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Via Web Portal

Steven King
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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 permission

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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

AT&T Corp., New Cingular Wireless PCS, LLC, and Teleport Communications America, Inc. (collectively "AT&T") appreciates the opportunity to submit comments on the Draft Rules Governing Access to Utility Poles, Ducts, Conduits, and Rights-of-Way issued on September 8, 2014 ("Draft Rules"). AT&T commends the Commission for issuing the draft rules which are largely based on the Federal Communications Commission ("FCC") pole attachment rules, yet also recognize unique aspects of Washington law.

I. THE DRAFT RULES WILL ENCOURAGE WIRELESS DEPLOYMENT

As AT&T detailed in its previous Comments,[1] this docket comes at a critical time for AT&T as it continues to invest in the state to expand its wireless network. The ever increasing demand for wireless service means that wireless carriers are constantly upgrading their networks to add capacity. In addition, wireless users are no longer just using their wireless phones while they are on the go; instead, many customers are using their wireless service as their only phone at home.[2] This requires wireless companies to expand networks into more residential areas and increasingly look to existing structures to place facilities. In

[1] See Comments of AT&T filed in Docket U-140621 (May 30, 2014).
[2] Id., at 4-5.

residential areas utility poles[3] are the most prevalent, and sometimes the exclusive existing structure that is available to wireless carriers to place facilities. Customers are also using wireless technology for other applications such as streaming movies, home security, and medical monitoring. As such, it is important that wireless carriers can deploy cell sites near the locations where people are using the service.

Codes in a number of jurisdictions in Washington actively encourage wireless providers to place their facilities upon existing structures such as utility poles in the rights-of-way. This includes a number of jurisdictions in which the investor-owned electric utility owns all of the poles in the rights-of-way.[4] This allows the investor-owned electric utility to exert monopoly power with respect to access to the poles, including location on the pole, along with monopoly annual rental rates for space on the existing utility pole structure.[5] AT&T currently pays at least fifty (50) times higher than the federal annual attachment rental rate for space on investor-owned electric utility poles in Washington

The FCC "has recognized that lack of reliable, timely, and affordable access to physical infrastructure – particularly utility poles – is often a significant barrier to deploying

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

[4] See, e.g., King County Code 21A.26.400(B) ("The placement of antenna on existing or replacement structures within street, utility or railroad rights-of-way is the preferred alternative in residential neighborhoods and the Rural Areas and the feasibility of such placement shall be considered by the county whenever evaluating a proposal for a new transmission support structure, except for a new structure that is proposed to collocate antenna for two or more separate service providers."); Kirkland Zoning Code 117.10(h)(" Prioritize the location of PWSF [Personal Wireless Service Facilities] on existing structures such as ballfield lights, transmission towers, utility poles or similar structures, particularly when located on public property.")

[5] This docket addresses the annual rental rate a licensee should pay to exclusively occupy space on the pole. This docket does not address the make-ready charges which are the administrative, engineering or construction activities necessary to make a pole or conduit available for a new attachment, modification, or additional facilities, including pole change out and pole extension activities. Make-ready charges are one-time charges borne by the requested attacher to make the pole ready for attachment and fully compensate the pole owner for any work. For example, if a wireless licensee plans to install antennas on a pole that is not strong enough to accommodate the weight and wind load of the antennas, the wireless licensee will pay the utility all of the costs to replace the pole as part of the make-ready charge.

wireline and wireless service."[6] The Draft Rules bring Washington into alignment with the federal default rates for access to utility poles and the annual pole attachment rental rates.[7] As a result, Washington will be more attractive to companies to deploy additional wireline and wireless infrastructure in the state promoting enhanced service to customers.

II. SUGGESTED CLARIFICATIONS TO DRAFT RULES

The Draft Rules appropriately combine the FCC's rules with Washington's statutes and regulatory process. These comments suggest clarifications to the Draft Rules to avoid uncertainty, confusion and additional disputes in the future.

A. Refinement of Definitions, Section 480-54-020

1. Definition of Attachment Should be Modified

It seems clear to AT&T that the Commission intends to include the attachments of wireless carriers, such as AT&T, within the scope of these rules;[8] however, to avoid future disputes, AT&T recommends that the Commission clarify the definition of attachment in the rules to explicitly include the antennas or other related equipment of wireless carriers. Specifically, AT&T recommends that the following sentence should be added to the end of the proposed definition of "Attachment" in WAC 480-54-020 which is consistent with Washington law: "Attachment includes antennas and related equipment of licensees or certificated carrier."

[6] 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)("*2011Pole Attachment Order*"), para. 3.

