

Docket U-140621

DRAFT RULES GOVERNING ACCESS TO UTILITY POLES, DUCTS, CONDUITS, AND RIGHTS-OF-WAY (Summary of Comments)

480-54-010 Purpose and Interpretation

- (1) This chapter implements RCW Ch. 80.54 “Attachment to Transmission Facilities.”
- (2) To the extent that these rules contain provisions that are the same as Federal Communications Commission rules governing pole attachments, the commission will consider Federal Communications Commission and federal court interpretation of those rules as persuasive authority in construing the comparable provisions in this chapter.

PCIA: Add, “Where indicated, these rules will incorporate FCC rules by reference.”

CenturyLink: Add citations to three FCC orders.

Avista: Include discretion to consider other authority when construing these rules.

PSE: Clarify that these rules govern only facilities over which the Commission has jurisdiction.

480-54-020 Definitions

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

PPL: Change term to “occupant” and modify definition.

- (2) “Attachment” means any wire or cable for the transmission of intelligence by telecommunications or television, including cable television, light waves, or other phenomena, or for the transmission of electricity for light, heat, or power, and any related device, apparatus, or auxiliary equipment, installed upon any pole or in any telecommunications, electrical, cable television, or communications right-of-way, duct, conduit, manhole or handhole, or other similar facilities owned or controlled, in whole or in part, by one or more utilities, where the installation has been made with the consent of the one or more utilities.

Google: Clarify includes facilities of all broadband providers.

PCIA: Clarify includes equipment and facilities of all licensees, including wireless.

AT&T: Clarify includes antennas and related equipment of wireless carriers.

BCAW: Add “consistent with these rules” at the end of the sentence.

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

Frontier: Expand and clarify this definition.

PPL: Modify definition.

- (4) “Conduit” means a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed.
- (5) “Duct” means a single enclosed raceway for conductors, cable, or wire.
- (6) “Facilities” means poles, ducts, conduits, rights-of-way, manholes or handholes, or similar facilities.

PPL: Delete as duplicative.

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

PPL: Change term to “owner” to reduce potential confusion.

- (8) “Inner duct” means a duct-like raceway smaller than a duct that is inserted into a duct so that the duct may carry multiple wires or cables.
- (9) “Licensee” means any person, firm, corporation, partnership, company, association, joint stock association, or cooperatively organized association, other than a utility, that is authorized to construct attachments upon, along, under, or across the public ways, including a provider of telecommunications service, radio communications service company, as defined in RCW 80.04.010, any cable television service company or personal wireless services company.

Google: Clarify includes all broadband providers.

CenturyLink: Delete reference to telecommunications service providers (which are utilities).

PPL: Delete “other than a utility.”

- (10) “Make-ready work” means work required to modify a pole, duct, conduit, or right-of-way to enable the facility to accommodate one or more additional attachments. Such work may include rearrangement of existing attachments, installation of additional support for the utility pole, or creation of additional capacity, up to and including replacement of an existing pole with a taller pole.

Google: Expand to make more robust.

PSE: Delete everything after “existing attachments.”

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

Integra: Limit definition to poles.

Frontier: Clarify that one foot presumption applies only to poles.

AT&T: Add sentence, “For a pole attachment the occupied space is the usable portion of the pole that is rendered unusable for any other attachment.”

BCAW: Add “on a pole and one-half of a duct in a duct or conduit” at the end of the sentence.

Avista: Revise presumption so that cable companies and CLECs occupy two feet of space and ILECs occupy two and a half feet.

- (12) “Pole” or “utility pole” means an above-ground structure on which a facility utility maintains attachments.

Frontier, PPL, Avista: Clarify that “pole” is limited to poles carrying distribution lines.

- (13) “Unusable space” with respect to utility poles means the space on the pole below the usable space, including the amount required to set the depth of the pole.

PCIA, AT&T, BCAW: Include FCC rebuttable presumption of 24 feet.

Frontier: Include rebuttable presumption of 24 feet (six feet below ground and 18 feet from ground to first possible attachment point).

PPL: Modify language.

- (14) “Usable space,” with respect to poles, means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the facility utility. With respect to conduit, “usable space” means capacity within a conduit that is available or that could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable, and associated equipment for telecommunications or cable services, and which includes capacity occupied by the facility utility.

PCIA, AT&T, BCAW, PSE: Include FCC rebuttable presumption of 13.5 feet.

Integra: Include cross arms or extension arms.

PPL: Modify language.

