[Service date November 16, 2015]

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

FRONTIER COMMUNICATIONS NORTHWEST INC.,	)	DOCKET UE-151344
	)	ORDER 02
Complainant,	)	
	)	INITIAL ORDER GRANTING IN
v.	)	PART AND DENYING IN PART
	)	MOTIONS FOR SUMMARY
PUGET SOUND ENERGY,	)	DETERMINATION AND CLOSING
	)	DOCKET
Respondent.	)	
. . . . .	)	

BACKGROUND

1 On June 30, 2015, Frontier Communications Northwest Inc. (Frontier) filed with the Washington Utilities and Transportation Commission (Commission) a formal complaint against Puget Sound Energy (PSE) involving a dispute over the proper method for calculating utility pole attachment rates (Complaint). On July 7, 2015, PSE filed its answer denying the substantive allegations in the Complaint.

2 On August 7, 2015, Frontier filed a motion for summary determination. As authorized in Order 01, Prehearing Conference Order, PSE filed its response to the motion and a cross-motion for summary determination on September 18, 2015. Frontier filed its response to the cross-motion on October 7, 2015. On November 3, 2015, the Commission conducted oral argument on the motions.

3 The basic facts are undisputed. In 2002, Frontier's predecessor, Verizon Northwest Inc., entered into a pole attachment agreement with PSE (Agreement), which established the rates, terms, and conditions for the parties to attach lines and equipment to each other's utility poles. Among those terms is a formula for calculating the rates the parties pay to make those attachments. The formula requires each party to divide the value of its poles by the "total number of distribution poles" and then multiply the result by the "annual carrying charge" and the ratio of the space the attachments occupy on the poles to the total usable space on the poles.[1]

[1] Agreement, Appendix IV.

4 Frontier owns its own poles and also owns approximately 70,000 utility poles jointly with the Snohomish County Public Utility District No. 1 (Snohomish PUD). Frontier owns 45 percent of each jointly owned pole while Snohomish PUD owns the remaining 55 percent. Until 2013, Frontier included the total number of poles that Frontier owned, in whole or in part, in the "total number of distribution poles" element of the rate formula when calculating the amount PSE owed for making attachments to Frontier's poles.

5 In 2013, Frontier contacted PSE and stated that Frontier's prior rate calculations were erroneous. Frontier contended that it should have included only its ownership interest in the poles it jointly owns with Snohomish PUD, rather than the poles in their entirety. Failure to account for such fractional ownership, according to Frontier, resulted in artificially low net investment amounts and corresponding rates that were insufficient.[2] Frontier recalculated the attachment rates it charged PSE since the beginning of the Agreement and requested that PSE compensate Frontier an additional $624,472.39 to account for the difference between the rates Frontier charged and the rates Frontier believed it should have been charging. PSE disagreed with Frontier's recalculations. Following unsuccessful negotiations in 2014 to resolve the issue, Frontier offset approximately half of the amount it believed it had undercharged PSE from payments Frontier owed PSE.

6 On February 8, 2015, PSE filed suit against Frontier in King County Superior Court alleging breach of the Agreement. Frontier subsequently filed its Complaint with the

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[2] By way of illustration, if the value of a pole is $100 and Frontier solely owns 10 poles ($1,000 value to Frontier) and jointly owns 10 other poles with Snohomish PUD ($450 value to Frontier, $550 to Snohomish PUD), the difference between using a count of all of the poles, regardless of ownership, and using only the portion of the poles Frontier owns in the "total number of distribution poles" element is as follows:

Using full pole amount:

$$\frac{\$1{,}450 \text{ value}}{20 \text{ poles}} = \$72.50 \text{ net investment per bare pole}$$

Using fractional pole value:

$$\frac{\$1{,}450 \text{ value}}{14.5 \text{ poles}} = \$100.00 \text{ net investment per bare pole}$$

(10 whole + 45% of 10)

Commission and later filed a motion in the Superior Court to stay or dismiss PSE's claims on the basis of the Commission's primary jurisdiction. The court denied Frontier's motion.

