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May 30, 2014

Via Web Portal

Steven King
Executive Director and Secretary
Washington Utilities and Transportation Commission
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Re: Docket U-140621

Enclosed for filing are comments by AT&T Corp., New Cingular Wireless PCS, LLC, and Teleport Communications America, Inc. (collectively "AT&T") in the above mentioned docket.

Sincerely,

Cynthia Manheim by Dac with permissi

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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 AT&T

In response to the notice of opportunity to file written comments filed by the Washington Utilities and Transportation Commission on April 23, 2014, AT&T Corp., New Cingular Wireless PCS, LLC, and Teleport Communications America, Inc. (collectively "AT&T") hereby submit the following comments.

All pleadings, correspondence, and other communications concerning this docket should be sent to the following addresses:

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I. Introduction

AT&T appreciates the opportunity to submit comments in this rulemaking proceeding to implement RCW chapter 80.54 relating to Attachments to Transmission facilities. Specifically, the Commission requests comment on the extent to which the Commission should adopt some or all of the rules promulgated by the Federal Communications Commission ("FCC") or the Oregon Public Utility Commission ("OR PUC") governing utility pole and conduit attachments.

As a provider of wireless service, competitive local exchange service and inter-exchange service, AT&T has a substantial interest in the outcome of this rulemaking. As explained in more detail below, customers' increased reliance on wireless technology is driving the need for continued infrastructure development. Consumers are increasingly using wireless service for everything from voice conversation to video streaming and home security. This demand for wireless service requires increasing amounts of spectrum (not all of which is at the attractive lower bandwidths), more cell sites, and the use of different technologies. In addition, consumers are now using their wireless phones more in their homes. All of this means, wireless companies are increasingly looking to existing structures, such as utility poles,[1] to place facilities, especially in areas that are typically more difficult to construct large cell sites, such as residential areas. To encourage continued deployment of wireless infrastructure in the state and avoid disincentives for wireless carriers to invest in Washington, it is necessary for the Commission to promulgate rules that provide access to utility poles at reasonable rates, terms and conditions.

[1] In these comments "utility poles" refers to investor owned electric utility poles and incumbent local exchange carrier utility poles.

AT&T appreciates the reasons why the Washington Commission denied PCIA's Petition to Adopt Rules to Implement RCW Ch. 80.54.[2] In order to have a well-considered pole attachment rules in Washington, the Commission should review and consider all of the FCC rules regarding pole attachments along with rules promulgated in other states, such as Oregon. However, to make Washington competitive with other states for wireless infrastructure investment, the Commission should adopt the FCC's rules regarding pole attachments, only departing from the FCC rules when absolutely necessary.

II. Need for Pole Attachment Rules in Washington

a. Rapid Increase in Wireless Usage

AT&T appreciates the Commission's attention to this important issue. Consumers are using their mobile devices more than ever before for business and personal use and in a variety of new ways. "Providers of mobile wireless services offer an array of mobile voice and data services, including interconnected mobile voice services, text and multimedia messaging, and mobile broadband Internet access services. Mobile wireless services also include machine-to-machine connections for fleet management, smart grid devices, vehicle tracking, home security systems, and other telematics services."[3] Data usage on AT&T's wireless network has increased more than 50,000 percent in the past six years (January 2007 through December 2013). Further, AT&T does not expect this increased demand for data

[2] See Docket UT-140024, Order 01.

[3] See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Sixteenth Report, WT Docket No. 11-186, FCC 13-34 (rel. March 21, 2013)("*16th CMRS Competition Report*"), para. 19.

usage to slow down anytime soon. Today, there are more connected devices than there are people in the U.S., and about 60 percent of Americans use data-hungry smartphones.[4]

All of this requires wireless carriers to deploy additional infrastructure, including facilities on utility poles. "America's demand for and reliance on wireless broadband services has been growing dramatically and will almost certainly continue to do so in the years ahead. The ability of wireless providers to meet this demand will depend not only on access to spectrum, but also on the extent to which they can deploy new or improved wireless facilities or cell sites. The impact of broadband demand on the number of cell sites is reflected in data showing a twelve percent increase in the number of cell sites in 2011…"[5]

AT&T's wireless services are being used by businesses and consumers. Small businesses depend upon wireless service to compete. A recent AT&T survey of small businesses indicated that nearly all (98%) small businesses utilize wireless technologies in their operations. Sixty-six percent (66%) of small businesses responded that they could not survive, or that it would be a major challenge to survive, without wireless service.[6]

Similarly, demand for wireless service in residential areas has grown significantly in recent years. Washington State is slightly above the national average with 39.4 % of homes

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[4] See FCC Press Release, *FCC Adopts Rules for First Ever Incentive Auction: Will Make Available Additional Airwaves, Increase Competition for Mobile Broadband* (May 15, 2014).