- (15) “Utility” means any electrical company or telecommunications company as defined in RCW 80.04.010, and does not include any entity cooperatively organized, or owned by federal, state, or local government, or a subdivision of state or local government.

Frontier, AT&T: Add definitions for “carrying charge” and “net cost of a bare pole.”

PSE: Add definition of “safety space.”

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

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

PCIA: Add “on a pole-by-pole basis.”

PSE: Clarify that all pole work will be done without discrimination or priority given to make-ready.

- (2) All rates, terms, and conditions made, demanded, or received by any utility for any attachment by a licensee or by a utility must be fair, just, reasonable, and sufficient. Parties may mutually agree on terms for attachment to or in poles, ducts, conduits, or rights-of-way that differ from those in this chapter. In the event of disputes submitted for commission resolution, any party advocating rates, terms, or conditions that vary from the rules in this chapter bears the burden to prove those rates, terms, or conditions are fair, just, reasonable, and sufficient

- (3) A utility or licensee must submit a written application to a facility utility to request access to its facilities. The facility utility must survey the facilities identified in the application and respond in writing to requests for access to those facilities within 45 days from the date the facility utility receives a complete application, except as otherwise provided in this section. A complete application is an application that provides the information necessary to enable the facility utility to survey the facilities to or in which the requester seeks to attach.

Google: Allow attachers to have make-ready engineering performed by authorized contractor.

PPL: Survey should not be required but should be conducted at the discretion of the owner.

Integra: Require response “as expeditiously as reasonable, but no longer than” 45 days.

PSE: Clarify that the facility utility may charge the attacher the actual cost of the survey.

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

Frontier: Substitute “information” for “evidence.”

AT&T: Follow FCC and require specific explanation of the reasons for denial on a pole-by-pole basis.

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

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

PPL: Modify to allow flexibility for parties to determine appropriate payment arrangements between themselves.

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

Integra: Lengthen time period to 90 days.

CenturyLink: Clarify no withdrawal when estimate has been accepted.

Frontier: Add “If the attacher has not accepted” to the beginning of this subsection.

PSE: Clarify the facility utility may charge the actual cost of completing the make-ready estimate.

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

PPL: Require licensee to notify and coordinate with other attachers.

Avista: Allow requesting attacher to waive notice to existing attachers.

- (a) For attachments in the communications space, the notice shall:
- (i) Specify where and what make-ready work will be performed.

(ii) Set a date for completion of make-ready work that is no later than 60 days after the notice is sent (or 105 days in the case of larger orders, as described in subsection (7~~f~~) of this section). For good cause shown, the facility utility may extend completion of the make-ready work by an additional 15 days.

Google: Expressly permit attacher to begin attaching upon completion of make-ready work.

PSE: Change 60 to 180 days and 105 to 225 days.

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

(iv) State that the facility utility may assert its right to 15 additional days to complete the make-ready work.

Integra: Insert “pursuant to WAC 480-54-030(7) and 480-54-030(8)”

(v) State that if make-ready work is not completed by the completion date set by the facility utility (or 15 days later if the facility utility has asserted its right to 15 additional days), the attacher requesting access may hire an authorized contractor to complete the specified make-ready work.

PPL: Require 10 day written notice to pole owner.

Avista: Clarify that contractors hired by attachers may only perform work in the communications space.

(vi) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready work.

(b) For wireless antennas or other attachments on poles in the space above the communications space, the notice shall:

(i) Specify where and what make-ready work will be performed.

(ii) Set a date for completion of make-ready work that is no later than 90 days after notice is sent (or 135 days in the case of larger orders, as described in subsection (7~~f~~) of this section). For good cause shown, the utility may extend completion of the make-ready work by an additional 15 days.

Google: Expressly permit attacher to begin attaching upon completion of make-ready work.

PSE: Change 90 to 180 days and 135 to 225 days.

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

(iv) State that the facility utility may assert its right to 15 additional days to complete the make-ready work.

(v) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready work.

(7) For the purpose of compliance with the time periods in this section:

Avista: Do not apply deadlines to facility owners with no history of failing to meet deadlines.

(a) A facility utility shall apply the timelines described in ~~subsections (b) through (e)~~ of this section to all requests for access to up to 300 poles or 0.5 percent of the facility utility's poles, ducts, conduits, or rights-of-way in Washington, whichever is less as applicable.

PPL: Change to 50 poles or one percent.

(b) A facility utility may add 15 days to the survey period described in subsection ~~(3b)~~ of this section to all requests for access to between 300 and 3000 poles or between 0.5 and five percent of the facility utility's poles, ducts, conduits, or rights-of-way in Washington, whichever is less as applicable.