[7] The federal default rules apply in thirty states. (Twenty states plus the District of Columbia have exerted reverse. See Public Notice, States that Have Certified That They Regulate Pole Attachments, WC Docket No. 10-101, DA 10-893.) In addition, some states that have exerted "reverse preemption" and control pole attachments have adopted rules similar to the FCC's.

[8] See e.g., Draft Rule 480-54-030(6)(b) is specifically addressed to "wireless antennas or other attachment on poles in the space above the communications space…"

a. Statutory Definition of Attachment is Broad Enough to Include Wireless Attachments to Poles:

The statutory definition of "Attachment" is broad in its scope, covering "any wire or cable…and any related device, apparatus, or auxiliary equipment" used "for the transmission of intelligence by telecommunications or television, including cable television, light waves, or other phenomena".[9] Attachments by wireless carriers fall within this broad definition of "attachment". All wireless attachments include "wire or cable" to connect wireless equipment (e.g., antennas) on the pole.

In 2007, the Oregon Public Utility Commission ("Oregon Commission") adopted its pole attachment rules.[10] Despite arguments to the contrary, the Oregon Commission concluded that the relevant Oregon statute[11] granted it jurisdiction to regulate wireless attachments to poles for those wireless carriers that are covered by federal law under 47 USC §224. Specifically, the Oregon Commission found:

> The Oregon laws governing pole attachments, though passed in 1979 before the Telecommunications Act of 1996 broadened 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 similar facility that is owned by a utility…
>
> …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

[9] RCW 80.54.010(1).

[10] See AR 506/AR 510, Order No. 07-137 (entered April 10, 2007) ("*Oregon Pole Attachment Order*")

[11] 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.)

> here may also apply to wireless attachments that are also governed by the 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.[12]

The Washington Commission should reach the same conclusion; the Washington statute is broad enough to include wireless attachments.

b. <u>The Commission has certified to the FCC that it regulates the attachment rates without any exceptions</u>

The regulation of pole attachments is governed by both federal and state law, which is intended to work together to advance important public policy goals, including the promotion of wireless coverage and capacity and further broadband deployment. The FCC is vested with the authority to establish the rates, terms and conditions for attachments to utility poles.[13] The FCC has found that pursuant to 47 USC §224, wireless carriers have a right of nondiscriminatory access to poles and the FCC has set a maximum reasonable rate for these attachments. Although it was challenged, the FCC's decision was ultimately upheld by the United States Supreme Court.[14]

Federal law also provides that the FCC will not have jurisdiction over pole attachments where such matters are governed by a state. This is often referred to as the "reverse preemption" provision.[15] The "reverse preemption" provision allows a state to certify to the

[12] *Oregon Pole Attachment Order*, pp. 3-4.

[13] 47 USC §224

[14] *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).

[15] 47 USC §224(c)

FCC that it regulates the rates, terms and conditions for pole attachments and has issued and made effective rules and regulations to implement its poles attachment authority.

Washington made its certification to the FCC years ago and although there have been intervening changes at the federal level to the pole attachment regulations Washington has never modified its certification to the FCC to exclude wireless attachments. If all wireless attachments are not included in the Draft Rules definition of attachment, the is Commission's "reverse preemption" of the FCC rules is incomplete and the exclusion of wireless attachments would effectively deny Washington wireless providers the benefits and protections of the federal law without any analogous state replacement. When Washington wireless providers are faced with unreasonable demands for pole attachment rates, terms and conditions, they apparently cannot seek relief pursuant to the FCC's process, because this Commission has certified that it regulates all pole attachments.

2. "Occupied Space"

As the entire cost of the pole is allocated to the "usable" space, the licensee should only pay for the portion of the pole that it occupies in the usable space.[16] As such, any entity with an attachment in the "usable space" should not pay a separate fee to place auxiliary items in the unusable space, such as a turn-off switch. Otherwise, the utility pole owner would in effect be double collecting.

Further, a licensee should only pay per foot for the usable space on the pole that it renders unavailable for other attachments. A licensee should not pay for wire or cables that are vertical on the pole. For example, a wireless carrier may have an electric cables vertical on the pole, but it should not have to pay for this attachment to the extent that it does not render any vertical portion of the pole's usable space unavailable for another licensee.

[16] The "space factor" in the Draft Rules uses Total Usable Space in its denominator.