7 Frontier provides three bases for its request that the Commission grant summary determination in Frontier's favor:

(1) The first part of the Agreement's rate calculation formula requires Frontier to divide the total value of its poles by the total number of poles. The total value, by definition, includes only Frontier's ownership interest in the poles. Mathematical congruity thus requires that the total number of distribution poles also reflect Frontier's fractional interest in the poles it jointly owns with Snohomish PUD.

(2) The Commission has adopted rules to implement the state's pole attachment statute, RCW 80.54, which become effective on January 1, 2016. Specifically, WAC 480-54-020 provides, "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." The Commission thus has determined what constitutes a fair, just, reasonable, and sufficient pole attachment rate consistent with Frontier's position, and the Agreement must be interpreted accordingly.

(3) The Federal Communications Commission (FCC) also has determined that when calculating attachment rates, only the pole owner's fractional interest in jointly owned poles should be included in the total pole count. The FCC adopted this requirement in 2002, the same year the parties executed the Agreement, which must be interpreted consistent with this obligation.

8 PSE opposes the Frontier Motion and seeks summary determination in PSE's favor on the following grounds:

(1) The parties' dispute is a simple contract action to recover payments due under the Agreement that requires no regulatory expertise to resolve. The dispute was already before the Superior Court when Frontier filed its Complaint with the Commission, and thus the court, not the Commission, should adjudicate the issues.

(2) RCW 80.54.030 authorizes the Commission only to establish just, reasonable, and sufficient pole attachment rates on a prospective basis. Accordingly, the Commission cannot grant Frontier the retroactive relief it seeks.

(3) The other statutes on which Frontier relies are inapplicable. RCW 80.04.220 and RCW 80.04.230 apply to excessive rates or overcharges by a utility, and Frontier complains that its own rates were too low, not that PSE's rates were excessive. Even if applicable, moreover, those statutes limit claims to the prior six months or two years, respectively, from the date they were filed. Frontier's request for compensation for the last ten years vastly exceeds those time frames.

(4) The Commission's pole attachment rules are not effective until January 1, 2016, and thus cannot support Frontier's claims. Even if that were not the case, the rules include the statutory limitation that the Commission will establish rates only on a prospective basis, not retroactively as Frontier requests. The rules also limit challenges to the terms in a pole attachment agreement to claims brought within six months of the date the agreement was executed unless the challenging party was reasonably unaware of the dispute when the agreement was executed. Neither of these circumstances exist here.

(5) Washington has taken jurisdiction over pole attachments through RCW 80.54, and thus the FCC's pole attachment determinations are not binding on the Commission. Nor are the parties required to incorporate those determinations in the Agreement. Even if that were not the case, the FCC issued the decision on which Frontier relies in 2002, and Frontier is or should have been aware of that decision and acted on it long before now.

9 Frontier opposes the PSE Motion and makes the following additional arguments:

(1) The Superior Court's decision not to stay or dismiss PSE's lawsuit does not deprive the Commission of the ability to adjudicate Frontier's complaint. Both the court and the Commission have jurisdiction. The Commission alone, however, has the authority to determine just, reasonable, and sufficient pole attachment rates, terms, and conditions, and the Commission should exercise that authority.

(2) PSE has not even attempted to dispute that failing to consider fractional pole ownership is just and reasonable. Rather PSE has effectively conceded that issue by ignoring Frontier's arguments.

(3) The Commission has express statutory authority to award prospective relief, and Frontier has requested such relief in addition to recovery of past undercharges. Frontier effectively seeks a declaratory order, which the Commission is also authorized to enter, that Frontier's interpretation of the Agreement is correct and that Frontier appropriately offset the amounts necessary to ensure that PSE complied with its legal obligations.

10 Román Hernández, K&L Gates LLP, Portland, Oregon, and George Baker Thomson, Associate General Counsel, Frontier, Everett, Washington, represent Frontier. James F. Williams and Karen Brunton Bloom, Perkins Coie, Seattle, Washington, represent PSE. Jennifer Cameron-Rulkowski, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff.