[5] See *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting et al*., WT Docket No. 13-238, WC Docket No. 11-59, et seq, FCC 13-122, Notice of Proposed Rulemaking (rel. Sept. 26, 2013) ("*Small Cell NPRM*"), para. 2. *See also*, *Id*. at ftnt 2 ("According to CTIA—The Wireless Association ("CTIA"), the total number of cell sites in use by CTIA's members was 283,385 as of year-end 2011. *See* CTIA, *2011 Semi-Annual Wireless Industry Survey Results*, at 163 (2012). This represents an increase of 12 percent since December 31, 2010, of 15 percent since December 31, 2009, of 54 percent since December 31, 2005, and of 61 percent since December 31, 2004. *Id.")*

[6] "2013 AT&T Small Business Technology Poll." *AT&T Website.* From URL: http://www.att.com/gen/press-room?pid=23878

that choose to be wireless only households and another 17.4% are "wireless-mostly."[7] This means consumers are increasingly relying on wireless service in their homes for a variety of needs, including E911. As such, additional wireless infrastructure is required in residential areas to provide high-quality, reliable service that penetrates inside homes. Obtaining permits to construct large cell towers in residential areas is often difficult, so carriers are increasingly looking for new ways to install infrastructure wireless infrastructure in residential areas. Attaching wireless antennas to existing utility poles is often the most effective and efficient solution.

b. Small Cell and DAS deployment

As demand on AT&T's wireless network increases, it must continue to find new ways to expand and enhance high-speed mobile access for our customers. Small cells and distributed antenna systems ("DAS") are innovative technologies that complement, but do not replace the need for traditional macrocell sites, to meet increased customer demand for wireless service.

Outdoor small cells can fill coverage holes and increase capacity in an area. Small cells are also small enough to be discreetly mounted on existing infrastructure such as utility poles, lights posts or buildings. Some macrocell sites cover a radius measured in miles; whereas, a single small cell covers a radius in the hundreds of feet. Therefore, a number of small cells must be deployed as an interrelated system to provide the needed coverage or capacity to an area. In order to encourage the deployment of small cells and enable service providers to meet the ever increasing demand for wireless service in Washington, pole attachment rules must be developed that make it more efficient and less costly to attach radio

[7] National Health Statistics Reports, Wireless Substitution: State-level Estimates from the National Health Interview Survey, 2012, Number 70, December 18, 2013, pg. 6. (http://www.cdc.gov/nchs/data/nhsr/nhsr070.pdf).

communications and personal wireless service equipment and associated cables to existing utility poles.

Outdoor DAS (or ODAS) also helps connect customers to wireless services in a different way than either macrocell or small cells. As a general proposition, ODAS is configured to utilize a group of antennas connected via fiber optic cable to a single base station. This technology would also benefit from pole attachment rules that make it more efficient and less costly to attach to existing utility poles.

c. Wireless Broadband

The National Broadband Plan[8] calls broadband, "the great infrastructure challenge of the early 21st century."[9] The *National Broadband Plan* states:

> Like electricity a century ago, broadband is a foundation for economic growth, job creation, global competitiveness and a better way of life. It is enabling entire new industries and unlocking vast new possibilities for existing ones. It is changing how we educate children, deliver health care, manage energy, ensure public safety, engage government, and access, organize and disseminate knowledge.[10]

To further facilitate broadband deployment, the *National Broadband Plan* calls for, among other things, "low and more uniform rental rates for access to poles…"[11] The FCC implemented this aspect of the *National Broadband Plan* by revising its pole attachment rules "to improve the efficiency and reduce the potentially excessive costs of deploying telecommunications, cable, and broadband

[8] *Connecting America: The National Broadband Plan* ("*National Broadband Plan"),* available at: http://download.broadband.gov/plan/national-broadband-plan.pdf.

