 15.

II. CONCLUSION

BCAW hopes that these Comments and suggested clarifications will help the Commission develop fair and just pole attachment rules in Washington that facilitate access, reduce the potential for disputes and promote broadband deployment and competition.

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EXHIBIT A

DOCKET U-140621

Initial Draft Rules Redline

DRAFT RULES GOVERNING ACCESS TO UTILITY POLES, DUCTS, CONDUITS, AND RIGHTS-OF-WAY

480-54-010 Purpose and Interpretation

(1) This chapter implements RCW Ch. 80.54 "Attachment to Transmission Facilities."

(2) To the extent that these rules contain provisions that are the same as Federal Communications Commission rules governing pole attachments, the commission will consider Federal Communications Commission and federal court interpretation of those rules as persuasive authority in construing the comparable provisions in this chapter.

480-54-020 Definitions

(1) "Attacher" means any utility or licensee with an attachment to a facility utility's pole, duct, conduit, or right-of-way or that is granted the right to make such an attachment.

(2) "Attachment" means any wire or cable 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 utilities, where the installation has been made with the consent of the one or more utilities, consistent with these rules.

(3) "Communications space" means the usable space on a utility pole below the space used to attach electrical wires.

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

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

(6) "Facilities" means poles, ducts, conduits, rights-of-way, manholes or handholes, or similar facilities.

(7) "Facility utility" means the utility that owns or controls the facilities to or in which an attacher maintains or seeks to make attachments.

(8) ”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.

(9) “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, including a provider of telecommunications service, radio communications service company, as defined in RCW 80.04.010, any cable television service company or personal wireless services company.

(10) “Make-ready work” means work required to modify a pole, duct, conduit, or right-of-way to enable the facility to accommodate one or more 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.

(11) “Occupied space” means that portion of the pole, duct, or conduit used for attachment, which is presumed to be one foot on a pole and one-half duct in a duct or conduit.

(12) “Overlashing” means the tying of additional communications wires or cables to already permitted communications wires or cable on poles.

(13) “Pole” or “utility pole” means an above-ground structure on which a facility utility maintains attachments. There is a rebuttable presumption that the average height of a pole or utility pole is 37.5 feet.

(14) “Unusable space” with respect to utility poles means the space on the pole below the usable space, including the amount required to set the depth of the pole. There is a rebuttable presumption that the average amount of unusable space on a pole is 24 feet.

(15) “Usable space,” with respect to poles, means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the facility utility. 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 which includes capacity occupied by the facility utility. There is a rebuttable presumption that the average amount of usable space on a pole is 13.5 feet.

(16) “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.

480-54-030 Duty to provide access; make-ready work; timelines

(1) A facility utility shall provide other utilities or licensees with nondiscriminatory access for attachments to or in any pole, duct, conduit, or right-of-way the facility utility owns or controls. A facility utility may deny such access on a nondiscriminatory basis where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering principles.

(2) All rates, terms, and conditions made, demanded, or received by any utility for any attachment by a licensee or by a utility must be fair, just, reasonable, and sufficient. Parties may mutually agree on terms for attachment to or in poles, ducts, conduits, or rights-of-way 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) A utility or licensee must submit a written application to a facility utility to request access to its facilities. The facility utility must survey the facilities identified in the application and respond in writing to requests for access to those facilities within 45 days from the date the facility utility 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 facility utility to survey the facilities to or in which the requester seeks to attach.

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

(5) To the extent that it grants the requested access, the facility utility's written response must inform the attacher of the results of the review of the application, including but not necessarily limited to a notification that the facility utility has completed a survey of the facilities identified in the application. Within 14 days of providing its written response, the facility utility must provide an estimate of charges to perform all necessary make-ready work.

(a) An attacher may accept an estimate of charges to perform make-ready work and submit payment to the facility utility any time after receipt of the estimate but before the facility utility withdraws the estimate.

(b) A facility utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 14 days after the facility utility provides the estimate to the attacher.

(6) Upon receipt of payment of the estimated charges for make-ready work, the facility utility shall provide written notice to all known entities with existing attachments on the facilities that may be affected by the make-ready work.

(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 60 days after the notice is sent (or 105 days in the case of larger orders, as described in subsection (f) of this section). For good cause shown, the facility utility may extend completion of the make-ready work by an additional 15 days.

(iii) State that any entity with an existing attachment may modify that attachment consistent with the specified make-ready work before the date set for completion of that work.

