

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

FRONTIER COMMUNICATIONS
NORTHWEST INC.,

Complainant,

v.

PUGET SOUND ENERGY,

Respondent

DOCKET UE-151344

FRONTIER COMMUNICATIONS
NORTHWEST INC.'S RESPONSE TO
CROSS-MOTION FOR SUMMARY
DETERMINATION

**ORAL ARGUMENT REQUESTED
HEARING DATE - TO BE DETERMINED**

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I. INTRODUCTION

1. PSE's Cross-Motion for Summary Determination ("Cross-Motion") should be denied for three reasons:
2. First, PSE offers no valid justification for the Commission to abandon this dispute – over which it has already asserted jurisdiction – simply because PSE's state court action was not dismissed or stayed. The issues presented in the parallel proceedings are distinct. PSE has framed its state court action as a "straightforward breach of contract action."¹ The parties' contract, however, is subject to an obligation imposed on the parties by statute. That statutory obligation requires the parties to utilize a "just, fair, reasonable, and sufficient" pole attachment rate, and the Commission has the express authority to determine whether a contractual rate satisfies the statutory standard.² Indeed, even PSE must concede that "the WUTC undoubtedly has expertise and authority to review and determine whether a rate is 'just, reasonable, and sufficient.'"³ That rate issue is the issue before the Commission, and it should remain before the Commission.
3. Second, PSE has conceded the underlying merits of the rate issue. In its opposition to Frontier's motion for summary determination, PSE does not argue *in any fashion* that an attachment rate that fails to account for fractional pole ownership is "just" or "reasonable." Nor could it. As Frontier explained in its Motion for Summary Determination ("Motion"), ignoring fractional pole ownership artificially and unfairly deflates the rate a utility is entitled to charge for attachments. Furthermore, both the Commission – in its draft and proposed rules – and the FCC have determined that a fair and just attachment rate requires parties to account for fractional pole ownership. PSE did not and cannot dispute any of these facts and thus waived any

¹ Cross-Motion at 12.

² RCW 80.54.020; RCW 80.54.030.

³ Cross-Motion at 10.

argument as to the merits of the rate dispute. The only issue remaining is what relief the Commission should award.

4. Third, Frontier is entitled to the relief it seeks. PSE does not dispute that the Commission is statutorily authorized to require the parties to account for Frontier’s fractional pole ownership *going forward*.⁴ This would include, for example, the parties’ forthcoming billing for 2015, and all billing thereafter. PSE contends, rather, that Frontier is not entitled to “retrospective” relief. But RCW 80.54.030, while requiring the Commission to order prospective relief, does not preclude the Commission from blessing the offset Frontier took to true-up past billing based on a just and reasonable rate formula, *i.e.*, accounting for fractional interests. In fact, Washington statutes and administrative rules clearly permit various forms of relief *in addition to* the relief afforded under RCW 80.54.030, such as monetary damages and declaratory relief. Simply, the Commission is authorized to “regulate in the public interest the rates, terms, and conditions for attachments by licensees or utilities,”⁵ and PSE points to nothing that would preclude the Commission from granting the relief Frontier seeks.

II. ARGUMENT

A. The Commission should continue to exercise its original jurisdiction over this dispute.

5. The Commission regulates both parties to this dispute, and it has already asserted jurisdiction over this adjudicatory proceeding.⁶ Neither the state court’s decision declining to

⁴ See Cross-Motion at 13; RCW 80.54.030.

⁵ RCW 80.54.020.

⁶ See Motion at 9–10; RCW 80.01.040(3) (granting the Commission 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.”); Notice of Prehearing Conf. ¶ 2, Docket UE-151344 (“The Commission has jurisdiction over this matter under RCW Title 80, and has legal authority to regulate the rates, services, and practices of electrical utilities and telecommunications companies providing services within the state of Washington.”).

defer decision-making to the Commission, nor PSE's self-interested desire to avoid the Commission, can or should divest the Commission of its jurisdiction.