[9] *National Broadband Plan*, p. XI.

[10] *Id*.

[11] *Id* at XII.

networks, in order to accelerate broadband buildout."[12] The FCC describes its *2011 Pole Attachment Order* as adopting rule changes to help "facilitate the deployment on utility poles of Distributed Antenna Systems (DAS) and small cell solutions that are especially useful for providing wireless broadband service."[13]

III. Enactment of Pole Attachment Rules in Washington Will Encourage Wireless Infrastructure Investment

A. Federal Framework for Pole Attachment Regulation

Congress left the matter of the regulation of the rates, terms and conditions of pole attachments to the state if the state certifies to the FCC that (A) it regulates such rates, terms, and conditions; and (B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.[14]

At the federal level, a utility is required to provide "any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by" the utility except in situations where an electric utility cannot provide access because of "insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[15] The FCC is required to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures…to hear and resolve complaints concerning such

[12] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, FCC 11-50, Report and Order and Order on Reconsideration (rel. April 7, 2011)("*2011 Pole Attachment Order*").

[13] *16th CMRS Competition Report*, para. 77.

[14] See 47 USC §224(c).

[15] 47 USC §224(f)

rates, terms, and conditions."[16] The FCC's rules regarding pole attachments are set forth in 47 CFR §§1.1401-1.1424.

A state may preempt the FCC's regulation of pole attachments in certain circumstances. Specifically, 47 USC §224(c)(1) provides that "[n]othing in this section shall be constructed to apply to, or to give the [FCC] jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way…for pole attachments in any case where such matters are regulated by a State." In order for a State to exert such jurisdiction over pole attachments it must certify to the FCC that it has enacted regulations that meet the conditions set forth in 47 USC §224(c)(2) and (3). Specifically,

> (2) Each State which regulates the rates, terms, and conditions for pole attachment shall certify to the Commission [FCC] that –
>
> (A) it regulates such rates, terms, and conditions; and
>
> (B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachment, as well as the interest of the consumers of the utility services.
>
> (3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments –
>
> (A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and
>
> (B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter –
>
> i. within 180 days after the complaint is filed with the State, or
>
> ii. within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

B. Washington Pole Attachment Rules Should Apply to Wireless Attachments

After passing enabling legislation in 1979, Washington certified to the FCC that it would regulate the rates, terms, and conditions for pole attachment.[17] As explained in more

[16] 47 USC §224(b)(1).

detail below, even though the federal pole attachment statute and regulations have changed over the years, the Commission has never changed its certification to the FCC that it regulates the rates, terms and conditions of pole attachments. Presumably this is because the Commission believes it has the requisite authority to regulate all pole attachments, including wireless attachment to poles.

This position is consistent with Oregon, which has a statute very similar to the Washington's statute defining attachments.[18] Specifically, the Oregon Commission reached the following conclusion regarding pole attachments by wireless carriers:

> Attachments by wireless carriers are covered by the federal pole attachment statute. *See National Cable & Telecommunications Assn., Inc. v. Gulf Power Co*., 534 US 327, 340 (2002). The Supreme Court addressed arguments that only wires and cables were governed by the statute, and not antennae. *See id*. The Court noted that the statutory language did "not purport to limit which pole attachments are covered," and that the broader term "associated equipment" allowed room for regulation of wireless attachments. *See id*. at 340-341. The Court also dismissed arguments that poles are essential facilities for wireline services, but not wireless services, deferring to the FCC's decision to not distinguish between providers of telecommunications services.
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> The Oregon laws governing pole attachments, though passed in 1979 before the Telecommunications Act of 1996 broaden the federal law, are broad in scope. For instance, an attachment means "any wire or cable for the transmission of intelligence," supported by "any related device, apparatus, or auxiliary equipment" installed on any pole "or other facility that is owned by a utility…

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[17] See, Public Notice, *States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, DA 10-893 (May 19, 2010).

[18] See ORS 757.270(1) ("Attachment" means any wire or cable for the transmission of intelligence by telegraph, telephone 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 telephone, telephone, electrical, cable television or communications right of way, duct, conduit, manhole or handhole or other similar facility or facilities owned or controlled, in whole or in part, by one or more public utility, telecommunications utility or consumer-owned utility.)