(iv) State that the facility utility may assert its right to 15 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 facility utility (or 15 days later if the facility utility has asserted its right to 15 additional days), the attacher requesting access may hire an authorized contractor to complete the specified make-ready work.

(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 90 days after notice is sent (or 135 days in the case of larger orders, as described in subsection (f) of this section). For good cause shown, the utility may extend completion of the make-ready work by an additional 15 days.

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready work before the date set for completion of that work.

(iv) State that the facility utility may assert its right to 15 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) A facility utility shall apply the timeline described in subsections (b) through (e) of this section to all requests for access to up to 300 poles or 0.5 percent of the facility

utility's poles, ducts, conduits, or rights-of-way in Washington, whichever is less as applicable.

(b) A facility utility may add 15 days to the survey period described in subsection (b) of this section to all requests for access to between 300 and 3000 poles or between 05 and five percent of the facility utility's poles, ducts, conduits, or rights-of-way in Washington, whichever is less as applicable.A facility utility may add 45 days to the make-ready work periods described in subsection (e) of this section to all requests for access to between 300 and 3000 poles or between 0.5 and five percent of the utility's poles, ducts, conduits, or rights-of-way in Washington, whichever is less as applicable.

(d) A facility utility shall negotiate in good faith the timing of all requests for access to more than 3000 poles or 5 percent of the utility's poles, ducts, conduits, or rights-of-way in Washington, whichever is less as applicable.

(e) A facility utility may treat multiple requests from an attacher as one request when the requests are filed within the same 30 day period. The applicable time period for completing the required survey or make-ready work begins on the date of the last request the facility utility receives from the attacher within the 30 day period.

(8) A facility utility may extend the time limits specified in this section under the following circumstances:

(a) Before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment; or

(b) During performance of make-ready work if the facility utility discovers unanticipated circumstances that reasonably require additional time to complete the work. Upon discovery of such circumstances, the facility utility must immediately notify, in writing, the requesting attacher and other affected entities with existing attachments, and shall include the reason for the additional time and date by which the facility utility will complete the work. The facility utility 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.

(9) If the facility utility fails to complete a survey of the facilities specified in the application within the time frames established in this section, an attacher requesting attachment in the communications space may hire an authorized contractor to complete the survey. If the facility utility does not complete any required make-ready work within the time frames established in this section, an attacher requesting attachment in the communications space may hire an authorized contractor to complete the make-ready:

(a) Immediately, if the facility utility has failed to assert its right to perform any necessary make-ready work by notifying the requesting attacher that it will undertake that work; or

(b) After 15 days from the end of the applicable time period authorized in this section if the facility utility has asserted its right to perform make-ready work and has failed to timely complete that work.

(10) A licensee may perform overlashing without submitting a written request or receiving the facility utility's consent if the overlash can be performed in compliance with generally applicable engineering requirements. The licensee shall provide notice to the facility utility within 5 days of the overlashing. The notice shall include the location of the pole(s) overlashed (including the pole number, if available) so the utility may inspect the overlashing.

480-54-040 Contractors for survey and make-ready.

(1) A facility utility shall 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 utility poles in cases where the facility utility has failed to meet deadlines specified in WAC 480-54-030.

(2) If an attacher hires a contractor for purposes specified in WAC 480-54-030, the attacher must choose a contractor included on the facility utility's list of authorized contractors.

(3) An attacher that hires a contractor for survey or make-ready work shall provide the facility utility with a reasonable opportunity for a facility utility representative to accompany and consult with the authorized contractor and the attacher.

(4) Subject to commission review in a complaint proceeding, the consulting representative of an electric facility utility may make final determinations, on a nondiscriminatory basis, on the attachment capacity of any pole, duct, conduit, or right-of-way and on issues of safety, reliability, and generally applicable engineering principles.

(5) [Alternative language to definition of "Attachment."] In the event an attacher hires a contractor for survey or make-ready work, but does not receive consent of the utility to make the attachment(s), the attachment(s) shall be deemed to have been made with the consent of the utility, provided the attacher follows these rules and generally applicable engineering requirements.

480-54-050 Modification costs; notice; temporary stay.

(1) The costs of modifying a pole, duct, conduit, or right-of-way shall be borne by all utilities and licensees that obtain access to the facility as a result of the modification and by all such entities that directly benefit from the modification. Each such entity shall share proportionately in the cost of the modification. A utility or licensee with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification, that entity adds to or modifies its attachment.

(2) A utility or licensee with a preexisting attachment to a pole, duct, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by the facility utility or attacher.