1. The state court's decision not to dismiss or stay the state court proceeding does not impact the Commission's original jurisdiction.

6. PSE's Cross-Motion incorrectly conflates the doctrine of primary jurisdiction with the Commission's original jurisdiction to regulate rates, including pole attachment rates. PSE argues that Frontier's Motion "is legally unfounded because it is premised upon the Superior Court agreeing that the WUTC has primary jurisdiction[.]"⁷ Not so. Frontier pursued relief with the Commission *independent* of PSE's related state court action, based on the Commission's original jurisdiction over rate disputes. Frontier then asked the state court to dismiss or stay that action under the primary jurisdiction doctrine out of deference to the Commission's expertise and regulatory authority over pole attachment rates.

7. The state court's decision not to dismiss or stay based on primary jurisdiction does not in any way divest the Commission of its original jurisdiction over this dispute concerning pole attachment rates, jurisdiction which exists concurrently with the state court's jurisdiction over contract interpretation. In fact, despite its name, the doctrine of "primary jurisdiction" has nothing to do with actual jurisdiction. That is, "[t]he doctrine of 'primary jurisdiction' does not involve jurisdiction in the technical sense."⁸ It is merely a doctrine of deference – "predicated on an attitude of judicial self-restraint" – that "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."⁹ Thus, the Commission's original jurisdiction over pole attachment rates arises from statute, not from whether the state court decides to defer to the Commission based on the doctrine of primary

⁷ Cross-Motion at 1.

⁸ *Kerr v. Dep't of Game*, 14 Wash. App. 427, 429, 542 P.2d 467 (1975).

⁹ *Id* (internal quotations omitted).

jurisdiction. Specifically, RCW 80.54.020 provides the Commission express “authority to regulate in the public interest the rates, terms, and conditions for attachments by licensees or utilities.” And RCW 80.54.030 (among other statutes and administrative rules) allows the Commission to remedy unjust and unreasonable attachment rates. Thus, the Commission has original jurisdiction over this dispute irrespective of the state court’s decision to retain PSE’s action.

8. Furthermore, the Commission’s jurisdiction over this dispute is necessary because *only* the Commission – and not the state court – can “determine the just, reasonable, or sufficient rates, terms, and conditions” that will govern the parties’ pole attachment rate calculation.¹⁰ The state court can unravel the meaning of contract terms, but it does not have the Commission’s authority, much less the Commission’s expertise, to determine a just rate that comports with “the interests of the customers” of both parties.¹¹ Indeed, PSE has conceded that the Commission “undoubtedly has expertise and authority to review and determine whether a rate is ‘just, reasonable, and sufficient.’”¹² And although that may “not [be] the issue” as PSE framed it in state court,¹³ that *is* the issue Frontier has presented to the Commission.

2. The Commission should continue to exercise its original jurisdiction over this adjudicatory proceeding to ensure that the parties abide by their statutory obligation to charge just and reasonable attachment rates.

9. PSE contends that the Commission should let slide Frontier’s concern about the fairness of the parties’ attachment rates because this “is an isolated contract dispute,” and “[r]esolving this dispute as a private contract matter is consistent with long-standing authority under pole

¹⁰ RCW 80.54.030.

¹¹ *See id.*

¹² Cross-Motion at 10.

¹³ *Id.*

attachment regulations that favor private negotiation of pole attachment agreements and private resolution of disputes.”¹⁴

10. PSC is wrong for two reasons. First, PSE’s argument ignores that the Washington legislature granted the Commission express statutory authority to regulate pole attachment rates.¹⁵ The legislature did not limit this authority – as PSE attempts to do – to disputes involving so-called “widespread” concern.¹⁶ PSE cites only one case for its position that the Commission should decline jurisdiction over this dispute because it does not involve “widespread” concern.¹⁷ That decision, *D.J. Hopkins, Inc. v. GTE Nw., Inc.*, 89 Wn. App. 1, 947 P.2d 1220 (1997) was not even a Commission decision. More importantly, the only discussion of “widespread” concern in that opinion related to the state court’s decision whether to defer decision-making to the Commission under the primary jurisdiction doctrine.¹⁸ The court did *not* say that the Commission should – let alone *must* – decline its *own* original jurisdiction over disputes among regulated entities. In fact, the court reiterated that the Commission has *original* jurisdiction where a statute expressly grants the Commission authority:

Under RCW 80.04.230, any GTE customer who believes he, she, or it was charged an amount in excess of the lawful rate for its telephone service is authorized to seek a refund of the overcharge from the WUTC. Under RCW 80.04.240, the WUTC has original jurisdiction over claims for refunds of

¹⁴ *Id.* at 11.

¹⁵ RCW 80.54.020.

¹⁶ It is difficult to imagine an attachment rate dispute that would involve more than two parties given that parties typically enter private, one-off pole attachment contracts with each other. Furthermore, the Commission is not hesitant to resolve “isolated” disputes involving regulated entities. In fact, some of these disputes have involved PSE. See *Bellingham Cold Storage Co.*, UE-001014, 2000 WL 33125121 (July 31, 2000) (involving a contract dispute between PSE and two customers over whether certain prices were “no longer just and reasonable”); *Kimberly-Clark Tissue Co.*, UG-990619, 2000 WL 33125107 (May 18, 2000) (resolving dispute between PSE and one of its customers).

¹⁷ Cross-Motion at 11.

¹⁸ *Id.* at 9 (“Courts often defer to agency jurisdiction when the allegations involve widespread acts[.]”).

overcharges.¹⁹

Nothing limits the Commission's original jurisdiction over pole attachment rates to matters of "widespread concern" as described by a party seeking to evade regulatory scrutiny of pole attachment rates.

11. Second, even assuming that the Commission favors private negotiation of attachment terms, the parties *did* privately negotiate their Pole Attachment Agreement, and, as part of that negotiation, expressly permitted the Commission to revise their pole attachment rate formula.²⁰

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."²¹

12. In short, PSE offers no valid justification for the Commission to decline jurisdiction over this matter. Both parties are Commission-regulated entities, and the determination of how to treat fractional poles when performing an attachment rate calculation is firmly within the Commission's statutory mandate and expertise.

B. PSE has rightfully conceded that a just and reasonable pole attachment rate must account for Frontier's fractional pole ownership

13. PSE has not even attempted to argue that ignoring fractional pole ownership is just and reasonable. Specifically, PSE failed to address any of Frontier's three arguments as to why a just and reasonable rate *must* account for fractional ownership. Instead of addressing the substance of fractional pole ownership, PSE merely asserts, repeatedly, that Frontier is *procedurally* barred from obtaining certain relief (which Frontier disputes). PSE offers no facts (or counter-argument of any type) to oppose Frontier's position that a just and reasonable rate calculation must account

¹⁹ *Id.* at 6.

²⁰ Nothing in the decision that PSE cites discusses private *resolution* of disputes.

²¹ A copy of the Pole Attachment Agreement is attached to Frontier's Complaint, and it is also attached as Exhibit A to the Declaration of Gregory Brubaker In Support of Frontier's Motion for Summary Determination.

for fractional ownership. PSE has simply ignored Frontier’s arguments and has thus failed to raise a genuine issue of material fact that would require denial of Frontier’s Motion.

14. In its Motion, Frontier marshalled numerous facts to support its claims in this proceeding. It explained that, for several years, the parties failed to account for Frontier’s fractional pole ownership when calculating the rental rate for PSE’s attachments on Frontier’s poles.²² It further explained, and PSE did not dispute, that basic mathematical congruity requires that *both* the numerator and denominator in the parties’ rate calculation must account for fractional pole ownership to avoid “an artificially lower net investment per bare pole, and thus a lower total attachment rate.”²³ Nowhere in its briefing does PSE argue – even in conclusory fashion – that it would be just and reasonable to treat a party’s fractionally owned poles as wholly owned.