> This Commission has certified to the FCC that it will regulate pole attachment matters, which could be construed to encompass wireless attachments. While the Oregon commission is not required to follow federal statutes precisely, the Commission has found that federal law is instructive. *See* Order 05-981. In addition, the legislature provided the Commission broad authority to regulate attachments. For these, we conclude that the pole attachment statutes…give the Commission jurisdiction to regulate wireless attachment to poles, and the rules adopted here may also apply to wireless attachments that are also governed by federal statutes…We exercise our jurisdiction only to those wireless carriers who would be covered by federal law, to ensure that they fall within the scope of 47 USC 224, which this state has chosen to preempt. See *National Cable & Telecommunications Assn.*, Inc., 534 US at 342.

Similar rationale applies in Washington. If the Commission does not assert jurisdiction over wireless attachments to utility poles, it will be difficult for wireless carriers to obtain any relief when denied access to utility poles or when rates demanded for attachments are excessive. The federal rules require that a complaint to the FCC about rate, term or condition being unjust or unreasonable, "shall contain a statement that the State has not certified to the Commission that it regulates the rates, terms and conditions for pole attachments."[19] Years ago Washington certified to the FCC that it regulates the rates, terms and conditions for pole attachments. Washington has not changed this certification despite changes in federal law and the advent of new technologies, such as wireless antenna. If the Commission did not assert jurisdiction over the rates, terms and conditions of wireless attachments, the wireless providers will likely lack recourse, making Washington a less attractive place to invest for wireless infrastructure. With all things being equal, it is understandable that a wireless carrier may decide to invest finite dollars on wireless infrastructure in a state that has the FCC rates for pole attachments of well below $100

[19] See 47 CFR §.1404(c).

dollars, as opposed to Washington where the utility is charging monopoly rates of several thousand dollars per pole attachment or limiting access to the utility pole.

C. Washington Rules Should Follow the Complete Federal Pole Attachment Rules

AT&T appreciates the rationale for the Washington Commission's denial PCIA's Petition to Adopt Rules to Implement RCW Ch. 80.54.[20] In order to have a well-considered pole attachment rules in Washington, the Commission should review and consider all of the FCC rules regarding pole attachments along with rules promulgated in other states, such as Oregon. The Commission also necessarily must consider the Washington enabling statutes regarding pole attachments. AT&T, however, strongly believes that the final result should be for the Commission to adopt the FCC rules found in 47 CFR §1.1401 *et seq*., only deviating from the FCC rules where absolutely necessary. For example, it would not make sense to incorporate 47 CFR §1.1414 regarding state certification into the state rules as this only serves as a prerequisite for the FCC to consider a complaint.

In 1978, Congress added section 224 to the Communications Act of 1934, as amended, directing the FCC to ensure that the rates, terms, and conditions for pole attachments by cable television systems are just and reasonable. The Telecommunications Act of 1996 ("1996 Act") expanded the definition of pole attachments to include attachments by providers of telecommunications service and granted both cable systems and telecommunications carriers an affirmative right of nondiscriminatory access to any utility pole. In 1998, the FCC adopted rules to implement the 1996 Act's new pole attachment rate

[20] See Docket UT-140024, Order 01.

formula for telecommunications carriers.[21] The FCC also held that wireless carriers had a right of nondiscriminatory access to poles. Although challenged, this was ultimately upheld by the United States Supreme Court.[22]

In December 2004, the FCC reminded utilities of the "obligation to provide wireless telecommunications providers with access to utility poles at reasonable rates pursuant to section 224 of the Commissions Act, 47 U.S.C. §224."[23] The FCC also confirmed that wireless attachments are permitted above the communications space and, specifically, on pole tops.[24]

Beginning in 2007, the FCC undertook a four year process to update and revise its pole attachment rules.[25] This substantial effort culminated in the adoption of the revised rules in 2011. The FCC summarized its action as follows:

- The Commission revised its pole attachment rules to promote competition and to reduce the potentially excessive costs of deploying telecommunications, cable and broadband networks.

- The Commission has historically relied primarily on private negotiations and case-specific adjudications to ensure just and reasonable rates, terms, and conditions, but its experience during the past 15 years had demonstrated the need to provide more guidance.

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[21] *In the Matter of Implementation of Section 703€ of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, FCC 98-20, Report and Order (rel. Feb. 6, 1998).