For these reasons, AT&T suggested the following revision to "Occupied Space": revision:

> "Occupied Space" means that portion of the pole, duct, or conduit used for attachment which is presumed to be one foot. <u>For a pole attachment the occupied space is the usable portion of the pole that is rendered unusable for any other attachment.</u>

B. 480-54-030 Duty to provide access

In order to avoid future disputes, AT&T recommends that the Commission further clarify that Draft Rule 480-54-030(4) requires a specific explanation of the reasons for denial on a pole-by-pole basis. Specifically, the FCC has stated:

> It is not sufficient for a utility to dismiss a request with a written description of its blanket concerns about a type of attachment or technology, or a generalized citation to section 224. Instead, we find a utility must explain in writing its precise concerns – and how they relate to lack of capacity, safety, reliability, or engineering purposes – in a way that is specific both with regard to both the particular attachment(s) and the particular poles(s) at issue. Furthermore, such concerns must be reasonable in nature in order to be considered nondiscriminatory. Concerns that appear to be mere pretexts rather than legitimate reasons for denying statutory rights to access will be given serious scrutiny by the Commission, including in any complaint proceeding arising out of a denial of access.[17]

C. Modification Costs – 480-54-050

AT&T recommends an addition to the language in section (1) and (3) to make it clear that a utility or licensee must only pay its proportion for the cost of modification based on the space occupied in the usable space. AT&T's suggested language is as follows:

> (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 <u>based on the space occupied in the usable space</u>. A utility or licensee with a preexisting

[17] FCC 2011 Pole Attachment Order, para. 76.

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.

(3) If a utility or licensee makes an attachment to the facility within 180 days after the completion of a modification, that entity shall share proportionately in the cost of the modification based on the space occupied in the usable space if it enabled the added attachment.

D. Rates – 480-54-060

It appears that the Draft Rules eliminate most of the FCC's requirements for the filing of a complaint as set forth in 47 CFR 1.1404 and will instead rely on Washington complaint procedures. While AT&T does not necessarily object to this approach, in eliminating all of 47 CFR 1.1404 some of the definitions of the items contained in the rate section (480-54-060(2)) have been lost. Specifically, AT&T suggests that either in the rate section or in the definition section, clarification be provided regarding "Net Cost of a Bare Pole" and "Carrying Charge Rate" to avoid disputes in the future. Alternatively, the Commission could make clear that it will follow the FCC rules and federal court interpretations in interpreting these sections.

The "Net Cost of a Bare Pole" means the original investment, purchase price of poles and fixtures, excluding cross-arms and appurtenances, less depreciation reserve and deferred federal income taxes associated with the pole investment, divided by the number of poles represented in the investment amount.

"Carrying Charges" are defined by the FCC as the costs incurred by the utility in owning and maintaining poles regardless of the presence of pole attachments. The carrying charges

include the utility's administrative, maintenance and depreciation expenses, a return on investment, and taxes.[18]

The Draft Rules also do not contain the presumed average utility pole height or the average usable and unusable space on a pole. The FCC rules presume that an average utility pole is 37.5 feet.[19] The FCC rules also presume that the pole will have 24 feet of "unusable space".[20] Thus on an average 37.5 foot pole, the FCC presumes that there is a total of 13.5 feet of "usable" space.[21] The FCC's presumptions are all rebuttable. While AT&T prefers the use of presumed pole height, and usable and unusable space, the most important thing is that the utility use an average pole height and usable and unusable space for the calculation in 480-54-060(2). Under Draft Rule 480-54-060(2), a utility could presumably use a different pole height for each pole; however, this would be administratively burdensome for the pole owner and attachers. For example, if the net cost of a bare pole is not based on an average or standard height for a pole, as in the federal rules, then the actual, i.e., booked, net value of each pole must be separately determined.

E. Complaint – 480-54-070

Section (5) should be modified so that the complainant does not have to "include sufficient data or other factual information and legal argument to support its allegations" in a complaint. As there is nothing in the proposed rules that require a utility to provide sufficient information to a wireless licensee regarding rates, terms, or conditions to include in

[18] 47 CFR §1.1404(g)(ix).

[19] 47 CFR 1.1418

[20] The FCC presumes that for a 37.5' pole, 6 feet will be buried underground ("support") and 18 feet is the required "clearance" space up to the lowest permissible wire attachment.

[21] 47 CFR 1.1418

a complaint, "sufficient data or factual information" will be very difficult to include in a complaint. Instead, the complainant should only be required to make a notice type pleading that includes a good faith basis for bringing the complaint and legal argument to support the allegations. The discovery process will then allow the complainant to prove its case with all relevant factual data. In the alternate, the utility must be compelled to provide relevant data or other factual information that provides sufficient information so that a licensee can bring a complaint.

III. CONCLUSION

AT&T appreciates the Commission's effort to establish fair and reasonable pole attachment rules in the state that incorporate a number of the FCC's pole attachment rules, yet also recognize the differences in the Washington statutes and regulatory process.

Submitted this 8th day of October, 2014

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