(3) If a utility or licensee makes an attachment to the facility after the completion of a modification, that entity shall share proportionately in the cost of the modification if it enabled the added attachment.

(4) A facility utility shall provide an attaching utility or licensee no less than 60 days 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 utility or licensee has attachments.

(5) A utility or licensee may file with the commission and serve on the facility utility a "Petition for Temporary Stay" of utility action contained in a notice received pursuant to

subsection (d) of this section within 15 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 facility utility and its customers and that the petitioner will likely be successful on the merits of its dispute. The facility utility may file and serve an answer to the petition within 7 days after the petition is filed unless the commission establishes a different deadline for an answer.

480-54-060 Rates

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

(2) The following formula for determining a fair, just, reasonable, and sufficient rate shall apply to attachments to utility poles and shall conform to the Federal Communications Commission's rules and regulations governing rates:

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

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

(3) The following formula for determining a fair, just, reasonable, and sufficient rate shall apply to attachments to utility ducts or conduits and shall conform to the Federal Communications Commission's rules and regulations governing rates:

$$\textit{Maximum Rate per Linear ft./m.} = \frac{[\ 1\ ]}{\textit{Number of Ducts}} \times \frac{1\ \textit{Duct}}{\textit{No. of Inner Ducts}} \times \textit{(Percentage of Conduit Capacity)} \times [\textit{No.}\ \text{of Ducts} \times \frac{\textit{Net}\ \text{Conduit Investment}]}{\textit{System Duct Length (ft./m.)}} \times \textit{(Net Linear Cost of a Conduit)} \times \textit{Carrying Charge Rate}$$

simplified as:

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

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

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 facility utility in connection with attachments to its facilities are not fair, just, and reasonable, or by a facility utility that the rates or charges are insufficient to yield a reasonable compensation for the attachment, the commission shall determine the fair, just, reasonable, and sufficient rates, terms, and conditions thereafter to be observed and in force and shall fix the same by order. In determining and fixing the rates, terms, and conditions, the Commission shall consider the interest of the customers of the attacher, as well as the interest of the customers of the facility utility.

(2) A utility or licensee may file a formal complaint if:

(1) A facility utility has denied access to its poles, ducts, conduits, or rights-of-way;

(2) A facility utility fails to negotiate in good faith the rates, terms, and conditions of an attachment agreement; or

(3) The utility or licensee disputes the rates, terms, or conditions in an attachment agreement, the facility utility's performance under the agreement, or the facility utility's obligations under the agreement or other applicable l aw.

(3) A facility utility may file a formal complaint if:

(1) Another utility or licensee is unlawfully making attachments to or in the facility utility's poles, ducts, conduits, or rights-of-way;

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

(3) The facility utility disputes the rates, terms, or conditions in an attachment agreement, the attacher's performance under the agreement, or the attacher'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 such challenge is brought within six months from the date the parties executed the agreement. Nothing in this section precludes a facility utility or attacher from bringing any other complaint that is otherwise authorized under applicable law.

(5) A complaint authorized under this section must identify all actions, rates, terms, and conditions alleged to be unjust, unfair, unreasonable, insufficient, or otherwise contrary to applicable law and shall include sufficient data or other factual information and legal argument to support the allegations. The complaint also must include a copy of the attachment agreement, if any, between the parties. A facility utility shall supply an attacher the information required to calculate rates under 480-54-060, along with the supporting pages from its ARMIS, FERC Form 1, or other report or order to or from a regulatory body, within 30 days of the request by a licensee. No complaint filed under this section shall be dismissed where the utility has failed to provide the information required to calculate rates under 480-54-060 after reasonable request by the attacher.

(6) An attacher has the burden of establishing a prima facie case ~~to prove~~ of its right to attach to the facility utility's poles, ducts, conduits, or rights-of-way and that any rate, term, or condition the attacher challenges is not fair, just, and reasonable or otherwise varies from these rules or violates any provision of RCW Ch. 80.54, this Chapter, or other applicable law. A facility utility bears the burden to prove that attachment rates calculated under these rules are insufficient or that, once a prima facie case is established by the attacher, the facility utility's denial of access to its facilities or the challenged rate, term, or condition is lawful and reasonable.

(7) If the commission determines that the 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.

(8) If the commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully or unreasonably denied or delayed, the commission may order the facility utility to provide access to that facility within a reasonable time frame and in accordance with fair, just, reasonable, and sufficient rates, terms, and conditions.