15. Frontier also explained that the Commission’s draft rules on this topic explicitly comport with Frontier’s interpretation.²⁴ The Commission’s draft rules (and now the proposed rules) are the product of an extensive drafting process, involving multiple rounds of public comments.²⁵ That the Commission has agreed with Frontier’s view, after such an exhaustive rulemaking process, is highly persuasive support for Frontier’s position. Importantly, PSE does not even attempt to suggest that the Commission erred in its view on fractional pole ownership.

16. Finally, Frontier noted that the FCC determined a decade ago that, when calculating attachment rates, poles “must be adjusted to the total number of equivalent poles if some of the

²² Motion at 6–7.

²³ Motion at 11.

²⁴ *Id.* at 12–14. The Commission’s current proposed rules continue to clarify that, when calculating the “net cost of a bare pole,” parties must account for fractional pole ownership. Proposed Rules, Chapter 480-54 WAC - Attachment to Transmission Facilities at 2, *available at*: <http://www.utc.wa.gov/docs/Pages/PoleAttachmentRulemakingU140621.aspx>.

²⁵ *See* Pole Attachment Rulemaking, Docket U-140621, *available at* <http://www.utc.wa.gov/docs/Pages/PoleAttachmentRulemakingU140621.aspx>.

utility's poles are jointly owned by another utility.”²⁶ In its Cross-Motion, PSE correctly acknowledges that “the Commission may look to the FCC for guidance,”²⁷ which is precisely why Frontier included the *Nevada State* decision. More fundamentally, PSE does not argue that the FCC's conclusion is wrong.

17. In sum, there is simply no genuine issue of fact (or law) that the parties' prior rate calculation, which ignored Frontier's fractional pole ownership, was unjust and unreasonable.²⁸ As a result, Frontier is entitled to judgment as a matter of law that the parties' pole attachment rates must take into account fractional pole ownership.²⁹ The only remaining issue is the scope of Frontier's relief.

C. The Commission can award some or all of Frontier's requested relief.

18. Frontier requests a summary determination that (i) the parties' rate calculation going forward shall account for fractionally owned poles, (ii) Frontier appropriately offset the amounts it under-billed for the five years between 2008 and 2012,³⁰ and (iii) Frontier properly calculated

²⁶ Motion at 14 (citing *Nevada State Cable Tel. Ass'n*, 17 F.C.C. Rcd. 15534, 15540, n.15 (2002)).

²⁷ Cross-Motion at 17. Frontier never argued, as PSE suggests, that the FCC decision is binding on the Commission.

²⁸ RCW 80.54.020; RCW 80.54.030. Furthermore, by failing to oppose *any* of Frontier's arguments concerning the unfairness of the parties' rate calculation under these statutes, PSE has waived any later argument on the issue.

²⁹ See *Washington Exch. Carrier Ass'n*, 233 P.U.R.4th 208 (June 11, 2004) (“The Commission determines that there are no genuine issues of material fact in dispute and that Complainants and Staff are entitled to judgment as a matter of law.”); *Adair Homes, Inc. v. Butler*, 2009 WL 9411469, *1 (Wash. Super. 2009) (“In his response to Plaintiffs Motion for Summary Judgment, Defendant does not deny any of the facts giving rise to Plaintiff's claim on the notes and claim for foreclosure. Therefore, the amounts due on the notes can be calculated with certainty, and Plaintiff is entitled to summary judgment on the liability and amounts of the claim, and is entitled to foreclose.”).

³⁰ PSE mistakenly and repeatedly states that Frontier is seeking relief back to 2002. It is not. Frontier seeks a determination that it properly used the amount by which it under-billed PSE for years 2008 to 2012 to offset amounts on more recent invoices from PSE to Frontier. Motion at 7.

the amounts due from PSE for 2013 and 2014 by accounting for fractionally owned poles.³¹ The Commission can and should grant this relief.