DISCUSSION

Jurisdiction

11 We first must determine the extent of the Commission's jurisdiction and ability to award the relief Frontier has requested. Frontier brought its Complaint pursuant to RCW 80.54.030, which provides:

> 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 utility in connection with attachments are unjust, unreasonable, or that the rates or charges are insufficient to yield a reasonable compensation for the attachment, the commission shall determine the just, reasonable, or 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 attaching utility or licensee, as well as the interest of the customers of the utility upon which the attachment is made. (Emphasis added.)

12 We agree with PSE that the plain language of this statute authorizes the Commission to award only prospective relief. The Superior Court, not the Commission, must determine whether either party owes the other any disputed unpaid amounts, attorneys fees, or other compensation under the Agreement as a result of past conduct.

13 Frontier contends that RCW 80.04.220 and 80.04.230 empower the Commission to require PSE to compensate Frontier for past undercharges, but these statutory provisions are inapplicable to Frontier's Complaint. They authorize the Commission to remedy excessive rates or overcharges a utility charges its customers. Frontier does not allege that PSE's rates are excessive or that PSE has overcharged Frontier for attachments to PSE's poles. Rather, Frontier alleges that it has *under*charged PSE in the past for attachments to Frontier's poles. Frontier does not cite, nor are we aware of, any statutory authority for the Commission to order compensation for such undercharges.

14 We agree with Frontier, however, that the Commission has an independent obligation under RCW 80.54.030 to determine just, reasonable, and sufficient pole attachment rates, regardless of the pending action in the Superior Court. The judge denied Frontier's motion to stay that case but did not order the Commission to dismiss these proceedings. We therefore conduct the review authorized under RCW 80.54.030 but limit the available relief accordingly.

Sufficiency of Annual Rate

15 RCW 80.54.030 requires the Commission to find in response to a utility's complaint whether "the rates or charges are insufficient to yield a reasonable compensation for the attachment." Upon a finding that the rates are insufficient, the Commission must "determine the just, reasonable, or sufficient rates . . . thereafter to be observed and in force and shall fix the same by order." Before we can make a finding on the sufficiency of Frontier's attachment rates, we must determine what those rates are.

16 The Agreement establishes the rates for each party's attachments to the other party's poles and requires PSE annually to pay Frontier "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 [Frontier]."[3] The Agreement defines "Annual Rate" to "mean the

[3] Agreement ¶ 6.2.2. We note that the quoted reference to paragraph 6.2.2 (b) apparently is a typographical error because that subparagraph does not address the calculation of the Annual

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." A "Joint Pole" is "a Pole owned in whole or in part by a Party to which Equipment of the other Party is attached."[4] A "Sole Owner" is "the Party that owns in whole the Pole."[5]

17 As an initial matter, we observe that the Agreement does not expressly establish an obligation for PSE to pay *any* rate for its attachments to the poles Frontier jointly owns with Snohomish PUD. Section 6 governs payments and repeatedly refers only to rates and compensation for each party's *solely* owned poles. Although it the term "Joint Pole," the Agreement defines that term to apply to either solely or partially owned poles. By specifying that a party must pay only for its attachments to the other party's "solely owned poles," the Agreement does not require either party to pay the other for attachments to jointly owned poles.

18 Frontier and PSE, however, have paid each other for attachments to all Joint Poles, whether solely or jointly owned, since executing the Agreement in 2002, and neither party contends that the Agreement should be interpreted otherwise. The parties' course of performance thus appears to reflect their intent not to limit payment under the Agreement to Joint Poles solely owned by a party. The alternative of a zero rate for attachments to jointly owned poles would indisputably be insufficient, but the Commission need not make any such finding because neither party raised this issue. The lack of any express payment obligation for jointly owned poles, however, colors, if not completely undercuts, Frontier's arguments that the rate calculation prescribed in the Agreement accounts for such poles.

19 Just as it does not expressly require payment for attachments to jointly owned poles, the Agreement does not contemplate any adjustment in the Annual Rate calculation to account for fractional pole ownership. The Agreement does not specify all the math used

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Rate. The reference, therefore, should be to paragraph 6.2.2 (c), which provides that Frontier must determine "the Annual Rate for each Joint Pole owned solely by [Frontier] calculated in accordance with Schedule 2 of Appendix IV."