[22] *Implementation of Section 703(e) of the Telecommunications Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order, 12 FCC Rcd 677 (1998), *aff'd in part, rev'd in part, Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000), rev'd, *Nat'l Cable & Telecommunications Ass'n v. Gulf Power*, 534 U.S. 327 (2002).

[23] FCC Public Notice, *Wireless Telecommunications Bureau reminds Utility Pole Owners Of Their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates*, DA 04-4046, (rel. Dec. 23, 2004).

[24] *Id.*

[25] The FCC's Notice of Proposed Rulemaking was released on November 20, 2007 (FCC 07-187). Its Further Notice of Proposed Rulemaking was released on May 20, 2010 (FCC 10-84).

- The Commission established a four-stage timeline for wireline and wireless access to poles; provides attachers with a self-effectuating contractor remedy in the communication space; improved its enforcement rules; reinterpreted the telecommunications rate formula within the existing statutory framework; and addressed rates, terms, and conditions for pole attachments by incumbent LECs.

- The Commission also resolved multiple petitions for reconsideration and addressed various points regarding the nondiscriminatory use of attachment techniques. [26]

The FCC docket was a huge undertaking that involved carefully balancing many competing interests. AT&T recommends, as the best alternative, the adoption of the FCC's rules without any changes, except as necessary to accommodate for unique conditions, if any, in Washington.

In its *2011 Pole Attachment Order*, the FCC found that "widely disparate pole rental rates distort infrastructure investment decisions and in turn could negatively affect the availability of advanced services and broadband…"[27] The FCC also noted that in its Order, "we seek to eliminate unnecessary costs and burdens associated with pole attachments, while taking into account legitimate concerns of pole owners and other parties that might be affected by additional attachments."[28]

The *2011 Pole Attachment Order* recognizes that "state experience with regulation of pole attachments provides an invaluable opportunity for the Commission to observe what works and what does not work to achieve policy goals."[29] When the amended rules were released, the Commissioner of the FCC remarked that "[t]hanks to the thoughtful work of a number of states in crafting pole attachment rules over the last two decades, we have several

[26] 76 FR 26631, May 9, 2011

[27] *2011 Pole Attachment Order*, para. 6.

[28] *Id.*

[29] *Id*., para. 7.

effective models for pole attachment governance with a proven track record. Our rules incorporate best practices from Oregon, Utah, New York and other states."[30] By incorporating the federal rules into Washington regulation, the Commission adopts the best practices and learnings from other states.

The "reverse preemption" provision in 47 USC §224(c) allows states to certify that they regulate rates, terms and conditions for pole attachments with the FCC only retaining jurisdiction over pole attachments in states that do not make such a certification to the FCC. Washington is one of twenty-two (22) states and the District of Columbia that has certified they directly regulate utility-owned infrastructure in their state.[31] Adopting rules in Washington that are consistent with those adopted by the FCC and used in at least twenty-eight other states will help to ensure that Washington is not left behind in infrastructure deployment for wireless service, including wireless broadband.

The following are some important principles from the federal pole attachment rules that should be preserved in Washington:

- Specific timelines for access to poles;
- Access to attach in communications space and pole top;
- Federal formula to establish pole attachment rates;
- Any denial of access by pole owner must specify, in detail, the reason for denial; and,
- Ability to bring complaint at any time challenging rates, terms and conditions for pole attachment.

[30] See Statement of Chairman Julius Genachowski, FCC 11-50, pg. 139.

[31] States That Have Certified That They Regulate Pole Attachments, Public Notice, WC Docket No. 10-101, DA 10-893 (May 19, 2010).

The Oregon pole attachment rules[32] should be reviewed, but it is instructive to remember that these rules were adopted prior to the FCC's latest revision to the federal pole attachment rules which more clearly reflect the changing technological environment. Although Oregon was one of the states reviewed by the FCC in its *2011 Pole Attachment Order*, the FCC's rules have been revised more recently than the Oregon rules.

IV. Conclusion

AT&T commends the Commission for instituting this pole attachment rulemaking to develop fair and balanced pole attachment rules in Washington. Fair and balanced pole attachment rules that follow the structure established by the FCC will facilitate further deployment of wireless and broadband infrastructure in the state.

Submitted this 30th day of May, 2014

Cynthia Manheim by Dee with permission

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[32] OAR 860-028-0020 *et seq.*