1. The Commission has express statutory authority to award prospective relief.

19. PSE concedes, as it must, that RCW 80.54.030 expressly permits – indeed, requires – the Commission to grant prospective relief if it finds that “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 for the attachment.”³²

20. PSE contends, however, that Frontier “has not asked the Commission to determine the fairness of any rate charged for 2015 or going forward.”³³ Not so. Frontier expressly requested prospective relief in its Motion: “Frontier respectfully requests the Commission’s summary determination that . . . the just and reasonable interpretation of ‘Total number of distribution poles’ in the Agreement’s attachment rate calculation requires the parties to account for fractionally owned poles.”³⁴ On its face, this requested relief unequivocally applies on a forward-looking basis. Furthermore, the additional forms of relief that Frontier requested all related to past billing disputes, confirming that the relief quoted above is prospective.³⁵ Given

³¹ Motion at 4–5, 15. Frontier also requested a determination that the fees and interest charged by PSE as a result of Frontier’s offset and disputed billing for 2012–14 were improper and unreasonable because Frontier applied the just and reasonable calculation. *Id.* at 5, 16.

³² Cross-Motion at 12 (“[A]ny relief the WUTC can provide would be prospective”); 13 (“[T]he Commission’s power in ruling on pole attachment disputes is limited solely to *prospective relief*.”) (emphasis in original).

³³ *Id.* at 18, n. 64; *see also id.* (“PSE notes that Frontier’s Motion for Summary Determination is explicitly limited to Frontier’s request that the Commission order retroactive relief for 2002 to 2014.”).

³⁴ Motion at 4–5; *see also id.* at 15.

³⁵ *Id.*

that Frontier has yet to calculate its invoice to PSE for 2015 pole attachments, the Commission's rate determination would apply to the 2015 billing period and beyond.

21. PSE also briefly argues that “[b]ecause the draft proposed rules are not yet in place, there is no existing rule for the WUTC to apply to this dispute.”³⁶ To the extent PSE contends that the lack of a rule prohibits the Commission from awarding prospective relief, it is wrong. The Commission is unquestionably authorized *by statute* to set a just and reasonable rate going forward.³⁷ PSE cites no authority for the notion that the Commission *must* enact rules before exercising its authority under RCW 80.54.030 to set a just and reasonable attachment rate, particularly when the legislature set forth clear instruction on *how* to determine whether a rate is just and reasonable.³⁸ Furthermore, if PSE's position were correct, then Frontier and PSE could simply agree to *any* rate calculation they chose – no matter how one-sided or contrary to public interest – and the Commission would be powerless to protect consumers. PSE's argument ignores the Commission's entire purpose.

22. In short, PSE does not dispute that a just and reasonable attachment rate must account for fractional pole ownership, and it cannot seriously contest the Commission's authority to award prospective relief. There is no issue of material fact precluding summary determination on this issue.

2. The Commission can and should award Frontier additional relief.

23. The Commission is not limited to granting prospective relief. PSE contends otherwise by contorting the Commission's *obligation* to award prospective relief under RCW 80.54.030 as a

³⁶ Cross-Motion at 18.

³⁷ RCW 80.54.030.

³⁸ See RCW 80.54.030; RCW 80.54.040; *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wash. 2d 656, 665, 911 P.2d 1301 (1996) (“[T]he WUTC has jurisdiction not only to approve or disapprove service area agreements but also to *apply and interpret relevant statutes* where a dispute arises pursuant to such an agreement and to issue appropriate orders.”) (emphasis supplied).

prohibition on awarding other relief. PSE insists that “[t]he statute plainly prohibits the Commission from [awarding retrospective relief].”³⁹ Yet RCW 80.54.030, while *requiring* the Commission to order prospective relief, does not *prohibit* anything. And PSE points to no other Washington statute or administrative rule that would prevent the Commission from awarding the relief Frontier seeks.