[4] *Id*. ¶ 1.2. That paragraph also defines "Pole" as "a utility pole located within the State of Washington owned in whole or in part by a Party," and "Equipment" as "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 with the State of Washington."

[5] *Id*.

to calculate the components of the Annual Rate for poles Frontier owns, but the Net Investment per Bare Pole component appears to be calculated by dividing the "Combined value of bare poles and easements" by the "Total number of distribution poles."[6] Frontier correctly observes that the Agreement does not define these terms, but Frontier provides no basis for interpreting "Total number of distribution poles" to mean anything other than what the plain language states – a count of all of Frontier's poles.[7]

20 Nothing within the four corners of the Agreement provides any indication that the parties intended the "Total number of distribution poles" to be adjusted for fractional ownership. Nor has Frontier produced any extrinsic evidence of such an intent. To the contrary, Frontier does not dispute that for eleven years after the parties executed the Agreement, Frontier has charged PSE an Annual Rate without any adjustment to the "Total number of distribution poles." Frontier claims this billing history was the result of a mistake, but there can be no mistake about the meaning of the Agreement when it does not provide for a different calculation than Frontier consistently used. Based on the information the parties have filed in this docket, the Commission cannot conclude that the Agreement authorizes Frontier to calculate the Annual Rate as Frontier claims.

21 Frontier maintains that such a result is internally inconsistent. The numerator in the equation (pole value divided by number of poles) by definition is limited to the poles' value to Frontier, and thus according to Frontier, mathematical congruence requires that the denominator – the "Total number of distribution poles" – also must reflect Frontier's fractional ownership. We agree with that concept in principle, and the Commission's newly promulgated rules adopt that requirement. In determining the current rate, however, the issue is whether the parties incorporated that principle into the Agreement. We find no indication that they did. Frontier cites no authority for the proposition that a contract must be construed to require mathematical congruence in the absence of the parties' agreement to include such a requirement.

22 Frontier nevertheless argues that the FCC requires pole attachment rate calculations to account for fractional ownership, and because the FCC adopted that requirement in 2002, the same year the parties executed the Agreement, the Agreement should be interpreted to

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[6] *Id*. Appendix IV, Schedule 2 at A(8) and (9).

[7] The Commission interprets "distribution" in this context to refer to the type of electric facilities attached to the pole. A "distribution pole" thus would be a pole to which lower voltage distribution, rather than high voltage transmission, lines and facilities are attached.

incorporate that decision. The FCC does not regulate pole attachments in Washington. The FCC's pole attachment rules and decisions are not legally binding in this state and thus are not automatically incorporated into the Agreement. The parties had to expressly include any FCC requirements. Again, we find no indication that the parties did so with respect to fractional pole ownership. To the contrary, the coincidence in timing of the FCC decision and the Agreement's execution is a strong indication that the parties were aware of that decision and chose not to incorporate it into the Agreement.

23 We determine, therefore, that the Agreement does not authorize Frontier to reduce the "Total number of distribution poles" to reflect Frontier's joint ownership of poles with Snohomish PUD when calculating the Annual Rate PSE must pay for its attachments to Frontier's poles.

24 We correspondingly find that the Annual Rate is insufficient to yield a reasonable compensation for PSE's attachments to Frontier's poles. A utility's pole count must be congruent with its investment when calculating the attachment rate – otherwise, the calculation understates the net investment per pole, resulting in an artificially low rate. The FCC has long mandated such congruency in the states in which it has jurisdiction to regulate pole attachments, and the Commission adopted the same requirement in its newly promulgated rules. The lack of consideration for fractional ownership in the Agreement's Annual Rate calculation formula renders the rate insufficient.

25 A just, reasonable, and sufficient pole attachment rate accounts for fractional ownership, as the Commission recognized when adopting WAC 480-54-020. Both the Agreement and Washington law permit the Commission to require the parties to revise the Agreement prospectively.[8] Accordingly, we order the parties to amend the Annual Rate calculation in the Agreement to ensure congruency between a party's investment and its ownership interest in its poles.