PPL: Delete this subsection.

Avista: Deadlines are too short and should be subject to good faith negotiation.

(c) A facility utility may add 45 days to the make-ready work periods described in subsection ~~(6e)~~ of this section to all requests for access to between 300 and 3000 poles or between 0.5 and five percent of the utility's poles, ducts, conduits, or rights-of-way in Washington, whichever is less as applicable.

PPL: Delete this subsection.

Avista: Deadlines are too short and should be subject to good faith negotiation.

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

PPL: Apply this subsection to all requests for access to more than 50 poles.

(e) A facility utility may treat multiple requests from an attacher as one request when the requests are filed within the same 30 day period. The applicable time period for

completing the required survey or make-ready work begins on the date of the last request the facility utility receives from the attacher within the 30 day period.

Google: Examine and expedite timeframes in entire section to the extent possible

Google: Modify subsection (e) to provide first in, first out review of applications with shot clock starting immediately.

Integra: Delete subsection (e).

- (8) A facility utility may extend the time limits specified in this section under the following circumstances:
- (a) Before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment; or
 - (b) During performance of make-ready work if the facility utility discovers unanticipated circumstances that reasonably require additional time to complete the work. Upon discovery of such circumstances, the facility utility must immediately notify, in writing, the requesting attacher and other affected entities with existing attachments, and shall include the reason for the additional time and date by which the facility utility will complete the work. The facility utility may not extend completion of make-ready work for a period any longer than reasonably necessary and shall undertake such work on a nondiscriminatory basis.
- (9) If the facility utility fails to complete a survey of the facilities specified in the application within the time frames established in this section, an attacher requesting attachment in the communications space may hire an authorized contractor to complete the survey. If the facility utility does not complete any required make-ready work within the time frames established in this section, an attacher requesting attachment in the communications space may hire an authorized contractor to complete the make-ready:

PPL: Clarifications.

- (a) Immediately, if the facility utility has failed to assert its right to perform any necessary make-ready work by notifying the requesting attacher that it will undertake that work; or
- (b) After 15 days from the end of the applicable time period authorized in this section if the facility utility has asserted its right to perform make-ready work and has failed to timely complete that work.

Integra: Delete “15 days from”

CenturyLink: Separate subsections for surveys and make-ready work.

Avista: Clarify that contractors hired by attachers may only perform work in the communications space.

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

- (1) A facility utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready work in the communications space on its utility poles in cases where the facility utility has failed to meet deadlines specified in WAC 480-54-030.

PPL: Clarify owner's responsibility.

- (2) If an attacher hires a contractor for purposes specified in WAC 480-54-030, the attacher must choose a contractor included on the facility utility's list of authorized contractors.
- (3) An attacher that hires a contractor for survey or make-ready work shall provide the facility utility with a reasonable opportunity for a facility utility representative to accompany and consult with the authorized contractor and the attacher.
- (4) Subject to commission review in a complaint proceeding, the consulting representative of an electric facility utility may make final determinations, on a nondiscriminatory basis, on the attachment capacity of any pole, duct, conduit, or right-of-way and on issues of safety, reliability, and generally applicable engineering principles.

Frontier: Delete "electric" to clarify all pole owners have the right to make final determinations.

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

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

AT&T: Add "based on the space occupied in the usable space" at the end of the second sentence.

PPL: Modify to except modifications made to remedy nonconforming attachments.

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

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

AT&T: Add “based on the space occupied in the usable space” after the second “modification.”

PPL: Delete subsection.

- (4) A facility utility shall provide an attaching utility or licensee no less than 60 days written notice prior to removal of, termination of service to, or modification of (other than routine maintenance or modification in response to emergencies) any facilities on or in which the utility or licensee has attachments.

Integra: Add at the beginning, “As soon as practicable after it is aware, but no less than 60 days in advance.”

Avista: Eliminate 60 day notice requirement if a landowner or government entity makes such notice impossible.

- (5) A utility or licensee may file with the commission and serve on the facility utility a “Petition for Temporary Stay” of utility action contained in a notice received pursuant to subsection (4) of this section within 15 days of receipt of such notice. The petition must be supported by declarations or affidavits and legal argument sufficient to demonstrate that the petitioner or its customers will suffer irreparable harm in the absence of the relief requested that outweighs any harm to the facility utility and its customers and that the petitioner will likely be successful on the merits of its dispute. The facility utility may file and serve an answer to the petition within 7 days after the petition is filed unless the commission establishes a different deadline for an answer.