24. Small wonder. Numerous administrative rules expressly refute PSE’s attempt to circumscribe the Commission’s authority. For example, RCW 80.04.220 allows a customer who has been charged an “excessive or exorbitant” rate to recover damages.⁴⁰ If, for example, Frontier asserted that PSE overcharged it by imposing an unjust and unfair attachment rate, the Commission could unquestionably set a fair rate going forward under RCW 80.54.030 *and* award past damages under RCW 80.04.220. While Frontier does not seek damages, the damages statute demonstrates that RCW 80.54.030 does not preclude the Commission from awarding additional relief. In particular, given that the Commission has the authority to award damages under RCW 80.04.220, RCW 80.54.030 does not preclude the Commission from declaring as appropriate the offset that Frontier took on invoices from PSE to prevent a net overcharge based on unjust and unreasonable pole attachment rates, *i.e.*, rates calculated without taking into account fractional pole ownership.

25. Furthermore, Frontier’s requested remedies are more akin to declaratory relief, which the Commission is indisputably authorized to award.⁴¹ Frontier seeks an order concluding that RCW

³⁹ Cross-Motion at 13.

⁴⁰ PSE assumes, incorrectly, that Frontier is seeking damages under RCW 80.04.220 and RCW 80.04.230. Cross-Motion at 14–16. Frontier is not seeking damages, and merely cited those statutes in response to PSE’s argument in state court that the Commission was powerless to award past damages. In fact, it is PSE seeking monetary damages, not Frontier. Thus, the statutes are not applicable here, other than to demonstrate that the Commission *is* authorized to award relief in addition to prospective rate-setting under RCW 80.54.030.

⁴¹ RCW 34.05.240 (the Commission may “[e]nter an order declaring the applicability of the statute, rule, or order in question to the specified circumstances.”); WAC 480-07-930.

80.54.020, which requires that “[a]ll rates, terms, and conditions made, demanded, or received by any utility for any attachment by a licensee or by a utility must be just, fair, reasonable, and sufficient,” applies to the parties’ Pole Attachment Agreement, and that Frontier appropriately offset the amount necessary to render its rate just, fair, reasonable, and sufficient. Nothing in RCW 80.54.030 bars such relief, and Washington statutes and administrative rules expressly permit it.⁴²

III. CONCLUSION

26. PSE’s entire Cross-Motion tellingly ignores the fundamental issue in this adjudicatory proceeding: whether the parties’ attachment rate calculations are just and reasonable. Rather than address this issue, PSE devotes nearly 20 pages pleading with the Commission to turn a blind eye to Frontier’s concerns or, at a minimum, to reject all of the relief Frontier seeks. In doing so, PSE simply disregards that the Washington legislature charged the Commission with resolving expressly these types of attachment rate disputes, and *required* the Commission to remedy unfair attachment rates.⁴³ Because PSE has not raised a single genuine issue of material fact, Frontier respectfully requests that the Commission award Frontier summary determination on the necessity of taking into account fractional ownership of poles in calculating pole attachment rates. Frontier further respectfully requests that, as a consequence of taking into account fractional pole ownership, the Commission grant Frontier’s requested relief.

⁴² Even if the Commission declines to explicitly approve Frontier’s offset for years 2008 to 2012, Frontier is entitled to, at a minimum, a determination that the parties’ prior rate calculation – which ignored Frontier’s fractional pole interest – was contrary to the terms and policy of RCW 80.54.020 and 80.54.030.

⁴³ RCW 80.54.020; RCW 80.54.030.

DATED this 7th day of October, 2015.

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CERTIFICATE OF SERVICE

1. I hereby certify that I have on this day caused to be electronically filed the foregoing Frontier's Response to Cross-Motion for Summary Determination with the WUTC by email delivering a true and correct copy to records@utc.wa.gov.

2. I hereby certify that I have this day I caused to be served the original of the foregoing Frontier's Response to Cross-Motion for Summary Determination via overnight delivery 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

3. I hereby certify that I have this day caused to be served a true and correct copy of the foregoing Frontier's Response to Cross-Motion for Summary Determination upon the persons and entities listed on the Service List below via email and by depositing a copy of said document in the United States mail, addressed as shown on said Service List, with first class postage prepaid.

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DATED at Portland, Oregon this 7th day of October, 2015.

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