26 PSE contends that Frontier did not ask for prospective relief in its Complaint and thus is not entitled to it. We disagree. Frontier invoked the Commission's jurisdiction under RCW 80.54.030 and requested a determination that "the pole attachment rate calculation

[8] RCW 80.54.030; Agreement ¶¶ 6.1.2 & 6.1.3.

formula in the parties' Agreement must account for fractionally-owned utility poles."[9] We construe Frontier's Complaint to include a request for prospective relief.

27 PSE also claims that any prospective relief is not ripe because the Commission's pole attachment rules do not become effective until January 1, 2016, and Frontier cannot seek to incorporate those rules' requirements into the Agreement until after they take effect. The Commission's authority, however, is established in the statute, and RCW 80.54.030 empowers – indeed, requires – the Commission to order a just, reasonable, and sufficient rate upon a finding that a utility's attachment rates are insufficient. Our findings and determination in this order are consistent with, but not derived from, WAC 480-54-020. Requiring Frontier to wait to seek prospective relief until the rule is effective would conflict with our statutory obligation, as well as waste Commission and party resources. We decline to do so.

FINDINGS AND CONCLUSIONS

28 (1) The Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including investor-owned electric and telecommunications companies.

29 (2) The Commission has jurisdiction over the subject matter of, and the parties to, this proceeding.

30 (3) The Commission's jurisdiction over Frontier's Complaint is limited to finding if the rates in the Agreement "are insufficient to yield a reasonable compensation for the attachment," and if so, determining "the just, reasonable, or sufficient rates . . . thereafter to be observed and in force" as required in RCW 80.54.030.

31 (4) The Agreement does not authorize Frontier to reduce the "Total number of distribution poles" to reflect Frontier's joint ownership of poles with Snohomish PUD when calculating the Annual Rate PSE must pay for its attachments to Frontier's poles.

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[9] Complaint ¶ 34(e).

32 (5) The lack of adjustment for fractional ownership in the Agreement's Annual Rate calculation formula renders the resulting rate insufficient to yield a reasonable compensation to Frontier for PSE's attachments to Frontier's poles.

33 (6) A just, reasonable, and sufficient attachment rate accounts for fractional ownership of the poles.

34 (7) The Commission should order the parties to revise the Agreement's Annual Rate calculation formula to account for fractional ownership of the poles.

ORDER

THE COMMISSION ORDERS That

35 (1) Frontier Communications Northwest Inc. and Puget Sound Energy must amend their Pole Attachment Agreement to provide that when a party owns poles jointly with another entity, the total number of distribution poles for purposes of calculating the net investment per bare pole is the number of the party's solely owned poles plus the product of the number of the jointly owned poles multiplied by the party's ownership percentage in those poles.

36 (2) The Commission otherwise denies Frontier Communications Northwest Inc.'s Motion for Summary Determination.

37 (3) The Commission otherwise grants Puget Sound Energy's Cross-Motion for Summary Determination and closes this docket.

Dated at Olympia, Washington, and effective November 16, 2015.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

GREGORY J. KOPTA
Administrative Law Judge

NOTICE TO THE PARTIES

This is an initial order. The action proposed in this initial order is not yet effective. If you disagree with this initial order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this initial order, and you would like the order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has 20 days after the entry of this initial order to file a petition for administrative review (Petition). Section (3) of the rule identifies what you must include in any Petition as well as other requirements for a Petition. WAC 480-07-825(4) states that any party may file an answer (Answer) to a Petition within 10 days after service of the petition.

WAC 480-07-830 provides that before the Commission enters a final order any party may file a petition to reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. The Commission will not accept answers to a petition to reopen unless the Commission requests answers by written notice.

RCW 80.01.060(3), as amended in the 2006 legislative session, provides that an initial order will become final without further Commission action if no party seeks administrative review of the initial order and if the Commission fails to exercise administrative review on its own motion.

You must serve on each party of record one copy of any Petition or Answer filed with the Commission, including proof of service as required by WAC 480-07-150(8) and (9). To file a Petition or Answer with the Commission, you must file an original and three copies of your petition or answer by mail delivery to:

Attn: Steven V. King, Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250