Integra: Change 15 to 21 days.

PPL: Add a subsection (6) to address abandoned attachments.

480-54-060 Rates

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

just, reasonable, and sufficient rates, terms, and conditions thereafter to be observed and in force and shall fix the same by order. In determining and fixing the rates, terms, and conditions, the Commission shall consider the interest of the customers of the attacher, as well as the interest of the customers of the facility utility.

Frontier: Include requirement of Commission determination within 360 days to comply with FCC rules.

- (2) A utility or licensee may file a formal complaint if:
 - (1) A facility utility has denied access to its poles, ducts, conduits, or rights-of-way;
 - (2) A facility utility fails to negotiate in good faith the rates, terms, and conditions of an attachment agreement; or
 - (3) The utility or licensee disputes the rates, terms, or conditions in an attachment agreement, the facility utility's performance under the agreement, or the facility utility's obligations under the agreement or other applicable law.
- (3) A facility utility may file a formal complaint if:
 - (1) Another utility or licensee is unlawfully making attachments to or in the facility utility's poles, ducts, conduits, or rights-of-way;
 - (2) Another utility or licensee fails to negotiate in good faith the rates, terms, and conditions of an attachment agreement; or
 - (3) The facility utility disputes the rates, terms, or conditions in an attachment agreement, the attacher's performance under the agreement, or the attacher's obligations under the agreement or other applicable law.
- (4) The execution of an attachment agreement does not preclude any challenge to the lawfulness or reasonableness of the rates, terms, or conditions in that agreement, provided that such challenge is brought within six months from the date the parties executed the agreement. Nothing in this section precludes a facility utility or attacher from bringing any other complaint that is otherwise authorized under applicable law.

PCIA: Extend deadline to 18 months from agreement execution date.

CenturyLink: Perhaps clarify that the limitation does not apply to differing interpretations of contract provisions discovered after six months.

PPL: Delete provision allowing challenge to the provisions of the agreement.

Frontier: Clarify applicability to existing attachments or agreements.

- (5) A complaint authorized under this section must identify all actions, rates, terms, and conditions alleged to be unjust, unfair, unreasonable, insufficient, or otherwise contrary

to applicable law and shall include sufficient data or other factual information and legal argument to support the allegations. The complaint also must include a copy of the attachment agreement, if any, between the parties.

AT&T: Clarify that notice pleading is sufficient for complainants that do not have access to the data and factual information.

BCAW: Add requirement for facility utility to provide information required to calculate rates and supporting documentation within 30 days of request by a licensee.

- (6) An attacher has the burden to prove its right to attach to the facility utility's poles, ducts, conduits, or rights-of-way and that any rate, term, or condition the attacher challenges is not fair, just, and reasonable or otherwise violates any provision of RCW Ch. 80.54, this Chapter, or other applicable law. A facility utility bears the burden to prove that attachment rates are insufficient or that the facility utility's denial of access to its facilities is lawful and reasonable.

BCAW: Reconcile attacher's burden of proof to prove unreasonable rates, terms, or conditions with burden on the party to prove reasonableness of departure from the rules in this chapter.

- (7) If the commission determines that the rate, term, or condition complained of is not fair, just, reasonable, and sufficient, the commission may prescribe a rate, term, or condition that is fair, just, reasonable, and sufficient. The commission may require the inclusion of that rate, term, or condition in an attachment agreement and to the extent authorized by applicable law, may order a refund or payment of the difference between any rate the commission prescribes and the rate that was previously charged.

PPL: Clarify any refund or payment is limited to the time period during which the unlawful rates were charged.

Avista: Clarify that refunds date back only to the date the complaint is filed, and no refund period will predate the effective date of this rule.

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

PCIA: Include requirement to engage in good faith, executive level discussions to resolve disputes prior to filing a complaint.

General

Google: Provide guidance on “service drop,” including a definition and explanation that no permit is required for installation as long as permit requested shortly after installation (see Oregon PUC rules).

CenturyLink: Delete ducts, conduits, and rights of way from 030 and 040.

BCAW: Adopt a rule authorizing overlashing without a permit subject to applicable safety requirements.

PPL, PSE: Remove rights-of-way from the rules.

Avista: Revise draft rules to establish a presumption that the rates, terms, and conditions of existing joint use agreements between electric utilities and ILECs are reasonable.

Avista: Rules governing access to conduit and ducts should not apply to electric utility facilities.

Avista: Adopt penalties for unauthorized attachments comparable to those in Oregon.

Avista: Require the same application and approval process for overlashing.